OXFORD AGRRO CHEMICALS (PVT) LTD AND ORS

versus

ZB BANK LTD

HIGH COURT OF ZIMBABWE

DUBE J

HARARE, 26 January 2012

**Opposed Court Application**

*T.K. Hove*, for the applicants

*O, Mutero*, for the respondents

DUBE J: The applicants filed two applications, one for condonation of late filing of an application for rescission of judgment and the other for rescission of judgment. The court, for expediency and in exercising its discretion conferred to it, in terms of r 4C of the High Court Rules, 1971, directed that the applications be argued one after the other and indicated that the judgements in the matters would be dealt with in one judgement. For ease of reference, the court will refer to the first application as “the application for condonation’’ and the second as “the application for rescission”.

The facts of this case are that the applicants applied and obtained a loan of US$ 250 000-00 from the respondent, being working capital. The applicants delayed in extinguishing the loan and the respondent issued summons against them. The summons was served on 2 November 2010 on the instructions of Sawyer and Mkushi, Harare. The applicants instructed Sawyer, Mkushi and Maupa of Kwekwe to defend the matter. On 16 November 2011, Sawyer Mkushi and Maupa wrote to the applicants advising them that they had handed the matter over to Hore and Partners of Kwe Kwe due to the fact that summons commencing the action had been issued by their sister firm in Harare. Notice of appearance to defend was filed the same date by Hore and Partners and the applicants were advised of this fact.

On 1 December 2010, Sawyer and Mkushi issued a notice to plead and intention to bar and served it on Mpame and Partners who were Hore and Partners’ correspondence lawyers in Harare. The applicants did not file their plea and default judgment under HC 7564/10 was entered against them on 25 January 2011.

The applicants aver that they were not aware of the judgment and that they only knew of the judgment when their attached property was advertised for execution and that they immediately acted upon the judgment. The applicants further state that Sawyer Mkushi and Maupa and Hore and Partners did not advise them of the judgment. A writ of execution was served on the applicants on 11 March 2011 and the applicants filed their application for condonation together with the application for rescission of judgment on 23 May 2011. The applicants were expected to file an application for rescission of judgment within one month of the judgement. Where a party fails to file an application for rescission of judgment within a month after he gained knowledge of the judgement, he must make an application for condonation of the late filing of the application for rescission of judgment in terms of r 63 of the High Court Rules, 1971, explaining the delay. The applicant is expected to give an acceptable explanation for the delay as soon as he realises that he has not complied with the rule, explaining,

1. The delay in seeking condonation and,

2. The delay in making the application for rescission. As put in *Saloojee and Anor NNO* v *Minister of Community Development 1965 (2)SA 135 A@138 H, per STEYN* CJ,

“What calls for some acceptable explanation is not only the delay in noting an appeal and in lodging the record timeously, but also the delay in seeking condonation.”

There are therefore two hurdles that applicants must cross. The court dealt first with the application for condonation.

APPLICATION FOR CONDONATION

The requirements which the court should consider in determining an application for condonation are similar to those for an application for condonation for late noting of an appeal. These requirements are set out in Herbstein & van Winsen's,The Civil Practice ofthe Supreme Court of South Africa 4 Ed by Van Winsen, Cilliers and Loots at pp 897-898 as follows:

"Condonation of the non-observance of the rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause to excuse him from compliance ... The court's power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant. In the determination of whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides in which the court will endeavour to reach a conclusion that will be in the best interests of justice. The factors usually weighed by the court in considering applications for condonation ... include the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice."

The court has a discretion to grant condonation of late filing of an application for rescission of judgment and it should exercise that discretion judiciously after considering all the circumstances of the case.

The applicants became aware of the judgement on 11 March 2011 after a writ of execution had been served on them and they filed the two applications on 23 May 2011. The applicants were expected to make an application for rescission within one month after they became aware of the judgment. They were therefore expected to make the application for rescission of judgment on or after 11 April 2011. There was a delay of just over one month in filing the application for rescission. The application for condonation was necessary as they filed the application for rescission out of time. That delay is not inordinate and cannot be said to be a flagrant disregard of the rules. One has to consider that the applicants had to instruct new attorneys and that the delay was just over a month. This court finds the explanation reasonable.

The applicants admit liability for the debt amounting to US$ 250 000-00 as reflected in the credit facility plus interest. They deny that the contract they entered into with the respondent involved a revolving fund and that they borrowed money exceeding that reflected in the credit facility. They do not deny liability for the debt and challenge the quantum of the debt only. The credit facility shows that only US$250 000-00 was advanced as working capital. There is no other paperwork to show that an additional sum of money was advanced and used by the applicants. The applicants have so far paid US$ 332 841-00 of the debt. Although the induplum Schedule attached shows that a total of US$515 490-63 was withdrawn by them, the applicants deny accessing that total. There is no proof that the applicants did indeed withdraw all that money. The applicants therefore have a plausible defence. The amount of money that was advanced is in issue. Based on the facts of this case, there seems to be prospects of success in the main matter for the applicant.

This is a good case where condonation for late filing of an application for rescission of judgment is merited.

The court proceeded to consider the application for rescission of judgment.

APPLICATION FOR RESCISSION OF JUDGMENT

The factors to be taken into account in determining an application for rescission of judgment were laid down in *G D Haulage(Pvt) Ltd* v *Mumurgwi Bus Services (Pvt) Ltd* 1979 RLR 447 at 455 B-G as follows;

“In *Du Preez* v *Hughes R & N 706 (SR),* according to the head note of that case, it was decided that although there are no precise rules limiting or regulating what matters the court may take into account in deciding whether a defendant who seeks to set aside a default judgment has shown the existence for such relief of “good and sufficient cause” in terms of r 63, the court will normally take into account

(a) The applicant’s explanation for his default,

(b) The *bona fides* of the application to rescind the judgement, and

(c) The *bona fides* of the applicant’s defence on the merits of the case.

And the court will normally consider these merits in conjunction with each other and cumulatively. .......Careful consideration was also given to the prospects of success.

The onus is on applicant to show the court that he is entitled to ask the indulgence of the court. Such indulgence will not be granted where the applicant is shown to have been in wilful default. The applicant must show “good and sufficient cause for rescission of the judgment.”

The requirements set out will be considered in seriatim.

EXPLANATION FOR THE DEFAULT.

The applicants place the blame for failure to file their plea on their legal practitioners. Their complaint is that they were not appraised of the developments in the matter and that the legal practitioner who purported to be acting on their behalf did not have their mandate to represent them and failed to enter a plea on their behalf. This complaint raises ethical issues and the court is not in a position to pursue the issue as applicant never sought an explanation from Messrs Hore and Partners or Mpame and Associates explaining their conduct in the handling of this matter. The exact role they played in this matter is not known except that they entered appearance to defend and reportedly failed to file the applicants’ plea. In a case where a delay or failure to attend to a matter or to act results in default judgment, it is expected that the applicant will seek an explanation for the delay or failure to act from lawyers who represented him at that stage. Affidavits from the legal practitioners involved would have been of great assistance in shedding light into the allegations or complaint. In *Mubvumbi* v *Maringa & Anor* 1993 (2)ZLR 24( HC),the court impressed on the need for the applicants to attach to their founding affidavits, supporting affidavits from the legal practitioners who handled the matter during the early stage setting out the history of the events to support the applicant’s contention since the onus rests on him to show ” good and sufficient cause” for rescission of judgment. See also *Cobra & the Wild Cat (Pvt) Ltd* v *Tundu Distributors (Pvt) Ltd* 1990 ( 1)ZLR 133 (H), for that proposition*.*

The applicants were advised by letter of 16 November 2010 that Hore and partners would enter appearance to defend on their behalf. The applicants did not resist that suggestion nor did they make any attempt to contact the legal practitioners with a view to either withdrawing the matter from them or giving them further instructions. The applicants were aware that Hore and partners were acting on their behalf, their conduct amounts to acquiescence. The default judgment is attributable to the applicant’s attorneys who failed to enter a plea. In *Mubvumbi* (*supra*), the court held that an explanation which attributes the blame for the delay to the party’s legal practitioner will usually not avail an applicant as non-compliance with or wilful disdain of the rules by a party’s legal practitioner will be treated as non-compliance or wilful disdain by the party himself. *As* STEYN CJ said in *Saloojee & Anor* v *Minister of Community Development* 1965 (2) SA 135 (A) at 141C-E:

"I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results 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 ..."

Whilst the applicants did not choose these attorneys themselves, they, by their conduct accepted that they act on their behalf. The applicants neglected to follow-up the progress of the matter with their legal practitioners. Their legal practitioners’ failure to comply with the rules amounts to the applicants’ non- compliance with the rules. The applicants cannot avoid the sins of their attorneys being visited upon them. *See also, Beit Bridge Rural District Council* v *Russell Construction (Pvt) Ltd* 1998 (2) ZLR 190 (SC) .

It is difficult for this court to find that a reasonable explanation for the default has been proffered without an explanation for the default by attorneys who handled the matter at that stage.

BONA FIDES OF THE APPLICATION TO RESCIND JUDGMENT

The applicants wrote to the respondents on 4 May 2011 offering to settle the outstanding balance of the debt. They expressed regret for the delay in the settlement of the debt owed to the respondent. They explained that they were facing constraints concerning the sourcing of material resources and offered settlement terms. This was done after they became aware of the default judgment. The settlement offer included all monies claimed. On 23 May 2011 they filed these applications. It is this court’s view that the applicants have not shown good faith when they say that they wish to have the judgment rescinded. It would seem that the applicants have lodged this application in order to buy time and raise money to settle the debt.

BONA FIDES OF THE APPLICANT’S DEFENCE ON THE MERITS.

This aspect of the case was considered when the court dealt with the application for condonation. Although this matter may be strong on the merits, this court is not satisfied, considering cumulatively all the circumstances of this case, that the applicants have shown good and sufficient cause for rescission of this judgement in this case.

In the result

1. The application is dismissed.

2. Costs follow the event.

*TK Hove and Partners*, applicants’ Counsel,

*Sawyer and Mkushi,* respondents’ Counsel,