

ALBERT CHITAUNHIKE N.O  
versus  
FAZILLA CHARMINE CHIMBGANDAH  
and  
THE MASTER OF HIGH COURT  
and  
CHRISTONVILLE ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE  
FOROMA J  
HARARE, 12, 19 October & 2 November 2022

### **Opposed Matter**

*K Mutyasira with M Magiya*, for the applicant  
*P R Zvenyika*, for the respondent

**FOROMA J:** This is an application for rescission of a default judgment entered against the applicant on 27 October 2021 in favour of the first respondent.

The default judgment was entered against the applicant in his capacity as the Executor Dative of the Estate Late Matthew Z Chimb Gandah in favour of the first respondent a daughter and therefore one of the beneficiaries of the Estate Late Matthew Z Chimb Gandah.

The brief background of the dispute between applicant and first respondent is given below. First respondent lodged a claim with applicant in terms of which she claimed ownership of an immovable property namely C212 Mupfure Court Eastview Gardens Eastlea Harare. In other words first respondent was claiming that the said asset ought not have been treated as an asset in the deceased estate it having been donated to her by her late father Matthew Z Chimb Gandah at her wedding. Applicant rejected the 1<sup>st</sup> respondent's claim on two grounds namely:

- (i) that the said property was registered in the name of third respondent a duly registered company in which the late Matthew Z Chimb Gandah (herein after called the deceased) was the majority shareholder. Applicant thus reasoned that the deceased could not have donated to first respondent an asset that was not his but third respondent's;
- (ii) the evidence that first respondent tendered as proof of the said property having been donated to her was not conclusive and could therefore not justify applicant acknowledging

her claim as to do so would be detrimental/prejudicial to the interests of the other beneficiaries of the deceased's estate.

Dissatisfied with the ruling of the applicant in regard to her claim, first respondent instituted a claim in the High Court under HC 1463/21 for an order declaring that the said property namely Flat C212 Mupfure Court Eastview Gardens Eastlea Harare held under deed of transfer No. 9316/2003 had been donated to the first respondent by third respondent. It is noted that contrary to accepted practice the default order granting the declaratur also granted consequential relief. This aspect was not argued by the parties and shall therefore not detain the court.

When first respondent instituted the court application for a declaratur per HC 1463/21 applicant was duly served with the application which was served at applicant's business premises by delivering a copy of the application on applicant's receptionist who duly stamped copies taken back by the first respondent's legal practitioner's messenger. In support of this application for rescission of judgment applicant averred that his secretary/receptionist did not bring to his attention the said application. Thus he did not take any steps to respond to the said application. This claim by applicant is supported by one Patience Marume in a supporting affidavit wherein she deposed that she indeed was served with a copy of the court application but could not explain how it was that she did not bring it to applicant's attention.

In para(s) 5 & 6 of her supporting affidavit Patience Marume says:

“(5) In this case I do not recall what would have happened because applicant on 4 November 2021 enquired from me where I had put the application whose receipt I acknowledged on 14 April 2021 and could not explain myself because I did not have the application.

(6) I can only surmise that I could have stamped all the copies and forgot to retain applicant's copy or I could have left the application on the counters and the next person inadvertently picked the application together with their documents.”

While applicant considers this to be a reasonable explanation for the default the first respondent does not agree and considers the applicant's secretary's explanation to be “impractical and false. Thus on the strength of *Saloojee and Another v Minister of Community Development* 1965 2 SA 135 first respondent submitted that the sins of applicants secretary should be visited on applicant. This argument by first respondent is misplaced as it can only apply where a party is prejudiced by its legal practitioner's lack of diligence but not where a party's prejudice is directly attributable to ineptitude on the part of the legal practitioner's staff.

First respondent's also argued that the application for rescission of judgment should be dismissed because applicant had no prospects of success on its defence to the first respondent's claim for a declaratur as the court that granted the default judgment had accepted that the first respondent was entitled to the lifting of a corporate veil in order to determine the beneficial owner of the property allegedly donated to first respondent as between the deceased and third respondent. This argument is neither here nor there as applicant by reason of his default was not able to present any counter argument to the invitation to the court to lift the corporate veil. It is clear that the parties are not agreed on whether the lifting of the corporate veil is warranted in the circumstances where the property in dispute is registered in the third respondent's name. It is clear that applicant has an arguable defence on which it deserves to be heard on the merits in respondent's application for a declaratur.

The first respondent also argued that the third respondent did not contest its claim for a declaratur despite the remaining shareholder who is also a beneficiary of the deceased's estate and being aware of first respondent's application did not challenge it. By this argument first respondent has shot herself in the foot in as much as she did not cite as respondents the beneficiaries of the deceased Chimb Gandah's estate in her application for a declaratur despite the beneficiaries' obvious interest in the relief she was seeking. Surely Applicant's case would have been a lot stronger if after joining all the beneficiaries in the application for a declaratur it turned out that none of them opposed her claim. As things stand it is not clear what the attitude of the other beneficiaries to the claim for a declaratur is as they were not represented in HC 1463/21. Neither applicant nor first respondent filed any supporting affidavit by any of other beneficiaries *in casu*. The applicant represents the deceased estate's interests and is not the spokesperson or legal representative of any of the eleven beneficiaries.

The parties are agreed on the law as it applies to the approach when the courts deal with applications for rescission of judgment namely that the applicant must establish

- a) good and sufficient cause by
  - (i) providing reasonable explanation for the applicant's default or that the default was not wilful.
  - (ii) that the application for rescission is *bona fide*.
  - (iii) *bona fides* of the defence on the merits.

In this regard the case of *Zimbabwe Banking Corporation v Masendeke* 1995(2) ZLR 400(S) is instructive and provides a sound guidance on how to address a situation such as *in casu*. In that matter the Supreme Court reasoned that "wilful default occurs when a party freely takes a decision to refrain from appearing with full knowledge of the service of set down of the matter. Where there is negligence in relation to the default the court will examine whether the negligence is so gross as to amount to wilfulness. In coming to its conclusion there is a certain weighing of the balance between the extent of, negligence and the merit of the defence." The first respondent also argued that she had compelling evidence that supports the deceased's donation of the property to her which she detailed in the opposing affidavit. Such evidence has not persuaded the applicant and cannot prevail unless the court in a properly contested case finds that there is a proper case for the lifting of third respondent's corporate veil.

In the circumstances the court is not satisfied that applicant's secretary's tardiness can be imputed on the applicant neither can the defence that applicant has raised on the merits of its intended opposition to first respondent's application for a declaratur one which can be described as without any prospects of success.

The court is accordingly satisfied that applicant has established a good and sufficient cause entitling him to the relief he seeks. In the circumstances the applicant's application is hereby granted in terms of the draft order on p 63 of the bundle and for the avoidance of doubt-

**IT IS ORDERED THAT:-**

1. The Application for Rescission of Default Judgment be and is hereby granted.
2. The Default Judgment entered by this Honourable Court in case number HC 1463/21 be and is hereby rescinded.
3. The Applicant shall file his Notice of Opposition in HC 1463/21 within (10) days of the granting of this Order.
4. There shall be no order as to costs.

*Mubangwa & Partners*, applicant's legal practitioners  
*Muchiriwesi & Zvenyika*, for the first respondent's legal practitioners