FUNGAI GWENZI
versus
ASHANTI GOLDFIELDS ZIMBABWE t/a FREDA REBECCA MINE
and
DEPUTY SHERIFF MOUNT DARWIN

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 15 & 23 March 2016

Opposed Application

G Manyurureni for the applicant
P Jambwa, for the 1st respondent

TSANGA J: The applicant applied for rescission of a default judgment in case number **HC3735/08.** His further quest was that bar operational in that case for failure to file his plea be uplifted and that he be ordered to file the plea within 48 hours. The applicant was first respondent's employee until 14 July 2008. When employment ended, the first respondent, Ashanti Goldfields, instituted proceedings for his eviction from certain residential property he was occupying as a tenant. As an employee, he had been allowed by the company to remain as a tenant in the house following his brother's death, which occurred sometime in August 2004.

He entered an appearance to defend the eviction but did not file his plea. He was accordingly barred and the first respondent obtained a default judgment against him. It is this that he seeks to rescind.

The requirements for rescission of a default judgment are well set out in r 63 (2) of the High Court Rules, 1971. The granting of rescission is dependent upon the reasonableness of explanation rendered for the default. Also considered are the *bona fides* of application to rescind; and *bona fides* of the defence on merits as well as the prospects of success. (See *Dupreez* v *Hughes N.O;*[1] *Deweras Farm (Pvt) Ltd & Ors* v *Zimbank Corp;*[2] *Zimbabwe*

[1] 1957 R & N 706 (S R)
[2] 1997 (2) ZLR 47 (H)

Banking Corp v *Masendeke*[3]*; Mvaami (Pvt) Ltd* v *Standard Finance Ltd*,[4] for applicable considerations taken into account and for what constitutes wilful default.

The applicant sought rescission on the basis that his failure to file his plea had not been wilful. His explanation regarding his default was that he had instructed a law firm, Manyurureni & Company, to represent him in the matter of his eviction. They had entered an appearance to defend on his behalf on the 29th of October 2008, a copy of which was served on the first respondent's legal practitioners on the 3rd of November 2008. At same time, he says unbeknownst to him, colleagues at work with a similar grievance to his relating to eviction from houses that they had purportedly purchased from the respondent as their employer, had also approached Zimbabwe Lawyers for Human Rights (ZHLR) and included his name on the schedule of those needing legal assistance. ZHLR had also entered an appearance to defend on his behalf on the 27th of October 2008, a copy of which was served on the first respondent on the 5th of November 2008. The first respondent's lawyers acted on the last received process, being that from ZHLR as representing the applicant's practitioners. As a result, the notice to plead and intention to bar had been sent to them by the first respondent's lawyers. ZHLR had however failed to file a plea on his behalf resulting in the first respondent successfully obtaining a default judgment. Applicant said that ZHLR did not have his permission or instruction to act on his behalf. He averred that it was only in 2010 when he received notice of removal from the Deputy Sheriff (second respondent) that he became aware that he had been barred. He had consulted his lawyer about the matter since he had intended at all times to have the matter entertained on merits.

The first respondent argued that there was no good and sufficient cause shown for rescission. It challenged the explanation for default as provided above as lacking credibility on the basis that it would have been impossible for ZHLR to have entered an appearance to defend on his behalf without sight of his summons. According to the first respondent, the reasonable inference was that ZHLR must have had sight of the summons and case number as supplied by the applicant himself. Moreover, there was no supporting affidavit attached by ZHLR confirming that applicant had not instructed them to act. Ordinarily in terms of the rules a lawyer must file a notice of renouncing his agency and the one taking up the matter must file his assumption of agency. This was not the case here. Notably, though served on the

[3] 1995 (2) ZLR 400 at p 402
[4] *1976 (2) RLR 257 (G)*

5th of November 2008, it had been the first to be entered on the 27th of October 2008 as compared to the other one which appears to have been entered on the 29th of October 2008. Thus first respondent emphasised that it was the responsibility of the applicant to shed light on who were his practitioners in the face of the double representation. The first respondent adhered to the ZHLR as being the applicant's practitioners. Furthermore, first respondent challenged the failure of applicant's legal practitioner to file a plea on his behalf if indeed they were representing the applicant at the time in question. The lawyers in question who represented the applicant at this hearing argued that there was never a reminder to file their plea as per court rules. Also, in the scheme of things, they had neglected to file a plea due to oversight arising from too many cases.

I am inclined to agree with the first respondent that the applicant cannot have his cake and eat it too. He was negligent in instructing more than one lawyer at a time and must bear the consequences that arose from so doing. The assumption by the first respondent that applicant was being represented by ZHLR was not an unreasonable one since they provide legal assistance to the needy. Furthermore, the applicant did not give a tangible explanation as to how ZHLR had gotten hold of his case number to which they filed an appearance to defend, if he had not instructed them to do so.

But even if I am wrong on this score, all factors must be weighed in total in an application for rescission. As regards the merits of his defence, applicant states that the respondent had sold him property known as Stand 1499 Chiwaridzo Road, Chiwaridzo Bindura, before he resigned in the sense that he had taken over the agreement that his late brother had with the first respondent. This was based on a scheme that applicant said the first respondent company had agreed to implement some time in 2003 whereby its sitting employees would purchase, as sitting tenants, the house they occupying on a rent to buy scheme. He placed reliance on a copy of the agreement which listed his late brother among those to benefit under a particular section of the scheme.

The first respondent denied that the memorandum in question constituted an agreement of sale and drew attention to the cases of *Ashanti Goldfields Zimbabwe Ltd* v *Clement Kovi*[5] and *Ashanti Goldfields Zimbabwe Ltd* v *Tongai Chigariro*[6] in which

[5] *SC 7 -09*
[6] HC 3610/07

memorandum of agreement in question was said not to be an agreement of sale.[7] Furthermore, the first respondent denied entering into an agreement of such purchase with the applicant himself. It maintained that from correspondent placed before the court, the applicant was clearly a tenant whom the respondent had agreed to continue leasing the property to after his brother died in August 2004. A letter written to the applicant in 2007 was filed as part of the first respondent's documents. Its position was that payments made by the applicant were with respect to rentals. As such, the application for rescission was said to be without legal basis as first respondent was not obliged to pass transfer. Upon termination of employment applicant had no right to remain in occupation.

Clearly, looking at the prospects of success of applicant's defence, there is no proof that the applicant ever queried his status as a tenant when he received the letter of 2007 neither is there any proof of a cession. His argument that he took over his brother's instalment payments does not clothe his defence with merit to warrant rescission. The fact that what applicant was paying as rentals was similar to the amount that he said had been agreed to as payments towards the purchase price is neither here nor there. The evidence on file clearly stipulates that he was a tenant. If indeed there was any agreement to sell to his late brother, then it is his late brother's estate that has a claim, if any, against the first respondent. It is clearly not the applicant and neither does he represent the estate of his late brother. There are virtually no prospects of success based on the evidence filed of record, to justify rescission.

Accordingly, the application for rescission lacks merit and is dismissed with costs.

Manyurureni & Company, applicants legal practitioners
Magwaliba & Kwirira, 1st respondent's legal practitioners

[7] At the hearing applicant's counsel stated that decisions on the nature of the sale remain pending in the Supreme Court.