LIVRE INVESTMENTS (PRIVATE) LIMITED
and
GRANARY INVESTMENTS (PRIVATE) LIMITED
versus
ELKIN PIANIM

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 3 October, 6 October and 29 October 2014

OPPOSED APPLICATION

Advocate Zhuwarara, for the applicants
I Musimbe, for the respondent

TAGU J: This is an application for rescission of default judgment brought in terms of Order 9, r 63 and subrule1 of the Rules of the High Court of Zimbabwe 1971. The applicants are seeking for an order that:-

> "1. Judgment issued by this Honourable Court on 27 November 2003 in HC 9363/03, be and is hereby rescinded, and the Applicants be given leave to defend.
>
> 2. That the Respondent bears the costs of suit."

The background of this matter is that the respondent who was the plaintiff in case HC 9363/03 issued summons out of this court on 30 October 2003 against the applicants claiming US$ 512 000-00 or alternatively Z$ 421 888 000-00 in terms of an agreement of sale dated 13 May 2002 in pursuance of which the applicants stood as guarantor and surety, and which amount was due and payable on 13 July 2002 but despite demand the applicants refused or neglected to pay.

According to the papers, the summons was served at applicants' place of business at number 50 Selous Avenue, Harare, through their receptionist one Marion who accepted

service on behalf of the applicants on 14 November 2003. The applicants did not enter an appearance to defend the matter. Consequently, the respondent applied for and duly obtained a default judgment against the applicants in case HC 9363/03 on 27 November 2003 in the following terms-

> "IT IS ORDERED:
>
> That judgement with costs be and is hereby granted in favour of the plaintiff in the sum of US$ 512 000.00, or alternatively Z$ 421 888 000.00 together with interest thereon at 30 % per annum from 13 July 2002 to the date of final payment."

The attachment of applicants' immovable property was done on 18 February 2004 to satisfy the debt, and Caveat 66/ 2004 was registered against the Title Deeds of the immovable property on 18 February 2004. It was only until 23 November 2011 that a notification of a sale in execution of the said property was made. The applicants only filed this application for rescission of the default judgment on 21 February 2012.

It is clear that this application for rescission of a default judgment was not made timeously, but after a period of 9 years.

Order 9, Rule 63 provides that:

> "**63. Court may set aside judgment given in default**
>
> (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.
>
> (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 his action, on such terms as to costs and otherwise as the court considers just."

It is clear from the reading of r 63 (2) that before considering the question whether or not the application contains a "good and sufficient cause" for it to exercise the wide discretion conferred upon it in favour of the applicant, the court must be satisfied that the application has been made within one month of the date when the applicant had knowledge of

the default judgment or that an application for condonation of non-compliance with r 63 (1) has been made or granted. See *Sibanda* v *Ntini* 2002 (1) ZLR 264 at 266.

In the case of *Viking Woodwork (Pvt) limited* v *Blue Bells Enterprises (Pvt) limited* 1998 (2) ZLR 249 (S) at 251 C – E SANDURA JA had this to say-

> "In terms of r 63 (1), a defendant against whom a default judgment has been granted has period of one month, from the time he becomes aware of the judgment, within which to file an application for the rescission of that judgment. If he does not make the application within that period but wants to make it after the period has expired, he must first of all make an application for the condonation of late filing of the application. This should be done as soon as he realises that he has not complied with the rule.
>
> If he does not seek condonation as soon as possible, he should give an acceptable explanation, not only for the delay in making the application for the rescission of the default judgment, but also for delay in seeking condonation."

See *Saoojee & Anor* v *Minister of Community Development* 1965 (2) SA 135 at 138 H.

In casu, the applicants are making this application after a period of 9 years after the default judgment was granted. No application for condonation was made and granted.

Advocate Zhuwarara submitted that he was now making both the application for condonation of late filing of the application for the rescission, and application for rescission of default judgment at the same time. He relied on a founding affidavit deposed to by one Minora Koshen who is a Director and Shareholder of Granary Investments (Pvt) Limited and Livre Investments (Pvt) limited, which are the first and second applicants in this matter.

In the founding affidavit Minora Koshen stated among other things that they only became aware of the default judgment on 23 November 2011 when they received the notification of a sale in execution. Several attempts were then made to locate the file without success up to the time they filed this application for condonation and rescission of default judgment. He therefore argued that that was the cause of the delay and prayed that the delay in filing this application be condoned.

Mr *Musimbe*, on behalf of the respondent opposed the application and raised a point *in limine* through an opposing affidavit deposed to by the respondent Elkin Pianim. The point *in limine* read as follows:-

> "I am duly advised that there is no proper application for condonation before this Honourable Court as required by law. On this basis alone this application for rescission of judgment is not properly before this Honourable Court and should be dismissed with costs on a legal practitioner and client scale."

Mr *Musimbe* referred this court to the case of *Arthur Shingai Mutasa and Morayford Investments (Pvt) limited* v *Hope Tembo* HH 284/13 wherein Justice CHIGUMBA extensively dealt with the requirements for an application for rescission of default judgments and applications for condonation in terms of Order 9, r 63 of the High Court of Zimbabwe 1971.

Advocate *Zhuwarara* painstakingly sought to address the requirements of the application for condonation. He floundered when asked by the court whether the requirements for an application for condonation were met given the scanty information in the founding affidavit of Minora Koshen. Realising the mammoth task that faced him, Advocate *Zhuwarara* made an interesting somersault. He advised the court that the applicants were now abandoning the whole application for rescission of default judgment and implored the court to rely on r 4C which allows expeditious resolutions of the matter without delving into the merits. He therefore made an oral application from the bar to proceed with a new application for rescission of the same judgment in terms of Order 49 r 449.

Among other things he submitted that the default judgment was granted fraudulently, hence was susceptible to rescission. Further, he submitted that the judgment was illegal because it sounded in foreign currency.

This new development was vehemently opposed by Mr *Musimbe* who stated among other things that the new application was not properly before the court since what we have on papers is an application for rescission in terms of r 63 of the High Court Rules.

Advocate *Zhuwarara* was adamant that the application in terms of r 449 was proper since it does not require any condonation and it could be made at any time. He referred the court to plethora of cases such as-

Barker v *African Homesteads Touring & Safaris (Pvt) Ltd & Anor* S-18-03, ((2003 (2) ZLR 6 (S);

Evans v *Snapper* S-55-04, 2004 (2) ZLR 12, (S);

Muguti v *Uboxit Worldwide (Pvt) Ltd & Ors* HH- 5 – 10;

Mega Pak Zimbabwe (Pvt) Ltd v *Global Technologies Central Africa (Pvt) Ltd* HH – 84-08, ((2008 (2) ZLR 198 (H);

Gambiza v *Taziva* HH- 109-08, 2008 (2) ZLR 107 (H);

Avacalos v *Riley* HH-75-07, (2007 ZLR (2) 274 (H);

Portnet Holdings (Pvt) Ltd v *Maliseni* HH-450-12;

Zimbank v *Zambezi Safari Lodges (Pvt) Ltd & Ors* HH -95-06; and

Echodelta Ltd v *Kerr & Downey Safaris (Pvt) Ltd* HH-94-02, 2002 (1) ZLR 632 (H).

However, Mr *Musimbe* was not moved and he stuck to his opposition alleging that what Advocate *Zhuwarara* was now doing was tantamount to "closing the stables when the horse has bolted". Mr *Musimbe* referred the court to the cases of-

Amer Khan v *Innocent Muchenye and Charm Muchenye* HH- 126/13, and

John Harries Jones v *Kim Graham Strong* SC 67-03.

The questions that fall for determination are, after the applicants had wholly abandoned their application, whether it is proper for the court to-

a) Resort to r 4 C, and proceed to rescind a judgment whose application has been abandoned, and,

b) Whether the applicants can automatically switch over and make a fresh application for the rescission of judgment in terms of r 449 without withdrawing the matter they have abandoned.

Rule 4C says-

> "4 C**. Departure from the rules and directions as to procedure**
>
> The court or a judge may, in relation to any particular case before it or him, as the case may be-
>
> (a) direct, authorizes or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;
>
> (b) Give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient."

In my view and given the fact that the applicants had wholly abandoned their application for rescission of judgment there was nothing that was left for the court to condone. That was supposed to be the end of the matter. In the circumstances the court is of the view that it would have been improper for it to resort to r 4C. Proper procedure had to be followed in order to resuscitate the withdrawn or abandoned case.

Order 49 rule 449 says-

> **"449. Correction, variation and rescission of judgments and orders**
>
> (1) The court or a judge may, in addition to any other power it or he may have, mero motu or upon the application of any party affected, correct, rescind, or vary any judgment or order-
> (a) that was erroneously sought or erroneously granted in the absence of any other party affected thereby; or
> (b) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
> (c) that was granted as the result of a mistake common to the parties.
> (2) The court or a Judge shall not make any order correcting, rescinding, or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed."

Rule 449 allows this court either *mero motu* or upon the application of any party affected, to correct, rescind, or vary any judgment or order, *inter alia*, that was erroneously sought or erroneously granted in the absence of a party affected thereby. The purpose of the rule was stated by SANDURA JA in *Matambanadzo* v *Govsen* 2004 (1) ZLR 399 (S) at 404 A-C.

The requirements being that-

(1) The judgment was erroneously sought or granted;

(2) The judgment was granted in the absence of the applicant; and

(3) The applicant's rights or interests are affected by the judgment. See *Tiriboyi* v *Jani & Anor* 2004 (1) ZLR 470 (H) at 472 D –E.

It was held that once these requirements are met, the applicant is entitled to succeed and the court should not enquire into the merits of the matter to find good cause upon which to set aside the order or judgment.

In casu, the applicants did not make out a case for setting aside of the order in terms of r 449. What is before the court is an application to set aside the case in terms of r 63. It is trite that an application stands or falls on its founding papers. There is no affidavit from the applicants setting out the fraud or illegality now being raised by Advocate *Zhuwarara*. He is now merely giving evidence from the bar. To me this is an after- thought having realised that the applicants' application had hit a brick wall after failing to pass the first hurdle of an application for condonation of late filing of the application. In any case, the moment the applicants wholly abandoned their application for rescission, their right to be heard any further ended there. If they wanted to make a different application the prudent thing to do was to then file a fresh application in terms of r 449 after withdrawing the present application that had been brought in terms of r 63.

I agree with the submissions made by Mr *Musimbe*. The applicants belatedly sought to change the whole thrust not only on the application itself, but of the argument thereof from r 63 to r 449. In any case an application under r 449 must be brought expeditiously. See *Grantully (Pvt) Ltd & Anor* v *UDC Ltd* 2000 (1) ZLR 361 (SC) at 366 where it was referred to in the case of *Amer Khan* v *Innocent Muchenje and Charm Muchenje* (*supra*). In this case r 449 is now being invoked after a period of 9 years. It is therefore not being raised expeditiously.

In the result I am inclined to dismiss the application with costs.

This brings me to the last issue of the scale of costs. Mr *Musimbe* asked for costs on a legal practitioner and client scale. He argued that the applicants were not serious in having this matter finalised as evidenced by the following events:-

(1) Heads of arguments were first filed by the respondent because the applicants had taken long to file their heads of argument;

(2) Application for set down of this matter was done by the respondent;

(3) The binding of the file was done by the respondent; and

(4) Security for costs was processed by the respondent. Hence there is need for punitive costs.

I entirely agree with Mr *Musimbe*. In the circumstances I make the following order:-

IT IS ORDERED THAT:-

The application is hereby dismissed with costs on legal practitioner and client scale.

Hussen Ranchhod & CO, Applicants' Legal Practitioners
IEG Musimbe & Partners, Respondent's Legal Practitioners