ARCHFORD DUBE
versus
LEEROY REECE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 29 March 2018 & 12 June 2018

Opposed Application

M Mandingwa, for the applicant
R Venge, for the respondent

TSANGA J: This was an application for rescission of a default judgement which had been granted in 2016 after applicant failed to attend a pre-trial conference on account of having missed a connecting flight from Dubai. His lawyer had advised him that the pre-trial conference was scheduled on 18 September 2016 when it was in fact on 15 September 2016 as per notice of set down. He had only arrived on 16 September to learn that a default judgment had been granted. I dismissed his application on account of a holistic analysis of the principles applicable in the granting of a default judgment. The reasons given have been requested in writing.

The principles, emanating from r 63 of the High Court Civil Rules 1971, that are applied in deciding whether a default judgment should be rescinded, and, which are looked at in conjunction are as follows:

i) The reasonableness of the applicant's explanation for the default
ii) The *bona fides* of the application to rescind the judgment
iii) The *bona fides* of the defence on the merits of the case and whether that defence carries some prospect of success

See *Ronald & Anor v McDonnell* 1986 ZLR 216 (SC); *Stockil v Griffiths* 1992 (1) ZLR 172 (SC)

The applicant did show that he was not in wilful default in the sense of having deliberately abstained from attending the pre-trial conference, in that that he was not able to attend due to missing his flight. In other words the court believed him that he did not deliberately take a decision not to attend although he had of course left his attendance to the 11th hour. However, as to whether there was good and sufficient cause to set aside the default judgment, the *bona fides* were far from satisfactory. In the main matter the applicant is being sued for the sum of $46 000 being monies advanced to him by the applicant for a purported mining venture in which he has failed to account for the money given to him and is alleged to have converted the money to his own use. At the time of the pre-trial as respondent averred no papers had been field by the applicant. His discovery affidavit had also not been filed. There was no summary of evidence and no pre-trial issues. This was despite the fact that the notice of set down for the pre-trial conference had been sent to his lawyers sometime in August 2016. His intention, according to his lawyer was to seek a postponement on the day scheduled for the pre-trial conference to enable these documents to be put together since applicant was resident in England. His erstwhile counsel averred that his client could not discover as his signature was needed on the discovery affidavit. There are procedures for the signing of affidavits outside the country so that could not have been a valid excuse. His assertion that there were a whole host of papers to be availed for both the discovery schedule and summary of evidence again is no defence. They could and ought to have been availed earlier if applicant had a *bona fide* defence from the time he consulted with and engaged his lawyers. Even if the applicant was in the UK there is no reason why he failed to furnish his discovery affidavit of the documents he had in his possession to support his case, together with his summary of evidence, and his pre-trial issues. After all he was in communication with this lawyer. The notice to make discovery within 24 days was sent to the applicant's erstwhile legal practitioners on the 28th of January 2014 as appears in the cross reference file, HC 7704/13. More than two and half years later at the time of the pre-trial conference in September 2016, there had still not been any discovery by applicant. These are not the actions of a person with a serious defence.

By the time a pre-trial conference is held the discovery process in terms of order 24 should in fact be completed otherwise the pre-trial conference itself which is designed to curtail the issues referred to trial becomes meaningless. By knowing what documents are on

the discovery schedule, a party can request the production of those documents before the pre-trial conference. The only information that is excluded is of course that which is privileged and which constitutes the work product of a litigant's case with his practitioner. A pre-trial conference is not called for a party to start the process of discovery or to allow a party to only then begin compliance with the processes attendant upon the holding of a pre-trial conference. It is indeed after discovery that each party is truly familiar with the strength or weakness of their case. In fact, if documents are properly discovered and provided upon request in support of either party's case, most cases are able to be settled after such discovery.

Respondent pointed out that at no point even before formally suing the applicant had a shred of evidence ever been given to him in the form of genuine receipts as to how the money he advanced was utilised. Despite averment of mining claims having been bought, it was averred that no such proof has ever been provided. Despite assertions by applicant of a tractor having been purchased on the basis that they had also agreed to a farming venture, again this assertion had never at any time been supported by evidence.

Summons were issued in September 2013. Respondent pointed out that at the time of the envisaged pre-trial conference, a period of three years had lapsed since issuance of summons and all this while still not a shred of proof has ever been furnished. Materially, this court notes that the nature of the applicant's own defence was such that he needed to produce the proof of his assertions. His argument that it was for the trial court to decide whether or not there was a partnership and whether he used the money as he alleged needed to have some foundation. The documents that the applicant chose to attach to his affidavit and application for rescission in no way provided the necessary evidence to bouy this court towards a finding that his case is indeed meritorious.

Furthermore, even if the lawyer had gotten the date of the pre-trial conference wrong, the evidence that was placed before the court was that the lawyer became aware of the correct date before the pre-trial conference was heard yet no one showed up to postpone.

Without a shred of core evidence to persuade the court that he indeed has a meritorious defence, this court accordingly dismissed his application with costs on an ordinary scale.

Mhungu & Associates, applicant's legal practitioners
Mambosasa Legal Practitioners, respondent's legal practitioners