

SENZIWANI SIKHOSANA  
and  
FUNGAI SIKHOSANA  
versus  
ACOL CHEMICAL HOLDINGS (PVT) LTD

HIGH COURT OF ZIMBABWE  
MAKONI J  
HARARE, 27 July 2017 & 20 September 2017

### **Opposed Roll**

Mr *Mpofu*, for the applicants  
Mr *T.S Manjengwa*, for the respondent

MAKONI J: The application before this court is one for rescission of default judgment.

The salient facts are as follows: The first and second applicants are directors of a company named Plastech Design (Pvt) Ltd. The respondent herein successfully sued Plastech Design (Pvt) Ltd for a debt due to the respondent in case number HC 13679/12. The debt was for an amount of US\$51 140.67. The respondent executed against Plastech Designs (Pvt) Ltd but they failed to recover the judgment debt. The respondent then sued the 1st and 2nd Applicants in their personal capacity for the US\$ 51 140.67 owed to the respondent by Plastech Design (Pvt) Ltd in case number HC 817/13.

The respondent alleged that the first and second applicants had conducted their business in a fraudulent and or reckless manner. Respondent further alleged that it was this conduct that led to Plastech Design (Pvt) Ltd incurring and failing to pay their debt to the respondent. The first and second applicants denied that they had been reckless and they employed the services of Messrs

Nyikadzino Simango and Associates in defending HC 817/13. The first and second applicants, through Messrs Nyikadzino Simango and Associates, entered an appearance to defend. They filed their pleas, PTC conference papers timeously and even attended the PTC meeting. By all indications the first and second applicants intended to defend the matter fully.

The respondent then the Plaintiff, had the matter set down for trial and the notice of set down was served on Messrs Nyikadzino Simango and Associates. The notice of set down clearly stated that the matter was to be heard on 12 September 2016. Messrs Nyikadzino Simango and Associates acknowledged receipt of the notice of set down on 15 August 2016, at 15:06 hours, in that their receptionist signed the notice of set down and affixed the date and time at which the notice of set down had been served on them.

On 25 August 2016 the respondent sent a Request For Further Particulars for the Purposes of Trial to the first and second applicant's legal practitioners. Again this Request For Further Particulars was dated and signed by Messrs Nyikadzino Simango and Associates' legal practitioner on 25 August 2016 at 15:36 hrs. From the record it appears Mr Simango, who was the legal practitioner representing the first and second applicants, did not respond to the request.

On September 2016 the trial was due to kick off however the first and second applicants and their legal practitioner Mr Simango failed to appear in court. Default judgment was thus entered in favour of the Respondent.

The first and second applicants aver that Mr Simango did not inform them that the matter had been set down. The applicants allege that they only became aware that the matter had been set down, heard, and default judgment entered against them on 6 February 2017 when the Sheriff tried to execute against their property. The present application for rescission of default judgment was then filed on 10 February 2017.

It is worth noting that no evidence was presented to show that execution was indeed attempted on 6 February 2017 save for the applicants' averments to that effect.

The applicants sought to fortify the present application by having Mr Simango depose to an affidavit stating that it was his fault that the parties had not been notified of the hearing date. Mr Simango appears to have been evasive and attempts by the applicants to meet with him were fruitless. Messrs Nyikadzino Simango and Associates' receptionist Daphine Kavhumbura eventually deposed to an affidavit which reads as follows:

1. I am the receptionist at Nyikadzino Simango and Associates, I submit that I received the Notice of Set Down under Case No. HC 8170/13 and erroneously misfiled same, hence did not diarise the matter. As a result of the misfiling and non-diarising of the matter, our Mr Simango did not attend Court hence the default.
2. I therefore sincerely apologise for the inconveniences caused.

In support of their application the applicants submitted that they were not in wilful default as their legal practitioner had not advised them of the court date. They stated that they had every intention to defend the matter, and indeed they were on track to so doing but for the negligence and unprofessional conduct of their legal practitioner. The applicants also submitted that the their application was being made *bona fides* and that *prima facie* the reason given for their default was acceptable for the purposes of this application.

Applicants also submitted that on the merits they had good prospects of success and as such they ought to be allowed to defend the matter. In particular the applicants argued that they had not acted in a manner that was fraudulent and reckless in conducting their business and that the fact that they signed and witnessed an agreement of sale between Plastech Designs (Pvt) Ltd and the respondent was not sufficient to impute personal liability.

The respondent raised a point *in limine* that the application for rescission of judgment was out of time as the applicants made the application some 6 months after default judgment granted. As such applicants should have made an application for condonation for the late filing before making their application for rescission of default judgment.

On the merits the respondent argued that the applicants must take responsibility for the actions, or the lack thereof, of their legal practitioner as the first and second applicants had chosen him to represent them. Respondents added that the affidavit by Daphine Kavhumbura was scant and it did not disclose a good enough reason to justify the applicants' default.

On the merits the respondent argued that the first and second applicants had no defence to the allegation that they had been conducting business in a fraudulent and reckless manner. The Respondent detailed the business history between themselves and Plastech Designs (Pvt) Ltd. They cited numerous undertakings made by Plastech Designs (Pvt) Ltd, under the direct control of the first and second applicant, to discharge their debt to the respondent which undertakings respondent

maintains Plastech Designs (Pvt) Ltd wilfully disregarded. Respondent argued that Plastech Designs (Pvt) Ltd, through the first and second respondent employed various means to avoid payment of the amount owed. Respondent alleges that Plastech Designs (Pvt) Ltd abused court process to delay having to pay their indebtedness and then began disposing of assets in order to avoid liability.

Respondent also argued that the first and second applicants incorporated another company, Senzpack (Pvt) Ltd in which first and second applicant have 50% shareholding each. Respondent alleged that the Applicants had transferred the business of Plastech Designs (Pvt) Ltd to the new company in a further attempt to strip Plastech Designs (Pvt) Ltd of assets so that Respondent could not recover what was due and owing to them. This, Respondent argued, this showed that the applicants were acting in a fraudulent and reckless manner.

### **THE ISSUE**

The issue before this court is whether or not rescission for default judgment should be granted. In this regard the court should look at whether or not:

- (a) There is a reasonable explanation for default;
- (b) There was wilful default;
- (c) The application is *bona fides*;
- (d) The defence has a reasonable prospect of success.

Before dealing with this question however, it is incumbent on this court to make a finding on the point *in limine* raised by the respondent.

### **POINT IN LIMINE**

The respondent raised a point *in limine* that the application for rescission of judgment was out of time as the applicants made the application some 6 months after default judgment granted. Respondent was of the view that the first and second applicant should have made an application for condonation for the late filing before making their application for rescission of default judgment.

Rule 63 of the High Court Rules 1971 sets the time frame within which an application of this nature can be made. Rule 63 reads as follows:

**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.

[Subrule amended by S.I. 43 of 1992]

...

(3) Unless an applicant for the setting aside of a judgment in terms of this rule proves to the contrary, **he shall be presumed to have had knowledge of the judgment within two days after the date thereof.** [My emphasis]

In the present matter the first and second applicants maintain that they became aware of the default judgment on 6 February 2017. The Affidavit by Daphine Kavhumbura was deposed to on 8 February 2017 and then the application for rescission was made on 10 February 2017. If the applicants' story is to be believed they made the application within 4 days of becoming aware of the default judgment.

Respondent argued that the applicants' version of events is not to be believed as no evidence was presented to support the applicants' submissions. The respondent highlighted the contents of r 63 (3) which creates a presumption that the applicants knew about the default judgment within 2 days of judgment being handed down. Respondent went on to state that the applicants failed to rebut this presumption as the applicants did not attach the notice from the Sheriff to show the date on which execution was attempted, nor did they have a supporting affidavit from the tenants who were present at the property on the day that the Sheriff was said to have attempted execution.

It is clear that the applicants' legal practitioner was not communicating updates in the case to the applicants. The applicant's position that they only became aware of the default judgment was when the Sheriff tried to execute seems plausible. How else were they to know? The question then is one of when did the Sheriff try to execute?

The respondent points out that there is a lack of evidence as to when the Sheriff attempted to execute. The respondent does not, however, say that the Sheriff actually attempted execution prior to the 6th of February 2017. Neither party produced documentation from the office of the Sheriff to show when execution was attempted. I would imagine that the respondents, having instructed the Sheriff, would have a return from the Sheriff showing when execution was attempted.

In light of the fact that no other plausible date has been presented as to when execution could have been attempted, I am inclined to accept the first and second Applicants' version of events; namely that they became aware of the default judgment on the 6th of February 2017. This

means that by filing the present application on the 10th of February 2017 the application was made in time.

In paragraph 13 of the respondent's affidavit the respondent made averments that they wrote a letter to the first and second applicants informing them of the default judgment. The letter referred to is said to have been attached as **Annexure J**. **Annexure J** however is dated 21 November 2016 addressed to the Sheriff not to the applicants. **Annexure J** is an instruction from the respondent's legal practitioner to the Sheriff advising the Sheriff to execute the default judgment. The applicants were not copied in the letter marked **Annexure J** nor was Mr Simango. Furthermore, the letter was not endorsed by the applicants or the gardener upon whom the Respondents allege service of the letter was effected. It may be that the Respondent attached the wrong letter as **Annexure J**.

Whatever the case may be, without the letter allegedly addressed to the applicants attached herein this court is not satisfied that the applicants were actually informed of the default judgment prior to 6 February 2017 by means of a letter.

In light of the above the point *in limine* is dismissed.  
I shall now proceed to the merits.

In terms of Rule 63 the court may set aside a judgment if there is good and sufficient cause to do so. Good and sufficient cause has been defined in a number of jurisdictions as:

- (i) A reasonable explanation for the default;
- (ii) Where there is a *bona fide* defence to the main claim.
- (iii) And where the application for rescission is itself *bona fide*.

See *G D Haulage (Pvt) Ltd v Mumurgwi Bus Services (Pvt) Ltd* 1979 RLR 447 (A), *Songore vs Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (HC); *Deweras Farm (Pvt) Ltd and Others vs Zimbabwe Banking Corporation* 1997 (2) ZLR 47 (HC) AND 1988 (ZLR) 368 (SC).

Particular attention must be paid to *Newman (Pvt) Ltd v Marks* 1980 (2) SA 170 (SR) in which the following is said:

“The true test, in my mind, is whether the default is a deliberate one i.e. when a defendant with full knowledge of the set down and of the risks attendant on his default freely takes a decision to refrain from appearance.”

See also *Zimbank v Masendeke* 1995 (2) SA ZLR 400 (S)

In the present matter the first and second applicants have provided a reasonable explanation for their default. The applicants were clearly not in wilful default as they were not informed of the court dates by their legal practitioners. Seeing that they did not know of the trial date they could not have possibly attended court on that date.

My finding that the first and second Applicant did not know is based on the affidavit by Daphine Kavhumbura to the effect that papers were misfiled and thus the matter was not diarised. I am in agreement with the respondent in that the reasons given by Messrs Nyikadzino Simango and Associates for being in default, namely the misfiling of papers is unsatisfactory. If indeed the Notice of Set Down had been misfiled Mr Simango ought to have been alerted to the fact that the matter had been set down when the respondents served a Request for Further Particulars for the Purposes of Trial on the on 25 August 2016. Mr Simango's conduct was unprofessional and negligent. Laying the blame at his receptionist's feet does not absolve Mr Simango of the fact that he is responsible for ensuring that his office functions efficiently and in a manner that upholds his duty to client and to this court. The fact remains, however, that the fault lies with the legal practitioner and not with the applicants.

The respondent argued that a litigant must be ready to suffer the consequences of their legal practitioners conduct good and bad as litigants freely chose who will represent them. In support of this position respondent cited *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (SC), *Bishi v Secretary for Education* 1989 (2) ZLR 240 (HC) and *Kombayi v Berkout* 1988 (1) ZLR 53 (SC). The *Bishi* and *Viking Woodwork (Pvt) Ltd* cases involved applications which were made out of time and after an inordinate delay on the part of the legal practitioner.

In *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 253 the case of *Saloojee & Anor NNO v Minister of Community Development* 1965 (2) SA 135 (A) 141B-E is quoted as follows:

"I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise, might have a disastrous effect upon the observance of the rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this

court, was due to negligence on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."

In *Bishi v Secretary for Education* 243 the abovementioned passage from *Saloojee* supra is quoted with the following observations being added by the late CHIDYAUSIKU CJ:

"In the present case the legal practitioners involved were aware of the *dies induciae*. For over a year and a half after *dies induciae* they did not launch F this application. The reason advanced for this delay is that Mr Mutzuris was too busy to attend to the application. In my view, to grant condonation in the circumstances of this case would be creating a dangerous precedent. It is easy for a legal practitioner to plead pressure of work to cover up for lack of diligence and negligence. In the present case, both legal practitioners exhibit G a clear disdain for the rules. I am satisfied that the explanation advanced for the inordinate delay in this case is insufficient."

In both cases the legal practitioners involved exhibited a clear disdain for the rules of court. That is the legal practitioners were aware of the need to file their applications timeously but then acted in clear disregard for the rules. In this instance it is would seem Mr Simango did not act knowingly when he defaulted. He was unaware of the dates on which the trial was to begin due to misfiling. The first and second applicant only became aware on 6 February 2017. After having complained about Mr Simango's conduct applicants were hasty in changing their legal practitioners and ensuring that the necessary applications were made speedily. The present matter can be distinguished from the above matters and I do not think it fit to visit the negligence of the legal practitioner on the first and second applicants in this instance.

It is clear from the papers that the first and second applicants intended to defend the matter to the end as they filed their papers all the way to the PTC stage. As such this court is of the finding that this application is being made *bona fides* and not in an attempt to abuse court process or to buy time.

The applicants made averments which averments leave this court with the view that the applicants have reasonable prospects of success.

In *Songore vs Olivine Industries (Pvt) Ltd* 1998 (2) ZLR 210 (S) 213 F the following is said:

“It is dangerous to generalize, and each case differs from others, but nonetheless I think it must be said that bald general allegations of fact may not be enough in every case to show *bona fide*”

I am satisfied that the applicants’ case has prospects of success and that said prospects have been illustrated in sufficient detail to go beyond merely being bold allegations of fact.

The respondent details transaction in which the applicants are alleged to have acted fraudulently and recklessly. These transactions were mainly in two types: the first type are the ones where the applicants allegedly incurred liability for Plastech Designs (Pvt) Ltd knowing that they could not/would not discharge said obligations, the second type are in that applicants disposed of assets in order to avoid having to pay Respondent.

In their defence the applicants raised the point, *inter alia*, that the recklessness and fraud alleged by the respondent is of a serious nature which the court will not take lightly. It is thus incumbent on the respondent to prove their allegations beyond bold allegations. The applicants also raised the defence that the assets disposed of belonged to the first and second applicant in their personal capacity and were bought by the first and second applicant using their personal funds; as such it cannot be said that Plastech Design (Pvt) Ltd deliberately off loaded assets to avoid liability.

All in all, upon reading the first and second applicants’ Founding and supporting affidavits, and upon reading their plea marked, as “**Annexure H**” of the respondent’s affidavit, I am satisfied that the first and second applicants have reasonable prospects of success and that the matter warrants a finding on the merits.

In view of the above, I find in favour of the first and second applicants and grant their application for rescission of default judgment.

In the result I make the following order:

1. The default Order granted on 12 September 2016 under case number HC 8170/13 be and is hereby set aside.
2. The Registrar be and is hereby ordered to reset down HC 8170/13 for trial on the Continuous Roll.
3. The respondent to pay the applicants’ costs.

*Venturas & Samukange*, applicants' legal practitioners  
*Wintertons*, respondent's legal practitioners