HEARTFELT INTERNATIONAL MINISTRIES
versus
USHEWEKUNZE CHITEWE
and
SYLIVIA CHAREKA

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 14 October, 2021 and 20 January, 2022

COURT APPLICATION

R Mahuni, for the applicant
A Masango, for the 1st respondent

MANZUNZU J This is a court application in which the applicant seeks the rescission of a judgment which was granted by consent in case number HC 8603/19 on 28 October 2019. The background of the matter is common cause. The first and second respondents obtained judgment in the Labour Court against the applicant on 21 September 2018 in the sum of $20 225.00 and $47 130.00 respectively. The court will take judicial notice of the fact that this was during the multicurrency error where the United States dollar was predominant.

On 12 June 2019 and 17 July 2019 the first and second respondents respectively registered the orders in their favour with the High Court for the purposes of enforcement. The amounts to be paid by the applicant were registered as US$20 225.00 and US$47 130.00. Following the registration of the orders the respondents proceeded to issue writs against the applicant's movable property on 29 July 2019. On 19 August 2019 the applicant's property was attached by the Sheriff. Applicant said it paid ZW$71 895.76 with the Sheriff on 18 October 2019 in what it believed was a full payment of its debt. However, contrary to its belief the respondents claimed payment in United States dollars or equivalent at interbank rate at the time to the tune of ZWL1 067 570.00. The Sheriff was then instructed to proceed with the removal of the applicant's goods despite the protestations by the applicant.

In an effort to stop the sale of its property the applicant filed an urgent application under case number HC 8603/19 which ended with an order by consent on 28 October 2019 in the following terms;

"IT IS ORDERED BY CONSENT THAT:

1. The applicant shall pay US$63 105.45 (sixty three thousand one hundred and five United States Dollars and forty five cents) to the 1st and 2nd respondents at the prevailing interbank rate at the date of payment payable in terms of the deed of settlement.
2. The applicant shall pay costs of suit in terms of the deed of settlement."

It is this order by consent derived from a deed of settlement which the applicant seeks rescinded. The application is in terms of the then rule 56 of the High Court Rules 1971 which provides that;

> "A judgment given by consent under these rules may be set aside by the court and leave may be given to the defendant to defend, or to plaintiff to prosecute his action. Such leave shall only be given on good and sufficient cause and upon such terms as to costs and otherwise as the court deems just."

In an application to set aside an order granted by consent the applicant must therefore show good and sufficient cause. The applicant says the order must be set aside because;

a) The judgment was erroneously granted.
b) It was signed under duress.
c) Order was entered when the debt had been extinguished.
d) The judgment amount at interbank rate was unlawful.

The applicant further said it had prospects of success in the main matter.

While this application is brought under r 56, the heads of argument introduced r 449 which reads;

"(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; or
(b) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
(c) that was granted as the result of a mistake common to the parties.
(2) The court or a judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed."

It appears the applicant is uncertain as to the exact nature of the application it intends to pursue. To sneak in r 449 in the heads of argument without the same having been pleaded is misplaced. Mr *Mahuni* who appeared for the applicant concentrated more on when the obligation arose and whether the same was affected by the provisions of SI 33 of 2019. The

applicant's written heads say that the order was erroneously sought and granted as a result of both fraud and mistake which was common to both parties. The grounds upon which this application was brought, cited *supra*, appear to be abandoned. Issue of duress was not pursued neither was there evidence to show its existence. The applicant was legally represented at all times. There was no evidence in support of the averment from its erstwhile legal practitioners. Fraud or error were not proved either.

Parties entered into a deed of settlement upon which an order by consent is derived. Considering the evidence before me, I see no good and sufficient cause for the applicant to resile from this order. The applicant has failed to prove its case. There is need for finality to litigation. Applicant is bend on abusing court process. Not only did the applicant fail to meet its obligations within the time limit set by the Labour Court but has been making every effort to frustrate the respondents. There were interpleader proceedings following the attachment of its property. There was also an application under r 449 to set aside the registration orders and later an urgent application with the result of a deed of settlement. The applicant wants to retract from the deed of settlement and from the order of this court in circumstances that are not justified. The applicant must carry the burden of costs at a higher scale.

Disposition:
The application be and is hereby dismissed with costs on a legal practitioner and client scale.

Mahuni Gidiri Law Chambers, applicant's legal practitioners.
Gambe Law Group, 1st and 2nd respondents' legal practitioners.