RUNYARARO MAGADZIRE
versus
TRUSTEES FOR THE TIME BEING OF SHUMBA MURENA FAMILY TRUST
and
CHIVERO PROPERTIES (PVT) LTD

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 28 November 2024 and 8 April 2025

Opposed Application-Court Application for Rescission of a Judgment

J B Matandire, for the applicant
T A Mandizvidza, for the 1st respondent
No appearance for the 2nd respondent

TAKUVA J: This is an application for rescission of a judgment entered in default on the 12th of September 2024, under Case No. 3413. The application is made in terms of 29(1) of the High Court Rules, 2021.

The terms of the final order which is sought to be partially rescinded are as follows:

1. First respondent be and is hereby ordered to make joint efforts with applicant to ensure that title for Lot 1A Johannesburg Farm situated in the district of Chegutu is passed to second respondent.
2. First respondent be and is hereby ordered to ensure that the second respondent is responsible for the development of stands at Lot 1A of Johannesburg Farm situated in the district of Chegutu.
3. First respondent be and is hereby ordered to pay costs of suit.

BACKGROUND OF FACTS

The applicant, Runyararo Magadzire, is the landholder of Lot 1A of Johannesburg Farm situated in Chegutu. The first respondent is a trust named Shumba Murena Family Trust, and the second respondent is Chivero Properties (PVT) LTD, a company duly incorporated in accordance with the laws of Zimbabwe. The applicant states, in her founding affidavit that the first respondent caused the application under Case No HCH 3413/24 to be served at the wrong

address, John Mugogo Attorneys at No 7A Monmouth Avenues, Avondale, Harare instead of Runyararo Magadzire, Harare Polytechnic staff cottages (Department of Secretarial Studies, corner Hebert Chitepo and Prince Edward) as set out in the contract. She alleges that John Mugogo Attorneys were not her appointed agents and had no instructions to either receive court process on her behalf or act in her stead. The applicant claims that the matter under Case No HCH3413/24 ought not to have succeeded and shall not succeed if she is afforded an opportunity to oppose it. She relies on the fact that the 1st respondent was fully aware that the contract concluded between them was null and void.

In opposing the application, the first respondent raised points *in limine*, claiming the application to be fatally defective because the applicant approached the court in terms of the wrong rule. The first respondent claims that the applicant should have applied for rescission in terms of rule 27 of the High Court Rules, which caters for the rescission of default judgements. The first respondent alleges that the applicant did not satisfy any provision of Rule 29(1), hence, the present application must fail. This claim of the first respondent is discredited by the supporting affidavit filled by John Mugogo dated 30 August 2024. The affidavit clarifies that neither John Mugogo nor any legal practitioners at their firm held instructions to receive and respond to original court process on behalf of the applicant. It further emphasised that the applicant's cell phone was not reachable, and when they finally got hold of her, the first respondent had already set the matter down for hearing on the unopposed roll.

THE LAW

In an application of this nature, the onus is on the applicant for rescission to show that there is good and sufficient cause for granting the application as required by r 27 of the High Court Rules, 2021. It reads,

> "Court may set aside judgment given in default
> 27. (1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment for the judgment to be set aside, and thereafter the rules of court relating to the filing of opposition, heads of argument and the set down of opposed matters, if opposed, shall apply.
> (2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute the action, on such terms as to costs and otherwise as the court considers just."

Rule 27 of the High Court Rules, 2021, empowers this court to set aside or rescind a judgment given in default if a party against whom the judgment was given files a court application no later than one month of knowledge of the judgment. The applicant must demonstrate that there is good and sufficient cause to set aside the judgment.

As indicated above, in order for this court to set aside the default judgment, the applicant must show good and sufficient cause. In *Dhliwayo* v *Matukutire* HH 326-23 p 3, Chinamora J made reference to *Stockil* v *Griffiths* 1992 (1) ZLR 172 (S) at 173, in which the Supreme Court considered the factors to be considered when examining "good and sufficient cause". They are: (i) the reasonableness of the applicant's explanation for the default, (ii) the *bona fides* of the applicant to rescind the judgment; and (iii) the *bona fides* of the defence on the merits of the case which carries some prospects of success. These factors must be considered cumulatively. This entails that, too much emphasis must not be placed on one factor, all must be regarded in conjunction. An unsatisfactory explanation for default may be strengthened by a very strong defence on the merits, and a completely satisfactory explanation for defaulting may cause the court not to scrutinise too closely the defence on the merits.

In *Tradepass Marketing Services (PVT) LTD t/a Agrisec Environmental Health v OK Zimbabwe* HB 157-18 p 3, the court outlined that;

> "Further, and in any event, an application for rescission of judgment must be accompanied by the grounds which show good and sufficient cause why it should be granted"

The above precedent simply shows that, in order for an application for rescission of a default judgment to succeed, the applicant must show that there is good and sufficient cause why it should be granted. In so doing, factors such as the length of delay in applying for rescission, the reason for the default, the prospects of success, and the balance of convenience should be considered.

ANALYSIS

In order to discharge the onus of proving 'good and sufficient cause' as required by Rule 27 of the High Court of Zimbabwe Rules, 2021, an application for rescission of judgment must prove the reasonableness of applicant's explanation for the default, the *bona fides* of the application to rescind the judgment and the *bona fides* of the defence on the merits of the case which carries prospects of success.

In *casu*, the applicant seeks rescission of the default judgment on the basis that there is an honest and satisfactory reason for the delay in that the applicant made it clear that what led to the delay was a factor beyond its control. The reason being that at the time of service, *John Mugogo Attorneys* where the application under Case No. HCH 3413/24 was served, were not her appointed agents, and had no instructions to either receive court process on her behalf or act in her stead. However, the first respondent opposes this claim, saying that it had exchanged correspondence with the applicant for a long time and in all these times, *John Mugogo Attorneys* were acting for the applicant. The supporting affidavit filed by John Mugogo, however, clarifies this dispute, addressing that, indeed, *John Mugogo Attorneys* were not mandated by the applicant to act on her behalf, thus proving good reason why the application must be rescinded.

The first respondent has raised certain points *in limine*, I proceed, therefore, to deal with each of the preliminary points.

Whether or not the applicant adopted the wrong rule

The first respondent submitted that the heading of the application indicates that the application was made in terms of r 29(1) of this court's 2021 rules, yet the submissions made would be applicable in an application under r 27 of the same rules. It was further submitted that the applicant has to be clear on which rule she is proceeding under for the matter to be properly heard before the court. Under r 29(1)(a), for the applicant to succeed, he or she must show that;

(1) the judgment was erroneously sought or granted
(2) the judgment was granted in his or her absence
(3) the applicant's rights or interests are affected by the judgement

Under R27, the court has to determine whether or not there is good and sufficient cause to set aside the judgment. Due to the fact that the applicant did not show that the judgment was erroneously granted as per r 29 under which it brought its application, the application ought to have been brought under R27. In *Sachiti & Anor* v *Mukaronda* HH 42-21 p 4, an application was dismissed on the basis that the applicant was not clear on which rule he was basing the application.

In response, the applicant alleges that the first respondent's claim that the applicant used the wrong law is both insufficient and made to prevent the full ventilation of the dispute between the parties. The applicant argues that the first respondent undermines the precedent

set by this court. She argues that, the citation of a wrong rule in an application for rescission of a default judgment is not always fatal and is not in itself a basis for non-suiting a litigant as long as the application meets the basis of a court application and communicates its intention to have the default judgment rescinded on the basis of identifiable and relatable facts without misleading or prejudicing the other party. In *Muhlwa* v *Alphs Media Holdings (Pvt) Ltd t/a Sothern Eye* HB 117-22 p 6, this court held that:

> "The application is opposed by the 1st and 3rd respondents who raised a point *in limine* regarding the jurisdiction of this court to hear this matter as in its founding affidavit, the applicant referred to rule 63 as opposed to rule 56 of the then High Court Rules 1971. Further it was contended that this application is fatally defective and must be struck off the roll for this reason…. In my view since the applicant has abandoned or withdrawn his concession that reliance on rule 63 was wrong, the whole point raised in this point *in limine* becomes moot. In any event the mere citation of an incorrect rule does not always render an application defective. What matters is the substance or content of the pleadings…"

In *casu,* the applicant ought to have sought the application for rescission of a default judgment in terms of r 27(1)(2) of the Rules of the High Court. However, the failure to cite the correct rule does not affect it, as rescission can be granted on the basis of the common law. Accordingly, the 1st respondent's point *in limine* has no merit and must fail.

Whether or not the application is marred with material falsehoods

The first respondent argues that the application is marred by material falsehoods and ought to fail on that basis. Further, it claims that *John Mugogo Attorneys* held instructions to receive and oppose court process on behalf of the applicant and that its offices were or are the *domicilium citandi et executandi* of the applicant for the purpose of service of the impugned court process. This point is submitted to be improperly taken on the simple basis that it is common cause that a legal practitioner is an agent who acts on behalf of another, who, in this case, is the applicant. To be considered a lawful agent, the counsel requires a specific mandate and specific instructions in order to do a thing and to bind the applicant by so doing. In *Makate* v *Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) on page, the court outlined that,

> "If an agent wishes to perform a juristic on behalf of a principal, the agent requires authority to do so, for the act to bind the principal"

Due to the fact that the first respondent is the one claiming that *John Mugogo Attorneys* held instructions to receive and oppose court process on behalf of the applicant, it ought to have

proven the existence of such a specific mandate or an instruction or an acknowledgement by the law firm that it held instructions to receive and oppose court process on behalf of the applicant. The first respondent has failed to discharge its *onus*, thus, this allegation cannot stand.

The applicant claims that there are prospects of success in the main application. It claims that the petition in Case No HCH3413/24 ought not to have succeeded and shall not succeed if she is given an opportunity to oppose. The applicant bases this claim on the fact that the first respondent is aware that the contract they concluded between them is null and void and is consequently of no effect. She claims that she was not personally the landowner of Lot 1A of Johannesburg Farm situated in the district of Chegutu, hence making the relief sought incompetent and the contract invalid. The first respondent, however, argues that the agreement is valid to date as it has not been declared invalid by any court. It claims that the invalidity of the agreement cannot be impugned through the applicant's mere word. The applicant contends that, the court in HCH3413/24 would not have granted the default judgment, had it been made to appreciate that the property subject to the agreement belonged to another. The court would then have inevitably found that the contract was invalid and was impossible of performance as between the parties.

In terms of R 27(1) of the High Court Rules, 2021, a party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment for the judgment to be set aside. The default judgment was issued on 12 September 2024, and the present application was filed on 13 September 2024. There was no inordinate delay. The balance of convenience favours the granting of the application.

Rescission of default judgment is a remedy in which the court exercises judicious discretion in considering whether to grant or refuse rescission. I am of the view that the applicant has shown good and sufficient cause for the grant of the relief of rescission of the default judgment.

DISPOSITION

It is hereby ordered that:

1. The Application be and is hereby granted
2. The default judgment under Case No HCH 3413/24 be and is hereby rescinded.

3. First respondent shall pay applicant's costs.

TAKUVA J:.....

John Mugogo Attorneys, for the Applicant
Masiya-Sheche & Associates, for the first Respondent