

SHELL ZIMBABWE (PRIVATE) LIMITED
versus
CHARLES P. MOTSI
and
NEBORTH INVESTMENTS (PRIVATE) LIMITED
t/a BELGRAVIA SERVICE STATION

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 15 July 2013, 11 September 2013

OPPOSED APPLICATION

E. Jera, for applicant
Mrs. J. Wood, for respondent

CHIGUMBA J: This is an application for rescission of default judgment brought in terms of Order 9 rule 63 of the High Court Rules 1971. The relief sought is that:

1. Judgment in case HC 1805/12 entered against applicant on 28 March 2012 be and is hereby rescinded.
2. Applicant is granted leave to supply further particulars requested by first and second respondents under case HC 11517/11 within five (5) days of the date of the granting of this order.
3. First and second respondents pay costs of suit on a legal practitioner client scale if opposed to the application.

At the hearing of the matter the citation of the applicant, which has changed its name to Zuva Petroleum (Private) Limited was changed, by consent. The background to this matter is that:

Under HC1805/12, this court granted an order that:

1. The respondent (applicant in this matter) supplies the further particulars requested by the applicants on 6 February 2012 within ten (10) days of the date of this order, failing which the respondents claim in case number HC11517/11 shall be deemed to be dismissed.
2. Respondent bears the cost of this application.

When that order was granted, applicant was in default, and contends that the order was not served on it; consequently it was unable to supply the further particulars within the ten day period in terms of the court order. Applicant avers that it became aware of the order on 10 January 2013. The present application was filed on 25 January 2013. It was set down for hearing on 15 July 2013. Although this was not raised by any party at the hearing of the matter, the court is bound, by its duty to ensure compliance with its own rules, to consider whether the applicant complied with the provisions of r 63 (1) in relation to the stipulated time period within which to file an application for rescission of default judgment, before it considers the merits of the application for rescission of default judgment.

Order 9, Rule 63 provides that:

“63. Court may set aside judgment given in default

- (1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.
- (2) If the court is satisfied on an application in terms of sub rule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just”.

It is necessary that the court satisfies itself that an applicant for the relief sought in terms of rule 63 has complied with the first hurdle set out in r 63(1), before proceeding to consider the merits of the matter, whether the applicant has established “good and sufficient cause”, in terms of r 63(2). The question that the court must determine is whether application for rescission of default has been made “not later than one month after knowledge of the judgment”. In *Sibanda v Ntini SC 74/02, 2002 ZLR (1) @ 266* Malaba JA, stated that:

“It is clear from r63(2) that before considering the question whether or not the application contains a “good and sufficient cause” for it to exercise the wide discretion conferred upon it in favor of the applicant, the court must be satisfied that the application has been made (that is set down for hearing and not just filed with the registrar) within one month of the date when the applicant had knowledge of the default judgment or that an application for condonation of non-compliance with r 63(1) has been made or granted”.

MALABA JA cited with approval the observation made by SANDURA JA in the case of *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd 1998 (2) ZLR 249 (S) @ 251 C-E*, that

“In terms of r 63(1), a defendant against whom a default judgment has been granted has a period of one month; from the time he becomes aware of the judgment, within which to file an application for the rescission of that judgment. If he does not make the application within that period but wants to make it after the period has expired, he must first of all make an application for the condonation of the late filing of the application. This should be done as soon as he realizes that he has not complied with the rule.”

Was this application before the court filed with the registrar and set down for hearing within one month of the date when applicant acquired knowledge of the default judgment? The simple and unequivocal answer is no. Default judgment was entered against the applicant on 28 March 2012. Applicant became aware of the judgment, on 10 January 2013. It filed this application on 25 January 2013, well within the stipulated one month period. Applicant, however, did not set down the matter for hearing within one month; the matter was set down for hearing on 15 July 2014, six months out of time. The application for rescission of default judgment is not properly before me. In the absence of condonation of the late filing of application for rescission of default judgment, I am constrained and cannot consider the merits of the application.

In the circumstances, the application is dismissed with costs.

Moyo & Partners, applicant's legal practitioners

Dhlakama Attorneys, respondent's legal practitioners