MATTHEW MAFARA
versus
DINAH GUKUTA

HIGH COURT OF ZIMBABWE
BACHI -MZAWAZI J
HARARE 23 February, & 9 March, 2022

OPPOSED APPLICATION

I. Musimbe, for the applicant
D.C Kafaruwenga, for the respondent

BACHI MZAWAZI J: The applicant herein defaulted in entering an appearance to defend the summons issued against him by the respondent in case HC 2038/20. As a result a default judgment against him was obtained ensued by a writ of execution, consequently giving rise to this application for rescission of judgment.

The undisputed factual run up is that the respondent is resident in the United Kingdom. Through her legal practitioner, one Innocent Taruvinga, entered into two separate loan agreements with the applicant. In the first one, executed on 3 July, 2020, applicant was advanced the sum of forty-five thousand (US$ 45 000, 00). Within a space of three months and before any repayments had been done a second loan of twenty thousand (US$ 20 000, 00) dollars was disbursed to the applicant on 8 October the same year.

The second loan necessitated a new loan restructuring agreement as an embodiment of both loans which was entered into and signed on 8 October 2020 reflecting a grand total lent to the applicant as sixty-five thousand four hundred and sixty-three (US$ 65 463,00). Of note, there is a discrepancy, however as to the dates and amounts disbursed to applicant in the second loan. Applicant alleges that the second loan was advanced in the month of July and it was for the sum of fourteen thousand three hundred and twenty-three (US14 323, 00) which makes the grand total fifty-nine thousand three hundred and twenty-three (US59 323, 00). In support of their stance they attached a copy of the said loan agreement but the date portion is not fully completed. The date section only shows the month as the month of July with no specific day. On the other hand the

respondent's copy of the loan restructuring agreement signed by both parties on 8 October, 2020 reflects what is initially stated herein.

It is common cause that an interest rate of ten percent per month was a term of the contract mutually agreed to by the parties. The whole loan was payable in six months. A mortgage bond No. 1399/20 over an undivided share being share No.19, in a certain piece of land situate in the District of Salisbury, called the remainder of Lot 4 Athlone Township of Greengrove, measuring 2, 5924 hectares in extent held under Deed of Transfer No.575/98 dated 27/01/98, was registered on the applicant's property as security on both occasions. Applicant only paid two sporadic instalments totaling US$.13 092.00(Thirteen Thousand Ninety –Two United States dollars) and then defaulted payments propelling the respondent to take the litigation route.

On 6 May, 2021, Respondent caused summons to be issued for the recovery of the capital sum lent and the accrued interest as per their agreement totaling eighty-five thousand (US$85.000.00). These where served on the applicant's address, his *domicilum citandi* appearing in all the transaction documents of the parties. An application for default judgment was subsequently, applied for and granted by CHITAPI J on 30 June 2021 in case HC 2038/21 after the applicant had failed to enter an appearance to defend within the time frame prescribed by the Rules of this court. Consequently, a writ of execution was issued on 6 July, 2021 and served on the respondents on 1 September 2021, at number 58A Beverly West Msasa Town. Applicant claims that he became aware of the order on 1 September 2021 resulting in him instituting this application for rescission of the default judgment in December 2021.

In their opposing papers the respondents had raised a preliminary objection that application for rescission was out of time. As such an application for condonation should have been sought first in conformity with the governing rules of this court. Commendably, at the hearing of this matter the parties found each other and the point was abandoned. The issues that arise are whether or not applicant was properly served and whether or not applicant's defence carries prospects of success?

Applicant states that it is not in dispute that service was done at the address he had given as his *domicilium standi*, but argues that he never received the summons as he no longer resided

at that address. He assets that , even if it were to be argued that that was his address of choice so service was proper , he still maintains that service was not done properly. It is his submission that service was not done on a reasonable person within that property. Further, he contends that the affixation on the gate was not proper service in terms of the law. In his defence applicant submits that he had stopped using the address in question long before the alleged service of summons.

It is his contention that he only became aware of the default judgment on 1 September 2020, when it was served on his current address number 58A Beverly West Msasa Township, which is totally different from the address appearing on the summons , the *domicilium standi* as. 19 St Malo Villas, Greendale, Harare. Applicant states further, that the mere fact that there is evidence of service on two addresses tends to buttress his averment that he did not see the summons commencing action.

As regards the prospects of success, applicant submits that he has a mortgaged property at stake. As such he has every reason to have the default judgment rescinded so that he can be given an opportunity to contest applicant's claim in court. In addition, he argues that, there are reasonable prospects of success if the matter proceeds to trial, in that their transaction is governed by the Money Lending and Rate of Interest Act, [*Chapter 14:14]*. As such the interests rate, and the compounded interest charged by the respondent although initially agreed to by the parties, are usurious and *ultra vires* the law. Therefore, he posits that he is only entitled to pay the capital sum lent, which from his own calculations is fifty-nine thousand three hundred and twenty-three (US$59,323.00), plus interest at the prescribed rate. Applicant also articulates that their loan agreement falls squarely within the ambit of the Money Lending Act [*Chapter 14:14*]. In that regard from their construction of, section 20(5) of the same, it entails that, since the money was given to a borrower in Zimbabwe, from a lender outside Zimbabwe, then the debt is subject to the laws of Zimbabwe. To augment their argument they relied in the case of *Philip Ellse* v *Michael Johnson of on SC 49/17*.

The Respondents counter attacked by stating that the applicants made a conscious choice as to the address for service and litigation as evidenced by clauses in the loan agreements. Therefore they must be held to their *domicilium standi*. They also allude to the principle of privity of contract that a party is bound by the agreed terms of a contract. As it where, proper service was

done in terms of rule 15(13)(d) and15(13)(i) sub rule (ii) ,by leaving and or delivering the summons at the given address and by placing the summons in a letter box . Relying on the case of *Abina Chapfika* vs *Central building society* HH2/18, the respondent propounded that the Sheriff's return of service in this case, is prima facie evidence of service of the summons in question. It is therefore their submission that the applicant has no bona fide defence to offer and his application should, without further ado, be dismissed on this ground.

In respect to prospects of success, the respondents contend that applicant does not deny owing respondent money and agreeing to the stipulated sum of interest therefore he is bound by the agreement. They argue that a surgical analysis of the Money Lending Act and Rate of Interests Act [*Chapter 14:14*] will disclose that it is not applicable to the loan transaction in contention. From their point of view, s20 (5) ousts the application of the provisions of the Act from this transaction as the source of funds is an external source outside Zimbabwe. In addition, they claim that, what this signifies is that, even the rate of interest prescribed therein is inapplicable. In their own perception the mischief behind the piece of legislation in question was to leave the freedom of governing and determining loan interests of transactions so exempted from the Money Lending Act to the respective foreign jurisdictions. It therefore follows, they argue, any definitions assigned to the transaction from the Money Lending and Rate of Interest Act, *[Chapter 14:14*] is inapplicable as the Act exempts their transactions. The respondents thus urge the court to interpret the Act, particularly s 20(5) from their own perspective, which will then mean the interest rate charged by the respondent is justified and the applicant will be left with no prospects of success in the main case but to pay the amounts as claimed.

In view of the parties' respective sides of the story, it is essential to outline what the law in relation to an application for rescission of judgment says. The first port of call is the rules governing an application of this sort. In this case the rule 27 of the high court rule S.I 202/21 which reads:

> Rule 27
> (1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside, and thereafter the rules of court relating to the filing of opposition, heads of argument and the set down of opposed matters, if opposed, shall apply.

> (2) If the court is satisfied on application in terms of sub rule (1) that there is a good sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute the action, on such terms as to costs and otherwise as the court considers just.

The concept of what constitutes good and sufficient cause has been explained in a plethora of decided cases in this jurisdiction. It is trite that to succeed in an application of this nature the applicant must not only allege but prove cumulatively three crucial components of what at law is termed " good and sufficient cause', justifying their default in entering an appearance to defend and non adherence to the rules.

These three majors factors of what constitutes good and sufficient cause where authoritatively delineated in the cases of *Govha* v *Ashanti Goldfields Zimbabwe Limited t/a Freda Rebbeca Mine and anor (HC 6444/08){2012}ZWHHC* 48, *Sachiti & Anor* v *Mukaronda* HMT 38/2021, *Zvinavashe* v *Ndlovu* SC40/2006, to mention but a few. They are as follows;

a. The reasonable explanation for the default

b. The bona fides of the application to rescind

c. The bonafides of the defence on the merits which carries some prospects of success.

In rendition, it has been noted in several judicial pronouncements that for the application for rescission of judgment to sail through the above three elements should not be considered in isolation but cumulatively. See, *Saitis & Company (Pvt) Ltd* v *Fenlake (Pvt) Ltd 2002(1) ZLR 378(H) at 387F, Barclay Bank of Zimbabwe ltd* v *CC International (Pvt) Ltd S-16-86. Golden Reef Mining (Private) Limited and Ferbitt Investments (Private) Limited* v *Mnjiya Consulting Engineers (Pty) Limited SC 55/2016,* the list is endless.

In casu, in order to determine whether or not the applicant was properly served, there is need to begin by examining the ancillary issue of whether the applicant's explanation to the default is plausible.

From the given facts, submissions and evidence, Applicant corollary, supplied an address of his choice and service undeniably was effected on this address. At Common Law a person who selects an address at which process may be serviced in the event of litigation is bound by that choice. This common law position is the same as the South African one, as illustrated in a plethora

of case authorities. See *Loryan (Pvt) Ltd* v *Solorsh Tea & Cattle (Pvt) Ltd 1984 (3) SA.* This also seems to be the same approach propagated by rule 15(13)(d) of the 2021 High Court rules, on service of process which stipulates:

> Rule 15(13) (d)
> .. if the person to be served has chosen an address for legal purposes, by delivering or leaving a copy thereof at the address for legal purposes chosen.

The respondent 's submissions are anchored on this rule which finds support in the old South African positions as highlighted in several cases such as in the case of *Prudential building Society (Pvt) Ltd* v *Botha 1953(3) SA 887*(W). In this case, it was stated that, the *domicilium stand*i, so chosen is thus deemed to be the place of abode of the person to be served, even if he is known not to be living there. In *L'Ons* v *Freedman & Ferock 1916 Wimberley,* service on a pole was held to be valid on a vacant piece of stand, so much that service by leaving process at a vacant piece of ground on the principal residence was considered good in principle. *Gerber v Stolze and Others* 1951(2) SA 166 t at 170 is authority to the fact that where an exact address has been chosen as *domicilium standi,,* the question of actual residence is immaterial.

As can be noted the above authorities relied on precedence set and applicable in different and diverse places in time. Societal dynamism due to diverse socio-politico-economic dictates inevitably led humans to change their places of abode and could not be held to ransom on the addresses that they may have committed themselves to at a given time. Inevitably this led to a paradigm shift in judicial decisions particularly in this jurisdiction. A departure from the hard and fast rule, of strictly sticking to the address so chosen was taken by GILLESPIE J in the case of C*entral African Building Society* v *Kufa* 1998 (1) ZLR 30 H. The honorable judge upon analysis of the South African position highlighted the Zimbabwean position as encapsulated in the 1971 rules which incorporated, delivery on a responsible person and service by the Sheriff in some conspicuous position, at the residence, place of business, employment, address of service as the case maybe.

GILLESPIE J noted at 306 (D) in the above case, commenting on the changes in the 1939 rules and the then new 1971 rules observed as follows:

> "The condensation of the former subparagraphs (b)(at his residence or place of business or employment to some responsible person) and (c)(if the person to be served has chosen a *domicilium citandi* at the domicile so chosen in the manner provided by subparagraphs (a) and (b) of this rule)(a) to the respondent personally or to his authorized agent) into one existing sub-rule has not altered the requirement under our rules that service even at a *domicilium standi* , should be on a responsible person. Only when a responsible person is not found after a diligent search, or where premises are to be kept locked so as to frustrate service, it is permissible to leave the process affixed to the premises in the manner expressly provided. Our rules therefore clearly impose a more of an obligation on the person seeking to effect service at *a domicilium citandi* than does the common law (or the South African rule)."

The observations by GILLESPIE J are captioned in rule 15(13)(i) of the 2021 rules which states:

> (i)where any process is to be served, including process in which the only relief claimed, apart from costs, is an order for ejectment from premises or judgment for rent thereof, and-
>
> > (i) the person upon whom it is to be served prevents service by keeping his or her residence, place of business or employment, address for service or registered office closed or,
> > (ii) the person seeking to effect service of the process is unable, after diligent search at the residence, place of business or employment, address for service or office of the person to be served, to find that person or a responsible person referred to in this rule,
>
> it shall be sufficient service to leave a copy of the process in a letter box or affixed to or near the outer or principle door of, or in some other conspicuous position at, the residence, place of business or employment, address for service of office, as the case may be.

In the current set up, I would like to associate myself with the above quoted dictum by GILLESPIE J, in that indeed it is undisputed that service was done at the *domicilium standi* of the applicant but there is evidence on record that it was not done on a responsible person. Whilst it is appreciated that the return of service by the Sheriff is *prima facie* proof that service as stated in the case of *Abina Chapfika v Central African Building Society* above, the return of service *in casu* states that the person who was found on the premises told them he did not know the applicant and they did not serve on him. This in essence means that although service was done at the chosen address it was not done on a responsible person. Further, the sheriff then did what is referred to as alternative service, as stated in, in the *Central African Building Society* v *Kufa* case, at the same address.

The defect in this process in my view is that there was no evidence proffered by the respondents who bore the burden of proof that the alternative service of affixing inside the letter

box was done after a diligent search. At least if there had been two or three returns of service that would to some extend have indicated diligent search. Not only that, there was no proof that the applicant was refusing service or frustrating service as dictated by rule 15(13)(i) (i) and (ii). Lastly, affixation in a letter box which is distinguishable from mere placing in a letter box, is not affixation in a conspicuous place. The word affix in common parlance denotes pasting, pinning or securing amongst others. Affixing inside a letter box by any stretch of the mind is not in a conspicuous place and is inaccessible. Notably the key word in terms of the rules above, is 'conspicuous'. Contrary to the submissions by the applicants the return of service on page nine of the court's record makes reference to affixation in a letter box at the far end of the principal gate. I am startled as to where then the applicants got the information, 'by affixing at the gate' from. Nevertheless based on the above analysis I am not satisfied that service was done in terms of the rules.

What makes it more interesting is that it is not disputed that although the applicant had not notified the respondent of any change of address as required by rule 15(24). The respondent proceeded to serve him the writ of execution accompanied by the default judgment at a totally different address, in Msasa, from that of the *domicilium standi* in Greendale. This illustrates that at some stage respondent became aware of the change of address and must have been aware of the possibility that summons may not have come to the attention of the applicant. This in my view is vacillation. Respondents cannot aprobate and reprobate. They cannot now cry foul that the applicant was in willful default yet by their own action they knew that he had relocated. By this very action of serving at an alternative they waived the shield provided by the doctrine of privity of contracts as espoused in of *Golden Reef Mining (Pvt) Limited* v *Mining Consulting Engineers (Pty) Limited SC55/2016*. In this regard it is my finding that the applicant's explanation as to his default and the *bona fides* of this application for rescission are plausible.

Proceeding to the next rung of the enquiry of good and sufficient cause, that of reasonable prospects of success on the merits. Which inevitably brings us to the second issue of whether or not the applicant has a *bonafide defence* which carries some success? It is not in dispute that applicant owes respondent considerable amounts of money and that he has been playing truant to repay after paying only two instalments. It is also irrefutable that the interest agreed to by the parties is *on the face of it* in excess of the prescribed interest rate in our country and jurisdiction. This found expression in the case of in the Supreme Court decision in *Ellse* case SC 49/17 above.

What is in issue however, is whether the parties' loan transaction falls within the ambit of Money Lending and Rate of Interest Act, [*Chapter 14:14]* or not, given that the lender, respondent, is resident outside Zimbabwe and the moneys lent are from an offshore account. If the loan agreement falls within the scope of the said Act then a usurious interest rate is impermissible and *ultra vires* our law. From a different angle, if the Act in question does not encompass such loan transactions, then it means the applicant is liable to pay the sum claimed in the summons by the respondent and will stand to lose the mortgaged property.

The representatives of both parties interpreted s 20(5) of the Money lending and Rates of Act [*Chapter 14:14*] to suit their situations. With applicants punctuating their submissions by the decision in the *Ellse* case *supra.*

Section 20(5) of the said Act says;

> "Nothing in this Act contained shall apply to any transaction in terms of the which a money lender outside Zimbabwe grants a loan of a sum of money which is outside Zimbabwe to a borrower in Zimbabwe, whether or not the instrument of debt in respect of such loan is executed in Zimbabwe and whether or not such sum of money is transferred to Zimbabwe."

I had the opportunity of reading the Supreme court case referred to *Ellse v Johnson* (above) and also s (20)5 of the Money Lending and Rates of Interests Act as read with section 2 of the same Act. In my opinion, these two sections, conjunctively, are exemption clauses which oust the jurisdiction of this court. But I must hastily mention that, it is not my place to construe the said Act in juxtaposition with the cited authorities and then determine whether the applicants are liable to pay the capital owed at the prescribed rate or not. In my considered view these are the issues that are better left to be thoroughly argued and determined by a trial court. In any event there are no submissions made as to the canons of interpretations to assist in this regard meaning these are for the trial court. Any attempt on my part to construe the contentious section will be usurping the powers of the trial court in the main action.

I am therefore of the view that the applicant does have prospects of success on the merits if the trial court is swayed by the Supreme Court case they have adduced to support their case.

DISPOSITION

Accordingly, it is my finding that the applicants gave a reasonable explanation both in the reasons for their default and their bona fide defence to the current application. I am also satisfied

that there are triable issues with regards to the interest charged and agreed to by the parties in their loan agreement which will inevitably necessitate the construction of and determination on the applicability of the Money Lending and Rates of Interest Act [*Chapter 14:14*] to their situation. In addition, the decision of the Supreme Court case in *Ellse supra,* until interrogated in the trial court against the backdrop of the parties arguments *viz aviz* the Money Lending Act, suffices to be reasonable prospects of success in the main action.

In the result, it is ordered as follows:

1. The application for rescission of judgment succeeds.
2. The default judgment granted on 30 June, 2021, in case HC 2038/21, is hereby rescinded
3. Each party to pay its own costs.

IEG Musimbe and Partners, applicant's legal practitioner

Dzimba Jaravaza & Associates, respondent's legal practitioners.