AL SHAMS GLOBAL BVI LIMITED
versus
EQUITY PROPERTIES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 18 September 2018

**Opposed application**

*A Muchandiona*, for the applicant
*TT G Musarurwa*, for the respondents

MUZENDA J: This is an opposed application for rescission of a judgment granted in default where the applicant seeks the following relief in terms of the draft order attached to its application:

> "IT IS HEREBY ORDERED THAT:
>
> 1. The default judgment which was granted against the applicant under HC 3254/17 on the 24th July 2017 be and is hereby set aside in its entirety.
> 2. Leave, be and is hereby granted to the applicant to file and serve its Notice of Opposition and Opposing Affidavit to the Chamber application in HC 3254/17, within ten (10) days from the date of this order.
> 3. The costs of this application shall be paid by the respondent on legal practitioner and client scale."

The background of the application as per the applicant's affidavit is that on or about the 3rd November 2017 Mr Jayesh Shah, the applicant's director was informed through internet published by Newsday that the respondent had obtained a judgment against the applicant. He then contacted applicant's legal practitioners to investigate circumstances surrounding the granting of the default judgment. On 13 November 2017 he was informed that the default judgment was granted on 24 July 2017. The respondent had made a chamber application for attachment to found or confirm jurisdiction and for substituted service which was filed on 11 April 2017. The applicant contends that its address of service is not 9 Hood Road, Southerton Harare, that is where the chamber application is said to have been served by the respondent.

The applicant further avers that the respondent snatched a judgment and or order against it. According to the applicant it was not necessary for the respondent to attach the applicant's property to found jurisdiction and to seek an order for substituted service at a time when the parties already had five cases pending hearing before the court.

Deed of Transfer No. 9068/08 was not accessed by the applicant directly from the respondent. The respondent had pledged the deed to Interfin Banking Corporation Limited which is in liquidation and currently under the curatorship of the Deposit Protection Corporation. To the applicant the cession of the respondent's title deed in favour of the applicant was declared legally binding and enforceable.

The applicant argues that it was not in wilful default on 21 July, 2017 and also that it has a good and bona fide defence to the chamber application which was filed by the respondent on11 April 2017 under case No. HC 3254/17.

The application is opposed by the respondent. The respondent contends that the applicant is a *peregrinus,* who is domiciled in the British Virgin Islands but conduct business in Zimbabwe. To the respondent applicant's local address is 9 Hood Road Southerton, Harare. On or around 30 May 2011 the respondent, was offered and accepted a credit facility by Interfin Bank Limited for an amount of USD 1, 600,000-00. As security for its obligation to Interfin Bank respondent registered a first mortgage, No.5818/11 in favour of Interfin bank for USD2 500 000-00 against a piece of land called Lot 3 Bannockburn; deed of transfer number 9068/08 which belongs to it. The mortgage bond was cancelled by the court under case number HC 387/13. The debt owing to Interfin Bank has since been satisfied by the payment of US$3 810 000-00 worth of treasury bills made on 23 February 2016. Sometime before the debt owing to Interfin Bank was satisfied, Interfin Bank, without the knowledge of the respondent, purportedly sold the Bankers Acceptances to the applicant on the understanding that the Bankers Acceptances would be bought back by the Interfin Bank. Interfin Bank handed over the title deeds to the applicant on the understanding that the title deed would be returned to Interfin Bank upon settlement on all amounts due. Despite settlement by the respondent of all amounts due to Interfin Bank, and a lack of indebtedness by the respondent to the applicant, the applicant has refused to release the said title deed to the respondent thus leaving the respondent with no option but to sue the applicant. In order to do so it was necessary for the applicant to make an application to found and or confirm jurisdiction first since the applicant is a *peregrinus*, hence the application under HC 3254/17, the respondent states.

The respondent argues further that an application to found and or confirm jurisdiction by its very nature is impossible of consolidation with other matters, it is a procedural application. They made the application to confirm jurisdiction in order to properly bring the applicant before the jurisdiction of this court and to ensure that the judgment that this court may give against the applicant in any matter is effective and not rendered nugatory. On the issue of service of the chamber application on the applicant, the respondent argues that the application to found or confirm jurisdiction was made in terms of order 32 r 242 (1) (b) to (e ) and (2) of the High Court Rules to the respondent, it was thus not necessary to serve the application on the applicant. In any case the respondent insists that the application was served on a responsible person in the employ of the applicant who accepted service on behalf of the applicant. The attachment of the applicants' property was necessary to found jurisdiction and to prevent the applicant, from raising a point *in limine* that they have raised in other applications that jurisdiction of the court has not been confirmed. It was therefore necessary to have the issue of jurisdiction dealt with and confirmed by the court. On the aspect of the need by the respondent to cite Deposit Protection Corporation as a party to the proceedings, the respondent's view is that since HC 3254/17 is an application to confirm/found jurisdiction in respect of the applicant it was not necessary to join it. The respondent adds that the applicant has failed to prove the essential elements of the purported application for rescission of judgment." It being a *peregrinus* the applicant also failed to demonstrate that it has any prospects of convincing this court not to attach its property to place it within the jurisdiction of this court.

Order 9 r 63 of the High Court Rules, 1971 provides the option available to a party against whom judgment has been given in default and that person may make a court application not later than one month after he has knowledge of the judgment for the judgment to be set aside. If the court is satisfied that there is good and sufficient cause to do so, it may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action on such terms as to costs and otherwise as the court considers just. The subject order which applicant seeks to have be set aside by this court was obtained by the respondent which had lodged a chamber application under order 32 r 242 (1) (b) – (e) and (2) of the High Court Rules. The rationale for bringing the application under order 32 r 242 without affording a respondent an opportunity to defend the application is that such a respondent may, if alerted, decide to frustrate the very purpose the application has been filed for and for instance in this

case the respondent may decide to remove its property from the jurisdiction[1]. In the matter of *Jansen* v *Major*[2] the case cited by the respondent in its heads of argument:

> "Applications for attachments or arrest as a matter of course are brought without notice and the plaintiff has until submission, the right to apply for such an order and if the requirements have been met, entitled to an order."

The respondent got the judgment from this court against the applicant so as to place the applicant properly within the auspices and confines of the local jurisdiction and to ensure that when a judgment is eventually granted for or against the applicant or a *peregrinus*, the judgment is effective and will not be rendered academic nor nugatory. In the circumstances it is the view of this court that the whole procedure outlined by the applicant citing order 9 r 63 of the High Court Rules 1971 is not for a matter of this nature. An application for rescission of judgment of this nature has to be made by an applicant in good faith[3]. Having looked at the affidavit filed on behalf of the applicant the applicant's application and papers did not establish a *bona fide* intention for this application. The applicant admits that it is indeed *peregrinus* and or ordinarily its head office is outside Zimbabwe. There are five cases involving it with the respondent, it also admitted that it is holding the respondent's title deeds, yet it wants this court to set aside the very judgment to found or confirm this court's jurisdiction over the matters. I agree with the respondent that if the rescission is granted in favour of the applicant, then the applicant is effectively removed from the jurisdiction of this court. It would mean that the respondent will not be able to constitute any lawful proceedings against the applicant without first approaching this court again to found or confirm jurisdiction.

The contention by the applicant that there is absolutely no need for the respondent to seek an order of attachment of the applicant's property to found jurisdiction and also to seek an order for substituted serve is misplaced. The application for rescission of judgment has failed to lay any basis for such an application.

The application is dismissed with costs.

*Danziger & Partners*, applicant's legal practitioners
*Chambati Mataka & Makonese Attorneys at Law*, respondent's legal practitioners

[1] Thermo Radiant New Sales (Pvt) Ltd v Nelsprint Bakers (Pty) Ltd 1969 (2) SA 295 (A) at 306 D-H
[2] [2005] 4 ALL SA 26 (SCA)
[3] Zuva Petroleum (Pvt) Ltd v Motu & Anor 2004 (2) ZLR 728 (H)