METAL SALES (PVT) LTD
versus
SAKURAI MBANDA
t/a FAUNORLD ENTERPRISES

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 11 October and 15 December 2016

Opposed Matter

G. T Chapwanya, for the applicant
L Uriri & J Makiya, for the respondent

MANGOTA J: The applicant and the respondent are respectively referred to as "Metal Sales" and "Sakurai". Metal Sales sued Sakurai. It claimed the following amounts from Sakurai:

(i) $65 000.00 which it said it lent and advanced to Sakurai during the period February, 2010 to February, 2012;

(ii) $56 541.00 which it said were damages which Sakurai agreed to pay as at 31 December, 2012;

(iii) Interest on both sums at the rate of 10% per month from 1 January, 2013 to the date of full payment – and

(iv) Costs of suit.

Sakurai entered appearance to defend and filed its plea.

Metal Sales filed a request for further particulars. The request related to para 6 of Sakurai's plea. It requested further particulars on the paragraph to enable it to file its replication.

The record is silent on whether or not Metal Sales' request for further particulars was complied with. What is clear though is that, the above process having been filed with the court, Metal Sales applied for summary judgment. The application was set down for hearing of 13 May, 2016.

The record reveals that, three days before the hearing of the application, Sakurai's legal practitioner, a Mr *Makiya* ("Makiya") requested Metal Sales' legal practitioner, *George Tizirai – Chapwanya* ("Chapwanya") for a meeting. The meeting aimed at exploring the possibility of an out of court settlement. Chapwanya fell for the idea.

On 11 May 2016, Chapwanya and Makiya met as had been agreed. The two legal minds discussed a settlement proposal which Makiya would put forward to Sakurai. The following day, Makiya advised Chapwanya that Sakurai wanted the court to decide the matter. Chapwanya and Makiya agreed between them to meet at court the following day, i.e. 13 May, 2016.

As fate would have it, Chapwanya confused the time of the hearing of the summary judgment application. He, therefore, failed to attend the hearing. His non-attendance at court resulted in the application for summary judgment being dismissed.

The dismissal of the application gave birth to the present application. Chapwanya applied, on behalf of Metal Sales, for rescission of the default judgment. His application was in terms of r 63 of the High Court Rules, 1971. He gave a chronology of events as they appear in the foregoing portions of this judgment. He gave, as a reason for his non-attendance at court on 13 May, 2016 the story that he confused the time of the hearing of the application. He said he recorded the time in his diary as 2 pm and not 10 am. That, he averred, accounted for the default.

Sakurai opposed Chapwanya's application. It embarked upon what may, for lack of a better phrase, be described as pre-emptive action. It raised the following four preliminary matters:

(i) Metal Sales did not depose to the founding affidavit. It did not authorise Chapwanya to do so on its behalf. There is, therefore, no application before the court.

(ii) The relief which appears in the draft order refers to the "*reinstatement*" and set down of the dismissed application. That relief is incompetent.

(iii) Chapwanya's application did not address the merits of the matter.

(iv) No good and sufficient cause was/is set out for rescission of the default judgment. Rule 63 of the High Court Rules 1971 is, therefore not satisfied.

Sakurai asserted, on the merits, that Chapwanya did not intend to attend court. It said he had other commitments which he prioritized ahead of attending court on the day and time. It urged the court to dismiss the application with costs on a *de bonis propriis* scale.

There is, in the court's view, no doubt that Metal Sales intended to prosecute its application for summary judgment. It filed the application. It served the same upon Sakurai. It filed its heads. It applied for the set down date. Such stated matters point towards the fact that it intended the natural consequences of its actions.

It requires little, if any, debate to assert that Chapwanya, and not Metal Sales, was properly placed to depose to the founding affidavit for this application. It is not Metal Sales which failed to attend court. Chapwanya did. The reasons for his default were known by him. Metal Sales did not know them. He was, therefore, more duty bound than Metal Sales was to explain the circumstances which related to his non-attendance at court.

There is a plethora of case authorities which support the proposition that a legal practitioner can, in such cases as the present one, depose to an affidavit for and on behalf of his client. *Mandaza* v *Mzilikazi Investments (Pvt) Ltd* 2007 (10 ZLR 77, 79 is one such case wherein NDOU J remarked:

> "……. if the facts are within the knowledge of the legal practitioner, he may swear an affidavit on behalf of the client." [emphasis added]

The facts of the present case, it needless to emphasise, were known to Chapwanya. They were not known to Metal Sales. Chapwanya stated as much during submissions. He, accordingly, acted properly when he deposed to the founding affidavit.

Chapwanya did not require the authority of Metal Sales to depose to the affidavit as he did. The authority which Metal Sales conferred upon him when it engaged him as its legal practitioner of record sufficed. The court's assertion in the mentioned regard is *in sync* with the remarks of Gowora J (as he then was) who, in *TFS Management Co (Pvt) Ltd* v *Graspeak (Pvt) Ltd & Anor*, 2005 91) ZLR 333, 338 dealt with the issue where a legal practitioner, a Mr . Lloyd, deposed to an affidavit for, and on behalf of, his client. The learned judge remarked:

> "It would be an absurdity for Mr Lloyd to be given the mandate to sue for the claim and not to have the authority to depose to an affidavit in the name of the applicants where such affidavit would be in relation to matters particularly within his knowledge for purposes of the successful performance of that mandate. It cannot be suggested on the part of the respondents that a legal practitioner instructed to represent a litigant is obliged, each time it becomes necessary to issue process pertaining to the matter at hand, to obtain and exhibit, for the information of the protagonist to that dispute, authority to institute proceedings for an interlocutory nature [emphasis added]."

The affidavit which Chapwanya deposed to as the basis of the application for rescission of judgment is, on the strength for the above cited case, properly before the court. That is so notwithstanding the fact that Metal Sales against whom default judgment was entered did not depose to any affidavit. GOWORA J's remarks resonate well with r 227 (4) of the High Court Rules 1971. It reads:

> "227 Written applications, notices and affidavits.
> (1) ……..
> (a) ……
> (b) …….
> (c) …….
> (2) ……...
> (a) ……
> (b) ……
> (c) ……
> (3) ……..
> (4) An affidavit filed with a written application-
> (a) Shall be made by the applicant or the respondent, as the case may be, or by a person who can swear to the facts or the averments set out therein; and ……. [emphasis added]"

The affidavit which forms the foundation of this application is properly before the court. The above stated matters support that position. The respondent's first *in limine* matter is, therefore without merit.

The relief which Chapwanya moved the court to grant to Metal Sales is contained in the draft order. He attached the draft order to his application. The contents of the draft order render the same to serious attack. They read, in part, as follows:

> "WHEREUPON after reading documents filed of record and hearing counsel:
>
> IT IS ORDERED THAT:
> 1. The application for summary judgment dismissed in default on the 13th May 2016 be reinstated and set down on the opposed roll.
> 2……
> 3……"

In couching the draft order in the manner that it appears in the foregoing paragraph, Chapwanya did not appear to have applied his mind to what he wanted to achieve. He laid more emphasis on the reinstatement of the dismissed application for summary judgment than on the application for rescission of the same. He, as it were, put the cat before the horse, so to speak.

Sakurai was correct when it submitted that the relief was/is incompetent. It did not accord with the substance of the application. The question which begs that answer is whether or not the application should be dismissed on the basis of a badly couched draft order.

In all applications which are placed before a court, the court is enjoined to look at the substance of the application. It is that, and not the form, which informs the court of the relief which it is being moved to consider and/or grant.

A draft order is what its name suggests. It is only a draft. It is subject to correction so that it resonates with the substance of the application. It spells out the intention of the applicant in convention or reconvention. It speaks to his aim and object. It is not binding on the court. The court is not enjoined to adhere to it to the letter and spirit. It can, therefore, be recouched so that it remains *in sync* with the substance of the application. This is always done in the interests of attaining justice as between the parties.

In para 11 of his affidavit, Chapwanya stated in clear and categorical terms that the default judgment [of 13 May 2016] be set aside. The heading of his court papers appears at p 1 of the record. It reads:

> "COURT APPLCIATION FOR RESCISION OF DEFAULT JUDGMENT: RULE 63 OF THE HIGH COURT RULES"

That, in the court's view, is the substance of this application. It is an application for rescission of judgment. The reinstatement issue would only follow after the judgment of 13 May, 2016 has been rescinded, if the court finds in Chapwanya's and/or Metal Sales' favour. Reinstatement is a process which is separate and distinct from the present application. It cannot, therefore, be conjoined to the current application.

It was for the mentioned reasons, if for no other, that Chapwanya realised the folly of para 1 of the draft order. He, following that realization, moved the court during submissions to amend para 1 of the draft order to read '*that the default judgment be set aside*'. His assertion which related to the reinstatement of the summary judgment application was misplaced. It, however, did not adversely affect the substance of the application.

Rule 449 of the rules of this court confers power on the court to recouch its order. The rule refers to correction, variation and rescission of judgments and orders. It reads:

> "1. The court or a judge may, in addition to any other power it or he may have *mero motu* or ……, correct, rescind or vary any judgment or <u>order</u> –

(a) that was erroneously sought……or
(b) in which there is an ambiguity or patent error or omission but only to the extent of such patent error or omission; or
(c) ……..
2. The court or judge shall not make any order correcting, rescinding or varying a judgment unless satisfied that all parties whose interests may be affected have had notice of the order proposed." [emphasis added]

Sakurai raised the issue of the order which had been prayed for. It submitted that the order was incompetent. It, in fact, sought a dismissal of the application on the strength of the incompetent order.

Chapwanya moved the court to have the order amended. The move which he adopted during submissions aims at aligning the order with the substance of the application.

The court remains of the view that both parties to the present application have had notice of the order which Chapwanya proposed. It will, therefore, invoke its powers as contained in r 449 and have the draft order amended so that it reads as per the prayer which Chapwanya made during submissions.

Sakurai's third *in limine* matter was that Chapwanya's application did not address the merits of the summary judgment application. Chapwanya, in response, made reference to the annexures which he attached to the application. He said the annexures dealt with the merits of the summary judgment application.

The court did have the pleasure of going through the contents of the annexures which Chapwanya collectively referred to as Annexure A. The annexure which is in the form of paginated bundle of documents comprised:

(i) Court application for summary judgment;
(ii) Summons and declaration which Metal Sales issued out of this court together with a set of ten (10) attachments;
(iii) Sakurai's Notice of appearance to defend;
(iv) Metal Sales' request for further particulars in regard to paragraph 6 of the plea
(vi) Sakurai's notice of opposition and opposing affidavit to Metal Sales' application for summary judgment;
(vii) Metal Sales' Heads of Argument;
(viii) Sakurai's Heads on the same - and

(ix) Metal Sales' Notice of set down together with

(xi) Metal Sales' draft order.

The court remained of the view that Chapwanya addressed the merits of the case through the above mentioned paginated bundle. The bundle was for the court's information as well as consideration. The bundle assisted the court to formulate a clear view of the basis of the application for summary judgment. Its contents were clear, cogent and to the point.

Sakurai's assertion which was to the effect that Chapwanya did not address the merits of the summary judgment application was misplaced. Chapwanya referred the court to what he had filed of record. He allowed the court to form its own unaided opinion of the strength, or otherwise, of the application for summary judgment. He made every effort to not belabour the court with a lengthy affidavit. He allowed the court to read the papers which related to the summary judgment application and to make up its mind on the same. The court did exactly as he had moved it to do.

Chapwanya anchored his application on r 63 of the rules of this court. The rule reads:

> "63. Court may set aside judgment given in default.
> (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.
> (3) Unless an applicant for the setting aside of a judgment in terms of the rule proves to the contrary, he shall be presumed to have had knowledge of the judgment within two days after the date thereof" (emphasis added)

Chapwanya's application is for rescission of the default judgment. He should, therefore, show that his non-attendance at court on 13 May, 2016 was not willful. He should, in other words and in terms of r 63 of the High Court Rules 1971, show that there is good and sufficient cause for his default.

The phrase good and sufficient cause excludes willful default. The Supreme Court defined willful default in *Fletcher* v *Three Edmunds (Pvt) Ltd,* 1998 (1) ZLR 257 (S) wherein it remarked as follows:

> "Wilful default requires that a party freely decides to refrain from appearing knowing of the service of the summons and the risks attendant upon the default." [Emphasis added]

In *Deweras Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Coorp Ltd*, (1998 (1) ZLR 368, 369 MCNALLY JA quoted, with approval, KING J'S dicta in *Manjean t/a Audio video Aqencies* v *Standard Bank of South Africa Ltd* 1994 (s) SA 801, 803 H – I who said of the phrase :

> "More specifically, in the context of a default judgment, 'willful connotes deliberateness in the sense of knowledge of the action and its consequences, i.e. its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation of this conduct might be" [emphasis added].

Chapwanya stated, during submissions, that the notice of set down which landed at his desk, read; "Court R, number 2 at 10 am". He said he recorded that in his diary as "Court R 2 pm". That, according to him, caused his non-attendance at court at 10am of 13 May, 2016. He said he came to court at 2 pm as he had diarized and he was advised that the application for summary judgment had been heard at 10 am. He submitted that he made notes which read:

> "Missed court, got mixed up as to time, worst regret in recent times, client advised but the buck stops with me. I must get out of this mess at all costs – rescission of judgment".

Chapwanya's default was not wilful in the context of the phrase as defined in *Fletcher* v *Three Edmunds* and *Deweras Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Corp Ltd* (*supra*). He took responsibility for the default and paid wasted costs for the application which had been discussed. Makiya confirmed that stated position of the matter.

Sakurai critisised para 9 of Chapwanya's affidavit. It submitted that Chapwanya did not set out any good and sufficient cause for his default. It stated that the reason which he gave for non – attendance was neither a reason nor reasonable at all.

Chapwanya, in the court's view, stated the obvious. He moved the court to remain alive to the fallibility of the human mind.

The court takes judicial notice of this obvious fact. It accepts that all men are, by their very nature, fallible and that no one is immune to that weakness. Legal practitioners, all professionals and non-professionals fall foul to the stated weakness. If man was not a fallible animal, as Sakurai would have the court believe, the world in which man abides would be a perfect place to be. The sad reality is that it is not.

It is for the mentioned reason, if for no other, that professionals such as legal practitioners and others sometimes miss their important appointments owing to mis-diarising of important upcoming events either on paper as occurred *in casu,* or in their minds. When such an unfortunate event occurs and a professional is candid enough to tell it as it is, the professional cannot be blamed for his candidness. The reason he gives is, by any stretch of imagination, a plausible one.

The fifth *in limine* matter which Sakurai raised related to the fact that Chapwanya did not address the issues which it raised by way of an answering affidavit. Chapwanya's response with which the court agrees was that the opposing affidavit did not raise any new issues which required to be addressed by an answering affidavit.

An answering affidavit is, at any rate, not a must. It is within the discretion of the affected party, Chapwanya *in casu*, to prepare and file it.

Sakurai's intention was, in the court's view, to dispose of the application through technical issues. Those were, however, ably dealt with by Chapwanya. He dealt with them each in turn to the satisfaction of the court.

The court has considered all the circumstances of this case. It remains satisfied that Chapwanya proved his case, and therefore, that of his client on a balance of probabilities. The application for rescission of default judgment which the court entered against Metal Sales on 13 May, 2016 is, accordingly, granted with costs.

Murambasvina, Tizirai-Chapwanya, applicant's legal practitioners
Makiya & Partners, respondent's legal practitioners