ALEC RUTENDO MANJENGWA
versus
VERONICA MANJENGWA (NEE CHIMBOZA)

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 15 May, 2022 & 30 August 2023

Opposed Matter

R E Nyamayemombe, for the applicant
W Magaya, for the respondent

MAXWELL J:

At the hearing of this matter preliminary points were raised on behalf of the respondent and they are the subject of this judgment.

BACKGROUND FACTS

On 16 June 2022 a default judgment was granted in case number HC 4678/10 in the following terms; -

a. A decree of divorce be and is hereby granted.
b. Immovable property House number 421 Hobhouse Mutare together with household goods and effects are hereby awarded to the plaintiff.
c. Stand number 5070 Chikanga 3 is hereby awarded to the defendant.
d. Each party to bear its own costs

On 15 July 2022, applicant filed the present application seeking rescission of the default judgment. Applicant stated that the application is in terms of s 29 of this court's 2021 rules. He averred that he had defended the summons for a decree of divorce and subsequently moved to South Africa. Further, that he was not aware of the set down date for the Pre-Trial Conference as the notice of set down was not served at his address of service. He also averred that the notice of set down was not served by the sheriff or his lawful deputy. Applicant stated that in 2021 he had caused summons to be issued out of the Mutare High Court on the basis that respondent had abandoned HC 4678/10 since 2011. According to him, after being served with the summons for HC 96/22, respondent appears to have resurrected the old case and set it

down on the Unopposed Roll without giving him or his legal practitioners notice. As a result, he further stated, respondent was awarded the only immovable property the parties had after misleading the court that the parties had two immovable properties at the time of divorce. applicant said he only became aware of the default order on 24 June 2022 when respondent served his lawyers with a 'Special Plea" to the divorce summons he had issued. Applicant submitted that the order was granted in error as the court was not aware that there was a pending matter in Mutare, and the notice of set down was not served on him or his legal practitioners. On the other hand, he stated that he was not in willful default. Applicant stated that he has a defence to the matter as the house awarded to the defendant was acquired in 1995, before his marriage to her, during the subsistence of his marriage to his late first wife.

In response respondent stated that applicant was served with the notice of set down of the PTC through his legal practitioners and at the time there was no requirement for it to be served by the sheriff. She disputed that HC 4678/10 was ever abandoned. She stated that there was no need for serving the applicant and his lawyers with the notice of set down on the unopposed roll as the matter was referred for set down by order of the court. She disputed that the property awarded to her was the only immovable property and that she acted in bad faith. She also disputed that applicant had a *bona fide* defence to the matter and stated that the house in issue was acquired in 1998 as an undeveloped stand. She averred that she contributed immensely, directly and indirectly to its acquisition and improvement. She stated that applicant owes her millions of Zimbabwean dollars in maintenance and the arrear maintenance of over twelve years should offset whatever claim he may have on the house awarded to her. In addition, she stated that she solely bore the burden of raising the children therefore applicant's claim is unjustified, malicious and selfish. She prayed for the dismissal of the claim with costs on a higher scale.

In his answering affidavit, applicant pointed out that the address where service of the notice of set down was attempted was not the one on record. Further that he was not aware that the matter was still pending when he issued fresh summons. Applicant submitted that respondent acted in bad faith, having been served with fresh summons, she proceeded to set the matter down without notifying him or his legal practitioners. According to him, respondent is afraid to face him in court as she misled the court to get sole ownership of a property purchased by him and his late wife.

PRELIMINARY POINTS

Two preliminary points raised in respondent's heads of argument were persisted with at the hearing of the matter. The preliminary points are considered below.

1. **The matter is not properly before the court.**

Respondent argued that the matter is improperly before the court because the Applicant adopted the wrong procedure and did not seek condonation of late filing of the application for rescission of judgment.

a. **Wrong Procedure-**

Respondent submitted that the heading of the application indicates that the application was made in terms of R 29 of this court's 2021 rules yet the submissions made would be applicable in an application under R 27 of the same rules. It was further submitted that the applicant has to be clear on which rule he is proceeding for the matter to be properly before the court. Reference was made to the case of *Mushosho* v *Mudimu & Another* HH 443/13 in which the requirements for each rule are set out. Respondent also referred to the case of *Sachiti & Anor* v *Mukaronda* HH 38/21 in which an application was dismissed on the basis that the applicant was not clear on which rule he was basing the application.

In response applicant submitted that it is clear that the application is in terms of r 29 in that he is complaining of an error Mr *Nyamayemombe* pointed out that para(s) 19-26 of the founding affidavit highlight the error that was made. Indeed applicant included one paragraph dealing with the defence to the respondent's claim. I am not persuaded that the effect of that is to remove clarity of the fact that the application is in terms of r 29. After the single paragraph on the defence to the matter, applicant repeated the submission on the error that was made and the basis of that error. At no point did he address the reason for the default and the explanation thereof. Rule 27 is applicable where proper service was effected and default follows such service. Applicant's contention is that there was no proper service. Whether or not the service was proper goes to the merits of the application for rescission.

b. **Failure to seek condonation**

-respondent submitted that applicant is seeking rescission of two orders handed down on 16 June 2022 and 24 November 2011. She referred to rule 27(1) of this court's 2021 rules and stated that as applicant had not sought rescission within one month of the

order granted, he ought to have filed an application for condonation of late filling of the application for rescission of judgment. Respondent referred to the case of *Jonas* v *Mabwe* HH 72/16 in which it was stated that the striking out of a defence for failure to attend a Pre-Trial Conference constitutes a judgment given in default. She submitted that in relation to the order granted on 24 November 2011, over a decade has lapsed and applicant ought to have sought condonation. Respondent also referred to the case of *Sibanda* v *Ntini* 2000 (1) ZLR 264 in which it is stated that an application for rescission of judgment would not be properly before the court if it is made after the expiry of one month from the date applicant had knowledge of the judgment. It further highlights that applicant is obliged to disclose the date on which he became aware of the judgment failing which it will be presumed to be the second day after the date of judgment. Respondent submitted that applicant did not state when he became aware of the judgment therefore it is presumed that he became aware of it on 26 November 2011. Consequently he ought to explain the delay in seeking condonation as well as in applying for rescission of judgment. Respondent also submitted that the court should not hear the request for rescission in relation to the order of 16 June 2022 because even if the applicant is successful, there will be need to for condonation in relation to the order of 24 November 2011, and rescission of the same o*rder.*

In response, *Mr Nyamayemombe* stated that the founding affidavit is clear that the order sought to be rescinded is of the 16th of June 2022. He submitted that applicant became aware of the order on 24 June 2022. He further submitted that the present application was filed timeously within a month of the order sought to be rescinded.

Indeed paragraph three of the founding affidavit states that the order sought to be rescinded is under case number HC4678/10 attached as Annexure "A". Annexure "A" is the order of 16 June 2022. There is therefore no merit in this preliminary point and it cannot succeed.

2. Improperly introducing new facts in answering affidavit

Mr *Magaya* submitted that para(s) 5 to 9 of applicant's answering affidavit contain new issues and should be expunged from the record. He further submitted that an application stands or falls on the founding affidavit and it was improper for applicant to introduce new facts in the answering affidavit and the attached supporting affidavit. Mr *Magaya* argued that in the alternative the respondent seeks leave to be allowed to file an affidavit in response to the new

facts in the answering affidavit. Respondent's heads of argument refer to a number of authorities on the impropriety of introducing new facts in the answering affidavit. The authorities cited include *Turner & Sons (Pvt) Ltd* v *Master of the High Court & Others* HH 498/15 in which the court stated that answering affidavits should not contain new material or bring fresh allegations against the respondents. Mr Nyamayemombe disputed that the answering affidavit contains new facts. Despite the new issues being specifically mentioned, he did not deal with each and every one of them. He was content to make a blanket statement that the points raised are addressed in the founding affidavit. He did not refer to the relevant paragraphs in the founding affidavit. There is merit in this point *in limine, a*nd it therefore succeeds.

DISPOSITION

The point *in limine* that has succeeded is not dispositive of the matter. Two options are applicable, either to expunge the offending portions of the affidavit from the record, or to allow respondent to file a supplementary affidavit to address the new facts. To allow the filing of a supplementary affidavit may result in further delays. I am inclined to rule that the new facts will be disregarded as the matter proceeds.

I make the following order.

1. The first preliminary point be and is hereby dismissed.
2. The second preliminary point be and is hereby upheld.
3. Paragraphs 5 to 9 of the answering affidavit be and are hereby expunged from the record.
4. The supporting affidavit attached to the answering affidavit be and is hereby expunged from the record.
5. Costs will be in the cause.
6. The Registrar is to set the matter down on the next available date.

Mugadza Chinzamba & Partners, applicant's legal practitioners
Coglan Welsh & Guest, respondent's legal practitioners