MXOLISI NXUMALO

Versus

THEMBISILE KHUMALO

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 1ST JUNE 2022 & 10 AUGUST 2023

Opposed application

T. Masiye-Moyo for the applicant
V. E. Ndlovu for the respondent

TAKUVA J: This is a chamber application in terms of Order 32 Rule 241 (1) as read with Order 49 Rule 449 (1) (a) of the old High Court Rules 1971. It is an application for rescission of an order erroneously granted.

Background facts

Applicant and respondent were customarily married and they have two children. Sometime in 2014 they had marital disputes leading to a separation. Applicant then approached the Magistrates' Court, Bulawayo where he obtained an order for custody of the minor children, see page 9 of the record. Respondent sought an order for rescission of the default judgment but the application was dismissed. The dispute moved to this court on appeal and this generated the following matters, HCA 104/16; HCA 18/17 and HCA 04/18.

As these matters were going on, applicant's legal practitioners stumbled upon a court order in which the respondent had obtained guardianship and custody of the minor children through the High Court. The order was granted under HC 2518/17 on 29th day of September 2017. See page 10 of the record – Annexure B. This order was obtained on the basis of a return of service by the Deputy Sheriff which purported that the application was served upon applicant's mother at number 4438 Gwabalanda, Bulawayo. The applicant's mother never stayed at that address, instead it is the respondent's sister one Thembani who lived there.

The legal practitioners engaged each other on what applicant's legal practitioners perceived to be a "fraud" and the respondent through a notice of abandonment abandoned the order. See Annexure C on page 11 of the record. In a surprising move, respondent through

her legal practitioner issued the same application or a similar one under HC 2537/18 and tendered the same fraudulent return of service used under HC 2518/17.

Applicant then filed this application to have the order under HC 2537/18 rescinded.

Applicant's case

Applicant contends that the use of the fraudulent return of service misled the judge in that the court did not notice that the return of service tendered by the respondent under HC 2537/18 related to HC 2518/17 and not the matter before it. Consequently, respondent was erroneously granted an order for custody and guardianship of the minor children in the absence of the applicant. The order was erroneously granted because had the court noticed that the return of service tendered related to a 2017 case when this was a 2018 case showing a different case number, it would not have granted the order.

Applicant further contended that respondent used fraudulent means to defeat the course of justice especially when he considers the fact that respondent and applicant had numerous pending cases before the courts pertaining to the custody and guardianship of their two minor children. Instead of waiting for justice to take its course and for the courts to decide on the issue of custody and guardian of the minor children, the respondent with the assistance of her legal practitioner fraudulently misled the court thereby obtaining an order in her favour.

In making the above argument, the applicant relied on the following cases;

1. *Vela* vs *Magolis* HH-429-13
2. *Munogwara* v *Madimbira & Anor* HH-223-17
3. *Munyami* v *Tauro* SC-41-13
4. *Matambanadzo* v *Goven* SC-23-04

Respondent's case

Respondent opposed the granting of the rescission order on the ground that it was not erroneously and fraudulently granted as alleged by the applicant. Further, respondent argued that applicant has not satisfied the requirements of o49 r449 of the High Court Rules currently Rule 20 of the High Court Rules, 2021.

Respondent's argument goes like this; The common law, position which was prevailing at the time the order under HC 2537/18 was granted is that the mother of a child born out of wedlock is the sole guardian and has exclusive custody over that child. When respondent took *defacto* custody of the minor children, an application for confirmation of the prevailing common law position for custody and guardianship was filed before this court under HC 2518/17 and was granted on 29 September 2017.

Respondent admitted that she abandoned this order on the hope that an alternative dispute resolution would be in the best interest of all the parties and the children. Settlement discussions failed. Respondent approached this court seeking under HC 2537/18 confirmation of guardianship and custody of the two minor children. The application was never served on the Master of the High Court nor on the Applicant. The respondent argued that there was no need and neither did the court order such. Further respondent submitted that the allegations of fraud as averred by the applicant are without merit and substance "in that there was no requirement to serve the application". As regards the return of service, respondent contended that she did not even refer to it in her founding affidavit and clearly "did not play any role in the granting of order under HC 2537/18". According to the respondent the order for confirmation of custody and guardianship of the minor children was granted solely on the grounds that it was the prevalent common law position and respondent had simply requested the court to confirm the legal position.

Finally, respondent submitted that order under HC 2537/18 was properly sought and granted and as such applicant has failed to satisfy the bare minimum requirements of Order 19 Rule 449 of the old High Court Rules 1971.

Respondent relied on the following cases;

1. *Docrat* v *Bhayat* 1932 PD 125
2. *Cruth* v *Manuel* 1999 (1) ZLR 7 (SC)
3. *Munyimi* v *Tauro* SC-41-13

The Law and its application

A judgment procured by fraud of one of the parties whether by forgery, perjury or in any other way such fraudulent withholding of documents cannot be allowed to stand – see

Vela's case *supra*. See also Herbstein and Van Winsen in the *Civil Practice of High Courts and the Supreme Court of Appeal of South Africa* 5th ED at pp939.

In *Munongowarwa* v *Madimbira & Anor* HH-223-17, the court stated that;

> "Rescission of a judgment or order obtained through fraud is a tool used to defeat orders acquired fraudulently. Once an applicant points to fraud, he is without further ado entitled to rescission. Courts will not allow an order obtained by fraud to stand. This approach derives from equity and is based on the Latin principle *commondum ex injuria sua nemo habere debet* which translates to mean that a wrong doer should not be enabled by law to take any advantage from his actions."

The mere fact that a party obtained an order fraudulently entitles the innocent party to rescind the order. It is established law that once fraud is proved then the court should rescind the judgment in question. The respondent has not denied tendering the same return of service which it had admitted to have obtained fraudulently. The respondent's argument as I understand it is that the return of service was harmless in that it had not influenced the judge as it was not a requirement.

In the *Munyimi* case *supra*, it was held that;

> "What amounts to an error has also been the subject of a number of decisions. In *Banda* v *P. T. Luk (supra)* a default judgment granted against an applicant who had filed an appearance to defend but which appearance had not been brought to the attention of the judge entering the default judgment was held to be an error on the part of the court. In *Mutembwa* v *Mutembwa (supra)*, a false return of service was filed by the Deputy Sheriff indicating that service had been effected personally when in fact no such service had been effected resulting in an order being made. The court had no difficulty in coming to the conclusion that the order had been erroneously granted in the sense that had the judge been aware that the summons had not been served on the applicant he would not have granted it."

Respondent in the present case tendered a false return of service resulting in the court granting her an order. In my view had the judge noticed that the return of service tendered related to a 2017 case when he was dealing with a 2018 case, he would not have granted the order.

GARWE J in the *Munyani* v *Tauro* case *supra* went on to state that;

"In *Banda* v *P. T. Luk (supra)* the possible failure on the part of the judge before whom the application for default judgment was placed "failing to observe the notice of appearance to defend contained in the court rule was held to constitute an error."

It is not in dispute that the judge understandably failed to notice that the return of service tendered by the respondent in 2018 under HC 2537/18 related to the 2017 case of HC 2518/17. It follows therefore that the order under HC 2537/18 was granted in error and must be rescinded. The purpose of Rule 449 is to correct, vary or rescind orders erroneously granted."

In *Matambanadzo* v *Goven* SC-23-04 SANDURA J (as he then was) stated that;

"Commenting on the purpose of Rule 42 (1) in *Theron N.O.* v *United Democratic Front & Ors* 1984 (2) SA 532 (C) at 536D-F VIVIER J said the following;

Rule 42 (1) entitles any party affected by a judgment or order erroneously sought or granted in his absence to apply to have it rescinded. It is a procedural step designed to correct an irregularity and to restore the parties to the position they were in before the order was granted. The court's concern at this stage is in the existence of an order or judgment granted in error in the applicant's absence and, in my view, it certainly cannot be said that the question whether such an order should be allowed to stand is of academic interest only. I entirely agree with these comments. In my view, they apply to Rule 449 (1) (a) of the High Court Rules with equal force."

In casu, I do not agree that it was unnecessary to serve the applicant and the Master with the application. One wonders why the respondent attached a fraudulent return of service if it was not a requirement. That the respondent had rights at common law is neither here nor there in that there was in existence at the time an extant court order under JC 38/16 granted by a magistrate on 23rd December 2016. The respondent was aware of this order.

In the result it is ordered that:

1. The order of this court granted on the 20th February 2019 in HC 2537/18 be and is hereby set aside.

2. The respondent be and is hereby ordered to pay costs on an attorney and client scale.

Masiye-Moyo & Associates, applicant's legal practitioners
Mathonsi-Ncube Law Chambers, respondent's legal practitioners