CAMEL MINING (PVT) LTD
versus
RUMBIDZAYI EVELYN TIZORA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 21 July 2021 & 2 June 2022

Opposed Court Application – Rescission of Default Judgment

TS Mujungwa, for the applicant
R Nyapadi, for the respondent

CHITAPI J: In case number HC 1795/20 which was a court application filed in this court, the respondent herein was the applicant and the applicant the respondent. In that application the respondent claimed payment of USD$30 000 from the applicant arising from a loan allegedly advanced by her to the applicant on or about 14 June 2019. A written loan agreement was attached to the application. Interest on the loan was agreed to be 15% per month with the loan being reduced in instalments of US$4 500 per month payable from 30 June 2019 until the loan and the interest was extinguished.

The applicant opposed the application and *inter-alia* raised the point *in limine* that the application did not contain a draft order. A further point taken in this regard was that the respondent sought repayment of the loan in United States dollars which were no longer legal tender and that to so would be to sanction an illegality. On the merits, the applicant averred that the respondent was not a registered money lender and as such, under the Money Lending and Rates of Interest Act, [*Chapter 14:14*], the loan advanced amounted to an illegal transaction which the court could not recognize or enforce. It was further contended that the interest rate set in the agreement was illegal as it exceeded the rate prescribed by law.

Further still it was contended by the applicant that the respondents claim felt foul of the provisions of s 9(1)(a) of the same Act in that the respondent sought to recover total interest charges that exceeded the capital sum extended to the applicant. Lastly the applicant repeated its

allegation of the illegality of the transaction and pointed out to the provisions of SI 142/19 as codified by the Finance Act (No. 2) 2019 in terms of which the loan agreement amounted to an illegal foreign currency transaction which could not be enforced.

In the answering affidavit the respondent denied that the transaction was illegal. She averred that the loan agreement was entered into on 14 June 2019 which was a date falling before the promulgation of SI 142/19. The respondent also averred that she did not lend money to the applicant as a "money lender" as defined in the Money Lending and Rate of Interest Act. The respondent further averred that the transaction was exempt from an application of s 20(3) of the Money Lending and Rates of Interest Act which exempts non money lenders from being bound by the provision of the Act. The respondent also averred that the rate of interest of 15% was agreed between the parties in consequence of which there was no illegality where parties have agreed to an interest rate to be applied to the transaction. In relation to interest and other charges exceeding the capital lent, the respondent also admitted to the application of the *induplum* rule in regard thereto but averred that subject to the rule, interest could still be claimed as long as the loan remained outstanding. It was the respondent's position that the applicant did not really have a defence to the claim and that to the extent that albeit relying on illegality, the applicant did not offer to refund the capital amount or tender what it admitted be due, it showed malice on the applicant's past.

The parties filed heads of argument. The matter was set down on 3 November 2020 on the opposed roll before CHAREWA J. The hearing was postponed to 10 November 2020 with the parties intimating that they needed time to attempt a settlement of the matter. There was no settlement reached as none was recorded by the court. On 10 November 2020, the applicant's legal practitioner was in default at the hearing. The applicant averred that its legal practitioner erroneously diarised the date of the postponement as 17 November 2020 instead of 10 November 2020. The applicant also averred that the respondent's legal practitioner did not submit the deed of settlement to the court on 10 November 2020 and instead applied for default judgement. The applicant's legal practitioner deposed to an affidavit in which he explained his error in diarising the matter. He also explained that parties discussed the settlement of the matter in terms of the deed of settlement entered by the parties on 4 June 2020. In terms thereof, the applicant undertook

to settle the matter on the basis of payment of the principal amount of US$30 000 only in cash spread over three instalments.

The respondent did not deny the existence of the deed of settlement aforesaid. She averred that payments in terms thereof were not made as agreed and that for that reason the deed of settlement fell through. She averred that the applicant paid the balance of the principal amount after the filing of heads of argument on 11 October 2020 which was some three months after the agreed date of payment of 4 August 2020. The agreement ought in terms of its provisions to have been registered as an order of court but it was not so registered. The obligation to register the agreement as a consent order was reposed on the parties respective legal practitioners. The registration ought to have been done within 7 days of the date of its signature. The respondent admitted that she did not disclose the deed of settlement to her legal practitioners. The deed of settlement or agreement was not pleaded by the respondent in the main matter. In motion proceedings, parties must not withhold material evidence as the application or defence as the case may be falls or stands on the affidavits filed in support thereof. This trite principle has become elementary in as much as it has been exhaustively dealt with by the courts (see *Yunus Ahmed* v *Decking Stalion Safaris t/a CC Sales* SC 70/18; *Bushu* v *GMB* HH 326/17).

It is a common cause that consequent on the default by the applicant's legal practitioners at the postponed hearing on 10 November 2020 the respondents' legal practitioners obtained default judgment for payment of interest and costs of suit on the punitive scale of legal practitioner and client. The capital sum on which interest was to be calculated was erroneously recorded in the order as US$300 000. The error was common to all the parties. The order was corrected on 4 January 2021 to reflect the correct amount of US$30 000. The order by CHAREWA J was therefore in respect of payment of interest on the capital sum of US$30 000. The learned judge ordered that interest be paid at the rate of US$4 500 per month at a rate equivalent to the "Reserve Bank of Zimbabwe rate" on the date of payment for the period from 30 June 2019 to 11 October 2020 which latter date was the date on which the applicant paid off the capital amount.

The applicant seeks a rescission of the default judgment aforesaid. However, the application on the merits takes a different complexion in that the judgment sought to be rescinded no longer involves the payment of the capital amount. The issue is whether or not the applicant

has made out a case for the rescission of the default judgment in so far as it relates to the claim for payment of interest and punitive costs.

To refresh on the subject of rescission of a default judgment in terms of the then r 63 of the High Court Rule 1991, the law is clear. The court considers various factors cumulatively as was stated in the case of *Stockill* v *Griffitis* 1992 (1) ZLR 172 (5) at p 173 wherein the following was stated:-

> "The factors which are taken into account in deciding whether a default judgment shall be rescinded are:-
> (i) The reasonableness of the applicant's explanation for the default.
> (ii) The *bona fides* of the application to rescind the judgment; and
> (iii) The *bona fides* of the defence on the merits of the case which carries some merits of success …."

See also *Ronnati Mafarirano* v *Total Zimbabwe (Pvt) Ltd* HH 286/13.

From the above extrapolation, it appears to me no matter how the factors to be considered have been expressed in various judgments of this court and the Supreme Court, the ultimate consideration is whether or not taking into account and balancing the factors aforesaid, the court considers that the interests of justice will be met upon a rescission of the default judgment being granted with the parties not being taken out of court but given the opportunity to put their respective claim and defence before the court for determination on the merits.

In casu, the application was clearly contested from the onset. It proceeded to a hearing and the matter was postponed to a later date. It was not disputed by the respondent that the postponement arose following engagement by the parties legal practitioners on the existence of a prior deed of settlement which the parties had entered on 11 June 2020. The respondent had not related to the agreement in her founding affidavit. Upon the postponement on 3 November 2020, there was no indication that the applicant had lost interest in resisting the claim. The applicants' legal practitioner explained that he mis-diarised the matter. This explanation was not controverted by the respondent save to the extent only of stating that the legal practitioner was negligent and that the court frowns upon negligence by legal practitioners. In my view there is nothing unusual about a mis-diarisation of a matter. I view the conduct of the applicants' legal practitioner holistically. On 3 November 2020 he was enthusiastically involved in the matter and the matter would have been argued but for the alleged deed of settlement which surfaced and needed interrogation. Indeed it turned out that the deed or agreement existed in fact.

The applicant argues that the deed of settlement aforesaid constituted a compromise or transaction. This argument is not far-fetched and can be developed and properly adjudicated upon by the parties if they are given an opportunity to argue the point. The alleged defence is not fanciful and if it succeeds, it will imply that the default judgment may well have no legal justification since any relief which may be granted would have to be founded on the terms of the said deed of settlement including costs which were awarded. The deed of settlement did not provide for interest for example. Therefore the court would require to determine whether the deed of settlement has legal force and its effect on the principal agreement and on the principal claim.

The facts of the matter shows that the application for rescission of judgement is *bona fide* and not intended to frustrate the respondent from obtaining relief. The decision whether or not to rescind the judgment is ultimately a discretion of the court informed upon a consideration of all relevant facts and circumstances of each case. As with every discretion which a court may enjoy, it must be exercised judiciously which implies in a manner that can be followed logically as far as the reasoning of the court is concerned. *In casu*, the applicant has made out a case for rescission of the default judgment.

This application is disposed of by issue of the following order:-

(i) The default judgement granted in case number HC 1795/20 dated 10 November 2020 as amended by the order dated 4 January 2021 is rescinded and set aside.

(ii) Application HC 1795/20 is returned to the Registrar for set down of its hearing.

(iii) Costs of this application shall be in the cause in case number HC 1795/20.

Tavenhave & Machingauta, applicant's legal practitioners
Muza & Nyapadi, respondent's legal practitioners