MVURWI TOWN COUNCIL
versus
ZIMBABWE NATIONAL WATER AUTHORITY

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 2 June 2016 and 3 August 2016

Opposed Application

R Wenyeve, for applicant
H Mazarura, for respondent

TAGU J: This application for rescission of default judgment is being brought in terms of r 63 (2) of the High Court Rules 1971. The application is strongly opposed by the respondent.

The gist of the matter is that on 30 September 2015 the parties attended a Pre-Trial Conference meeting before Honourable Justice Musakwa. At that meeting it was agreed that the matter ought to be discussed further between the parties. The matter was then postponed to enable the parties to hold meetings to clear certain issues that had arisen between the parties. Following this the parties convened a meeting which was attended by clients only at Zimbabwe National Water Authority (ZINWA) offices. On 29 October 2015 the counsel for the applicant who deposed to the founding affidavit on behalf of the applicant said he had a meeting at his office which was attended to by two ZINWA officials a Mr Katsande and Mr Meke together with their legal practitioners Ms Mazarura. This meeting was to prepare for the Pre-trial Conference that was to take place on 30 October 2015. The parties failed to reach an agreement on the issues of how much was to be paid by the respondents who had proposed a set off on certain figures claimed and hence the parties agreed to appear before the Pre-trial Judge Honourable Justice Musakwa the following day at 09.00hrs the time the Pre-Trial Conference had been scheduled to take place.

On the agreed date and time the applicant's counsel noticed that he was behind time having been engaged in other matters he was doing in his offices whilst waiting for his clients who are the applicants. He rushed to court without his clients but failed to catch up with the time. According to him he was 10 minutes late. By then his clients had not pitched up and a default judgment had been granted. He now submitted that his clients also arrived late and he apologises for the oversight that he did not keep track of the time as he got busy with office work. He now wants the default judgement to be rescinded on the ground that he nor his client was not in wilful default. His prayer is that it be ordered that-

> "1. The Applicant's case No. HC 2148/15 dismissed on 30 October be and is hereby reinstated.
>
> 2. That the Applicant shall proceed to set that Case No. HC 2148/15 for Pre-trial Conference.
>
> 3. The Respondent shall pay the costs of this application if it opposes this application."

The respondent opposed the application on the ground that while it is uncommon for a legal practitioner to depose to an affidavit on behalf of a client, the circumstances of this case demanded that an affidavit from the applicant itself should have been made to support and explain the reasons why the representatives of the applicant did not also appear in court when they knew fully well that a Pre-trial Conference had been scheduled to take place on 30 October 2015 at 0900hrs. To the respondent the applicant is now hiding behind the sins of its legal practitioner.

The law relating to an application of this nature is well settled.

Rule 63 (1) and (2) of the High Court Rules, 1971 provides as follows:

> "(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.
>
> (2) if the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just."

The factors that the court is required to consider in an application of this nature are as follows-

(a) The applicant's explanation for the default.
(b) The bona fides of the applicant's case on the merits.
(c) The bona fides of the applicant to rescind the judgment.

See *G.D. Haulage (Pvt) Ltd* v *Mumugwi Bus Services (Pvt) Ltd* 1979 RLR 447, *Duprez* v *Hughs R&N* 706 (SR).

The onus in an application of this nature is on the applicant to show the existence of good and sufficient cause for rescission of the judgment. The court in considering the factors outlined above is required to consider them cumulatively. Put differently, the court is not required to place much emphasis on one requirement only but, rather, to make a positive decision after determining all the requirements together. (See: *Chetty* v *Law Society Transvaal* 1985 (2) SA 756 (A); *Songare* v *Olivine Industries (Pvt) Ltd* 1988 (20) ZLR 210 (S); *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 (HC); *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S); *HPP Studios (Pvt) Ltd* v *ANZ (Pvt) Ltd* 2000 (1) ZLR 318 (HC) ; Saints and C V Fenlake [2000] 4 ALL SA 50 (ZH) and *Kkumalo* v *Mafurirano* HB- 11-04.)

The above point was succinctly made clear by Gubbay CJ (as he then was) in the case of *Georgias & Anor* v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S) at page 493 D as follows:

> "As has been stated repeatedly, too much emphasis should not be placed on any one of these factors. They must be viewed in conjunction with each other and with the application as a whole. An unsatisfactory explanation may be strengthened by a very strong defence on the merits. See for instance, *du Preez* v *Hughs* No. 1957 R& N 706 (SR) at 709A-F; *Stockil* v *Griffths* 1992 (1) ZLR 172 (S) at 173 F. In general terms, what an applicant must show is something which entitles him to ask for the indulgence of the court. See Arab v Arab 1976 (2) ZLR 166 (A) at 173 E."

In the present case the applicant's counsel submitted that the applicant's legal practitioners' explanation for the default is reasonable notwithstanding that it may not be satisfactory before the court.

The respondent's counsel however, submitted that the explanation proffered for the non- appearance of the applicant at court is that the applicant's legal practitioner lost track of time while doing office work resulting in him being late to court. The respondent contended that such an explanation is not sufficient because there is no real explanation as to why none of the applicant's representatives did not themselves appear at court save for a belated contention that the applicant's representatives were also late to court. It is the respondent's

view that had they not appeared timeously, and the legal practitioner had arrived early, the legal practitioner would have made an application for the applicant's representatives to be excused or even apply for a postponement. Equally, had the applicant's representatives appeared earlier than the legal practitioner, the court may have allowed a further postponement or give any appropriate directive. In *casu* neither the legal practitioners nor the applicants appeared at court.

The respondent submitted that the blame lied squarely on both the legal practitioner and his clients such that the default judgment need not be rescinded. The counsel for the respondent referred to various cases authorities that dealt with a similar situation in urging the court to dismiss the application.

In the case of *Moyo and Ors* v *Madondo N.O* HB-44-07 the court stated as follows with regard to the explanation offered by the applicant-

> "The Applicants have decided to pass the blame on to their erstwhile legal practitioners. Generally, the courts have held that a client is unable to escape the actions of his /her chosen legal practitioner's fault- *Baloyi* v *NSSA* HH-102-95. In *Mubvumbi* v *Maringa & Anor* 1993 (2) ZLR 24 (H) it was held that an explanation which attributed the blame to the party's legal practitioners will be treated as non-compliance or a wilful disdain by the party himself."

Further, in *Ndebele* v *Nube supra* McNALLY JA considered whether a party should be penalised for the negligence of his legal practitioner and had this to say at page 290C-E:

> "It is the policy of the law that there should be finality in litigation. On the one hand, one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses of failure to act. We are beginning to hear more appeals for charity than justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re –argued until the costs far exceed the capital amount in dispute. The time has come to remind the legal profession of the old adage *vigilantibus non dormientibus jura subveniunt*, roughly translated, the law will help the vigilant but not the sluggard."

To complicate matters, no explanation for applicant's non-appearance has been proffered by the applicant itself. Neither has it indicated what steps it took to ensure that there was appearance by their legal practitioner. The oft quoted passage in the case of *Saloojee & Anor, NNO* v *Minister of Community Development* 1965 (2) SA 135 (A) at 141 C-E explains that an applicant must also show what action he took to ensure that the matter was prosecuted properly where it states-

> "A litigant… is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney (cf. *Regal* v *African Superslate (Pty.) Ltd supra* at p 23 i.f.) and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself."

In *casu*, there is no indication of why none of the blame can be imputed to the applicant itself as if any representative of the applicant had appeared, the matter would not have been granted in default.

As have been stated before in deciding this matter the court is not required to place much emphasis on one requirement only but rather to make a positive decision after determining all the requirements together. The purpose is to try as much as possible to avoid doing injustice to litigants. The court also needs to look at the prospects of success on the main matter or the bona fides of the application.

The respondent submitted that the applicant's prospects of success in obtaining judgment against the respondent in the main matter are weak because the applicant is claiming payment for specified business levies that have since been set off by outstanding unit taxes that were owed to the respondent by the applicant by agreement.

In my view the presence or otherwise of prospects of success have been held not to be decisive in matters of this nature. See *Machaya* v *Muyambi* SC -04-04 where the court at page 4 stated-

> "I will address this submission below but suffice it to say at this stage that even where there are prospects of success, that factor is not necessarily decisive. See *Kodzwa* v *Secretary for Health & Anor* 1999 (1) ZLR 313 (S) at 315 F-G…I am of the view that the lack of diligence exhibited by both the legal practitioner and the applicant in this matter is sufficient to render this matter unworthy of consideration irrespective of the prospects of success."

In my view the sum total of the facts before the court revealed that there is no good and sufficient cause for rescission to be granted. The explanation for the default is unsatisfactory and the prospects of success are weak. Rescission ought not to be granted in the interests of finality to litigation. The application therefore fails.

It is ordered as follows:

1. The application be and it is hereby dismissed.
2. Each party to bear its own costs.

Warara, and Associates, applicant's legal practitioners
Mutamangira & Associates, respondent's legal practitioners