

KEMERST CONSTRUCTION (PVT) LTD
versus
THE SCHOOL DEVELOPMENT ASSOCIATION (SDA)
OF CHITSERE PRIMARY SCHOOL

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 12 July and 26 July 2017

Opposed Matter

K Maeresera, for the applicant
T.N. Kanengoni, for the respondent

MATANDA-MOYO J: This is an application for rescission of judgment. The brief facts are that applicant issued summons against the respondent under HC 3597/15. All pleadings were filed and the matter was set down for 14 February 2017. On the date of hearing the applicant failed to attend resulting in the matter being dismissed. The applicant's representative submitted that on the same day whilst proceeding for the hearing, he was arrested by the police and taken to Southerton Police Station. He explained that he could not pay the fine required in cash as he had no cash on him. He was only released at around 0920 hours. That resulted in him getting to court around 0945 hours. By then the matter had been dismissed for want of appearance by the applicant. Applicant submitted that its prospects of success in the main case are good. Applicant did the job and the respondent has not paid for the job. Applicant's lawyers also filed a supporting affidavit that he attended at the Magistrates Court before proceeding to court for the pre-trial conference. It is his evidence that he disposed of the magistrates matter at around 0930 hours, the same time the pre-trial conference commenced. The lawyer indicated that he advised respondent's lawyer that he was running late. He only got to court when the matter had just been dismissed.

Respondent opposed the granting of the relief sought on the basis that applicant was in willful default and that applicant had no prospects of success in the main matter. It is respondent's case that applicant has no cause of action against the respondent. The person who entered into the contract with the applicant lacked authority to do so in terms of section 6 (h) of SI 379/98.

In terms of r 63 (2) of this court's rules the court may set aside a judgment granted in default;

“If the court is satisfied on application in terms of sub-rule (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 actions

BEADLE J (as he then was) in the case of *Du Preez and Hughes NO 1957 RKN 706* explained the meaning of good and sufficient cause at page 707 as follows;

“There are three broad considerations which the court will always take into account: First, the explanation given by the applicant for his default; second the bona fides of the application made to rescind the judgment; and third the bona fides for the applicant's case on the merits of the case. The court has a very wide discretion in deciding what is, or what is not, sufficient for relief. But as I have said, the circumstances already set out are considerations which are generally taken into account in all applications such as this. Too much emphasis should, however, not be laid on any one of these considerations individually. They should be regarded in conjunction with each other and with each other and with the application as a whole. An unsatisfactory explanation for the default may be strengthened by a very strong defence on the merits.”

See also *Zimbabwe Banking Corporation v Masendeke* 1995 (2) ZLR 400 (s), *Sangove v Olivine Industries (Pvt) Ltd* 1999 (2) ZLR 210 (s); *Deweras Farm (Pvt) Ltd and others v Zimbabwe Banking Corporation* 1997 (2) ZLR 47, *Stockhill v Grihiths* 1992 (1) ZLR 172 (s), *Chihwayi Enterprises (Pvt) Ltd v Atish Investments (Pvt) Ltd* 2007 (2) ZKR 89 (5).

From the affidavit of the applicant it cannot be said that the applicant was in willful default. No challenge has been taken on the explanation by Ernest Mangome that he was delayed by the police. I am satisfied that the explanation provided is reasonable. As regards the lawyer's affidavit nothing turns on it in view of the explanation by Ernest Mangome. It is clear that Ernest Mangome did not decide to refrain from appearing. His explanation is reasonable.

The second requirement for the rescission of an order or judgment granted in default is the *bona fides* of such application. The application must not be made as a way of delaying the day of reckoning. See *Registrar General of Elections v Tsvangirai* HH 142-2003. The

application must be genuine and not made with intention of delaying the plaintiff's claim or with intention of harassing the defendant. See *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210, *Sixth Century Contraction (Pvt) Ltd v ZETC (Pvt) Ltd* HH 85/14.

I am of the view that this application is made in good faith. At all times the applicant has shown a willingness to prosecute its claim. I do not doubt applicant's good faith.

Lastly let me deal with the applicant's prospects of success in the main matter. Does the applicant have a *bona fide* claim against the respondent. A *bona fide* claim is not one which can be rejected out of hand on the face of it. See *Andrew Noel Cornswick v Retired Major General Happyton Bonyongwe* HH 184-15. The onus is on applicant to place facts before the court, without dealing fully with the merits which if proved would entitle it to the relief sought. See also *Grant v Plumbers (Pvt) Ltd* 1949 (2) SA 470 (O); *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A), *GD Haulage (Pvt) Ltd v Munurungwi Bus Services (Pvt) Ltd* 980 (1) SA 729 (ZR AD).

It is clear the onus is on the applicant to prove a *prima facie* case. The applicant has established that it was contracted to carry out renovations at Chitsere School. Such contract was signed by the Acting Headmistress. The work was done and payment has not been made. The respondent is not denying that work was done. It is simply relying on the defence that the Acting headmistress had no authority.

I am satisfied that the applicant has discharged the onus on it. This is a matter which should be allowed to proceed to trial. There is *prima facie* evidence that the amount claimed is owing to the applicant.

Accordingly I order as follows;

- 1) That the application be and is hereby granted.
- 2) That the default judgment granted by this Honourable Court on 24 February 2017 be and is hereby set aside.
- 3) That the applicant is granted leave to set down case no. 3597/15 for pre-trial conference hearing.
- 4) That costs be in the cause.

Chizengeya, Maeresera & Chikumba, applicant's legal practitioners
Nyika, Kanengoni & Partners, respondent's legal practitioners