

WALTER NJONJO t/a MR SMART FURNISHERS

Versus

DIRECT ACCESS LEGAL AID SOCIETY

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 23 & 26 JULY 2018

Opposed Application

Applicant in default
Menard Mutusva for respondent

MAKONESE J: This is an application for rescission of a default judgment entered against the applicant on the 4th January 2018. The judgment was entered by consent. The respondent opposes the application for rescission of judgment and contends that the application for rescission of judgment is based on falsehoods and material non disclosures. Respondent prays for the dismissal of the application on a punitive scale.

The brief facts as gleaned from the papers filed by the parties is that following the issue of summons at the instance of the respondent, the applicant approached the respondent with a proposal to settle the matter without having to go through the rigors of a prolonged legal process. Applicant approached the respondent with a proposal for an out of court settlement. The applicant signed a deed of settlement and an order was granted in default by MATHONSI J on the 4th January 2018. Respondent issued a writ of execution against property. The applicant instituted interpleader proceedings and when this failed, the applicant filed this application for rescission of judgment.

In his founding affidavit, the applicant states that he only became aware of the existence of this judgment for the first time when the Sheriff of this Honourable Court visited his former place of residence which he is currently letting out to Artwell Nkomo on the 4th March 2018. Prior to this date, the applicant claims he had no knowledge of the default judgment and service

of the summons. The Deputy Sheriff's return of service indicates that the summons and declaration was served at DST Complex, Gweru by:

“Affixing to a glass coffee table among the property on sale after a man who had dark spots on his face measuring a blue work suit declined service on behalf of the defendant”.

The applicant avers that the copy of the summons and declaration was never handed to him. Further, the applicant contends that the judgment was fraudulently claimed. The fraud, so it is claimed, runs from the fact that there was never any consent to the default judgment. The applicant remarkably claims that he left his letter head in the custody and care of one Mernard Mutusva. This, he states was after he had reported Menard Mututsva for fraud in respect of a sum of US\$2 800 which he had collected on his behalf but misappropriated it. The applicant then goes on to give lengthy explanation of how the respondent had used his letterhead to prepare a deed of settlement, before forging his signature. I have tried to understand the applicant's narration of events but it is extremely difficult to understand the applicant's story. In spite of going through the applicant's founding affidavit for a number of times I was unable to make out the nature of his defence to the summons, that led to a default judgment. I find it impossible to believe that a businessman, as articulate and seemingly sophisticated, as applicant, would handover to some other person his letterheads for the purpose of preparing a withdrawal affidavit. An affidavit is not ordinarily prepared on letterhead and one wonders why the applicant did not prepare such an affidavit and submit it to the police. The applicant's explanation simply does not make sense.

In terms of Order 9 Rule 63(1) of the High Court Civil Rules, 1971 the court may rescind a judgment granted in default if it is satisfied there is good and sufficient cause to do so. The High Court Rules, however, do not define the terms “good and sufficient cause” but these terms have been defined in a plethora of decided cases. In *Chiwayi Enterprises (Pvt) Ltd t/a Paint & Tools Hardware v Atish Investments (Pvt) Ltd* SC-23-07 at page 95A-B it was held that the terms “sufficient cause” or “good cause” entails two elements which should be provided and these are:

- “(a) *that the party seeking the rescission of a judgment must present a reasonable and acceptable explanation for his default, and*
(b) *on the merits such a party must have a bona fide defence which prima facie carries some prospects of success”.*

See also *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 219; *Zimbabwe Banking Corporation v Masendeke* 1995 (2) ZLR 400 (S).

I find that the allegation that the applicant did not sign the deed of settlement, on his own letterhead is dishonest. The denial is vexatious and amounts to unworthy conduct. In *Underhay v Underhay* 1977 (4) SA 23(W), DAVIDSON J remarked as follows:

“It is fundamental to court procedures in this country and in all civilized countries that standards of truthfulness and honesty be observed by parties who seek relief.”

In *Deputy Sheriff Harare v Mahleza & Another* 1997 (2) ZLR 426 (H) the learned Judge held that:

“People are not allowed to come to court seeking the court’s assistance if they are guilty of lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. It is called. In time honoured legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek a court’s assistance, then the court risks compromising its integrity and becoming a party to underhand transactions”.

I must indicate that the judgment sought to be rescinded is an order by consent. By its nature, a consent order is a final order, and one normally has to prove and establish that such judgment was obtained through fraud. In truth, a consent order is not a default judgment. See *Graspeak Investments v Delta Corporation (Pvt) Ltd* 2001 (2) ZLR 551, where the learned Judge, NDOU J stated as follows:

“The courts should in my view, discourage urgent applications, whether ex parte or not, which are characterised by material non-disclosures, mala fides or dishonesty. Depending on the circumstances of the case, the court may make adverse or punitive orders as a seal of disapproval or mala fides or dishonesty on the part of litigants”.

In this matter, the applicant’s wife was served in person with the warrant of execution in March 2018. After failed interpleader applications, the applicant filed this application for

rescission of judgment. I am satisfied that there is no good and sufficient cause for application and the explanation for seeking rescission is not reasonable. Further, applicant has not placed before the court a *bona fide* and prima facie defence that carries some prospects of success.

For the foregoing reasons, the application for rescission of judgment is dismissed with costs.