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NATPHARM (PVT) LTD

Versus

ZEALOUS NYABADZA

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
6 July 2023 and 28 February 2024

Opposed application

O. Kondongwe for applicant
B.T. Mudhara for respondent

CHILIMBE J

BACKGROUND

[1] Respondent served as applicant's acting managing director between July 2020 and January 2021. During the period February and December 2021, he was arrested and prosecuted over matters arising in the course of duty. The charge was Criminal Abuse of Duty as a Public Officer in terms of Section 174(1) (b) of the Criminal Law, Codification and Reform Act [Chapter 9:23].

[2] Respondent was however acquitted of the charge in December 2021. He then approached applicant and sought compensation for legal fees and other expenses incurred during his criminal trial. His claim was based on indemnification provisions set out in applicant's articles of association. The relevant Article 54 provided as follows; -

“Every director, agent, auditor and other officer *for the time being in the employment of the company* shall be indemnified out of assets of the company against proceedings whether civil or criminal in which judgment is given in his favour or in which he or she is acquitted or in connection with any application under section 349 of the Act in which relief is granted to him or her by the court.”

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[3] Applicant declined respondent`s claim. Its position was that the respondent was no longer an employee of the company. As such, he was not entitled to receive the benefit.

THE DEFAULT JUDGMENT

[4] That rebuff induced respondent to institute action for the recovery of the expenses in question. Judgment was granted by this court in default on 15 March 2023. Applicant filed the present application on 23 March 2024. He now seeks an order setting aside the judgment entered against it in default. The application is opposed.

[5] I will refer to applicant and respondent as “Natpharm” and “Mr. Nyabadza” respectively. For completeness, I set out hereunder the order granted in default by this court on 15 March 2023; -

1. Defendant pay Plaintiff the sum of US\$16 728.00 being the Legal Fees incurred by Plaintiff. Defendant pay Plaintiff the sum of US\$4500.00 for mileage.
2. Defendant pay Plaintiff interest on the sums mentioned in paragraphs 1 and 2 above at the prescribed rate of interest calculated from 20 January 2022 to date of full payment.
3. Defendant pay Plaintiff's costs of this suit.

“GOOD AND SUFFICIENT CAUSE”

[6] Counsel from both sides were aligned on the principles governing an application of this nature¹. Naturally, there was a marked divergence on application and interpretation of the principles and authorities to the facts. But in essence, it was agreed that the law is well-settled. A party seeking to offset a judgment entered in default must demonstrate that there is

¹ The parties cited the following; -*Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210, *Bishi v Secretary for Education* 1989(2) ZLR 240 (HC); *Zimbabwe Banking Corp v Masendeke* 1995 (2) ZLR 400 (S). *Mdokwani v Shoniwa* 1992 (1) ZLR 269 (S) at 271; *Registrar General Elections v Morgan Tsvangirai* HH 142-03, among many others.

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good and sufficient cause to do so. In doing so, a party must show that it was not in wilful default, is *bona fides* in its quest and defence, and that he enjoys good prospects of success on the merits.

[7]. In carrying out the inquiry into “good and sufficient cause”, a court must evaluate the considerations collectively and balance each against the others. I will now advert to the facts as they relate to the applicable principles.

[8] As they say in ordinary parlance, the wheels came off when Natpharm`s legal practitioners failed to file the plea, bundle and summaries within 7 days of service of summons. This being the requirement prescribed by r 12 (1) and (2) of the High Court (Commercial Division) Rules SI 323/20 (the “Commercial Rules”).

[9] Summons were served on 19 October 2022. Natpharm entered appearance to defend on 25 October 2022. But it did not file its plea and related papers as required. The reasons stated for failure to do so form the crux of this matter. Nonetheless, Mr. Nyabadza applied for, and was awarded judgment in default on 15 March 2023.

[10] Between 26 October 2022 when summons were issued, and 23 March 2023 when judgment was taken, Natpharm and its legal practitioners took no action associated with this matter. Mr. Ivan Gibson Dumba, the managing director of Natpharm, explained this default as follows in paragraph 8 of his founding affidavit; -

“I am advised that Applicant’s Legal Practitioners were inadvertently ignorant of the requirement to simultaneously file the Plea with notice of appearance to defend. Applicant’s Legal Practitioners were of the view that after filing the notice of appearance to defend, they would be required to file their plea upon being served with a Notice to Plead as is the case under the High Court general rules.”

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[11] The legal practitioners concerned duly filed a supporting affidavit. Such being the approach recommended in *TFS Management Co (Pvt) Ltd v Graspak (Pvt) Ltd & Anor*, 2005 91) ZLR 333. In that decision, the court recognised the specialist -intermediary role of legal practitioners. It being a role deriving from the privileges of the office of legal practitioner. For that reason, it is often the case that only legal practitioners can shed light on why there was a breach of rules of court.

[12] In addition, the inquiry into “wilful default” primarily targets the litigant. Even where such litigant was represented by a legal practitioner. This court, in *Friendship v Dick* HH 128-13 per ZHOU J observed at page 3 that; -

“This is a case in which the applicant flagrantly disregarded the requirements of the rules. In such a case, particularly where there is no reasonable and acceptable explanation the indulgence of the court may be refused whatever the merits of the applicant’s case may be, even if the blame lies solely on the attorney as is alleged by the applicant.”

[13] Mr. Obert Kondongwe, the legal practitioner for Natpharm stated thus paragraph 4 of his supporting affidavit; -

“Unbeknown to me, the Plea out ought to have been filed simultaneously with the appearance to defend unlike the procedures set out in the High Court general rules. In the latter, the Defendant is usually served with a notice to plead and intention to bar before default judgment can be obtained. Even in this case, the record shows that there was an attempt by the Respondent to file the Notice to Plead and intention to bar though same was then never eventually filed and served upon us.”

[14] Mr Kondongwe went further. He (presumably it was him) found it fit to describe the above default in the following terms in paragraphs 2 and 3 of the heads of argument filed on behalf of Natpharm; -

“2. Applicant indeed takes the view that:

2.1 the fact that the Applicant failed to file its Plea in error which is explainable and reasonable ought to weigh in Applicant’s favour; and

2.2 Respondent is opposing this matter in bad faith and wants to unjustifiably cling on to a judgment obtained on a mere technicality.

2.3 the fact that the Applicant makes this application for rescission of default judgment, really means that to all intents and purposes, it wants to defend the matter.

2.4 Justice demands that the issues raised ought to be interrogated fully in a trial and that the applicant should not be shut out, as it were, on the technicality of default judgment.

3. It is submitted in this matter, that for the reasons that follow, the default judgment entered against the Applicant should be rescinded with costs on a higher scale.”

[15] Mr. Nyabadza was scathing in his rejection of the explanations tendered by Natpharm and their legal practitioner. He dismissed both (explanations) as puerile and “laughable”. A colourful epithet then followed to further express his low opinion of these attempt to justify Natpharm’ s failure to adhere to the rules of court.

[16] There is every justification for Mr. Nyabadza` s indignation. Especially when the subject of his scorn is considered against the legal practitioner` s further effrontery in the heads of argument. How could the failure to observe a most basic direction in the rules be waved dismissively away as “*explainable_and reasonable*”? How could an admitted case of “*inadvertent ignorance*” of a legal practitioner weigh in favour of an offending party during an application for rescission of judgment?_

[17] The submissions by counsel to that effect were ill-advised. Counsel had inexcusably misread the very simplest of the rules of court -r 12 (1) and (2). The rules demanded little of

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him; -to undertake a basic step in defence of his client`s claim. To file a plea and attach the required bundles and summaries.

[18] Not only did he fail to do so within the required seven (7) days, he went for an inexplicably lengthy period of four months without realising the breach. It must be remembered that the court draws comfort from the presumption that all legal practitioners remain its worthy and honourable officers. (See *M.B. Ziko (Pvt) Ltd and Manase and Manase Legal Practitioners v Cestaron Investments (Pvt) Ltd & Anor* SC 68-07.)

[19] I do however note, that counsel did make a clean breast of his dereliction in the supporting affidavit. He nonetheless risked blighting this initial compunction by the subsequent attempts to downplay and become sole judge of his error. I further take note that as stated, wilful default is a matter primarily ascribed to the litigant. The above excerpt in *Friendship v Dick* confirms so.

[20] The question becomes; -can Natpharm escape the transgressions of its legal practitioners? The extent of dereliction must be recognised. A survey of the authorities suggests that courts will not excuse a party where it was complicit and or where the infraction by the legal practitioners was flagrant. ZHOU J made a survey of the authorities and opined thus at page 3 in *Friendship v Dick*; -

“This is a case in which the applicant flagrantly disregarded the requirements of the rules. In such a case, particularly where there is no reasonable and acceptable explanation the indulgence of the court may be refused whatever the merits of the applicant`s case may be, even if the blame lies solely on the attorney as is alleged by the applicant. *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd supra at 254D; Tshivhase Royal Council & Anor v Tshivhase & Anor, Tshivhase & Anor v Tshivhase & Anor 1992 (4) SA 852(A) at 859E-F.*”

[21] Herein the breach, as noted, was most extreme. There are, however some redeeming factors. To begin with, there has been no direct attack of on Natpharm. It was neither

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complicit nor derelict. The fault is squarely placed on the legal practitioner. The legal practitioners moved promptly to remedy the position after judgment in default was taken. Both attorney and client, despite attempts to minimise their mistake, admitted their error. I believe herein, that the client must be granted a reprieve from the aberrations of its attorney.

BONA FIDES OF APPLICATION, DEFENCE AND PROSPECTS

[22] I now address the issue of *bona fides* of the application. In *The Registrar General of Elections v Morgan Tsvangirai* (supra), CHINHENGO J stated as follows [page 10], in describing the *bona fides* (or absence thereof) of a defence or application; -

“The second requirement for the rescission of an order or judgment granted in default is that the application for rescission must be *bona fide*, that is to say, it must not be intended to delay the claim by the other party. The various applications to which I have referred bring into question the application's *bona fides*. These are the decisions of this court in Cases Numbers HC 8225/2002; HC 8657/2002; HC 9021/2002 and later HC 10273/2002. The failure to comply with the interim order indicates an initial unwillingness to comply with the terms of the provisional order. I do not think that I need to say more about the application's *bona fides*.”

[23] The learned judge`s observations accurately record the lack of sincerity on the part of the applicant in that matter. Herein, I find no cause to doubt Natpharm` s earnest intention to defend itself against Mr. Nyakudya. This is so despite vehement suggestions to the contrary from Mr. Nyabadza. His position is understandable. He feels badly undone by Natpharm. Not only did they in his view, cause his arrest and refuse to compensate him, they proceeded to dismiss him unfairly from his post.

[24] The relationship between the parties appears to have soured considerably. In that respect, the cause of Mr. Nyakudya` s misgivings is identifiable. But the veracity of such in as far as they relate to present application have not been demonstrated. Apart from the

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parties` entrenched and polarised positions regarding the main matter, I detect no *mala fides* in Natpharm` s prosecution of this matter. Accordingly, I am satisfied that the application has been mounted with the legitimate intent to defend a cause.

[25] In the same vein, I have had regard to the primary claim and defence. Mr. Nyakudya insists that he was entitled to indemnity in terms of Article 54 of Natpharm` s Articles of Association.

[26] Natpharm` s simple defence is that the part “*for the time being in the employment of the company*” disqualified Mr. Nyakudya. He had been dismissed from employment. That position sustained notwithstanding Mr. Nyakudya` s contestation to the contrary. His status as a dismissed employee was sealed. The law itself said so per the Supreme Court` s guidance in *Ambali v Bata Shoe Company Limited* 1999 (1) ZLR 417(S).

[27] It is common cause that Natpharm took steps to terminate Mr. Nyabadza` s contract of employment. It is also common cause that Mr. Nyabadza` s contested such termination. In his letter (addressed to Natpharm) dated 16 February 2021 claiming indemnification, Mr. Nyabadza signed off as “*Mr. Nyabadza-Former A/MD, A/Operations Manager and Head ICT*”.

[28] It is clear that the resolution of the primary dispute is likely to turn on Article 54. And Article 54` s nub relates to Mr.Nyabadza` s status as an employee. This position renders as plausible, Natpharm` s claim that it enjoys prospects of success should it manage to disprove applicant` s status as a dismissed employee.

[29] Natpharm also challenged Mr. Nyakudya` s claim for legal fees. Mr. *Kondongwe* cited the case of *Kanto & Immerman v Chombo* 1999 (1) ZLR 300 (H) in support. That decision, in my view does not take Natpharm` s case far. It dealt with a quarrel over legal fees between a legal practitioner and its client. That is not the case herein.

DISPOSITION

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[30] The court is obliged in applications of this nature to set its judgment aside only if there is good and sufficient cause. A cumulative consideration of the relevant factors shows that Natpharm's legal practitioners were clearly derelict. To the extent that they failed to file the plea, and having failed to do so, further failed to remedy the position until several months had elapsed.

[31] But as noted, Natpharm is deserving of the court's clemency. Especially when its position is viewed against a legitimate intention to defend the suit brought against it. And a suit in which it appears to enjoy decent prospects of success. It is therefore entitled to the relief sought. But the court must express its displeasure with the dereliction leading to the breach of its rules. For that reason, costs will not follow the successful party.

Accordingly, it is ordered that; -

1. The application for rescission of judgment be and is hereby granted.
2. The default judgment entered by this court on 15 March 2023 in case number HCHC 336/23 be and is hereby set aside.
3. Applicant to pay the costs of suit.

Dube, Manikai & Hwacha-applicant's legal practitioners

Mundia & Mudhara -respondent's legal practitioners

[CHILIMBE J_____28/2/24]

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