THE MINISTER OF LOCAL GOVERNMENT AND NATIONAL HOUSING
and
MINISTER OF JUSTICE AND LEGAL AFFAIRS
versus
LANGTON CHIGWIDA
and
J KMWATSIYA

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 25 February 2010 & 12 January 2011

Opposed Matter

N Mutsonziwa, for the applicant
P Chiutsi, for the 2nd respondent

CHATUKUTA J: This is an application for rescission of two judgments entered against the applicant in case No. HC 6759/2000 and case No HC 6442/00 both granted on 6 February 2002 in favour of the 1st and 2nd respondents respectively. The matters had been consolidated into one by an order of the court granted on 16 January 2001.

The background to the matters is that 1st respondent was the Director of Prisons and the 2nd respondent was an Assistant Commissioner of Prisons. Prior to their leaving the prison services, they had been in occupation of properties belonging to the government. When they left the service, the applicants instituted proceedings for their eviction. The respondents defended the actions on the basis that government had offered to sell then the houses and they had accepted the offer. There was therefore a binding agreement of sale between the two.

The trial commenced and was due for continuation on 6 February 2002 at 10am before BLACKIE J. However, the applicants' counsel did not appear for the hearing at the set down time leading to the court dismissing the applicants' claim at 11:30am. The applicants now seek an order for the rescission of the judgments in terms of *r* 63 of the High Court Rules, 1971.

A rescission of judgment under *r* 63 can only be granted where an applicant shows "good and sufficient cause" for the rescission. The words 'good and sufficient cause' have been construed to mean that the applicant must:

(a) give a reasonable and acceptable explanation for his/her default;

(b) prove that the application for rescission is bona fide and not made with the intention of merely delaying plaintiff's claim; and

(c) show that he/she has a *bona fide* defence to plaintiff's claim.

(see *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210,; *Bishi* v *Secretary for Education* 1989(2) ZLR 240 (HC); *Ndebele* v *Ncube* 1992(1) ZLR 288(S) *Dewera Farm (Pvt) Ld & Ors v Zimbabwe Banking Co-operation* 1997 (2) ZLR 47 (H) *Zimbabwe Banking Corporation Ltd v Masendeke* 1995 (2) ZLR 400 (S) and *Apostolic Faith Mission in Zimbabwe & others v Titus I Murufu* SC 28/03)

The applicants' explanation for the default is that their erstwhile counsel from the Attorney General's office, Mrs Matanda-Moyo, was appearing in the Supreme Court between 9am and 1300hrs. She instructed Mr Majuru from the same office to contact the respondents' counsel, Mr Chiutsi and request him that the matter be stood down to 1415hrs. Mr Majuru did so. She was surprised when she arrived at court at 1415 to be advised that the claim had been dismissed in the morning. Mr Majuru deposed to a supporting affidavit dated 26 March 2002 which was filed together with the answering affidavit explaining the nature of his discussions with Mr Chiutsi.

Mr Chiutsi deposed to the supporting affidavit to the opposing affidavit and denied that he had agreed that the matter be stood down to 1415hrs. He explained that when he spoke with Mr Majuru, his understanding was that an officer from the Attorney General would come to court at 1000hrs and make the necessary application. The court waited until 1130hrs and when no officer came from the Attorney General's office dismissed the claim. The respondents challenged the admission of Mr Majuru's supporting affidavit on the basis that it should have been filed together with the founding affidavit and not the answering affidavit as it raised issues that the applicants were aware of at the time of the filing of the founding affidavit and was deposed to by the person whom the applicants blamed for the confusion leading to the dismissal of the action.

The first question before me is whether or not the explanation advanced by the applicants for their default is a reasonable and acceptable explanation. It appears to me that the explanation is indeed reasonable. The respondents did not challenge that Mrs Matanda-Moyo had indeed been in attendance in the Supreme Court between 0900hrs and 1300hrs. They did not dispute that Mr Majuru contacted Mr Chiutsi explaining Mrs Matanda-Moyo's predicament. Its is also not disputed that Mrs Matanda-Moyo was more familiar with the matter and that it was desirable that she continued representing the applicants. It is a recognised practice that the proceedings before the Supreme Court takes precedence over proceedings in lower courts. The explanation that Mrs Matanda-Moyo had to appear before the Supreme Court first is reasonable.

The Attorney General's office might have been negligent in not sending an officer to apply for the matter to be stood down for the afternoon, but, it cannot be said that it took a conscious decision to refrain from appearing. Further, the negligence in my view was not so gross as to amount to wilfulness. In *Zimbabwe Banking Corp v Masendeke* 1995 (2) ZLR 400 (S), McNally JA observed, at 403A that:

> "The wilfulness of a default is seldom, if ever, clear-cut. There is almost always an element of negligence, and the question arises whether it was gross negligence and whether it was so gross as to amount to wilfulness. And in coming to a conclusion there is a certain weighing of the balance between the extent of the negligence and the merits of the defence." (See also *V Saitis & Co (Pvt) Ltd* v *Fenlake (Pvt) Ltd* 2002 (1) ZLR 378 at 381A)

Given the actions taken by both Mrs Matanda-Moyo and Mr Majuru to ensure that Mrs Matanda-Moyo's predicament was brought to the attention of the respondents and the court, the failure to send an officer to apply for the matter to be stood down does not in my view amount to gross negligence. The applicants cannot therefore be denied the relief that they seek. I believe it is therefore not necessary for me to determine whether or not Mr Majuru's supporting affidavit is properly before the court. The affidavit does not take the matter any further.

Turning to the second issue for determination, it appears to me that conduct of the applicants' legal practitioners described above indicate that the application for rescission is *bona fide* and has not been made with the intention of merely delaying bringing the

matter to finality. The legal practitioners took all steps possible in my view to ensure that the matter be prosecuted. They contacted the respondents' legal practitioner to have the matter stood down to the afternoon. Mrs Matanda-Moyo attended court in the afternoon at the time she believed the matter was to continue. Further, the fact that the applicants had prosecuted the matter to the extent that evidence had already been led showed a willingness on their part to prosecute the action to its final conclusion. The application for rescission cannot therefore be said to have been filed to delay the finalisation of the matter.

Regarding the *bona fides* of the application for rescission, the respondent had alluded to evidence that had been led before the action was dismissed as indicating that there was indeed an offer and an acceptance. It had been my view at the time when the parties concluded their submissions on this application that it was necessary that I be availed the record of proceedings to enable me to determine the *bona fide* of the applicants' action. The record has not been forthcoming. I am, however now of the view that, given the fact that the matter had not been completed, the availability of the record would not assist the court in determining the *bona fides* of the applicants' claim. In *V Saitis & Co (Pvt) Ltd* v *Fenlake (Pvt) Ltd*, supra at 387E-F, CHINHENGO J after examining the cases on what constitutes good and sufficient cause observed as follows:

> "Each element of the test of good and sufficient cause may be decisive on its own in any particular case but this does not mean that it becomes the only element or that the court has lost regard of the other elements of establishing good and sufficient cause"

I am satisfied with the explanation that the applicants have proffered for the delay and that the application for rescission is bona fide. It is my view that the applicants' have established good and sufficient cause why the application for rescission should be granted It is therefore not necessary, in my view, for me to determine the bona fide of the applicant's claim.

In the result, it is ordered that:

1. The default judgment entered against the applicant on 6 February 2002 be and is hereby rescinded.
2. The respondents shall pay costs of the application.

Civil Division, applicants' legal practitioners

Puwayi Chiutsi, 2nd respondent's legal practitioners