BERNARD STEPHENS NCUBE

And

Versus

RACHEL MAKIWA

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 24 MAY 2019 AND 28 MAY 2020

Opposed Application

Mrs J Mugova, for the applicant
Advocate P Dube, for the respondent

MABHIKWA J: On 17 July 2018, default judgement was granted in favour of the respondent in case No. 1769/02. Applicant has made this application in terms of Order 9 Rule 63 of the court rules seeking rescission of that judgement.

The applicant submits that he was not in willful default in that he instituted action proceedings in July 2002. When respondent defended the action, he (applicant) filed the necessary pleadings right up to the Pre-Trial Conference hearing stage, thereby showing a willingness to have the matter to be taken to its final conclusion. He further submits that when the matter was set down for hearing on 17 July 2018, he unfortunately did not attend the hearing. Firstly, he says he did not receive the email from his legal representatives advising him of the hearing date, because his representatives had challenges with their firm's "server." To that extent and to confirm that predicament, he attached affidavits from Mr J.J Moyo a Legal Practitioner with Calderwood, Bryce Hendrie and Partners Legal Practitioners, as well as one Brian Mutsika Maluwe, an IT consultant with the same law firm.

Secondly he submits that in any event, he had lost a brother at the time, and was attending to the funeral arrangements of the deceased brother, and attached Annexture "D". It is a document from Nyaradzo Funeral Services titled "Declaration on Identification of Deceased Person." It is date stamped 17 July 2018 (the date of the PTC hearing) and shows

that Benard S Ncube, on 18 July 2018 identified and confirmed to an officer of Nyaradzo Funeral Services that the deceased body presented to him was that of his late brother Edward Sibanda. The authenticity of the document was not in issue, neither was the bereavement. Thirdly he submits that in any event also, there was a lawyer from the same law firm who was in attendance for the Pre-Trial Conference and therefore believes it should not be taken that he was in willful default.

Finally, he submits that he and the respondent were customarily married in 1984 and that during the subsistence of that union, they entered into a Universal Partnership to purchase and jointly own the property in issue, No. 43 Southway, Burnside in Bulawayo. The house was then constructed in 1988 to its completion the intention being to register it in the parties' joint names. He however does not state whether it was then registered in their joint names. He states that respondent was in charge of the property. He submits that he contributed to the purchase of the stand and the construction of the house to that extent he got injured during the said construction leading to him being disabled.

I must say that the applicant omits, perhaps conveniently so, to state what transpired at the Pre-Trial Conference, leading to the granting of the default judgement notwithstanding the appearance of Ms Mugova there. This I mention because it appeared, and rightly so in my view, to incense *Ms N Ncube* for the respondent, not only in the response to the application but also in argument. It was a very relevant part of the default.

On 17 July 2018, the legal practitioner who attended for applicant, simply appeared to believe that she was entitled to represent a party in a Pre-Trial Conference in that party's absence. Her client being the plaintiff, she said nothing about his non-attendance. She just proceeded into the conference's conduct apparently prepared to simply adopt the other party's P.T.C Memorandum and get over with the Conference. Realising an impropriety, it is the Judge that reminded her to "start with the first things first." The judge asked that since it was a PTC, where was her client (the plaintiff then) and if she had attempted to seek indulgence to proceed in the manner she was doing. Ms Ncube quickly indicated that she too was about to object for the same reason. Counsel for the applicant then indicated that she was not the lawyer ordinarily seized with that matter. She did not know where client was and had not obtained any instructions directly from him on his absence at PTC. Precisely, she did not know why he was not in attendance. As if that was not enough, she was not sure either

why the legal practitioner seized with the matter could himself not attend. She infact said that she had been phoned when she was within the High Court building and told that there is a P.T.C to be held "shortly" before the Judge and that she should attend. She did not seem to have spoken directly to her colleague lawyer either.

Again as if that was not enough and as stated above, she seemed unaware that the court rules required that the litigant (applicant) be in attendance. If not, the best she could have done was first before anything else, to give an honest and convincing explanation for his non-attendance. Thereafer, she would apologise for his failure to attend and then seek indulgence from the Judge and the other party to proceed in the absence of her client. It is only after being granted the indulgence that she would have audience and platform to proceed with the P.T.C business of the day. Unfortunately for her, the other party and her counsel were not prepared to change their position insisting that applicant should have been in attendance for progress's sake in a matter wherein he was the plaintiff and it had dragged for sixteen (16) years at the time. They further argued that the court and its rules had been taken too much for granted and that indulgence should not be granted as it had not even been sought. Counsel for the applicant then indicated that in the circumstances, she was constrained from saying further as she had no audience. Respondent then sought judgement in her favour, in plaintiff's default and the Judge duly granted it.

It must be said therefore that on the face of it, giving the explanations and apology as he does now in the current application is all that applicant needed to do on 17 July 2018. It does not appear however to me to have been that easy, as it would amount to "using what we now know to explain what may not have been known on 17 July 2018."

THE LAW RELATING TO APPLICATIONS FOR RESCISSION OF JUDGEMENT

It appears to me to be well settled law that an applicant seeking the rescission of a judgement granted in default must establish and satisfy the following important facts;

1) That the default was not willful. This would entail giving what could be regarded by the court as "good and sufficient cause" for the default. The court would therefore consider, before coming to a final decision to grant or not to grant the rescission, the applicant's explanation for his default

2) The applicant's prospects of success on his principal claim in the case of a plaintiff or alternatively, a *bona fide* defence in the case of a defendant.

My brother BERE J (as he then was), stated the following in *ZEDTC v Ruvinga* (1) 2012 (2) ZLR 61 (H)

> "In order to succeed in having an order made in default of appearance set aside, the applicant must show good and sufficient cause. The explanation tendered must negate any willful default. In the context of default judgement, "willful" connotes deliberateness in the sense that the applicant must have had full knowledge of the set down date and the risks … upon default; and yet freely took the decision to refrain from appearing, whatever the motivation of that decision may have been."

In the ZETDC case, the applicant had desired a postponement in a matter wherein the issues raised were *res novae*. Counsel was convinced that the postponement would certainly be granted. He decided not to attend court and sent a junior legal practitioner who then bundled. The Judge had no kind words as he held;

> "There is nothing like an automatic post-ponement when a matter is set down before a Judge. A party desiring a post-ponement must advance cogent reasons for post-ponement and seek the court's indulgence in that regard. Only when ……. would the court accede to such application. It was certainly not enough for the applicant's legal practitioner to decide not to attend court on a date that he had agreed to, and delegate his junior to handle the desired post-ponement."

In *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (SC) MCNALLY JA (as he then was) had the following to say regarding prospects of success or *bona fide* defence in applications for rescission of default judgement.

> "The applicant must show that he has a *bona fide* defence, it being sufficient if he sets out averements, which established at the trial, would entitle him to the relief asked for. He need not deal with the merits that the probabilities are actually in his favour."

The learned Judge further held that;

> "A defendant who admits that he was negligent in his tardiness may nonetheless be granted rescission if he shows *bona fides*; Indeed the court might be unjustified in condemning him for a very short delay, although his explanation for it is inadequate, if defendant where found to be acting *bona fide* and had a *prima facie* defence."

See also

(i) *Mereki v Forrester Est (Pvt) Ltd* 2010 (1) ZLR 351 (H) per MAKONI J

(ii) *Zimbabwe Banking Corporation v* Masendeke 1995 (2) ZLR 400 (S)

(iii) *Mushosho v Mudimu & Another* 2013 (2) ZLR 642

Also in *Uzande v Katsande* 1988 (2) ZLR 47 (H) wherein REYWOLDS J held that there should ordinarily be a two (2) pronged approach or enquiry into the issue of "good and sufficient" cause. He held that;

> "An allegation by a litigant that he was unaware of a pending trial would justify restitutio only if he could establish "a supremely just cause of ignorance free from all blame whatsoever." (section 2.4.14). The first hurdle is to show that *prima facie*, he was blameless. In the present case, his allegations, if true, would establish a supremely just cause of his ignorance." The second hurdle is to establish, on the balance of probabilities, the truth of his allegations."

Unfortunately, in the Uzande case above, the applicant had failed on the 2nd hurdle to show on a balance of probabilities that he was genuinely unaware of the date of hearing because of incorrect information supplied by his legal practitioners. Infact also in *ZEDTC v Ruvinga* (supra), in its application and explaining the none appearance, one applicant relied on an affidavit of its legal practitioner one Vote Muza. Although the court held that he was entitled to depose to the said affidavit in support of the application the Judge held that it discredited the *bona fides* of the explanation for the default. Whereas Mr Muza had stouty tried to convince the court in his founding affidavit that the reason for the default was that his client's representative was held up by professional examinations, his colleague, the junior that he had sent to court, a Mr Tawona was singing a different song advising the Judge that the representative was attending a course in Kadoma. In another, also similar to the current application, in explaining the default, the applicant claimed that he had not attended court because his erstwhile legal practitioner, who had renounced agency a few days before the set down date had sent him an email with a wrong date. He was thus unaware of the date. Unfortunately, the erstwhile legal practitioner could not confirm that explanation as it was apparently false.

However, and in my considered view, the same cannot be said of the current application. It is not disputed that applicant had lost his brother. On the same date of the hearing he identified to an official of Nyaradzo funeral services a deceased body as that of his

brother. The documentary proof from Nyaradzo was not discredited. That explained his none attendance. Then came the issue that he had in any event not received the email advising him of the set down date so that he would in turn have advised his lawyers of his bereavement and non attendance. His explanation was simply that he did not know of its existence. That was explained by Messrs Jonathan Joseph Moyo and Brian Mutsika Maluwe in their respective affidavits. The affidavits were not shown to be false, neither was it alleged that they were false. The explanation of the server posing challenges and Brian's explanation appears possible. He explained in the affidavit that whilst there is a delivery report showing that the electronic mail was delivered, it could well be that same was actually delivered in applicant's 'spam' or 'junk mail' instead of his inbox owing to the problematic server. That way, Brian explains, the mail may have been completely missed because electronic mail users rarely check that particular mail box. It therefore becomes difficult to rigidly pin him down on the complaint by respondent's counsel that in the ten (10) days between the sending of the email and the set down date, his lawyer should have done more and enquired why he had not responded or confirmed receiving the mail.

It remains clear therefore that what stands out as the major cause of the default judgement is the legal practitioners' bundling on 17 July 2018. Authorities are clear that that kind of bundling is one that cannot be blamed on the litigant. Legal practitioners should know the rules and adhere to them. Where they bundle, the lay person litigants have no control and are *prima facie* blameless. In fact in some cases, Judges have exonerated the litigant and slapped the legal practitioner concerned with costs *de bonis propris*. In as much as I would not condone the dilatory manner in which it had been handled by counsel, I am not persuaded either to hold that this is the kind of case where the sins of his legal practitioners may properly be visited on the applicant. I am inclined therefore to hold that applicant passes the two (2) pronged test to show "good" and sufficient cause.

Respondent avered that in any event applicant's claim has no merit at all, being meant only to have hers and the court's time wasted. She refutes that applicant ever contributed in the purchase and construction of the property as he claims. She states that the property in issue in case No.1769/02 was never "theirs" or 'partnership" property. She goes on to state at page 26, paragraph 12 of her opposing affidavit that;

> 12. "…… By the year 2000, when my brother purchased the property for me, our customary union was already over in all but name which is why the Memorandum of Agreement of Sale (Annexture B) for the property was between the seller and myself only."

Respondent goes on to say that at that point, she had made up her mind that the applicant was no longer in hers and the children lives. She says in fact at the time, she was already in a relationship with another man to whom she is still married and who helped her raise the children. However, at page 39 of the record is a technical drawing of the house plan. At the bottom right corner of the technical drawing is an inscription usually inserted by the architect or person drawing up the plan. It reads;

> "PROPOSED COTTAGE ON LOT 2 OF LOT 11 BURNSIDE OF FARM 9 OF MATSHEUMHLOPHE FOR MR B S AND MRS R.S NCUBE"

This is the same property also known as No. 43 Southway, Burnside, Bulawayo. The above inscription on the house plan coincides with applicant's claim that the property was jointly owned and was to be registered in the parties' joint names.

Whether the applicant contributed in the acquisition and construction of the said stand and house or whether the property was given or bought for the respondent by her brother as a gift after her union with applicant was over, are issues that should, in my view be decided by a court on the merits. In addition to that, the court could not ignore the inscription referred to above on the house plan. If it is true that respondent's brother bought her the property and gave it to her as a gift as she claims why and how would the house plan state that the house of Mr B.S and Mrs R.S Ncube referring to applicant's initials and respondent's once marriage name. She, apparently from the record, now uses Makiwa. Even the agreement of sale that she relies on as being in her name only, also in fact bears her marriage name to the applicant. Can all this be ignored for the sake of convenience and expediency?

As for the fact that the property was long sold in 2003, that issue again is for the trial court. I take note though of the fact that summons having been issued in July 2002, the said property would have been *res litigiosa* at the alleged time of sale in 2003.

Ms Ncube for the respondent has correctly argued that there should be finality to litigation and that the applicant has prosecuted his case at a chameleon's pace dragging for

the past sixteen (16) years causing so much cost and unending, unwarranted anxiety to the respondent.

The court agrees that the lack of urgency and will in the prosecution of his case by the applicant is undesirable and that there must be finality to litigation and that default judgement had led to finality, but this is also always balanced against the legal requirement and need to decide matters on merit after hearing both parties. I find that this is one case which needs to be ventilated and be decided on the merits. All that the court may say is that applicant would better be warned that it (court) may not brook further tardiness. As one Judge colloquially remarked, the time will come when he would be told that "he has had his merry go round but the music has stopped." When that time comes, the court will certainly not help the sluggard.

Finally, it is clear that applicant though successful, cannot hope for an award of costs.

In the circumstances, I order as follows that;

1) The application for rescission of the default judgement granted in HC 1769/02 on 17 July 2018, is rescinded.
2) The applicant shall apply for a new set down for the Pre-Trial Conference hearing within ten (10) days of this order.
3) There shall be no order as to costs.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
Lazarus & Sarif, respondent's legal practitioners