DISTRIBUTABLE (31)

WECTOR ENTERPRISES PRIVATE LIMITED
V
LUXOR PRIVATE LIMITED

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, HLATSHWAYO JA, & MAVANGIRA AJA
BULAWAYO, JULY 28 & JULY 30, 2014

H Malinga, for the appellant

L Nkomo, for the respondent

ZIYAMBI JA: On the 25 February 2014, the respondent (Luxor), as the plaintiff, issued simultaneously a summons and a declaration claiming, *inter alia*,

"(a) Cancellation of the lease agreement between the Plaintiffs and the Defendants on the 31st January 2005;
b) Payment of the sum of US$11 127.55 being arrear rentals operational costs and rates as at 25 January 2013, for Shop 1 Luxor House Fife Street/9th Avenue, Bulawayo
c) Eviction of the Defendant(s) from Shop 1 Luxor House Fife Street/9thAvenue, Bulawayo together with all those who claim title through him;
d) Payment of holding over damages of US$1 000.00 per month calculated from 1st January 2013 to the date of eviction and/or cancellation of the lease agreement;
e) Costs of suit on a client Attorney (sic) scale."

On 11 March 2013 the summons were served on the appellants by the Deputy Sheriff Bulawayo who explained to them the exigencies thereof. No appearance to defend was entered.

On 4 April 2013, Luxor applied for default judgment. The matter was duly set down for hearing on the roll of unopposed matters and, on 11 April 2013, default judgment was granted by the High Court as prayed save that costs were granted on the ordinary scale.

On 22 April 2013 a Writ of Execution and Ejectment was served on the appellants by the Deputy Sheriff. The date of ejectment was set for the 25 April 2013. Certain items of movable property as well as a motor vehicle were attached and removed by the Deputy Sheriff pending their sale in execution on the 9 May 2013.

On 29 April 2013, the appellants were evicted in terms of the writ.

On 7 May 2013 the appellants filed a court application for rescission of the default judgment. They based their application on Order 49 r 449(1)(a) of the High Court Rules[1]. They alleged that the default judgment was erroneously granted in that it disclosed no cause of action. In particular, they alleged that there was no allegation in the declaration of a breach of the lease agreement nor was there a computation as to how the amount claimed was arrived at.

[1] High Court Rules, 1971

The application was opposed by Luxor whose opposing affidavit was deposed to by one Simon Moyo, a partner in Knight Frank estate agents, who are the letting agents of Luxor. He averred that he was authorized to depose to the affidavit on behalf of Luxor and could swear to the facts. He denied that the judgment was erroneously given and alleged that not only were the averments in the summons and declaration sufficient to sustain the cause of action alleged, which was a failure to pay rent and operational costs, but that documentary evidence in the form of a schedule of payments by the appellants, deeds of suretyship signed by the second and third appellants, and a schedule showing the balance outstanding as at January 25, 2013, were produced to the Court which granted the application for default judgment. The appellants, it was alleged, had followed the wrong procedure and should have brought their application in terms of r 63 of the Rules. Their failure to take action after service of the summons coupled with their inaction even when they were served with the writ of execution and eventually evicted on 29 April 2013, was a clear indication that they had no defence to Luxor's claim.

In their answering affidavit the appellants alleged that the opposing affidavit of Simon Moyo was not properly before the court in that he had no authority (in the form of a resolution by Luxor) to act on behalf of Luxor. Further, there was no need for the appellants to enter appearance to defend because upon receipt of the summons they approached Luxor and 'the parties reached an agreement that the court process be stayed as an agreement to settle the rental arrears was reached.' One notes, in passing, that the fact that the rentals were in arrears was accepted by the appellants.

The learned Judge found no merit in the application and dismissed it with costs, hence this appeal.

THE APPEAL

Two main points were taken by the appellants. They were, that the court *a quo* erred in dismissing the application when there was clearly no cause of action; and secondly, that the deponent of Luxor's opposing affidavit had no authority to represent the respondent since not only had no resolution of the directors of Luxor been produced authorizing him to do so but in addition, one Mr Stirling, whom the appellants alleged to be a director of Luxor, had instructed Knight Frank not to proceed with the matter against the appellants. The second point was taken *in limine* and I deal with it first.

THE AUTHORITY OF MR MOYO

It was submitted on behalf of Luxor that Mr *Moyo* was not the litigant but had merely deposed to the affidavit in terms of the High Court Rules as one who could attest to the facts since he had represented Knight Frank as agent for Luxor in most of the dealings with the appellants in connection with the lease.

In my view the criticism leveled against the respondent in this regard is misplaced. The appellants served the court application on the legal practitioners for Luxor. The legal practitioners in question had been acting on behalf of Luxor in the past proceedings between the parties. It is trite that a company being an artificial person must be represented by a legal practitioner. All that Luxor was called upon to do in response to the application filed by the applicants was to file a notice of opposition in Form no. 29A together with one or more

opposing affidavits[2]. This is what it did. The notice of opposition was filed by its legal practitioners. The appellants cannot blow hot and cold. By serving the application on Luxor's legal practitioners they have accepted that Luxor is represented by its legal practitioners in the litigation. They cannot now deny that Luxor is the party litigating. The affidavit by Simon Moyo is merely an accompanying affidavit filed in terms of Rule 233.

The court *a quo* was attacked for accepting the affidavit sworn by Simon Moyo whereas it rejected the letter of a Mr Stirling who, it is alleged, had instructed Knight Frank not to proceed with the case against the appellants. The two positions can hardly be compared for, as the learned Judge found, the letter had no evidential value as it was not supported by an affidavit from Stirling confirming that he had written the letter and had authority to do so. In any event if Stirling did have such authority, it would have been a simple matter to have withdrawn the action against the appellants since the letter is dated 13 March 2013 two days after the summons commencing action was served on the appellants.

WAS THE JUDGMENT ERRONEOUSLY SOUGHT OR GRANTED?

The appellants' claim was based on r 449(1) (a) which provides:

"(1) The Court or Judge may, in addition to any 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 granted in the absence of any party affected thereby …"

The learned Judge found as follows[3]:

[2] Rule 233(1) of the High Court Rules

[3] Page 3 of the judgment

> "A reading of the summons paragraph (a) thereof shows that the parties entered into a lease agreement on 31 January 2005, and it shows that as at 25 January 2013 the Defendants were in arrears to the tune of 11 127-55. Whilst the summons is not drafted in the best of terms, it does state that the basis of the claim is due to the fact that the Defendants are in arrears prompting Plaintiff to seek cancellation of the agreement in question. The summons, even before one proceeds to read the declaration, which is the one the Applicant seems to have problems with, can be understood as to the claim that is being made by the Plaintiff and its basis. It would have been proper for the applicant to have entered an appearance to defend and either request for further particulars or file an exception which the court was then going to deliberate upon, than to sit back and take it that the court would consider the summons defective and fatally flawed …"

She concluded that the application ought not to have been brought in terms of r 449 but rather in terms of r 63 as there was no error on the Court's part justifying the relief sought.

Rule 449 has been invoked, among other instances, where there is a clerical error made by the Court or Judge[4]; where entry of appearance had been entered but was not in the file at the time that default judgment was entered[5]; 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[6] . 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.

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

[4] City of Harare v Cinamon1992 (1) ZLR 361

[5] Banda v Pitluk 1993 (2) ZLR 60

[6] Grantully (Pvt)Ltd 2000 1 ZLR361 (S)

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.[7]

However, in each case, the error or mistake relied upon must be proved[8] and in each case the court exercises a discretion.

Turning to the instant matter, I agree with the court *a quo* that the appellants failed to prove that the judgment was erroneously granted.

In any event, r 449 is not mandatory but confers upon the Court a discretion to act in terms thereof. There being no allegation, or finding by this Court, that there was an improper exercise of its discretion, this Court would be unable to interfere with the judgment of the court *a quo*.

It is for the above reasons that after the hearing we dismissed the appeal with costs.

HLATSHWAYO JA: I agree

---

[7] Banda v Pitluk (supra)
[8] Gondo and Anor v Syfrets Merchant Bank 1997 (1) ZLR 201

MAVANGIRA AJA: I agree

Job Sibanda & Associates, appellant's legal practitioners

Messrs Dube-Tachiona & Tsvangirai, respondent's legal practitioners