GIBSON CHAMBOKO
and
MR CHAMBOKO SNR
and
CHANGE TOMAS KWODZI
versus
PATRIC JOHN STOOKS
and
P J STOOKS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 3 September 2009 and 30 June 2010

Opposed Application

M T N Chingore, for the applicants
H Zhou, for the respondents

MAKONI J: This is an application for rescission of the judgment granted by this court on 13 May 2009 in case number HC 6215/08. The matter was argued before me on 3 September 2009. In their submissions the respondents raised a point in *limine* that the applicants were in contempt of the judgment that they seek to rescind. The applicants opposed the issue of contempt. On 21 October 2009 I made a finding that the applicants were in contempt of the order and that their application for its rescission will not be determined on the merits until they purge their contempt. The applicants have since purged their contempt. I will now proceed to determine the application for rescission.

The brief background to the matter is that the respondents filed a court application for spoliation in case number HC 6215/08 on 27 October 2008. This was after the dismissal of an urgent chamber application for the same relief in case number HC 4864/08. They proceeded to file another urgent chamber application on 12 November 2008 under case number HC 6507/08 seeking the same relief based on fresh acts of spoliation.. This case was heard by MUSAKWA J on 19 November 2008 and judgment was handed down on 28 January 2009 dismissing the respondents application.

The applicants did not file opposing papers in case number HC 6215/08. The matter was set down on the unopposed roll on 6 April 2008 and was postponed to 29 April 2008. The record reflects that on 29 April 2008 Mr *Zhou* appeared for the respondents and Mr *Chingore* for the applicants. This appears on the motion roll result sheet. The matter was further postponed to 13 May 2008. The result sheet of that date reflects that, again, the parties were represented by the same legal practitioners who appeared on 29 April 2009. It also reflects that the order was granted as amended. The present application was then filed the following day.

The application is made in terms of order 9 r 63. In terms of that rule, the court may set aside a judgment entered in default if it is satisfied that there is good and sufficient cause to do so. The factors that the court takes into account in defining good and sufficient cause are now settled in our law. They have been discussed and applied in a number of cases in our jurisdiction. See *Stochhill* v *Olivine* 1988 (2) ZLR 210. These factors are:

(i) the reasonableness of the applicants' application for the default.
(ii) The *bona fides* of the application to rescind the judgment.
(iii) The *bona fides* of the defence on the merits of the case which carries some prospect of success.

The applicants contend that they were not served with the court application. They got to know about the application when they were served with case number HC 6507/08 whereby the respondents were seeking; inter *alia*; amalgamation' of that case with case number HC 6215/08. This was around 18 November 2008. They further contend that the two matters were consolidated and were dealt with by MUSAKWA J.

The respondents contend that the applicants were served with the court application by the Deputy Sheriff in October 2008. When the applicants put this factor in issue before MUSAKWA J, they were again served with the application through their legal practitioner Mr *Chingore*. They did not file any papers in opposition hence the setting down of the matter on an unopposed roll.

The issue of service of the court application in HC 6215/08 was dealt with by MUSAKWA J in his judgment. He commented as follows under the heading "Service of Application in case number HC 6215/08":

> "As stated earlier, the Deputy Sheriff's returns of service indicate that the application was served on the respondent's relatives. In respect of the first and second respondents,

> the application was served on Milton Chamboko who happens to be the respective respondent's son and brother. In respect of third respondent, it was served on Abel Rwodzi his son. A Deputy Sheriff's return is *prima facie* proof of service. The contention by the first, second and third respondents that they were not served or that service was defective cannot be sustained. In any event the letter by the respondents legal practitioners to the effect that they had authority to receive service is dated 28 October 2008 whereas the respondents were served on 23 October 2008".

I agree entirely with the finding by MUSAKWA J that the applicants were served with the court application by the Deputy Sheriff on 23 October 2008.

Even if I were to disregard the returns of service by the Deputy Sheriff, the applicants have not disputed that they were served with the court application through their legal practitioner, during or after the hearing before MUSAKWA J. They attribute their failure to file opposing papers to the fact that they thought the two matters had been consolidated.

If one were to accept their version, the judgment by MUSAKWA J was handed down on 28 January 2009. The applicants contend that they only managed to get the full reasons towards the end of May. The applicants have not tendered any explanation as to why from the end of May to 13 May 2008, they failed to apply for upliftment of the bar and file their opposing papers.

Further to the above, on 29 April 2009, Mr *Chingore* appeared before HUNGWE J in motion court. As is the nature of motion court proceedings, one cannot tell, from the record, what transpired in court. However, what is significant about this fact is that by 29 April 2009 Mr *Chingore* was aware that case number 6215/08 was still alive and had been set down on the unopposed roll due to failure by his clients to file opposing papers. No papers were filed to regularize the default until on 13 May 2009 when the default judgment was granted.

From the above account, it is clear that the applicants became aware of the existence of case number 6215/08 and with full knowledge of the service or set down of the matter, and of the risks attendant upon default, freely took a decision to refrain from filing papers in opposition. See *Zimbank Banking Corp* v *Masendeke* 1995 (2) ZLR 400 (S) at 402 D.

I would agree with Mr *Zhou*'s submission that the application is not *bona fides*. It was triggered, by the writ of execution. The applicants had various opportunities to regularise their papers but they did not. As was submitted on their behalf, .they filed the present application as they believed that the application for rescission suspended the order until the determination of the application.

The applicants submitted that they have a *bona fide* defence on the merits on the basis that the respondents have no *locus standi* to seek their eviction. As the land now belongs to the State, the respondents are "unlawful occupiers" and "illegal occupiers".

It was further submitted that the applicants moved on the farm with the acquiescence of the respondent. It was only much later that the respondents unsuccessfully instituted spoliation proceedings in case numbers HC 4864/08 and HC 6507/08

On the other hand the respondents argue that the spoliation order is not dependant on the respective rights of parties but upon the unauthorized self-help disturbance of the respondent's occupation on the farm. It was the duty of the Minister to provide vacant possession to the new occupier.

The respondents in case number HC 6215/08 sought an order for spoliation and not eviction as is advanced by the applicants. They have *locus standi* to institute spoliation proceedings as these proceedings are not dependant on the respect rights of the parties.

The requirements for spoliation relief are well settled in our law. These are:

(i) that the applicant was in peaceful and undisturbed possession of the property; and
(ii) that the respondent deprived him of the possession forcibly or wrongfully against his contest.

See *Botha & Anor* v *Barrett* 1996 (2) ZLR 73 (S) at 79 D-E, *Best of Zimbabwe Lodges* (*Pvt*) *Ltd & Anor* v *Croc Ostrich Breeders of Zimbabwe* (*Pvt*) *Ltd & Ors* 2003 (1) ZLR 57 H and *Shiriyekutanga Bus Services* (*Pvt*) *Ltd v* Total Zimbabwe.

When the applicants moved onto the farm they did not have the respondents consent neither did they have a court order. They were armed with offer letters. The offer letters did not entitle them to despoil the respondents. Their remedy is to approach the Minister so that he can give them vacant possession through the provisions of the Gazetted Lands (Consequential Provisions Act. [*Cap 20:28*]. In view of the above the applicants have not established a *bona fide* defence on the merits which carries some prospect of success to the claim by the respondents.

In the result, I make the following order:

(i) The application is dismissed.
(ii) The applicant must pay respondents costs.

Chingore & Associates, 1st and 2nd applicants' legal practitioners
Coghlan, Welsh & Guest, 1st and 2nd respondents' legal practitioners