

LADYMOTOR INVESTMENTS (PVT) LTD
versus
PETER MANDA ZA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 1 October and 8 October 2014

Opposed application

P Musina, for the applicant
Respondent in person

MANGOTA J: the applicant applied for Condonation for the late application for rescission of default judgment. The judgment was entered against it and in favour of the respondent on 26 September, 2013.

The history which led to the default judgment being entered against the applicant and the subsequent endeavours which the latter took to correct the situation depicts the applicant as an extremely unfortunate legal entity which is likened to the biblical *voice which is crying in the wilderness*, so to speak. The history goes as follows:

- (i) On 27 August, 2013 the respondent issued summons against the applicant
- (ii) On 28 August, 2013 summons and declaration were served on the applicant's employee one Bernadette Paradza. The employee did not bring the process to the applicant's attention.
- (iii) On 26 September, 2013 default judgment was entered against the applicant.
- (iv) On 15 October, 2013 the applicant became aware of the summons and default judgment. This was after the respondent had, through a writ of execution, instructed the Sheriff for Zimbabwe or his lawful deputy to proceed to the applicant's place of business to attach and remove from there the latter's movable goods and place those under the hammer to satisfy his claim for the sum of \$17 311-00 together with interest thereon at the prescribed rate.

- (v) Faced with the abovementioned unpalatable situation, the applicant approached Messrs Mambara and Partners Legal Practitioners for redress. It did so on the date that it became aware of the default judgment (i.e. 15 October, 2013).
- (vi) Messrs Mambara and Partners Legal Practitioners wasted no time, so to speak. They filed with the court, and served upon the respondent, an urgent chamber application. They prayed that the respondent be interdicted or stopped from attaching and removing the applicant's property from the latter's place of business. The procedure which they adopted did not address or advance the concerns of the applicant. It was a wrong procedure.
- (vii) On 28 November, 2013 the application was dismissed. It failed because the legal practitioners did not apply for rescission of judgment which they should have done.
- (viii) The applicant was thrown back to the point from when it became aware of the default judgment. The applicant, in frustration at the conduct of its legal practitioners whose confidence it had lost, made up its mind to pursue the criminal, as opposed to the civil, side of the case. It reported the matter to the police. It, in the report, cited one Joseph Murimwa as a fraudster who had forged the signature of its Managing Director and Chief Executive officer one Petros Kanjera and had, in the process, purported to cede to the respondent what it said was a non-existent debt on the basis of which default judgment was entered against it.
- (ix) On 15 November, 2013 and because the default judgment which had been entered against it was neither rescinded nor varied, the applicant's property was, in terms of the writ, attached and removed from its premises for sale.
- (x) On 9 December, 2013 the applicant, through Messrs Kantor and Immerman Legal Practitioners, filed an interpleader notice with the court. The court dismissed the notice on 22 January, 2014 paving way for execution.

The above constitutes the effort which the applicant made to safeguard its interests. It filed the present application with the court on 30 May, 2014. It did so through a new set of legal practitioners namely Mushonga, Mutsvairo and Associates.

The respondent opposed the application. He raised a number of matters which the court did not think did have any meaningful bearing on the matter which the applicant had placed before it. The respondent, it was observed, has already executed on the judgment which had

been entered in his favour. The basis of opposition was, therefore, difficult, if not impossible, to appreciate. The rescission of the default judgment, if granted, would not in any way operate to his prejudice in the circumstances of this application.

The applicant stated that its application for Condonation was aimed at nothing but to have its name as a bad debtor cleared. It delayed in the filing of the present application by a stretch of some four (4) months. That delay, taken on its own, would appear to be inordinate. However, when the same is taken together with all the effort which the applicant put into having the situation rectified, without success though, the delay cannot be said to have been unreasonable. The legal practitioners whom it chose to act for, and on its behalf, let the applicant down in a very sad way. It was, to that extent, an extremely unfortunate entity. The question which begs the answer is should the applicant be punished for the sins of those whom it gave the mandate to prosecute its cases. Generally, the answer is in the affirmative particularly where prejudice will visit the other party. The instant is one case where the respondent would not suffer any prejudice; real or potential.

The applicant is crying that justice be allowed to come to its doorstep. It must have spent some substantial sums of money in its quest to attain justice. The legal practitioners whom it engaged performed shoddy work for it. They did not offer their services to it on the basis of charity. They earned money from it for their respective services, though the services were so poor as to be unconscionable.

The court is satisfied that the applicant's explanation for the delay in applying for rescission of judgment is reasonable. It is also satisfied that the applicant has merits on its application for rescission of judgment. It is pertinent for the court which will be seized with the matter which relates to the action to determine whether, or not, the default judgment was obtained fraudulently or otherwise. The applicant stated that the judgment was obtained through fraud. It said when the respondent obtained the default judgment, as he did, he was acting on the strength of a cession letter from Joseph Murimwa who allegedly ceded a purported debt to him on the day that the respondent issued summons against it. It averred that it never entered into a sub-contract with Joseph Murimwa. It insisted that Joseph Murimwa could not have ceded to the respondent the rights which he did not have himself.

What the applicant stated poses some material disputes of facts which can only be cleared through a ventilation of all the matters in an action. It is, accordingly, pertinent that it is allowed to pursue what it holds dear to it in a conclusive manner.

The court has considered all the circumstances of the present application. It is satisfied that the applicant established its case on a balance of probabilities. It, in the result, orders as follows:

1. That the application be, and is hereby, granted.
2. That costs be costs in the cause.

Mushonga, Mutsvairo & Associates, Applicant's legal practitioners