SHINECOPARS INVESTMENTS (PVT) LTD
and
JUSTIN MACHIYA
versus
HOSSINY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE,14 November 2016 & 1 March 2017

Opposed matter

F Mahere, for the applicants
R Mabwe, for the respondent

FOROMA J: This is an application for rescission of judgment brought by the first applicant and the second applicant. The first applicant is a duly registered company and the second applicant is the majority shareholder of the first applicant and its managing director.

The default judgment which the applicants seek to have rescinded was obtained against them by the respondent (which is also a duly registered company with limited liability) on 10 January 2015 under case No. HC5310/14. It was a judgment for payment of the following amounts

(i) $44 800,00

(ii) Collection commission in the sum of $1 172, 50 and

(iii) Costs of suit at an attorney and client scale.

The judgment also declared a certain piece of land known as 2015/1 Northway Prospects Waterfalls Harare held under Deed Number 7882/2002 specifically executable. The monetary orders were to be paid by the applicants (defendants jointly and severally the one paying the other to be absolved).

The circumstances leading to the grant of the default judgment were as detailed below. The summons and declaration having been issued against both defendants (now

applicants) was served on the defendants at different times even though at the defendants' *domicilicum citandi it executandi* at 10912 High Glen Road Willowvale Harare. The first applicant was served with the summons and the plaintiff's declaration by affixing same on a silver outer principal door after an unsuccessful diligent search on the 4 July 2014. The second applicant was served at 2298 Bluffhill Harare on the 18 September 2014 by affixing summons and declaration to outer principal black gate of the second applicant's *domicilium citandi* after an unsuccessful diligent search.

It is important to note that the first applicant did not enter an appearance to defend within the *dies induciae* with the result that it became automatically barred in terms of the rules of this court. The second defendant did not delay in entering an appearance to defend as its appearance was entered on 1 October 2014. The second applicant's appearance to defend through a typographical error suggests that the summons was served on 26 September 2014. It however contained a more serious error as it purported to be an appearance to defend by both the first and second the applicants when it ought to have only been an appearance to defend by the second applicant only as the first applicant could not have entered appearance to defend without leave of the court as there was an automatic bar operating against it.

The respondent appears not to have immediately taken issue with the appearance to defend purportedly on the first applicant's behalf. According to the cross reference file i.e. HC 5310/14 before default judgment was obtained on the basis of an automatic bar against the first applicant and a bar in default of a plea the defendants (applicants) filed a joint request for further particulars on the 17 September 2014 which was served on the respondent's legal practitioners Nhemwa & Associates on the 20 September 2014 who responded to same on the 23/10/14 serving further particulars on the applicant's legal practitioners on the same day. Then as now Muzangaza, Mandaza and Tomana were the applicants' legal practitioners. It is significant to note that when addressing Muzangaza, Mandaza and Tomanan in the further particulars the respondent called them the defendant's legal practitioners an indication that they did not regard them to be acting on behalf of the first applicant despite the defective appearance to defend in terms of which they purported to enter an appearance to defend on its behalf before seeking the upliftment of the bar.

The applicants did not file any pleadings despite delivery of the further particulars. As a result the respondent's legal practitioners filed and served on the second applicant's legal

practitioners a notice of intention to bar in terms of which it called upon the second applicant (second defendant) to file its plea within 5 days failing which it (respondent) would file the notice with the Registrar as a bar. Instead of filing a plea on behalf of the second applicant (then second defendant) within 5 days failing which it (respondent) would file the notice with the registrar as a bar. Instead of filing a plea on behalf of the second applicant (then second defendant) the second applicant's legal practitioner addressed a letter of complaint to the respondent's legal practitioner in terms of Order 21 r 140 before the expiry of the 5 days in the notice of intention to bar.

The respondent relying on the authority of *Russelll Noah P/L* v *Midsec North P/L* 1999 (2) ZLR 8 J-F proceeded to file a bar and applied for default judgment against both the applicants on the following bases

(i) As against the first applicant (first defendant) the automatic bar for failing to enter appearance to defend and

(ii) As against the second applicant (second defendant) the bar in default of a plea.

This application for default judgment which was made as a chamber application was granted by CHATUKUTA J on 30 January 2015.

On 16 March 2015 the respondent through its legal practitioners caused the Deputy Sheriff to serve a notice of seizure and attachment on the first applicant at its business address and attached some movable assets at 10912 High Glen Road and indicated the removal date as the 19 March 2015. This execution process does not appear to have prompted any action on the applicant's part.

The respondent appear to have sent the Deputy Sheriff back to the applicants to remove some property only in June 2015 but found nothing. As a the result of a *nulla bona* return respondent instructed the Deputy Sheriff to attach the immovable Prospect (Waterfalls) property declared executable in the default judgment. It was the attachment of the immovable property which triggered this application for rescission of judgment by the applicants which application the respondent opposed.

In its opposition the respondent raised a point *in limine* in terms of which it argued that there was no application before the court as no application for rescission of judgment could be filed in the circumstances of this case without seeking condonation of late application of the rescission of judgment as the period within which the application for

rescission ought to have been filed (30 days in terms of Order 9 r 63) had long expired. The respondent's objection was based on two alternative grounds namely:-

(1) 30 days reckoned from 2 days after the grant of default judgment in terms of the presumption of knowledge of default judgment in terms of r 63 (3) had expired and

(2) more than 30 days had also expired when reckoned from the 16 March 2015 (date of service of writ of execution at 10912 High Glen Road). It is clear that the presumption of knowledge *in casu* is displaced by actual knowledge on or about the 16 March 2015.

In response to this objection the applicants through the second applicant's answering affidavit had the following to say:

"5 Ad para 5 I am advised that a party against whom a default judgment has been entered can apply to have it set aside 'not later than one month after he has had knowledge of the judgment". The respondent wishes to impute knowledge of the judgment based on the supposed service of a writ on 16 March 2015 which is Annexure "B" to the respondent's Opposing Affidavit. Firstly it will be noted that the said Annexure "B" says:

"that Attachment was made in the presence of someone who – 'Refused to supply name'. Was such person an adult or a chid a man or a woman, a security guard Cashier, Receptionist or other. What value is to be placed on such a report?" The second applicant goes on to say "Secondly it will be noted that Annexure 'B' states the date of removal of the attached chattels as the 19 March 2015. There is no report or explanation of what transpired on the said date of scheduled removal to make it absolutely certain that the applicants got to know of the judgment then and not on 20 July 2015 as I aver. No removal of the applicant's property of whatever description, took place anywhere anytime".

Instead of explaining why the court should disregard the truthfulness of the return of service (which regularity is presumed) and why in the circumstances the managing director of the first applicant whose assets had been attached should be assumed to have remained in ignorance of the attachment, applicants chose instead to be argumentative and dismissive. The applicants have not denied the attachment of the 16 March 2015 neither have they given this court any explanation justifying a conclusion that despite the execution process that took place on the 16 March 2015 the applicants nevertheless remained ignorant of the existence of

a judgment against them. It is worth noting that second applicant does not comment on the *nulla bona* return by the Deputy Sheriff – Annexure 'F'. In the absence of the applicants explanation for continued ignorance of judgment beyond the 16 March 2015 respondent's view that the applicants have not dealt with this issue in the answering affidavit is too compelling to dismiss. Indeed anything not denied is taken as having been accepted. This court is convinced beyond reasonable doubt that the applicants got to know about the existence of the default judgment on or about the 16th March 2015 certainly before the 19th March 2015 as there is no likelihood that whoever it is on whom was served the notice of removal by the Deputy Sheriff would have overlooked alerting the second respondent of the attachment in view of the impending removal of goods in 3 days time. There definitely was a need to act in light of the events of the 16th March 2015. It is therefore irresistible to find that the respondent is correct in its view that the applicants' application is not properly before the court. As a matter of law an application for rescission of judgment filed late and unaccompanied by an application for condonation of the late filing of such application is null and void – see CHEDA JA's judgment in *Jones* v *Strong* SC 67/2003.

In the circumstances I find that indeed the application by the applicants is not properly before the court. The respondent has claimed costs on the higher scale of legal practitioner and client. In the absence of an application for condonation it is unavoidable to draw an inference that the application is frivolous and vexatious and no more than a mere delaying ploy.

The conclusion I have come to above regarding the nullity of the application makes it unnecessary to deal with the merits of the application. I accordingly order as follows:

It is ordered that:

1. The application be and is hereby dismissed.
2. The applicants pay costs at the scale of legal practitioner and client jointly and severally the one paying the other to be absolved.

Muzangaza Mandaza & Tomana, applicants' legal practitioners
C Nhemwa & Associates, respondent's legal practitioners