RODOX (PVT) LTD
and
RODNET (PRIVATE) LIMITED
and
AGRID MUCHENJE
and
RODNEY N. DANGAREMBIZI
and
TAURAI MUFARO CHIPAMAUNGA
versus
CBZ BANK LIMITED

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 14 September 2018 & 15 September 2021

Court Application – Rescission of judgment.

B. Ngwenya, for the applicants
T. Biti, for the respondent

CHITAPI J: This is an application for rescission of two default judgments granted in favour of the respondent in case numbers HC11700/16 and HC 11701/16 respectively on 24 April, 2017 against the applicants jointly and severally the one paying the other to be absolved for payment of the sums of US$1 232 672 and US$2 070 908.03. The judgments ordered payment of interest and costs on the amounts of the judgment. Further, in case number HC 11700/16 an immovable property called stand 896 Glen Lorne Township of 23 Lot BC Kambanyi held under Deed of Transfer number 492/2009 by one Rodney Ndangariro Chiteme (2nd Defendant in that case) was declared specially executable to satisfy the judgment order.

The background to the application was succinctly set out in the respondent's opposing affidavit in paragraphs 5 and 6 as follows:

> "5. I confirm that in both instances, the Applicants had through respective offer letter borrowed monies from the judgment creditor (the respondent herein – own

clarification). I attach hereto marked annexure B1 and B2; the respective offer letters in respect of both Case No. HC 11700/16 and HC 11701/16.

6. The judgments were obtained, pursuant to summons having been issued on 16 November, 2016, appearance having been entered on the 27th February, 2017 in both instances and a Notice to Select and Intention to Bar having been issued on the 10th of March, 2017 with no plea being filed and a chamber application having been made on 6 April, 2017."

In a nutshell, the applicants did not file their pleas or defence in the two cases and were barred. Judgments were therefore granted against them in default of plea. The two judgments have led to this application in that the applicants want the court to rescind its two judgments aforesaid.

Consequent on the filing of a joint application for rescission of the two judgments, the respondent took a point *in limine* that it was "Incompetent for two different sets of litigants in two different matters to seek rescind two separate judgments." The respondent did not develop the point further in regard to why it contended that it was improper to file the hybrid application. The applicants in their reply averred that the applicants shared a common identity in that they were common directors in the same companies against whom judgments were granted and that both them and the companies were judgment debtors with the respondent being the same. The applicants averred that the cause of action was the same in that what was being sought was a rescission of the default judgments granted against the same applicant in favour of the common respondent. The applicants argued that it was not only convenient to deal with the matters as one but that such a course would be cost effective and save the court and parties time.

The Respondent was the first to file heads of argument on 10 July, 2018 and the Applicant filed theirs on 12 July, 2018. The point *in limine* was not persisted with in the heads of argument or at the hearing. I will note in passing that the point *in limine* had no substance. The respondent did not allege let alone establish that the joinder of the two applications would

embarrass or prejudice it in the conduct of its defence to the combined application. In terms of Order 13 r 85, the scope for a joinder of parties and actions is very wide. It is competent to join causes of action where common questions of law or fact would arise in the individual causes were they to be individually determined. Additionally, the rights to the relief sought be they joint severally or in the alternative arise from or are in connection with the same transaction or senses of transactions. In *casu*, the applicants are the same and so are the respondent. There is a common or united cause of action. It is proper that the courts' jurisdiction should be exercised in respect of both cases at one sitting in terms of r 87, a misjoinder or non-joinder of parties or causes of action do not defeat the case before the court. The court has a discretion to determine the case as between the parties present in the case of a non-joinder or to order a separation of the cases in the event that there is a misjoinder which may embarrass the other party, may delay the determination of the case before the court or will otherwise result in an inconvenience. The circumstances of these applications typified an instance where a joiner was most suited.

The law on rescission of judgment applications made under r 63 of the High Court 1921 is that the court upon the applicant satisfying it that there is good and sufficient cause to do so, is given discretion to set aside a judgment granted in default and in the case of the applicant being the plaintiff, grant such plaintiff leave to prosecute his action, and in the case of the applicant being the defendant grant such defendant leave to defend the claim against him or her. In the case of *Deweras Farm (PVT) Ltd & Ors* v *Zimbabwe Banking Corporation Ltd*, 1998 (1) ZLR 368(s) MCNALLY JA Stated at 36-370 that:

> "The High Court rules require "Only good and sufficient cause" as the basis of rescission of judgment. This gives the court a wide discretion and it is not possible to provide an exhaustive definition of what constitutes sufficient cause to justify the grant of indulgence."

As I understand the above dicta, what the learned judge intended to convey was simply that, the granting or refusal of the indulgence of rescission of a default judgment under r 63 is informed upon a consideration of the circumstances of each case.

The parties herein are agreed upon a consideration of their heads of argument that generally, the court that determines a rescission of default judgment application considers firstly whether or not the applicants' default was wilful. Secondly if the default was not wilful, the applicant must demonstrate that he or she has good prospects of success on the merits of the matter in which default judgment was granted.

In relation to determining whether or not the applicant was in wilful default, it was stated in the case *Zimbank* v *Masendeke* 1995(2) ZLR 400(S) at 402, thus –

> "Wilful default occurs when a party, with full knowledge of the service or settlement of the matter, and of the risk attendant upon default, freely takes a decision to refrain from appearing."

The question then becomes whether or not the applicants in the full knowledge that they were required to file pleas and the consequences of failing to do so, deliberately refrained from filing the pleas.

In *casu,* the applicants were required to file their pleas within the extended period of five days given in the notice of intention's to bar which was issued on 10 March 2017. A default judgment was applied for on 6 April 2017 and was granted on 24 April 2017. This application was filed on 6 June. 2018, a period of fourteen months having lapsed from the date of judgment to the date of filing the application. The applicants did not heed the notice of intention to bar. They did not answer it either by filing their answers to the claim as required nor by communicating their position that they considered the filing of a plea unnecessary in view of what they perceived as the settlement of the matter. In para 15 of the founding affidavit, the applicants averred as follows-

> "15. The applicants believed that since the debt had been taken over by a third party, and they had accepted such, there was no longer need for liquidation (sic) to continue between them and the respondent."

The fact that without prejudice negotiations will be taking place between litigants who have a pending case, does not suspend the need for the parties to comply with rules of court unless the parties have consented to a moratorium of the litigation. In this case, the applicants did not show that the respondents undertook to nor stayed further proceedings. Parties to litigation must therefore always keep in mind that side negotiations do not affect compliance with rules in as much as the negotiations will not be part of the litigations steps. – There was nothing to stop the applicants from filing a plea wherein they would have pleaded compromise or transaction to the effect that the respondent no longer had *locus standi* by reason of its cession of the debt to a third party, ZAMCO.

The applicant seeks to lay blame on their erstwhile legal practitioners for not filing the plea. They alleged in paragraph 10 of the founding affidavit that their efforts to obtain explanatory affidavits from their then legal practitioners, to explain the default have not yielded any joy. – There was nothing attached to the founding affidavit to evidence any communication between the applicants and their legal practitioner in regard to a request for the legal practitioner to depose to affidavits to explain the default. The applicants did not state the steps which they took to obtain the explanatory applicants from their erstwhile legal practitioners. It was also not reasonable for the applicants to consider the litigation as having been closed without a notice of withdrawal having been filed nor a deed of settlement or consent order having been filed. Litigation is ended by delivery of a judgment, a withdrawal or consent order. It cannot be ended by partied simply assuming that because they have reached their private settlement done outside of the court process, such settlement amounts to the termination of legal process.

The above described ill-advised conduct of the applicants' aside, it is not disputed that their applicants engaged the respondent over settlement of the debt through cession of the same ZAMCO which would became the new creditors, albeit the respondent remaining as the collecting bank. The fact that the applicants did not simply ignore the respondents offer to have the debt transferred to ZAMCO has persuaded me to give the applicants the benefit of their *bona fides* to conclude the litigation by agreement as inconsistent with a finding of wilful default. I therefore determine that the applicants were not in wilful default.

The next consideration is whether the applicants have prospects of success in the sense that they have a *bona fide* defence. The applicants pleaded that the cession of the debt to ZAMCO created a new contract with ZAMCO which effectively removed the applicants from indebtedness to the respondent. That being the case, the respondent ceased to have a cause of action against the applicant. In response, the respondent averred that no *transactio* or compromise was concluded by the parties. The applicants attached copies of relevant correspondence in this regard as follows:

a) Letters from the respondent to the Directors of the 1st and 2nd applicants dated 2 March 2017. The letters were in similar wording except in regard to amounts of debt which in the case of the 1st applicant was US$1 232 977.92 and in the case of the 2nd applicant was US$2 253 489.96. The content of the letters read as follows in material part.

> "We bring to your attention that your debt currently managed by Recoveries and Collection Department was recently acquired by ZAMCO. To this end, your account balance with the bank was zerorised. We hasten to remind you that you still have an obligation to pay the entire debt over an extended period at favourable interest rate.
> We therefore invite you to come forward to our offices at your earliest convenience to formalise this transaction. Failure to formalise this debt transfer will mean you are not interested in accepting this offer. Under the circumstances, the bank will proceed with legal action to recover the outstanding debt.
>
> We look forward to your response shortly.

Yours faithfully

Thomas Gambiza
Head:- Recoveries & Collections"

b) Letters dated 12 June, 2017 in similar wording by the Directors of the 1st and 2nd applicants, except for the amounts which were indicated as in the letters from the respondent. They read as follows in material part

> "We acknowledge receipt of your letter of 02 March, 2017 on the captioned matter and hereby accept your offer for the debt transfer as well as entering into a repayment arrangement with ZAMCO.
>
> In that regard we will be contacting you in due course for a suitable appointment when we can formalise a repayment plan."

It was common cause between the parties then that the offer which the 1st and 2nd applicants accepted would only become of force and effect upon formalization of the debt acquisition by ZAMCO. The letter by the respondents was clear that a failure to formalize the debt transfer would imply that the arrangement was not acceptable to the 1st and 2nd applicant. It was also made clear that in such a situation the respondent would proceed with legal action to recover the amount of debts. The respondent proceeded to do so.

The applicants have deliberately misstated the facts. They stated in paragraph 15 and 16 of their founding affidavit as follows:

> "15. The applicant believed that since the debt had been taken over by a third party and they had accepted such; there was no longer need for liquidation (sic) to continue between them and the respondent.
>
> 16. The Respondent is no longer owed by the Applicants. If any person has a claim, that will be ZAMCO. This position is still prevailing as at 1st June, 2018. – see Annexure 1 and 2 hereto being the two bank statement dated 1 June 2018 which shows that the debts were transferred to ZAMCO."

Further the applicants stated as follows in paragraphs 22 and 23 of the founding affidavits:-

> "22. As of today; the 1st and 2nd applicants have no debt due to the Respondent. In the event that the Respondent insists that its default orders should stand, they cannot be enforced as they have been fully satisfied by the transfer of rights by the Respondents to ZAMCO.
>
> 23. The new development in the relationship of the parties as debtors and creditors occurred after the issuance of summons and as such, the summons was now a legal nullity as the debtor – creditor relationship had ceased."

The respondent's response was clearly set out in paragraph 26, 27 and 28 of the opposing affidavit as follows:

> "26. Indeed I wrote the letter of 2 March, 2017 that the applicants refer to that letter was merely an invitation on the respondents to come and negotiate.
>
> 27. The way it works is that when ZAMCO indicated that they can tale over a debt, the debtors have to come to the bank to negotiate a payment plan. Once ZAMCO accepts the payment plan, the takeover is complete.
>
> 28. I need to state that once we wrote that letter, the applicants did nothing, they did not come to the bank to negotiate a payment plan. They have not paid anything since our letter of the 2nd March, 2017."

The respondent further averred that on account of the applicants' failure to negotiate with the respondent on a payment plan that would then be presented to ZAMCO for approval, where after the Respondent and ZAMCO would formalize the debt take over, the debt was not taken over.

The applicants in their responses to the Respondent's offer that the debt be taken over by ZAMCO clearly indicated that they would contact the respondent "in due course for a suitable appointment wherein we can formalize a repayment plant". The respondent's letter to the applicants was also clear on the need to formalize the debt transfer and the consequences of a failure to formalize the transfer. The letter states:-

> " …. Failure to formalize this debt transfer will mean you are not interested in accepting this offer. Under the circumstances, the bank will proceed with legal action to recover the outstanding debt."

The applicants did not formalize the debt as required. They instead make an untenable argument as set out in para 7.3 of the answering affidavit that the

> "Absence of a payment plan did not clothe the Respondent with rights that it had ceded to a third party. The third party of its agent could lawfully sue. In this case, this is no proof of agency by the Respondent and the summons was not amended to rescind (sic) to reflect the new and prevailing position."

The applicants deliberately did not relate to the clear terms of the offer which they accepted as set out in the letter from the Respondent. The debt transfer was conditional upon the applicants and the respondent formalizing a payment plan. The applicant did not explain why they did not contact the respondent to formalize he payment plan as they had promised to do. Once the condition *sine qua non* of formalizing a payment plan was unsatisfied the proposed debt take over was not completed.

The respondent averred that the applicant have not made any payment on the debt. The applicants did not dispute this fact. The failure to pay anything in my view is an indication of the applicants' lack of *bona fides*. They have conveniently scuttled the issue of payment which is the real issue between the parties. The situation would have been understandable had they shown that they engaged ZAMCO and were paying on the debt. The intended defence which the applicants propose to put forward if rescission is granted amounts to a plea in *terrorum* to a valid claim in which the amounts owed are not disputed but for the payee or identity of the creditor. In this regard the clear evidence is that there was no formalization of the debt takeover by ZAMCO. The applicants have not provided evidence of their purported debtor and creditor arrangement with ZAMCO under the debt take over. The applicants' claim that their bank statements were zerrorised is hardly proof that the process of takeover was complete. At best, it was part of the debt takeover process which did not materialise for failure by the applicant to complete the process.

Under the circumstance the applicants have failed to demonstrates sufficient cause for the court to indulge them with an order for rescission of default judgment. Their intended defence is untenable and has no prospect of success.

In relation to costs, the respondent has in para 41 of the opposing affidavit asked the court to dismiss the application with costs calculated on the scale of "Attorney and client scale". This scale of costs is punitive. It constitutes a special order of costs and is an exception to the norm. The norm can be expressed as that costs are in the discretion of the court. In the exercise of such discretion, the generally acceptable principle is that the successful party is entitled to his or her costs on the court or ordinary tariff. When the tariff must be departed from, the party claiming punitive costs must specifically plead justification for the court to depart from the norm and punish the losing party with such costs. The respondent did not plead the special circumstances which should persuade me to order punitive costs against the applicants. Costs will therefore be ordered on the ordinary scale.

DISPOSITION.

The applicants having failed to demonstrate good and sufficient cause to warrant the granting of an order of rescission of judgment,

It is ordered that the application for rescission of default judgments granted in case numbers HC 11700/16 and HC 11701/16 on 24 April 2017 is dismissed with costs.

Chinawa Law Chambers – Applicants' legal representatives
Tendai Biti Law – Respondent's legal representatives