V DAYA AND COMPANY

and

MR DAYA

versus

SAVANNA TOBACCO (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

MATHONSI J

HARARE, 8 June and 13 June 2012

The applicant in default

Ms *E Chimombe*, for the respondent

**Opposed Application**

MATHONSI J: The respondent instituted proceedings in this court in case number HC 1901/11 seeking an order for payment of the sum of US$17735-00 being the balance of the purchase price for goods sold and delivered to the two applicants, interest at the prescribed rate and costs of suit. The summons commencing action was served upon the applicants on 9 March 2011.

The applicants did not enter appearance to defend but instead, on 22 March 2011 they signed a document with the title “Agreement of Debt and Form”, in terms of which they acknowledged indebtedness in the whole sum claimed in the summons and undertook to liquidate the debt at the rate of US$2500-00 per month. The document does not state when the first instalment was due.

Meanwhile the respondent sought and obtained default judgment against the applicants on 10 May 2011 in the amount claimed plus interest and costs of suit. The applicant filed this application for rescission of judgment on 2 August 2011 and also made an urgent application for a stay of execution pending the hearing of the rescission of judgment application. The application for a stay of execution was not successful.

In his founding affidavit the second applicant confirms receipt of the summons and states that after that an acknowledgement of debt was signed aforesaid. He claims that instalments were paid in March, April, May and June 2011 in terms of the acknowledgment of debt. As proof of that he has annexed receipts for payments made before the acknowledgment of debt was signed and not in the sums of US$2 500-00 stated in the agreement but in various sums ranging from US300-00 to US$1000-00. All the receipts add up to a total of US$4 700-00. Of this amount, only a sum of US$400-00 was paid after the signing of the acknowledgment of debt.

The second applicant states further that they have not defaulted in payment. From the papers placed before me it is certainly not true that they have paid in terms of the agreement nor that they have not defaulted in payment. He states that the applicants sat back and did nothing about the summons content that the matter had been settled by the signing of “the agreement of debt” but were shocked to receive a writ of execution.

The applicants seek a rescission of the default judgment for reasons set out in para(s) 4, 5 and 6 of the founding affidavit which read:

“4. What is apparently clear is that I was never in wilful default as I believed that the matter had been settled when the respondent made me to sign the agreement of debt and agreeing to me paying US$2 500-00 a month. Had I known that the respondent was negotiating in bad faith and misleading me, I would have defended the matter. The responded duped us into believing that the matter had been settled, so as to snatch a judgment.

5. I was not in wilful default and I only became aware of the order on 27 July 2011, had the respondent served me immediately after being granted the order I would have acted on time, the order was never served and the respondent proceeded to issue a writ as if I had refused to pay thus misleading the court.

6. I have a *bona fide* defence and my defence is that we have an accepted payment plan with the respondent which plan was initiated by the respondent and we have never breached that plan as we are paying US$2 500-00 a month as agreed.

Further, the summons as they stand are defective in that they do not comply

with Order 2 r 11 (c) of the High Court Rules.”

If the application had been prepared by an unrepresented litigant this would have been excusable. It was not. Instead it was prepared by a legal practitioner who should have known that, not only were that applicants in wilful default, but also that this deposition does not come anywhere near disclosing a defence.

I have already stated that the applicants did not pay to the respondent in terms of the agreement. They also did not pay a single instalment of US$2 500-00 as provided for in the agreement. More importantly, the applicants admit liability in the exact sum claimed in the summons which is what was granted in the order they now seek to have rescinded.

Nowhere in the world can it be a defence to say that a debtor should be allowed to pay in instalments. By virtue of being a qualified legal practitioner and an officer of this court, the applicant’s legal practitioner is presumed to know that for an application in terms of r 63 to succeed, subr (2) of r 63 requires “good and sufficient cause” to be shown for the rescission of a judgment entered in default.

The factors taken into account in determining “good and sufficient cause” are well established and they include, the reasonableness of the applicant’s explanation for the default, the *bona fides* of the application for rescission and the *bona fides* of the defence on the merits. *Stockill* v *Griffiths* 1992 (1) ZLR 172 (S) at 173 D-F; *Barclays Bank of Zimbabwe Limited* v *CC International* (*Pvt*) *Ltd* S-16-86; *Sangore* v *Olivine Industries* (*Pvt*) *Ltd* 1988 (2) ZLR 210 (S) at 211 C-F and *Govha* v *Ashanti Goldfields Zimbabwe Ltd* t/a *Freda Rebecca Mine & Anor* HH 48-12 at p 4.

To say that the applicants negotiated a settlement after receipt of the summons does not even begin to explain the default. It is as unreasonable an explanation as it is dishonest. To say that the applicants should be allowed to pay the debt they acknowledged as owing in monthly instalments does not come anywhere near presenting a *bona fide* defence. It puts to question the *bona fides* of the entire application for rescission of judgment.

Indeed this application epitomises what is slowly gaining notoriety, as the “new way of business”, where debtors virtually say to creditors: “I know I owe you money but I do not want to pay you; or I will pay you at my own time and in my own way.” This kind of attitude forces those willing to do business with such people to footling court proceedings instituted on spurious grounds in order to delay the day of reckoning.

It is this kind of litigation which must be discouraged at all costs and legal practitioners who indulge in such egregious departure from acceptable behaviour risk the sanction of costs *de bonis propriis* being visited upon them.

In my view, a legal practitioner owes it to the court to protect it from such unwarranted litigation which is clearly a complete waste of the court’s time and a frustration of just claims. Fortunately for the legal practitioner involved, Ms *Chimombe*, for the respondent, did not ask for such an award of costs to be made, which I would not have hesitated to grant. Little wonder they did not attend the court hearing.

This application is an absolute waste of time. It is thoroughly without merit and is an exercise in futility. Not less than ten months have been lost by the respondent as a result of this ill-fated application. An award for punitive costs is therefore called for.

Accordingly the application is dismissed with costs on the legal practitioner and client scale.

*Cheda & Partners*, applicants’ legal practitioners

*Magwaliba & Kwirira*, respondent’s legal practitioners