DELWARD ENGINEERING (PVT) LTD
T/A ZECO ENGINEERING
and
ZECO HOLDINGS LIMITED
versus
WARARA AND ASSOCIATES

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 2 June and 17 August 2016

Opposed Matter

G Gomwe, for the applicants
R Wenyeve, for the respondent

TAGU J: The facts in this matter are common cause. On or around 24 August 2015 the respondent caused summons and declaration to be served simultaneously on the applicants based on an amount owing for legal services rendered in case Number HC 7427/15. The applicants filed a Notice of Appearance to Defend on 16 September 2015 followed by a request for Further and better Particulars which was filed on 25 September 2015. The respondent proceeded to make a chamber application for default judgment which was granted by Her Ladyship Justice CHATUKUTA on 28 October 2015. The respondent obtained default judgment after convincing the Honourable Mrs Justice CHATUKUTA that the applicants had failed to enter its appearance to defend within the *dies induciae* (time within which to enter appearance to defend) and therefore were automatically barred, and in any event, there supposedly was an "acknowledgment of debt".

The applicants filed an application for rescission of judgment filed on 16 November 2014 (No. HC 11088/15) in terms of Rule 449 of the High Court Rules 1971. The applicants submitted that they were still within the *dies induciae* in terms of Order 18 Rule 119 which provides for entering appearance to defend within twenty (20) days instead of the ten (10) days provided by Rule 17of the rules.

The respondent filed its Notice of Opposition in opposition to the application for rescission of default judgment.

This application has been launched in terms of Rule 449 (1) (a) which reads:

"449. Correction, variation and rescission of judgment 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 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."

Note should be taken at this stage that applications for rescission of default judgment under r 449 are materially different from applications made under r 63, where an applicant is additionally expected to establish "good and sufficient cause" for grant of the relief. Under r 449 (1) the court has to consider whether or not a relevant fact which ought to have been placed before the court has not been placed before it. The court need not go into whether or not there is good and sufficient cause. Put simply, once it is established that a certain fact was not brought to the attention of the judge at the time of grant of order or judgment then that is sufficient and consequently the end of the matter in an application to correct, rescind or vary any judgment order in terms of r 449.

In the case of *Wector Enterprises (Private) Limited* v *Luxor (Private) Limited* SC-31-15 ZIYAMBI JA made the following remarks:

> "Rule 449 has been invoked, among other instances, where there is a clerical error made by the Court or Judge; where entry of appearance had been entered but was not in the file at the time that default judgment was entered; where, at the time of issue of the judgment, the Judge was unaware of a relevant fact namely a clause in an acknowledgement of debt. Although for other reasons, mainly the inordinate delay in making the application, the court in Grantully declined to grant the remedy sought, it was of the view that had the clause been brought to the attention of the Judge, the default judgment would not have been granted.
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> Where applicable, the Rule provides an expeditious way of correcting judgments obviously made in error. It envisages the party in whose absence the judgment was granted being able to place before the Court the fact or facts which were not before the Court granting the judgment. There is no need for the applicant to establish good and sufficient cause as required by Rule 63.
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> However, in each case, the error or mistake relied upon must be proved and in each case the court exercises a discretion."

See also *Lora Machiri* v *Amadvet Investments (Private) Limited and Another* HH-505-15; *Grantully (Pvt) Ltd* v *UDC Ltd* 2000(1) ZLR 361 (S) and *Tiriboyi* v *Jani and Another* 2004 (1) ZLR 470 (H) 472E-H.

The position to be gleaned from the authorities is that r 449 is applicable in circumstances where an error was made by the court itself and the applicant must prove the error or mistake relied upon.

In the present case the applicants contend that they had twenty days within which to file an appearance to defend. Noteworthy is the fact that it is common cause that the notice of appearance to defend was filed more than ten days after the applicants were served with the summons. The sole issue for determination before this court is whether or not the applicants filed their notice of appearance to defend timeously.

The court was referred to two conflicting but extant judgments on the interpretation of r 119 of the High Court Rules 1971. The applicants placed reliance on the interpretation by CHIGUMBA J in *Finwood Investments Private Limited &Another* v *Tetrad Investment Bank Limited & Another* HH-69-14 where the learned judge observed that:

> "My reading of r 17 is that it applies in the normal course of things where summons is served; appearance to defend may be entered within 10 days. Rule 17 implies that summons may be served with or without a declaration. Rule 119 then expressly stipulates, in its proviso, that the normal dies induciae provided by r 17, within which to enter an appearance is added onto the normal dies induciae provided by r 17, within which to enter an appearance to defend. There is no other construction of these rules which would not lead to an absurdity."

On the other hand the respondent relied on the interpretation by MTSHIYA J in the case of *Finewood Investments (Private) Limited* v *Kilma Investments (Private) Limited and Another* HH-909-15 at p 5 of the cyclostyled judgment wherein he remarked as follows:

> "As already indicated, my reading of the rules is that the time referred to in rule 119 relates specifically to the filing of a plea where summons and declaration have been filed in terms of rule 113. Rule 119, under Order 18, specifically deals with the "time for filing plea, exception or special plea". It does not in any way interfere with r 17, under Order 3, which provides for when an appearance to defend should be filed.(i.e. within 10 days after service of summons-excluding day of service)
>
> In the majority of cases, where a party does not proceed in terms of r 20 (i.e. summons claiming provisional sentence), the practice is to file summons and declaration together as provided for under rule 113. It is only then that a further 10 days are added to the time for filing a plea (not for filing appearance to defend). That is the situation catered for under the proviso in r 119. Ordinarily the plea should be filed within ten days of the plaintiff's declaration."

My understanding of the rules is that Order 3 r 17 provides for the entering of appearance to defend. It is worded as follows-

> **"17. Time allowed for entering appearance to defend: dies *induciae***
> The time within which a defendant shall be required to enter appearance to defend shall be ten days, exclusive of the day of service."

Rule 17 therefore, says in peremptory terms that the defendant must enter appearance to defend within a period of ten days from date of service of summons where the summons was issued alone or together with a declaration. The calculation of the days excludes the day of service. In this case it automatically follows that since the summons and declaration were served on the applicants on 24 August 2015, the dies *induciae* was to be calculated from 25 August 2015 and was to end on the tenth day from that date.

Rule 112 provides for the barring for failure by plaintiff to file declaration. The rule provides as follows-

> **"112. Barring: failure of plaintiff to file declaration**
> Where the defendant has entered appearance to defend and the plaintiff has failed to file his declaration within twelve days of the date of entry the defendant may give the plaintiff notice of intention to bar him from declaring."

This follows that the plaintiff may serve summons alone without a declaration. If this happens the plaintiff is expected to then file his or her declaration within 12 days from the date of entry of appearance to defend. The defendant is the one who can only bar the plaintiff after an extra 12 days from date of entry. This rule does not extent the dies *induciae* within which the defendant can enter appearance to defend.

The plaintiff may elect to serve the summons together with the declaration at the same time. This is provided for in rule 113. This is the situation in the present case. The rule says-

> **"113. Filing and service of declaration**
>
> Subject to the provisions of rule 112 the plaintiff may file and serve his declaration with the summons or at any time after issue of the summons."

My understanding of this rule is that the plaintiff may elect to issue and serve both the summons and declaration at the same time or may elect to serve the declaration at a later stage, but subject to the 12 day period stipulated in r 112. Rule 113 does not in any way extent the dies *induciae* within which the defendant is supposed to enter appearance to defend. The dies *induciae* remains at 10 days.

This now brings me to the interpretation of the proviso in rule 119. Rule 119 says-

> **"119.Time for filing plea, exception or special plea**
>
> The defendant shall file his plea, exception or special plea within ten days of the service of the plaintiff's declaration:

> Provided that where the plaintiff has served his declaration with the summons as provided for in rule 113 there shall be added to the period of ten days above referred to the time allowed a defendant to enter appearance as calculated in terms of rule 17." (my underlining).

The applicants' understanding of the proviso to r 119 is that the proviso extents the dies *induciae* within which to enter appearance to defend to 20 days from the date of service of both the summons and declaration.

With the greatest of respect I do not agree with that interpretation. What r 119 to my understanding is saying is that the plaintiff may elect to serve both the summons and the declaration onto the defendant at the same time. Once that has happened the defendant is entitled to an extra ten days within which to file his plea, exception or special plea. Put simply the defendant is expected to file his or her appearance to defend within ten days from date of service. Then within the next extra ten days the defendant is expected to then file his or her plea. The proviso only gives a period of 20 days to the defendant in which to file a plea, exception or special plea. The proviso does not extent the dies *induciae* within which to enter appearance to defend.

For argument's sake if r 119 is interpreted to mean that it is applicable to filing of an appearance to defend it therefore follows that there is lacuna in the rules in that they would not have provided for the time within which a plea must be filed where summons and declaration are served simultaneously. I therefore concur with the remarks of MTSHIYA J in *Finwood Investments (Private) Limited* v *Kilma Investments (Private) Limited and Another* (*supra*) that the time referred to in r 119 relates specifically to the filing of a plea where summons and declaration have been filed in terms of r 113.

Having reviewed what I perceive to be the correct legal position to be gleaned from the authorities, and my own analysis, it is abundantly clear that the applicants deliberately failed or neglected to file their appearance to defend timeously under their own mistaken belief that they had twenty days within which to file an appearance to defend. The deliberate failure to comply with the peremptory rules of court cannot be condoned. The court in this case cannot be blamed for the applicants' own folly. Accordingly, the applicants have failed to satisfy the requirements of an application of this nature in that they failed to prove whether or not the default judgment was granted erroneously.

In the result it is accordingly ordered that:

1. The application is dismissed.

2. That the applicants shall meet the costs of these proceedings on a legal practitioner and client scale.

Mutamangira & Associates, applicants' legal practitioners
Warara & Associates, respondent's legal practitioners