FARHIGH TRADING (PVT) LTD
versus
THE ADDITIONAL SHERIFF CHIVHU
CENTRAL ESTATE (PVT) LTD
and
PETER TARUVINGA AND 37 OTHERS

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 25 July 2018 and 12 September, 2018

Opposed Application

B. Moyo, for the applicant
No appearance for the respondent
K. Masasire, for the 2nd respondent

MANGOTA J: I dealt with this application on 25 July, 2018. I delivered an *ex tempore* judgment in which l dismissed it with costs. I indicated that my reasons for the decision would follow. These are they:

The judgment creditor which is the third respondent in *casu* is a group of former employees of Central Estates (Pvt) Ltd, the judgment debtor. It successfully sued the judgment debtor for arrear salaries or wages which are to the tune of $228 945. It did so through arbitration.

Following its successful suit, the third respondent successfully applied for registration of the arbitral award. It then instructed the first respondent to attach and take into execution the movable goods of the second respondent. The property was duly attached.

The attached property brought the applicant into the equation. It claimed that the same belonged to it. Its claim resulted in the issuance of an interpleader notice. It was issued under HC 7899/13.

The applicant filed a fatally defective opposing affidavit in the interpleader proceedings. The affidavit was defective in that it was deposed to by one person and signed by the other.

The court which dealt with the interpleader dismissed the applicant's claim. It did so on the basis that the applicant did not oppose the third respondent's position.

The applicant appealed the dismissal of its claim. It did so through its erstwhile legal practitioners, Scanlen & Holderness. These renounced agency on 11 May, 2015.

On 8 June, 2015 the applicant engaged its current legal practitioners. It is on their advice that it realised that the appeal which it had filed was erroneous. They advised it to withdraw the same and apply for rescission of judgment. It withdrew the appeal on 27 January, 2016. It filed this application on the same date.

The application is for condonation of late filing of the application for rescission of judgment. It is the applicant's view that it be condoned for having adopted a wrong procedure. It states that, once condonation is granted, it would apply for rescission of judgment and, if successful, it would instruct the first respondent to issue a fresh interpleader notice, and in the process, bring its claim back on track as well as have the same decided on the merits. It insists that it is the owner of the property which the first respondent attached at the instance of the third respondent. It attached to its application HC 223/14 which it says confers ownership of the property to it.

The third respondent opposes the application. The first and second respondents do not. My assumption is that they intend to abide by my decision.

The third respondent alleges that the applicant and the second respondent are colluding in the matter which relates to the attached property. It states that the two are one and the same entity. HC 223/14, it insists, is a result of the collusion of the applicant and the second respondent and their effort to mislead the court which granted the order to believe that the applicant owns the attached property. It contends that the applicant deliberately refrained from citing it in the matter because it knew that, if it did, the truth would be told. It submits that the applicant is not the owner of the property. It avers that the application was filed to frustrate its effort to execute upon its judgment. It moved the court to direct the applicant to pursue the alternative remedy which the court granted to it in HC 223/14. It states that it is only fair that the applicant obtains a refund of its purchase price and it be allowed to remain with the attached property which it would sell to satisfy what the second respondent owes to it. It moved the court to dismiss the application with costs on a punitive scale.

The Supreme Court and this court have laid firm principles which guide them in the determination of such applications as the present one. Both parties cited these principles properly in their Heads.

The applicant cites the case of *Chimbonda & Anor* v *Muvami*, 2007 (2) ZLR 326 (H) which states at 327 E-H that:

> "…. Importantly, but not exclusively, the court takes into account such factors as the length of the delay, the explanation for the delay, the merits of the application and the prejudice to the interest of justice generally."

It also relies on the case of *Katembende* v *City of Harare* LC/H/2013 which states at pages 2-3 of the cyclostyled judgment as follows:

> "the factors to be considered in condonation applications are aptly set out in the case of *Jenson* v *Cavalos*, 1993 (1) ZLR 216 (S) and that of *T. Mazvimbakupa* v *City of Harare* HH 92/05. These are couched in the following words"
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> "In determining whether or not, in a given case, good cause for condonation has been shown, the following factors must be considered:
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> a) degree of non-compliance with the rules;
> b) the explanation thereof;
> c) the prospects of success on the merits;
> d) the importance of the case;
> e) the degree of prejudice to the respondent;
> f) the convenience to the court;
> g) the avoidance of unnecessary delay."

The case of *United Plant Hire (Pvt) Ltd* v *Hills & Ors* 1976 (1) SA 717 (A) at 720 F-G which the third respondent cites repeats the same factors as the applicant mentions in the cases it cites in support of the application. The case, however, adds one or two important elements which the applicant's cases do not mention. It reads:

> "It is well established that, in considering applications for condonation, the court has a discretion, to be exercised judiciously upon a consideration of all the facts; and that in essence it is a question of fairness to both sides…" (emphasis added).

The remarks which the court made in the first of the abovementioned three cases are apposite. They define the meaning and import of an application for condonation. They read:

> "It is trite that there is a certain degree of negligence in failing to observe the rules of the court. An application for condonation is therefore, an application for excusing the negligence of the offending party and the degree of such negligence then becomes a factor, together with other factors that will ensure that at the end of the day justice as between the parties prevails…" (emphasis added).

It follows, from the foregoing, that an application for condonation is a request for an excuse by the offending party. It arises out of a party's negligence and / or failure to comply with the rules of court. The excuse must, in my view, be accompanied by a clear and unambiguous explanation for the negligence. The explanation should justify condonation for

the party's negligence. It must, in other words, show that the party made an effort to comply with the court's rules but failed to do so for some plausible reason which it shall state in the application for condonation.

It is more like a rule of the thump than otherwise to state that an affidavit must be deposed to, and signed by, one and the same person. The rules of court demand that the stated position be so.

The situation where one party deposes to an affidavit which is signed by another shows such a serious degree of negligence as cannot be countenanced. It can only be condoned when the application which relates to it contains an explanation which, upon the court's judicious exercise of its discretion, justifies the negligence.

The applicant blames its erstwhile legal practitioners for, as it puts it, adopting the wrong procedure. It offers no explanation at all as to the circumstances which led to the dismissal of its claim. It fails to show how its opposing affidavit which forms the foundation of its claim in the interpleader proceedings was deposed to by one person and signed by the other.

The stated set of circumstances preceded the wrong advice which it imputes against its former legal practitioners. It is, in fact, the *raison de etre* for the dismissal of its claim.

The applicant became aware of the irregular affidavit before HC 7899/13 was heard and determined. Its attention was drawn to the same by the third respondent's notice of opposition which was filed on 9 October 2013. Its knowledge of that fact notwithstanding, it made no effort to correct the anomalous situation which it had created for itself. It had every opportunity to withdraw its claim as well as to instruct the first respondent to there and then issue a fresh interpleader notice as a way of correcting the incomprehensible circumstances which relates to its claim. It did nothing. It entertained the vein hope that it would argue its case and get away with it in flagrant violation of the rules of court. It is, without doubt, the author of its own misfortunes.

The interpleader proceedings were determined against it on 21 November 2014. This application for condonation was filed on 27 January 2018. It suffers a delay of thirty-seven (37) months running. If this is not inordinate delay, then one wonders what this is.

It may be accepted, for argument's sake, that the applicant's erstwhile legal practitioners tendered wrong advice to it. Its new legal practitioners did not assist its case either. They assumed agency on 8 June 2015. They did so after its erstwhile legal practitioners had renounced agency. They renounced agency on 11 May 2015.

The applicant's new legal practitioners did not work upon its case from the time that they assumed agency to the time that the registrar of the Supreme Court served it with the notice to file its heads under case number SC 630/14. He, it states, served the notice upon it on 6 January 2016. It is, according to it, on a closer perusal of the file following the registrar's communication to it, that it became alive to the fact that it had adopted the wrong procedure as a result of which it withdrew the appeal and filed this application.

The applicant's new legal practitioners who became seized with its case on 8 June 2015 allowed the matter to remain in abeyance from the mentioned date to 27 January 2016. They did not prosecute the appeal or withdraw the same, as they later did, for a stretch of seven (7) months running.

The applicant does not state that it requested them to prosecute its appeal as they should have done. The probabilities are that it did not.

The cavalier manner in which the applicant dealt with its case remains inexcusable. It leaves a lot to be desired. It did not prosecute, or withdraw, its appeal until the court proded it to do so. Its conduct does not fit into that of a litigant who is seriously moving the court to condone his negligence. It falls into a class of its own which remains outside the degree of acceptable negligence.

The remarks which ZHOU J made in *Friendship* v *Dick,* HH 128/13 are pertinent to this application. He said:

> "The applications for rescission and condonation were filed more than five months after the default judgment was granted. The applicant was already out of time by more than four months. That is a considerable delay in the circumstances. It has been held, repeatedly, that if a party fails to 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." (emphasis added).

I fully associate myself with the learned judge's remarks. I am satisfied that the applicant did not profer an acceptable explanation for the late filing of an application for condonation. It also did not explain what caused it to want to proceed to argue on the strength of an affidavit which it knew was defective and which it could have corrected with little, if any, difficulty. If a delay of four months could not be condoned in the *Dick* case (*supra*) l find it difficult to see how a delay of 36 or 7 months can be condoned in *casu*.

The applicant stated in its application for summary judgment which it filed on 12 January 2015 that it is not the owner of the property which is the subject of its clam. Reference

is made in this regard to paras 5, 5.4, 7, 8, 9.3.2, 9.3.3 and 9.3.4. of its founding affidavit. This appears at pp 140 – 141 of the record. The paras read:

> "THE CAUSE OF THE ACTION
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> (5) On or about December 2012, the defendant and I entered into a verbal agreement for the sale of goods – the material terms whereof were as follows:
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> 5.1 ---
>
> 5.3 ---
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> 5.4 That the plaintiff shall take delivery of the goods at any time after payment of the full purchase price at which stage the risk and profit of the goods shall pass to the plaintiff. In turn the defendant would facilitate the change of ownership of the goods into the name of the plaintiff.
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> 6---
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> 7 The defendant has subsequently breached the agreement in that, despite several demands, it has neglected, refused and/or failed to deliver the agreed goods to the plaintiff and to facilitate registration thereof in the plaintiff's name.
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> 8 As a result of the defendant's breach, the plaintiff has been left in a position where it parted with the purchase price and as such complied with its undertaking in terms of the agreement, and yet remains dispossessed of the goods in question which goods remain in the possession and use of the defendant.
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> 9.3.2 The defendant has failed and/or refused to effect delivery of the goods to the plaintiff without any just cause.
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> 9.3.3 In the premises the defendant has both the purchase price and the object of sale at the plaintiff's expense.
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> 9.3.4 The defendant actually knows that it owes it to the plaintiff to deliver the goods in question or effect financial restitution of the purchase price paid." (emphasis added)

It is evident, from the foregoing, that, as late as 12 January 2015, the applicant who describes itself as the plaintiff in the application for summary judgment, was not the owner of the attached property. It was, therefore, not being candid with the court when it stated in its affidavit which supports its interpleader claim that it was/is the owner of the attached goods. Its statement which appears at p 9 para (2) of its affidavit is false. It is false in the sense that the applicant could not state on 12 September, 2013 – the day that its affidavit was deposed to – that it owns the property and state, further, on 12 January 2015, that the second respondent is refusing to pass title in the property to it.

The applicant, it is clear, does not have real rights in the property. It has a personal right against the second respondent. The said right does not confer upon it the right to instruct the first respondent to issue an interpleader notice as it did in regard to its claim which the court dismissed on 21 November, 2014.

The third respondent's statement which is to the effect that the applicant and the second respondent are colluding between them with a view to frustrating its effort to satisfy the judgment which the court entered in its favour in not far-fetched. It is, if anything, well made

as well as real. My views in the mentioned regard find support from the affidavits which one James Nqindi deposed to in the matter of the second and the third respondent. The affidavit appears at p 53 of the record. It falls under case number LC/MD/59/12. He swore to it on 28 August, 2012.

In the mentioned case, the second respondent was the applicant and the third respondent was the respondent. Mr *Nqindi* stated, in the founding affidavit, as follows:

> "I the undersigned JAMES NQINDI do hereby make oath and solemnly state as follows:
> I am the applicant's General Manager and am duly authorised to depose to this affidavit in my capacity as such. I am properly and sufficiently seized with the facts deposed to hereunder.
> The applicant is Central Estates (Private) Limited a company duly registered in accordance with the laws of Zimbabwe whose address is that of its attorneys of record ……." (emphasis added).

On 8 October, 2013 Mr *Nqindi* deposed to the claimant's opposing affidavit under case number HC 7899/13. His affidavit reads:

> "Claimant's Opposing Affidavit
> I the undersigned JAMES NQINDI do hereby make oath and solemnly state as follows:
> I am the claimant's authorised deponent and am properly and sufficiently seized with the facts deposed to hereunder.
> The claimant opposes the attachment of its property. The claimant purchased several items and various times (*sic*) from Savannah Retail (Private) Limited. …." (emphasis added).

The fact that James Nqindi deposed to an affidavit for the applicant and the judgment debtor at different times shows the collusion which the third respondent made mention of against the two. Neither the applicant nor the second respondent made any effort to explain away the observed matter. They cannot refute what is real.

The applicant remained alive to the fact that it is not the owner of the property which the first respondent attached. It realised that it was being economic with the truth when it stated in the affidavit which founded its claim, that it owns the property. It is for the mentioned reason, if for no other, that it "*sued*" the second respondent and later applied for summary judgment under HC 223/15.

Two matters come clearly out of the circumstances which surround the application for summary judgment. These are that:

i. the applicant was telling a falsehood when it stated, in the affidavits which related to the dismissed claim, that it was the owner of the attached property - and

ii. in applying for summary judgment as it did, the applicant intended to convince the court as well as all and sundry that ownership of the property had been conferred to it in terms of the order which it obtained under HC 223/15.

I reiterate that ownership which false into the dispute of the present parties' case - i.e applicant and third respondent - cannot be resolved through the procedure which the applicant adopted under HC 223/15. It can only be resolved through the issuance of an interpleader notice. That is so because the third respondent who has a real and substantial interest in the property cannot be left out in the cold. It remains in the equation until the matter is resolved with its participation in the same.

HC 223/15 which the applicant intended to confer ownership of the attached property to it does not confer such. All it does is to direct the second respondent to honour its side of the contract within a stipulated period of time failing which the second respondent would be enjoined to refund the purchase price to the applicant with interest at the prescribed rate from 31 July, 2015 to the date of full and final payment of the same.

The applicant does not state that the second respondent complied with the order which the court entered against it under HC 223/15. The status *quo ante* the order of 1 July, 2015, therefore, obtains. The stated matter leaves the applicant with no option but to enforce the alternative order of the court. That avenue remains open to it.

The *in limine* matter which the applicant raised in its Heads is neither here nor there. It acknowledges the existence of the third respondent. It states in its affidavit which appears at p 9 of the record, and in para 4 of the same, that it advised the judgment creditor prior to the attachment of its claim to the property that the property belonged to it.

The third respondent sufficiently addressed the mentioned *in limine* matter in its opposing affidavit as well as in its heads. It states that all the persons who constitute the third respondent are clearly cited in the application which it filed for registration of the arbitral award. It states, and correctly so, that they are part of the award.

I took the liberty to read HC 4811/13 which is the third respondent's application for registration of the arbitral award. I remain satisfied that all the thirty-eight (38) persons who are referred to as the third respondent are cited in the case. I am, therefore, satisfied that the applicant's *in limine* matter has no merit.

Given the length of time that the parties' case has remained on the rolls of this court as well as the fact that the applicant fails to meet any of the requirements of the principles which relate to the determination of this case as enunciated in the above cited case authorities, the

application cannot stand. It is, therefore, only fair to stress that the balance of convenience favours its dismissal. The applicant, it has already been observed, does not own the property which the third respondent attached. It is colluding with the judgment debtor. HC 223/15 upon which it relies for its claim to the property does not support its position. Its degree of non-compliance with the rules of court is inexcusable. The explanation which it advanced for the same is incomprehensible. The third respondent has, no doubt, been extremely prejudiced by the applicant's cavalier approach to the case.

The applicant failed to prove its case on a balance of probabilities. The application is, in the premise, dismissed with costs.

Mushoriwa Pasi Legal Practitioners, applicant's legal practitioners
Musoni Masasire Legal Practitioners, 2nd respondent's legal practitioners