BERNARD JARAVAZA
versus
TRUENESS MUTAMIRI
and
MBCA BANK LIMITED
and
THE SHERIFF OF ZIMBABWE
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 19 September 2019 and 14 November 2019

Opposed Matter

Application for rescission of judgment:

T.S Mjungwa, for the applicant
L. Jonasi, for the 1st respondent

PHIRI J: On the 19th September, 2019 this court dismissed the application for rescission of judgment filed by the applicant and it awarded costs against the applicant on a legal practitioner and client scale.

The following are the reasons of the grant of the aforesaid order

The Law

Order 9 rule 63 of the High Court Rules, 1971 governs application for rescission of judgment. It provides that;

> "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 sub rube (1) that there is good and sufficient cause to do so, 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."

The phrase "good and sufficient cause has been given definition in numerous cases. In the case of *Dewaras Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Corp Ltd* 1998 (1) ZLR 368 (SC) it was stated that;

> "…the High Court Rules require…. "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 indulgence. 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…"

In *Stockill* v *Grifiths* 1992 (1) ZLR (SC) 216 (S) it was stated that;

> "The factors which are taken into account in deciding whether a default judgment shall be granted 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 and whether the defence carries some prospect of success."

These factors are not to be considered individually but must be considered in conjunction with one another.

<u>The facts and the background of this matter</u>

It is important to give a brief summary and background to this application.

1. Applicant's immovable property known as 265, Hopley Township of Subdivision "C" of Hopley, measuring 1925 square metres was sold to the first respondent in execution by the third respondent (The Sheriff in July 2018 pursuant to a judgment of this court in case number HC 334/15.
2. The applicant objected to the sale in terms of Rule 359 (1) of the High Court Rules on the ground that the auction price was unreasonably low.
3. The hearing of the objection was set before the 3rd respondent on 18th September, 2018 at 1500 hours.

   After the hearing of the application the matter was postponed to the 20th September 2018 to give the applicant the opportunity to furnish the Sheriff with an agreement of sale with the willing purchaser and a deposit equivalent to the open market value of Fifty Five Thousand United States Dollars (US$55 000.00).
4. The third respondent consequently confirmed the sale on the 11th October 2018 on the basis that applicant did not provide what was required as aforesaid "on or before the 20th of September, 2018.

5. Applicant was aggrieved by the 3rd respondents confirmation of the sale and subsequently filed a court application for review of the 3rd respondent's decision. This was in case number HC 9763/18 and applicant was seeking an order setting aside the confirmation of the sale.
6. On the 5th November, 2018 the 1st respondent filed a notice of opposition and opposing affidavit, and served the same on the applicant on the same date.

On 7 January 2019 first respondent wrote a letter (Annexed to the papers as Annexure R1) reminding applicant to either file an Answering Affidavit or set the matter down for hearing failing which, first respondent would seek dismissal of the application, for review, for want of prosecution.

Applicant failed to file his Answering Affidavit or to attend to set down the application for review.

First respondent then fled a chamber application, under case number 339/19, seeking a dismissal of the applicant's court application for review for want of or delay in prosecution.

This court granted an order dismissing the applicant's court application for review. This order was granted on 11 February 2019.

This is the order that the applicant sought to rescind.

APPLICANT'S FOUNDING AFFIDAVIT

In the founding affidavit deposed by the applicant he indicated that he had given his lawyers, Bherebhende Law Chambers instructions to oppose the application in case No. HC 339/19. He was surprised that this application had not been opposed;

> "I seek the rescission of case number 339/19 which was decided in my absence. I was not aware of this application as the matter was being handled by my then lawyers Bherebhende Law Chambers. That law firm had my full instructions to prosecute my matter, and I was concerned to find out there had been such an application and that it had not been opposed. I have attached s supporting affidavit by Mr Walter Bherebhende which explains why the application was not opposed." (See Annexure A).

He maintained that the lack of opposition to this application was not his fault but that of his lawyers.

In para 9 of his Founding affidavit, applicant stated:

> "In my enquiries with Mr Walter Bherebhende I was told that the delay in filing an answering affidavit or setting the matter down was as a result of the communications were going to affect the outcome of the application for review he say s---"

Applicant then referred to the supporting affidavit of Mr Walter Bherebhende.

THE SUPPORTING AFFIDAVIT OF MR WALTER BHEREBHENDE

Mr Bherebhende who deposed to a Supporting Affidavit of the applicant submitted the following:

1. He had assigned the file to a junior assistant at the form. This assistant was handling this file under his supervision since 2017.
2. He confirmed that on 22 January 2019 the law firm received a chamber application for dismissal for want of prosecution but when this application was received it was placed in the officer of the practitioner dealing with the file and it was not brought to his attention.
3. At the time when the application was received the legal practitioner dealing with the matter had taken some time off due to ill health.
4. He became aware of this chamber application in February 2019 but when they tried to remedy the wrong it was way out of time and the application had been granted.
5. He also submitted that what may have caused the delay was that they had engaged the judgment creditor who had given a notice to the Sheriff not to sell the property. He also stated that:

   "Given these developments the application for review seems to have been overtaken by events and we had contemplated withdrawing it… We only decided to pursue the matter when he realised the purchaser was not agreeable to the arrangement made."

PROSPECT OF SUCCESS IN THE APPLICATION FOR REVIEW

Applicant also submitted that he had prospects of success in the main application. That is the setting aside of the confirmation of sale by the Sheriff.

In this regard he gave two reasons in support of that contention and these are:

a) That he made the fact known to the Sheriff that his daughter, Tsungai Josephine Jaravaza was prepared to buy the property at a price higher than that offered by the first respondent. He submitted that the Estate Agent appointed by the Sheriff took long to finalise the agreement of sale but subsequently the Sheriff confirmed the sale at a lesser price. (See para 6 of the Founding Affidavit).
b) Applicant submitted that he had paid off the debt which gave rise to his property being sold in the first place.

   (I have since paid off the debt which gave rise to my property being sold in the first place.)

FIRST RESPONDENT'S OPPOSITION TO THE APPLICATION

First respondent opposed the application for rescission of judgment and submitted that applicant had failed to satisfy the requirements for rescission of judgment.

REASONS FOR THE DEFAULT

In her opposing affidavit first respondent argued that "applicant cannot seek to insulate himself on the basis that his erstwhile legal practitioners were negligent."

Firstly, first respondent submitted that his legal practitioners wrote a letter to applicant's legal practitioners annexed as Annexure "R1" in which they express concern on applicant's failure to file an answering affidavit or set the matter down for hearing.

Notice was duly given to applicant's legal practitioner to file his answering affidavit on or before 11 January 2019, failing which an application would be made in terms of Order 32 r 236 (1) of the High Court Rules 1971 to dismiss the main matter for want of prosecution.

Secondly, first respondent put in dispute the explanation given by Mr Walter Bherebhende as regards why his law firm failed to oppose the chamber application seeking dismissal of the applicant's case.

First respondent put in dispute the conflicting positions given by the applicant and Mr Bherebende as to why there was failure to oppose the chamber application.

On one hand applicant submitted that failure to oppose the application was because of communication taking place between the parties and on the other the reason was because the practitioner responsible with the matter had taken some live off due to ill health.

First respondent put in issue the fact that the aforesaid legal practitioner failed to attach either Medical or Doctors report and or an affidavit confirming the said averments.

In paragraph 49 of her opposing affidavit first respondent observes that:

> "Again it boggles one's mind that one can file answering affidavit and heads of argument but fail to file notice of opposition to application for chamber application for dismissal for want of prosecution when the said answering affidavit and heads were filed on 30th January, 2019, that is well after receipt of the chamber application for dismissal of prosecution which was filed and served on the 22nd January, 2019."

SUBMISSIONS ON PROSPECT OF SUCCESS

First respondent submitted that the applicant did not have any *bona fide* defence in the main action and accordingly enjoyed no prospects of success in his application for review.

First respondent submitted that the decision of the sheriff to confirm the sale by public auction cannot be faulted. The Sheriff gave applicant a month that is up to the 20th September

2018 to sell the property by private treaty. Applicant also failed to file with the Sheriff the agreement of sale and proof of payment.

First respondent, submitted that the alleged payment by applicant was only done after confirmation of the sale by the third respondent and without the consent of the first respondent as an interested party.

In fact first respondent submitted that the reported payment and acceptance by the second respondent was in fact fraudulent as fully explained in the letter which was addressed to first respondent's legal practitioners dated 9th January, 2019 and annexed to the applications as annexure "R3".

In that letter first respondent's legal practitioners pointed only that once a sale is confirmed by the Sheriff it can only be set aside in term of an order of the High Court in terms of order 40 r 359 (8) and (9) of the High Court, rules 1971.

The applicant had filed its review in Case No. HC 9763/18 and accordingly first respondent challenged second respondent's acceptance of payment before finalization of the aforesaid review application in case number HC 9763/18.

First respondent also disputed the fact that there may have been any communications between the parties which had, the effect of disposing the dispute between the parties.

COURT'S FINDINGS ON THE DISPUTE BETWEEN THE PARTIES

It is this court's finding that both the applicant together with his erstwhile legal practitioners, Mr Bherebende beside failed to tender good and sufficient cause as to why the present application should be granted. The explanations tendered by the applicant and his erstwhile legal practitioners does not specifically convince this court as regards the reason why the applicant failed to timeously oppose the chamber application for dismissal of the application for review.

On one hand it was submitted that the legal practitioners ceased with the matter was taken ill.

On the other hand it is submitted the applicant had engaged the judgment debtor with a view to settle the debt.

Which is which?

This court holds then the applicant's legal practitioners were clearly negligent and failure by the said legal practitioners to be truthful and candid with this court as to why they

failed to diligently observe the rules of this court should in the present circumstances also visit the applicant.

This court adopts the principle spelt out in the cited case of *Kombayi* v *Berkout* 1988 (1) ZLR at p 56 where KORSAH JA quoted with approval the case of *Saloojee and Anor NND* v *Minister of Community Development* 1965 (2) SA 135 (a) at 141 C where it was stated that:

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or its insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of the court. Considerations and miseticordium should not be allowed to become an invitation to laxity."

In the case of *Beitbridge Rural District Council* v *Russell Construction Co.* 1996 (2) ZLR (2) ZLR 190 (S) at 193 A-B SANDURA JA said:

> "This court has on similar occasions stated that Non-compliance with or a wilful disdain of the rules of court by a party's legal practitioner should be treated as non-compliance or a wilful disdain by the party himself."

Similarly in the case of *Viking Woodwork (Private) Limited* v *Blue Bells Enterprises (Private) Limited* 1998 (2) ZLR 249 at 254 D-F it was held that:

> "Flagrant breaches of the rules, especially where there is no acceptable explanation therefore, the indulgence of condonation may be refused whatever the merits of the appeal are. This applies even where the blame solely applies with the attorney."

In the present matter the applicant's legal practitioners failed to act timeously despite being given courteous notice to comply with the rules.

No reasonable and acceptable explanation has been advanced in respect of the applicant's default in failing to pursue its application for review and or, his failure to oppose the chamber application to dismiss the main application for failure to prosecute its matter.

<u>No prospects of success on review</u>

This court also finds that the applicant has not demonstrated that it has any prospects of success in his Review Application.

From the papers filed of record in this case it is clear that the Sheriff sold the property in dispute after having granted the applicant the opportunity to both object, and find, an alternative purchaser who was offering a higher price.

Similarly the applicant failed to further utilize the opportunity afforded to him by way of review proceedings

Accordingly this court arrives at the decision that he must be finality in terms of the execution process in this case.

In this context this court relies on the findings of GILLESPIE J, as he then was, in the case of *Mortfofoulous* v *Zimbabwe Banking Corporation Limited & Ors* 1996 (1) ZLR at 635 H; 836 A, where he stated:

> "The awe and finality with which the law seeks to invest the process of execution cannot be disturbed by such ill refined and non-specific averments s these. The rights which the third respondent has acquired cannot be denied him share upon sufficient proof that it is not fair that he should continue to enjoy them."

This court also accepts submissions on behalf of the first respondent that the sale by the Sheriff respondent should not be interfered with in line with the findings of the Supreme Court in the case *Mapedzamombe* v *Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257 (S) 260 D-E that:

> "Once confirmed by the Sheriff in compliance with r 360, the sale of the property is no longer conditional. That being so, a court would even be more reluctant to set aside the sale pursuant to an application in terms of r 359 for it to do so. When the sale of the property not only has been properly confirmed by the Sheriff but transfer effected by him to the purchaser against payment of the purchase price, any application to set aside the transfer falls outside r 359 and must confirm with the principles of the common law."

Costs

It is this court's considered view that the first respondent has been unnecessary put out of pocket by file conduct of the applicant wherein on various instances applicant has failed to timeously observe the rules and take advantage of opportunities granted to him.

Firstly being afforded the opportunity to find an alternative purchaser of the property in dispute

Secondly being given notice to file an answering affidavit or set down his application for review.

The conduct of the applicant in filing the present application for rescission, even out of time without seeking conclusion, amounts to an abuse of this court's process.

This is one case that calls for an award of costs in favour of the first respondent, on a higher scale.

This court finds that the first respondent has been unnecessarily put out of pocket by the applicant's conduct and accordingly makes the following order:

That the application for rescission of judgment is hereby dismissed.

The applicant is to pay first respondent costs on a legal practitioner and client scale.

Bruce Tokwe Commercial Law Chambers, applicant's legal practitioners
Wilmot & Bennet, 1st respondent legal practitioners