SLICE DISTRIBUTORS (PVT) LTD
versus
SAKHILE MBANO
and
Lucia MKANDHLA N.O
and
CITY OF KWEKWE

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 25 January, 2024 & 11 September, 2024

**Opposed Application**

*R Dembure,* for the applicant
*W Chishiri*, for the 1st Respondent
No appearance for the 2nd and 3rd Respondents

DEME J: The Applicant approached this court seeking an order for the rescission of default judgment entered against it following its former legal practitioners' failure to file Heads of Argument. In particular, the Applicant sought the following relief:

> "1. The judgment handed down on 27th September 2023 in Case Number HC 8122/22 be and is hereby set aside.
> 2. The applicant be and is hereby granted leave to defend the application in Case No. HC 8122/22 and to file its heads of argument within ten days Of this order.
> 3. The 1st respondent shall pay the costs of this application."

On 25 January 2024, I granted the order as prayed for with the exception of Paragraph 3 of the draft order. With respect to costs, I granted an order that costs shall be in the cause. The order of 25 January 2024 was not accompanied by the reasons. . Thus, this judgment seeks to justify the order of 25 January 2024.

The Applicant is a company duly registered in Zimbabwe where the first respondent is a female adult, the second respondent is sued in her official capacity as the City of Kwekwe Town Clerk while the third Respondent is a local authority.

The Applicant alleged that on 27 September 2023 Chinamora J granted a default judgment against the Applicant in HC8122/22, the order of HC8122/22 is as follows:

> "1. The point in *limine* raised against the first and second respondents be and is hereby upheld
> 2. The application for upliftment of bar operating against the third respondent be and is hereby refused.
> 3. This application is hereby treated as unopposed by reason with first and second respondents not being properly before the court, and the third being barred
> 4. The decision of the first and second respondents to terminate the applicant's lease agreement and to dispose of stand 1493-3rd Street, Kwekwe, be and is hereby set aside.
> 5. The first and second respondents shall pay the applicant's costs on the scale of attorney and client scale, jointly and severally, the one paying the other to be absolved.
> 6. There shall be no order as to costs against the third respondent."

The matter under case number HC8122/22 was filed by the first Respondent in this matter in terms of Section 4(1) of the Administrative Justice Act [*Chapter 10:28*] (herein after called "the Administrative Justice Act") for a review of the 3rd Respondent's decision to terminate the 1st Respondent lease agreement and to sell Stand 1493 Kwekwe Township (hereinafter called "the property") to the Applicant. The Applicant's erstwhile legal practitioners had defaulted in filing heads of argument on time In HC8122/22 as prescribed by the rules of this court, therefore the matter proceeded as unopposed because of the bar that was operating against the Applicant.

The Applicant averred that it failed to submit its heads of argument in HC8122/22 on time because it always depended on its legal practitioner one Mr Mupure to do all the necessary paperwork for litigation. The applicant further claimed that it only became aware that the heads had not been filed on the day of the hearing of HC 8122/22 before CHINAMORA J. The Applicant also asserted that Mr Mupure had not notified it of the predicament. The Applicant maintained that it relied on Mr Mupure for he had handled the Applicant's other business without mistakes. Annexed to the application is an affidavit by Mr Mupure attesting that the failure to file heads on time was a genuine mistake. The Applicant is not to be blamed according to the Applicant's former legal practitioner.

With respect to merits of the main matter under case number HC8122/22, the Applicant argued that the 3rd Respondent advertised the property in question and invited the public to raise objections if any. According to the Applicant, the 1st Respondent never raised any

objection. The Applicant further insisted that it consequently purchased the property in dispute and paid the full purchase price.

Further, the Applicant maintained that the application by the 1st Respondent under case number HC 8122/22 had no valid cause of action because the decision by the 3rd Respondent was not an administrative action to which the Constitution and the Administrative Justice Act applies. It further asserted that the decision was not administrative in nature but rather it was private as it was in terms of clause 5.2 of the lease contract between the parties. It is the case of the Applicant that the 3rd Respondent had the right to terminate the lease and it did so lawfully. According to the Applicant the 3rd Respondent even gave the 1st Respondent 3 months to vacate the property after the Applicant had paid the full purchase price of the property.

The contract between the Respondents had no right of first refusal clause and it could not be created by the court in favour of the 1st Respondent according to the Applicant. The Applicant also affirmed that the application for the setting aside of the decision by the 3rd Respondent was baseless and had no cause of action as the lease between the 1st and 3rd Respondents had expired in January 2023.

The 1st Respondent opposed the present application. She argued that judgment was not granted in default as explained by the Applicant but there were oral arguments for application for upliftment of bar then it was dismissed. The 1st Respondent also claimed that the relief sought by the Applicant was challenging the dismissal of the application for upliftment of bar and hence the court is now *functus officio.* The Respondent averred that the applicant's appropriate course of action is to appeal against the judgment by Chinamora J and hence the present application is improperly before the court according to the 1st Respondent.

The 1st Respondent additionally affirmed that the present application had failed to meet the requirements of an application for rescission of default judgment. It is the case of the 1st Respondent that there was no reasonable explanation for the failure to file Heads of Argument by the Applicant and this was, according to the 1st Respondent, why the court dismissed the application for upliftment of bar in HC 8122/22.

The 1st Respondent maintained that a perusal of HC8122/22 shows that the Applicant is lying as it failed to annex council resolution authorising the sale of the property in dispute. The 1st Respondent averred that she was notified of the advertisement when the property had already been sold without being given time to make representations. She claimed that she was

entitled to the right of first refusal in light of the legitimate expectation created by the 3rd Respondent through the 2nd Respondent. The 1st Respondent argued that its dispute falls within the realm of administrative law.

According to the 1st Respondent, the 2nd and 3rd Respondents breached their duty to act reasonably, lawfully and just as their decision was biased, prejudicial and irrational which violates the dictates of the Administrative Justice Act. The 1st Respondent also averred that the expiry of the lease does not affect her rights. Therefore the 1st Respondent asserted that the present application had no basis.

The Applicant insisted that the remedy sought before this court is the correct course of action as one cannot appeal against a default judgment. The Applicant argued that the court is not *functus officio* as the matter was not decided on the merits.

The following issues arise for determination:

A. Whether default judgment is appealable.

B. Whether the present application meets the essential requirements of the application for rescission of default judgment.

The first issue gives rise to the principle of *res judicata*, among other issues emerging therefrom. The 1st Respondent argued that the proper remedy for the Applicant was to appeal against the decision of 27 September 2023 by CHINAMORA J. The concept of *res judicata* has been a subject for determination in our jurisdiction. In the case of *Wolfenden* v *Jackson*[1], the court had occasion to define res judicata in the following way:

> "The origin of the doctrine is to be found in the civil authorities, which laid down two requirements for its successful invocation, namely, that the proceedings relied upon must be between the same parties or their privies, and that the same question, *eademquestio*, must arise. (See *Bertram G v Wood* (1893) 10 SC 177 at 180) In Roman-Dutch law the requisites were divided into three. *Voet* 44.2.3 says that there must also be the same cause of action."

In the case of *Towers* v *Chitapa*[2], GILLESPIE J remarked as follows:

> "This approach has been approved by the Supreme Court in Zimbabwe; although subsequent to that approval further doubt appeared to be cast on the issue by the same court. Any doubt must now, however, be regarded as having been dispelled by the decision in *Kommissaris van BinnelandseInkomste* v *Absa Bank Bpk.* In this case the elements of the defence *of res judicata* were explained as consisting of an identity of

[1] 1985 (2) ZLR 313.
[2] 1996 (2) ZLR 261.

> the plaintiff, the defendant, thing in contest and cause of action. It was held that the latter two requirements in particular ought in the appropriate case to be interpreted expansively so as to permit the possibility of a defence of *res judicata* being invoked in respect of an issue determined as part of the *ratio decidendi* of the earlier decision, a defence that may conveniently be termed issue *estoppel*, despite the fact strictly speaking, a different cause of action and different relief may be sued for in both cases. The defence ought only to be allowed, however, with caution, and only where the underlying requirement that the same question should arise in both cases is satisfied."

Although the decision of 27 September 2023 involves the same parties, the question which was definitively determined on 27 September 2023 was the oral application for the upliftment of the bar operating against the Applicant for its failure to file Heads of Argument. The main matter was determined by way of default judgment. In Paragraph 3 of the judgment, the court ruled that:

> "This application is hereby treated as unopposed by reason with first and second respondents not being properly before the court, and the third being barred."

Without a doubt, the diction of the paragraph highlighted above demonstrates that the decision of 27 September 2023 was a default judgment and consequently it must be construed and considered as such. There is no basis for regarding this judgment as final in nature. Hence, this default judgment is not appealable.

Further, on 27 September 2023, the question which was before the court was whether the Applicant satisfied the requirements for the application for the upliftment of the bar. The question which is before me is whether the Applicant has met all the requirements of the application for rescission of default judgment. undoubtedly, the causes of action for and the reliefs sought in the two applications are different and hence it is not proper that this court is *functus officio.* The requirements for the two applications are different. The counsel for the 1st Respondent did not insist on this point in his oral submissions on the day of hearing.

Additionally, in the case of *Zvinavashe* v *Ndlovu*[3], the Supreme Court made the observation that the only way of setting aside a default judgment is by approaching the court which granted default judgment. The Supreme Court observed as follows:

> *"*Counsel for the respondent contends correctly that a default judgment can only be set aside by a successful application for rescission of the judgment under the rules of the relevant court. The application must be made by the defaulting party himself, as indicated by the expression, "purging his default".

[3] SC40/06

> It follows that *in casu,* the appellant's default remained unpurged even as the learned Judge *a quo* considered the merits of the matter and gave reasons for his judgment. By virtue of Rule 62 the learned Judge *a quo* could simply have "absolved" the respondent from the application, that is, dismissed it, as long as he was not considering postponing the application or making any other order. The consideration by the Judge *a quo* of the merits of the case, and the giving of his reasons for judgment, therefore had no effect on the status of the judgment given, which remained that of a default judgment."

It is palpably clear from the case of *Zvinavashe* v *Ndlovu (supra)* that the default judgment regardless of its shape or form, whether the default judgment is based on merits or otherwise, remains a default judgment which can only be set aside through the application for rescission of default judgment. Therefore, the decision of 27 September 2023 is equally affected by the decision of *Zvinavashe* v *Ndlovu (supra)* as it is a default judgment and can only be set aside through the present application. Thus, the Applicant has to purge its default for its failure to file Heads of Argument in the main application under case number HCH 8122/22. Mr. Dembure, as he then was, correctly argued that the judgment of 27 September 2023 is a default judgment granted in terms of Rule 59(22) of the High Court Rules, 2021. This sub rule provides as follows:

> "Where heads of argument that are required to be filed are not filed within the period specified in sub rule (21),the respondent concerned shall be barred and the court or judge may deal with the matter as unopposed or direct that it be set down for hearing on the unopposed roll."

Unlike Rule 238 (2b) of the High Court Rules, 1971 (hereinafter called "the repealed High Court Rules), Rule 59 (22) of the High Court Rules, 2021 no longer gives the court a choice to consider the merits of the matter where a party defaults in filing Heads of Argument. Rule 238 (2b) of the repealed High Court Rules provides as follows:

> "Where heads of argument are required to be filed in terms of sub rule (2) are not filed within the period specified in sub rule (2a), the respondent concerned shall be barred and the court or judge may deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll."

The legislature, in its wisdom, saw it prudent to have a departure from the old position as established in terms of Rule 238 (2b) of the repealed High Court rules by taking away the court's option to grant default judgment based on merits. I am sure that the legislature was alive to the fact that the default judgment is not final in nature and that the same is not appealable. Hence, giving the court an option to deal with the merits or generate reasons for default judgment would be an exercise in futility. In my view, the provisions of Rule 238 (2b) of the

repealed High Court rules caused this court to be conflicted by granting default judgment on merits as such judgment could only be set aside by application for rescission of default judgment which could only be considered by the same court. The repealed rules put this court in a difficult position where it was forced to reconsider its decision which was based on merits. The party in whose favour default judgment on merits would have been granted may visibly enjoy unfair advantage over the defaulting party who has failed to file Heads of Argument. Inviting the court to deal with the merits where the Respondent has failed to file Heads of Argument would obviously cause a dilemma to the court as the court, at this moment will only rely on opposing affidavit. The Respondent's case would be incomplete at this stage in the absence of Heads of Argument. The provisions of Rule 238 (2b) of the repealed High Court Rules would put this court in an embarrassing situation under such circumstances. Thus, Rule 59 (22) is a step in a positive direction in enhancing access to justice in the regime of default judgments as it eliminates the potential conflict where this court could be forced to contradict its decision on merits.

In the case of *Zvinavashe* v *Ndlovu* (*supra*), the Appellant unsuccessfully appealed against the decision of the default judgment despite the fact that such default judgment was based on the merits. The appeal was consequently struck off the roll with costs. The Supreme Court remarked as follows:

> "For the avoidance of doubt, it is declared that the giving of reasons for the default judgment in question, by the court *a quo*, was unnecessary and consequently, of no force or effect. It does not convert the default judgment into a judgment on the merits.
>
> Sibanda's case *(supra)* in my opinion, does not need any clarification, despite its reference to reasons for judgment not having been given. Having read that judgment in full, I am satisfied the appellant has misinterpreted the import of the comments cited. In that case the applicants in an application for rescission of a default judgment sent their legal counsel to appear on the scheduled hearing date, with instructions not to prosecute the application, but to seek a postponement. The court turned down the request for postponement and proceeded to dismiss the application, prompting the applicants to file an appeal to this Court. The learned Judge of Appeal noted that the judgment was effectively a default judgment which could only be set aside through an application for its rescission. The comments in question, in my view, were made by way of emphasising why the judgment was regarded as a default judgment, as opposed to one that was reached after consideration of submissions on the merits. The absence of submissions on the merits, and the lack of the resultant reasons for judgment, are characteristics of a judgment given in default. I am satisfied the comments cannot and should not be, interpreted to mean that a default judgment in which, rightly or not, reasons for judgment are given, is appealable. As I have already made clear, reasons or no reasons, a default judgment remains that until it is set aside in the prescribed manner.
>
> This "appeal" was in reality not properly before this Court. I have made reference to "appeal" and "appellant" merely for convenience.

In the result the appeal, such as it is, is struck off the roll with costs."

Thus, default judgment whether with or without reasons is never appealable as it remains a default judgment in accordance with the jurisprudence established by the Supreme Court in the case of *Zvinavashe* v *Ndlovu (supra)*. In light of this, the present application is properly before me.

Consequently, I will now proceed to examine the next issue of whether the Applicant managed to satisfy the requirements of the present application. The present application has been brought before this court in terms of Rule 27 of the High Court Rules, 2021, which provides as follows:

*"*(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, and thereafter the rules of court relating to the filing of opposition, heads of argument and the set down of opposed matters, if opposed, shall apply.

(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 the action, on such terms as to costs and otherwise as the court considers just."

The requirements for what constitutes "good and sufficient cause" has been elaborated by a variety of case law in our jurisdiction. In *Stockil v Griffiths*[4], Gubbay CJ made the following remarks—

"The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving "good and sufficient cause", as required to be shown by Rule 63 of the High Court of Zimbabwe Rules 1971, are well established. They have been discussed and applied in many decided cases in this country. See for instance, *Barclays Bank of Zimbabwe Ltd* v *CC International (Pvt) Ltd* S-16-86(not reported); *Roland and Another* v *McDonnell* 1986 (2) ZLR 216(S) at 226E-H; *Songore* v *Olivine Industries (Pvt) Ltd* 1988(2) ZLR210(S) at 211C-F. They are:

(i) the reasonableness of the applicant's explanation for the default ;
(ii) the *bona fides* of the application to rescind the judgement; and
(iii) the bona fides of the defence on the merits of the case which carries some prospect of success.

These factors must be considered not only individually but in conjunction with one another and with the application as a whole."

[4] 1992 (1) ZLR 172(S) at 173D-F.

*In casu,* the reasons proffered by the Applicant for its default appear to be reasonable in my opinion. In my view, the present application cannot be described as a *mala fide* application. The Applicant does have a reasonably arguable case which carries some prospect of success. I do not agree with the submissions by the counsel for the 1st Respondent, Mr. Chishiri, who argued that the Application fails to meet the requirements of the application for rescission of default judgment. Mr. Chishiri further argued that Applicant's default was wilful. This was vehemently opposed by the counsel for the Applicant. In *Deweras Farm* (*Pvt*) *Ltd & Ors* v *Zimbabwe Banking Corp Ltd*[5], the court, in discussing the link between "good and sufficient cause" and wilful default, made the following observations:

> "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:
>
> '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."

In *Zimbabwe Banking Corp. Ltd* v *Masendeke*[6], the court, in defining and elucidating wilful default, opined as follows:

> "Wilful default occurs when a party freely takes a decision to refrain from appearing with full knowledge of the service or set down of the matter."

The conduct of the Applicant's former legal practitioner does not meet the threshold of wilful default. Although the Applicant's former legal practitioner exhibited a level of negligence, this cannot amount to wilful default. I am unable to detect any act of deliberateness in such demeanour. The behaviour by the Applicant's former legal practitioner is a mistake, in my considered view. Nothing has been placed before my attention to suggest that such character amounts to gross negligence or deliberateness.

[5] 1998 (1) ZLR 368(S) at 369 E – H; 370A.
[6] 1995 (2) ZLR 400 (S).

Having failed to establish wilful default in the Applicant's comportment, I saw it prudent to grant the present application with amendment to the prayer of costs. I ordered that costs must be in the cause. The Applicant had prayed for costs against the 1st Respondent. In my view, there was no justification for such costs. It is just that the question of costs be deferred to a later date when the merits of the main application are considered.

Resultantly, I was motivated to grant the present application with consequential amendments due to the aforementioned reasons.

*Mabulala and Dembure*, applicant's legal practitioners.
*Saunyama Dondo*, 1st respondent's Legal practitioners.