DOUGLAS MAMVURA
versus
TENDAYI BERNADETTE HLUPO
And
CREDIT INSURANCE ZIMBABWE
LIMITED

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE 18 January 2023 & 8 February 2023

**Opposed Application.**

*I. Mandongwe* for the applicant
*V. Mukwachari* for the first respondent
*U. Sake* for the second respondent.

**BACHI MZAWAZI J:**

**Introduction**

In the real world, to err is human. Even those tasked to uphold justice, as humans are not infallible. Rule 29 of the High Court rules, S.I. 202 of 2021, was designed to cater for such scenarios. It gives all the stakeholders in a civil matter an opportunity to amend mistakes in deserving situations in the interest of justice. Instances upon which this rule can be invoked are well spelt out under its provisions. In that regard, this is an opposed application brought in terms of this rule, rule 29 (1)(a) in particular, for the recession of an order of this court in case number HC250/22.

**Brief Factual Background**

Apparently, the parties to this suit, once in a marital relationship that gave birth to three major offspring, are now divorced, estranged and embroiled in several legal battles. The common cause facts are that, pursuant to one of those legal wrangles, the first respondent, in case HC 7249/21, filed contempt of court proceedings wherein she sought the committal of the first respondent for the contempt of a High Court order in case number HC 2874/19. Threatened with the contemplated court action the first respondent, on the 1st of March 2022 initiated an out of court settlement which culminated into of a Deed of settlement entered.

It was an agreed term, in clause 1 of the said Deed of settlement that, applicant would pay the first respondent the sum of USD 486,032.62 cash or transfer into her Nostro account in two equal monthly instalments, one on the 7th of March 2022 and the other on the 31st of March 2022 respectively. Applicant also pledged to pay all of the first respondent's legal costs on a higher scale in the event of default and attendant law suits, to recover the sums stated therein.

In clause 4 of the Deed of settlement, the second respondent bound itself as surety *in solidium* and co-principal debtor for the due payment and fulfilment of the first respondent obligation therein by issuing a Credit guarantee *cum* Deed of suretyship. By virtue of this binding document the second respondent made themselves jointly and severally liable with the first respondent, one paying the other to be absolved for the payment of the sum of USD 486,032.62, due to the applicant in terms of the operative Deed of settlement.

It is not in dispute that the applicant failed to honour his obligations in terms of the Deed in question. It is also a fact that despite several correspondence and reminders between the parties the applicant remained in default of payment of the sums due to the first respondent. Efforts by the first respondent legal practitioners to recover the debt from the second respondent by placing them in *mora* through letters were futile, as the second respondent sought to renege from their undertakings and their Surety deed contract. Their defence was that the applicant had not fulfilled the terms of the Deed of surety and Credit guarantee.

Due to the impasse, the first respondent approached this court by way of Chamber application seeking the registration of the Deed of settlement under case HC7249/21 as a consent court order in case HC 2502/22. Subsequently, on the 17th of June 2022, the consent order sought was granted by this court in Chambers. Consequently, a writ of execution was issued on the 18th of August 2022 for the attachment of properties belonging to both the applicant and the second respondent for the recovery of the money due in terms the Deed settlement and consent order. It is this consent order that the applicant seeks rescission citing that it had been entered in error and the remedy lies in rule 29(1)(a).

Of note, the second respondent did not file a notice of opposition nor did they file an opposing affidavit. Instead, they filed an unfamiliar creature, they termed the second respondent's notice and affidavit of response wherein they were basically joining issues with the applicant. Their justification

being, since they want the same recourse as the applicant, they felt obligated to respond and not to oppose, hence the 'invention'. They also asserted that they had filed a parallel application seeking to rescind the same judgement obtained by the first respondent in case HC5681/2022. The second respondent was, therefore, not opposed to the rescission of judgement application.

A point of law was taken up at the hearing, as a *point in limine* attacking the foreign nature of the documents filed by the second respondent, alien to the governing rules, urging the court to strike them out. For the sake of the interests of justice and finality to litigation, this court elected to waive the rules, in terms of rule 7 of the 2021 High Court rules, which are in essence for the convenience of the court and allowed the alien *species* filed of record to stand. See, *Forestry Commission v Moyo* 1997(2) ZLR 254, which says, "Insofar as the High Court rules are concerned, rule 4C(a) permits a departure from any provision of the rules where a court or a judge is satisfied that the departure is required in the interests of justice."

**Applicant's argument**

Applicant concedes that, in terms of the Deed of settlement he indeed waived his right to be served with the Chamber application under case HC2502/22. However, he brings in a new dimension that the Chamber application itself was fatally defective as it did not comply with rule 60(4)(b) of the High Court rules S.I 202 of 2021, which in their view, requires the accompaniment of a certificate compiled by a legal practitioner, justifying why service was not affected to other interested parties. They therefore, motivate that, for that reason there was an error which was not drawn to the attention of the trial court calling for the rescission of that order.

**First Respondent's argument**

It is the first respondent's submission that, the applicant by reason of clause 4.3 of the Deed of surety ship waived his right to be served with the notice of the set down date of the Chamber application registering the Deed of settlement and the attendant consent order. They further contend that, the second respondent in turn, by entering a contract of guarantee, stepped into the shoes of the defaulter, which entails that they too are bound by the terms of Deed of settlement. As such they also waived their right to be served as guarantors.

**The second respondent's argument**

The second respondent argued that the contract of guarantee entered between themselves and the applicant was an inchoate contract. Essential conditions of that contract where not fulfilled by the first respondent; they therefore cannot be held ransom to the incomplete contract. They argue further, that, they are an interested party who was affected by the impugned order granted when they were not a party to it or to the Deed of settlement in question. In that vein, they highlight that they have, as already alluded to launched a similar challenge to have the said order rescinded in terms of the same rule 29(1) (a) of the current High Court rules. In addition, they also join issue with the applicant on the circumvention of the requirements rule 60(4) by the first respondent.

**Issues**

Emerging from the above facts, are two issues, whether or not the maligned judgement or order of the 17th of June, 2022 in case HC2502/22, was granted in error warranting rescission in terms of rule 29(1) (a)? Whether or not the trial court erred in granting the order sought in an application which was not accompanied by a certificate specified in rul4 60(4)(b)?

**Synthesis of facts, law and evidence**

As a starting point, rule 29(1)(a) of the 2021 High Court rules reads:

(1) The court or judge may, in addition to any other powers it or he or she may have, on its own initiative or upon the application of any affected party, correct, rescind or vary-
   a. An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; or
   b. An order or judgment in which there is an ambiguity or patent error or omission, but only to the extent of the such ambiguity, error or omission; or
   c. An order or judgment granted as a result of a mistake common to the parties.

In examining the above factors, the applicant's application is specifically in terms of rule 29(1) (a), which relates to the correction or rescission of an order erroneously sought or ordered in the absence of any party. In the present case, can it be safely concluded that the order was granted in the absence of the applicant especially in the face of their admitted waiver of their right to notice in terms of their Deed of settlement? In their answering affidavit they actually acknowledge this position but in their heads of argument and oral submission they are reneging from such a glaring fact and their own admissions. Paragraph 5 of the applicant's answering affidavit states,

'The gravamen of my complaint is not that it was not served with the Chamber application under case number HC2302/22, as it is common course that, in terms of the Deed of settlement between the first respondent and myself, I was not entitled to be served with such court process.'

This is a clear admission by the applicant that their absence was sanctioned by their waiver borne in the stated Deed of settlement. Notably, this is a legally binding contract which they consciously and voluntarily entered into. See, *Mining Industry Pension Fund v DAB Marketing (Pvt) (Ltd) 2012 ZLR132(S).*

In, *Firstel (Pvt)Ltd, v Net One cellular (Pvt) Ltd,* SC1/15, it was highlighted that, "It is trite that courts will be astute not to exonerate a party from performing its obligations under a contract it has voluntarily entered into at arm's length.' See, *Watergate (Pvt) Ltd v Commercial Bank of Zimbabwe 2006(1) ZLR 9 (S).* In that regard, in as much as the consequences may be harsh a party is bound by their contractual terms. The court's hands are tied by what the parties agreed to in the circumstances of this case.

Upon further evaluation, Rule 60(3) which is the rule governing chamber applications, specifically mentions that, a chamber application shall be served on all interested parties unless the defendant or respondent, as the case may be, has previously had due notice of the order sought and is in default. The notice being referred to in rule 60(3) is the notice that was waived by the applicant in terms of the Deed of settlement.

Rule 60(3) (a -e) also outlines instances which exonerates an applicant from giving such notice to all interested parties. In *casu,* it is obvious, that the said chamber application was for the registration of the Deed of settlement as provided in Clause 4.3 which reads,
"In the event of respondents default applicant shall be at large to obtain a consent order without notice to the respondent and issue a warrant of execution for the sums or costs due as at the date of the default in terms of the consent order".

By virtue of clause 4.3 of the Deed of Settlement, applicant nailed himself to the mast. It is evident that they failed to demonstrate that their situation qualifies under rule 29(1)(a) which they consciously invoked as the violated provision, as they had contractually consented to the course of action taken. Their situation does not fall under the default envisaged under that rule. Therefore, if

strict regard is given to this rule, as read in conjunction with rule 60(3), the applicant has no leg to stand on.

They chose to make their bed, expressly under rule 29(1)(a) at the exclusion of other sections within the ambit of that rule dealing with patent errors or omissions, so they must lie on it. It is my finding that Applicant, though an interested party who tend to be affected by the order sought, waived his right to be given such notice therefore there was no error as envisaged by the rule this application has been brought under. As such there is no violation of rule 29(1)(a). The impugned order does not qualify to be an order granted in default *perse* given the circumstances under which it was obtained as elucidated above. See, *Grantully (Pvt)Ltd and Another v Udc* ltd 2000(1) ZLR 361(S) at 364 G - 365 A-B.

For the sake of completeness, if the second angle of their argument is explored, applicants are saying that the error prompting the need to have the judgement rescinded springs from the fact that the underlying Chamber application did not comply with rule 60(4)(b). A totally new angle from that upon which this application had been brought Although this may seem to be an error in terms of their argument, it is not captured under rule 29(1)(a). Had applicant brought its application in terms of rule 29 in its broader context then may be the issue of patent error or any other instances of mistakes captured therein would have encompassed their second ground of attack.

Applicant chose to deliberately proceed in terms of rule 60(4)(b), as it is clear that the first respondent complied with the provisions of sub rule(4)(a) of the same rule. The essence of the composite rule is that an explanation as to why notice was not given to interested parties has to be given. The question is did the legislature intend the notice to be two fold, both in terms of the affidavit and the accompanying certificate or either one of the processes?

Thus, rule 60(4) reads, where an applicant has not served a chamber application on another party because he or she reasonably believes one or more of the matters referred to in rule 61(2) (a) to (e)-

a. He or she shall set out the grounds for his or her belief fully in his or her affidavit; and
b. Unless the applicant is not legally represented, the application shall be accompanied by a certificate from a legal practitioner setting out, with reasons, his or her belief that the matter is uncontentious, likely to attract perverse conduct or urgent for one or more of the reasons set out in sub rule (3) (a) – (e)

To mention in passing, is the observation by both parties in concurrence, which the court also shares, that there is no rule 61(2) (c) to (e) but only rule 61 sub rules 2(a) to (b). It therefore is, clear that reference to rule 61(2)(a) – (e)is a simple topographical error as rule 61, is out of context with the provisions of rule 60, as it relates to a totally different subject matter altogether on deceased estates and persons under disability. The correct reading should be rule 60(3) (a) to (e) not 61(2)(c) to(e) as these sub rules complements the whole provision, that is rule 60.

The applicant in their oral submissions argue that the use of the word 'and' by the legislature means that both the founding affidavit stating the reasons for circumventing notice on the interested parties and the certificate are a requisite to a chamber application in terms of rule 60(3). Hence, they argue that had this issue been brought to the judge in the matter in issue, he would not have entertained the application in the first place without the accompaniment. In support of their averments they cited the case of *Gerrat Trust vs Creative Credit (Pvt)Ltd* SC 146/21 and *Matambanadzo v Goven* (1) ZLR 23/2004(399) (S).

On the other hand, the first respondent counters that, the stating of reasons in the founding affidavit is sufficient, once that is done there is no need to duplicate the same by accompanying the application with the said certificate. It is their argument that although there is the word "and," it must be construed in such a manner that it was the intention of the legislature to give an option to do one of the two. As far as they were concerned, they had done their part by stating in their founding affidavit the reasons why service could not be effected. They also contested that the two cases relied upon by the applicant, in contradistinction relate to certificates mandatorily specified by the respective statutes not by the rules of the court which the court has powers to waive.

This court is of the view that since both provisions rule 60(4) (a) and (b) speak to one and the same thing, proof in writing embodying reasons why a notice has not been served, doing both will be superfluous as either one of the two methods will sufficiently address the mischief. Just as unanimously observed that there was an error in referring to a non-existing rule, 61(2)(a) -(e), as detailed earlier on, the use of the word "and" in rule 60(4)(a) and (b) is perceivably an error.

This is one of the exceptional cases where the court is compelled to construe the provision in such a manner where the word "and' is overlooked as an error so as to give effect to the intention and

object of the legislature as borne in the context of the whole rule. See *R v Patel and Another*, 1944 AD 379 at 388, *R v Jaspan and Another* 1940 Ad 9 *Storm & Co. v Durban Municipality* 1925 AD 49. In Principal *Immigration Officer v Hawabu and Another* 1936 AD 26 at 31 De Villiers JA commented, "It is true that, even where the words of an Act are capable of one meaning only, there is an exceptional class of extreme cases in which courts of law have felt themselves compelled to 'modify,' 'cut down' or 'vary 'the words used by the Legislature."

Further, the cases of *Gerrat Trust* and *Matambanadzo v Govens SC23/.2004* above, are distinguishable in that, the certificates mentioned therein where mandatory certificates, without which any action taken in their absence was a legal nullity, in terms of Statutory law which is substantive law. In *Matambanadzo* as correctly pointed out by first respondent, the certificate from the rent board was a prerequisite for the granting of an eviction order. In the *Gerrat* case a certificate issued by the Master was compulsory in terms of s5(4) (a) and (b) of the Insolvency Act Chapter 6:07. In contradistinction, the certificate *in casu* is a procedural requirement which is subject to waiver by the court in terms of rule 7 of the current High court rules, that is if it is accepted that section 60(4) (a) and (b) are to be read conjunctively. Nevertheless, a finding has already been made that it is not the case, the certificate can only be filed when the affidavit is silent on reasons for not notifying other interested parties as both serve the same purpose.

This court is of the view that there was no error on the part of the presiding court even though that issue had not been brought to its attention. It therefore does not qualify as a patent error or omission. Moreover, the applicant's application has been brought specifically under rule 29 (1) (a) and no other.

Whether or not the order adversely affects the applicant is not a valid ground to have the order rescinded. They contractually bound themselves through a deed of settlement and all its clauses that culminated into the impugned decision. Come reckoning time, they want to hide behind the finger. Hard as it maybe they must face the music.

The same applies to the second respondents. The deed of surety *cum* Credit Guarantee, on page 84 of the record needs no elaboration. It binds them hook, line and sinker. They took an undertaking to step into the shoes of the applicant. They are bound by the same. Contrary to their argument that they are not part to the deed of settlement hence they had the right to be served with notice as the outcome affected their interests. The caption of the Credit Guarantee, "Deed of

Suretyship for the performance in relation to the deed of settlement in the matter between Tendayi Bernadette Hlupo vs Douglas Mamvura case no. HC 7249/21," disapproves that averment.

What this means is that, the waiver to be served with notice applied to them *mutatis mutandis*. It is not an excuse that the first applicant did not fulfil its part of the bargain in terms of a contract that was between themselves. The Deed of Surety should not have been released if its terms had not been fully complied with. Its release meant everything was in order at the time. Had the second responded not explicitly associated themselves with the deed of settlement then maybe they would have deserved the right to be given notice. However, they became part and parcel of the deed of settlement itself and cannot escape from joint liability.

As a result, there was no error warranting rescission of the order in case HC2502/22 in terms of rule 29(1)(a) nor for the violation of rule 60(4)b of the high court rules, S.I 202 of 2021.

Accordingly, the application is dismissed with costs.

*Chitewe Law Practice*, Applicant's Legal Practitioners
*Chitapi & Associates* first respondent's Legal Practitioners
*Kantor &Immerman Legal Practitioners*, 2nd Respondent's Legal Practitioners