PHILLIP SAKADZA
versus
JENIFER CHARUMBIRA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 2 & 3 June and 12 October 2022

Contested Court Application

M Mutagwa, for the applicant
T E Gumbo, for the respondent

CHITAPI J: By default judgment of this court per MUREMBA J granted in Case no. HC 4536/16 on 8 April 2019. The respondent who was then married to the applicant was successful in obtaining an order of divorce with ancillary relief. The order ended the parties' marriage. The applicant was adjudged to be in default. Amongst other orders granted in the divorce order was a declaration that two properties namely Stand 1127 Uplands, Waterfalls, Harare and House No. 14208-2 Kuwadzana, Harare be declared the sole and exclusive e properties of the respondent.

Consequent on the declaration of ownership of the property as aforesaid, the respondent filed under case No. HC 5445/21 an application for the eviction of the applicant from Stand 1127 Uplands, Waterfalls. On 17 November 2021 again by default judgment, per MANGOTA J, the respondent was granted an order for the eviction of the applicant and those claiming through him from the property and costs of suit on the legal practitioner and client scale. On 16 December 2021, a writ for the eviction of the applicant was issued by the Registrar. On 6 January 2022, the Sheriff served the applicant with the writ and notice of removal.

The applicant stated that it was upon service of the writ of execution and notice of removal that he became aware that an eviction order had been obtained against him. The applicant was consequently moved into action mode and filed the application on 19 January 2022.

A procedural matter arises in the application. The judgment sought to be rescinded is simply an enforcement order. The applicant's problem could not be with case No. HC 5445/22 because the judgment which granted the property in issue is HC 4536/16. For as long as that judgment stands its enforcement can only be stayed by an order of court that suspends its operation. In relation to case No. HC 4536/16, the applicant cursorily averred that the basis of the application was a divorce order and that the court should rescind it because it was obtained in his absence. The applicant's draft order reads as follows:

"**IT IS ORDERED THAT**:

1. The judgment granted in default by this Honourable Court on 17 November 2021 under HC 5445/21 against the applicant be and is hereby rescinded.
2. The matter be re-opened and the applicant be directed to file its notice of opposition within 10 days from date of this order.
3. Each party to bear its own costs."

The draft order does not speak to the extant main judgment HC 4536/16. The applicant has not pleaded a special basis for not enforcing the main judgment. Judgment HC 5445/21 does not stand on its own as it derives from the main judgment. Even the averment by the applicant that the property from which he is being evicted is the only available residence that he has got does not serve him because of the extant judgment HC 4536/16.

A default judgment may in terms of the High Court Rules 2021 be rescinded by the court in the instances as provided under r 27, per default of the party against whom judgment is granted, r 28 where both parties consent to the rescission and r 29 which provides for variation, correction and rescission of judgment and orders granted in error. The respondent noted in the opposing affidavit that the applicant purported to rely on r 29(1)(a) of the rules. The cited rule reads as follows:

> "29(1) The court or a judge may, in addition to any other powers it or he or she may have on its own initiative or upon the application of any affected party, correct, rescind or vary –
>
> (a) An order or judgment erroneously granted in the absence of any party affected hereby – or;"

The applicant did not allege any error committed by the court. The error envisaged must, in my view be one which is apparent upon a consideration of the record and the ensuing order which was granted. For example, it may be apparent from a return of service of the

summons or other process served that the return of service does not pertain to the case in question or that default judgment was granted upon an error that there was no appearance filed or notice of opposition filed when there is on record a valid appearance or notice of opposition. Where such error is discovered, the court or judge has a discretion to rescind the default judgment. Issues of good cause to rescind or the applicant proffering a *bona fide* defence do not arise. If the default judgment is founded upon an error, then the judgement is void and must be set aside. See *Banda* v *Pitluk* 1993(2) ZLR 60(H).

In the case of *Grantually (Pvt) Ltd and Anor v UDC Ltd* 2000(1) ZLR 361(3) GUBBAY CJ, the Chief Justice stated of r 449(1)(a), the equivalent of r 29(1)(a) in the current rules:

> "… Rule 449(1)(a) envisages such a party being able to place facts before the correcting, rescinding or varying court, which had not been before the court granting the judgment or order. I think the rule goes beyond the ambit of more formal or technical defects in the judgment."

Accordingly, the error must be one of substance and not mere form of technicality.

In casu, the applicant apart from not demonstrating or establishing the alleged error also failed to demonstrate that the service of process was not made nor validly so it if was. The applicant simply stated in para 10.1 of the founding affidavit:

> "10.1. The application was never served on me nor at 1127 Uplands, Waterfalls. In essence the respondent snatched a default judgment."

The applicant did not relate nor comment on the certificate of service of the application. The return of service which was filed by the respondent in case No. HC 5445/21 showed that the applicant was personally served with the application but refused to sign for it. It is the certificate of service which the applicant needed to relate to. A bare denial as advanced by the applicant that the application was not advanced by the applicant or that the application was not served on him without more ado is not explanation at all. It is just a statement or conclusion not backed by any facts to support it. The fact that the applicant was not served does not qualify for an error envisaged in r 29(i)(a). No case for correction, rescission or valuation of judgment in HC 4536/16 was therefore established by the applicant on its papers.

Unhappily for the applicant, my attention was drawn to the judgment of TSANGA J HH 625/22 in case No HC 319/22, after I had reserved judgment in this matter. The respondent's legal practitioners by letter dated 20 September, 2022 addressed to The Registrar

and copied to the applicant's legal practitioners attached TSANGA J's judgment. In the judgment the learned judge dismissed an application for condonation of late application for rescission of the default judgment in the main matter HC 4536/16. Therefore, the order of divorce which was executed through case No HC 5445/21 sought to be rescinded herein is still extant. Execution may lawfully be levied at the respondent's instance.

In relation to costs, the respondent prayed for costs on the legal practitioner and client scale. I am persuaded to accept that the applicant filed an application which was doomed to predictable failure. He was represented by counsel of choice. Counsel for the applicant filed a meritless application from the onset. It would have been obvious to a trained and astute legal practitioner that one cannot succeed in rescinding a judgment which simply orders an enforcement of an extant court order without attacking the main order itself because for as long as it is extant, it remains executable. The applicant's legal practitioner's ineptitude led the respondent to meet unnecessary costs. I would have given thought to an order *debonis propris* against the applicant's legal practitioners had such an order been sought. The applicant should in this case reimburse the respondent all necessary costs incurred in defending this application.

Accordingly, the following order disposes of this application:

IT IS ORDERED THAT:

The application be and is hereby dismissed with costs on the scale of legal practitioner's and client.

Madotsa & Partners, applicant's legal practitioners
Chinawa Law Chambers, respondent's legal practitioners