BROOKLANDS (PVT) LTD
versus
SAVE VALLEY CONSERVANCY

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 15 July 2013, 11 September 2013

OPPOSED APPLICATION

D Dube, for applicant
Advocate Morris, for respondent

CHIGUMBA J: The court is seized with two applications. In HC 6250/12 application is made for rescission of judgment in terms of Order 9 r 63 of the High Court Rules 1971. The relief sought is as follows:

1. That the order granted on 1 February 2012 in case number HC9205/11 be and is hereby rescinded.

2. The applicant be and is hereby granted leave to file his plea or other answer to case HC9205/11 within 10 days of granting of the order for rescission.

3. An order that respondent pays costs of suit on an attorney-client scale if the order sought is opposed.

In HC 6249/12 application is made for condonation of the late filing of the application for rescission of judgment in case HC 6250/12. The applicant and the respondent are the same.

Applicant caused the two matters to be consolidated and to be placed before me for consideration, at the same time. The relief sought in HC6249/12 is for condonation only, with no order as to costs if that relief is not opposed.

At the hearing of the matter, I dismissed both applications with costs on a legal practitioner and client scale, and indicated that my reasons for so doing would follow. These are the reasons. The background to this matter is that:

Under case number HC 9205/11 the respondent sought and obtained a default judgment which was granted on 1 February 2012. The default judgment was sought and obtained after a notice to plead and intention to bar had been filed and served on Messrs Mtetwa & Nyambirai, applicant's correspondent Legal Practitioners of record at the time, on 25 November 2011. After service of summons on it, applicant had duly filed appearance to defend the matter in terms of the rules of this court, on 3 November 2011.

Applicant, in paragraph 3.2 of its founding affidavit to the application for default judgment, avers that when the notice to plead and intention to bar was served on the correspondent legal practitioners on 25 November 2011, they failed to notify Messrs Cheda & Partners, the Legal practitioners of record for the applicant. The applicant avers further, that it became aware of the existence of the default judgment on 28 February 2012 when it was informed of that fact in a letter to it from Messrs Coghlan Welsh & Guest, respondent's legal practitioners of record.

Applicant contends that it has always intended to defend the matter as evidenced by numerous correspondences between the parties, and by its entering of appearance to defend in terms of the rules. It contends further, that it has a good prima facie defense on the merits. The application for rescission of judgment was filed of record on 11 June 2012. Rule 63 Provides that:

> "(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the Judgment to be set aside.
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> (2) If the court is satisfied on an application in terms of sub rule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave

> to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just".

It is necessary that the court satisfies itself that an applicant for the relief sought in terms of rule 63 has complied with the first hurdle set out in rule 63(1), before proceeding to consider the merits of the matter, whether the applicant has established "good and sufficient cause", in terms of r 63(2).

The question that the court must determine is whether application for rescission of default has been made "not later than one month after knowledge of the judgment". In *Sibanda v Ntini SC 74/02, 2002 ZLR (1) @ 266* MALABA JA, stated that:

> "It is clear from r63(2) that before considering the question whether or not the application contains a "good and sufficient cause" for it to exercise the wide discretion conferred upon it in favor of the applicant, the court must be satisfied that the application has been made (that is set down for hearing and not just filed with the registrar) within one month of the date when the applicant had knowledge of the default judgment or that an application for condonation of non-compliance with r 63(1) has been made or granted."

MALABA JA cited with approval the observation made by SANDURA JA in the case of *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises (Pvt) Ltd 1998 (2) ZLR 249 (S) @ 251 C-E*

> "In terms of r 63(1), a defendant against whom a default judgment has been granted has a period of one month; from the time he becomes aware of the judgment, within which to file an application for the rescission of that judgment. If he does not make the application within that period but wants to make it after the period has expired, he must first of all make an application for the condonation of the late filing of the application. This should be done as soon as he realizes that he has not complied with the rule.
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> If he does not seek condonation as soon as possible, he should give an acceptable explanation, not only for the delay in making the application for the rescission of the default judgment, but also for the delay in seeking condonation."

My reading of these cases is that the test laid down in Viking Woodwork was subsequently clarified and expanded in *Ntini* v *Sibanda.* Initially the test required that:

1. Applicant files the application for rescission of judgment within a period of one month from the date of awareness of the judgment.

2. If applicant fails to apply for rescission of judgment within one month of becoming aware of the judgment, an application for condonation of non compliance with rule 63(1) must be made as soon as applicant becomes aware of the non-compliance.

3. *Sibanda* v *Ntini* added a third requirement, that the application for rescission of judgment must not only be made within one month of the date of becoming aware of the judgment, it must be "set down for hearing and not just filed with the registrar", within that period.

When regard is had to the circumstances of this matter, in para 3.2 of the founding affidavit, applicant confirms that the date when it became aware of the judgment is 28 February 2012. According to my calculation, one month after 28 February 2012, would bring us to 27 March 2012. It is common cause that the application before the court, for rescission of judgment, was filed of record on 11 June 2012, three months after the stipulated period. The application was set down for hearing, on 15 July 2013, fifteen months after the stipulated period. The application for rescission of default judgment, case HC 6250/12 is clearly not properly before the court.

In an attempt to rectify its failure to adhere to the provisions of r 63 (1) the applicant placed an application for condonation before me to be dealt with simultaneously with the application for rescission of judgment. The court must determine whether such a course of action is competent, and permissible in terms of r 63 (1). In *Ntini v Sibanda supra @ 266*, the court stated that before proceeding to hear the merits of an application for rescission of judgment in terms of r 63 (2),

> "…the court must be satisfied that the application has been made, that is set down for hearing and not just filed with the registrar, within one month of the date when applicant had knowledge of the default judgment, *or that an application for condonation of non-compliance with r 63(1) has been made or granted". (*my emphasis.)

In my view it is not desirable to set down an application for condonation simultaneously with an application for rescission of judgment, because where the application for rescission of judgment was made out of time, it is necessary that condonation be sought and obtained first, before a court can consider the merits of an application for rescission of judgment which has

been filed out of time. Different considerations govern the granting of condonation and the granting of rescission of judgment. Applicant ought to have advised the court of the date on which it became aware that it had not complied with r 63 (1), as well as advance a reasonable explanation why it delayed in seeking condonation.

The application for condonation was filed of record on 11 June 2012, simultaneously with the application for rescission of default judgment, and three months after the time stipulated in r 63(1). Both applications were set down on 15 July 2013, 15 months after they were filed. In the founding affidavit to the application for condonation, paragraph 5 thereof, the applicant merely states that it was not in willful default when the default judgment was granted against it in the main matter. In my considered view, this falls short of the requirement that an applicant for condonation must not only provide an acceptable explanation for the late filing of the application for rescission of judgment, but also an acceptable explanation for the delay in seeking condonation. Applicant fell afoul of r 63 (1) by three months. It delayed in seeking condonation by fifteen months. The vague references to settlement negotiations between the parties after appearance to defend had been entered do not in my view constitute acceptable explanations for failing to apply for rescission of judgment after knowledge of the judgment had been acquired in February 2012, or for the delay in seeking condonation. Counsel for the applicant submitted that the court had discretion in terms of r 4C to depart from its own rules in the interest of justice and invited the court to use its discretion in that case. The court respectfully declines to do so, on the basis that this is not a proper case for the use of its discretion in terms of r 4C. There appears to have been some mix up between applicants' legal practitioners.

In *S* v *McNab 1986 (2) ZLR 280(S) @ 284 A-D* the court stated that:

> "the court has to consider whether to punish the applicants for the negligence of their legal practitioners. 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 NO* v *Minister of Community Development supra* at 141C-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.
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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".

The applicant has failed to provide an acceptable explanation for its delay in applying for condonation of the late filing of the application for rescission of default judgment, as well as its delay in seeking condonation. I find that the applicant has failed to persuade the court to exercise its wide discretion in its favor and grant it condonation of the late filing of the application for rescission of judgment. At the hearing of the matter, to further compound matters, it was apparent that applicant had also failed to file its heads of argument in relation to the application for rescission of judgment, contrary to the provisions of r 239(b) of the rules of this court. The effect of this oversight is that applicant is barred from being heard in the application for rescission of default judgment, unless and until it files an application for condonation of late filing of the heads of argument. The application for rescission of judgment is not properly before the court. Not only was it filed out of time, applicant is barred for failure to file heads of argument on time.

I also find that the applicants have not laid down any basis before the court, for consideration of the second part of the relief that they seek, that they be allowed to file their plea within ten days of the date of this court's order. For the court to consider whether the applicants are entitled to that relief, it would necessitate a consideration of the merits of the application for rescission of default judgment.

The court was asked to consider a punitive award of costs, given the deplorable manner in which the applicant has conducted both matters before the court. It was submitted that applicant has displayed a flagrant disregard of the rules of this court by simultaneously filing an application for rescission of default judgment and an application for condonation of late filing well out of time, then sitting on both applications and setting them down well after the stipulated period, then failing to provide an acceptable explanation for the delays. Then failing to ensure

that heads of argument in the application for rescission of default judgment were filed in terms of the rules.

I am persuaded by the argument that a punitive order for costs will register the court's displeasure at the flagrant disregard for its rules exhibited by the applicant. Both applications are therefore dismissed with costs on a legal practitioner client scale.

Cheda & Partners, applicant's legal practitioners
Coghlan Welsh & Guest, respondent's legal practitioners