TRUSTEES (FOR THE TIME BEING) OF TONGOGARA
COMMUNITY SHARE OWNERSHIP TRUST
versus
MATRIX REALTY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 12 February 2018, 29 March 2018, 10 April 2018 & 16 May 2018

Opposed Application

E.T Moyo, for the applicant
T. Mpofu, for the respondent

MUREMBA J: This is an application for rescission of a default judgment that was granted against the applicant on 24 May 2017. Apparently the applicant had been served with a court application by the respondent on 26 April 2017 claiming payment of US$54 625-00 and costs of suit on a higher scale. The applicant filed its notice of opposition and opposing affidavit out of time on 16 May 2017, the *dies inducea* having expired on 11 May 2017. Consequently, the respondent applied for a default judgment which was granted on 24 May 2017.

In response to the application for rescission, the respondent had initially raised a point *in limine* to the effect that the application was improperly before the court having been filed out of time. However, at the beginning of the hearing, the respondent abandoned this point *in limine*. The matter was then argued on the merits. However, as Mr *Moyo* for the applicant was still making his submissions he sought to withdraw the application and tendered wasted costs, but Mr *Mpofu* vehemently opposed the application to withdraw and moved an application for dismissal of the applicant's application for rescission with costs on a higher scale arguing that the matter had been argued and as such there was need to bring finality to litigation. After hearing argument on Mr *Mpofu's* oral application, I delivered judgment in HH 164/18 dismissing Mr *Moyo*'s application to withdraw the application for rescission of the default judgment and ordered the hearing of the same application to proceed for a determination on

the merits. Consequently, I conducted a full hearing of the application for rescission and the present judgment is pursuant to that full hearing.

The law

In an application of this nature the onus is on the applicant for rescission to show that there is good and sufficient cause for granting the application as required by r 63 of the High Court of Zimbabwe, 1971. It reads,

> ***"63. Court may set aside judgment given in default***
> (1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.
> (2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, (my emphasis) the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just."

In *Stockil* v *Griffiths* 1992 (1) ZLR 172 (SC) at p 173 it was held by GUBBAY JA that:

> "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 E & 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."

In *Mdokwani* v *Shanhiwa* 1992 (1) ZLR 269 (S) the court stated that the factors to be taken into account by a court in an application for rescission of judgment were stated in *G D Haulage (Pvt) Ltd* v *Mumurugwi Bus Services (Pvt) Ltd* 1979 RLR 447 (A) at 455 B-G where it was stated that although there are no precise rules limiting or regulating what matters the court may take into account in deciding whether the applicant has shown the existence for such relief of good and sufficient cause in terms of r 63, the court will normally take into account:

(a) the applicant's explanation of his default

(b) the *bona fides* of the application to rescind the judgment and

(c) the *bond fides* of the applicant's defence on the merits of the case, and the court will normally consider these matters in conjunction with each other and cumulatively.

In *Dupreez* v *Hughes N O* 1957 R & N 706 (SR) at 709 A-D it was held that too much emphasis must not be placed on one factor, all must be regarded in conjunction. An unsatisfactory explanation for default may be strengthened by a very strong defence on the merits and a completely satisfactory explanation for defaulting may cause the court not to scrutinise too closely the defence on the merits.

The above cited case authorities show that in determining what constitutes good and sufficient cause this court has a very wide discretion. It is not limited to the above mentioned 3 factors that are normally considered. The applicant must show what entitles him to an indulgence. According to the headnote in *Dewwras Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Corp Ltd* 1998 (1) ZLR 368 (SC) it was held that:

> "The High Court Rules requires only "good and sufficient cause" as the basis of rescission of judgment. This gives the court a wide discretion and it is not possible to provide an exhaustive definition of what constitutes sufficient cause to justify the grant of indulgency. Even where there has been wilful default there may still sometimes be good and sufficient cause for granting rescission. The good and sufficient cause, for instance, might arise from the motive behind the default."

The reasonableness of the applicant's explanation for its default

Initially in its founding affidavit the applicant denied that it was in default when the application for default judgment was granted. It averred that the respondent fraudulently sought and obtained the default judgment on 24 May 2017 when it was fully aware that the applicant had filed its notice of opposition and opposing affidavit on 16 May 2017 having been served with the respondent's application on 3 May 2017. However, it turned out that the allegations of fraud on the part of the respondent were false as the respondent explained in its notice of opposition and opposing affidavit that the applicant had been served with the respondent's application on 26 April 2017 and not on 3 May 2017 as the applicant was saying. In the answering affidavit the applicant made a concession that its later investigations had indeed revealed that the respondent's application had indeed been served at its offices on 26 April 2017 and not on 3 May 2017. The applicant further averred that the application had been received by a student who was on attachment who put it in a drawer without bringing it to the attention of the Trust Administrator only to discover it on 3 May 2017 and then brought it to the attention of the Trust Administrator who took it and date stamped it 3 May 2017, thinking that it had been received on that date. So in the answering affidavit the applicant was now pleading mistake on its part. It averred that its legal practitioners were given instructions to

oppose the respondent's application based on the mistaken apprehension of facts. The allegations of fraud were abandoned.

Clearly, there is an apparent conflict in the applicant's averments in the founding affidavit and those in the answering affidavit. This is an irreconcilable conflict which Mr *Moyo* was at pains to explain. Fraud and mistake are two irreconcilable factors. When I took Mr *Moyo* to task to reconcile the two factors that is when he then made the application to withdraw the matter which Mr *Mpofu* vehemently opposed. As I have stated above, I dismissed the application to withdraw and ordered the hearing to proceed.

When the hearing of the matter proceeded Mr *Moyo* submitted that the applicant in its answering affidavit had made a concession that the respondent had not obtained the default judgment fraudulently as per its explanation in the notice of opposition. Mr *Moyo* further submitted that for this reason the applicant had further averred in its answering affidavit that the respondent should not have moved for a default judgment without first communicating to it in light of the notice of opposition that had been filed by the applicant albeit out of time. For this argument Mr *Moyo* referred to the cases of *Zimbabwe Banking Corporation Ltd* v *Masendeke* 1995 (2) ZLR 400 (S) and *Founders Building Society* v *Dalib (Pvt) Ltd & Ors* 1998 (1) ZLR 526 (H). He submitted that the respondent in the present matter had a duty to give fair warning before obtaining default judgment. He further submitted that the explanation that there was a mistake on the part of the applicant is an additional basis on which the court may as well consider rescinding the default judgment. Citing Herbstein and Van Winsen *The Civil Practice of The Supreme Court of South Africa* 4th ed at p 366 Mr *Moyo* submitted that where new facts are disclosed in the notice of opposition the applicant can enlarge upon them in the answering affidavit. He said that this is what the applicant was seeking to do in its answering affidavit when it explained that there was a mistake on its part and that the applicant had since realised that there had been no fraud on the part of the respondent. Mr *Moyo* submitted that the applicant thus became aware of the irregularity of its notice of opposition from the respondent's notice of opposition and opposing affidavit to the present application.

In response Mr *Mpofu* took issue with the fact that the applicant had given two conflicting and inconsistent explanations in its founding affidavit and in its answering affidavit. He submitted that a party who misleads the court does not deserve the court's sympathy. He submitted that in such circumstances the court is allowed to draw adverse inferences and to

disregard his evidence as if he had not given any evidence at all. He relied on the case of *Manjala* v *Maphosa* SC 18/2016 wherein it was said:

> "It is trite that if a litigant gives false evidence his story will be discarded and the same adverse inferences may be drawn as if he had not given any evidence at all." See also *Moroney* v *Moreney* SC 24/2013.

Mr *Mpofu* submitted that the incoherent and diverse explanations as to when the applicant actually received the application make its credibility questionable. Mr *Mpofu* further submitted that the applicant having failed to file its opposing papers within 10 days from 24 April 2017 it was accordingly barred. He further submitted that the position regarding the course open to the innocent litigant where the defaulting party has failed to timeously oppose a claim or application is stated in *HPP Studios (Private) Limited* v *Associated Newspapers of Zimbabwe (Private) Limited* 2000 (1) ZLR 318 (H) which has been quoted with approval in later cases such as *Chichi Clothing Manufacturers (Pvt) Ltd & Ors* v *Commercial Bank of Zimbabwe Ltd and Ors* HH 88/2006 and in *Megalink Investments & Ors* v *African Century Limited & Ors* HH 115/2015. He said that in the HPP Studios case it was held that if the bar against the defendant is automatic, the plaintiff is not required to do anything else before applying for his default judgment even if there were indications the defendant intended to defend the matter. Mr *Mpofu* submitted that the respondent properly approached this court and obtained a default judgment. Mr *Mpofu* submitted that the conflicting and inconsistent explanations in the applicant's founding affidavit and answering affidavit coupled with a previous attempt to withdraw the application warrant the dismissal of the application.

In *Zimbabwe Banking Corporation Ltd* v *Masendeke* 1995 (2) ZLR 400 (SC) the Supreme Court held that giving a warning to the other party or lawyer saves a lot of trouble and expense. The court warned legal practitioners against snatching at judgments. In the *HPP Studios* case (*supra*) ADAM J did not speak about the need to give fair warning to the other party, but he simply said that once the defendant's attention has been drawn to the defective proceedings it is up to him to make the necessary application to rectify the defect. He said that there is no inherent jurisdiction in the court to compel the plaintiff to apply to set aside an irregular proceeding before he can obtain a default judgment that is his by right. He was talking about a late appearance of entry to defend an action. He said that the defendant is automatically barred and the plaintiff is entitled to apply for default judgment even if indications are that the

defendant intends to defend the matter. The onus is on him to apply for condonation for late appearance or removal of the bar.

In *casu* it cannot be disputed that a fair warning about the irregular notice of opposition the applicant had filed would have saved a lot of trouble and expense for the parties. However, procedurally, the respondent did not err in seeking default judgment because the applicant was automatically barred for failing to file its notice of opposition on time. See r 233 (3) of the High Court Rules, 1971.

It is trite that in application proceedings the court looks for the cause of action and the evidence to sustain that cause of action in the founding affidavit. The application therefore stands or falls on its founding affidavit because these are the facts the respondent is asked to affirm or deny. See *Hiltunen* v *Hiltunen* HH 98-08. The purpose of an answering affidavit in an application is to refute the case put up by the respondent in the opposing affidavit. As a result it is a well-established general rule of practice that new matters should not be permitted to be raised in the answering affidavit. This is subject to the discretion of the court. In the exercise of such discretion the court will only sanction a departure from the general rule on good cause shown. The applicant should give reason or cause for failing to include the true basis of its action in its founding affidavit. See *Mobil Oil Zimbabwe (Pvt) Ltd* v *Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (HC).

In casu, the applicant in the answering affidavit did not seek to elaborate on the allegations of fraud it had initially averred in the founding affidavit but it came up with a totally different reason *vis a vis* its explanation for the default. In the founding affidavit it was denying having been in default, but in the answering affidavit it was now admitting having been in default because of a mistake which it said had happened at its institution. It was therefore not correct for Mr *Moyo* to submit that the mistake explanation was being given as an additional basis or reason for seeking rescission. The word additional implies that the averments of fraud were still being maintained yet this was not the case. The allegations had been abandoned totally. With that it is not correct to say that the explanation of the mistake was now enlarging upon the facts in the founding affidavit. The applicant was now seeking to make its case based on mistake for the first time in the answering affidavit. This is wrong. The applicant cannot seek to make its case for the first time in the answering affidavit. It is my considered view that the applicant should have withdrawn its application at this stage and started it afresh if it so

wished instead of proceeding with it the way it did. For this reason I cannot say that the applicant gave a reasonable explanation for its default.

The cases I have cited above show that even where the applicant fails to give a reasonable explanation for their default, there may still be good and sufficient cause to grant rescission. So the fact that the applicant did not withdraw its application when it should have does not render the application fatally defective. That is not the end of the matter. The court can still consider other factors which constitute "good and sufficient cause" since all these factors are considered conjunctively and cumulatively.

The bona fides of the applicant's defences on the merits of the case which carries some prospect of success

Before delving into the defences raised by the applicant it is imperative that I give the background facts of this matter which can be aptly summarized as follows. The applicant and a company called Kelor Investments (Pvt) Ltd entered into an agreement of sale of an immovable property. The contract was brokered by the respondent which was entitled to an agent's commission. Clause 6.1 which dealt with the issue of commission provided,

> "The agent's commission in respect of this sale shall be payable by the seller and the sellers hereby authorise their said agent (Matrix Realty (Pvt) Ltd) to deduct the commission from the purchase money when the same becomes payable to him. Commission shall be deemed to be earned upon the parties to this agreement appending their signatures to this agreement. The parties to this agreement acknowledge that the commission shall be deducted from the purchase price. Should any party to this agreement breach the terms of such agreement causing the agreement to be cancelled, the defaulting party shall be liable for the agent's commission."

It so happened that after the contract was signed, the applicant being the buyer did not pay the purchase price by the agreed timeline, only to write a letter to the seller's lawyers at a later date saying it was cancelling the contract. This resulted in the respondent suing in contract for its commission from the applicant in the sum of US$54 625.00 on the ground that it was the applicant which had breached the agreement of sale. The applicant having failed to file its opposing papers within the prescribed time limit, the respondent obtained the default judgment which now forms the subject matter of the present application.

The applicant averred that it has 3 defences to the respondent's claim. Firstly, it averred that the respondent has no *locus standi* to sue it in contract claiming payment of the agent's commission because it (the respondent) was not a party to the agreement of sale which was signed by and between the applicant and Kelor Investments (Pvt) Ltd.

In response to this defence the respondent averred that the parties to the sale agreement had agreed and promised that the respondent was entitled to agent's commission from the seller and further that in the event of breach of the contract, the party in breach would be liable for payment of the said commission to the respondent. The respondent averred that the applicant after the contract had been signed is the one which breached it by not paying the purchase price and later went on to write a letter to the seller's lawyers saying that it was cancelling the contract. Mr *Mpofu* submitted that a person can sue on a contract to which he is not a party if such a contract creates or contains a benefit for him on the basis of the *stipulatio ateri* principle or *ius quaesitum tertio* principle which means that a party has acquired a right. Mr *Mpofu* cited a *plethora* of the following cases and authorities. R Christie *Business Law in Zimbabwe* (Revised Edition) at p 75; *M Mabothini Victoria Xaba and Ors* v *Nobantu Pascaline Ruth Xaba & Ors*, ZAHCGA 279-2013, *Eldacc (Pty) Ltd* v *Bidvest Properties (Pty) Ltd* ZASCA 144-2011; *Pam Golding Properties Pty Ltd* v *Nkosi Hosea & Anor* ZAHC 08585 J -2013; RH Christie and GB Bradfield in *Christie's Law of Contract in South Africa* 7th ed at p 302-303.

The doctrine of privity of contract means that a person who is not a party to an agreement is not liable and is unable to claim on it. C Cannot sue upon a contract entered into by and between A and B even though he would have benefitted from its performance- See Innocent Maja *The Law of Contract in Zimbabwe* p 27. One of the exceptions to the doctrine of privity of contract is in instances where contracts are made for the benefit of third parties commonly called the *stipulatio alteri* principle. However, even then certain requirements have to be met. In RH Christie, *Business Law in Zimbabwe* 2nd ed, Juta & Co Ltd at pp 75-76 it is stated that the contract in question must give the third party the option to adopt it as his own. The intention that the third party should have this option must actually appear from the contract: *Whaley and Others (Law Society of Zimbabwe intervening)* v *Cone Textiles (Pvt) Ltd* 1989 (1) ZLR 54 (S) and *Acting Minister of Industry* v *Tanaka Power* (Pvt) Ltd 1990 (2) ZLR 208 (S). When the third party adopts the contract he is entitled to its benefits and its obligations. To adopt the contract the third party must accept the option contained in the contract and communicate his acceptance.

In *The Law of Contract in Zimbabwe* by Innocent Maja at p 28 it is stated that for *stipulatio alteri* to exist the stipulator and promisor must intend to create a right for the third party to adopt and become a party to the contract. Maja further says that until accepted by the third party, the contract remains one between the actual parties. All the authorities that Mr

Mpofu cited make it clear that under the *stipulatio alteri* doctrine, the stipulator agrees with the promisor that the promisor will render performance to a beneficiary. The beneficiary acquires rights under the contract when he accepts the benefit stipulated in his favour and notifies the contracting parties of his acceptance.

In casu the contract which was entered into by the applicant and Kelor Investments (Pvt) Ltd does not seem to meet the requirements of *stipulatio alteri*. It is an agreement for the sale and purchase of a property between the two of them. The clause simply dealt with which party would be liable for paying the agent's commission in the event of a breach of the contract between the applicant and Kelor Investments (Pvt) Ltd. It appears to me that the purpose of the provision was not to benefit the respondent but to regulate the issue of breach between themselves so that the defaulting party would meet the costs of the commission due to the respondent instead of the innocent party meeting such costs. It does not look like the parties ever intended to make the respondent a party to the contract. This is evidenced by the fact that the respondent was never given the option to adopt this contract as his own and become a party to it. Furthermore, the respondent did not adduce anything by way of evidence to show that it adopted the contract as its own and that it communicated its acceptance to the contracting parties. It is thus my considered view that the applicant has a *bona fide* defence which carries some prospects of success.

The applicant raises as its second defence the defence that the nature of the respondent's claim is a damages claim. The applicant avers that the respondent adopted the wrong procedure by proceeding by way of an application in suing for its claim instead of proceeding by way of action. In response the respondent averred that it adopted the correct procedure because the amount of the commission payable is very clear as the percentage was stated as 5% of the purchase price plus 15% VAT, the purchase price being $950 000-00. I am in agreement with the respondent. The amount of the commission is readily ascertainable. This is not a claim for damages, but for commission. This defence carries no prospects of success.

The applicant raised as its third defence that the agreement of sale in question is not valid because the person who purportedly concluded the alleged agreement on its behalf did not have the authority to do so. Apparently, its then Board Chairperson one Oathnery Munetsi Ngere signed the agreement of sale on its behalf. It was the applicant's averment that the board Chairperson lacked the capacity to enter into the agreement on behalf of the applicant as he had not been authorised.

In response the respondent attached two minutes held by meetings held by the Board of Trustees which show that the board is the one which resolved that the property be purchased- Minutes of 12 May 2015 and 29 July 2015. The respondent averred that the board chairman signed the contract in the presence of 6 officials of the applicant and his signature was witnessed by 2 other trustees. The applicant averred that whilst it is correct that it was indeed looking for a property to buy it however never authorised the board chairperson to conclude the agreement on its behalf. The applicant averred that the minutes produced by the respondent do not say any particular trustees or the board Chairman was authorised to conclude the transaction. Citing the case of *Ngatibataneyi Private Ltd* v *Vengesai Moyo & Anor* 2007 (1) ZLR 330 (S) Mr *Moyo* submitted that in the absence of proper authorisation to conclude the agreement the agreement was voidable. He submitted that trustees must act together if they are to bind a Trust. He further submitted that a single trustee cannot bind the Trust. He referred to the case of *Edinburg* v *Mercantile Credit* 1980 (1) SA 244. Mr *Moyo* submitted that even an administrator cannot bind the Trust acting on his own. He further submitted that an outside person dealing with a Trust can only assume that contractual powers must be exercised by all trustees unless there is an instrument authorising a lessor number of trustees. Mr *Moyo* submitted that the principle that outsiders are entitled to assume that all the requirements have been complied with is not applicable or has limited application to Trusts. Mr *Moyo* submitted that where the Trust says the trustee was not authorised to sign the agreement that is a *bona fide* defence.

It is a fact that on 15 October 2015 the applicant wrote a letter to Kelor Investments cancelling the contract the two parties had entered into. Mr *Mpofu* argued that if the agreement of sale was invalid because it had been concluded by an unauthorised person the applicant would not have sought to cancel it. This is an agreement which had been signed on 25 August 2015. Mr *Mpofu* argued that it is not a legal principle that all the trustees should sign. He argued that furthermore, the Deed of Trust had not been placed before the court for it to see who should conclude contracts on behalf of the Trust.

As was correctly submitted by Mr *Mpofu*, Trusts are regulated by a Trust Deed. It is Trust Deed that spells out persons with contractual capacity. *Gold Mining and Minerals Development Trust* v *Zimbabwe Miners Federation* 2006 (1) 174 (H). *In casu* the applicant did not furnish its Trust Deed to show the persons who have contractual capacity to sign contracts on its behalf. In the absence of the Trust Deed it cannot be said that the applicant has a *bona*

fide defence which carries some prospects of success. This is compounded by the fact that the applicant then went on to write a letter cancelling the contract in question instead of seeking to invalidate the contract on the basis of it being a nullity for having been signed by a person without authority.

The bona fides of the application to rescind the judgement

The defence that the respondent has no *locus standi* to sue the applicant in contract is *bona fide* and it carries some prospects of success. As such the application to rescind the default judgment is *bona fide.*

Conclusion

Since factors that are considered to determine if there is good and sufficient cause are considered and examined not in isolation but together I am inclined to grant the application for rescission in the present matter. The explanation for the default was very unsatisfactory as there were contradictions in the applicant's averments in the founding affidavit and in the answering affidavit. However, the applicant seems to have a *bona fide* defence on the merits which carries some prospects of success. This is the defence that the respondent not being a party to the contract which was signed by the applicant and Kelor Investments (Pvt) Ltd has no *locus standi* to sue it in contract.

In the result, the application for rescission of the default judgment in HC 1863/17 is granted with costs.

Scanlen & Holderness, applicant's legal practitioners
Ushewokunze Law Chambers, respondent's legal practitioners