AROSUME PROPERTY DEVELOPMENT PRIVATE LIMITED
versus
GODFREY MADIRO FUNGURANI
and
TSITSI MARGARET MUKAMBA

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 6 November & 7 December 2018

Opposed Application

Advocate Musarurwa., for the Applicant
Advocate Sithole, for respondents

MUZOFA J: On the 6th of December 2017 a default order was granted against the applicant. In terms of the rules of the court the applicant if so advised, has 30 days within which to apply for the rescission of the default order. The applicant did not, and therefore seeks condonation for the late filing of the application for rescission.

According to the applicant, the applicant and respondents entered into two separate agreements, one for the sale of an undeveloped immovable property and the second one for the construction of a villa on the said property. The respondents defaulted in their payments; the statement of account showing the defaults was attached. The applicant thereafter cancelled the agreements. Having cancelled the agreement the respondents filed an application for specific performance. The order was to compel the transfer of the property to the respondents and ancillary relief. Applicant alleges that it was not served with the application. In their notice of opposition the respondents averred that proper service was effected on the applicant. They also indicated that they did not default in payment and attached the proof of payments.

In an application for condonation, the court is called upon to exercise its discretion to achieve fairness in the interests of justice. This exercise of discretion is made after a consideration of such factors as 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. See Herbstein and Van Winsen's *The Civil Practice of the Supreme Court of South Africa* 4th Ed by Van Winsen, Gilliers and Loots at pp 897 -898, *Kodzwa* v *Secretary for Health and Another* 1999 (1) ZLR 313 SC.

The extent of the delay in this case is about six months. The extent of the delay should be considered in its context in conjunction with the explanation for the delay. Applicant's explanation is that the application for specific performance was served at an address that it had left some 4 years before the date of service. There was no effective service, it became aware of an order to compel served at the same address after the tenant at 315 Carrick Creagh advised applicant of the application on 4 July 2018. This is the date it became aware of the order and thereafter filed this application.

It is not in dispute that in the agreement entered by the parties, the applicant's chosen *domicillium citandi et executandi* is number 315 Carrick Creagh Road, Borrowdale Harare. Any changes in the *domicillium* was to be communicated to the other party in writing. Nowhere did the applicant indicate that it communicated the change in address. So the address of service as agreed by the parties was 315 Carrick Creagh . At common law a person who elects *domicillium citandi at executandi*, at his discretion at which service of a court process in the event of litigation is bound by that choice. This position was aptly enunciated by MARGO J in *Loryan (Pvt) Ltd* v *Solarsh Tea and coffee (Pvt0 Ltd 1984* (3) SA 834 at 847 D – F where he said

> "…..service of any process may be effected by delivering or leaving a copy thereof at the *domicillium* chosen by the party concerned. Such service is then good, even if the process may not be received, for the very purpose of requiring the choice of a *domicilliu*m is to relive the party causing service of the process from the burden of proving actual receipt. Hence the decisions in which service at a *domicillium* has been held to be good, even though the address chosen was vacant ground, or the party was known to be resident abroad or had abandoned the property or could not be found"

The applicant chose to use Number 315 Carrick Creagh as its address for service. If indeed it had moved from the premises, it was duty bound in terms of the agreement to advise the respondents in writing. It is common cause that the parties' relationship still subsisted in view of the construction work that was being undertaken by the applicant. The applicant opted not to. A certificate of service by a person in the employ of Matsanura and Associates was filed of record showing that the application for specific performance was served on a responsible person in the employ of the applicant. In terms of Rule 42 B (1) (b) that was valid service. Where a

defendant denies that service was effected on him, he cannot do so by a mere bare denial. Further information to confirm the veracity of his assertions should be provided. *In casu* the respondent said it had moved from 315 Carrick Creagh Road address that is not enough. Katson Kwaramba said he did not receive service but still there was no supporting evidence. I do accept that there was valid service and the respondent has no reasonable explanation for the default. No explanation was given for the further delay in making this application. The respondent said it became aware of the compelling order on 4 July 2018. This application was made on the 17th of July 2018 no explanation was given. It is an acceptable principle that a litigant should file an application as soon as he becomes aware of the offending order.

Where a finding that there was wilful default in order for the applicant to succeed it should show that it has clear prospects of success. It is common cause that the two agreements required a payment of $110 000 from the respondents. For the respondents to succeed in their application for specific performance they should show that they fulfilled their obligations.

The applicant produced the letter of cancellation which to my mind relates to the two agreements but quoting an amount that parties did not agree to, secondly it produced the statement of account which shows that the respondents paid a total of $53, 824.84 an amount that falls short of the $110 000 agreed by the parties.

The respondents filed what they called the proof of payments. The payments do not add up to $110 000. For the first agreement in respect of the sale of stand 50 Carrick Creagh stand, the amount of $20 0000 was to be paid on date of signature. The agreement was signed on 29 September 2011. The respondents filed three documents from First National Bank South Africa as proof of payment. Two payments were made on 29 September 2011 of ZAR 140 000 and ZAR 83,000 besides these amounts are handwritten conversions with different rates translating to $18 791.95 and $10 000 respectively. Prima facie that would mean the $20 000 for the stand was paid.

On 30 September the parties signed the construction agreement for $90 000, a deposit of $20 000 was to be paid in cash. I did not hear the respondent say they paid this cash deposit. Instead they filed a notification of payment from the First National Bank showing that a deposit of ZAR 140 000 was made into the applicant's account on 30 September 2011. There is an inscription in long hand that the amount translated to $20 000.

Going by the respondents' proof they paid $48, 791.92. Another document was filed by the respondents as proof of payment, an online payment in the sum of 74 000 on 24 March 2012. The currency of the amount is not stated. However if the respondents used the First National Bank it cannot be farfetched to assume that the amount was in South African rands. The respondents did not address this issue. There is no indication how much that amount translated to. Assuming the payment was in rands then surely the respondents did not pay the total amount of $90 000 of for construction. Assuming the $74 000 was in US dollars the respondents would have paid a total of $122 791,92 well above the agreed amount. No explanation was given for this over payment. The applicants certainly has prospects of success, there is a high likelihood that the respondents did not pay the full amount for the construction of the villa. It would be an injustice for them to get transfer of the villa.

It is possible for a court, even after making a finding that the applicant has no reasonable explanation for the default to grant condonation on the basis of a strong case on the merits. This is the position *in casu*. It is in the best interest of justice that the applicant is given an opportunity to defend itself on the merits.

Accordingly the following order is made.

The application for condonation of late filing of an application for rescission of judgment be and is hereby granted. Costs be in the cause.

Mutamangira and Associates, applicant's legal practitioners
Matsanura & Associates, respondents' legal practitioners