ALLIED TIMBERS ZIMBABWE (PRIVATE) LIMITED
versus
JOSEPH KANYEKANYE

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 24 November 2016 and 29 June 2017

Opposed Matter

B. Ngwenya, for the applicant
T.G. Musarurwa, for the respondent

CHIWESHE JP: This is an application for rescission of a default judgment granted in favour of the respondent on 27 January 2016 under case number HC 12172/15. The application is made in terms of r 63 of the High Court Rules, 1971.

The judgment sought to be rescinded reads as follows:

"IT IS ORDERED THAT:

1. Respondent be and is hereby ordered to pay an amount of $54 225.99 to Applicant being the agreed terminal benefits due to the Applicant.

2. Respondent be and is hereby ordered to updated all contributions with AON Zimbabwe up to the effective date of termination of employment.

3. Respondent be and is hereby ordered to pay costs of suit on an attorney-client scale."

The background facts are these. The respondent was employed by the applicant as its Group Chief Executive Officer. The parties agreed to an arrangement in terms of which the respondent's employ would be mutually terminated on agreed terms. To that end they executed a document entitled "Mutual Termination of Employment Agreement" which was signed by both parties on 16 February 2015. Paragraph 3.4 of that agreement provides as follows:

"3.4 **Release by Allied Timbers Zimbabwe (Pvt) Ltd**

Allied Timbers Zimbabwe (Pvt) Ltd, for itself and each of its past, present and future administrators, heirs, executors, shareholders, directors or attorneys, hereby expressly releases, acquits and forever discharges Employee from any and all manner of action or actions, fixed or contingent which they now have or may hereafter have, by reason of any matter, cause, or act whatsoever from the inception of time to the execution of this Agreement including, but not limited to, any claim related to or arising from the Employment Contract or Employee's employment with Allied Timbers Zimbabwe or the termination thereof."

Paragraph 3.5 (wrongly captured as 3.4) provides in addition that "each party agrees that the releases set forth in this Agreement shall be in all respects effective and not subject to termination, rescission, alteration or reformation."

In terms of para 1 of the agreement the parties quantified the benefits to be paid to the respondent by the applicant. Thus para 1.1 reads:

"1.1 **Payments by Allied Timbers Zimbabwe (Pvt) Ltd**

Until the Effective Date, Employee shall continue to receive his current salary and benefits at the monthly rate of $9006.00, less applicable withholdings and taxes, payable in accordance with Allied Zimbabwe (Pvt) Ltd's regular payroll practices. After the exchange of the signature pages of this Agreement signed by the parties, Allied Timbers Zimbabwe (Pvt) Ltd will pay the employee **$153 295.00** (**subject to TAX as per ZIMRA Tax Directive**) being terminal benefits which are broken down as follows:

a. 3 Months Statutory Notice pay with benefits - $29 520.00

b. Cash in lieu of 51.5 leave days - $46 380.00

c. School fees for current term at 75% of $10 500.00 - $7 875.00

d. 2 holidays - $40 000.00

e. Outstanding Salaries and benefits Dec 2014 Jan and Feb 2015 - $29 520.00

Each such amount shall be subject to the deduction of all applicable withholdings and taxes as per ZIMRA tax directive."

In terms of para 1.2 the applicant undertook to pay the above benefits in accordance with an agreed payment plan.

When the applicant failed to pay the agreed benefits timeously, the respondent filed an application titled "an application for a compelling interdict." That application was served

on the applicant in the present matter through its erstwhile legal practitioners on 11 December 2015. Instructions were issued to oppose the application. The reason for so opposing the respondent's application was that subsequent to the execution of the termination of employment by mutual consent, there had been a further audit of the applicant's pay roll by the Zimbabwe Revenue Authority. That audit revealed that the respondent had an additional tax liability to ZIMRA in the sum of $293 698.19. The benefits due to him had as a result been subsumed by this burden such that his net entitlement of $54 225.99 would not be executable. The applicant had an obligation to transmit to the ZIMRA the requisite tax from the respondent's earnings.

According to the applicant, the respondent, as the Group Chief Executive Officer, had a duty to ensure that all taxes accruing from his earnings were deducted and remitted to ZIMRA. The respondent failed to do so hence he owed tax in the sum of $293 698.19. The applicant's erstwhile legal practitioners sought to resolve this impasse by engaging the respondent's legal practitioners. Unbeknown to the applicant, the respondent's legal practitioners had other ideas. Instead of putting litigation in abeyance in order to pursue the ongoing discussions, the respondent's legal practitioners enrolled the "application for a compelling interdict" on the unopposed motion roll and obtained a default judgment. That despite the fact the applicant's current legal practitioners, having gotten wind of what was about to happen in motion court, proceeded to the court room where they confronted the respondent's legal practitioners, urging them not to proceed with the application for default judgment, in view of the findings of the ZIMRA audit. Their pleas fell on deaf ears, the default judgment being granted shortly thereafter, allowing the respondent's claim for the sum of $54 225.99.

The above court room fiasco has been confirmed by way of a supporting affidavit sworn to by Blessed Ngwenya, the legal practitioner who sought to persuade the respondent's legal practitioner from proceeding with the "unopposed" application. It must be noted that the contents of that affidavit have not been controverted by the respondent. It reads in paragraphs 4 to 9 as follows:

> "THE FACTS
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> 4. On the 27th of January 2016 and at around 10:50 hrs I attended to the High Court in a bid to check the progress of the file on the computerised system. It is then

that I discovered that the matter had been set down on the unopposed roll which was already in motion.

5. I immediately rushed to the Motion Court where I met Ms Musekiwa of Mambosasa Legal Practitioners.

6. I confirm that I explained to her the technicality and impropriety relating to the order the Respondent sought in light of the correspondences the Respondent's lawyers had with Messrs Dube Manikai & Hwacha and requested a postponement to enable parties to discuss.

7. However, Ms Musekiwa advised me that she did not have any instructions to postpone the matter and as such, she accordingly prayed for an order which was granted subject to a certain amendment regarding pension payment.

8. I confirm that the averments made by the Applicant in its founding affidavit in relation to the above interaction with the Respondent's legal practitioners are true and correct.
9. I also submit that the conduct of the Respondent and his legal practitioners in the circumstances amounted to snatching a judgment."

In its opposing affidavit the respondent indicates that the applicant had agreed to pay his terminal benefits within three months of termination of employment. It had not so paid him a year later. He states that the applicant was seeking to evade this obligation by raising "a spurious defence" to do with ZIMRA outstanding taxes. He further avers that his legal practitioners notified the applicant's legal practitioners that should payment not be received within the week commencing 1 December 2016, litigation would be commenced. No payment was received hence the "application for a compelling interdict" was filed and served on the applicants. It was not opposed and the respondent's legal practitioners obtained default judgment. The respondent further states that the present application is a reaction to that default judgment and that since then his legal practitioners have requested that the applicant's legal practitioners have a closer look para 3.4 of the of the Mutual Termination Agreement in terms of which the matter should be disposed. At para 5 of his opposing affidavit he states as follows.

"5. Applicant's legal practitioners have since been challenged by mine to produce authorities that show that it can renege on terms of the Mutual Termination of Employment Agreement without any consequences, and more-so that it is not bound or restricted by the above clause from passing on its obligation to pay ZIMRA to me. A copy of such correspondence is attached hereto marked Annexure D. The challenge is yet to be met. I am advised and verily believe that a sincere interpretation of the above clause and an appreciation of the

> import of the whole Mutual Termination of Employment Agreement will go a long way in showing that Applicant has no leg to stand on."

It is apparent from the above that the respondent's sole defence to the application is that in terms of the Termination of Employment Agreement, the applicant is obliged to pay on his behalf not only the usual benefits of employment but anything else to do with or arising from his employment, including taxes owing by him to ZIMRA. It is from that stand point that the respondent avers that the applicant has no prospects of success on the merits, should rescission be granted.

In my view a lot depends on one's interpretation of this agreement. Was the question of the respondent's personal tax obligations intended to be covered by this agreement such that the employer then assumed the responsibility for paying the same? Was the employer aware of the extent of that vast tax liability, incurred by the respondent? The respondent was the applicant's Chief Executive Officer and in charge of the applicant's day to day operations. Why was he not effecting tax deductions from his pay as is required by law? If his tax bill exceeds the amount due to him by way of benefits, does the applicant then owe him anything? All these issues deserve to be ventilated. There is no doubt in my mind that the applicant has an arguable case. It accordingly has prospects of success in the event that rescission is granted.

The applicant argues that the provisions of the Income Tax Act [*Chapter 23:06*] militate against the respondent's assertions as to the merits. Thus s 73 of that Act provides for the payment of tax by employees which tax is payable under the 13th Schedule to the Act. The respondent is therefore liable at law to pay tax to the fiscus. He deliberately failed to do so. Further in terms of article 3 of the Thirteenth Schedule, the employer is obligated to withhold tax on behalf of the fiscus. It is for this reason that the applicant has not disbursed the respondent's benefits as the respondent owes tax to ZIMRA to whom the employer must pay from the respondent's earnings and benefits.

Article 6 of the Third Schedule protects employers from actions, such as those by the respondent, aimed at withholding taxes due to the fiscus. More importantly Article 7 of that Schedule makes void any agreement in which the employer undertakes not to withhold tax. Accordingly clause 3.4 of the parties' agreement could be declared void. In all this, it cannot be said that the applicant has no prospects of success on the merits.

By the same logic I hold the view that the applicant has a *bona fide* defence to the respondent's claim, based on the question which ought to be determined by a court of law, whether given the above statutory provisions and the respondent's alleged complicity in failing to remit his taxes, the employer should, by this agreement, be held liable to meet the respondent's personal tax obligations.

The applicant always indicated to the respondent's legal practitioners that in view of the revised audit by ZIMRA, the respondent now owes ZIMRA so much money, that his benefits have now been subsumed by that debt and sought to discuss the way forward. Litigation should have been held in abeyance then. Instead the respondent's legal practitioners snatched judgment and then sought to discuss the matter with the applicant after the event. That kind of conduct is reprehensible. The words of McNally J in *Minister of Home Affairs & Ors v Vuta* 1990 (2) ZLR 338 at 344 are apposite.

> "…….a litigant who snatches a judgment maybe expected, in a proper case, to consent to rescission or pay the costs of opposition."

Given these factors it is evident that the applicant has a reasonable explanation as to the delay in filing opposing papers. Its explanation is not only reasonable but indeed plausible.

The requirements for an application for rescission of judgment to succeed are well traversed in various authorities and legislation. The remedy is available at the discretion of the court and on good cause shown. Rule 63 (2) of the High Court Rules 1971 provide:

> "(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 or the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just."

(See *Deweras Farm (Pvt) Ltd v Zimbabwe Banking Corporation* 1998 (1) ZLR 368 (S)

Good and sufficient cause is ordinarily interpreted to mean, *inter alia,* that the applicant has a reasonable explanation for his default (conversely that he was not in wilful default), that he has a *bona fide* defence and that on the merits he has some prospects of success.

The applicant has satisfied the above requirements. The application must succeed.

Accordingly it is ordered as follows:

1. The default judgment granted under case number HC 12172/15 on 27 January 2016 be and is hereby rescinded.

2. The applicant be and is hereby ordered to file the notice of opposition in case number 12172/15 within 5 days from the date of this order.

3. The respondent shall pay the costs.

Chinawa Law Chambers, applicant's legal practitioners
Mambosasa, respondent's legal practitioners