(1) GOLDEN REEF MINING (PRIVATE) LIMITED
(2) FERBITT INVESTMENTS (PRIVATE) LIMITED
v
MNJIYA CONSULTING ENGINEERS (PTY) LIMITED

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & BHUNU JA
HARARE, MARCH 4, 2016

L Uriri, for the appellants
L Madhuku, for the respondent

MALABA DCJ: This is an appeal against the decision of the High Court dismissing an application for rescission of a default judgment. After hearing arguments on behalf of the parties, the Court dismissed the appeal with costs. It was indicated that reasons for the decision would follow in due course. These are they.

The appellants are companies incorporated in terms of the laws of Zimbabwe. The second appellant is a wholly owned subsidiary of the first appellant. The respondent is a company incorporated in terms of the laws of South Africa carrying on the business of mining in Zimbabwe.

In contemplation of a joint venture agreement in pursuit of mining and exportation of chrome, the respondent made an offer to the first appellant to acquire forty-percent of shares in the second appellant. The forty-percent share capital to be issued to the respondent was to be in recognition of US$400 000.00 which the respondent paid to the first

appellant as the sole shareholder of the second appellant. In other words the US$400 000.00 was the respondent's capital investment in the chrome mining project subject to a future joint venture agreement. The respondent also alleged that it contributed US$15 616.61 as working capital to the joint venture which amount was not challenged by the appellants. The agreement was signed on behalf of the parties on 11 March 2011.

On 26 June 2013, the second appellant and the respondent subsequently entered into a joint venture agreement to engage in chrome mining and export. The appellants were to mine and export unprocessed chrome to the respondent. The first appellant's mandate was to manage the joint venture company (second appellant) on a day to day basis. Certain chrome claims subject to the joint venture agreement were registered in the name of the first appellant and the first appellant was to transfer to the respondent all other mining rights relating to the chrome mining project by 31 December 2013.

Forty-percent shares existing in the second appellant were issued to the respondent. At the time of the signing of the joint venture agreement, a shareholders agreement to regulate the relationship and other related issues between the parties as shareholders of the second appellant was yet to be drawn up and signed by the parties.

Among the clauses in the joint venture agreement, there was one that required the parties to choose their *domicilium citandi et executandi.* The second appellant expressly chose 15 Harrow Avenue, Avondale, Harare, Zimbabwe as its *domicilium citandi et executandi*. The same address appeared on the face of the joint venture agreement which agreement bore the name of the first appellant.

The Government of Zimbabwe banned the export of un-processed chrome which circumstance undermined the purpose of the joint venture. The appellants could mine but not export un-processed chrome. Due to the ban on the export of un-processed chrome the respondent sought to reverse the joint venture agreement.

The respondent alleged that on 17 March 2014 its representatives held a meeting with those of the first appellant with the view of reaching agreement on the value of what the appellants owed it. On 24 April 2014, one EF Mugwagwa wrote to the first appellant on behalf of the respondent informing them of how much they owed. He informed the first appellant that the respondent expected to receive payment proposals.

On 20 May 2014, the first appellant represented by *Thomas Gono* wrote to the respondent acknowledging indebtedness to it in the sum of US$415 616.66. The appellants undertook to pay the money in instalments over a period of three years.

The first appellant failed to honour its undertaking. The respondent issued summons against the appellants in the High Court claiming payment of the sum of US$415 616.66 plus interest at the prescribed rate with effect from 1 May 2014 together with costs of suit on a legal practitioner and own client scale. The summons was served at 15 Harrow Avenue, Avondale, Harare which address the appellants had indicated on the joint venture agreement as the *domicilium citandi et excutandi*. The summons was served by the Sheriff by affixing it to an outer gate after an unsuccessful search. The appellants did not enter appearance to defend by the due date.

On 2 February 2015 default judgment in the amount claimed plus interest was entered against the appellants. On 27 February 2015, the Deputy Sheriff attached the first appellant's mining equipment. The appellants alleged that they got to know that default judgment had been entered against them on 27 February 2015. They made an application for rescission of judgment in terms of r 63 of the High Court Rules on 3 March 2015.

The appellants sought to have the default judgment rescinded alleging that they did not see the summons which was served at 15 Harrow Avenue, Avondale, Harare, the address they chose as their *domicilium citandi et executandi.* Their argument was that they carried on their business from 16 Kenilworth Road, Newlands, Harare. The argument was that the summons should have been served at that address and not at 15 Harrow Avenue, Avondale, Harare. The appellants further argued that the respondent's cause of action did not arise from the joint venture agreement hence service of summons on the second appellant at 15 Harrow Avenue, Avondale, Harare was not valid service. Lastly, the appellants argued that there had been no agreement to pay the respondent the sum of US$415 616.66 despite the first appellant's proposal in the letter dated 20 May 2014.

The issue before the court a *quo* was whether the appellant had shown good and sufficient cause for rescission of the default judgment.

In *Chihwayi Enterprises (Pvt) Ltd v Atish Investments (Pvt) Ltd* 2007(2) ZLR 89(S), SANDURA JA recalled that the requirement that there be good and sufficient cause to rescind judgment is a common law principle. Reliance was made on *Chetty v Law Society, Transvaal* 1985(2) SA 756(A) at 764-765C where it was said:

> "The appellant's claim for rescission of the judgment ….must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on

default of appearance, provided sufficient cause thereof has been shown. (See *De Wet & Ors v Western Bank* Ltd 1979(2)SA 1031(A) at 1042, and *Childerly Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163). The term 'sufficient cause' (or 'good cause') defies precise or comprehensive definition, for many and various factors to be considered. (See *Cairn's Executors v Gaarn 1912 AD 181 at 186 per INNES JA*). But it is clear that in principle and in the long-standing practice of our Courts two essential elements of 'sufficient cause' for rescission of a judgment by default are:

(i) That the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) That on the merits such party has a bona fide defence which, prima facie, carries some prospect of success. (*De Wet's case supra* at 1042; *PE Bosman Transport Works Committee and Ors v Piet Bosman Transport (Pty) Ltd* 1980(4) SA 794(A); *Smith N O and Anor; Smith N O v Brummer* 1954(3) SA 352(O) at 357-8)."

The court *a quo* considered whether or not there had been a reasonable explanation for the default, the *bona fides* of the application for rescission of judgment and whether or not there existed a *bona fide* defence on the merits should the court grant the application for rescission of the default judgment.

The learned judge found that the appellants had failed to give a reasonable and acceptable explanation for the default. He also found that there were no prospects of success on the merits. The application was dismissed with costs. The appellants appealed against the decision of the court a quo o the following grounds:

1. The learned judge in the court *a quo* erred in finding that the *domicilium citandi et executandi* in the joint venture agreement (JVA) applied to the dispute between the parties
2. Even if the JVA is applicable no proper service was effected as stipulated in paragraph 14.4.2 of the JVA
3. The learned judge in the court *a quo* erred by concluding that the appellants admitted liability

4. The learned judge in the court a *quo* erred by finding that the debt to the first respondent was due in light of the fact that the due date for the first year payment was not due
5. All in all the learned judge in the court *a quo* erred in finding that good and sufficient cause had not been established warranting the rescission of the default judgment.

Mr *Uriri* for the appellants premised his oral argument on the allegation that the appellants were not in wilful default. The test is whether or not good and sufficient cause to rescind a default judgment has been established. It is not whether or not there was wilful default.

In an application for rescission of default judgment, a court exercises a discretion. (*Smethwick Trading (Pvt) Ltd & Another v Rome Furniture Manufacturers (Pvt) Ltd* SC 51/15). It is trite that an appellate court will not interfere with the exercise of discretion by the lower court unless serious misdirection is shown. In *Barros & Another v Chimphonda* 1999(1) ZLR 58(SC) GUBBAY CJ said:

> "It is not enough that the appellate court thinks that it would have taken a different course from that of the trial court. It must appear that some error had been made in exercising the discretion, such as acting on a wrong principle, allowing extraneous or irrelevant considerations to affects it s decision, making mistakes of fact or not taking into account relevant considerations."

REASONABLE EXPLANATION FOR THE DELAY

It is common cause that the summons was served at 15 Harrow Avenue, Avondale, Harare. The appellants argued in the court a quo that they did not see the summons hence their default. To see whether or not there was proper service, regard must be had to the

clauses in the joint venture agreement which provided for either party's address for service. Clause 14 provided as follows:

> **"14. *DOMICILIUM CITANDI ET EXECUTANDI* AND JURISDICTION.**
> 14.1 Each party chooses the following physical address, postal address…as *domicilium citandi et executandi* for all purposes under this agreement whether in respect of court process, notices or other documents or communications of whatsoever nature, and in the event of change each party shall inform the company… annually at the annual general meeting of its chosen *domicilium citandi et executandi.*
> 14.1.1…
> 14.1.2 F1 Chooses: 15 Harrow Avenue
> Avondale
> Harare
> Zimbabwe
> 14. …
> 14.3 Any party may between annual general meetings by notice to all other Parties change the particulars of their chosen *domicilium citandi et executandi* to another physical address, postal address… provided that the change shall only become effective vis-à-vis the other Parties on the 7th day from the deemed receipt of the notice by the addressees.**" (my emphasis)**

The joint venture agreement stated in clear and unambiguous language that 15 Harrow Avenue, Avondale, Harare was the address chosen by the second appellant as the address for service for all purposes under the joint venture agreement and especially in respect of service of court process. No change of address to 16 Kenilworth Road, Newlands, Harare where the respondents allege summons should have been served was notified to the respondent in terms of clause 14 of the joint venture agreement. The appellants and the respondent were the parties to the joint venture agreement. The preamble to the offer agreement shows who the parties to the joint venture agreement were. The summons was served at the correct address.

In their heads of argument the appellants sought to invoke r 39(1)(d) of the High Court Rules which provides for service of process on corporate bodies. The appellants cannot invoke rules of court where they expressly provided for an address for service in the joint venture agreement. It is trite that the courts will uphold the principle of the sanctity of

contracts unless there are special circumstances justifying departure.(see *Edgars Stores Managers' Association v Edgars Stores Ltd* SC 103/04). In *casu,* there was nothing illegal about the clause providing for the address for service nor does the Court see anything *contra bonos mores* about the clause.

***BONA FIDES* OF THE DEFENCE ON THE MERITS**

In determining the question of the *bona fides* of the defence, the court *a quo* had to make a finding on the alleged admission of debt by the appellants.

The court *a quo* had regard to the letter of 20 May 2014 where the appellants' representative made proposals for the payment of the amount of money they acknowledged owing to the respondent. The letter reads:

> "Attention: Mr Mkhabele and Mr Mugwagwa,
>
> **RE: Ferbit Chrome Project: MCE Investment Repayment Plan-Draft Proposal.**
>
> I present to you, in good faith the following draft repayment plan of the investment of $415,616 made by MCE into Ferbit Chrome project. I must hasten to extend my company's sincerest apology in the dealing with the matter. It was due to unforeseen circumstances.
>
> The repayment plan below is guided by GRM's current unfavourable financial position which in turn is largely being influenced by the dire cash liquidity position in Zimbabwe…It is our hope that an improved economic climate and sound economic growth driven policies will assist Golden Reef Mining (Pvt) Ltd, attract funding that will enable it to repay your investment (MCE) quicker…
> At this moment in time, we propose a safe and realistic repayment spread over three years…
>
> ….GRM will strenuously continue to search for funds for the repayment plan. This is a priority matter that we would like resolved as quickly as possible…
> Signed".

The letter is a clear acknowledgment of debt. Mr *Uriri* for the appellants sought to argue that when the respondent paid for the forty-percent shares, it became a shareholder and hence asking for the US$400 000.00 back would amount to the respondent buying its own shares.

When the court asked for proof that the respondent owned the shares in the form of a share certificate, no such proof was produced. The respondent had paid money for no value. It was logical for the respondent to claim its money back. The appellants understood the situation as imposing an obligation to refund the money. The letter is a clear admission of liability. It goes on to propose a possible repayment plan. The only inference that can be drawn from the clear and unambiguous letter is that the appellants were binding themselves to pay the money. They could not have undertaken to pay money they did not believe the appellants owed.

Mr *Uriri* argued that the appellants had not read the letter as an acknowledgment of liability. The argument flies in the face of the letter written in clear and unambiguous language of an acknowledgement of debt. An acknowledgment of debt is not a matter of form. It is a matter of substance arrived at by interpretation of the document in which it is contained.

The appellants sought to argue that the first appellant should not be cited because it was not a party to the joint venture agreement. When the respondent offered to acquire shares in the second respondent, the preamble to the offer agreement read as follows:

> "**PREAMBLE**
> a. Whereas MCE (the respondent) and Golden Reef Mining (GRM) have been in negotiations for a possible joint venture in terms of which the parties would participate in the Chrome Project."

It must be emphasised that the offer agreement above was a build up to the joint venture agreement. The second appellant was cited as "a mining subsidiary" of the first appellant in that agreement. The offer was accepted by Thomas Gono in his capacity as chairman of the first appellant although the offer to acquire shares was for shares in the second appellant.

Although it was between the second appellant and the respondent, the joint venture agreement was on the letterhead of the first appellant. The joint venture agreement stated that the second appellant was a subsidiary of the first appellant. Clause 5.3.2 of the joint venture agreement further stated that the first appellant had the mandate to manage the "joint venture company" (which is the second appellant). The same address that was used by the first appellant on its letter head is the same address that the second appellant chose as its address for service in the joint venture agreement. The acknowledgment of debt was by the appellants. It was not by the second appellant only.

The appeal was without merit. It was for the above reasons that an order to the following effect was made:

"The appeal be and is hereby dismissed with costs".

GOWORA JA: I agree

BHUNU JA: I agree

Thompson, Stevenson & Associates, appellants' legal practitioners
Mundia & Mudhara, respondent's legal practitioners