HB 157/18
HC 3336/17
X REF HC 2367/17

TRADEPASS MARKETING SERVICES (PVT) LTD
t/a AGRISEC ENVIRONMENTAL HEALTH

Versus

OK ZIMBABWE

And

THE DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 15 & 21 JUNE 2018

Dr De Souza in person
P. Madzivire for 1st respondent

Opposed Application

MAKONESE J: The first respondent avers in its Heads of Argument that:

> "*This is one of the most unfortunate applications which this honourable court has to deal with. This is sad in light of the fact that the application is frivolous, erroneous, badly drafted and the application itself is very alien to both the court and the founding rules of the court."*

I cannot help, but agree with these observations regarding the application before the court. The cover of the application refers to the application, as an application for rescission of judgment. The lengthy founding affidavit is argumentative and rumbling in nature. It is not clear what the applicant seeks or the basis of the relief being sought. The application simply attacks the findings of a judge of this court in a manner that does not make the case clear at all. This is indeed unfortunate. I shall not delve into what are clearly unnecessary attacks on the justice system but deal with the merits of this application, if any.

The 1st respondent has raised certain points *in limine*, which if sustained, would dispose of the matter without further ado. I proceed, therefore, to deal with each of the preliminary points.

Applicant adopted the wrong procedure

The applicant has clearly adopted the wrong procedure in that the judgment it seeks to rescind was not granted in default. On 23 November 2017 MATHONSI J delivered a written judgment declining to grant default judgment in favour of applicant under case number HC 2367/17. The judgment was delivered under HB-371-17. Full and comprehensive reasons are given by the learned judge why he declined to grant default judgment that had been sought by way of a chamber application. The draft order in this present application appears on page 209 of the bound papers and is in the following terms:

> "1. Judgment entered in the chamber application for default judgment in case number HC 2367/17 against the applicant be and is hereby rescinded, set aside in its entirety.
>
> 2. The defence in HC 2367/17 is hereby dismissed for want of prosecution.
>
> 3. That judgment be and is hereby entered in terms of the order attached to the summons in the High Court case number 2367/17."

This application, though purporting to be an application for rescission of judgment is simply a rumbling and wanton attack on the decision of this court. The procedure adopted by the applicant in this matter falls foul of the rules of the court. An application for rescission of judgment is made to rescind the decision of the court on the basis that the other party defaulted court proceedings or failed to attend court, or where a party fails to enter appearance to defend, resulting in a judgment being entered in default. This is in terms of the Rules of the High Court Rules, 1971, under Order 9 Rule 63. If the court is satisfied in an application for rescission of judgment, that there is good and sufficient cause to do so, it may set aside the judgment concerned and grant leave to the defendant to defend the action or suit. A perusal of the papers filed by the applicant shows that the application does not meet the requirements of an application for rescission of judgment as prescribed by the rules of this court.

Further, and in any event, an application for rescission of judgment must be accompanied by the grounds which show good and sufficient cause why it should be granted. The decision of

Chetty v *Law Society of Transvaal* 1985 (2) SA 756 (A), lays down the essential elements of an application for rescission of judgment.

The applicant in this matter has not laid out any good and sufficient reasons why it is entitled to the relief sought. The applicant raises frivolous and embarrassing grounds, not contemplated in terms of the rules that govern applications for rescission of judgment.

The application is not recognized in terms of the rules

All court applications should be brought in terms of the rules. An application for rescission should therefore be made in terms of Form 29 and under Rule 230. The applicant's application is not recognized in terms of the rules of the court. One cannot ascertain what the nature of the application is. The relief sought in the draft order is incomprehensible. Rule 230 provides that a court application shall be in Form 29 and shall be supported by one or more affidavits setting out the facts upon which the applicant relies. This application is alien to this court and does not meet the prescribed form for seeking the relief sought. On this basis alone, the court is entitled to dismiss the application with costs on a punitive scale.

Applicant not represented by a legal practitioner

In its opposing affidavit filed on 12th January 2018, 1st respondent drew the attention of the applicant to the fact that the applicant being a company ought to be represented by a legal practitioner. It was also pointed out that Muriel De Souza, the deponent to the founding affidavit did not refer to any Board Resolution authorising her to act on behalf of the applicant. The applicant has ignored this advice and pursued its application inspite of the impropriety of this application being raised formally in opposing affidavits. The applicant is a private limited company, and where a company is bringing a suit before the High Court it must do so under the assistance of a legal practitioner. That common law rule is part of our law, and this was noted in the case of ; *Lees Import and Export (Pvt) Ltd* v *ZIMBANK* 1999 (2) ZLR 36 (S).

The rationale behind the rule is that it intends to limit frivolous proceedings being brought before the court by litigants who lack the skill and legal expertise, and who may bring to court legal proceedings that prejudice the company of its funds.

In the matter before me, this common law rule applies with equal force in that the application is fraught with irregularities, which irregularities would not have been there if the applicant had engaged the services of a legal practitioner.

This application is bad at law. It is incurably bad. The whole application is premised on attacks on the findings of a judge of this court. The application is ill-conceived, has no merit and has been made in bad faith. If litigants are allowed to wantonly attack the judgments and integrity of this court without just cause, the dignity of this court will be impugned. The application is clearly an abuse of court process. The applicant ought to have taken legal counsel on the matter before proceeding with this application. In order to show its displeasure with the conduct of the applicant, this court shall order costs on a punitive scale. It is the view of this court that the 1st respondent is entitled to recover its full costs.

In the result, the following order is made:

The application is dismissed with costs on an attorney-client scale.

Joel Pincus, Konson & Wolhuter, 1st respondent's legal practitioners