

STEWART DHLIWAYO

Versus

WARMAN ZIMBABWE (PVT) LTD

And

C H WARMAN HOLDINGS (PVT) LTD

And

WENDY ANNE KING N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 5 NOVEMBER 2021 & 13 JANUARY 2022

Application for rescission of judgment

S. Siziba for the applicant
T. Mpofu for the respondent

DUBE-BANDA J: This is an application for rescission of judgment. At the outset, and to avoid confusion it is important to state that this application is in terms of rule 63(1) of the High Court Rules, 1971.¹ It is important to state this because the heading of this application is framed thus: court application for the rescission of judgment in terms of rule 449(1) (a) as read with rule 63(1) of the High Court Rules, 1971. Respondents objected to this approach on the basis that an application for rescission cannot be anchored on both rules 63 and 449. At the commencement of this hearing Mr *Siziba* counsel for the applicant informed the court that this application is solely in terms of rule 63(1). Mr *Mpofu* counsel for the respondents did not persist with the objection. Consequently no further reference would be made to rule 449.

In this matter this court is being asked to rescind the judgment it handed down in case number HC 2693/15. The order sought by the applicant is couched as follows:

¹ This application was filed prior to the enactment of the High Court Rules, 2021.

1. That the rescission application be and is hereby granted and the order of this court dated 18 July 2019 under cover of HC 2693/15 be and is hereby set aside.
2. That the applicant be and is hereby directed to cause his new attorneys to file an assumption of agency within 7 days of granting of the order in this matter.
3. That there be no order as to costs.

Background facts

This application will be better understood against the background that follows. On the facts of this case it is either common cause or cannot be seriously disputed that 1st respondent (company) was incorporated on the 8th August 1988 and was 100% owned by Research and Development (Pty) Ltd of Australia until 2003. 2nd respondent is wholly owned by Research and Development (Pty) Ltd the initial shareholder of 1st respondent. C.H. Warman Holdings (Pty) Ltd (2nd respondent) and Estate late C.H. Warman (3rd respondent) are shareholders in 1st respondent.

Applicant was employed by the 1st respondent as a branch manager. He was also its Secretary. A dispute arose between applicant and 1st respondent's directors and shareholders, in the main turning on whether or not applicant had authority to indigenize the company i.e. to change the directors and shareholders of the company. As a result of the disputed indigenization of the 1st respondent, applicant became a shareholder through trusts that he created. He also made two employees Ncube and Lunga directors in the company.

Aggrieved by what it considered applicant's misconduct the company on the 29 September 2015 convened a disciplinary hearing against him. A number of allegations were levelled against the applicant. The disciplinary committee found that he had breached section 4(a) of the National Conduct, S.I. 15/06 and was on the evidence before it guilty of the following: appointing himself as director without authority; amending the Memorandum and Articles of Association without authority; failing to update annual returns and failing to submit annual returns from 2001 to 2014; and without authority of shareholders transferred shares on the 14 April 2014; without authority took possession of the employer's property and also abused some funds; unprocedurally disposed of the company vehicles and did not follow given instructions of the disposal of the vehicles and supplied falsified documents; and conducted himself dishonestly over several given financial transactions and other business dealings, resulting in prejudice to the business. Consequently he

was dismissed from employment with effect from the 30 September 2015. He was ordered to surrender all company assets and advised to approach a Labour Officer should he be aggrieved by the decision of the disciplinary committee. Applicant did not surrender company assets as directed the disciplinary committee.

In 2016 respondents (as applicants) sued out a court application (HC 2693/15) wherein applicant was the first amongst other eleven respondents. Applicant (as 1st respondent) opposed the application while the other respondents did not. Applicant in HC 2693 /15 took a number of points *in limine*, and after argument in *Warman Zimbabwe (Pvt) Ltd & Ors v Stewart Dhliwayo & Ors* HB 175/16 this court ordered that the matter be referred to trial and the papers filed of record to stand as pleadings.

Initially the trial in HC 2693/15 was set-down for the 12 to 15 March 2019, it did not commence and the matter was removed from the roll. It was again set down for the 17 July 2019, and again on this date applicant applied for a postponement of the matter and his application was dismissed. The court ordered that the trial should start the following day i.e. 18 July 2018 at 10 O'clock. On the 18 July 2018 there was no appearance for the applicant and default judgment was granted against the all the respondents. The default judgment is couched in the flowing terms:

1. The indigenization of 1st plaintiff which was based on an unauthorized indigenization plan submitted by 1st defendant be and is hereby set aside and the Compliance Certificate issued by 4th respondent defendant on the 1st January 2015 be and is hereby cancelled.
2. The appointment of 1st, 2nd and 3rd defendants as directors of 1st plaintiff is unlawful and of no effect.
3. The allotment of shares in 1st plaintiff to 9th, 10th and 11th defendants is unlawful and of no force or effect.
4. The cancellation and substitution by 1st, 2nd and 3rd defendants of 1st plaintiff's Articles of Association is invalid and of no force or effect.
5. 4th, 5th and 6th defendants are hereby directed to remove the names of 1st, 2nd and 3rd defendants wherever their names appear as signatories in the 1st plaintiff's bank accounts held by them.
6. Costs on a punitive scale against 1st defendant.

It is this default judgment that applicant seeks that it be set aside by means of rescission. The application is opposed by the respondents. It is against this background that applicant on the 19 July 2019 launched this application seeking the relief mentioned above.

Preliminary points

Each side of the divide made every effort to outdo the other side on the basis of points *in limine*. At the commencement of the hearing I informed counsel that I shall adopt a holistic approach. This approach avoids a piece-meal treatment of the matter, in that the points *in limine* are argued together with the merits, but when the court retires to consider the matter it may dispose of the matter solely on the basis of the points *in limine* despite that they were argued together with the merits.

Applicant's points *in limine*

No valid opposition for 2nd and 3rd respondents

At the commencement of the hearing Mr *Siziba* took a point *in limine*, that there is no proper or valid opposition by 2nd and 3rd respondents. It is contended that the deponent to the respondents' opposing affidavit has relied on the same authority of documents rejected in this court in *Warman Zimbabwe (Pvt) Ltd and Ors v Dhliwayo and Ors* HB 175/16. It is argued that since the purported resolution by the 2nd respondent was allegedly passed at a purported meeting of the shareholders of 1st respondent that was adjudged invalid in this court, it follows that the authorisation of the deponent by the directors of 2nd respondent is equally invalid. It is contended that there is no proper or valid opposition before court by the 2nd respondent.

As regards the 3rd respondent it is contended that the special power of attorney that is before court as authorising the deponent to represent her was signed on the 25th May 2015. It does not specifically authorise or grant the deponent any authority to represent 3rd respondent in court proceedings. It is argued that it authorises him in general terms to manage the business affairs of 3rd respondent and there is no proof that the deponent is authorised to represent 3rd respondent in this case. It is argued that there is no proper or valid opposition to the application by the 3rd respondent.

In this matter the three respondents were directed to file opposing papers within ten days of service of the court application should they intend to oppose the matter. Simply put it is applicant who invited all respondents to file a notice of opposition. In general, I do not think a party can cite a litigant in court proceedings and invite such litigant to oppose the matter should it so wish and then make a turn and allege that such litigant has no authority to oppose the matter. See: *Mudzengi & Ors v Hungwe & Anor* 2001 (2) ZLR 175. To my mind such would amount to double standards and is absolutely untenable. It is in this context that I agree with the submission made by Mr *Mpofu* that it is astounding that on the facts of this case applicant can question the right of a respondents to respond to an application it has itself filed.

Mr *Mpofu* argues that the issue of authority has been improperly taken. It is contended that applicant is confusing the distinction between the authority to bring proceedings and being a witness in the proceedings. I agree. Cut to the bone, what applicant is challenging is the deponent's (Nyoni's) competence to depose to the opposing affidavit on behalf of the respondents. I say so because 2nd and 3rd respondents are not being represented by the deponent in these proceedings, but by their legal practitioners of record. The deponent is merely a witness, if this was a trial he would simply take the witness stand and testify under oath. This position was stated with clarity in *Willoughby's Investments (Pvt) Ltd v Peruke Investments (Pvt) Ltd & Anor* HH 178/14, where the court held thus:

The applicant persisted with the contention that the deponent was not authorised to represent the respondent. That argument seems to be raised with amazing regularity these days. The applicant's contention is not that the respondent has not sanctioned the opposition to the application but, rather, that the deponent is not authorised to represent the respondent in these proceedings. But the respondent is represented not by the deponent but by its legal practitioners. The rules are clear as to the qualification for a person to depose to an affidavit. Order 32 r 227(4) provides that an affidavit filed in written applications "shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein". In other words, a person who has knowledge of the facts and can swear to those facts is the one qualified to depose to an affidavit in application proceedings. The applicant is not contesting the assertion that the deponent to the affidavit has knowledge of the facts stated in the affidavit. The cases cited by the applicant in its heads of argument relate to authority to institute proceedings on behalf of a company or to take certain decisions on its behalf, and not to the competence of a witness to depose to an affidavit on behalf of a company. Compare *Madzivire & Others v Zvarivadza & Others* 2005 (2) ZLR 148(H);

see also *Madzivire & Others vZvarivadza & Ors* 2006 (1) ZLR 514(S). For that reason, the objection cannot be sustained.

The applicant is not contesting the assertion that the deponent to the opposing affidavit has knowledge of the facts stated in the affidavit. Therefore he is a competent deponent or witness in this matter. As a deponent or witness he can only be disqualified if he does not meet the requirement of Order 32 r 227(4) of the High Court Rules, 1971 which provides that an affidavit filed in written applications “shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein.”

As a deponent he is not instituting proceedings on behalf of 2nd and 3rd respondents or to taking certain decisions on their behalf. This is a distinction that must be taken note of i.e. the difference between the authority to institute or defend proceedings and the competence of a witness to depose to an affidavit on behalf of a litigant. On the facts of this case I find that the deponent is a competent witness to depose to the opposing affidavit on behalf of 2nd and 3rd respondents. The contention that there is no company resolution appointing him to represent the 2nd and 3rd respondents in this matter must fail.

This should really mark an end to the inquiry into this point *in limine*, but for the sake of completeness I deal with other ancillary issues taken by applicant. Applicant submits that the deponent to the opposing affidavit is relying on the same authority or documents which were rejected by this court in the main matter HC 2693/15. Again a clear look at the judgment in *Warman Zimbabwe (Pvt) Ltd and Ors v Dhliwayo and Ors* shows that this court did not deal with the competence of the deponent to depose to the opposing affidavit on behalf of the of the 2nd respondent and special power of attorney signed by the 3rd respondent. In fact I take the view that there is nothing irregular about the special power of attorney. To my mind based on the facts of this case there is a proper and valid notice of opposition by 2nd and 3rd respondents.

Furthermore the authority of the deponent to depose to the opposing affidavit on behalf of the 1st respondent has not been challenged. It is trite that what has not been challenged is taken to have been admitted. Therefore even on applicant’s best case this application is still opposed.

In any event on the 12th August 2019 1st respondent passed a resolution authorising and empowering the deponent to sign the affidavit on its behalf. This resolution was passed by means of a Round Robin.² A Round Robin resolution of directors is as valid and effectual as if it had been passed at a meeting of the directors duly called and constituted, provided that the majority of the directors have voted in favour of the matter. Again on this basis the application is still opposed by the 1st respondent. It is for these reasons that applicant's point *in limine* must fail and it is accordingly refused.

Respondents' points *in limine*

Respondent raised the following points *in limine viz* non-joinder of parties who were cited in the application that yielded the judgment sought to be rescinded; judgement sought to be rescinded has been given full effect to with applicant's participation and consent and there is nothing to rescind i.e. doctrine of preemption and mootness; and material non-disclosure and material falsehoods. It is contended that the points *in limine* be upheld and the application be dismissed without any consideration of the merits.

I now deal with these points *in limine* in turn.

The Doctrine of Preemption

Mr *Mpofu* argued that it is well established in law that a party who becomes aware of a judgment and acquiesces therein is precluded thereafter from applying for rescission of the same judgment as the right to challenge it would have become preempted. Respondents submits that a party who has acquiesced in a judgment cannot thereafter seek to challenge it. It is contended that applicant has acquiesced to the order he seeks to be set aside by means of rescission of judgment. It is submitted that applicant has acquiesced in the judgment in that on the 18 July 2019 he contacted Mr Clark and Mr West for a meeting at the offices of Coghlan

² Internet dictionary defines Round Robin Resolution to mean a resolution passed by either the Board or a committee of the Board other than in a meeting of the Board or a meeting of the committee of the Board; or by the Members other than in a General Meeting.

and Welsh Legal Practitioners and requested that it be a “no lawyers meeting.” At the meeting he handed over the company and accounted to what he termed his principals i.e. Mr Clark and Mr West.

In his affidavit Charl Henning Clark (Mr Clark) states that on the 18 July 2019, after attending court and default judgement was granted against applicant they were advised that applicant was seeking a meeting to hand over the assets and control of the company. A meeting was held at about 1500 hours at the offices of Coghlan and Welsh Legal Practitioners. In attendance was Clark, Mr John West and applicant. In that meeting applicant gave an account of the affairs of 1st respondent and informed all the employees to hand over all the company assets. Applicant further informed the employees to report to Mr Clark and Memezi Tariro Nyoni (the deponent to the opposing affidavit).

In his supporting affidavit Lunga avers that he contacted applicant and advised him to handover the company to the respondents and to settle the matter out of court. He met applicant and urged him to do this in earnest and not prolong the dispute. He advised applicant to meet the two representatives of the respondents to map the way forward. Applicant agreed and as a result a meeting was held and the premises and vehicles of the company were subsequently handed over to the representatives of the respondents. Mr Lunga resigned as a director in 1st respondent.

In his supporting affidavit Mr Ncube avers that he was employed by 1st respondent as a Sales Engineer until 30 September 2015. In January 2015, applicant called a meeting and advised the employees of 1st respondent to stop reporting to Weir Minerals Africa (Pvt) Ltd and that anyone who engaged Weir directly would be dismissed. Mr Ncube was then appointed a director in 1st respondent. He says he did not solicit for the appointment neither was he shown any authority from the shareholders. When Weir Minerals Africa (Pvt) Ltd advised him that it had not blessed applicant’s actions, he resigned as a director on the 28 September 2015.

In his answering affidavit applicant avers that it is not correct to say that he is the one who contacted Mr Clark and Mr West to organize a meeting at Coghlan and Wesh on the 18th July 2019. It is Mr Lunga who requested him to attend such a meeting. He initially refused to attend the meeting. He agreed to attend because of the hopes of an amicable resolution of the

matter. He did not know that he was going to hand over all company assets and tell the employees to co-operate with Mr Clark and Mr West. He acted under duress. He says he was told by Mr Clark and Mr West that he was going to comply with their demands willingly or by force if he did not consent. He says he also complied with their demands because he did not want them to end up breaking into the premises by force as they had done previously.³

In his evidence and submissions applicant denies that the handover of the company was voluntary. It is said he handed over the company as a result of duress. It is contended that the handing over of the company should not be used to defeat applicant's case. The high watermark of applicant's opposition to this point *in limine* is duress. It is important to note that he does not dispute that he has complied with the judgment in HC 2693/15, he contends that he did so under duress. This narrows the inquiry to whether or not his compliance was induced by duress.

According to the common law doctrine of peremption, a party who acquiesces to a judgment cannot subsequently seek to challenge the judgment to which he has acquiesced. This doctrine is founded on the logic that no person may be allowed to opportunistically endorse two conflicting positions or to both approbate and reprobate, or to blow hot and cold. It may even be said that a party will not be allowed to have her cake and eat it too. Although the doctrine has its origin in appeals, the doctrine and its principles do apply equally in the case of rescission. See: *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of*

³ Paragraph 26.2 of the Answering Affidavit: It is not correct to say that I am the one who contacted Mr Clark and Mr West to organize a meeting at Coghlan and Wesh on the 18th July 2019. I was sick on that day. Mr Zwelibanzi Lunga is the one who came into my house and persisted to me that I should attend such a meeting. He told me that he had discussed with advocate Mpofu and that respondents wanted to resolve the case amicably. I had refused to go at first but he persisted to me and told me that the other parties were going to go out of the country that same day. With such hopes of an amicable resolution of the matter, I proceeded to attend the meeting even though I was sick without knowing that I was going to hand over all company assets and tell the employees to co-operate with Mr Clark and Mr West under duress. The two gentlemen told me that I was going to comply with their demands willingly or by force if I did not consent. That was the reason why I did not even sign the minutes of such a meeting. Those minutes were just brought in at a later stage by Mr Huni and after he had left I was asked to sign them but I did not sign them. I also complied with their demands because I did not want them to end up breaking into the premises by force as they had done previously.

State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others [2021] ZACC 28[1] para. 101.

The doctrine of preemption was enunciated in *Hlatswayo v Mare and Deas* 1912 AD 242 where Lord De Villiers held that ‘where a man has two courses of action open to him and he unequivocally takes one he cannot afterwards turn back and take the other.’ Similarly, in *Dabner v South African Railways and Harbours* 1920 AD 583 @ 594 Innes CJ stated:

The rule with regard to preemption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with Sentraale Ko-Operatiewe Graan any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.

In *Gentiruco A.G. v Firestone S.A. (Pvt) Ltd.* 1972 (1) AD 589 @ 600 A-B the court said the right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be preempted if he, by unequivocal conduct inconsistent with an intention to appeal shows that he acquiesces in the judgment or order. See: *Cohen v Cohen* 1980 ZLR 286 and *Collective Self Finance Scheme v Asharia* 2000 (1) ZLR 472 (SC).

I take the view that the facts are clear. Applicant was requested and not compelled by Mr Lunga to comply with the order he seeks this court to rescind. When he agreed to attend the meeting he knew its agenda. It is a falsehood that he did not know that he was going to hand over company assets and tell the employees to report and co-operate with Mr Clark and Mr West. I say so because this was the very purpose of the meeting. Lunga advised him to attend the meeting and hand over the company to its owners. So when he left his home he knew that at the meeting he was going to hand over the company. It is falsehood that he was under duress. The allegation of duress is just a *red herring*. I say so because there is no evidence that Mr Clark and Mr West forced applicant to handover the company. It is Mr Lunga who advised him that the game was over he must just hand over the company and he agreed. It is inconsequential that he did not sign the minutes of the meeting held with Mr Clark and Mr West.

Applying the doctrine of peremption to the facts of this case, it is incontrovertible that the applicant by his conduct unequivocally acquiesced to the default judgment obtained against him on the 18th July 2019. He attended a meeting with the directors of respondents and made a handover and takeover of the 1st respondent's assets. He advised the employees of the new changes in 1st respondent. Applicant voluntarily yielded control of 1st respondent and respondents have taken control ever since. Applicant's co-directors Lunga and Ncube have since resigned, and there is a new outlook which cannot be undone. On the facts of this case what is done cannot be undone. I am satisfied that by handing over the company to the respondents' directors applicant unequivocally acquiesced with the judgment in HC 2693/15.

There would be no useful purpose to even consider the merits of the application when applicant unequivocally acquiesced to the default judgment he seeks this court to rescind. Such acquiescence is fatal to this application.

Having found that this point *in limine* has merit, it is not necessary for me to consider the other preliminary points taken by the respondents.

The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. I therefore intend awarding costs against the applicant.

Disposition

I am satisfied that the respondents have discharged the *onus* of showing that applicant acquiesced with the judgment he seeks this court to rescind. His conduct was unequivocal and inconsistent with any intention to challenge the judgment in HC 2693/15. There is no doubt at all in this case that applicant acquiesced with the judgment. He cannot seek its rescission. It is for these reasons that this point *in limine* must succeed.

In the result, I order as follows:

1. The point *in limine* regarding peremption, that is to say applicant voluntarily acquiesced with the default judgment in HC 2693/15 and he cannot seek to have it rescinded is upheld.
2. The application for rescission of judgment be and is hereby dismissed with costs of suit.

Z. Ncube & Partners plaintiffs' legal practitioners
Coglan and Welsh respondent's legal practitioners