ALPHA MOYO MAPHENDUKA

VERSUS

JONATHAN MAPHENDUKA

and

ASSISTANT MASTER, HIGH COURT, BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 12 JUNE 2013 AND 27 JUNE 2013

Mr *Sibanda* for the applicant
Mr *Moyo* for the 1st respondent

Opposed Application

CHEDA J: This is an application for condonation for failure to timeously apply for rescission of a judgment in case No. HC 915/05, Xref No. HC 663/05.

This application is on the basis of a judgment granted by this court on the 29th February 2005 and that order is couched as follows:

"In chambers

WHEREUPON, after reading documents filed of record,

IT IS ORDERED THAT:

1. Stand 48498 Mpopoma, Bulawayo is hereby declared to be part of the estate late Sicolani Moyo.
2. First respondent be and is hereby ordered to take all necessary steps to transfer stand 48498 Mpopoma, Bulawyo to Estate late Sicolani Moyo or its nominee within seven (7) days of being served with this order, failing which the Deputy Sheriff for Bulawayo be and is hereby authorised and directed to take all such necessary steps.
3. First defendant shall pay the costs of suit."

The brief historical background of this matter is that according to respondent and the records at the Bulawayo City Council (Mpopoma Housing Office) confirm this, that, the late Sicolani Moyo (hereinafter referred to as ("Sicolani") bought a property which is now subject of dispute. Sicolani was respondent's brother. The property was first registered under one Jabulani Mbulawa Masuku and was later transferred to respondent. Respondent later surrendered the said property to the late Sicolani as he had then bought his own house. The property was subsequently transferred to applicant who is Sicolani's nephew. This fact was known by all relatives. The said property was at the relevant period being held by respondent and applicant as nominees, although applicant now disputes this. Sicolani continued to collect rent from the said property. It is his contention that she always regarded the property as hers. After the death of Sicolani, applicant claimed the property as he averred that it was donated to her by the late Sicolani, her aunt.

Under case No. 663/05, first Respondent applied for and obtained an order compelling applicant to transfer the said property to either the estate of Sicolani or her nominee within seven days. Applicant did not do so.

He now applies for the rescission of the said judgment. The basis of the said application is that, his erstwhile legal practitioners, Messrs Advocate *S.K.M Sibanda and partners* failed to act timeously, which was contrary to his instructions. It is a fact that applicant did not act on this matter for seven years from the time of the issuance of the order.

The question which falls for determination is whether or not applicant's failure to comply with rules of the court are reasonable. It is his argument that he failed to lodge the application for rescission because he did not have funds to engage a legal practitioner. This according to him was the case for seven years.

These courts indeed sympathise with litigants who are desirous to have their rights determined in court. However, they are guidelines which they follow in the determination thereof. Amongst these guidelines, are that the court should examine the reasons for non-compliance, the length of the delay and defendant's defence.

Applicant blames his erstwhile legal practitioners for failure to timeoulsy file this application. What is curious, however, is that he did not file an affidavit from the said legal practitioners confirming his assertion or at least corroborating the said position. The common English adage that, *he who asserts must prove* holds sway in this regard.

A party seeking to set aside a judgment must give a reasonable explanation for its default which is commonly referred to as a good and sufficient cause. Applicant has a heavy onus in justifying the rescission of such judgment. In *casu* where neither an affidavit from the supposedly culpable legal practitioner nor an explanation for the non-availability of such affidavit the court can not escape the conclusion that applicant either deliberately or negligently failed to comply with the rules. In this instance the legal practitioner is being accused of gross negligence of his duty which is a brazen violation of the court rules. He should, therefore, have been given an opportunity to redeem himself of his alleged misconduct. In *Cobra and The Wild Cat (Pvt) Ltd v Tundu Distributions (Pvt) Ltd* 1990 (1) ZLR 133 (HC) at 135G -136A MTAMBANENGWE J ably stated;

> "Where, as is implied in applicant's affidavits in this case, the allegation is made which amounts to charging a legal practitioner of gross dereliction of duty, and a flagrant violation of this Court's rules it is my view that it is incumbent upon the applicant to afford the legal practitioner involved an opportunity to condemn himself, if that be the case, from his own mouth; he should be asked to swear an affidavit as to the facts for which he is being blamed. Failure to do so on the part of the applicant, particularly after his attention has been drawn to the need to do so, as in this case, must inevitably lead the court to draw the necessary inference that the applicant is not being truthful."

The same principle was applied in *Grant v Plumbers (Pvt)* Ltd 1949 (2) SA 470 (0) and *Muller v Braes* s51/86 (not reported).

In my view a litigant who blames the failure of the prosecution of his/her matter on his legal practitioner should buttress his blame by obtaining an affidavit from the said legal practitioner acknowledging

his culpability. Failure to do so, in my view should lead the court into concluding that there are no *bona fides* in his/her application. It is only reasonable to corroborate one's assertion where there is a need to.

I find that the explanation for his failure to apply for condonation is unreasonable in the circumstances. A delay of 7 years, in the absence of a reasonable explanation is inexcusable.

Further, his defence on the merits of the case carry no prospects of success at all in light of the historical background of the matter taken in totality with his reasons for the delay in applying for rescission. There are no prospects of success at all, see *Independence Mining (Private) Ltd v Alice Soko* SC 188/93.

Applicant has failed to discharge the onus placed on him regarding his failure to comply with the rules. Such failure, therefore, no doubt makes the conclusion of wilfulness unavoidable.

The application accordingly fails.

Another factor which should be taken into account is the strength of applicant's defence. According to the documents filed of record, it is my view that applicant's argument is not convincing. My conclusion is grounded on his inaction for seven years. He was employed and had always had a legal practitioner who for some unknown reasons decided to abandon him midstream. Both his conduct and that of his legal practitioner is suspicious and far from convincing.

I am not convinced that applicant has made a good case to upset a judgment granted on the 29th December 2005.

This application is dismissed with costs.

Job Sibanda and Associates, applicant's legal practitioners

Messrs Calderwood & Bryce, respondent's legal practitioners