PRINT AFRICA PRIVATE LIMITED
and
MOSES MPOFU
versus
OLD MUTUAL PROPERTY INVESTMENTS

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 4 and 17 November 2010

J Koto, for the applicants
T Pasirayi, for the respondent

GOWORA J: The applicants herein seek the rescission of a judgment granted against them in default on 14 June 2010 as a result of their failure to attend a pre-trial conference set down before MTSHIYA J. The background to the dispute is as follows:

On 1 January 2009 the first applicant and the respondent concluded an agreement for the lease by the first applicant of the respondent's premises specifically third floor, Batanai Gardens, situate in Jason Moyo Avenue, Harare. The agreed rental was $1541-94 per month and the first applicant also agreed to pay operating costs. The second applicant bound himself as surety and co-principal debtor for the due payment of its obligations by the first applicant.

It is common cause that a problem arose between the first applicant and the respondent in relation to the payment of rentals and operating costs. Summons was issued against both applicants and served on the second applicant on 18 January 2009. The second applicant entered an appearance to defend for both but was subsequently advised by the respondent's legal practitioners of the defect in the appearance entered on behalf of the first applicant. He engaged legal practitioners who filed an appearance out of time. An attempt to have the automatic bar operating against the first applicant was dismissed by this court. The first applicant had however gone on to file a plea which pleading is of no effect due to the bar.

The matter had however proceeded to the pre-trial stage. This pre-trial conference was set down before MTSHIYA J in chambers on 14 June 2010. The second applicant asserts in his founding affidavit that neither he nor the first applicant were aware of the date of set down.

The notice of set down was served at the offices of the legal practitioners then acting for the applicants. The second applicant has attached affidavits from Thodhlanga and one I Mandi. Nothing much turns on the affidavit of Thodhlanga. I Mandi is employed as a receptionist by Phiri & Associates a firm of legal practitioners which shares the reception area with Thodhlanga & Associates the applicants' former legal practitioners. He confirms having received the Notice of Set down for the pre-trial conference of 14 June 2010. He states that at the time the receptionist for Thodhlanga & Associates was not at her desk but he had placed the notice on her desk, directly in front of her chair so that she would see it the minute she walked in. She was not called upon to depose to an affidavit as she is the only person who can state what happened to the notice after it was received. There is in my view evidence that the applicants' legal practitioners were negligence. Should this court however be persuaded to accept the explanation of the default being advanced by the applicants. In S v Mc Nab 1986 (2) ZLR (5) DUMBUTSHENA CJ considered that a party should not escape punishment from the consequence that befall him as a result of the negligence of his client. The learned CHIEF JUSTICE had this to say:

> "In my view clients should in such cases suffer for the negligence of their legal practitioners. I share the view expressed by STEYN CJ in *Saloojee & Anor NNO* v *Minister of Community Development supra* at 141 C-E when he said:
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> > '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. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. 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. (*Cf Hepworths Ltd* v *Thornloe & Clarkson Ltd* 1922 TPD 336; *Kingsborough Town Council* v *Thirlwell & Anor* 1957 (4) SA 533 (N).)'
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> I have dwelt at length on this point because it is my opinion that laxity on the part of the court in dealing with non-observance of the Rules will encourage some legal practitioners to disregard the Rules of Court to the detriment of the good administration of justice".

Mandi's affidavit puts the blame squarely at the door of Thodhlanga & Associates. The notice was on the receptionist's desk in such a way that she could not have failed to see it. The question that has to be answered by the applicants is what happened to the notice. They have not found it necessary to answer this question and yet the answer thereto in my view, would be the deciding factor as to whether or not the explanation is reasonable. Without an affidavit from the receptionist on what she and with the notice there is in fact no explanation. I can only therefore find that the default was wilful.

I turn next to the *bona fides* of the application for rescission of judgment. The first applicant concedes that it is barred from proferring a defence .As regards the second applicant his contention is that the order does not reflect that the first applicant had vacated the premises on 26 February 2010 which is conceded by the respondent in a letter dated 3 March 2010. Despite this order sought by the respondent and granted on 25 August 2010 the applicants are ordered to pay holding over damages albeit from 29 September 2009, collection commission and costs on a legal practitioner client scale. The respondent's legal practitioners should have ensured that their claim as presented to the court at the time judgment was sought reflected the correct position between the parties. The order granted as at 25 August 2009 clearly was out of sync with the factual position. The order also required the first applicant to pay operating costs from 29 September 2009 to date of ejectment. This was not correct.

The respondent has attached to its papers certain documents which are supposed to prove the extent of the operating costs owed. The applicants contend that the respondent was unable in its opposing affidavit to state how much the first applicant was obliged to pay every month as operating costs.

In para 5 of the opposing affidavit the respondent boldly states:

> "In terms of clause 6 of the lease agreement the first applicant was obliged to pay operating costs".

Clause 6 details the services that result in the obligation to pay operating costs on the part of a tenant. No amounts are mentioned. The transaction scheduled attached to the papers do not specify in detail the operation costs and the respondent has made no attempt to explain the schedules.

I therefore accept the contention by the first applicant that the respondent should have responded to the request for further particulars. I find that the application is *bona fides.*

The claim for operating costs in my view is not established on the papers before me and the contention by the second applicant that he has a *bona fide* defence on the merits with prospects of success is borne out by the respondent's own inability to explain the operating costs.

In the premises it is my view that the second applicant has established good and sufficient cause for the judgment under case number HC 195/10 of 25 August 2010 to be set aside.

Accordingly there will be an order in terms of the draft as amended.

Koto & Company, applicants' legal practitioners
Gill, Godlonton & Gerrans, plaintiff's legal practitioners