AKINDELE POPOOLA AKINJIDE-OBONYO
versus
CLEVER MANDIZVIDZA N.O.
(ESTATE LATE MILLICENT TUTSIMANE
TANDILE AKINJIDE-OBONYO)
and
INNOCENT GONESE N.O.
and
LATHIZILE NONDABA AKINJIDE-OBINYO

HIGH COURT OF ZIMBABWE
CHINAMORA J,
HARARE, 20 October 2020 and 19 January 2023

Opposed application for rescission of court order

Mr *J Zviuya*, for the applicant
First respondent, in person
Mr *L Chimuriwo*, for the second and third respondents

CHINAMORA J:

Introduction

This is an application for rescission of a consent order made in terms of rule 449 (1) (a) of the High Court Rules, 1971 (which were then applicable) where the applicant who is the husband of the now deceased, Millicent Tutsimane Tandile Akinjide-Obonyo, seeks an order against her estate represented Clever Mandizvidza the duly appointed executor. The relief sought is the following:

"IT IS HEREBY ORDERED THAT:

1. The judgment by consent granted in Case Number HC 2098/98 on the 11th January 2002 in terms of which a divorce decree was granted is hereby rescinded.
2. Costs be in the cause."

Factual background

The applicant and the now deceased, Millicent Tutsimane Tandile Akinjide-Obonyo, were married in the United Kingdom in May 1978. He submitted that their marriage became irretrievably broken down resulting in his deceased wife instituting a lawsuit for divorce in 1998 under HC 2093/98. According to the applicant, the process was very acrimonious as there was no agreement on how the parties would share the immovable property acquired during the subsistence of the marriage. He further asserted that the divorce proceedings remained pending until the demise of his wife. The case averred by the applicant is that all this time till the demise of her wife they were separated. Subsequent to her death, the deceased estate of his wife was registered with the Master of High Court under DR 189/19, and Clever Mandizvidza was appointed executor dative. In addition, the applicant alleges that it was during one of the meetings, sometime in January 2020, that he learnt of the existence of an order by consent in respect of the divorce proceedings under HC 2093/98 granted on 11 January 2002, and amended on 11 April 2014.

In his founding affidavit, the applicant avers that he made efforts of verifying the authenticity of the consent order. It was only then that the applicant alleges there were some irregularities and that the order did not comply with rule 277B of the High Court Rules ("the Rules"). Additionally, it is alleged that upon perusal of the record, the applicant noted the following:

(a) The affidavit of evidence by the deceased was not in the file.

(b) There was neither affidavit of waiver that the applicant signed nor a record of any sworn testimony that he deposed to.

(c) There was no notice of set down of the matter and proof of service that a notice of set down was personally served on the applicant.

(d) The marriage certificate was not filed of record.

(e) There was no original consent papers filed of record.

As a result of the above, the contention of the applicant is that the document with proposals for settlement is irregular and fatally defective, since rule 54 of the previous Rules stipulates that a consent to judgment must be in writing and signed by the defendant personally or by his or her legal practitioner. *In casu*, the argument continues that the document was neither signed by the

applicant or his former legal practitioners to confirm his consent to the terms. Also alleged is that the chamber application for correction of the consent order under HC 997/14 was never served on him. Additionally, the applicant entertains the suspicion that this was meant to keep him in the dark and unaware of the consent order. As a result, the Applicant petitioned this court to set aside the judgment contending that his interests stood to be prejudiced during the administration of his late wife's estate. In opposition, the first respondent argued that the he was advised that the deceased was divorced and that position was confirmed by the beneficiaries. To support this submission, the first respondent made reference to the minutes of the first family meeting held on 9 October 2019, where applicant was present and never objected to this. As a preliminary point, the first respondent argued that in terms of rule 449 (2) of the repealed Rules, the applicant ought to have joined the beneficiaries of the estate, the Master of High Court and deceased's legal practitioners who represented her in the divorce proceedings, namely, Lawman Law Chambers.

Before the hearing of the present matter, Lathizile Nondaba Akinjide-Obonyo filed an application for joined under HC 1931/20. I will not dwell much on this application, as the record shows that the parties entered an order by consent in terms whereof the matter under HC 1282/20 and HC 1931/20 were consolidated under HC 1282/20. The result was that Lathizile Nondaba Akinjide-Obonyo and Innocent Tinashe Gonese N.O. were joined to the current proceedings as second and third respondents. The court ordered that the application under HC 1931/20 would stand as their opposing papers and also ordered the respondents to file heads of argument. In essence, the second and third respondents argue that the applicant is not being candid with this court, and maintain that the correct position is that he and the deceased were divorced.

I observe that the second and third respondents first raised some points *in limine*, namely; (a) the applicant committed perjury by filling contradicting affidavits with the court; (b) the applicant failed to satisfy the requirements for rescinding an order in terms of r 449 (1) (a) of the Rules; and (c) the applicant is guilty of a material non-disclosure. At the hearing, I heard argument in respect of both the preliminary points and the merits and reserved judgment. I indicated that I would give my judgment in respect of the points *in limine* and/or the merits in due course. I now give my judgment with reasons for the conclusion and decision I have reached.

Points in *limine*

I will deal with the preliminary points not in the order I have listed them above. My preferred starting point is to examine whether or not the applicant has *locus standi* to bring the present application. The applicant relies on r 449 (1) (a) of the Rules, which reads:

> "**449 Correction, variation and rescission of judgments and orders**
>
> (1) The court or judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order-
>
> (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby."

I note that r 449 gives the court or a judge, on its own volition or on application of a party, the power to correct, vary or rescind a judgment that was erroneously sought or erroneously granted in the absence of any party affected. My next observation is that the applicant indicates that, he is seeking rescission on the grounds that the order by consent was granted in his absence and that the process which led to the order was flawed and, accordingly, should be set aside. In response, the second and third respondents raise the point *in limine* that the application does not satisfy the requirements of rule 449 (1) (a). This point is emphasized in their heads of arguments filed of record. They assert that the judgment was neither erroneously sought nor granted in the absence of the applicant. I am conscious that on the authority of *Mhungu* v *Mtindi* 1986 (2) ZLR 171 (SC) at 173A-B, a court is entitled to refer to its own records and proceedings and to take note of their contents. In this respect, my attention was drawn to HC 5857/02, a matter in which the applicant deposed to an affidavit which is before this court, where he admitted the date of divorce as 11 August 2002. The applicant can, therefore, not deny that he was not aware of the date of divorce or the consent to the divorce order. Consequently, it is apt for me to rely on the dictum of NDOU J in *Leader Tread Zimbabwe (Pvt) Ltd v Smith* HH 131-03, where the learned judge observed that:

> "It is trite that if a litigant has given false evidence his story will be discarded and the same adverse inference may be drawn as if he has not given evidence at all.- see *Tumahole Bereng v R [1949] AC 253 nd South African Law of Evidence* IH Hoffman and DT Zeffert{3rd ed) at page 472, if he lies about a particular incident, the court may infer that there is something about it which he wishes to hide".

In light of the above case law, it is relevant to focus on the order by consent sought to be rescinded. A reading of it shows that the applicant was represented by a legal practitioner, Mr

Chagonda, who consented to the divorce order granted under HC 2093/98. It is clear that the order in question was granted in the presence of the applicant as he was represented by his legal counsel. As a result, the second and third respondents see no basis for the rescission of the order by consent and pray for the dismissal of the application with costs on a legal practitioner and client scale.

Analysis of case

The order being sought by the applicant to be rescinded was borne not granted in his default. The applicant was duly registered as evidenced on the order and his legal practitioner appended his signature to the draft and the draft became the final order when the judge signed it. In my view, if at all it is correct, the issues that the applicant relies on is that there are documents which are missing from the record. Furthermore, the argument that he did not sign any deed of settlement clearly shows that there were irregularities. Rule 449 (1) (a) of the High Court Rules, 1971 requires an applicant to establish that the consent order was erroneously granted in his absence and that his rights or interests were affected by the order. (See *Mshosho v Mudimu & Anor* HH 443-13). I am not satisfied that the applicants satisfies the aforesaid requirements of rule 449.

Having come to the conclusion I have made above, it is clear that the applicant invoked the wrong rule to approach this court. In *Tirivoyi v Jani and Anor* 2004 (1) ZLR 470, MAKARAU JP (as she then was) emphasized that rule 449 is an exception to the general rule, and must be resorted to only for purposes of correcting an injustice that cannot be corrected in any other way. In the present matter, the applicant failed to establish that the order by consent under HC 2093/98 was erroneously granted and the he was in default. This application does not fall squarely within the ambit of rule 449 (1) (a) of the now repealed High Court Rules, 1971. The conclusion I have come to on this point in *limine*, necessarily means that the applicant failed to satisfy the requirements for rescinding an order by consent in terms of rule 449 (1) (a). That being the case, I uphold that preliminary point. The effect is that there is no application before the court. As I have decided the application on the basis of the preliminary point, I find it unnecessary to deal with the remaining preliminary points or merits of the application. On costs, I see no reason from departing from the traditional rule that costs follow the result.

Disposition

The application is struck off the roll with costs.

Bere Brothers, applicant's legal practitioners
Lawman Law Chambers, respondent's legal practitioners