FIRST CLASS ENTERPRISES LTD
versus
SCANLINK (PVT) LTD

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 26 June 2009 and 1September 2010

Opposed Court Application

K Ncube, for the applicant
A Moyo, for the respondent

GOWORA J: On 1 August 2007 the applicant herein, under Case No HC 4094/07 issued a summons against the respondent herein claiming special damages in the sum of $4 102 500 000 in Zimbabwe dollars. The respondent (defendant) entered an appearance to defend and the matter proceeded in due to be set down for trial. A few days before the matter was due to be tried on the continuous roll the defendant filed a consent to judgment as set out in the summons and declaration. On 4 January 2009 judgment was entered for the applicant (plaintiff) in accordance with the consent filed by the defendant. The plaintiff has now launched these proceedings to have the judgment entered in its favour set aside. The defendant opposes the application.

The founding affidavit sets out the facts leading to the granting of the judgment as follows. The plaintiff filed summons under Case No HC 4094/07 alleging breach of contract on the part of the defendant and seeking the payment of special damages arising out of the breach. The parties filed pleadings resulting in the matter being set down for a pre-trial conference before a judge in chambers. At the pre-trial conference the defendant offered to settle the matter by paying the sum claimed on the summons. The plaintiff declined to accept the offer and its representative advised that the plaintiff would be filing an amendment of the claim before the trial. The deponent avers that the judge before whom the matter was set down for the pre-trial conference raised the issue of the replacement of the bus for the engine. The plaintiff's representative indicated that the issue would be dealt with just before the trial. In the result the matter was referred to trial on the understanding that the plaintiff would be filing an amendment to its claim before the trial.

The matter was set down for trial on 19 January 2009. On 13 January 2009 the defendant's legal practitioners wrote to the plaintiff's legal practitioners to the effect that they had filed a consent to judgment in terms of the summons. The letter which was served upon the latter was received on 15 January 2009 as the date stamp thereon will show. The consent to judgment was

actually filed on 14 January even though it was signed on 13 January 2009. On 15 January 2009 the plaintiff also filed an application to amend its claim. However, unbeknown to the plaintiff the consent to judgment that had been filed by the defendant on 14 January 2009 had been granted the same day by the trial judge in chambers. The plaintiff's legal practitioners unaware that judgment had been entered in their client's favour in terms of the summons had written to the defendant's legal practitioners on 15 January 2009 responding to the letter of 13 January 2009. The response was to the effect that it had always been the intention of the plaintiff to amend its claim, which position the defendant and its legal practitioners were aware of. In the event, the plaintiff would not accept the consent and the cheque tendered under cover of the letter of 13 January 2009 was returned to the defendant.

A judgment obtained by consent, may in terms of the rules of the High Court be set aside if the applicant shows that there are good and sufficient grounds for it to be set aside. Order 8 R 56 provides:

> "A judgment given by consent under these rules may be set aside by the court and leave given to the defendant to defend or to the plaintiff to prosecute his action, such leave shall only be given on good and sufficient cause and upon such terms as to costs and otherwise as the court deems fit."

Over the years courts have laid out general guidelines as to what would constitute good and sufficient cause and three broad considerations have been accepted as the factors to be taken into account when determining what would constitute good and sufficient cause. These are:

(i) The explanation given by the applicant for his default;

(ii) The bona fides of the application to rescind the judgment;

(iii) The bona fides of the merits of the defence; See *Duplessis v Hughes N.O*. 1957 R&N 706 (H) and *Georgias & Ano v Standard Chartered Finance Zimbabwe* 1998 (2) ZLR 488.

In my view the minefield that confronts a judge when considering an application for rescission of judgment was very succinctly stated by McNALLY JA in *Deweras Farm v Zimbabwe Banking Corp Ltd* 1998 (1) ZLR 368 at 370A as follows:

> "I respectfully agree with the dicta of INNES J in the oft cited case of *Cairns Executors v Gaarn* 1912 A.D. 186. In particular his Lordship said, 'It will be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the rules have purposely made very extensive and which it is desirable not to abridge.'."

According to the plaintiff the court herein has sufficient cause to set aside the judgment because as the plaintiff complains, the defendant snatched at a bargain resulting from the circumstances prevailing in the economy by consenting to judgment in the sum on the summons when it well knew that the plaintiff intended to amend its claim as the amount on the summons had no appreciable value and that the plaintiff had indicated, through its legal practitioners, that it intended to file an amendment of the claim. The refusal by the defendant to have the judgment set aside is described by the plaintiff as 'snatching at a judgment'

The procedure whereby a judgment may be granted by consent is provided for in Order 8. The relevant rules are 54 and 55 which provide as follows:

54. Requisites to consent to judgment

> A consent to judgment shall be in writing and be signed by the defendant personally or by a legal practitioner who has entered appearance on his behalf. The defendant's signature shall be verified by an affidavit by an affidavit made by someone other than himself, or by the signature of a legal practitioner acting for him and not the opposite party.

55. Judgment or Order

> Upon filing a consent to judgment with the registrar the plaintiff may make a chamber application for judgment and thereupon may be given an order made according to such consent.

The plaintiff suggests that since this was a judgment it did not seek the court has good and sufficient cause to set the judgment aside. The plaintiff contends that the court could only have granted the judgment upon application by the plaintiff and that in the absence of such application the court did not have grounds for entering the judgment in question. The plaintiff also contends that the judgment given did not discharge the defendant's liability. Although there are no cases in point on this issue counsel for the plaintiff has referred me to two case authorities, viz; *Lambert v Mainland Deliveries* [1977] ALL ER 826 and *Molete v Union National South British Conference Company* 1982 (4) S.A. 178. In the former case, MEGAW LJ observed[1]:

> "……I would, however, say this also: that it is a jurisdiction which ought to be exercised with very great care, and it may well be that the cases in which it falls to be exercised should only be rare. It is desirable that litigation, once apparently finished, including litigation finished by means of payment into court which is either of the full amount claimed or an amount accepted deliberately by a plaintiff, ought not lightly to be allowed to be re-opened. But that there are such cases where the court has such jurisdiction is, I should have thought, apparent from the examples that were discussed

[1] At 833c-g

> during the argument before us. If, for example, the claim put forward in the county court by a plaintiff was one which contained a simple mistake as to the amount (as for example Lawton LJ suggested in the course of argument by the omission of a '0' in the amount of the claim making it 150 pounds instead of 1 500 pounds) it would be absurd indeed if it were suggested that the defendant, having received the particulars of the claim, should be in a position to then promptly pay 150 pounds into court and then to say "The result under the rule, is that this action is stayed and cannot be re-opened". Another example, which I put forward during argument is: supposing a plaintiff discovers, when it is nearly time for trial, that the damage he has suffered is substantially increased by reason of some event over and above what he has included in his particulars of claim. As a matter of courtesy, he, or his solicitors, notify the opposing side that he will amend particulars accordingly. Is it possible that the law is that in those circumstances a defendant receiving information could promptly make a payment in of the sum at that moment included in the particulars of claim and then say; 'Well that is the end of it. This action is stayed. You, the plaintiff, may not amend your pleadings because the action is stayed and the court has no right to remove the stay'? It cannot be so. There must be, as was said by Green MR, cases in which the court has the power to set aside a stay."

This dicta was quoted with approval by O'DONOVAN J in *Molete v Union Nat South Brit Ins Co* (supra). The judge went on to state thus:[2]

> "I do not consider that an examination of the policy considerations underlying R 18 (1) is of assistance to the respondent in relation to the Supreme Court Rules. There are, in my view, clear indications in R 34 that the unilateral act of a defendant in making a payment into Court cannot have the effect of terminating the proceedings. Acceptance by the plaintiff of the money paid is essential before the original cause of action can be said to have come to an end."

A perusal of our own High Court rules reveals that this is not an option that is available to a defendant, who is instead, given an option to consent to the judgment. Both counsel are agreed that the rules permit a plaintiff where the defendant has filed a consent to judgment, to make a chamber application for the judgment to be granted in its favour, and that the court seized with the trial then entered judgment. The respondent concedes that the judgment, *stricti sensu*, was not entered in accordance with the procedure set out in Order 8 of our rules of court. The question that then must be asked is, whether this error is sufficient to constitute good and sufficient cause. I agree with the contention by Mr *Moyo* that the judgment cannot be regarded as a nullity and even if it were, this court sitting as a court of parallel jurisdiction with the court that granted the judgment in the first place cannot possibly declare such a judgment a nullity as that would amount to a review of that court. This court, can however, set aside such judgment on the basis that good and sufficient cause having been established.

[2] At 183E-F

The respondent has sought reliance on the *Washaya v Washaya* 1989 (2) ZLR 195 (H) in which case the court was concerned with an application to set aside a judgment granted by consent where the legal practitioner had apparently consented without instructions to do so from his client. The court therein found that even though the legal practitioner might not have been accorded instructions to consent nevertheless, under the common law such consent was recognisable and would bind the affected party.

I agree with counsel for the applicant that the circumstances surrounding the judgment in the Washaya case are different and distinguishable from the present. In the former case the court was dealing with a consent properly filed by a legal practitioner and on the basis of which the court duly entered judgment in favour of the applicant. The plaintiff therein actually prayed for judgment to be entered in the amount in respect of which the defendant had consented to the judgment. In the present case the plaintiff did not apply for the default judgment and instead it was the court which *mero motu* then granted judgment in favour of the plaintiff. This, presumably is the error that the plaintiff is adverting to when it applies for the setting aside of the judgment on good and sufficient cause. Can this court then conclude that the judgment was entered in error and thus find that such error constituted good and sufficient cause?

In *Sibindi v ARDA* 1994 (1) ZLR 284 the Supreme Court had to consider an appeal wherein the court had *mero motu* dismissed a claim when the defendant had been in default on the date of trial and no application had been made for the dismissal of the claim. GUBBAY CJ at pp287F-288C observed as follows:

> "I am satisfied, however, that the learned judge erred in dismissing the action. Indeed, Mr *Mutendadzamera,* who appeared for the respondent, very fairly conceded that he was unable to support that aspect of the judgment.
> The respondent was in default of appearance at the trial. It had not sought the dismissal of the action brought against it. There was, therefore, no application before the learned judge for the grant of such an order.
> It is well established that a superior court has an inherent jurisdiction to dismiss an action. See *Meyer v Meyer* 1948 (1) SA 484 at 487; *Broughton v Manicaland Air Services (Pty) Ltd* 1972 (1) RLR 350 (G) at 352B-C; 1972 (4) SA 458 (R) at 460A-B; *Schoeman en Andere v van Tonder* 1979 (1) SA 301 at 304G-H; *Kuiper & Ors v Benson* 1984 (1) SA 474 (W) at 476H-477B. But I am unaware of any decision in which that power has been exercised by the court *mero motu* and in favour of a defendant who is in default. Invariably its exercise has followed upon the making of an application and, I believe, correctly so.
> An examination of the Rules of the High Court appears to me to support the view I take. They reveal that an action may be dismissed on application by the defendant where the plaintiff has been barred from declaring or making a claim (r 61); or on the ground that the action is frivolous or vexatious (r 75); or for non compliance with an order compelling production of a document (rr 168 and 169 (4)) or requiring answers to an interrogatory (r

> 196). No provision is made for dismissal of an action solely at the instance of the court or judge."

I have quoted in extent the dicta from the learned Chief Justice in order to put into a proper perspective the power that a court, even a superior court of inherent jurisdiction has. In terms of our rules, when a defendant files a consent to judgment, the plaintiff may apply through the chamber book for judgment in terms of the consent filed by the defendant. In *casu*, the plaintiff did not file an application for the judgment to be entered. In effect therefore, the judgment was not granted through consent by both parties to the dispute. It was in fact granted by the court *mero motu*. It is for this reason that the plaintiff wishes to have the judgment set aside because it never consented thereto. The plaintiff has referred to two passages in the Washaya judgment which I respectfully agree with. The first at p 197A-B is stated in these terms;

> "It is stating the obvious, but it does require stating, that for such a judgment to have any validity the essential ingredient of consent must be present. What is more, the court must be satisfied as to the presence of consent. It is for this reason that both in South Africa and Zimbabwe the governing rules prescribe in clear and peremptory terms the form a consent to judgment must take."

And later at 201E-F;

> "It is clear, in terms of these precedents, common sense and justice, that once a court is not satisfied that a party consented to judgment then that party is entitled to *restitutio* in *intergrum.* Put differently, had the court granting the judgment been aware that the party had not consented it would not have acceded to the request that it enter judgment. The judgment must, therefore be set aside."

As to the contention by the plaintiff that there was intent to amend the claim for damages, the defendant has contended that the plaintiff wishes to amend its claim to reflect United Stated dollars when the loss was suffered in Zimbabwe dollars. This, in my view is an argument that should be considered by the court before whom the application to amend the claim is placed. It is not I believe, an argument that I can do justice to in an application for the rescinding of a judgment. It is not an issue that is before me.

In the premises, I find that there is good and sufficient cause to have the consent judgment entered into on 14 January 2009 to be set aside. The parties are directed to have the matter reset down for trial.

The question of costs is an issue. The plaintiff had sought costs only in the event that the application was opposed. The attitude of the respondent in seeking to cling onto a judgment

entered in circumstances where the plaintiff had not sought the judgment and it had been entered to the plaintiff's detriment is baffling to say the least. Although legal practitioners are primarily before the court to advance the interests of their clients, it goes without saying that their first duty is to the court. To defend a judgment that was obviously entered in error and to the legal practitioners knowledge where the plaintiff was clearly intent on seeking an amendment to the claim is not conduct that a court can find to be helpful. This conduct resulted in the lengthening of proceedings that could have been concluded a while ago. In my view, it is only proper that the respondent be ordered to pay the costs of this application.

In the result it is ordered as follows:

1. The judgment of this court dated 14 January 2009 be and is hereby set aside.
2. The Registrar of this court is directed to have the matter set down for hearing for trial.
3. The respondent be and is hereby ordered to pay the costs of the application

Gill, Godlonton & Gerrans, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners