ZIMBABWE TOURISM AUTHORITY
versus
BUSINESS FOCUS LTD

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 16 November 2016 & 14 June 2017

Opposed Matter

R Mhlanga, for the applicant
R Mabwe, for the respondent

CHATUKUTA J: This is an application for an order dismissing the application in Case No. HC 11735/15 for want of prosecution.

The following facts are common cause:

On 18 September 2015, the applicant instituted proceedings against the respondent under Case No. HC 9000/15 seeking an order for the payment of 18 564. 00 pounds. On 2 November 2015, an order was granted in default of the respondent. On 1 December 2015 the respondent filed an Urgent Chamber Application under Case No. HC 1173/15 seeking an interdict against the applicant from executing the order granted under Case No. HC 900/15 pending the determination of an application for the rescission of the default judgment and upliftment of automatic bar also filed on 1 December 2015. The application for the interdict was granted on 3 December 2015. On 21 December 2015, the applicant filed its opposition to the confirmation of the Provisional Order. The notice of opposition and opposing affidavit were served on the respondent's legal practitioners on 5 January 2016. The respondent neither filed an answering affidavit nor set down the matter for hearing. Consequently, the applicant filed the present application in terms of r 236 (3) of the High Court Rules.

The application is opposed.

Rule 236 (3) (b) provides that where the respondent files a notice of opposition and opposing affidavit and within one month thereafter the applicant in the matter has neither filed an answering affidavit nor set down the matter for hearing, the respondent, on notice to the applicant, may apply through the chamber book for dismissal of the application for want of prosecution. In order to escape the dismissal of the application, the respondent must show good cause why the application should not be dismissed. (See *Scotfin* v *Mtetwa* 2001 (1) ZLR 249).

The respondent submitted that it had good cause why the application should not be dismissed. It was submitted that it is committed to prosecuting its application under HC 11735/15 and failure to file the answering affidavit was not willful. The failure was as a result of confusion in the respondent's legal practitioners' office. The application for rescission of default judgment and upliftment of bar bear the same reference number as the Urgent Chamber Application. The legal practitioners filed the notice of opposition in their file for the application for rescission as opposed to the file for the Urgent Chamber Application. The error by the legal practitioners was reasonable under the circumstances and amounted to good cause as envisage in *Scotfin* v *Mtetwa (supra).* The respondent further submitted that the error by its legal practitioners in misfiling pleadings did not amount to willfulness. The respondent referred to the case of *Pinnacle Holdings Ltd* v *Redcliff* case number HH 277/2014.

The applicant responded that the explanation by the respondent could not disclose good cause in the absence of an explanation by the legal practitioners who caused the error. In support of this submission, the applicant referred to the case of the *Registrar General of Elections* v *Tsvangirai* HH 142-2003 (2003 (2) ZLR 110), MM *Pretorious (Pvt) ltd and Another* v *Chamunorwa* SC 39/12 and *Apostolic Faith Mission in Zimbabwe & 2 Ors* v *Titus I Murefu* SC 28/13.

The explanation for the legal practitioners' error is contained in the founding affidavit deposed to by Givemore Chidzidzi, the respondent's Chief Operations Officer. He stated under paragraph 3 as follows:

"**3. AD PARAGRAPH 9**

3.1 It is not correct that the respondent deliberately failed to file its answering affidavit as alleged. The court is invited to take notice of the fact that there are two court applications before the honourable court filed by the respondent. The one is an application for rescission of default judgment and upliftment of bar

under HC 11734/17, the other being an urgent chamber application for stay of execution under cover of HC 11735/15.

3.2 The applicant served the respondent with the notice of opposition but same was filed in the file for the application for rescission of default judgment under HC 11734/15 to which an answering affidavit was filed on time. Unfortunately the applicant notice of opposition was inadvertently filed in the file where an answering affidavit had been filed hence the mishap.

3.3 The respondent's lawyers, I am advised, were of the view that the notice of opposition related to one file to which an answering affidavit was timeously filed."

In view of the averments in the opposing affidavit attributed to the legal practitioner, I believe that the main issue for consideration is not whether or not there is good cause for me not to dismiss the application. The issue is in my view whether or not the opposing affidavit complies with the requirements set out in r 227 (4) of the High Court Rules and consequently if there is valid opposition to the application.

Rule 227 (4) provides that:

> "An affidavit filed with a written application.
> (a) shall be made by the applicant respondent, as the case may be, or by a person who can swear to the facts or averments set out therein."

It appears that the rule is so worded on the basis that an affidavit is a substitution of oral evidence that would ordinarily be adduced from the deponent during a trial. The person who deposed to the facts therein must therefore have first-hand information or independent recollection of the facts. Averments on behalf of another person would amount to hearsay evidence and ordinarily not admissible. (See *Hiltumen* v *Hiltumen* 2008 (2) ZLR 296).

The explanation contained in the respondent's opposing affidavit for the failure to file the answering affidavit timeously are better known by the legal practitioner who caused the error. Givemore Chidzidzi could not swear to the facts or averments set out and neither could he be said to have an independent recollection of the facts or averments as he did not work in the legal practitioners' office. As rightly submitted by the applicant, the explanation for the error must therefore have come from the person who caused the error. In fact, it is anyone's guess who exactly in the legal practitioners' office misfiled the opposing affidavit as such person is not

identified in the opposing affidavit. Furthermore, Givemore Chidzidzi did not state in the affidavit who, in the legal practitioners' office advised him how the error arose.

Mr *Mabwe* conceded during oral submissions that the opposing affidavit is fatally defective as it does not comply with r 227 (4) (a). In light of that concession, it therefore follows that there was no valid opposition to the application and the application must succeed.

Assuming I am wrong, in holding that there is no valid opposition to the application before me, it is my view that the application would still have succeeded as the respondent did not establish good cause in the absence of an affidavit from the person who caused the error in the legal practitioners' office. (See *Registrar General of Elections* v *Tsvangirai* (*supra*) & *Diocesan Trustees of the Diocese of Harare* v *Church of Province of Central Africa* 2010 (1) ZLR 267 at 277 F-278 B, *Dewera Farm* (*Pvt) Ltd & Ors* v *Zimbank Corp* 1997 (2) 47 at 57A-57 B).

The confusion suffered by the legal practitioners in the present matter is similar to that suffered by the applicant's legal practitioners in *Registrar General of Elections* v *Tsvangirai* (*supra*). In an application for the rescission of a provisional order confirmed against the applicant in his absence, the applicant in that case blamed his legal practitioners for failure to file opposing affidavits to the confirmation timeously. The applicant had explained that his lawyers had failed to file the opposing affidavits because the legal practitioner was seized with many files involving the applicant and the same responded. In discounting the error, CHINHENGO J observed at p 116 E:

> "These unfortunately are the words of the applicant and not those of any legal practitioner in the Civil Division, who should speak for herself. There would be no need for the applicant to speak on behalf of the Civil Division or to attempt to explain what may or may not have happened in the Civil Division.

He continued at 117 D that:

> "There is no affidavit by the legal practitioner who handled the matter to show what she did to ensure that the affidavits were filed timeously. The explanation for the defence is, in my view, inadequate as it does not tell what actually happened leading to the failure to file the opposing affidavit."

What is striking in the present application is that Mr *Mabwe* is the same legal practitioner who was handling the urgent chamber application. If indeed there was any error in the respondent's legal practitioner's office it can be safely assumed that the blame must rest squarely

with Mr *Mabwe*. He however did not file an affidavit in the present matter explaining the failure to file the answering affidavit. He still proceeded to represent the respondent in this application despite the error.

In *MM Pretorious (Pvt) Ltd & Anor* v *Mutyambizi* 2012 (2) ZLR 295 (SC 29/2012), ZIYAMBI JA observed at 297 E that:

> "A legal practitioner is not engaged by his client to make omissions and to commit "oversights". He is paid for his professional advice and for the use of his skills in the representation of his client. He is professionally, ethically and morally bound to exercise the utmost diligence in the handling of the affairs of his client.

I find the explanation given for the delay to be unreasonable. To quote GWAUNZA JA in *Gono* v *Trustees, Zimbabwe West Annual Conference of the United Methodist Church* S-65-06:

> "I do not find the explanation tendered for the default in question to be reasonable. Legal Practitioners are expected to be acquainted with the rules of the court, and to abide by them. They should not do their clients a disservice by 'overlooking' important requirements under the rules of the court."

> The applicants and their legal practitioner have placed the blame for the disregard of the Rules in this case squarely on the shoulders of the legal practitioner but, as said in *Apostolic Faith Mission in Zimbabwe & Ors v Marufu* S-28-03:
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> "There is a limit beyond which a client cannot escape the consequences of the conduct of his legal practitioner and it seems to me that this limit has been exceeded in this case. See *Salooje & Anor* v *Minister of Community Development* 1965 (2) SA 135 (A) at 141 C-E where Steyn CJ remarked as follows:
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> > "There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Considerations *ad misericodiumi* should not be allowed to become an invitation to laxity. In fact this court has lately been burden with an undue and increasing number of applicants for condonation in which the failure to comply with the rules of this court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to a condonation of a failure to comply with a rule of this court, the litigant should be absolved from the normal consequences of such are lationship, no matter what the circumstances of the failure are."

At least in *MM Pretorious (Pvt) Ltd*, the legal practitioner responsible for the non-compliance with the rules, unlike in the present matter, took full responsibility for the non-compliance by filing an affidavit explaining the lapse and sought the court's indulgence to rectify the non-compliance. The respondent cannot escape the consequences of the errors of its legal practitioners. It is accordingly ordered that:

1. The application under Case Number HC 11735/15 be and is hereby dismissed with cost for want of prosecution.
2. The provisional order under case Number HC 11735/15 be and is hereby discharged.
3. The respondent be and is hereby ordered to pay costs of this application

Kanokanga & Partners, applicant's legal practitioners
Mahuni & Mutatu, respondent's legal practitioners