**RONNAH MAFURIRANO**

**Versus**

**TOTAL ZIMBABWE (PVT) LTD**

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 18 OCTOBER AND 4 NOVEMBER 2021

**Opposed Application**

*T. Tavengwa,* for the applicant
*J. Mugova,* for the respondent

**KABASA J:** This is an application for rescission of judgment in terms of rule 449 of the High Court Rules, 1971. The application was filed before the new rules SI 202/2021 came into force. The judgment sought to be rescinded was granted on 9th January 2013 under case number HC 13281/12. The applicant contends that the order was erroneously sought and erroneously granted, in that the respondent, *inter alia*, did not serve the applicant with the application in which it sought the order which was granted in default. The agreement upon which the respondent relied in seeking that order was obtained under duress.

It is important to set out the background to this matter. It is this:-

The applicant and respondent entered into a Marketing Licence Agreement (MLA) in 2006 where the applicant was to operate and utilise the respondent's service station for purposes of selling the respondent's products and ancillary business approved by the respondent. The applicant obtained a bank guarantee which was to be called up in the event that she failed to pay the respondent amounts due in operating the service station.

Following a breach of the terms of the MLA the respondent suspended it and called up on the bank guarantee in satisfaction of what was owed to it by the applicant. The applicant was then asked to raise a working capital by 31 July 2012, failing which the suspended MLA would be cancelled. The 31/7/2012 deadline was not met and the applicant had signed an agreement to the effect that should she fail to abide by the terms of the MLA suspension conditions, the respondent would be entitled to apply to the High Court for her eviction from

the premises and for the recovery of any outstanding amounts without the need to give notice to her. This the respondent proceeded to do and obtained the order under HC 13281/12. The order was granted by Mwayera J.

The applicant subsequently sought to vacate this order through a rule 63 rescission application. The application was dismissed. The judgment was handed down on 11 September 2013 under case number HH 286/13. The applicant sought to appeal against this judgment but was out of time. She then filed a chamber application for condonation for late filing of an appeal and extension of time under SC 44/13. That application did not get to see the light of day as it was subsequently withdrawn on 30th January 2014.

The applicant then filed the present application in May 2020. In the application she takes issue with the manner in which the respondent arrived at the US$65 703,21 which it obtained payment for after calling up on the bank guarantee facility, the alleged fraudulent acknowledgement of her indebtedness which the bank required in order to process payment to the respondent, the agreement entered into after the MLA was suspended whose terms she breached leading to the cancellation of the MLA and the obtaining of the default judgment under HC 13281/12.

The applicant's contention is that HC 13281/12 can therefore not be allowed to stand as it is in essence a nullity. It must be rescinded.

In opposing the application the respondent took points *in limine*. These are:-

1. The matter is *res judicata* and the court *functus officio* having ruled on the rescission of judgment in HH 286/13, which judgment is extant.

2. The application, having been filed more than 8 years after the order in HC 13281/12 was granted, is way out of time, notwithstanding that rule 449 has no time limits. The delay in filing the application is unreasonable.

On the merits the respondent contended that all it did was above board, there was no fraud and no duress and the applicant breached the MLA and equally failed to meet the terms of the agreement to save the suspended MLA from cancellation. The judgment under HC 13281/12 was therefore obtained in line with the parties' agreement. It was not erroneously sought and equally not erroneously granted.

At the hearing of the application I asked the parties to address me on the points *in limine* as well as the merits. This they did and I will deal with the points *in limine* first (*Heywood Investments (Pvt) Ltd t//a GDC Hauliers* v *Zakeo* SC 32/2013).

1. Is the matter *res judicata*?

In *O'Shea* v *Chiunda* 1999 (1) ZLR 333 (S) SANDURA JA had this to say on what the principle of *res judicata* is:

> "*Res judicata* applies where the two actions are between the same parties, or their successors in title, concerning the same subject matter and founded on the same cause of action." (*Banda & 45 Ors* v *Zimbabwe Iron and Steel Corporation* SC 54-99).

In an application for rescission brought under rule 63 the applicant must show good and sufficient cause in order to succeed. In a rule 449 rescission all the applicant must show is that the judgment was erroneously sought and erroneously granted.

*Mrs Mugova* submitted that in the rule 63 rescission application the same parties were involved and it was the same subject matter. This is so, so counsel argued, because the applicant in trying to show good and sufficient cause argued that the agreement of 9 May 2012 which saw the respondent seeking judgment without notifying her was signed under duress and this is the same argument she makes *in casu*.

In that judgment CHIGUMBA J had this to say:-

> "Respondent admits that it did not serve the application for default judgment on the applicant and avers that there was no need to serve the applicant with the application because she had waived her right to be heard and consented to judgment without further notice to her on 9 May 2012. Applicant did not deny signing the agreement that judgment could be obtained without further notice to her, she averred that she had signed that agreement under duress."

The learned Judge went on to reproduce the terms of the agreement as well as considered the letter of 24 April 2012 in which the same issue was mentioned and yet another letter of 3 August 2012 in which the letter from the respondent's legal practitioners reminded the applicant of her breach and the consequences thereof before advising her that an order for her eviction was going to be sought from the High Court.

The learned Judge went on to say:-

> "Clearly, this letter placed applicant in *mora* and constitutes notice of intention to institute legal proceedings. I find that there is no *prima facie* evidence that applicant was placed under duress when she signed the letter of 24 April 2012. Applicant signed the letter on 9 May and the parties subsequently continued to enjoy a cordial business relationship until applicant defaulted on her undertaking to raise working capital in the sum of US$80 000,00 by 31 July 2012. The letter of 3 August 2012, in my view, destroys applicant's case in one fell swoop.
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> It shows lack of *bona fides* on the part of the applicant in averring that she was entitled to notice of the application for default judgment and it demonstrates that applicant is not likely to succeed on the merits."

The learned Judge therefore expressed herself definitively on the issue of notice and the failure to serve the applicant with the court application. The applicant intended to appeal but withdrew the application to condone her late noting of that appeal. Had that appeal been prosecuted, the applicant would have had an opportunity to test the correctness of Chigumba J's decision in dismissing her quest to have the order in HC13281/12 rescinded on the basis that, *inter alia*, she had not been served with the application for default judgment. She cannot seek to have this court grant her the relief she would have probably obtained on appeal thereby asking this court to vacate Chigumba J's decision. Mr. Tavengwa's argument that this court must declare both Mwayera J and Chigumba J's judgments a nullity is, in my view, untenable.

*Mr Tavengwa's* argument is that the Judge did not express herself on the lack of service of the application and to that extent the matter is not *res judicata* as this application is hinged on the fact that there was no service of the application for default judgment on the applicant. The learned judge did express herself contrary to counsel's assertion.

I am persuaded by counsel for the respondent's argument that in HH 286-13 the Judge definitively dealt with the argument concerning the lack of service of the application. The argument does not, in my view, change complexion merely because it is now being made under rule 449.

If I am to hold otherwise and say the lack of service entitles the applicant to the relief she was denied in HH 286-13 I will be as good as reviewing a sister Judge's decision.

Granted the issue in HH 286-13 was whether there was good and sufficient cause but in seeking to show that, the applicant relied on the fact that she was not served with the application for default judgment. This is what the learned Judge definitively decided on. If I

am to hold that that same argument affords the applicant the relief of rescission under rule 449 it is tantamount to holding that the learned Judge was wrong in refusing the applicant that relief. I am aware that the learned Judge went on to address the issue of prospects of success as she had to, given that this was a rule 63 application but that does not change the fact that a definitive pronouncement was made on the same issue the applicant is relying on *in casu*.

The same principle resonates in the *functus officio* principle.

> "It is a general principle of our law that once a court or judicial officer renders a decision regarding issues that have been submitted to it or him, it or he lacks any power or legal authority to re-examine or re-visit that decision. …….. Rule 449 is an exception to that principle and allows a court to re-visit a decision that it has previously made, but only allows it in restricted circumstances." per MAVANGIRA AJA in *Unitrack (Private) Limited* v *Tel-One (Private) Limited* SC 10/18)).

That same judgment is authority for the position that a Judge of parallel jurisdiction cannot alter or vary another Judge's decision or order for to do so will be to trod on the prerogative of the Supreme Court. An appeal will be the appropriate course of action.

If, for argument sake, CHIGUMBA J was called upon to determine this rule 449 application would she be expected to pronounce herself differently on the same issue? I think not. The applicant's recourse therefore lay in the appeal she decided to withdraw.

In HC 1267/16 the applicant sued the respondent for damages on the basis of the cancellation of the MLA and the calling up of the bank guarantee, issues raised again *in casu.* In a judgment handed down on 20 July 2017 under HB 222-17 the learned Judge concluded that:-

> "In case number HC 1328/12 the court confirmed the termination of the MLA arising from plaintiff's breach of the agreement while in HH 286-13 and HC 2306-13 the court dismissed plaintiff's application for rescission of default judgment. These two judgments are still extant. The sequence of events is that there was a breach, a call up of the guarantee which then led to the subsequent termination of the agreement. The fact that the issue of the termination has already been adjudicated on also has a bearing on the issue of the guarantee and on that basis those issues have already been determined by this court.
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> I find therefore that the plea of *re judicata* has merit."

The foregoing remarks speak to the issues the applicant again raises in this current application and the manner in which she ends her founding affidavit is very telling. She says:-

> "Wherefore, the applicant accordingly prays that the court frowns and shows disdain for such big Corporations like the respondent who are abusing their stronger bargaining positions and overreaching little people like me, and grant an order in terms of the draft order annexed hereto."
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> The draft order seeks the rescission of HC 13281/12 in order to correct an injustice.

It is my considered view that the same argument is repeated, the only difference being the vehicle through which the applicant has brought that same argument.

The undesirability of such conduct was dealt with by MATHONSI J (as he then was) in *Trastar (Pvt) Ltd t/a Takataka Plant Hire* v *Golden Ribbon Plant Hire (Pvt) Ltd* HB 4-18. The learned Judge accepted that the court is not held to be *functus officio* in the instances specified in rule 449 by reason that it always retains the residual rights to rescind the default judgment. The learned Judge went on to say:-

> "In this case, *res judicata* and *functus officio* were on the basis that the rescission of the default judgment has been decided by this court in HC 2696/15 where the court rejected all the arguments advanced in trying to show "good and sufficient 'cause' for such rescission. For that reason the same arguments cannot be made in a fresh application ostensibly under rule 449."

These remarks apply with equal force *in casu*. The applicant has premised her application on the same arguments which were rejected in the rule 63 rescission application.

> "Indeed the point being made is that while the rules provided for three instances for the making of a rescission of judgment, that is in terms of rule 56, rule 63 and rule 449 it cannot be said the framers of the rules by that meant that a party is allowed to spend years and years skipping from one rule to the other, kangaroo style, in an attempt to have the same judgment rescinded." (*Trastar (Pvt) Limited (supra*)).

In essence therefore this application raises issues which this court has already pronounced itself on, the parties are the same, the subject matter the same and the relief the same. Litigation is not about using ingenuity to bring as many applications as such ingenuity allows in order to get the same relief. There must be finality to litigation. (*Masulani* v *Masulani and Ors* HH 68-03).

The argument that the applicant was a self actor and so did not know any better thereby opted to seek rescission under rule 63 and not rule 449 does not find favour with this court. A

litigant who chooses to take on the specialised field of law assumes the risk that comes with a failure to fully comprehend and navigate the legal field.

I am of the view that the first point *in limine* was properly taken and must succeed.

2. The second point relates to the unreasonable delay in bringing the rule 449 application

The decision or order which is sought to be rescinded was granted in 2013. It has taken all of 7 years to bring this application. Whatever the reasons for such delay, the point is it is unreasonable in the circumstances.

In *Grantully (Pvt) Ltd and Anor* v *UDC Ltd* 2000 (1) ZLR 361 the default judgment was granted when the Judge was unaware that the amount claimed was not yet due for payment. The judgment had therefore been erroneously granted. The Supreme Court however refused to rescind the judgment because the application had not been made within a reasonable time.

In *Moonlight Provident (Pvt) Ltd* v *Sebastian and Ors* HB 254-16 MAKONESE J dismissed an application for rescission brought in terms of rule 449 because it had not been made within a reasonable time. The judgment sought to be rescinded had been granted "a decade ago." (See also *Khan* v *Muchenje* HH 126-13).

In *Manyame and Anor* v *Emily Karimazondo and 10 Ors* HH 750-15 MATHONSI J (as he then was) had this to say:-

> "Rule 449 is silent on the time frame within which an application made under it should be brought but that does not mean that a party relying on that rule is at liberty, without more, to come to court any time seeking a rescission of judgment. The application should be made within a reasonable time after knowledge of the offending judgment. In my view 4 years is not a reasonable time."

*In casu* the delay of 7 years is totally unreasonable and it is not in the interests of justice and equally not in the interests of public policy in seeing finality to litigation.

The applicant in HB 222-17, HB 201-18, HH 286-13 and SC 544-13 embarked on a merry go round trying to get the same relief she now seeks in this application. It is time to let go and allow the respondent to rest from the unending litigation.

The second point *in limine* is meritorious and must succeed.

These points are dispositive of the matter. I will therefore not proceed to consider the merits.

As regards costs, the applicant has literally been all over in seeking for relief over the same issue. This stems more from desperation rather than malice or some such reprehensible conduct.

To mulct her with costs would be punishing her for trying to pursue justice through the courts.

I am not persuaded to hold that her conduct is deserving of censure and accordingly will not accede to the respondent's request for punitive costs.

In the result, I make the following order:-

The application be and is hereby dismissed, with costs.

*Messrs Mutuso, Taruvinga & Mhiribidi*, applicant's legal practitioners
*Messrs Gill, Godlonton & Gerrans c/o Titan Law*, respondent's legal practitioners