

AFROCHINE SMELTING (PVT) LIMITED
versus
TINOTENDA MUTIZWA

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 17 July 2017 & 23 August 2017

Opposed matter

E Mutondiro, for the applicant
A Mufari, for the respondent

MATANDA-MOYO J: On 17 July 2017 I dismissed an application for rescission of judgment brought by the applicant. I have been requested to give reasons and these are they;

The brief facts of this matter are that the respondent issued summons against the applicant under HC case number 9528/16 for damages allegedly suffered by the respondent, through the applicant's wrongful and unlawful extraction of chrome ore on the respondent's mining claims. The respondent is the registered holder of chrome mining claims called VAN 17 registration number 33280 BM and DIVIDE registration number 41089 BM situate in Darwendale.

The applicant sometime in 2016, without the respondent's consent commenced mining operations on the above claims. The respondent alleged that an estimated 3 000 tonnes was extracted over an area covering 80 000 square metres. The respondent put the market rate of chrome at \$60 00 per tonne. The respondent alleged that he lost chrome ore to the value of \$180 000,00. The respondent also alleged that damage was caused to the permanent beacons and already sunken four shafts. Costs of rehabilitating the above was \$12 300,00 which the respondent also sought from the applicant.

In its plea, the applicant, whilst admitting liability, challenged the quantum of damages sought. The matter was subsequently set down for Pre-trial Conference on 17 February 2017. The applicant defaulted resulting in a default judgment being granted against it. The applicant sought rescission of such judgment.

It is important to outline the applicant's conduct which resulted in me throwing out the application for rescission of judgment. This matter was initially set for Pre-Trial Conference on 20 January 2017. The matter was rescheduled to 9 February to allow parties to further engage. On the 9th of February the applicant delayed coming to court. The court had to stand the matter down just to accommodate the applicant. On that day the respondent produced a survey report which report was challenged by the applicant. The court further postponed the matter to 27 February 2017 to allow the applicant to have its own assessment on the quantity of chrome extracted. On the 27th February 2017 the applicant failed to turn up for Pre-trial Conference. A look at papers filed also showed that no assessment had been done in compliance with the court's directions. The report was only done on 1 March 2017 after default judgment had already been granted against the applicant.

The applicant filed the present application for rescission of judgment. On the date of hearing the applicant was barred for failure to file heads of arguments. The applicant's lawyer unsuccessfully applied for postponement of the hearing to allow the filing of such heads. What irked the court so much was the fact that a week before the date of hearing of this application the applicant had appeared before this court seeking stay of execution of the judgment granted in default. The main argument being that the application for rescission was due to be heard a week away. Whilst making such submissions applicant knew it intended to apply for a postponement of the hearing of the application for rescission. I took great exception to such conduct by applicant's legal practitioner. I had to remind him that he was an officer of this court first before being anything else. He owed this court honesty. The applicant therefore lied before this court in order to get an order for stay of execution.

Coming to the application for rescission of judgment it is settled that r 63 of this court's rules allows this court to rescind a judgment granted in default, upon applicant showing good and sufficient cause. The applicant must satisfy the following;

- 1) that the default was not willful
- 2) the *bona fides* of the application and
- 3) that applicant enjoys good prospects of success on the merits.

See *Stockhill v Griffiths* 1992 (2) ZLR 172 (S), *Dewere Farm (Pvt) Ltd and Ors v Zimbabwe Banking Corporation* 1998 (1) ZLR 238 (S), *Chihwayi Enterprises (Pvt) Ltd v Alish Investments (Pvt) Ltd* 2007 (20 ZLR 89 (S). *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S).

A reading of those cases would show that an applicant in an application for rescission must firstly profer a reasonable explanation for his default. Herein the applicant stated that its representatives and lawyers used a route under construction resulting in the delay. I am inclined to reject that explanation considering how applicant's conduct in this particular matter.

The *bona fides* of applicant in bringing this application is questionable. The applicant had not filed heads of argument on the hearing date. To me the impression created is of an applicant who has no desire to see the result of a matter it instituted. The applicant seems to be wanting to stretch the matter so as to frustrate the respondent from receiving justice from the courts. The applicant to me lacks good intentions in bringing this application.

On the issues of quantum even though the applicant may have prospects, such prospects are under shadowed by the lack of *bona fides* of the applicant and the lack of a reasonable explanation for the default.

I cannot overemphasize the need for finality to litigation. I am of the opinion that the court has a discretion to refuse rescission of judgment irrespective of merits where it is satisfied that the applicant has failed to show good and sufficient cause for such rescission. See *Grantully (Pvt) Ltd & Anor v UDC Ltd* 200 (1) ZLR 36 (S), *V Saitis and Co (Pvt) Ltd v Fernlake (Pvt) Ltd* 2002 (1) ZLR (H).

In the result I am of the view that the applicant has failed to discharge the onus on it of showing the existence of good and sufficient cause warranting granting of rescission of judgment.

Accordingly the application fails and it dismissed with costs.

Mutandiro, Chitsanga, Chitima Attorneys, for the applicant's legal practitioners
Muhonde Attorneys, for the respondent's legal practitioners