RODGER MUHLWA

Versus

ALPHA MEDIA HOLDINGS (PVT) LTD
t/a SOUTHERN EYE

And

KHOLWANI NYATHI

And

THANDIWE MOYO

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 9 NOVEMBER 2021 AND 5 MAY 2022

Opposed Application

Advocate L. Nkomo, for the applicant
N. Mazibuko, for the 1st and 3rd respondents
No appearance for the 2nd respondent

TAKUVA J: This is a court application for partial rescission of a default judgment granted against the applicant in favour of the respondents under case No. HC 1950/20 on the 18th day of March 2021. The default judgment confirmed as final a provisional order which had been granted *ex parte* against the applicant on the 12th of November 2020. The terms of the final order which is sought to be partially rescinded are as follows;

"(a) It is hereby declared that save for untaxed costs, 1st and 3rd applicants have fully discharged their obligations arising from and in connection with the order of this court in HC 2163/16 Judgment HB 66-19.

(b) The writ of execution issued by the 3rd respondent on the 22nd day of September 2020 in HC 2163/16 be and is hereby set aside.

(c) 1st respondent to pay the costs."

The focus of this application is the declaratory order that the 1st and 3rd respondents have fully discharged their obligation arising from the judgment amount under HC 2163/16 as well as the costs order. The relief was sought in terms of Order 9 rule 63 (1) of the then High Court Rules 1971 on the basis that there is good and sufficient cause to partially rescind the default judgment in that the failure to oppose the confirmation of the provisional order was a result of a genuine mistake and misapprehension on the part of applicant's legal practitioner.

Background Facts

These are largely common cause as shown by the following sequence of events. On 29 August 2016, applicant caused summons to be issued out of this court against the respondents under case number HC 2163/16 claiming defamation damages in the sum of US$100 000-00. The respondents defended the claim and the matter progressed all the way to trial before MABHIKWA J who on 19th May 2019 upheld the applicant's claim for damages against the 1st and 3rd respondents and awarded applicant the sum of US$16 000-00 as damages.

Unhappy with the judgment the respondents noted an appeal to the Supreme Court under case No. 288/19. The respondents lost the appeal on 23 July 2020 under SC 110-20. Following the dismissal of the respondents' appeal, the applicant sought to recover from the 1st and 3rd respondents the defamation

damages in the sum of US$16 000-00. In what respondents termed "full and final settlement of the defamation damages", respondents' legal practitioners on 19 August 2020 processed an electronic transfer of the sum of ZWL$16 000-00 into the trust account of applicant's legal practitioners. By a letter dated 24 August 2020 written by respondents' legal practitioners to applicant's practitioners respondents advised the applicant that the payment was "in full and final settlement" of the defamation damages awarded in applicant's favour under HC 2163/16.

On 26 August 2020, the applicant's legal practitioners responded to the letter advising the respondents' legal practitioners that the applicant was not accepting the payment of ZWL$16 000-00 as full and final settlement. Applicant pointed out that SI 33/2019 was inapplicable in this case. On 28 August 2020 respondents' legal practitioners penned a letter to applicant's legal practitioners persisting with their contention that the payment of ZWL$16 000-00 was a full discharge of the 1st and 3rd respondent's obligation under judgment No. HB 66-19.

Having reached this stalemate, applicant's legal practitioners on 22 September 2020 caused to be issued a writ of execution against moveable and immovable property under HC 2163/16 instructing the Sheriff of Zimbabwe to cause to be realized "the sum of US$16 000-00 or the equivalent thereof in Zimbabwe dollars in terms of the official exchange rate prevailing as at the date of payment together with interest a *tempore morae* from the 21st January 2015, to date of payment in full." The respondents' legal practitioners were advised by letter dated 6 November 2020 that a writ had been issued consistent with applicant's refusal to accept payment of ZWL$16 000-00.

The respondents' legal practitioners noted an error on the writ and advised applicant's lawyers of this defect. The applicant's legal practitioners conceded that the writ was defective in that it incorrectly sought to recover interest on the judgment amount calculable from a date that was not ordered by the court in its judgment awarding defamation damages. The interest stated as recoverable under the writ of execution was inadvertently stated as calculable from the 21st of January 2015, when in fact the judgment of the court ordered that interest shall be calculable from the date of the judgment, which was the 9th of May 2019.

On 11 November 2020 respondents' legal practitioners filed an urgent chamber application under case No. HC 1950/20 seeking urgent interim relief interdicting the Sheriff from proceeding with the execution of the writ issued by the applicant's legal practitioners on the 22nd of September 2020. Upon being served with the urgent chamber application applicant's legal practitioners filed and served a notice of Consent to Judgment on 16 November 2020 which read as follows;

> "BE PLEASED TO TAKE NOTICE THAT the 1st respondent consents to an order setting aside and staying execution of the writ of execution issued on the 22nd of September 2020 in case No. HC 2163/16 and tenders costs on an ordinary scale."

The provisional order sought was granted *ex parte* on 12 November 2020. Later the provisional order was confirmed unopposed as applicant's legal practitioner believed that its terms were restricted to the setting aside of the defective writ only. On 16 March 2021, applicant's legal practitioner wrote another letter to the respondents' legal practitioners calling on them to finalise the provisional order proceedings under HC 1950/20. The second paragraph of the letter reads as follows;

> "Can you finalise the proceedings regarding the defective writ of execution so that you can pave way for us to deal with the main issue which is the question of whether or not your client has paid in full the damages." (my emphasis)

Respondents' legal practitioners replied by letter dated 22 March 2021 in the following terms;

> "A proper reading of the confirmed terms of the final order will suggest that it is not open to you to now issue a fresh writ after a declaration that ours has fully discharged its obligations to yours, except for the costs which are yet to be taxed." (my emphasis).

It was this letter that made applicant's legal practitioner realise for the first time the mistake and misapprehension he had labored under since November 2020 when he filed the Notice of Consent to Judgment. He had not realized that the relief sought by the respondents in the terms of the final relief in the provisional order went beyond interdicting execution of the writ and included a substantive declaratory order to the effect that the 1st and 3rd respondents' had fully discharged their obligation to pay the judgment amount of US$16 000-00 defamation damages awarded to the applicant under judgment number HB 66-19. Accordingly, the partial rescission sought relates only to the declaratory order to the effect that the 1st and 3rd respondents have fully discharged their obligation to the application.

The application is opposed by the 1st and 3rd respondents who raised a point *in limine* regarding the jurisdiction of this court to hear this matter as in its founding affidavit, the applicant referred to rule 63 as opposed to rule 56 of the then High Court Rules 1971. Further it was contended that this application is fatally defective and must be struck off the roll for this reason.

On the other hand applicant submitted that the concession in his answering affidavit that he cited the wrong rule is abandoned. *Advocate Nkomo* insisted that this application is based on rule 63 and not rule 56 because it relates to paragraph 1 of the Final Order dealing with the declaratory aspect. The argument is, since there was no consent to this term it cannot be said that it was granted by consent. It was also submitted that the applicant is not seeking a wholesome rescission of the default judgment.

In my view since the applicant has abandoned or withdrawn his concession that reliance on rule 63 was wrong, the whole point raised in this point *in limine* becomes moot. In any event the mere citation of an incorrect rule does not always render an application defective.

What matters is the substance or content of the pleadings – See *Wedzera Petroleum Pvt Ltd and 8 Others* v *Metropolitan Bank of Zimbabwe* HH 25-19, *Gondo and Another* v *Syfrets Merchant Bank Ltd* 1978 (1) RLR 201 (H).

In casu the Founding Affidavit clearly shows that what is sought is a rescission of a default judgment in terms of rule 63 (1) of the Rules. As regards the withdrawal of the concession it must be noted that citation of a wrong rule is a point of law and a concession on a point of law does not bind a party. Therefore, such a concession or admission can be abandoned specially where there is no prejudice to the other party – See *Eastern Highlands Electrical Pvt Ltd* v *Gibson Investments Pvt Ltd* SC 26-2007.

As regards jurisdiction of this court the failure to cite the correct rule does not affect it as rescission can be granted on the basis of the common law.

Accordingly the point *in limine* has no merit and it must fail.

ON THE MERITS

The issue for determination is whether or not the applicant has established the requirements necessary for the partial rescission of the judgment.

APPLICANT'S CASE

Applicant submitted that he has established the requirements for the rescission of the judgment under HC 1950/21 and for leave to be granted for the applicant to defend the action as the applicant has shown good and sufficient cause for such leave to be granted. It was further contended that the explanation is reasonable in that the consent was granted due to a mistaken belief by applicant's legal practitioner as to the contents of the consent. The error by the applicant's legal practitioner is fully explained in the affidavits of the legal practitioner.

From the explanation given by the legal practitioner and the applicant, it is apparent that the parties in granting the consent to judgment were not fully *ad idem.* Applicant submitted that what the parties were in agreement about is the incorrect interest calculation as appeared in the writ of execution. However, so the argument goes, it is clear from the papers that at all material times, both the applicant's legal practitioner and the respondents' legal practitioners were at cross purposes with regard to the effect of S.I 33 of 2019 and were not of one mind on this point.

Applicant submitted that there is a reasonable explanation for the incorrectly given consent and that the applicant has brought all the relevant and material facts before the court.

BONA FIDES **OF THE DEFENCE ON THE MERITS AND PROPSECTS OF SUCCESS**

It was applicant's argument that he has a *bona fide* defence to the claim on the merits and that there are prospects of success of the defence. Applicant anchored this conclusion on the basis that respondents' interpretation of the relevant provision is incorrect. Applicant disputes respondents' allegation that on the basis of the application of PART VI of the Finance (No. 2) Act No. 7 of 2019 (re-enacted S.I 33/2019) the judgment debt which was granted in United States Dollars on the 9th of May 2019, would be due and payable in Zimbabwean dollars at a rate of 1:1.

To support this argument, applicant submitted that the judgment debt had not been assessed and valued in United States Dollars before 22 February 2019. The judgment debt became assessed and valued in United States Dollars on the date the judgment was handed down which was the 9th of May 2019. According to the applicant section 22 of the Finance Act would not be applicable as the judgment debt was valued and expressed in United States Dollars after the effective date.

As regards respondents' submission that applicant issued summons in 2016 and that the cause of action arose in 2016, applicant submitted that this does not help the cause of the respondents for two reasons. Firstly, at the time of issuing summons, the applicant was making a claim for the payment of general damages which by their nature are non-percuniary in that the court decides upon an assessment of relevant factors and the particular circumstances of the case, the amount that should be awarded in damages.

Therefore, until the court makes a determination as to the existence of an extent of liability against the other party, the applicant's claim remains just that, a claim which only rises to the position of a judgment debt, once the court makes a specific finding as to liability.

Secondly, the respondents rightly concede at paragraph 10 of their Notice of Opposition that what arose prior to the 22nd of February 2019 was the cause of action. A cause of action is neither an asset nor a liability.

Finally the applicant submitted that the issue of quantum and currency of damages was properly dealt with by the Supreme Court under SC 288-19 wherein after hearing counsel for both parties on *inter-alia* the quantification of damages in foreign currency held that;

> "We are also satisfied that the court *a quo* properly exercised its discretion in assessing the quantum of damages. Having analysed the law and authorities cited on behalf of the parties, we hold the view that no case has been made for interference by this court with the court *a quo's* discretion in assessing the damages awarded."

In light of the above, applicant submitted that he has met the requirements for the partial rescission of the judgment.

RESPONDENTS' CASE ON THE MERITS

The respondents submitted that the explanation given by the applicant is unreasonable and unacceptable in that when the urgent application in HC 1950/20 was filed and served, it should have become clear to the applicant and his legal practitioner what the respondents' "cause of action" was. The fact that respondents mentioned in their first ground for bringing the urgent application that they had discharged their obligation in terms of the order in HC 2163/16

should have removed any doubt in the applicant's mind. It was further contended that as a result of the above it is not competent for the applicant to insist on the attachment of the respondents' property.

Further, respondent argued that the applicant's belief was that he was simply consenting to the setting aside of the writ of execution is simply dishonest in that the full urgent application was served on his legal practitioner. Respondents also criticized applicant's legal practitioner for failing to explain why an urgent application had to be filed if indeed the legal practitioners only discussed the incorrect calculation of interest as the sole basis for the setting aside of the writ. According to *Mr Masiye-Moyo's* affidavit, the legal practitioners "disagreed on the point that the respondents had fully discharged their obligations." Respondents argued that their legal practitioner's affidavit gives a more probable explanation which the court should accept and reject that of the applicant's legal practitioner.

On the question of what transpired before the Supreme Court regarding the appeal under SC 288-19 pertaining to the currency issue, respondents urged the court to agree with them that the correct position which the Supreme Court confirmed at the hearing of the respondents' appeal was that by operation of S.I 33 of 2019 as confirmed by section 22 of the Finance Act No. 2 of 2019 is that the sum of USD16 000-00 was payable in RTGS at rate of 1:1.

THE *BONA FIDES* OF THE DEFENCE AND THE PROPSECTS OF SUCCESS IN HC 1950/20

Respondents submitted that there is no basis for rescinding the order in HC 1950/20 given that the applicant's defence on the merits is bad and does not carry

good prospects of success. This is the case because the applicant's claim was affected by the provisions of section 4 (1) (d) of the Presidential Powers (Temporary Measures) (Amendment of the Reserve Bank of Zimbabwe Act and issue of Real Time Gross Settlement Electronic Dollars (RTGS) Regulations 2019 (S.I 33 of 2019).

It was respondents' further contention that section 4 (1) (d) of S.I 33/19 applies to the applicant's claim for the following reasons;

(a) The claim in HC 2163/16 was filed before the first and second effective dates of S.I 33/19 and the Finance Act No. 2 of 2019.
(b) The cause of action arose before the first and second effective dates in terms of the two statutes.
(c) The parties have always been based in Zimbabwe.
(d) The cause of action arose in Bulawayo Zimbabwe and clearly any monetary obligations arising from the parties' contract were affected by S.I. 33/2019.
(e) A summons issued prior to 22 February 2019 sounding in US dollars were by operation of law, amended to RTGS dollar claims.

For these reasons, respondents finally submitted that the argument that the claim had not yet been assessed as at 22 February 2019 and therefore, the claim remained valued in US Dollars does not hold water.

THE LAW

A court may set aside a judgment given in default. Rule 63 (1) of the High Court Rules 1971 provides as follows;

"63 (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 1 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 subrule (1) that there is a 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." (my emphasis)

What constitutes good and sufficient cause in the context of rescission of default judgments was spelt out in *Valentine* v *Mydale International Marketing (Pvt) Ltd & Another* HH 233-18 where the court held that in order to satisfy the requirements of good and sufficient cause, the explanation of the default must be reasonable, the *bona fides* of the application to rescind the judgment, the *bona fides* of the defence on the merits and the prospects of success.

Where it is the legal practitioner at fault, "it is trite that he must file an affidavit admitting his error. Further, it would only have been after the responsible legal practitioner had filed an affidavit admitting fault and explaining in detail what had happened, that the Judge would be in a position to decide whether the respondent should not be visited with the sins of his legal practitioners." See *Thokozile Zondo* v *CAFCA Ltd* SC 64-17.

The relevant legislation in this matter is Part VI of the Finance (No. 2) Act No. 7 of 2019 S.I 33/2019). Section 22 (1) (d) of the Finance Act provides as follows:

"that for accounting and other purposes (including the discharge of financial or contractual obligations), all assets and liabilities that were, immediately before the first effective date valued and expressed in United States Dollars, shall on the first effective date be deemed to be valued in RTGS dollars at a rate of one-to-one to the United States Dollar."

Note that the first effective date referred to above is 22 February 2019.

Section 23 (1) (2) of the Finance Act states;

"(1) for the avoidance of doubt but subject to subsection (4), it is declared that with effect from the second effective date, the British Pound, United States Dollar, South African Rand, Botswana Pula and any other foreign currency whatsoever are no longer legal tender alongside the Zimbabwean dollar in any transactions in Zimbabwe.

(2) Accordingly, the Zimbabwe dollar shall, with effect from the second effective date, but subject to subsection (4) be the sole legal tender in Zimbabwe in all transactions."

The second effective date is 24 June 2019.

The *locus classicus* in the interpretation of this legislation is the case of *Zambezi Gas Zimbabwe Pvt Ltd* v *N.R. Brber (Pvt) Ltd & Another* SC 3-20. In this matter the Supreme Court held that the requirements for the application of section 4 of S.I 33/2019 are that the value of the asset or liability must have been expressed in United States Dollars immediately before the effective date of 22 February 2019. Further, the court stated that;

"If for example, the value of the assets and liabilities was immediately before the effective date, still to be assessed by application of an agreed formular, section 4 (1) (d) of S.I 33/2019 would not apply to such a transaction even if the payment would thereafter be in United States Dollars. It is the assessment and expression of the value of assets and liabilities in United States dollars that matter." (my emphasis)

See also *Manica Zimbabwe Ltd* v *Windmill (Pvt) Ltd* HH 705-20 and

Joyce T. Mujuru & Another v *Peddy Motors (Pvt) Ltd & Ors* HH 436-21.

APPLICATION OF THE LAW TO THE FACTS

The rules of court provide for the setting aside of a judgment given by consent under rule 56 or a default judgment under rule 63 on good and sufficient cause being shown. It is trite that the following factors constitute good and sufficient cause;

1. The explanation must be reasonable.
2. The application must be *bona fide*.
3. The defence on the merits must be *bona fide* and
4. The application must enjoy good prospects of success.

I now deal with these requirements *seriatum*;

In order to assess the reasonableness of the application, I must closely examine the reasons for the default. The applicant gave detailed reasons why the urgent application under HC 1950/21 was not opposed by the applicant. In addition further reasons were supplied by the applicant's legal practitioner in two supporting affidavits filed of record. In these affidavits, the legal practitioner shows the sequence of events that culminated in the consent to judgment. By way of illustration, I have outlined these steps in detail at the beginning of this judgment. For the avoidance of doubt, these events occurred between the 19th May 2019 and the 22nd of March 2021. As I indicated before these events are common cause and supported by correspondence between the parties' legal practitioners.

What predominantly sticks out is that the parties were never at any stage *ad idem* on the currency to be used. After analyzing the above sequence of events, the question that begs an answer is why applicant's legal practitioner suddenly consented to the granting of a declaratur to the effect that respondents have fully discharged their indebtedness under HC 2163/16? In my view such conduct flies in the face of logic and common sense in that applicant had struggled since 2016 to be paid damages in US Dollars. He prosecuted his case successfully in this court and in the Supreme Court. Not only that, applicant took another step forward by issuing a writ of execution to recover specifically US$16 000-00 from the respondents. Also, applicant removed any semblance of doubt *vis-à-vis* his position regarding the appropriate currency when he in black and white rejected payment in RTGS. It boggles one's mind why applicant would suddenly make such a fundamental turn around and consent to payment in RTGS.

Clearly, something happened and it is the duty of this court to find out what it is. According to the applicant's legal practitioner's explanation, he held a misapprehension when he consented to the judgment. He fully explained the circumstances that gave rise to the application. Since the parties were not seeing eye to eye on the effect of S.I 33/2019, it is unusual and strange that applicant would wake up consenting to the judgment. I take the view that the totality of the circumstances that gave rise to this application shows that the order under HC 1950/21 should have never been granted.

I find for these reasons that there is a reasonable explanation for the incorrectly given consent.

As regards the *bona fides* of the application, my view is that once a conclusion is made that the explanation is reasonable it follows that it is *bona*

fide. In any event it is apparent that the applicant's intention is to be paid damages in accordance with the appropriate law. In this regard, applicant is not acting in bad faith at all. He is a judgment creditor under HC 2163/16. Applicant's defence on the merits is *bona fide* and has good prospects of success in that its object is to have a proper interpretation of S.I 133/2019 spelt out. This is crucial because the facts *in casu* are distinguishable from those in the celebrated case of *Zambezi Gas supra*. In the *Zambezi Gas* case, both the cause of action and liability occurred before the first effective date. The value of the assets was assessed and expressed before the 22nd February 2019. Further, the judgment creating the liability had been granted prior to the first effective date. Quite clearly under these circumstances S.I 33/2019 is applicable.

The scenario *in casu* is however very different in the following respect;

(a) The cause of action arose in 2016.
(b) The summons were issued in 2016 claiming general damages.
(c) The liability was still to be assessed by the court as this is a delictual claim.
(d) The judgment was handed down on 9 May 2019 well after the first effective date of 22nd February 2019.

The Supreme Court in the *Zambezi Gas* has already stated that where the value of the liability is still to be assessed S.I 33 of 2019 would not be applicable. The question *in casu* is whether S.I 33/2019 is applicable. Respondents contend it does, while the applicant is of a different view. As far as I am aware, this question has now been directly addressed by the Supreme Court in Ngalulu Investments (Pvt) Ltd and Another v N.R.Z & Another SC 42-22 where the court expressed itself thus;

> "It is also axiomatic that a delict, unlike a financial or contractual obligation cannot be categorized as an asset or liability until it is voluntarily accepted as such by the wrongdoer or until such acceptance is foisted upon the wrongdoer by a court of competent jurisdiction. This is because a delict is committed and does not accrue like an asset nor is it in incurred like a liability. In accounting terms, an asset or a liability has an ascertainable monetary value, which is recorded in the relevant books or statements of account. This is the position that pertains to a judgment debt. It constitutes an asset in the books of the judgment creditor and, conversely, a liability in the hands of a judgment debtor. Neither of these parties can treat a delictual claim as an asset or a liability. They can only do so after a competent court of law has made a determination on whether the claim establishes a liability and thereafter assesses the measure of such a liability. In any event, only a judgment debt and not a delictual claim can be executed in the manner contemplated in section 20 of the Act." (my emphasis)

Herein lies the *bona fides* of the defence on the merits.

Respondents' attempt to rely on the following precedents is futile for reasons discussed below;

(i) The *Mujuru* case is distinguishable on the grounds that liability arose from a contract of sale of farming equipment entered into on 25 July 2014 with final payment due in April 2015. Summons were issued in 2018 claiming payment of a contractual obligation that arose in 2014. A deed of settlement signed and judgment by consent granted in May 2019 in US Dollars. Respondents insisted that judgment in US dollars ought to be paid at the inter-bank rate. Mujuru filed an urgent chamber application arguing that the claim was affected by S.I 33/2019 and as such payment should be in RTGS at 1:1. The court per ZHOU J confirmed the payment in RTGS notwithstanding the fact that judgment was granted after the first effective date. It

was the court's reasoning that liability arose in 2014 through a contract of sale wherein the amount was known and expressed in US Dollars. There was no question assessment of the quantum in terms of the contract. *In casu,* the dispute gave rise to a delictual claim for damages which had to be assessed by the court at a later date.

(ii) *The Manica Zimbabwe* case is also distinguishable on the basis that the liability in that case had arisen before the first effective date. *In casu,* liability arose after the first effective date because the claim is one of an unliquidated amount for damages. That liability was only assessed on the date of judgment. It must also be noted that a cause of action is neither an asset nor a liability. Therefore the mere averment that the cause of action in this matter arose prior to 22nd February 2019 is insufficient to bring the subsequent judgment debt into the sphere of application of S.I 33 of 2019 as it is strictly applied to assets and liabilities and not to causes of action. See *Zambezi Gas* and *Ingalulu* cases *supra.*

I am satisfied that the applicant has a good defence on the merits and that there are high prospects of success. I am also satisfied that the applicant has met the requirements for the partial rescission of the judgment.

In the result, it is ordered that:

1. The default judgment granted by this court under case No. HC 1950/20 on the 18th of March 2021 be and is hereby partially rescinded by the setting aside of paragraphs 1 and 3 thereof.

2. The costs of suit be costs in the cause under HC 1950/20.

Messrs Webb, Low and Barry Inc Ben Baron and Partners, applicant's legal practitioners
Gill, Godlonton & Gerrans c/o Masiye-Moyo and Associates, 1st and 3rd respondents' legal practitioners