BOLTSPEED CONTRACTORS (PVT) LTD
versus
WANG HONG FANG
and
THE SHERIFF OF HIGH COURT

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 28 March 2023

Opposed Application

Mr C Muchichwa, for the applicant.
Mr.B Diza, for the respondent.
No appearance, for the 2nd respondent.

DEME J: On 28 March 2023, I dismissed the application for rescission of default judgment filed by the applicant. The applicant proceeded to ask for the reasons of the judgment. Accordingly, the reasons for the order of 28 March 2023 are as specified below.

The applicant approached this court seeking an order for the setting aside of default judgment granted on 19 September 2022. In the draft order, the date of the default judgment is wrongly captured. In particular, the applicant prayed for the relief couched in the following manner:

> "1. The default judgment granted by this court in the matter HC2474/22 on the 19th of October 2022 be and is hereby rescinded.
>
> 2. The Applicant be and is hereby granted leave to defend the 1st Respondent's claim in HC2474/22.
>
> 3. The Registrar of High Court be and is hereby directed to set the matter down for another Pre Trial Conference within five days of service of this order on him.
>
> 4. Respondent who opposes this application to pay costs of suit."

The applicant is a company duly registered in terms of the laws of Zimbabwe. On 12 April 2022, the first respondent instituted an action against the applicant claiming US$31 750 being rental arrears under case number HC2474/22 (hereinafter called "the main matter"). The applicant and the first respondent concluded the lease agreement in respect of the property known as number 23 Lezard Avenue, Milton Park, Harare (hereinafter called "the

property") where the applicant was a lessee at the property in question. The parties had a round table meeting on 7 June 2022 with a view to find a common ground in preparation for pre-trial conference. The parties subsequently agreed that the matter be referred to the pre-trial conference.

Consequently, the pre-trial conference was held on 19 September 2022 in the absence of the applicant and its legal practitioner. The court subsequently granted default judgment against the applicant.

It is the applicant case that the legal practitioner, Ms Mswazi, who was required to attend the pre-trial conference was suffering from COVID-19 and hence went into quarantine in line with the guidelines. The applicant further alleged that its legal practitioner was not able to contact the first respondent's legal practitioners neither was she able to contact the legal practitioners from her law firm. The applicant also affirmed that its secretary only advised the applicant's representative after the meeting for the pre-trial conference had ended. The deponent to the founding affidavit, Mr. Musindo, alleged that he had forgotten about the date and time of the pre-trial conference. He further asserted that if he had not forgotten the date in time of the gathering, he would have attended the pre-trial conference and would have asked for postponement to enable his legal practitioner to attend. In light of these facts and circumstances, the applicant is of the view that the default was not wilful.

With respect to the merits, it is the applicant's belief that it enjoys some prospects of success in the main matter. According to the applicant, it did not breach the lease agreement as alleged by the first respondent. The applicant further averred that the first respondent is the one who rendered the realisation of the lease agreement impossible. It is the applicant's case that the first respondent had failed to clear the outstanding rates and fines which were due to Harare City Council. Because of this, the City Council could not issue the operating licence for the property in question. The applicant also claimed that it advised the first respondent of this position who took no action to remedy the situation. According to the applicant, this action by the first respondent constituted the breach of the lease agreement.

The applicant further alleged that it advised the first respondent that it was going to withhold the rentals until the first respondent had settled its outstanding rates and fines with Harare City Council. The applicant stated that the withholding of rentals was with effect from September 2021. According to the applicant, the first respondent had no basis to claim rental arrears from the applicant as it never used the premises for the intended purpose. The

applicant alleged that the first respondent must refund the applicant the rentals paid before the withholding of rentals since the applicant never realised its rights in terms of the lease agreement.

The present application was opposed by the first respondent. According to the first respondent, in addition to the claim for rental arrears, the first respondent also claimed against the applicant an order for eviction together with holding over damages. The first respondent further averred that the applicant had no appetite to prosecute its defence in the main matter. The first respondent additionally claimed that the applicant's attitude of laxity could be signalled by its failure to file the pre-trial conference papers by the date of the pre-trial conference. The first respondent affirmed that the applicant wanted to extend its stay at the property without paying rentals. The first respondent further alleged that the applicant's legal practitioner could have alerted her fellow legal practitioners from her law firm of her predicament. This could have avoided the default, according to the first respondent.

The first respondent argued that the default was wilful. She further alleged that the applicant ought to have been advised of the pre-trial conference date in time and could have started some preparations for the conference. She also contended that the secretary of the applicant ought to have prepared the affidavit in support of her allegations. The first respondent additionally claimed that the deponent to the founding affidavit casually stated that he forgot without supplying further details.

The first respondent averred that she never breached the lease agreement as alleged by the applicant. She maintained that the terms of lease agreement which the applicant wanted to incorporate in the lease agreement are foreign to the agreement. According to the first respondent, the acts of withholding rentals is the basis for the termination of the lease agreement. Alternatively, the first respondent argued that the applicant could have cleared the rates and fine due to Harare City Council and claim the money from the first respondent. The first respondent affirmed that the applicant has no prospects of success in the main matter. She further argued that the applicant is not prejudiced by the default judgment. Rather, according to the first respondent, she stands to suffer more prejudice due to the acts of the applicant of withholding her rentals.

The sole question that arises for determination is whether the present application meets the requisite threshold for the application for rescission of default judgment.

The present application is provided for in terms of Rule 27 of the High Court Rules, 2021 which provides as follows:

> "27. (1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment for the judgment to be set aside, and thereafter the rules of court relating to the filing of opposition, heads of argument and the set down of opposed matters, if opposed, shall apply.
>
> (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 to defend or to the plaintiff to prosecute the action, on such terms as to costs and otherwise as the court considers just."

The requirements for what constitutes "good and sufficient cause" have been elaborated by a variety of case law in our jurisdiction. In *Stockil* v *Griffiths*[1], Gubbay CJ made the following remarks—

> "The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving "good and sufficient cause", as required to be shown by Rule 63(now Rule 27) of the High Court of Zimbabwe Rules 1971, are well established. They have been discussed and applied in many decided cases in this country. See for instance, *Barclays Bank of Zimbabwe Ltd* v *CC International (Pvt) Ltd* S-16-86(not reported); *Roland and Another* v *McDonnell* 1986(2) ZLR 216(S) at 226E H; *Songore* v *Olivine Industries (Pvt) Ltd* 1988(2) ZLR210(S) at 211C-F. They are:
>
> (i) the reasonableness of the applicant's explanation for the default ;
> (ii) the *bona fides* of the application to rescind the judgement; and
> (iii) the bona fides of the defence on the merits of the case which carries some prospect of success.
>
> These factors must be considered not only individually but in conjunction with one another and with the application as a whole."

Our jurisdiction has defined wilful default in a number of authorities. In *Deweras Farm* (*Pvt*) *Ltd & Ors* v *Zimbabwe Banking Corp Ltd*[2], the court, in discussing the link between "good and sufficient cause" and wilful default, made the following observations:

> "While it may generally be true to say that when there is wilful default there will usually not be good and sufficient cause, I believe we fetter our discretion improperly if we lay down a fixed rule that when there is wilful default there is no room for good and sufficient cause. I favour the definition of wilful default offered by KING J in *Maujean* t/a *Audio Video Agencies* v *Standard Bank of South Africa Ltd* 1994 (3) SA 801 (C) at 803 H-I:

[1] 1992 (1) ZLR 172(S) at 173D-F.
[2] 1998 (1) ZLR 368(S) at 369 E – H; 370A.

> 'More specifically, in the context of a default judgment, 'wilful' connotes deliberateness in the sense of knowledge of the action and of its consequences, i.e. its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation, for this conduct might be."

Further, in the case of *Zimbabwe Banking Corp. Ltd* v *Masendeke*[3], the court opined as follows:

> "Wilful default occurs when a party freely takes a decision to refrain from appearing with full knowledge of the service or set down of the matter."

It is the applicant's explanation that the default was as a result of the legal practitioner who was suffering from COVID-19 and was consequently quarantined. The act of the applicant and its legal practitioners is more than a mistake. It meets the threshold of negligence. However, in my view, it does not reach the level of wilfulness. I am not able to detect the acts of deliberateness by the applicant. Given the explanation for the applicant's default, I am of the view that the applicant was not in wilful default after assessing the requirements for wilful default from the case law.

With respect to the merits, I am of the view that the applicant's case lacks merits. According to the applicant's own testimony in the founding affidavit, it has not been paying rentals since September 2021. Reference is made to para 32 of the applicant's founding affidavit which is as follows:

> "Applicant then informed 1st Respondent in September 2021 that they were going to withhold rentals until Respondent regularises with the local authority. As such, there is no basis on the part of the 1st Respondent to claim the sum of US$ 31 750.00as the Applicant never operated its business at Plaintiff's premises."

By the time the pre-trial conference was held, the applicant had spent about one year without paying rentals to the first respondent. By the time this application was determined, the applicant had spent one and a half years of withholding rentals. The reason for withholding the first respondent's rentals is not justified. Certainly, if the applicant is telling the truth that it was not enjoying the rights in terms of the lease agreement, then one wonders why the applicant was still clinging to the property. It is apparent that where the applicant is not carrying out any business at the leased premises, then the granting of the present application would cause no prejudice to the applicant. Rather, the first respondent would stand prejudiced by the applicant's acts of withholding of her rentals for over one year. The

[3] 1995 (2) ZLR 400 (S).

applicant asserted that the first respondent ought to have refunded it for breach of the lease agreement. Such claim for refund, in my view does not create the lien right in favour of the applicant. In any event, the applicant did not institute the counter claim for the refund to the main matter. Resultantly, the applicant does not have prospects of success in the main matter. The applicant's defence, under such circumstances, to the main matter is hopeless, in my view.

In the absence of the applicant's meritorious defence to the main matter, I saw no reason why the present application ought to have been granted. Consequently, the application was appropriately dismissed with costs. The usual practice is that costs follow the outcome. I found no reason to depart from this practice.

Mushangwe and Company, applicant's legal practitioners.
Diza Munetsi Attorneys, first respondent's legal practitioners.