

ABINA CHAPFIKA
versus
CENTRAL AFRICAN BUILDING SOCIETY

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 17 November 2017 & 3 January 2018

Opposed Application

E Mandaza, for applicant
E Jori, for respondent

TAGU J: This is an application for the upliftment of an automatic bar in terms of Order 12 r 84 (1) (a) of the Rules of this Honourable Court. The facts are that on 10 December 2015 the respondent issued summons against a company called Racewin Trading (Private) Limited, David Chapfika, the applicant Abina Chapfika, and David Chapfika N O (In his capacity as Executor of the Estate Late Netsai Robson Chapfika) all co-principal debtors and surety respectively. The summons and declaration were duly served by the Sheriff on the applicant and other defendants on 17 December 2015 on their chosen *domicillium citandi et executandi* by handing the copies of the summons and declaration on one Enerst Chitsinde a caretaker at the address of service. It will be noted from the Deed of Surety on page 36 of the application that the applicant in the present application as a principal debtor and surety chose as her *domicillium citandi et executandi* Number 881 Endeavour Crescent, Mount Pleasant Business Park, Harare. The summons and declaration were duly served at the given address.

In her founding affidavit the applicant Abina Chapfika the wife to the second defendant David Chapfika submitted that she was not served with the summons and declaration and was not aware that the other defendants therein had been served with the summons. She said she only became aware of the summons when she came across the summons accidentally in their matrimonial home on the evening of 18 January 2016 when she was doing her routine cleaning.

She said the summons was not served upon her personally and as such she was not aware of its existence. Her husband who is the second defendant in the summons for reasons known to him did not inform her of the court process timeously and she was duly barred for failing to enter an appearance to defend. She now wants the automatic bar to be uplifted so that she files her appearance to defend the action. Her explanation being that she has a strong case and defence on the merits because the respondent's claim under case number HC 12138/15 is based on Surety Mortgage Bond No. 3876/2013 which she never signed. It is her contention that at no time did she execute a Deed of Suretyship in the respondent's favour and she only became aware of the same sometime in January 2016 when she discovered the summons. She said her husband fraudulently forged her signature without her knowledge and the signature on the said Surety Mortgage Bond is not hers. She prays for an order that-

- a) "The operative automatic bar against the Applicant in Case No. HC 12138/15 be and is hereby uplifted.
- b) The first respondent be and are hereby ordered to pay costs of suit on a legal practitioner and client scale only if it opposes this Application."

The application for the upliftment of the automatic bar is strongly opposed by the respondent. In his opposing affidavit Collins Chikukwa the respondent's Recoveries Manager submitted among other things that there is no averment by the applicant on how the summons came to be in the matrimonial house. Further, there has been no attempt to explain why the husband did not bring the summons to the attention of the applicant. This could have been done by way of a supporting affidavit from the applicant's husband confirming that he brought the summons into the matrimonial home and he did not bring them to the attention of the applicant. According to him its highly unlikely that having brought the summons home the husband would leave them lying around without bringing them to the specific attention of the applicant. The probability is that the applicant was advised of the service of the summons but probably left it to her husband to address the matter and this application is simply meant to frustrate the respondent in its efforts to recover the debt. This view is fortified by the fact that the applicant's husband, the co-defendant, has not been cited in this matter.

THE LAW

In an application of this nature the applicant must satisfy the requirements to be met in an application for the upliftment of the bar. The requirements were spelt out in the case of *Smith N O v Brummer N O & Anor* 1954 (3) SA 352 (O) at p 358 as follows-

- “(a) A reasonable explanation for the Applicant’s delay is forthcoming;
- (b) The Application must be bona fide and not made with intent to delay the other party’s claim;
- (c) The Applicant must not be guilty of a reckless or intentional disregard of the rules of court;
- (d) The Applicant’s case should not be obviously without foundation; and
- (e) The other party should not be prejudiced to an extent which cannot be rectified by a suitable Order as to costs.

REASONABLE EXPLANATION FOR DEFAULT

In my view the applicant must rebut the presumption of service created by the Sheriff’s return of service. The applicant’s explanation is that she was not personally served with the summons in case number HC 12128/15 and in the circumstances she could not enter an appearance to Defend within the stipulated time frame. The fact that the summons were not handed to the applicant personally is not decisive in her favour. This was not an action for civil imprisonment. The Rules of this honourable court provide for effective service on a person other than the defendant. Order 5 r 39 (2) (b) of the High Court Rules, 1971 clearly states in this respect as follows:

“Subject to this Order, process other than process referred to in subrule (1) may be served upon a person in any of the following ways-

- (a) by personal delivery to that person or his duly authorised agent;
- (b) by delivery to a responsible person at the residence or place of business or employment of the person on whom service is to be effected or at his chosen address for service.”

In this case the Sheriff’s Return of Service shows that the Sheriff handed a copy of the Summons to Ernest Chitsinde, a caretaker and a responsible person at Number 881 Endeavour Crescent, Mount Pleasant Business Park, Harare, the place which the applicant, in the Deed of Surety, had chosen as her *domicilium citandi et executandi*.

It is common cause therefore, that the Sheriff's Return of service constitutes *prima facie* proof of service. It is trite law as stated in the case of *Phill v Gweru Investments Limited & Others* HH195-16, that the delivery of a legal notice to a responsible person at the chosen *domicilium citandi et executandi* of a party to a contract will suffice as proper service for purposes of r 39 (2) (b). There is no legal requirement that, to be effective, the chosen address of service must be the defendant's place of residence. In fact, to prescribe that would be to take away the element of choice that is inherently associated with the *domicilium citandi et executandi*. It is submitted, therefore, that whether or not the defendant resides at the address of service is immaterial when establishing if good and proper service was effected. Therefore, despite that the applicant in the present case was not served personally, there was proper service.

HAS APPLICANT ESTABLISHED THAT SURETYSHIP DEED WAS FORGED?

In her founding and supporting affidavits the applicant has tried to disown the Deed of Suretyship which stipulates the address of service. It is with respect, submitted that the applicant has failed to discharge the evidentiary burden on her to establish the forgery. She has not produced any evidence which establishes her bona fides in making the allegation. She has not reported the alleged forgery which threatens to dispossess her of her matrimonial property to the police as any reasonable victim would do. The alleged forgery has not been admitted by the husband. The applicant has also failed to produce an affidavit of her husband admitting to this said forgery. The applicant has also not produced any report from a document expert proving that the signature appended on Annexure "H" to the Court Application really is a forgery as she alleges. There is no evidence whatsoever pointing to the fact that the applicant's husband forged the documents in question save for her unsupported declarations. The mere production of copies of her passport and Bank card are not enough in the absence of a finger print expert. She is therefore bound by the Suretyship agreement she signed.

IS APPLICANT BONA FIDE IN MAKING THIS APPLICATION?

When all the facts of this case have been considered the inescapable conclusion is that the applicant is not bona fide in making this application. In establishing its bona fide the applicant must have set out material facts which if proved constitutes a valid and sufficient defence to the action. In my view the applicant failed to establish the same. This defence has been only raised to delay the respondent from getting its relief.

HAS THERE BEEN A RECKLESS OR INTENTIONAL DISREGARD OF THE RULES OF COURT?

The Rules of this honourable Court clearly prescribe the time frame within which a defendant should file its Appearance to Defend. Rule 17 of the High Court Rules provides that “*The time within which a defendant shall be required to enter appearance to defend shall be ten days, exclusive of the day of service*”. When she realised that she had been automatically barred by operation of the law the applicant should not have rushed to try and file an appearance to defend but at that very moment if she was genuine should have applied for upliftment of the bar. That she did not do shows that she disregarded the rules of court.

WOULD THE RESPONDENT BE PREJUDICED TO AN EXTENT WHICH CANNOT BE RECTIFIED BY SUITABLE ORDER AS TO COSTS?

We are at the end of the year 2018. The matter in case number HC 12138/15 has not been settled since 2015. As a bona fide creditor with a bona fide claim it is my view that the respondent has already been prejudiced in a manner deserving of costs on a higher scale without having to deal with this frivolous application from the applicant. The applicant did not exercise the degree of care expected of a litigant who has been barred. She waited for over a year to apply for the upliftment of the Bar operating against her from the time that she allegedly “came across” the Summons. In doing so she failed to exercise the degree of care expected in the circumstances and was therefore negligent in the sense defined by MAFUSIRE J in the case of *Local Authorities Pension Fund v Nyakwawa & Ors* HH-60-15. See also the case of *Mears v Brooks’ Executor & Anor* 1906 TS 546 where the court refused to remove the bar where the applicant in that case had delayed filing his pleadings for a year and had no reasonable explanation for such a lengthy delay.

In the circumstances I refuse to order the upliftment of the bar.

IT IS ORDERED THAT

- a) The application is hereby dismissed with costs on a legal practitioner and client scale.

Muhonde Attorneys, applicant's legal practitioners
Wintertons, respondent's legal practitioners