M. MAZAI N.O.
and
MUNICIPALITY OF CHINHOYI
versus
TONDERAI MUKOSA
and
THE LOCAL GOVERNMENT BOARD

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 24 November 2016 and 13 June 2017

OPPOSED MATTER

Ms *F. Mahere*, for the applicants
Adv *Zhuwarara*, for the first respondent

CHIWESHE JP: This is a combined application for condonation of the late filing of an application for rescission of judgment and rescission of judgment.

The facts giving rise to the present application are these. On 6 January 2015 the first respondent entered the employ of the second applicant as its director of financial services. Prior to this appointment he was the local authority's internal auditor. Both positions command immense responsibility and the incumbent must of necessity be a person of high integrity as the positions involve handling large sums of money.

During the selection process for the position of director of financial services, candidates were required to disclose whether they had previously been convicted of any criminal offences, particularly those involving dishonesty. Contrary to his obligation in this regard, the first respondent indicated that he had not been previously so convicted nor incarcerated, when in truth and in fact, he had been convicted of defrauding his former employer of the sum of $804 549.00 and sentenced, as a result, to 4 years imprisonment. When the applicant received this information, the first respondent had already been appointed as its director financial services. The applicant's reaction was prompt.

The applicant proceeded to suspend the first respondent from its employ and set disciplinary processes into motion. The date of the hearing was set for the 13 August 2015.

The first respondent was duly notified of that date but indicated that he would not be available on that date. The second applicant then decided to withdraw the charges and proceeded to terminate the first respondent's employment on three months' notice. The applicant could properly do so under the common law.

Aggrieved by this turn of events, the first respondent approached this court and, under case number HC 11471/15, obtained a default judgment directing the applicant to reinstate him into its employ as its director of financial services. The order was granted on 19 February 2016.

The order was served on the second applicant on 3 March 2016. The second applicant sought to have this default judgment rescinded. In terms of Rule 63 (1) of the High Court Rules, 1971 such an application ought to be made within 30 days after the applicant has had knowledge of the judgment. The application for rescission ought to have been filed by 3 April 2016. The applicant only filed its papers on 2 June 2016, two months outside the time limit. The second applicant attributes this delay to the attitude of its then legal practitioners who took the view, from the outset, that the second applicant had erred in dismissing the first respondent from its employ, and in any event, to the delays encountered as a result of the need for it to comply with its own internal bureaucratic practices. Further, it is submitted that during the period in question, the second applicant's town clerk was indisposed to the point where he had to be represented in these proceedings by the first respondent.

Ultimately the second applicant was able to put its act together and sought the favourable opinion of its present legal practitioners, hence the present application. It is on these factual grounds that both the application for condonation for late filing of an application for rescission of judgment and the application for rescission of judgment is based.

For an applicant to succeed in an application for rescission of default judgment or condonation for late filing of papers, it has to satisfy the court, *inter alia*, that it has a reasonable explanation for the default or delay, that it acted *bona fides* and that it has prospects of success on the merits. In other words, it must show that there is good and sufficient cause for setting aside the default judgment or for granting of condonation. See *Zvinavashe vs Ndlovu* 2006 (2) ZLR 372 (S), *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S).

I accept Ms Mahere's argument that the second applicant, being a public body, has certain statutory requirements to meet in the discharge of its civic duties. Statutory procedures must be complied with and the necessary consultations and approvals must be

made and sought. One must accept that some time will be lost in fulfilment of these requirements. That on its own however, cannot be considered to be a reasonable explanation for a delay of two months. Public bodies, like any other litigant, must comply with the rules of court. To this end, they must conduct their business with reasonable expedition and efficiency. In particular, I do not accept the proposition that the absence of one official should cripple the operations of a municipality or council. However, one should accept, notwithstanding this tardiness, that the second applicant acted *bona fides*. It always intended to defend the application but for the attitude of its legal practitioners. When it became clear that its interests were not being met, it sought the services of another law firm, hence the present application. In that context, the second applicant's explanation for the delay is both reasonable and *bona fides*, notwithstanding the short comings alluded to earlier.

The second applicant has prospects of success on the merits. The first respondent was dismissed on notice and the right of the employer to so dismiss an employee was upheld in the famous case of *Nyamande and Ors v Zuva Petroleum (Pvt) Ltd* SC 281/14. Although initially the second applicant proceeded by way of disciplinary hearings, it withdrew that course of action and proceeded, as it was entitled to do, to dismiss the first respondent on notice. The basis for such dismissal is purely contractual and in terms of s 12 (4) of the Labour Act. An employer who proceeds this way is not required to prove fault on the part of the employee, nor is he required to act in terms of a finding of misconduct on the part of the employee.

More importantly, the default judgment sought to be rescinded is defective because it seeks to compel the second applicant to reinstate the first respondent without the option of paying damages. In *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) it was held that:

> "an order on an employer to reinstate an employee …….must carry with it, as an alternative, an award of damages."

It was also held that:

> "the principle that an employer is not to be compelled to keep in his employment a person with whom the relationship has soured beyond reconciliation is deep seated in the common law. The common law principle is "reinstatement or damages."

The terms of the default judgment run foul to the above principle. See also *BHP Minerals Zimbabwe (Pvt) Ltd vs Takawira* 1999 (2) ZLR 77(S) where it was held that any determination as to reinstatement, must specify an amount of damages to be awarded to the

employee as an alternative to his reinstatement. That position is embedded in s 96 of the Labour Act [*Chapter 28:01*] then styled as "the Labour Relations Act."

The first respondent raises a point *in limine* namely, that the applicant has not complied with the default order that is sought to be rescinded and is therefore in contempt of court and should not for that reason be heard. The case of *Commissioner of Police v Commercial Farmers Union* 2000 (1) ZLR 503 and other cases are cited in support of that submission. That might well be correct but in my view, that on its own, cannot bar the first applicant from approaching the court for relief where the order sought to be rescinded is patently defective at law. In any event, there is no application before the court for an order declaring the first applicant to be in contempt of court. But perhaps more importantly, any prejudice that first respondent might have suffered as a result of the non-compliance by the second applicant with the default judgment can be addressed by way of an order sounding in money. The first respondent also submits that the explanation for the delay given by the second applicant is at variance with its legal practitioner's stated stance, and that, in any event, no affidavit has been filed in support thereof by the legal practitioner concerned. Although the explanation given for the delay does not in all respects meet the standards set out in *Diocesan Trustees for the Diocese of Harare v The Church for the Province of Central Africa* SC 9-10, the following factors cannot be ignored in assessing the reasonableness of the explanation given in the present case. When served with the application, the subject of the order granting default judgment on 3 March 2016, the second applicant referred the matter to its legal practitioners in order to ensure that the application was opposed. Minutes of the second applicant's meetings confirm that the second applicant, though dilatory and bureaucratic in its approach, always intended to oppose the application. It is not disputed that the legal practitioner to whom the second applicant's case had been allocated was at the relevant time out of the country and unable as a result to attend to given instructions.

Dissatisfied with the services of that firm of lawyers, the second applicant resolved to seek the services of another firm, who immediately filed the present application. Taking these factors into account it cannot be said that the second applicant's explanation for the delay is entirely unreasonable. One thing seems clear throughout the events leading to the present application, namely, that the applicant was resolved and determined to get rid of the first respondent. The reason for that stance is very clear. The first respondent had betrayed the applicant's trust in a fundamental way. His continued association with the applicant was no longer tenable.

As already noted the second applicant's prospects of success are very high. That for me is a decisive factor, despite the weaknesses apparent in the explanation that has been given for the delay, in particular the standoff between the second applicant and its former legal practitioners.

I must commend both Advocates *Mahere* and *Zhuwarara* for their incisive and competent presentation of their respective cases. Unfortunately I must rule against one of them! Both applications will succeed. It is accordingly ordered as follows:

1. The applicant's late filing of the application for rescission of judgment is hereby condoned.
2. The default judgment in HC 11471/15 is hereby rescinded.
3. The first respondent shall pay the costs of this application.

Nyakutombwa Mugabe, applicants' legal practitioners
Gill, Godlonton & Gerrans, 1st respondent's legal practitioners