CROCO PROPERTIES (PRIVATE) LIMITED
versus
SWIFT DEBT COLLECTORS (PRIVATE) LIMITED
t/a RUBY AUCTIONS

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 16 July 2013 and 24 July 2013

T Mpofu, for the applicant
T Magwaliba, for the respondent

Opposed Application

MATHONSI J: The applicant seeks a rescission of a default judgment of this court issued against it on 22 May 2012, per MUTEMA J, for payment of storage charges of US$641-00 a day from 9 March 2009 together with interest at the prescribed rate calculated from the date of judgment to date of payment in full and costs of suit.

The circumstances leading to the grant of that order are that the respondent instituted summons action against the applicant in HC 1916/12 for payment of the aforementioned claim, which summons according to the deputy sheriff's return of service, was served on 22 February 2012 at number 1 Telford Road, Graniteside, Harare upon Eileen, the receptionist who accepted service on behalf of the applicant at the latter's place of business. When no appearance was entered, the respondent moved for default judgment which was granted aforesaid.

At the hearing of this application, Mr *Magwaliba*, who appeared for the respondent took two points in *limine*, namely that the signature on the founding affidavit and the answering affidavit of Zvikomborero Chawonza, the applicant's director, is significantly different such that it cannot be said that the same person deposed to the two affidavits. He urged the court to find that a fraud has been perpetrated upon the court and that the applicant be refused audience on that basis. Secondly, Mr *Magwaliba* took the point that Mr *Mpofu* appearing for the applicant had made reference in his heads of argument to remarks about the merits of the application made by CHIEF JUSTICE CHIDYAUSIKU in a related application involving the parties at the Supreme Court. In his view those remarks are not contained in

any record, there is no evidence of them being made and as such should be expunged from the record.

Mr *Mpofu* opposed the points in *limine*. He submitted that this court is being asked to make a factual finding that the signatures are different when no evidence exists to prove that point. In addition, the court cannot reject the application on the basis of a *prima facie* impression that the signatures are different when the cardinal principle is that this court makes a finding on a balance of probabilities and not on *prima facie* evidence.

I have examined the signatures on the two affidavits as urged by counsel but I am unable to say that they were not appended by the same person. Other than the fact that the signature on the founding affidavit it a longer impression of the deponent's initials and surname, while the one on the answering affidavit is a shorter version of the same, I am unable to say that the two were appended by different people. In any event, it was always going to be difficult for the court to rely on its visual impression of the signatures without the benefit of evidence of a handwriting expert.

On the second point, relating to the contents of the applicant's heads of argument, there is no basis in law for expunging submissions made by counsel. The respondent can only make counter submissions pointing to why those submissions should be rejected in favour of its' own. I agree with Mr *Mpofu* that those submissions are his own opinion of the case which he is entitled to make in asking the court to find in favour of the applicant.

Both points in *limine* are without merit and it is for that reason that they are dismissed.

In its founding affidavit, deposed aforesaid by its director, Chiwonza, the applicant stated that the summons was never served upon it as it does not have a receptionist or employee by the name of Eileen. For that reason, the summons was never brought to its attention which explains the reason why no appearance was entered. The applicant challenged the deputy sheriff to prove that the summons was served as alleged in the return of service. It submitted a supporting affidavit by Tinotenda Mhonyera, who stated that she has been employed by the applicant for the past four years as a receptionist and that she is the one who was at the reception desk on 22 February 2012 but was never served with the summons or any court process. She went on to say that there is no one by the name Eileen amongst all the receptionists insisting that no service of process was ever made as alleged.

Chawonza stated further in the founding affidavit that the applicant never had knowledge of the claim until 6 June 2012 when the deputy sheriff came to attach property

pursuant of a writ of execution issued against the applicant and as such, it was not in wilful default. He stated that a defence to the claim exists as the applicant is not liable for the storage costs which should have been recovered from Tel Access the owner of the property which was stored. He questioned why the respondent continued storing the property for such a lengthy period of time without receiving payment instead of selling it to defray expenses.

It is noted that the respondent received the goods for storage in March 2009, only to institute proceedings almost three years later. The applicant took issue with the reasonableness of the claim maintaining that it was not even substantiated.

In its opposing affidavit deposed to by Sijabulisiwe Simbisai Shumba, its director, the respondent contended that service of the summons was effected in compliance with the High Court Rules and that the deputy sheriff's return of service is *prima facie* evidence of such service. Shumba contested the veracity of the affidavit of Mhonyera insisting that she is an interested party being a low level employee of the applicant. According to the respondent the applicant was simply negligent in failing to enter appearance and reliance was placed on the affidavit deposed to by Maxwell Chakawarika on 12 June 2012 in a related application for a stay of execution in HC 6222/12 in which he stated:

> "I Maxwell Chakawarika hereby make oath and state that:
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> 1. I am employed by the deputy sheriff for Harare as an assistant deputy sheriff. My duties with the deputy sheriff are to serve court process including summons.
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> 2. On 22 February 2012 I served summons on the applicant at number 1 Telford Road, Graniteside Harare. The summons were (sic) received by a lady who was at the reception who advised me that her name was Eileen and that she accepted the summons on behalf of the applicant see the remarks on my return of service attached to the applicant's founding affidavit."

Significantly, Chakawarika's affidavit introduces nothing new. It merely repeats, almost word for word, the impugned return of service. To that extent it is unhelpful.

On the *bona fides* of the applicant's defence, the respondent submitted that it is the applicant, through its legal practitioners, who instructed the deputy sheriff to deliver the goods to the respondent for storage following the eviction of Tel Access from its premises. For that reason it should foot the storage bill. The respondent made reference to an order of this court dated 23 March 2009 which was obtained by Tel Access. It directed, *inter alia* that

the property in question was not to be disposed of by the applicant until it had taxed its costs after which it was to be released to Tel Access.

The respondent alluded to an invoice which it issued on 13 April 2012 to the applicant showing that the amount of storage charges due in terms of the default order from 9 March 2009 to 13 April 2012 is US$725 762-70.

This is an application made in terms of r 63 of this court's rules which requires that an applicant for rescission of judgment must show only a good and sufficient cause for the rescission of the judgment granted in default. It has long been accepted that the court has a very wide discretion in determining what constitutes "good and sufficient cause."

In *Deweras Farm* (*Pvt*) *Ltd & Ors* v *Zimbabwe Banking Corp Ltd* 1998 (1) ZLR 368 (S) 369 E – H; 370A the Supreme Court pronounced as follows on "good and sufficient cause":

> "While it may generally be true to say that when there is wilful default there will usually not be good and sufficient cause, I believe we fetter our discretion improperly if we lay down a fixed rule that when there is wilful default there is no room for good and sufficient cause. I favour the definition of wilful default offered by KING J in *Maujean* t/a *Audio Video Agencies* v *Standard Bank of South Africa Ltd* 1994 (3) SA 801 (C) at 803 H-I:
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> > 'More specifically, in the context of a default judgment, 'wilful' connotes deliberateness in the sense of knowledge of the action and of its consequences, i.e its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation, for this conduct might be.'
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> See also *Morkel* v *ABSA Bank Ltd & Anor* 1996 (1) SA 899 (C). But it is precisely in the 'motivation' mentioned in that passage that one might find 'good and sufficient cause.' I respectfully agree with the *dicta* of INNES J in the oft-cited case of *Cairns Executors* v *Goarn* 1912 AD 181 at 186 *passim*. In particular, His Lordship said:
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> > 'It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely made very extensive and which it is highly desirable not to abridge'".

In the exercise of its wide discretion whether to grant an indulgence to an applicant for rescission of judgment, the court has regard to essentially three factors, namely the reasonableness of the explanation for default, the *bona fides* of the application; and the *bona fides* of the defence on the merits which *prima facie* carries some prospect of success; *Stockill*

v *Griffiths* 1992 (1) ZLR 172 (S); *Mazuva* v *Simbi & Ors* HB 155/11 at p 4, *Govha* v *Ashanti Goldfields Zimbabwe Ltd* HH 48-12. All these factors must be considered in conjunction with each other and with the application as a whole. An unsatisfactory explanation for one may, in fact, be strengthened by a very strong defence on the merits: *Georgias & Anor* v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S) 493 C; *du Preez* v *Hughes N O* 1957 REN 706 (SR) 709 A-F. The applicant must show what entitles him to an indulgence.

In *casu*, the applicant insists that it was not served with the summons. In that respect, what I have is the applicant's word against that of the assistant deputy sheriff who says he served the summons. I have said that the latter's explanation under oath is unhelpful as it merely repeats what is in the return of service. I agree with Mr *Mpofu* that after the return of service was impugned, the erstwhile assistant needed to do more than that. For instance more details of the location of the applicant's address, the appearance of the reception where the summons was served and a description of the recipient would have enhanced his credibility.

Therefore, while the deputy sheriff's return of service is *prima facie* evidence of the matters stated therein in terms of s 20(3) of the High Court of Zimbabwe Act [*Cap 7:06*]; *Wattle Co* (*Pvt*) *Ltd* v *Inducom* (*Pvt*) *Ltd* 1993 (2) ZLR 108 (H); *Gundani* v *Kanyemba* 1988 (1) ZLR 226 (S) 229 C, I take the view that once the return has been challenged, the deputy sheriff must do more than just defer to the return. He must assist the court determine the truthfulness of the return of service.

On the merits, the respondent claims storage charges of $725 762-70 in respect of goods belonging to a third party which it kept for almost three years without taking any action. Its entitlement to that large amount, in particular to $641-00 per day, has not been clarified. On the face of it the claim appears excessive bringing to the fore the need, in the interest of justice, to interrogate those charges. Also of paramount importance is the question of who is liable to pay between the applicant and Tel Access.

For these reasons, and in the exercise of my very wide discretion, I am of the view that the applicant is entitled to the indulgence of the rescission of the judgment entered on 22 May 2012.

Accordingly, I make the following order; that:

1. The default judgment entered against the applicant in case number HC 1916/12 be and is hereby rescinded.

2. The applicant is hereby granted leave to file its notice of appearance to defend within ten (10) days of the date of this judgment.
3. The costs of suit shall be costs in the cause.

Manase & Manase, applicants' legal practitioners
Matipano & Associates, respondents' legal practitioners