HH 790-22
HC 3504/22
REF HC 1669/21

DIVVYMAN ENTERPRISES (PVT) LTD
Versus
CESPERK MARKETING (PVT) LTD
And
EDMORE MAKUREYA

HIGH COURT OF ZIMBABWE
HARARE 3 & 9 November 2022
CHILIMBE J

Opposed application

P. Chimombe -for applicant
R. Kadani-for first respondent
No appearance for second respondent

CHILIMBE J

BACKGROUND

[1] Applicant seeks the rescission of a judgment entered against it in default in terms of rule 49 of the High Court Rules 2021.According to applicant, the parties` present legal troubles are traceable to the second respondent, Edmore Makureya ("Edmore"). Edmore was applicant`s former (presumably the relationship ended) employee who committed a series of misrepresentations in order to procure goods (on credit) from first respondent. Edmore would place orders with first respondent then collect goods under the guise that he was acting for and on behalf of applicant. Edmore covered his tracks by effecting payment for the goods so supplied from his personal account.

[2] But the gap between port and ship eventually became too wide for Edmore to straddle. He plunged into default leaving first respondent exposed to the tune of US$ 7,783,50 and ZWL 60,750,00 respectively. Both applicant and first respondent are in agreement that Edmore indeed committed acts of fraud. I may state that Edmore did not oppose the application and is therefore not a participant in these proceedings. It is also not in dispute that Edmore was subsequently arrested and arraigned before the criminal courts where he awaits his fate.

[3] What is in dispute is whether applicant should meet Edmore`s bill. Applicant argues that first respondent should carry its loss as reward for colluding with Edmore and conducting "unholy business transactions". First respondent denies any such impropriety. It sought instead, to bind applicant to the acts of Edmore, raising in that regard, the presumption of regularity as prescribed in s 24 (1) and (2) of the Companies and Other Business Entities Act (COBA) *[Chapter 24:31]*.[1]

THE DEFAULT JUDGMENT

[4]. On that basis, first respondent issued summons against applicant and Edmore in case number HC 3504/22 ,seeking an order to recover the two stated sums plus interest. Applicant defended the claim and pleadings were progressed to pre-trial conference stage. The first pre-trial conference("pre-trial") was held before KWENDA J on 17 November 2021.The second one was held before CHITAPI J on 2 March 2022 where consideration was given to progressing the matter as a special or stated case in terms of r 52. This meeting was adjourned to 9 March 2022.

[5] Upon resumption (for the third pre-trial) on 9 March 2022 still before CHITAPI J, the parties presented their draft statement of agreed facts before the Judge. That 9 March 2022 pre-trial was in turn, postponed to 15 March 2022 (the fourth pre-trial) when the following road map was eventually agreed upon; -

i That the draft statement of agreed facts be amended by the parties.
ii That the updated stated case be filed by 18 March 2022.

---

[1] The relevant parts which provide;
24 Presumption of regularity; liability not affected by fraud
(1) Any person having dealings with a registered business entity or with someone deriving title from a registered business entity shall be entitled to make the following assumptions, and the company or private business corporation and anyone deriving title from it shall be estopped from denying their truth—
(*a*)that the company's or private business corporation's internal regulations have been duly complied with;
(*b*)……
(*c*)……
(*d*)……
(*e*)
(2) A company or private business corporation shall be bound in terms of subsection (1), notwithstanding that the officer or agent concerned acted fraudulently or forged a document purporting to be sealed or signed on behalf of the company or corporation.

iii That first respondent (as plaintiff) files its heads of argument by the same date 18 March 2022.

iv That applicant (as defendant) files its heads of arguments by 4 April 2022.

v That first respondent attends to consolidation of the bundle and related matters by 10 May 2022.

vi That on that same date 10 May 2022, parties to appear before CHITAPI J for the final pre-trial conference.

[6] It is important to note that (a) these steps up to (iv), including attendance at a total of 3 "pre-trials", were jointly executed by both parties and (b) that applicant was represented at those 3 conferences by (i) a Mr. Moses Kachika, an employee of applicant and (ii) Mesdames Magoge Law. Secondly as (b), applicant faltered on steps (iv) and (vi) -missed the 10 May 2022 pre-trial conference leading to the granting of the default judgment against it.

THE ARGUMENTS

[7] In my view, Ms *Chimombe* (for the applicant) to her credit, made a fair and proper concession at commencement. She admitted "some negligence" in applicant`s failure to adhere to the timeline tasks set by the Judge on 15 March 2022, and in particular, non-attendance at the 10 May 2022 pre-trial conference. She however, submitted that the negligence was not so gross as to amount to wilful default. Counsel struggled to explain why an affidavit had not been sought from applicant`s former legal practitioners to whom a significant amount of responsibility for the default was ascribed.

[8] She urged the court to (a) recognise the dedicated manner in which applicant had prosecuted its claim up to the point of default and (b) the circumstances of that default and (c) the prospects of success which she argued applicant greatly enjoyed. On that last point, counsel submitted that first respondent`s reliance on the presumption of regularity in s 24 of COBA, was misplaced. First respondent was, according counsel, compromised by, and complicit in the fraud perpetrated by Edmore. In particular, first respondent`s claim that it genuinely believed that Edmore was a legitimate representative of applicant was not tenable. This was because

first respondent would, in the course of its transactions with Edmore, receive (and accept) payments for the goods supplied from Edmore`s personal account.

[9] Mr. *Kadani* for the first respondent argued firstly that applicant had been uncontestably in wilful default. Counsel walked the court through the timeline of activities agreed on by the parties before CHITAPI J on 15 March 2022 in a bid to demonstrate applicant`s wilfulness and default. He argued that the roadmap was a clear step-by-step process which left no room for applicant to argue that it was unaware of its obligation to file heads of argument by 4 April 2022 and or more importantly, attend the 10 May 2022 pre-trial conference.

[10] The essence of counsel`s submission was that no ingenuity in argument could seriously deflect the conclusion that applicant simply derelicted in attending to its obligations. Applicant was at all times, represented by both its former legal practitioners and Moses Kachika.Mr. *Kadani* further submitted that applicant`s defence was neither motivated by *bona fides* nor did it carry any prospects of success. Applicant could not escape the presumption of regularity set out in s 24 (1) and (2) of COBA, and was estopped from disowning Edmore`s dishonest masquerade as its employee.

[11] In supporting this contention, counsel argued that Edmore utilised, in the transactions in question, applicant`s stationery, which he executed as applicant`s authorised signatory. There was every indication that Edmore was acting on behalf of applicant. Counsel for first respondent went further into the intricacies of the matter as reflected by the jointly agreed stated case. I found though, that such details went beyond the purposes of an inquiry to establish if a party had a plausible defence which carried some prospect of success. They were more suited for consideration by the trial court sitting to consider the matter on the merits.

THE LAW

[12] The requirements to be met by an applicant seeking the rescission of a default judgment are settled. These were set out as follows in, among many other authorities, *Stockil v Griffiths 1992 (1) ZLR 172 (S*) where GUBBAY CJ stated thus at 173 D-F; -

> "The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving "good and sufficient cause", as required to be shown by Rule 63 of the High Court of Zimbabwe Rules 1971, are well established. They have been discussed and applied in many decided cases in this country. See for instance, *Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd S-16-86* (not reported); *Roland & Anor v McDonnell 1986 (2) ZLR 216 (S*) at 226E-H; *Songore v Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210 (S)* at 211C-F. They are: (i) the reasonableness of the applicant's explanation for the default; (ii) the bona fides of the application to rescind the judgment; and (iii) the bona fides of the defence on the merits of the case which carries some prospect of success. These factors must be considered not only individually but in conjunction with one another and with the application as a whole."

[13] Applying these requirements the following emerges; -applicant attributed its failure largely to the default of its then legal practitioners. Two points issue from that argument (a) the need to attach an affidavit from the legal practitioners concerned[2] where their conduct allegedly led a litigant to breach of the rules of court, at the very least and (b) the recognition that a litigant will not necessarily escape the consequence of its legal practitioner`s dereliction[3].

[14] Applicant did not place before the court a supporting affidavit from its erstwhile legal practitioners. As noted, no explanation was tendered for such failure. Applicant however, attached to its papers; a letter dated 11 May 2022 from Nyaradzo Catherine Magoge of Magoge Law. This letter was written the very next day after judgment in default was entered against applicant. It detailed the events immediately preceding the pre-trial conference date as well as the engagements between Magoge Law the retiring attorneys, and applicant`s newly instructed lawyers.

[15] This letter captures the "back and forth" engagements between the two sets of legal practitioners. In particular, the letter carries an allegation that a Mr. Samuel Rusike, presumably a legal practitioner, specifically instructed Magoge Law not to proceed and file, the heads of argument which Magoge Law had prepared on 9 May 2022, (a day before the pre-trial

---

[2] *United Refineries v The MIPF & 3 Ors SC 63-14* and *Dombo Chibanda & 2 Ors v City of Harare SC 83-21.*
[3] *Kombayi v Berkout* 1988(1) ZLR 53 (SC); *Saloojee & Anor NNO v Minister of Community Development* 1965 (2) SA 135 (A**)**

conference date) and stood ready to file. According to that letter, Mr. Rusike expressed a preference to draw up and file his own heads of argument. Under normal circumstances, such would not be an unreasonable request from any legal practitioner destined to argue a matter.

[16] This letter attempts to explain the cause of applicant`s default. The explanation is not fully exculpatory but it does in my view, help to identify where, as they say, "the wheels came off". The hand-over and take-over process between retiring and assuming legal practitioners was not conducted to best advantage of the client. Can it therefore be said that (a) applicant freely took a decision to refrain from appearing with full knowledge of the fact that there was a set down date in court and that failure to attend carried grave legal consequence? (To sum up the principles set in *Zimbabwe Banking Corporation Limited v Masendeke* 1995 (2) ZLR 400 (S) and *Deweras Farm (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd* 1998 (1) ZLR 368 (S)). And can it also be concluded that (b) applicant must carry the fullness of blame because the two sets of legal practitioners each neglected the most important tasks at hand?

[17] My view is that both questions should be answered in the negative. I am persuaded thus by the following; -the applicant itself played no part in the mishap leading to the default judgment. The responsibility to avert such lay with the legal practitioners. Even then, both firms of legal practitioners let the guard down but only just. The matter could still have been rescued had the heads of argument been filed prior to, or on the date of the pre-trial conference and if applicant`s new legal practitioners had attended the conference on 10 May 2022.The dereliction, though costly was more clumsy than inordinate.

[18] I further note the peculiar circumstances in the changeover of attorneys. These must be differentiated from the case of a single legal practitioner solely seized with the management of a matter as well as the full discretion associated with such. I further take into account the substantial compliance that had been observed by applicant and Magoge Law to fulfil CHITAPI J`s pre-trial conference directive.

[19] This takes the inquiry to the *bona fides* of the application itself and its defence including prospects thereof. I detect nothing in the papers before me to suggest that applicant is motivated improperly in bringing this application. Applicant is a business whose employee fraudulently

utilised its stationery and thus landed left it facing a legal suit. It has not been alleged by first respondent that applicant was associated with Edmore in this illicit enterprise.

[20] In further support of his argument that applicant was not acting in good faith Mr. *Kadani* alerted the court to further acts of dereliction on the part of applicant`s legal practitioners of record in delaying the prosecution of this very application. I will pursue that argument no further other than state that an order of costs sought against applicant for those and other reasons seems justified.

[21] Finally; - the *bona fides* of the defence and prospects thereof; -again, I note that it is indisputable that both parties were effectively defrauded by Edmore. Where fraud and illegality taint a contract, a number of legal considerations automatically come into play[4]. Added to that is the issue of estoppel which carries its own implications.[5] Those considerations would be best left to the court trying the matter more-fully. It suffices to say that the defence tendered by applicant at this juncture does not appear as baseless and hopeless as counsel for first respondent seemed to suggest.

[22] Secondly and perhaps more importantly, I note that first respondent is relying on the presumption of regularity and resultant estoppel introduced by s 24 of COBA.Indeed COBA insulates the world at large from business that may seek to resile from the conduct of their employees or associates. It is however necessary to note two matters with regard to s 24 in particular and COBA in general. In the first instance, there is a proviso to s 24 (1) which limits the presumption of regularity and of course the estoppel concerned. It goes thus; -

> "Provided that— (i)a person shall not be entitled to make such assumptions if he or she has actual knowledge to the contrary or if he or she ought reasonably to know the contrary;" [emphasis on underlined]

[23] Additionally, s 24 of COBA has a dual effect. On the one hand, it seeks, like the rest of COBA, to defend commerce from those businesses that may attempt to evade responsibility to

---

[4] See *Agson Mafuta Chioza v Smoking Williams Siziba* SC 4-15

[5] See *Infrastructure Development Bank of Zimbabwe v ENGEN Petroleum* (Pvt) Ltd SC 16-20; *Zimbabwe Housing Company (Pvt) Ltd v Gabriel Mandombo & 6 Ors* HH 338-20.

outsiders by citing internal disaffection. In doing so, the legislature on the other hand, also endeavoured to urge all parties to exercise diligence in commercial transactions. That aspect becomes relevant in the ascertainment of prospects of success of a defence by pointing toward the likely matters a court will consider.

DISPOSITION

[24] For purposes of this application, it suffices to state that applicant has demonstrated good and sufficient cause to have the judgment entered against it set aside. That notwithstanding, I agree with Mr. *Kadani* that applicant failed to adhere to the simplest of directions that had been issued by a court. Its legal practitioners ought to have done better, given that the directions by the Judge were meant to support a speedy resolution of the dispute.

[25] I will therefore make an award of costs against applicant in this instance, recognising further, that there are sustainable complaints of tardiness on the part of applicant. Having said this, I do not believe however that the circumstances of the matter are so extraordinary as to warrant costs on a punitive scaler.

Accordingly, it is hereby ordered;

1. That the application for rescission of judgment be and is hereby granted. The judgment entered in default by this court in case number HC 1669/21 be and is hereby set aside.
2. Applicant to meet the cost of this application on an ordinary scale.

Jarvis, Palframan-applicant`s legal practitioners
Atherstone & Cook-first respondent`s legal practitioners

CHILIMBE J____09/11/22