HB 287/16
HC 2515/15

PHINEAS SIMUKAYI CHINGONO

Versus

ZIMBABWE NATIONAL WATER AUTHORITY

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 7 JULY & 3 NOVEMBER 2016

Opposed Application

E. Mlalazi for the applicant
R. Ndlovu for the respondent

TAKUVA J: This is a court application for condonation of late filing of an application for rescission of a default judgment granted by this court under case number HC 2054/14 on 15 January 2015.

The facts are that, respondent issued summons against one Mr Chin'ono out of this court on 24 October 2014. The summons is purported to have been served on the farm manager. The return of service contains the following remarks, "Summons and plaintiff's declaration served on the farm manager on behalf of the defendant". The applicant did not file an appearance to defend and respondent applied for default judgment which judgment was granted by this court on 15 January 2015.

Armed with the default judgment, respondent obtained a writ of execution which he served together with the court order, notice of attachment and notice of removal by the Sheriff in execution of the default judgment on 30 July 2015. Alarmed and surprised by this development, applicant lodged an application for rescission of the default judgment on 7 August 2015. It turned out that this application was defective in that it was issued on the wrong form. The application was supposed to be in form 29A. After being advised by his legal practitioner of this defect, applicant withdrew the application on the 17th day of September 2015.

In order to file a proper application for rescission of default judgment, the applicant had to seek condonation since he was now out of the thirty (30) day period required by the rules of this court. Hence this application.

The requisites for an application of this nature have been stated and re-stated in numerous decision of the superior courts in this jurisdiction. One such case is *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 (H) at 243 – C where the requirements were set out as follows;

"…

(a) the degree of non-compliance;
(b) the explanation thereof;
(c) prospects of success on the merits;
(d) the importance of the case;
(e) the convenience of the court;
(f) the need for finality of litigation; and
(g) the avoidance of unnecessary delay in the administration of justice."

See also *United Plant Fire (Pvt) Ltd* v *Hills & Ors* 1976 (1) SA 717 (A) at 720F-G; *Mutizhe* v *Ganda & Ors* 2009 (1) ZLR 241 (S) at 245C; *Kombayi* v *Berkhout* 1988 (1) ZLR; *Chimponda & Anor* v *Muvami* 2007 (2) ZLR 326 (H).

As regards the degree of non-compliance, it is common cause that the application for rescission of judgment was filed six (6) days from the date applicant became aware of the existence of the court order. It is also common cause that this application was defective and had to be withdrawn so that a proper one is filed. Applicant has attached an affidavit from his legal practitioner who not only acknowledged the error but took responsibility for it.

Respondent submitted that the applicant should be visited with the sins of his legal practitioner. It relied on *Saloojee & Anor NNO* v *Minister of Community Development* 1965 (2) SA 135 (A) at 141C-E where STEYN CJ stated that:

> "There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court …. The attorney, after all is the representative whom the litigant has chosen for himself and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."

See also *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S)

In the present case, I take the view that to visit the applicant with the sins of his legal practitioner will lead to grave injustice in that the applicant himself showed a keen interest in defending his rights. His legal practitioner committed a procedural error by using the wrong forms when filing the application for rescission. It should be noted that this application was noted within the *dies induciae* required by the rules. Clearly the applicant cannot be described as the "sluggard". In the circumstances, it cannot be said that the delay is inordinate.

The applicant has in my view presented a reasonable explanation for the failure to comply with the rules. This explanation has been corroborated by his legal practitioner in a supporting affidavit filed of record. From that explanation, it is clear that the applicant did not take a conscious decision not to comply with the rules of this court. Further, the conduct of the legal practitioner in the circumstances does not amount to a reckless disregard of the rules. Consequently, I come to the conclusion that the limit referred to in the *Saloojee* case *supra* has not been exceeded *in casu*.

Whether or not a litigant has a *bona fide* defence and prospects of success in the main matter are relevant factors in such applications. According to Herbstein and Van Winsen, *The Practice of the High Courts of South Africa* 5th Edition at p 532.

> "A *bona fide* defence is disclosed if the defendant swears to a defence, valid at law, in a manner that is not inherently or seriously unconvincing."

In *Finbro Furnishers (Pvt) Ltd* v *Registrar of Deeds Bloemfontain & Ors* 1985 (4) SA 773 (A) at 789C, it was pointed out that:

> "The court is bound to make an assessment of the petitioner's prospects of success as one factor relevant to the exercise of the court's discretion unless the cumulative effect of the case is such as to render the application for condonation obviously unworthy of consideration."

In the present case, applicant's first line of defence is that he was not properly cited in accordance with the provisions of O 3 Rule 11 (a) of the High Court Rules 1971. The rule states;

> "11. Contents of summons
>
> Before issue every summons shall contain …
>
> (a) the full name of the defendant and his residential or place of business and if he is sued in a representative capacity, the capacity in which he is sued. Where the defendant's full name is unknown to the plaintiff, that fact should be stated and his name and initials or his name and such of his initials as are known, should be given." (my emphasis)

In casu, the respondent did not allege that the full particulars of the defendant were unknown to it. Respondent cited the defendant as it did by merely referring to a title and surname i.e. "Mr Chin'ono". Before one cites a party in a summons or in application proceedings, it is important to consider whether the party has *locus standi* to sue or be sued (*legitima persona standi in judicio*) and to ascertain what the correct citation of the party is. See Herbstein & Van Winsen *supra* at page 143.

Consequently, the argument that the summons in HC 2054/14 was invalid for want of proper citation of the defendant cannot be dismissed as "obviously unworthy of consideration". Equally weighty is the applicant's contention that the return of service is incomplete for want of specific name of the farm manager who was served as per Form 5A in terms of O 5 r 42B (2) of the High Court Rules 1971. The essence of the sub-rule is that if the defendant was served, not personally, but in one of the other ways allowed by the rules, the return must state the name of the person on whom the process was served. The return of service does not state the name of the farm manager who was served with the summons.

Finally, applicant's further defence is that the statement of account is defective in that the respondent has not shown how the figure of US$30 563,66 had been arrived at. At some point in 2014, respondent had a separate agreement with a company called Chemda Farming (Pvt) Ltd for the supply of water, making applicant not liable personally for the whole period of 2014. Clearly, applicant is challenging the veracity of the amount claimed by respondent in the summons.

As regards the importance of the case, the avoidance of unnecessary delay in the administration of justice and the need for finality of litigation, it is apparent that this matter is of extreme importance to the applicant as he stands to suffer huge financial prejudice considering the high value of the money involved if he is not given an opportunity to be heard in his defence. It is in the interests of justice that matters are heard and determined on the full evidence from all parties rather than on technical basis. In this way, justice is accorded its fullness in both form and content. While it is the policy of the law that there should be finality to litigation, one does not want, on the other hand to do injustice to litigants – see *Ndebele* v *Ncube* (1) ZLR 288 (S).

For these reasons I make the following order.

1. The application for condonation of late filing of the application for rescission of default judgment under case number HC 2054/14 be and is hereby granted.
2. The applicant is to file its application for rescission of default judgment within ten (10) days from the date of receipt of this order.
3. Costs to be in the cause.

Sinyoro & Partners, applicant's legal practitioners
Messrs R. Ndlovu & Company, respondent's legal practitioners