MUPAMOMBE HOUSING CO-OPERATIVE SOCIETY
LIMITED
versus
MUPAMOMBE HOUSING PROJECT

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE; 27 February 2025

Opposed Court Application

B Magogo, for the applicant
E Mubayiwa, for the respondent

CHITAPI J: This application is for rescission of the judgment granted in default in favour of the respondent against the applicant in case No HC 3527/23 by MUSITHU J on 26 July 2023. The operative part of the order reads as follows:

> IT IS ORDERED THAT
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> 1. Mupamombe Housing Project and Mupamombe Housing Co-operative Society Limited are two different entities.
> 2. Mupamombe Housing Project is the *bona fide* owner of a certain piece of land known as Mupamombe Ingezi, Kadoma.
> 3. The respondent and all those holding through are hereby barred and interdicted from selling applicants' stands at Mupamombe Ingezi, Kadoma.
> 4. There shall be no order as to costs.

The respondent in case No HC 3527/23 has filed this application to seek the rescission of the default judgment aforesaid. The parties identities and how they relate feature as an issue in case No 3527/23. In that case, the respondent as applicant and in its founding affidavit, described itself in para 4 as "The applicant is Mupamombe Housing project, a legal *persona* in terms of the

constitution establishing the same…" It was therefore a universitas albeit it did not use this word to describe itself. It attached its constitution which was incomplete and not showing the date of its promulgation. The respondent in the same matter described the applicant herein who is respondent in case No HC 3527/23 as "MUPAMOMBE HOUSING CO-OPERATIVE SOCIETY LIMITED a cooperative society which was registered on the 13th May 2019 under section seventeen of the Co-operative Societies Act, [*Chapter 24:05*]. The respondent attached a copy of the applicant's certificate of registration. The same certificate has been produced in the current applicant. It is therefore common cause that if the applicant and the respondents are taken as separate entities which are independent of each other, then, simply put, the applicant is a registered co-operative under the co-operative Societies Act, whilst the respondent is an unregistered co-operative whose legal existence derives from its incorporation as a universitas.

For context, a brief summation of case No HC 3527/23 (the main matter) is advised. The respondent which is the current applicant *in casu*, sought the declaration which was granted by MUSITHU J as recorded and consequential relief as granted. The respondent alleged in that application that it was founded in 2002 as the brain child of the then Minister of Education to be used as a vehicle to lobby the government to provide non monetary benefits to mainly civil servants, pensioners and few from the private sector. The non monetary benefits none to be in the form of grants/ allocation of state land which would be subdivided into residential stands for allocation to the target beneficiaries. The applicants' members were then to pay subscription fees to the respondent as well as for servicing of the land to include sewer system installation. The respondent averred that as at 2016 a total of 950 of its members had benefited from the scheme. It also averred that in 2019, some members broke away from the applicant and formed the respondent (applicant *in casu*) which it registered under the Co-operative Societies Act on13 May 2019 which date was some seventeen (17) years post the formation or incorporation of the respondent therein. It was averred by the applicant therein that the piece of land, namely "certain piece of land known as Mupamombe. Ingezi, Kadoma" which was State land was ceded to it at its formation. The applicant averred that the respondent following its registration, had created books of accounts and was selling stands off the applicants' piece of land aforesaid without the applicants authority or

consent. This background explains how the dispute was resolved by default judgment whose rescission is sought devolved.

The applicant in this rescission application averred that it did not defend the application HC 3527/23 because it was not served with the application. The application was disputably served on the applicant on 26 June 2023 at 22 Milton Road, Kadoma. Service was effected by the additional Sheriff who endorsed that:

> "Court application served on Francis Magwida the Chairman ID No Queen as 67-090291D67 at 1553 hrs."

A copy of the return of service attached to the founding affidavit in case No HC 3523/23 shows the case No endorsed thereon as HC 3827/23 which is a wrong case number since the default judgment was granted under case No 3527/23. The return of service was inadvertently accepted as valid yet it referred to a wrong case number. There can be no gainsaying that had MUSITHU Js attention been drawn to the anomaly in case references between the number on the certificate of service being different from the one under which the application was filed, the learned judge would not have granted judgment but he would have raised a query and directed that the anomaly be reconciled. To this extent therefore, the default judgment was afflicted by a fundamental anomaly which is evident *ex facie* the filed papers thus rendering the judgment mistaken issued. The parties did not however note the anomaly. I also did not raise it when I heard the parties as I had not noted it. Judgment in this application cannot be determined on the basis of a point noted by the court but not addressed by the parties. It is trite that the court should not base its judgment on issues not raised by the parties and that if the court stumbles on a point on which it finds material relevant to the determination of the matter, it should at least invite the parties to address on that point first.

In the case of *Nzava & 3 Ors* v *Kashumba N.O & 3 Ors* SC 18/2018, per ICHENA JA it was stated:

> "The function of a court is to determine disputes placed before it by the parties. It cannot go on a frolic of its own. Where a point of law or a factual issue exercises the courts mind but has not been raised by the parties or addressed by them either in their pleadings in evidence or in submission from the bar, the court is at liberty to put the question to the parties and ask them to make submission on the matter."

Borrowing from the case of *Kauesa* v *Minister of House Affairs and Others* 1996 (4) 965 (NmS) per DUMBUTSHENA AJA sitting in the Namibia Supreme Court, reference pages 973H – 974 C UCHENA JA stated:

> "…It is the litigants who must heard and not the judicial officer. It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. Now and again a judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such a circumstance to inform counsel on both sides and invite them to submit arguments either for or against the judges point. It is undesirable for a court to deliver a judgment with a substantial portion containing issues never canvassed or relied on by counsel."

In *casu*, I decided not to call the parties to address the point because of the likely prejudice which would arise against the respondent especially, yet the parties had attacked the return of service on a different basis altogether and not relied on the Judges point" as colloquially described by DUMBUTSHENA AJA as quoted (*supra)*.

In an application for rescission of default judgment, the court considers various factors in arriving at a discretionary judicious decision whether or not to rescind its default judgment. Rule 29(1) of the High Court Rules 2021 which is a restatement of rule 63 of the repealed High Court Rules 1971, provides that a default judgment may be set aside on application made within thirty (30) days of the affected party having knowledge of the judgment. The court may rescind the judgment for good and sufficient cause. The phrase "good and sufficient cause" is not defined. In the case of *Stockil* v *Griffiths* 1992(1) ZLR 172 at 173, GUBBAY JA stated:

> "The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving good "good and sufficient cause" as required to be shown by Rule 63 of the High Court of Zimbabwe Rukes 1971 are well established. They have been discussed and applied in many decided cases in this country. See for instance Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd S 16-86 not reported; Roland E & Anor v McDonald 1968(2) ZLR 216(S) at 226 E – H; *Songore* v *Olivine Industries (Pvt) Ltd* 1988(2) ZLR 210(S) at 211C-F.
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> They are:
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> (i) the reasonableness of the applicants explanation for the default.
> (ii) the *bona fides* of the application to rescind the judgment and
> (iii) the *bona fides* of the defence on the merits of the case which carried some prospects of success.
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> These factors must be considered not only individually but in conjunction with one another and with the application as a whole."

In the founding affidavit, the applicant averred that it did not defend the application No HC 3527/23 because it was not served with the application. The applicant averred that the address where the application was served, viz, 22 Milton Road, Kadoma was not the applicants address. It averred that the applicants' registered offices were located at number 1158 Mupamombe,Ngezi, Kadoma. The applicant averred that the person allegedly served with the application was described as the applicants' chairman whose name was captured as "Francis Maguida." The applicant averred that applicants' chairperson was called "Francis Machidha whose residential and business addresses are at number 703 Mupamombe Ingezi, Kadoma and ZNA 5 Brigade, Kwekwe. To buttress the point the applicant attached a supporting affidavit by its chairperson Francis Machidha. The said Francia Machidha averred that he was elected the Executive Committee Chairperson in February 2022, having been a committee member since 2020. He denied having been served with the application and denied that he had any connection with the address 22 Milton Road, Kadoma. He averred that he resided at house No 703 Mupamombe, Kadoma and worked for the Zimbabwe National Army and was stationed at 5 Brigade, Kwekwe.

The applicants also attached a supporting affidavit by one Taurai Makwarimba who deposed that he was the administrator of Destiny for Africa Networkwas which entity has been in occupation of the premises called 22 Milton Road, Kadoma since 2021. The deponent averred that the applicant had never operated from this address nor did its chairman Francis Machidha ever reside there. It was the applicants' averment that the return of service could not be and was not authentic since even the person who was purportedly served denied the alleged service.

The first point made by the respondent was that the applicant was in contempt of court because it had not obeyed the court order in case No HC 3527/23 whose rescission it was seeking. The court order as already captured decreed that the applicant and the respondent were separate entities. It had also decreed that the respondent was the owner of land called Mupamombe Ingezi, Kadoma. It was averred that the applicant was in contempt of court because the deponent to the founding affidavit had stated that the applicant and the respondent were one entity. It was also averred that the deponent had also averred that the land in question was State land yet the default judgment order had decreed that the land belonged to the respondent.

The point *in limine* is hairsplitting and difficult to comprehend. The applicant averred that it was seeking the rescission of the order in question. It had to give reasons why it impugns the order. To state its position which is inconsistent with the order sought to be rescinded does not render the applicant to be in contempt of order. It did not say that it did not recognize the order but it impugned it and gave its side of the story. It must be a matter of common sense that in cases of rescission of a judgment, the applicant will invariably aver facts which are inconsistent with the terms of the order because the applicant will be seeking to show that there is good and sufficient cause to have that judgment set aside or rescinded. The point *in limine* lacks merit and is dismissed.

The second objection which again is hairsplitting was that the application was fatally defective for the reason that the applicant averred that the respondent was a non existent entity and that the applicant had no valid application before the court because it is legally incompetent to sue a non-existent party. It was also averred that because the applicant had averred that it was one and the same entity with the respondent, the applicant was therefore posing as both an applicant and a respondent. It was averred that a party could not sue itself. The same criticism I made in relation to the first point *in limine* relates to this unmeritorious objection. The respondent engaged in a sentence by approach of individual sentence analysis of the founding affidavit impugning each such sentence(s) instead of reading the application as a whole and in context. Had the respondent been advised to read the whole application and in context, it would have appreciated that the averments made by the applicant constituted the applicants' own side of the story or its defence as it were, if rescission is granted and it defends the main matter. The respondent should have noted that the applicants' averments were relevant to the issue of the *bona fides* of the applicant to defend the main matter and the prospects of success of the defence. Undoubteddly the point *in limine* had no merit. It is dismissed.

The third point *in limine* related to what the applicant averred to be material falsehoods. It was averred that the applicant lied that it was not served with the application, yet the return of service by the Sheriff correctly captured the name of the applicants' Chairman "Francis Machidha the Chairman ID number given as 67-090291D67." It was averred that the ID Number of the Chairman was the correct one. The second falsehood alleged to have been made was that deponent to founding affidavit stated that the applicant had averred that the applicant and the respondent

were one entity. The second part has already been dealt with. The first part cannot by any stretch of imagination be said to be a point *in limine*. It is a matter of a factual dispute which both parties address and lead evidence on for the court to answer the issue of whether or not service of the application was valid.

The respondent then averred that the applicant had told a lie by stating two different statements under oath. It was averred that the deponent to the founding affidavit had averred that the applicant and the respondent were one entity yet the same deponent had stated in his affidavit in case No HC 5664/2023 that the parties were different. Not much needs be said. These are evidentiary issues. No point *in limine* arises where litigants aver inconsistent statements and adopt inconsistent positions on an issue. This point in limine if it can describe as such has no substance. It is dismissed as indeed are the allegations that the applicant contravened s 183(3) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] by making a false statement on oath. The applicant it was averred had committed perjury yet, no proceedings against the deponent to the founding affidavit for perjury or any criminal offence had been preferred.

It appeared that what the respondent preferred was for the applicant to have first acknowledged the existence of MUSITHU Js order then gone on to say that "despite the existence of the order which is valid until set aside, I aver that the true facts which the court did not have before it and which I want to advance if rescission is granted are as follows." If I am right in my supposition, I would accept that to have been so done would have been a polished manner of pleading. However, it must remembered that with default judgments, the applicant in the rescission would not have participated in the proceedings. Therefore, in pleading for rescission the applicant states the facts as he/she believes them correctly to be. By so doing the applicant will not be in contempt of the default judgment unless the applicant did something positive to disobey the court order.

The second but not last point *in limine* was that the applicant could not properly apply for rescission of the default judgment because it was not an affected party within the contemplation of r 29(1)(a) of the High Court Rules 2021. Rule 29(1)(a) relates to correction, rescission and variations of judgments granted in the absence of a party affected by the order. In the applicants affidavit the deponent stated in paragraph 3.2 of the founding affidavit that the application was

being made in terms of rule 29(1)(a) of the rules. It is really not necessary to develop the applicants argument as it characteristically arises from nit picking for minor faults in what can be described as being fussy or pedantic. I say so because a cause of action cannot be defeated by a mere omission or misspelling nor indeed a misquoting of a rule. The substance of the cause of action must be considered. It must engage and detain the court to deal with. The applicants' application read wholly was clearly one for rescission of default judgment as envisaged in Rule 27. The applicant pleaded all the requirements of rule 27 and clearly so. Whilst the reference to rule 29(1)(a) was an error which is by no means being condoned, the matter cannot be determined upon the obvious misquote of the relevant rule. It must dawn on the respondents' counsel that technical objections which do not go to the substance of the dispute between the parties will not result in a judgment for the objector Counsel must relate to objections of substance and be guided by the need to promote and not inhibit the dispensation of justice between litigants. The dicta of MATHONSI J (as then he was) in the case *Telecel Zimbabwe (Pvt) Ltd* v *Potraz and others* HH 446/15 holds good when the learned judge stated:

> "Legal practitioners should be reminded that it is an exercise in futility to raise points in limine simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly, it is likely to dispose of the matter."

In *casu*, the applicants' legal practitioner should take some lessons from the above dicta. The point *in limine* is dismissed.

The last objection was that there was a material non joinder of Munashe Chidyamazana and Financial Mirirai against whom allegations were made. It was averred the two should have been cited so that they are not discussed without being granted an opportunity to be heard. Firstly, the respondent did not state the allegations which it related to and secondly non joinder does not result in a dismissal of a matter. Affected parties may always be joined by the court *mero motu* or on application by either of the parties. Rule 32(ii) of the High Court Rules is clear in this regard and it states:

> "(ii) No cause or matter shall be defeated by reason of misjoinder or non joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

The objection being a bare one made without substantiation is dismissed and in any event would still not pass to give the respondent any advantage or relief in view of the provisions of rule 32(ii) (supra).

Reverting to the merits, in relation to service of the application at 22 Milton Road, Kadoma, the respondent averred that because the correct ID No 67-090891D67 noted on the return of service by the Additional Sheriff was the correct one for the Chairman Francis Machidha, it meant that he was served with the process. It was also averred that two of the applicants' members. Angeline Badza and Simbarashe Muzvuzvu had confirmed that the applicant used to carry on business at 22 Milton Road. Supporting affidavits of Angeline Badza (Angeline) and Simbarashe Muzvuzvu (Simbarashe) were attached to the notice of opposition and opposing affidavit.

The affidavits of Angeline and Simbarashe are similarly worded. The deponent stated that when they registered as members of the applicant the applicant used "Exevier Chibasa" number 1158 Mupamombe, Ingezi, Kadoma as it registered address house No 1158 Mupamombe, Ingezi, Kadoma. They averred that "some time" Chibasa terminated this membership with the applicant whereafter he was no longer accepting process or mail. The two averred that the members then resolved to open a satellite office in town at 22 Milton Road Kadoma. They then stated individually that:

> "…I therefore confirm that number 22 Milton Road Kadoma is the applicants' address of service."

The two deponents did not give details of who they are in the applicant nor did they state why 22 Milton Road Kadoma was the applicants' address for service. They did not give details of when the address was in use vis-à-vis the time of service of the applications. Their depositions do not help much and consist in unclothed statements pertaining to the alleged address of the applicant.

In my view, there is a reasonable likelihood that the application was not served upon the applicants chairman as alleged. The affidavit of the administrator of Destiny for Africa Network which occupies 22 Milton Road, Kadoma denied that the applicants' chairman operated from there. The respondent did not seek confirmation from the Sheriff that indeed the process was served personally on the chairman. It is noted from the papers filed that the applicant and respondent has engaged and are engaged in litigations. It is unlikely that the applicant would have ignored a

process which sought to divest it of central of the valuable land asset which is the reason for the existence of both parties. It is my determination that the applicant gave an acceptable and reasonable explanation for its default.

In relation to the *bona fides* of the application to rescind, it is clear that the application is genuinely intended not to delay justice but relates to a declaration of rights to property in which the applicants' membership have an interest. There has admittedly been a number of litigations between the parties on various other matters as pleaded by them. The applicant in my view genuinely wants to defend the application in which the default judgment with its far reaching consequences to the applicant and its membership was granted.

In relation to the *bona fides* of the defence on the merits and whether it carries some prospects of success, the applicant in the founding affidavit stated that the applicant and the respondent were one entity formed in 2002 as Mupamombe Housing Project. The applicant came into being by name through the regularization done following a provisional order granted on 12 November 2018 wherein the court ordered a regularization of the respondent. This regularization of the applicant was done through the registration of the applicant as a co-operative on 13 May 2019. The applicant again averred that the membership of the applicant remained the same after registration as it had been before registration when it used the name Mupamombe Housing Project. The applicant attached a copy of the register of members which it relied upon.

The applicant further averred that the deponent to the founding affidavit in the case No HC 3527/23, one Chidyamazana was a member of the executive committee of the applicant as its secretary in the period 2019-2020. In this capacity it was averred that he was active in procuring the registration of the applicant to use the name Mupamombe Housing Co-operative Society Limited which is the within mentioned respondent. An audit report was attached pertaining to the audit of the respondent wherein finding of fraudulent activity were made against the Chidyamazana. It was averred that criminal charges were preferred against him and court cases against him were opened at Kadoma Magistrates' Court under case No CRB 15523/23 and CRB 1542-45/23. The applicant averred that the integrity of the deponent to the founding affidavit in the main case was dented.

The applicant averred that it carries on business using the by laws and the constitution approved on registration of the applicant as already noted. The applicant averred that the land in issue in this matter was granted to the applicant in 2002 and was not transferred from the applicant to the respondent because the parties are one entity.

The respondent as noted took time to raise points *in limine*. They have been dealt with. In relation to the land at play and its ownership, the respondent averred that since the applicant had averred that the land in question is still state land, the applicant had no cause of action or claim against the respondent as it was not the state. However, what the applicant meant was that there has not been a formal transfer by the registration of the land to it or its members from State. The respondent also averred that in case No HC 5664/23, the applicant had stated that its name was Mupamombe Housing Societies Limited and not Mupamombe Housing Project. It was averred that in that legard, the declaration which was granted that the applicant and respondent are separate entities was consistent with the applicants' stance in that case.

The respondent also averred that it could not have existed prior to its registration because a body corporate exists upon its registration. It averred that the respondent existed from 2002. The respondent also referred to a deposit slip made on 9 November 2018 and the High Court order and averred on that evidence that there was proof of the independent existence of the applicant. It was also averred that the respondent had filed case No HC 10206/18 before the applicant was established thus showing the independent existence of the parties. Further examples of court cases previously filed like case No HC 5908/19 was referred as proof of the independent existence of the two parties. In my view these previous litigations show that there are deep rooted problems in the identity of the correct entity which is the one charged with running the membership of people who are targeted beneficiaries of the land in question.

Bearing in mind that rescission of judgment is granted in the discretion of the court exercising such discretion judiciously, I determine that the applicant has satisfied the court that there is good and sufficient cause to grant rescission of the default judgment granted by MUSITHU J. The issue of the correct statuses and relationship of the parties vis-à-vis the members involved and the land which was granted by government for the benefit of qualifying members should be resolved to finality in litigation. The courts' determination will put paid to what are clearly power

struggles involving the leadership of the two parties which prejudice members who must benefit from the noble efforts by government to provide housing and shelter to the people.

On costs, since this case is ongoing. I exercise the courts discretion on costs and order them to be in the cause in case No HC 3527/23.

IT IS ORDERED THAT

1. The default judgment dated 26 July 2023 in case No HC 3527/23 in favour of the respondent against the applicant is set aside.
2. The applicant shall file its notice of opposition and opposing documents within ten (10) days of the date of this order and thereafter the matter shall proceed in terms of the rules.
3. Costs of this application shall be in the cause in case No in HC 3572/23.

CHITAPI J:……..

Ruzvidzo Mahlanga Attorneys, applicants' legal practitioners
Bherebhende Law Chambers, respondents' legal practitioners