INTERFREST INVESTMENTS (PVT) LTD
and
ISHMAEL MATAFI
versus
ZB BANK LIMITED

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE. 15 November 2021 and 6 February 2023

Opposed Application

Adv *R Mabwe,* for the applicants
M*r O Mutero,* for the respondent

CHINAMORA J:

This is an application for rescission of a default judgment made in terms of Rule 449 (1)(a) of the High Court Rules, 1971 ("the old Rules"). That judgment was granted by this court under case number HC 4052/11. What happened is that, the applicants (who were parties) in those proceedings, defaulted in filing their plea.

It is helpful to give a brief history of the dispute that resulted in the default judgment. In October 2009, the applicants and the respondent entered into an agreements in terms of which the respondent extended to first applicant a credit facility of US$45,000.00 for working capital. Again in 2010, the respondent extended another credit facility of US$45,000.00 to the first applicant. It is not in dispute that second applicant bound himself as surety and co-principal debtor in respect of these loan facilities. The first applicant defaulted on both facilities. As a result, the respondent issued out summons against the applicants, under HC 4052/11, for the recovery of the monies advanced to the applicant. The applicants filed an appearance to defend, but did not file their plea. Consequently, on 26 June 2012, the respondent obtained a default judgment as follows:

"IT IS ORDERED THAT:

Judgment with costs on a legal practitioner and client scale to the extent that such costs are permitted in *proviso* (iii) to by-law 70(2) and collection commission thereon calculated in accordance with by Law 70 of the Law Society of Zimbabwe by-laws (1982) be and is hereby entered against first and second defendant, jointly and severally, the one paying the other to be absolved payment of:-

a) Claim 1

i) US$41 165.19 being capital
ii) US$12 184.92 being interest
iii) US$153.01 being bank charges
iv) Interest on the sum of US$41 165.19 at plaintiff's maximum overdraft interest rate from time to time in force with effect from 1 March 2011 to date of payment.

b) Claim 2

i) US$30 148.06 being capital
ii) US$7 706.56 being interest
iii) US$75.78 being bank Charges
iv) Interest on the sum of US$30 148.06 at plaintiff's maximum overdraft lending rate from time to time in force with effect from 1 March 2011 to date of payment."

The applicants applied for rescission of this default judgment under HC 13393/12. The application was accompanied by an urgent chamber application for an interdict to restrain the respondent from executing the order obtained by default. It is not clear what happened to the application for rescission. What is evident, however, is that the applicants have yet again filed the present application seeking to rescind the default judgment. The applicants argue that the order was erroneously sought and granted in that the actual loan amount at the time of the order had been reduced by US$11,616.18. Additionally, the applicants submitted that the judgment was erroneously sought and granted, as the respondent misrepresented to the court that the money it loaned to the first applicant was its own private money when, in fact, it belonged to the Government.

In addition, the applicants submitted that the court was not advised that the Minister of Finance had approved an adjustment of the price of fertilizer from $28.00 per bag to $7 for all A2 farmers. The effect of this was to reduce by 75%, the loan amount of all A2 farmers under the facility. Despite this development, the respondent did not adjust the applicants' loan account accordingly. Besides, the applicants submit that the Government created the Zimbabwe Asset Management Corporation (Pvt) Ltd (ZAMCO), which was a vehicle for taking over non-performing loans for debt re-structuring. According to the applicants, the respondent refused to refer the first applicant's loan account to ZAMCO.

In response to the application, the respondent opposed it and raised some preliminary points. The first one was that the court application was a nullity. The basis of this objection was that the applicants were not permitted to represent themselves (as self-actors) in civil proceedings in the High Court. However, the respondent did not persist with that point in *limine* since the applicants were now represented by counsel. Secondly, the respondent argued that Rule 449 of the High Court Rules, 1971 is not available to the applicants, because it requires that such an application ought to be made within a reasonable time. The respondent added that nine years is an unreasonable length of time, which rendered the filing of the application an abuse of court process. In my view, this preliminary point was not properly taken, as it is strictly not a point in *limine,* as it involves examining the merits of the application through discussing the requirements of Rule 449(1)(a) of the old Rules. For this reason, I dismiss the preliminary point for lack of merit.

On the merits, the respondent denies that the court order was erroneously sought and erroneously granted by the court. The respondent submits that the application for judgment was both conscious and deliberate, and was properly and correctly granted on the basis of the papers which were before the court. The respondent contends that the sum of US$11,616.29 paid by the applicants was taken into account before summons were issued, and that no other payment was made on applicants' account. Its position is that the outstanding amount on both accounts was US$91,433.52 with further interest accruing on the capital from 1 March 2011. In addition, the respondent denies any misrepresentation, since the funds loaned to the applicants were its own. It also takes issue with the relief sought by the applicants, in particular, paragraphs 2, 3, 4, 5 and 6 of the draft order. The respondent, therefore, prayed that the matter be dismissed with costs on a legal practitioner and client scale.

My firm view is that the disposal of the application before me hinges on the interpretation of rule 449 (1)(a) which reads:

> **"449. Correction, variation, and rescission of judgments and orders**
> (1) The court or a judge may, in addition to any other 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 erroneously granted in the absence of any party affected thereby."

The above rule seems to be clear and unambiguous. Put simply, it provides that in order for the court to grant relief under r449 (1) (a), the applicant must satisfy three (3) requirements, namely:

(1) the judgment must have been erroneously sought or granted;

(2) the judgment must have been granted in the absence of the applicant; and

(3) the applicant's rights or interest must be affected by the judgment.

See *Mashingaidze* v *Chipunza and Others* HH 688/15.

In *casu*, the applicants contend that the judgment was erroneously granted. In *Naidoo and Another* v *Matlala NO and Others* 2012 (1) SA 143 (GNP) it was held that:

> "In general terms, a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment…"

See also *Nyingwa* v *Moolman NO* 1993 (2) SA 508 (TK).

I observe that the applicants alleged that the judgment in HC4052/11 was erroneously entered and that funds advanced by respondent were cessionary funds from government. The respondent disputed this in a letter dated 5 December 2012 which says:

> "…The monies advanced to your client were not Government funds. The Bank's own funds were lent to your clients. Or client is not CBZ Bank's lending agent in this matter, which is strictly contractual…"

There is no doubt that the applicants have been aware of this position since December 2012. I do not see how the judgment can be attacked as one not correctly and properly granted. For nine years the applicants sat on their laurels and did nothing to have the judgment rescinded. It is settled law that an application in terms of rule 449 of the old Rules should be made timeously or, at any rate, within a reasonable time of knowledge of the judgment. In this respect, in *Grantully (Pvt) Ltd and Anor* v *UDC Ltd* 2000 (1) ZLR 361 (S), GUBBAY CJ appositely stated:

> "It was said by the appellants that they only became aware that the judgment had been erroneously granted when they received advice of the fact on 25 July 1997, some five years and six months later. Such length of time, whatever the reason therefore, is unreasonable…"

What further compounds the applicants' problem in this matter is that, after having knowledge of the default judgment in 2012, the applicants filed an application for rescission under HC 133/12, but did not prosecute it to finality. It was almost nine years later that the applicants

filed the present application. There has to be finality to litigation and, in my view, the applicants lackadaisical, (if not, casual) approach certainly does not assist the court or the applicants themselves. In *Grantully (Pvt) Ltd supra*, the court decided that an application for rescission can be dismissed if there has been an inordinate lapse of time. Rule 449 is a procedural step meant to correct expeditiously an obviously wrong judgment or order. In this case, the delay of nine years is certainly inordinate, and my inclination is to dismiss it.

What then comes for consideration is the question of costs. Traditionally, costs follow the result. However, the respondent has prayed for costs on a legal practitioner and client scale. I agree with this request since the application in *casu* has the hallmarks of an abuse of process. The court must mark it displeasure in the way the applicants have conducted themselves in this matter by awarding punitive costs. Firstly, they did not file their plea in the main matter and the respondent obtained a default judgment against them. Secondly, the applicants filed an application for rescission of the default judgment under HC 133/11 and never prosecuted it. Finally, nine years later, the applicants filed yet another application for rescission of the same default judgment. Astonishingly, their explanation was that they were preoccupied with challenging the sale in execution which, as it turned out, was not successful. This is a clear abuse of court process. This court will, therefore, grant punitive costs as the litigant has obviously pursued a hopeless case.

Accordingly, the following order is granted:

1. The points in *limine* are hereby dismissed.
2. The application is dismissed with costs on a legal practitioner and client scale.

M S Musimbe & Associates, applicants' legal practitioners
Sawyer & Mkushi, respondent's legal practitioners