SENATAR (PVT) LTD
versus
OTC INTERNATIONAL GmbH
and
SHERIFF OF THE HIGH COURT, ZIMBABWE

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 18 September 2018

Opposed Application

Advocate E Matinenga, for the applicant
Ms *T.F Mataba*, for the 1st respondent
No appearance for the 2nd respondent

MUZENDA J: This is an opposed application where the applicant seeks to have a default judgment in favour of the first respondent on 2 March 2018 rescinded. The applicant in its application averred that the applicant had applied to this court for an order in terms of the draft. Applicant did not annex the draft order nor is it alluded to on the consolidated index.

Background

OTC International GmbH (the plaintiff in case number HC 11514/16) (the first respondent herein) issued summons for the recovery of the sum of USD673 146.24. The applicant entered appearance to defend and raised three special pleas and pleaded over on merits. The matter progressed to pretrial conference stage and on the date of the pretrial conference, the applicant did not attend and its plea was struck out and judgment was entered against it in default on 2 March 2018.

The applicant learnt about the default judgment on 5 March 2018. This application is for rescission of that judgment.

The applicant avers that it instructed its legal practitioners to seek senior counsel's opinion and agreed that Advocate *E Matinenga* would handle the matter. When the notice of set down was served on the applicant's corresponding legal practitioners on 26 February 2018, Mrs *N Tachiona* did not see the notice of set down, she had her own matter in Bulawayo which had been set down for 28 February 2018. Mrs *Tachiona* only advised applicant's legal practitioners upon her return from Bulawayo. The applicant contends that it was not in wilful default.

Further the applicant argues that it has a *bona fide* defence to the respondent's claim and had already filed its plea and amongst the issues forming its defence is an averment, that the first respondent is a peregrinus and without payment of security of costs, it does not have a right of audience with the court. It also denies that it ever purchased vehicles from the plaintiff but that the vehicles were purchased from Yutong, China and payments were made by Brehemen Finance. The applicant purchased seven buses from Yutong, a company in China and an invoice was raised on 8 April 2014, a loan was availed to defendants by Bremen Finance in Germany to purchase the buses. Applicant disputes the existence of a contract between itself and the respondent.

In its opposing affidavit the first respondent is opposing the application. In first respondent's view the applicant has not proferred a reasonable explanation for its default at the pretrial conference. The applicant's corresponding attorney was not to personally attend to a Bulawayo matter since she was legally represented and in any case that matter was but an application. First respondent admits that it is a peregrinus however that is not a reason enough that it be precluded from having audience before this court merely for non-payment of security of costs. The first respondent still insists that the applicant's lawyers were supposed to attend the pretrial conference. On the issue of whether the applicant has a *bona fide* defence, the first respondent alleges inconsistence on the number of buses on the proforma invoice and the number applicant claims to have purchased and received. The proforma invoices indicates eight buses at the price that the first respondent delivered seven to the applicant together with shipping and related charges. The first respondent also questions the whole process of purchasing and communication between it and the applicant concerning the purchase of the buses. The first respondent argues thus that the applicant's defence is *mala fide* and its plea is not consistent. Further the first respondent goes on to allege that the applicant has made no effort to present a case by which one could be persuaded that there are reasonable prospects of success.

The law relating to rescission of judgment granted in default of the other party is now well established in terms of Order 9 r 63 of the High Court Rules 1971. The affected person may make a court application not later than one (1) month after she/he has knowledge of the judgment, for the judgment concerned and grant leave to the defendant or to the plaintiff to prosecute his/her action on such terms as to costs and otherwise as the court considers just. Central to the current application is to find out whether the applicant was in wilful default on the date the default judgment was granted in favour of the first respondent if the applicant was in willful default surely the application will fail.

It is common cause that applicant's corresponding legal practitioner of record, Mrs *Tachiona* had a case in Bulawayo on the date when the pretrial conference was set for hearing. She left her office before seeing the notice of set down. She has deposed to an affidavit explaining what happened. She has no reason to misrepresent the facts, she has no motive to lie to this court. This court accepts her explanation as being truthful. Upon her return from Bulawayo, she informed applicant's legal practitioners who applied for the rescission of that judgment. It is my considered view that the applicant has managed to prove on a balance of probabilities that it was not in wilful default.

The first respondent in its opposing affidavit vehemently impugned applicant's plea, alleging that it has no prospects of success. It is not denied by the first respondent that the default judgment was granted on the date the matter had been set down for a pretrial conference showing that all the pleadings had been closed. The first respondent did not take any initiative to challenge applicant's plea until the application for rescission. The first respondent will not be prejudiced if the matter is allowed to proceed to finality on merits. If the applicant did not have a defence, the rules of this court allow a party to apply for summary judgment among other hosts of alternatives to curtail the duration of trial where the parties have gone to the pretrial conference stage, equity, justice and fairness would demand that where a party is found not to be in wilful default it ought to be allowed to prosecute its defence in a full trial.

It is also disturbing that the first respondent strongly opposed the application on flimsy reasons. It is for that reason that this court will not award costs to the first respondent.

It is therefore ordered as follows:

The application be and is hereby granted, costs of the application to be costs in the cause.

Dube-Tachiona & Tsvangirai, for the applicant
Wintertons, for the 1st respondent