MELINA MATSHIYA
(In her capacity as Executrix testamentary for
Estate late ETTORE FUMIA
versus
GEORGE STEPHEN FUMIA
and
ELLEN MARIA FUMIA
and
FALCON HAULIERS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 19 October 2012 and 21 February 2013

Opposed Application

Advocate *T Mpofu*, *for the applicant*
Advocate *F Nyakabau*, for the 1st and 2nd respondents
No appearance for the 3rd respondent

MAWADZE J: The tragic state of affairs in this case is that the father (who later passed on) and son have been engaged in a seemingly unending and bruising legal battle for over a period of seventeen years. Even after the death of the father the swords are still drawn out and the battle far from over. This is more so when one considers that the application before me is simply for a rescission of a default judgment.

This is an opposed application for rescission of a default judgment granted by this court.

On 7 September 2011 my sister judge GOWORA J (as she then was) granted the following order in case number HC 6280/11 in which the first and second respondents were the applicants and the late Ettore Pietro Fumia (now represented by the applicant) and the third respondent were the first and second respondents respectively:

"It is ordered that:

1. The purported allotment to the first respondent on 15 November 1994 of eight shares in the second respondent is declared to be unlawful and is set aside and;
2. The first respondent is ordered to pay costs of the application."

This order was granted pursuant to a court application in HC 6280/11 filed in this court on 30 June 2011 and was apparently unopposed by the two respondents cited therein. This is the order the applicant now seeks to be rescinded.

I now turn to the facts of this case:

At the time this application for rescission of default judgment was filed on 11 October 2011 Isabel Fumia represented the applicant Ettore Pietro Fumia in her capacity as the curator *ad litem* for Ettore Pietro Fumia. Isabel Fumia had been so appointed on 6 October 2011 as the now deceased Ettore Pietro Fumia was indisposed due to illness and mentally incapacitation. However, before the matter could be argued in court, Ettore Pietro Fumia passed on on 13 August 2012. This led to the appointment in terms of r 85 A of the High Court Rules 1971 of Melina Matshiya as the Executrix testamentary as per Letters of Administration granted in her favour on 9 October 2012 to substitute the applicant and represents the interest of the late Ettore Pietro Fumia.

The then applicant Isabel Fumia was married to the late Ettore Pietro Fumia ("hereinafter late Ettore"). The first respondent George Stephen Fumia and the second respondent Ellen Maria Fumia are husband and wife. The first respondent George Stephen Fumia is the first son of the late Ettore having been born to the late Ettore and his first wife (not Isabel Fumia) one Fedora Fumia who passed away on 14 October 2007.

The third respondent Falcon Hauliers (Private) Limited is a limited liability company duly registered in accordance with the laws of Zimbabwe. Its address of service is given by the applicant as number 1000 Manchester Street, Kwekwe and by the first and second respondents as number 44 Cosham Avenue, Borrowdale, Harare which also happens to be the residence of the first and second respondents.

The dispute between the parties is centred on the shareholding in the third respondent which is a non-trading but a property owning company whose sole asset is an immovable property number 981 Kariba Township in Kariba (hereinafter the Nyami Nyami property). The third respondent was incorporated on 2 July 1990. It would appear that it is not in issue that at the incorporation of the third respondent two shares in the initial share capital of the third respondent were subscribed for and held by the first and second respondents who were also the initial founding directors.

It appears not to be in issue that in 1992 the late Ettore purchased rights, title and interests in stand number 981 Kariba Township by way of cession from one S Zhou for Zimbabwean $13 00-00 which was paid by way of a cheque on 26 June 1992. It is also

common cause that notwithstanding that Ettore had purchased this immovable property number 981 Kariba Township (Nyami Nyami property) he proceeded to register it in the name of the third respondent.

At the material time the late Ettore was running a very successful construction company called FMB Construction (Pvt) Ltd which operated from Kwekwe. Isabel Fumia joined FMB Construction (Pvt) Ltd in May 1995 as a Secretary and at that time the second respondent Ellen Fumia was the Administration Manager. During the same year 1995 Isabel married the late Ettore who only had the first respondent George Stephen Fumia ("George") as his son. Later another son Luiguino Fumia was born out of the marriage between the late Ettore and Isabel Fumia ("Isabel"). When Isabel married the late Ettore, the second respondent Ellen Fumia resigned from FMB Construction (Pvt) Ltd and Isabel took over as the Administration manager of FMB Construction (Pvt) Ltd a position she holds to date. It is upon this background that Isabel alleges that in this capacity she virtually handled all financial transactions of FMB Construction (Pvt Ltd, the third respondent and affairs of the late Ettore. Isabel claims to have access to all records and documents of the third respondent and FMB Construction (Pvt) Ltd. This also informs the background information she gave in much detail in her founding affidavit of how between 1993 and 1995 the late Ettore developed the Nyami Nyami property into a palacious, a double storey home with six bedrooms at a cost Isabel puts at Zimbabwe $288 269-85.

It is also common cause that at the material time the first respondent George was running his own company called Dora Transport (Pvt) Ltd which according to Isabel was set up with the financial help of Ettore. It is a transport company. The parties are also agreed that when the Nyami Nyami property was developed Dora Transport (Pvt) Ltd contributed to the construction of this property although there is a dispute as regards the monetary value of such contribution. What is not in issue is that Dora Transport (Pvt) Ltd ferried building materials for the Nyami Nyami property from Bulawayo, Kwekwe, and Harare to Kariba. At that time the relations between the late Ettore and his son George were excellent. Dora Transport (Pvt) Ltd which owned a number of haulage trucks later faced serious financial problems. Isabel attributes this to financial mismanagement by George but the first and second respondents blames the hyperinflation which this country at some stage experienced. What is not disputed is that Dora Transport (Pvt) Ltd had borrowed heavily from financial institutions and the late Ettore had bound himself as surety and co-principal debtor. As a result Ettore together with FMB Construction (Pvt) Ltd were exposed to the indebtedness of Dora Transport (Pvt) Ltd.

What is material is to state is that the borrowings by Dora Transport (Pvt) Ltd is also alleged by Isabel to have been secured by a mortgage bond registered by the third respondent which meant that the Nyami Nyami property in essence secured the debt. According to Isabel this prompted the late Ettore who now risked losing FMB Construction (Pvt) Ltd and the Nyami Nyami property due to George's indebtedness through Dora Transport (Pvt) Ltd to pay off the first respondent George's liabilities. According to Isabel Dora Transport (Pvt) Ltd was ruined and George was totally financially ruined and problems then started between the late Ettore and George around 2000.

I now turn to the gist of the dispute between the parties. On 15 November 1994 there was an allotment of shares in the third respondent in which the late Ettore got eight shares. On 8 June 1995, seven months after, George wrote a letter indicating that there should be no further allotment of shares to any of the directors of the third respondent without a meeting being held involving all the directors which were presumably George, his wife Ellen Fumia and the late Ettore. There is now a dispute as to the meaning of this letter. The applicant contends that by writing such a letter George had accepted the allotment of eight shares to the late Ettore in the third respondent and simply wanted assurance that no further allotment would happen. On the other hand the respondents contend that the letter of 8 June 1995 shows that George did not approve of the allotment of eight shares in the third respondent to the late Ettore. There are various correspondences regarding the dispute between the parties in this regard, which dispute remains unresolved. On 30 June 2011 the first and second respondents proceeded to file a court application in case number HC 6280/11 seeking a declaratur to the effect that the allotment of eight shares on 15 November 1994 in the third respondent to the late Ettore was unlawful. This application was unopposed thus culminating in the default judgment which the applicant now seeks to be rescinded.

I now proceed to deal with the merits of the application.

While this application for rescission of default judgment was made in terms of r 63 of the High Court Rules 1971, the applicant argued in the heads of argument that this default judgment should be set aside in terms of r 449 (1) (a) of the High Court Rules which provides for the setting aside or rescission of any judgment or order that would have been erroneously sought or erroneously granted in the absence of any party affected thereby.

Advocate *Mpofu* for the applicant submitted that the judgment sought to be rescinded was granted in error and this court should proceed in terms of r 449 (1) of the Rules and set aside the judgment. Reliance was placed upon the case of *Banda* v *Pitluck* 1993 (2) ZLR 60

(H) which is authority for the proposition that the fact that an application is made under r 63 is not a bar to the court proceeding in terms of r 449 if circumstances of the case so warrant.

The applicant contends that the order sought to be impugned was granted pursuant to an error of law and proceeded to cite a litany of the alleged errors which are that:

(i) that the applicant could not have been in wilful default as he was both physically and mentally incapacitated due to illness;
(ii) that no proper service in terms of the rules was effected as service was effected in Zimbabwe when the applicant (the late Ettore) was now resident in Botswana;
(iii) that the cause of action had prescribed as the allotment of shares complained of had occurred on 15 November 1994 and the respondents only instituted these proceedings in June 2011.
(iv) that the proceedings in HC 6280/11 are a nullity as no curator *ad litem* had been appointed in terms of r 249 of the High Court rules as the late Ettore at the material time was alleged to be under mental and physical disability.
(v) that the respondents should have proceeded by way of edictal citation in terms of the rules and that no proper service of this application was effected on the third respondent (then the second respondent in HC 6280/11).

While there is merit in all the factors listed above I am not persuaded that I should proceed to deal with this matter in terms of r 449 (1). This court can exercise the powers bestowed upon it in terms of r 449 (1) *mero motu* or upon application of any party affected by the judgment or order. In *casu* no formal application was made by the applicant for the matter to be dealt with in terms of r 449 (1). This request is made for the first time in the heads of argument. This in my view creates problems. I am on the view that a party to any litigation should have clarity of mind as to which rule is applicable in any given case and not, like in this case seek rescission of judgment in terms of r 63 in the initial application but then seeks to rely on r 449 (1) in the heads of argument. I am also not satisfied that when this court granted the default judgment in HC 6280/11 it was not aware of some of the facts alleged. An affidavit from one Peter Carnegic Lloyd was attached after the court has raised certain queries initially on 31 August 2011. A number of additional documents were then attached which include *inter alia* documents relating to the nature of the late Ettore's illness and correspondence between the legal practitioners of the parties as regards the propriety of

service effected. I am therefore not persuaded that this is a proper case in which I can proceed to dispose of the matter in terms of r 449 (1).

I now turn to r 63 of the High Court Rules of 1971. It provides as follows:

"63

(1) Any party against whom judgment has been given in default, whether under the 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.

(2) If the court is satisfied on an application in terms of subr (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 his action, on such terms as to costs and otherwise as the court considers just."

It is clear that in order to set aside a default judgment under r 63 the test is that the court should be satisfied that there is good and sufficient cause. In the case of *Dewaras Farm* (*Pvt*) *Ltd & Ors* v *Zimbank* 1998 (1) ZLR 368 (S) at 369 E-G the Supreme Court deliberated on what constitutes good and sufficient cause to warrant rescission of a default judgment in terms of r 63. While it is not possible to give an exhaustive definition or list of factors of what constitute good and sufficient cause to justify rescission of default judgment a number of factors have been given and these include *inter alia* the explanation for the default, the *bona fides* of the applicant and the *prima facie* strength of the case. The court in exercising its powers imbued in r 63 enjoys very wide discretion and should look into the circumstances of each case as regards what constitute good and sufficient cause. In fact it has been held in some cases that they may still be good and sufficient cause to warrant rescission of default judgment even in circumstances where it is shown that a party was in wilful default although it is also accepted that wilful default generally denotes absence of good and sufficient cause.

In the case of *Zimbabwe Banking Corporation* v *Masendeke* 1995 (1) ZLR 400 McNALLY JA explains what constitutes wilful default as follows:

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

I now proceed to apply these principles to the facts of this case.

I am satisfied that if the number of issues raised by the applicant are properly considered the inescapable conclusion is that there is good and sufficient cause to set aside the default judgment granted. I now deal with all these issues.

The facts of this case indicate that the applicant was not in wilful default. That on its own is sufficient to establish good and sufficient cause warranting the rescission of the default judgment.

The state of health of the late Ettore at the time the court application in HC 6280/11 was made has not been disputed. In fact the respondents in their opposing affidavits do not put in issue this fact other than saying they are unable to comment on that fact. Despite the strained relations between Ettore and the respondents I do not believe that the respondents would not have known Ettore's state of health. The evidence on record clearly shows that Ettore at the material time was indisposed. In fact some of the medical reports were attached by the respondents in their application in case number HC 6280/11. The evidence on record shows that Ettore was suffering from prostate cancer and dementia. The description of Ettore's state of health by Isabel Fumia in the founding affidavit is uncontroverted. The diagnosis of his condition was terminal. Ettore had now a very poor memory and would need assistance for all decisions as he was unable to take care of himself. At the time the application was made he was under twenty-four hour nurse care, he could no longer feed or bath himself, he was permanently on a catheter and diaper. In fact Isabel Fumia's evidence is that Ettore was no longer able to recognise his wife and kids due to poor memory and confusion. I therefore have no doubt that Ettore had lost control of his mental faculties and was physically incapacitated due to illness. Indeed this explains why on 6 October 2011, albeit after the granting of default judgment, Isabel Fumia was appointed Ettore's curator *ad litem*. Ettore due to this illness passed on on 13 August 2012. In fact Ettore's relocation to Botswana in June 2009 as per Isabel Fumia's evidence was greatly influenced or necessitated by Ettore's health that was deteriorating. He was in need of medical care which at that time was increasingly difficult to access in Zimbabwe due to the economic meltdown.

The state of health of Ettore at the relevant time clearly shows that he was indisposed and could not have been able to appreciate the proceedings instituted against him. From the evidence on record this was brought to the attention of the respondents who agreed to suspend the proceedings for a specific time pending the appointment of a curator *ad litem* in terms of r 249 of the High Court Rules. For some strange reasons the respondents believed that Isabel Fumia as the wife of Ettore had the legal duty to have herself appointed Ettore's

curator and litem and defend the action instituted by the respondents. One would want to believe that once the respondents were advised about Ettore's incapacity or alleged incapacity as per r 249 (1) (a) it was incumbent upon the respondents who had commenced proceedings to have a curator and litem for Ettore appointed in order for them to properly execute the court application in HC 6280/11. Instead after the expiry of the period the respondents had unilateraly imposed against Isabel Fumia they nonetheless proceeded to set the matter down as unopposed matter oblivious to the provisions of r 249. To my mind this is good and sufficient cause to set aside the default judgment.

The next issue relates to the propriety or validity of the service of this court application in HC 6280/11 which was effected by the respondents. Before relocation to Botswana in June 2009 Ettore was resident at number 4 Musgrave Road, Redcliff, Kwekwe. He was then issued with residence permit together with Isabel Fumia by the Botswana Government on 9 September 2008 and they emmigrated to Botswana where they also operated businesses. The respondents did not challenge this fact and I do not believe that the first respondent being Ettore's son would not know of this. Despite being aware of this the respondents proceeded to serve the court application on Ettore's erstwhile legal practitioners on 18 July 2011 who protested to the respondents that they had no authority to receive the process on behalf of Ettore. The respondents conceded to this fact and indicated they had served the process on the erstwhile legal practitioners out of courtesy. They nonetheless proceeded on 19 July 2011 to effect service in a letter box at number 4 Musgrave Road, Redcliff after the gardener present had refused to accept service. Again the respondents had been advised that Ettore had relocated to Botswana but nevertheless they deemed it fit to serve process in Zimbabwe. It should have dawned on the respondents that they should have proceeded in terms of Order 6 r 44 by way of edictal citation. The respondents did not even bother to serve the third respondent and if they did they served the process on themselves! It is therefore clear that the serving of process in this matter was improper and this again is good and sufficient cause to set aside the default judgment.

The next issue relates to the defence on the merits. The first point raised by the applicant is that this matter has prescribed. The allotment of shares which gave rise to this cause of action happened in November 1994. The first respondent as already stated wrote the first letter in this regard in June 1995. From the correspondence in the record the last communication between the parties in relation to this issue was in February 2006. In essence the applicant's defence is that the claim is bad at law as the remedy sought had been

extinguished by the provisions of s 14 of the Prescription Act [*Cap 8:11*]. The respondents did not advance any meaningful argument in this respect despite some belated valiant efforts in oral submissions that the Prescription Act does not apply to the cause of action in this matter. This in my view is a valid point which the respondents cannot dismiss off hand.

Lastly the applicant's defence is that he holds eight shares in the third respondent and that the respondents acquiesced to this allocation of the shares as per the letter dated 8 June 1995. I have already alluded to the argument raised by both parties as regards the interpretation to be accorded to the contents of the letter of 8 June 1995.

It is common cause that Ettore is the one who built the sole asset owned by the third respondent, the Nyami Nyami which is the centre of dispute. It is not disputed that during his lifetime Ettore had rights and interests in the Nyami Nyami property. Ettore also claimed majority shareholding in the third respondent during his life time. This defence at this stage is clearly available to the applicant.

The sum total of all the factors considered above establish that the applicant has shown good and sufficient cause in terms of r 63 which warrants the rescission of the default judgment. The issues raised by the applicant are real issues which the court would have to deal with in this case in order to achieve justice.

As regards costs I am inclined to grant punitive costs against the first and second respondents. This is a case in which the first and second respondents should have properly consented to the setting aside of the default judgment. Instead, after snatching the default judgment they stubbornly and tenaciously clung to it thus causing the applicant to incur unnecessary costs.

Accordingly, I make the following order:

1. The judgment granted by this court on 7 September 2011, is hereby set aside.
2. The first and second respondents shall pay the costs on an attorney and client scale.

Mtetwa & Nyambirai, applicant's legal practitioners
Gill, Godlonton & Gerrans, 1st and 2nd respondents' legal practitioners