RUTENDO HOUSING CO-OPERATIVE
versus
AARON KUMANJA
and
KUDZAI KUMANJA
and
DENNIS RUKAWO
and
WILBERT RUKAWO
and
SHARON RUKAWO
and
VICTOR RUKAWO
and
BAZEL RUKAWO
and
PATIENCE RUKAWO
and
THE EXECUTOR OF THE ESTATE LATE FELIX RUKAWO N.O.
and
MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 10 & 23 November 2022

Opposed Application

P Tichaona, for the applicant
E Mubaiwa, for the 1st and 2nd respondents

TAGU J: This is a combined application for condonation for late noting an application for rescission of a default judgment and an application for rescission of a default judgment in terms of r 27 of the High Court Rules, 2021.

Background Facts

On 18 January 2020, first and second respondents filed summons together with a declaration under HC 281/20 claiming various reliefs from ten defendants. Upon being served

with the summons and declaration the applicant who was one of the defendants engaged Kanoti and Partners to defend the proceedings and they agreed subject to the condition that the applicant would pay for the fees immediately before filing of opposing papers to the summons and the declaration. At that time the applicant was in financial quagmire. Kanoti and Partners neglected or refused to enter appearance to defend and file the plea on the applicant's behalf due to non-payment of legal fees despite the applicant's undertaking to pay as the matter proceeds. Due to the complexity of the matter and its importance the applicant and other members failed to defend themselves resulting in the default judgment being granted against applicant on 25 March 2020 under the hand of Hon Justice CHINAMHORA. The applicant delayed for 14 months. Once they have been condoned, they seek the court to grant a rescission of the default judgment, hence the combined application.

The applications are opposed by the first and second respondents. Others did not file any papers despite being served with the application. They are automatically barred. Five points *in limine* were taken by the first and second respondents. These are:

1. That there is no prayer for extension of time,
2. That Applicant did not ask to file appearance to defend,
3. That there is no draft plea attached to the application,
4. That Applicant did not attach an affidavit from the lawyer it is blaming, and
5. That Applicant does not have *locus standi in judicio*.

No Prayer for Extension of Time

The first and second respondents submitted that applicant is out of time to file an application for rescission of default judgment. Beyond condonation it must ask for more time to file the same. Condonation will not give them more time hence the application should fail on this ground alone. The applicant opposed the point *in limine* and submitted that it lacks merit because the applicant filed a composite/combined application for condonation and rescission of default judgment. Hence there is no need to ask for extension of time because once condonation has been granted the court should proceed to determine the application for rescission of the default judgment. In support of its combine applications the applicant referred the court to the cases of ZACC v SC 11/21, *Environmental Management Agency and Director General, Environmental Management Agency* v *Angel Hill Mining Company (Pvt) Ltd* HH 706/21, and

Pauline Mandigo v *Tadzoka Paswarayi & Ors* HH 244/18. In the Environmental Management case (*supra*), the court dealt with a similar situation where an application for condonation and rescission of default judgement were combined. While admitting that there is no rule that allows the two to be combined, the court ruled that:

> "The application being a dual application. The justification of such an application is set out as for the convenience instead of making two applications one application would save both the court and litigant time and resources. The other reason is said to be to achieve justice between the parties without undue delays."

The court went on to accept the procedure. I accept the procedure adopted in this case. The case of *Pauline Mandigo* v *Tadzoka Paswarai* & Ors, (*supra*), the court also dealt with similar combined applications and granted the reliefs sought. Recently, the Supreme Court dealt with the same issue in a matter involving Zimbabwe Anti-Corruption Commission and granted the relief. For these reasons I find that there is nothing irregular about the procedure adopted by the applicant to combine the two applications.

Applicant did not ask to file Appearance to Defend

The first and second respondents submitted that default judgment was entered because applicant did not file appearance to defend. In the draft order the applicant is asking to file a plea within five days of the grant of the order. They said applicant asks for rescission but if granted, respondents can still apply for default judgment for failure to file appearance to defend. The brief submission by the applicant was that it is clear from the application that applicant intends to defend the summons case hence the present application. It said if the order is granted it has the net effect that applicant intends to defend the summons.

It is indeed correct that the reason for the application for rescission of a default judgment is to enable the applicant to defend the summons. The short coming in requesting to file an appearance to defend can be rectified by an amendment to the draft order to include a clause that the applicant to file its appearance to defend within the days permitted by the rules. Such a short come is not fatal to the application. See r 27 (1) and 27 (2) of the Rules of this Honourable Court.

There is no Draft Plea attached to the Application

The complaint by the two respondents is that when seeking condonation and rescission of default judgment, one must attach draft plea one intends to file. They said there is no way court

can decide the bona fide defence because the plea is not filed. They prayed that the application must fail.

In response the applicant submitted that once the Order is granted, next thing is to file a plea. It referred the court to r 27 of the High Court Rules. It said in an application for rescission of default judgment there is no need to file a plea. It argued further that the first and second respondents did not cite any authority that said a plea must be filed together with an application for rescission.

Rule 27 of the High Court Rules, 2021 provides that:

> "Court may set aside judgment given in default
> 27 (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 had knowledge of the judgment for the judgment to be set aside and thereafter the rules of court relating to the filing of opposition, heads of argument and the set down of opposed matters, if opposed, shall apply.
> (2) If the court is satisfied on an application in terms of subrule (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 the action, on such terms as to costs and otherwise as the court considers just."

Rule 27 of the Rules of this Honourable Court is very clear. The default judgment may be set aside and thereafter the rules of court relating to the filing of opposition and or appearance to defend, heads of argument and the set down of matters may then follow. The rule clearly gives the court power to give leave to the defendant to defend on such terms as to costs and otherwise as the court considers just. The rule does not say a plea has to be filed simultaneously with the application for rescission, although it may be necessary to assist the court on deciding on the prospects of success. The applicant therefore has a point that I accepted.

That applicant did not attach Affidavit from a Lawyer it blames

It was submitted that the applicant blames its lawyers for failure to comply with the rules. It was submitted further that the law requires that the lawyers should depose to an affidavit accompanying the application in which the lawyers must confess to their negligence and must ask for forgiveness. This the applicant did not do. See *Paul Gary Friendship* v *(1) Cargo Carriers Limited* (2) *Across Enterprises (Pvt) Ltd* SC 1/13 at 5 - 6:

> "The applicant did not attach any affidavit from his erstwhile legal practitioners to explain the default. Applicant from his mere allegation, there is nothing to demonstrate that the applicant sought an explanation for the default from his former legal practitioners. In a case such as the present where there is a history of consistent default on the part of a litigant and the legal practitioners

> are blamed for that default, it is necessary for the litigant to avail proof, preferably in writing, that it has demanded an explanation from the legal practitioners concerned …On his part the applicant has not shown what steps he took to protect his interests…The fact that the delay was just one week does not, on its own, assist the applicant. See *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) at 253F-H."

In this case the applicant referred the court to pages 44 to 45 of the record where there is an affidavit of *Tafara Shadreck*, applicant's erstwhile legal practitioner with Kanoti and Partners. The affidavit reads in part:

> "2. The applicant is a former client of our legal firm Kanot and Partners from which I took instructions to represent it in case No. HC 281/2020. At the time of taking instructions, the applicant only managed to pay consultation fee with the intention of paying a deposit for the handling of the matter at the time of filing the opposing papers.
> 3. At the time of filing the applicant pleaded financial deficit and the firm could not proceed to handle the applicant's matter.
> 4. Their offer to pay after work done was rejected leaving them with an option to defend the proceedings as self-actors which they failed to do."

This affidavit from the applicant's erstwhile legal practitioner is clear as to what caused the default. The legal practitioner explained why he did not enter appearance to defend on behalf of the applicant. While he did not blame himself but the applicant for failing to comply with the rules, it cannot be said that there is no affidavit from the blamed legal practitioner.

That Applicant did not have *Locus Standi in Judicio*

First and second respondents averred that the applicant lacks locus standi to institute the proceedings for the rescission of default judgment. They said the applicant has no direct and substantial interest in the subject matter of the dispute. Put differently, the applicant transferred immovable property to the third to eighth respondents and, it is there in the applicant divested all rights and interest in the immovable property. It was argued that as of 11 March 2019, the date on which the third to eighth respondents had real rights registered in their favour, the applicant ceased to have a right to sue in anything relative to the immovable property.

The applicant said it had locus standi to institute the proceedings as at the time of the demise of the Late Felix Rukawu title was vested in the applicant's name under Deed Number 2330/2007. It said when the title deed of the third to the eighth respondents was cancelled title should have reverted to the applicant and was in the name of the applicant and this is the reason why the applicant was cited as a part and the order that the first and second respondents sought was to transfer ownership from the applicant to the first and second respondents. If the title was

not vested in the applicant and that the applicant had no interest in the matter there was no reason why the applicant was cited and could be ordered to transfer title to the first and second respondents.

The applicant in this matter is Rutendo Housing Co-operative. The default judgment was issued in case HC 281/20. At page 21 of the record is the default judgment. Rutendo Housing Cooperative is cited as the eighth defendant. Paragraph 1 of the order declares the sale agreement between first, second, third, fourth, fifth and sixth defendants and the eighth defendant null and void. Paragraph four of the order directs the eight defendant to sign all papers necessary to effect transfer to the plaintiffs within seven days of the order. Paragraph five the applicant is ordered to pay costs. This shows that the applicant has a right to protect. For these reasons the applicant has the necessary *locus standi*.

On the Merits

This is a combined application for condonation and rescission of the default judgment. For the application for rescission of judgment to be dealt with the applicant has to overcome the first huddle of condonation. In order to grant an application for condonation there are some guide which a court which is seized with an application of the present nature is enjoined to consider in the exercise of its discretion to grant or refuse the application for condonation. The guide was aptly stated by MALABA JA (as he then was) in *Maheya* v *Independent African Church* SC 58/07. The learned judge stated as follows:

> "In considering applications for condonation of non-compliance with its rules, the court has a discretion which it has to exercise judicially in the sense that it has to consider all the factors and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed against the other are the degree of non-compliance; the explanation therefor, the prospects of success on appeal, the importance of the case, the avoidance of unnecessary delays on the administration of justice."

The respondent referred me to the case of *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (supra)*, when opposing the application foe condonation where the court said:

> "a). an application for condonation of the late filing of the application for rescission should be done as soon as a party realizes that he has not complied with the rules;
> b). a party who does not seek condonation as soon as possible, should give an acceptable explanation, not only for the delay in making the application for rescission, but also for the delay in seeking condonation."

In the present case the applicant knew that a default judgement had been entered against it on 25 March 2020. The applicant should have applied for rescission of the default judgment within 30 days of its knowledge of the same. In terms of the rules, it should have filed its application for rescission on or about 25 April 2020. It did not do so. It only filed this combined application on 18 January 2022, some 14 months later. The defence or the reason of the delay is given as "poverty". The applicant said it did not have money to pay its legal practitioners to enter appearance to defend or to mount the present application timeously. On para 16 of its founding affidavit the applicant said:

> "I reiterate that the applicant has a serious concern over this matter, however, the financial position of the applicant as outlined above and given the complexity of the matter could not defend the proceedings timeously and consistently. It can be argued that the explanation for the delay in seeking both rescission and condonation is plausible."

The delay of 14 months was said to be in ordinate by the first and second respondents. The respondents referred me to the case of *Michael David Moon* v *Lois Dyliss Moon* HB 94/02. In that case the delay was attributed to poverty. The court found that the explanation for the delay was not reasonable and acceptable and it refused to grant the application. The applicant further submitted that it has good prospects of success in the main matter. The respondents on the other hand submitted that the applicant does not have bright chances of success on the main matter. Given the explanation for the delay is unreasonable and unacceptable, the applicant enjoys no prospects of success on the main matter. For these reasons the application for condonation is dismissed. Having dismissed the application for condonation it follows that the applicant's application for rescission equally falls away.

IT IS ORDERED THAT:

1. The application is dismissed.
2. The applicant to pay costs on the ordinary scale.

Mudzonga and Kabasa, applicant's legal practitioners
Tendai Biti Law, first and second respondents' legal practitioners