XIANBO INVESTMENTS (PVT) LTD
versus
METBANK LIMITED
and
ECOBANK ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 13 November 2019 & 20 November 2019

Opposed application

B Mufadza, for the applicant
T R Tanyanyiwa, for the first respondent
S Y Khupe, for the second respondent

CHINAMORA J: This is an application for rescission of judgment in which the applicant seeks to set aside the judgment of 14 September 2018, handed down by this court under case number HC 7308-18. The application is brought in terms of Order 9, Rule 63 (1) of the High Court Rules, 1971.

The judgment in question was given by default after the first defendant had sued the applicant to recover US$56 640.00, which was erroneously debited from the applicant's non funded account held with the first defendant, and then transferred to the applicant's account with the second respondent. The applicant asserted that the failure to enter appearance to defend was not deliberate as it only knew of the judgment on 20 February 2019 when its manager, Mr Ru Hongxing, was telephonically advised by an official of the first respondent. The applicant stated that the person on whom the summons was served, Mr David Mutizamhepo, was its former director whose directorship ceased on 10 June 2017. The applicant attached to its founding affidavit a CR 14 filed with the companies registry on 12 October 2017, confirming Mr Mutizamhepo's resignation. The applicant submitted that when process was served, Mr Mutizamhepo could not have acted for it. In

addition, the applicant stated that the CR 6, filed together with the aforesaid CR 14 shows its address as 5 Wembley Crescent, Eastlea, Harare, and that service should ordinarily have been effected at that place.

In respect of a *bona fide* defence on the merits, the applicant stated that it has challenged the first defendant to prove that the person who authorized the transaction had acted on the applicant's authority. The applicant attached to its papers two letters written by its legal practitioners of record dated 11 July 2018 and 16 July 2018, respectively. The first letter seeks a meeting in order to make some representations to the first respondent. It did not state the nature of the representations that the applicant sought to make. The second letter confirms that a meeting was held between the parties and that a request was made for information on who of the applicant's personnel authorized the withdrawal on the account. The applicant's defence, as can be gleaned from the second letter, is that the first respondent may have allowed an improperly authorized transaction to go through.

The application was not opposed by the second respondent which elected to maintain a watching brief. However, the first respondent vigorously opposed the application. In its opposing affidavit, the first respondent raised a point *in limine* concerning the propriety of Mr Ru Hongxing to depose to the applicant's founding affidavit. This preliminary objection abandoned on the date of hearing. I will therefore not concern myself with its merits or otherwise. The first respondent asserted that on 6 March 2018, the applicant advised it of a change in its signing arrangements. The first respondent attached a letter on its letterhead informing it that Mr Ru Hongxing had relocated to China and that Mr Cheng Mengxu was the new signatory. The company's CR 14, filed with the Registrar of Companies on 28 March 2011, accompanied the said letter, together with Mr Mengxu's passport. Additionally, the same letter was signed by both Mr Mutizamhepo and Mr Mengxu who were indicated as directors of the applicant. The first respondent further asserted that the address where summons was served, being 6 Cudmore Drive, Mount Pleasant, Harare, was the one which the applicant had registered with the first respondent, and was also the place where Mr Mutizamhepo accepted service on behalf of the applicant. The aforesaid address appeared on the applicant's letter of 6 March 2018 as its place of business.

I have to decide whether or not there is before me a good case to set aside the default order granted by this court on 14 September 2018. The law places the onus on the applicant to show that

there is good and sufficient cause for this court to rescind that default order. The legal position is set out in Rule 63 of the High Court Rules 1971, which provides that:-

> (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 judgement, for the judgement to be set aside
> (1) If the Court is satisfied on an application in terms of sub rule (1) that there is good and sufficient cause to do so, the court may set aside the judgement concerned and give leave to defendant to defend or to 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 (S), GUBBAY CJ enumerated the factors which the court takes into account when confronted with a Rule 63 application. The learned Chief Justice observed, at 173D-F, as follows:

> "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 and Another* v *McDonnell* 1986 (2) ZLR 216 (S) at 226E-H; *Songore* v *Olivine Industries (Pvt) Ltd* 1988(2) ZLR210 (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 judgement; 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."

It is evident from the decided cases that the formulation 'good and sufficient cause' means that, for an application for rescission to succeed, the applicant should satisfy the court that:

(i) the explanation for the reason for the default is reasonable;
(ii) the application to rescind the judgment is *bona fide*;
(iii) The applicant has a *bona fide* defence on the merits of the case which has some prospects of success.

In this case, the applicant seeks rescission of the default judgment on the basis that it was not served with court process, and that it has a *bona fide* defence to the first respondent's claim which carries prospects of success. While the applicant submitted that both Mr Mutizamhepo and Mr Mengxu were no longer directors of the applicant, it did not advise the first respondent to amend its records to reflect this change. In the absence of such a notification, it is inconceivable how the first respondent could have related to the applicant's change of directors. The letter of 6 March

2018 advising the first respondent of the change in signatory arrangements was introduced through the opposing affidavit filed on 25 March 2019. More relevantly, the CR 14 showing the said individuals as directors of the applicant was also attached to the opposing papers. When responding to the allegations in the opposing affidavit (paragraphs 4 to 7), the applicant did not deny the averments asserting that Mr Mengxu was substituting Mr Ru Hongxing as signatory on its account owing to the latter's relocation to China. Nor did the applicant challenge the letter submitted to the bank, particularly the directors who signed that letter and the address shown as its address. The failure to address such issues was dealt with by the Supreme Court in *Fawcett Security Operations* v *Director of Customs and Excise* 1993 (2) ZLR 121 (SC), which held that an allegation of fact not denied in affidavits is taken to be admitted. Thus, the applicant's failure to comment on the letter to the bank written on 6 March 2018, and deny the asserted current directorships of Mr Mutizamhepo and Mr Mengxu is significant. Consequently, despite asserting that Mr Mutizamhepo resigned on 10 June 2017, the applicant did not explain why Mr Mutizamhepo signed a letter as a director of the applicant sometime in 2018, almost a year after his alleged disengagement from the applicant. More relevantly, none of the applicant's affidavits demonstrates that the first respondent was advised of the resignation alluded to. Nor did the applicant plead that it served on the first respondent a copy of the CR 14 it relies on as evidence of change of directors. Indeed, the applicant's counsel conceded at the hearing that the first respondent had not been advised of the change in applicant's directorship.

Section 12 of the Companies Act [*Chapter 24:03*] is relevant to the issue before me. The first respondent argued that it was entitled to rely on the communication and CR 14 submitted by Mr Mutizamhepo and Mr Mengxu in March 2018, despite their alleged resignation in June 2017. In this respect, Section 12 provides as follows:

> "Any person having dealings with a company or with someone deriving title from a company shall be entitled to make the following assumptions, and the company and anyone deriving title from it shall be estopped from denying their truth—
>
> (a) that the company's internal regulations have been duly complied with;
> (b) that every person described in the company's register of directors and secretaries, or in any return delivered to the Registrar by the company in terms of section one hundred and eighty-seven, as a director, manager or secretary of the company, has been duly appointed and has authority to exercise the functions customarily exercised by a director, manager or secretary,

as the case may be, of a company carrying on business of the kind carried on by the company;

(c) that every person whom the company, acting through its members in general meeting or through its board of directors or its manager or secretary, represents to be an officer or agent of the company, has been duly appointed and has authority to exercise the functions customarily exercised by an officer or agent of the kind concerned;

(d) that the secretary of the company, and every other officer or agent of the company having authority to issue documents or certified copies of documents on behalf of the company, has authority to warrant the genuineness of the documents or the accuracy of the copies so issued;

Thus, to the extent that the first respondent was not advised that the directors of the applicant had changed, it was entitled as a matter of law to rely on the documents submitted to it purporting to be documents from the applicant. Similarly, the first respondent was entitled to assume that the persons in the CR 14 that came with the letter of 6 March 2018 were the duly appointed directors of the applicant and were empowered to act as such. In this respect, Section 11 of the Companies Act buttresses my view since it appositely provides as follows:

> "No person shall be deemed to have notice or knowledge of the contents of a company's memorandum, articles or other document - by reason only of the fact that the memorandum, articles or document has been registered by the Registrar or is available for inspection at the company's registered office".

I am therefore satisfied that the applicant was duly served with the summons which was received on its behalf by Mr Mutizamhepo. My view in this respect is fortified by Rule 39 (2) (d) of the High Court Rules which that process may be served upon a person in any of the following ways:

> "in the case of process to be served on a body corporate –
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> (i) by delivery to a responsible person at the body corporate's place of business or registered office; or
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> (ii) if it is not possible to serve the process in terms of subparagraph (i), by delivery to a director or to the secretary or public officer of the body corporate".

In light of the letter of 6 March 2018, I am satisfied that the first respondent was entitled to make the assumption that Mr Mutizamhepo was a director and/or responsible person who was still part of the applicant company. Consequently, the applicant has failed to explain its delay or show that the failure to enter appearance to defend was not a deliberate disdain for the Rules of this court.

I now proceed to consider whether the applicant has shown that it has a *bona fide* defence on the merits which has prospects of success. The liability of a person who receives an amount

erroneously deposited into its account to repay the bank was confirmed in *Absa Bank Ltd* v *Standard Bank of SA Ltd* 1998 (1) SA 242 (SCA). This case was decided on the principle of unjust enrichment. In this jurisdiction, in the case of *Zimbabwe Banking Corporation Ltd* v *Chibune* HH 67-04, this court also held that a customer who received payment on the basis of uncleared effects was liable to pay back the funds upon the cheque bouncing. The applicant has not pleaded that it was expecting funds into its account from another source, and assumed that it was entitled to the deposit. Its sole defence apparent from the papers before me is that the persons who dealt with the transaction were not authorized to do so. However, the applicant does not dispute that the amount for which the first respondent obtained judgment went into its account from where it was moved to its other account with the second respondent. Given the CR 14 in its possession and the letter of 6 March 2018 which had not been contradicted by any other correspondence from the applicant, on the basis of Sections 11 and 12 of the Companies Act, the first respondent was entitled to assume that the persons transacting on that account were authorized to do so. Put differently, there was nothing to put the first respondent on its guard that something was amiss. No *bona fide* defence is discernible from the papers before me. Indeed, there is no suggestion that any money went into the account of either Mr Mutizamhepo or Mr Mengxu. Crucially, the applicant does not deny the first respondent's averment that the money ended up in its account owing to an erroneous transfer. I am therefore satisfied that the applicant has not established the onus upon it to demonstrate that it has a bona fide defence, let alone one which carries prospects of success on the merits. Good and sufficient cause for me to exercise my discretion has not been shown.

In the result, I make the following order:

1. The application for rescission of judgment is dismissed.
2. The applicant shall pay the first respondent's costs.

Mufadza and Associates, applicant's legal practitioners
T Pfigu Legal Practitioners, first respondent's legal practitioners
Coghlan Welsh and Guest, second respondent's legal practitioners