CHITKEM SECURITY (PVT) LTD
versus
XINHANS INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 28 September 2016 & 4 October 2017

Opposed matter

K Muronda, for the applicant
Ms *R Zimvumi,* for the respondent

PHIRI J: This was an application for rescission of judgment granted by this Honourable Court on 28 September 2016.

This court dismissed this application and the following are the reasons why the application was dismissed with costs.

Background

The applicant and the respondent entered into a contract whereby applicant was to provide respondent with 24 hour security services.

In terms of the contract the applicant indemnified respondent against loss or damage to property not in excess of one hundred thousand United States Dollars (US$100 000.00)

On or about 8 June 2016 respondent discovered that certain property valued at twenty eight thousand eight hundred and eighty two dollars ($28 882.00) was missing. Respondent engaged applicant for reimbursement of the stolen or missing items but to no avail.

Respondent issued summons against the applicant on 29 August 2016 and served them upon the applicant. Applicant did not enter any appearance to defend the action and respondent

obtained a default judgment against the applicant. This is the judgment which the applicant seeks to rescind.

The Law

In terms of Order 9 r 263 (2) of the High Court Rules, 1971

> "If the court is satisfied on an application in terms of sub rule (1) that there is good and sufficient cause to do, 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."

In the case of *Roland & Anor* v *Macdomeli* 1986 (2) ZLR (SC) AT 226 E-F the then learned Chief Justice DUMBUTSHENA CJ observed that;

> "In coming to a final decision one has to ask whether the defendant has shown good and sufficient cause within the meaning of r 63 of the High Court Rules.
> Did the court take into account:
>
> a) the defendant's explanation of his default
> b) the *bona fides* of the applicant's defence on the merits of the case, and did the court normally consider these matters in conjunction with each one and cumulatively."

Also refer to the case of *Maria* v *Standard Credit Corporation Ltd* 202 (4) SA 892 (W) where COETZEE J OBSERVED;

> "1. The party seeking relief must present a reasonable and acceptable explanation for his default.
> 2. That on the merits, such party has a *bona fide* defence which *prima facie* carries some prospects of success."

Explanation for the default

In the present application the applicant has failed to give a reasonable explanation as to why it failed to serve the appearance to defend on the respondents legal practitioners.

In the applicant's founding affidavit, applicant contended that they were served with summons on 1 September 2016. However applicant's staff advised the company director that summons were served on 2 September 2016.

Applicants averred that its legal practitioners filed on appearance to defend with this court on 16 September 2016 but on the plaintiff's legal practitioners.

In the supporting affidavit of one Doreen Tinarwo, an employee of applicant's legal practitioners it was contended that applicants issued an appearance to defend on 16 September 2016 but failed to serve the same on plaintiff's legal practitioners.

The explanation given was that the deponent to the supporting affidavit took the appearance to defend home, and, was admitted to hospital until 2 September 2016.

She also submitted that she totally forgot that had Notices of Appearance to defend in an A4 size envelope.

She proferred another explanation namely that the situation she found herself is common with all pregnant woman.

She finally proferred yet another explanation that "it was due to delays at the Registrar's Office that the Notice of Appearance was not filed in the record by the time a default was granted in error.

It is this court's view that no reasonable explanation was given by the aforesaid Doreen Tinarwo, on behalf of the applicant. Doreen Tinarwo did not give any medical documentation that she was in hospital.

Similarly all the other aforementioned averments are not substantiated at all. in the court's view, she was not candid with the court as to why applicant failed to serve the appearance on plaintiff's legal practitioners.

Accordingly this court holds that no reasonable and acceptable explanation has been given on behalf of the applicants, as regards their failure to serve the appearance to defend on plaintiff's legal practitioners.

No *bona fide* defence

This court also holds that the applicants do not have any bona fide defence to the plaintiff's cause of action.

It is common cause that the parties entered into a contract in respect of which the applicant was to provide 24 hour security services to the respondent.

It is also common cause that certain items went missing from the plaintiff's premises.

It is also common cause that applicant indemnified the respondent for loss or damage to the amount of $100 000.00 (one hundred thousand United States Dollars US$100 000.00).

There accordingly is no good reason why the applicant should not indemnity the respondent for the aforesaid loss of the property which occurred whilst applicant had a contract to provide security services at the premises.

This court accepts the respondent's submission that the amount involved is not trifling and applicant cannot be allowed to be unjustifiably enriched at the expense of the respondent.

The observations of MACNALLY JA, as he then was, in the case of *Ndebele* v *Ncube* 1992 (1) ZLR 288 at 290 C-F apply with full force to the present case,

> "It is the policy of the law that that there should be finality to litigation. On the other hand, one does not want to do injustice to litigants. But it must be observed that in recent years application for rescission, for condonation, for leave to appeal out of time, and for other relief arising out of delays either by the individual or his lawyer have rocketed on numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then reargued until costs for exceed the capital amounts in dispute…
>
> The time has come to remind the legal profession of the old adage *vigilantibus jura Sub ventiunt.* Roughly translated, "the law will help the vigilant and not the sluggard."

Accordingly, the present application for rescission of judgment is dismissed with costs on a legal practitioner and client scale.

Musunga & Associates, applicants' legal practitioners
Ruth Zimvumi Legal Practice, respondents' legal practitioners