MOSLEY MASHINGAIDZE
versus
PRECIOUS CHIPUNZA
and
LALAPANZI PROPERTIES (PRIVATE) LIMITED
and
FRANK BUYANGA
and
REGISTRAR OF DEEDS N.O
and
GILDASTONE HOLDINGS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 6 August, 2015

Opposed application

L. Uriri, for applicant
S.M. Hashiti, for 1st respondent

CHITAKUNYE J: This is an application for the setting aside of a default judgement obtained by the first respondent in HC 2469/13 which had the effect of cancelling the applicant's title deeds to certain immovable property registered in his name. The applicant was not a party to the default judgement but its provisions affected his title to the immovable property.

The brief history of the matter was to the effect that applicant purchased the immovable property, being Stand 3206 Mabelreign Township 17 of Greeba of Mabelreign, Harare from the fifth respondent. At the time of such purchase the first respondent was in occupation. The applicant alleged that prior to the purchase his family members and himself had viewed the property at varying times and had been guided by the first respondent during such viewing.

After purchase applicant successfully sued the fifth respondent for transfer of the property into his name under case no. HC 3931/11. After obtaining title under deed of transfer no.4941/11, applicant as owner, demanded rentals from the first respondent. After a few months of paying rentals the first respondent resisted further rent payments claiming that he was in fact the owner and not tenant in the property.

Applicant thereafter sued the first respondent for eviction in case no. HC 11588/11. The first respondent defended the suit.

Upon the closure of pleading a pre-trial conference was held. The sole issue referred for trial was: whether or not the first respondent had a defence to the claim.

It is pertinent to note that during that pre-trial conference certain issues were raised by the presiding judge. Though parties were not agreed on the exact nature of the issues, it was common cause that it was after this pre trial conference that the first respondent issued summons in case no. HC 2469/13. In that action the first respondent was seeking the nullification of the transfer of the property in question from him to the second respondent and all subsequent transfers and the cancellation of applicant's title deed.

In HC 2469/13 the first respondent cited Lalapanzi Properties (Private) Limited, Frank Buyanga, Gildastone Holdings (Private) limited, the applicant and the Registrar of Deeds. Of the five defendants only the applicant entered appearance to defend. The applicant proceeded to file a comprehensive plea.

In spite of the plea filed by applicant which plea raised, inter alia, issues of estoppel and unjust enrichment, the respondent through his legal practitioners applied for default judgment against the defendants who had not entered appearance to defend without advising applicant of such a step or citing him. The order applied for included a substantive order against applicant. The order granted was as follows:-

"It is ordered that:-

1. The transfer of Stand 3206 Mabelreign Township 17 of Greeba of Mabelreign, measuring 1065 square metres situate in the District of Salisbury also known as 20 St. Stephens Road, St. Andrews Park, Harare from applicant to 1st respondent passed on 14th January 2010 under deed of transfer No. 5210/2010 and all subsequent transfers under deed of transfer Nos. 9360/2010 and 4941/11 be and is hereby declared null and void.
2. The third respondent be and is hereby ordered and directed to cancel Deed of Transfer Nos. 4941/2011 in favour of 4th defendant in the main matter and restore title to applicant under deed of transfer No. 8780/2002 or if no longer be practical, under a new title deed.
3. The Sheriff of Zimbabwe be and is hereby directed and authorised to sign all necessary papers to effect transfer back to applicant's name.

4. The 1st and 2nd respondents shall pay applicant's costs of suit on a legal practitioner and client scale."

The order was granted on the 10th July 2013.

The above order was not immediately brought to the attention of applicants' legal practitioners.

On 1 August 2013 applicant's legal practitioners wrote a letter to the first respondent's legal practitioners urging them to replicate and to indicate the status of the case. Upon not receiving any response applicant's legal practitioners wrote another letter inquiring on the same on 18 September 2013. It was only then that on 23 September 2013 the first respondent's legal practitioner replied indicating that she was having problems with her client as he had not paid her fees and so as soon as he paid she would attend to the closing of the pleadings and applying for a pre-trial conference. At that point 1st respondent's legal practitioner did not disclose to applicant's legal practitioner that she had in fact obtained a default judgment against the other defendants.

The applicant alleged that it was only on 5 March 2014 that the first respondent's legal practitioner advised applicant's legal practitioner of the default judgment but did not furnish it or disclose its contents. The first respondent's legal practitioner only produced the order in cross examining the applicant in HC 11588/11 on the 7th March 2014. Prior to this she had not heeded applicant's legal practitioner's request to be shown the order. Due to the ambush nature by which the order was produced, the trail in HC 11588/11 court was adjourned.

This application is therefore brought in order to set aside that default judgment. The application is premised on two grounds. Firstly, applicant alleges that the judgment be set aside in terms of r 449(1) (a) of the High Court Rules, 1971 as amended. The second ground advanced is a common law ground in which he alleges the judgment was obtained on the basis of fraud and error.

The first respondent opposed the application. He contended that applicant has no *locus standi* to seek rescission of a default judgment where he was not part to. He contended that in terms of r 63 of the High Court Rules only the party against whom a default judgment was obtained can seek its rescission.

The applicant's counsel submitted that the order was erroneously granted by the court in light of the fact that the order affected the interests of a person who was not a party to it and who had filed a comprehensive plea in the main case. The order also ignored the contents

of the plea which, if accepted by a trial court, would disentitle 1st respondent to the relief sought against all the defendants.

In this regard the applicant based his application on r 449(1) (a) of the Rules of the High Court, 1971 as amended.

The applicant's counsel argued that the first respondent's contention that applicant was not party to the application for default judgment and so cannot seek its rescission is not in line with the above rule. In this case applicant is not seeking rescission in term of r 63 but r 449(1) (a) of the Rules. There is a clear distinction between rescission under r 63 of the High Court rules and setting aside under rule 449(1) (a) (see *Bopoto* v *Chikumbu & Others* 1997(1) ZLR1).

Rule 63(1) provides that:-

> "A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application,……………., for the judgment to be set aside."

Rule 449(1) (a), on the other hand, provides that:-

> "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."

It is apparent that r 63(1) expressly provides that only a party against whom a judgment has been given in default has *locus standi* to apply for it to be set aside.

Under r 449(1) (a) one does not need to have been a party to the application for default judgment for one to be able to apply for the setting aside of the judgment. The applicant is only required to show that it is affected by the judgment or order and that such order was erroneously sought or granted.

In *Matambanadzo* v *Goven* 2004 1 ZLR 399 (S) court considered the question of *locus standi* under r 449(1) (a) and held that:-

> " .. a party affected by a judgement or order that was erroneously sought or granted in his absence may apply for the rescission of the judgment or order. To show *locus standi*, the applicant must show that he has an interest in the subject- matter of the order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the order was granted."

In *Tiriboyi* v *Jani & Another* 2004 (1) ZLR 470(H) court held that:-

> "… the purpose of rule 449 is to enable the court to revisit its orders and judgments to correct or set aside its orders and judgments given in error, in situations where to allow such to stand on the excuse that the court is *functus officio* would result in an injustice and would destroy the very basis upon which the justice system rests. It is an exception to the general rule, and

> must be resorted to only for purposes of correcting an injustice that cannot be corrected in any other way. The rule goes beyond the ambit of mere formal, technical, and clerical errors and may include the substance of the order or judgment. The rule is designed to correct errors made by the court itself and is not a vehicle through which new issues and new parties are brought before the court for trial. The three requisites that have to be satisfied for relief under the rule are:-
> (1) that the judgment was erroneously sought or granted;
> (2) that the judgment was granted in the absence of the applicant; and
> (3) that the applicant's rights or interests are affected by the judgment."

At page 473C-D the learned judge in that case opined that:-

> "Once these three factors are satisfied, the applicant is entitled to succeed and the court should not inquire into the merits of the matter to find 'good cause' upon which to set aside the order or judgment in issue."

(also *Grantully (Pvt) Ltd & Another* v *UDC Ltd* 2000(1) ZLR 361(S) and *Banda* v *Pitluk* 1993 (2) ZLR 60(H))

It may also be said that court will not be deceived by form as being one originating from a default judgment, court will look at the substance of the order and its effect.

In *casu,* it is common cause that whilst applicant was a party to the main action, this was not the case in the application for default judgment. Despite not being party to that application, the order substantially affected applicant. The applicant had a direct and substantial interest in the subject matter as he was the holder of title in the subject matter by virtue of Deed of Transfer No. 4941/11. The order had the effect of nullifying applicant's title deed. Clauses 1 to 3 of the order cited above are quite clear on this.

The order declaring deed of transfer no. 4941/11 null and void and cancelling same was granted in the absence of the holder of such title, the present applicant. This was applied for and obtained in spite of the fact that applicant had filed a comprehensive plea in defence of his title.

It cannot by any stretch of imagination be said that applicant was not affected by the default judgment. Clearly his title to the property was surreptitiously taken away from him without his participation in that process. The true nature and substance of the order in question is that a default judgement was entered against applicant.

As a party affected, applicant is perfectly entitled to seek the setting aside of that order.

In seeking the setting aside of the order a party must show that not only was he affected but also that the order was erroneously sought or erroneously granted. On this aspect applicant's counsel argued that the errors comprised:-

firstly in the seeking of the default judgment when it was clear from applicant's plea that one of the questions in issue was whether first respondent should be estopped from obtaining the relief he seeks on the basis of his conduct which conduct led applicant to buy the property.

Secondly, in seeking a default judgment which nullified the title of a person who was not in default in the action; and thirdly, in the granting of an order nullifying applicant's title when applicant had put up a defence that if successful would entitle him to retain the property.

The first respondent's counsel contended that the judgement was not granted in error as it was granted in terms of Order 9 r 58; all the pleadings which had been filed were placed before the judge when he granted the order and the parties from whom the relief was being sought were duly served in terms of the Rules but chose not to enter appearance to defend. Counsel contended that as applicant's plea was on record the judge considered it as well and so it cannot be said applicant's position was not heard.

I did not hear counsel to seriously suggest that granting an order cancelling the title deed of a party who had entered appearance to defend and had filed a comprehensive plea without hearing him was not an error. In my view, the error on the part of the court was, *inter alia*, that despite being aware of the applicant's interest by virtue of the plea filed of record, the court proceeded notwithstanding applicant's absence to pass a judgment that affected applicant's title to the property in question without hearing applicant.

The first respondent's contention that his legal practitioner had, after obtaining the order, written a letter to the registrar of deeds not to action the order pending the determination of applicant's contestation did not take away the fact that the order affected applicant and virtually made his continued challenge in HC 2469/13, a mere academic exercise. The order remained extant despite that letter and could be enforced anytime without notice.

The first respondent's legal practitioner confirmed this when in paragraphs 15 and 16 of her internal memo to her senior Mr. Sinyoro she wrote that:-

> "On 28 August 2013, I wrote a letter to the Chief Registrar of Deeds requesting him to suspend cancellation of current title deed since there was an opposition which needed to be dispensed with first.
> I authored the above mentioned letter because I was afraid that client would seek to effect the Order using other lawyers behind my back as well as without affording Mr. Mashingaidze's opposition to be dispensed with. My client was being evasive with regards to payment of my fees."

This serves to confirm that the legal practitioner realised she had obtained a judgment which was enforceable against applicant.

I am of the view that this is a proper case for court to set aside the default judgment.

The applicant's counsel further submitted that the default judgment may also be set aside at common law on the ground of fraud. In this regard he referred to the words of GUBBAY JA as he then was in *Mudzingwa v Mudzingwa* 1991 (4) SA17 (ZS) at page 22 J wherein the learned judge said that:-

> "Furthermore, it is firmly established that a judgment can only be rescinded under the common law on one of the grounds upon which *restiitutio in integrum* would be granted, such as fraud or some other just cause, including *justus error* …."

The fraud being alleged pertains to the actions of first respondent through his legal practitioner. The basic circumstances relied upon is that: at the time of making the application for default judgment first respondent's legal practitioner was fully aware of the nature and extent of applicant's plea. The plea was to the effect that first respondent was not entitled to any judgment in his favour due to his conduct; that is one of estoppel. The applicant had in his plea explained the basis for alleging so. Despite this knowledge the first respondent's legal practitioner sought a substantive order against applicant. She did so without citing the applicant. She virtually sought to undermine the applicant's cause.

It was also alleged that at the time first respondent's legal practitioner was pursuing the default judgment she was ignoring letters from applicant's legal practitioners asking her to close the pleadings and inquiring on the status of the case. It was only after obtaining the default judgment that 1st respondent's legal practitioner responded to applicant's letters by advising that her client had not paid her and so she was not doing work for him till he paid. As it later turned out this was not true as in about the time she was expected to close pleadings she was applying for default judgment.

As has already been alluded to earlier, after obtaining the default judgment, 1st respondent's legal practitioner did not advise applicant's lawyers till about 2 days before the trial for 1st respondent's eviction in HC 11588/11. Even then the order was not furnished to applicant's legal practitioner despite request. The order was only produced in cross examining applicant. This was a deliberate attempt at ambushing applicant with the contents of the order which clearly showed that applicant's title deed had been cancelled and so he had no right to evict first respondent. The applicant's counsel argued that the order was produced in such a manner as to defeat applicant's application for the eviction of 1st respondent.

It was in these circumstances that applicant alleged fraud.

Fraud generally consists in knowingly making a false representation of fact with the intention to defraud the party to whom it is made, and such false representation actually causes prejudice or is potentially prejudicial to another.

In *casu*, when the first respondent's legal practitioner applied for default judgement she was aware of the contents of applicant's plea. The nature of the plea was such that if successful it would not entitle first respondent to the relief he was seeking. She was aware applicant was contesting the claim for cancellation of his title deed.

Despite this knowledge 1st respondent's legal practitioner applied for the cancellation of applicant's title deed without citing the applicant or even serving him.

In this way first respondent's legal practitioner misrepresented that her client was entitled to judgment even against the applicant whom she had not cited and who had in fact filed a plea in the main case and against the other defendants. Due to that misrepresentation 1st respondent obtained a default judgment cancelling applicant's title deed. This was clearly prejudicial to applicant.

I am of the view that in the circumstances of this case the default judgment was obtained under misrepresentation. This is a case whereby the applicant ought to have been cited and allowed to participate in the application as the relief being sought included the cancellation of his title deed.

The application ought to succeed with costs on a punitive scale.

<u>Costs</u>

On costs the applicant sought :-

1. That the costs of this application be paid by the first respondent's legal practitioner, Ruth Mukozho *de bonis propriis* on the higher scale;
2. That she should not charge her client for the application for default judgment under HC 2469/13 and also defending this application; and lastly
3. That the legal practitioner should be ordered to report herself to the law society of Zimbabwe for investigation of her conduct in this matter.

The applicant's counsel submitted that 1st respondent's legal practitioner's indiscretion is what led to this application. This indiscretion comprised that the legal practitioner made an application for default judgment which she knew was not appropriate as the relief sought affected a party who had entered appearance to defend. She knew the plea

had been filed. The nature of the plea was such that it disentitled her to obtain that judgment until final argument of the matter.

Despite this first respondent's legal practitioner obtained the default judgment without citing or serving applicant. She thereafter kept that as a closely guarded secret to only produce it in cross examining applicant in the trial for the eviction of 1st respondent.

In support of this argument applicant's counsel cited a number of case authorities were costs *de bonis propriis* had been awarded against legal practitioners in varying circumstances.

The first respondent's counsel contended that the conduct by the first respondent's legal practitioner was above board and so costs should not be ordered against her. Counsel made effort at distinguishing cases cited by applicant's counsel from the present case.

The circumstances of this case show that applicant maybe justified is seeking costs against the first respondent's legal practitioner.

It is pertinent to note that at the time of applying for a default judgment first respondent's legal practitioner was aware that the relief she was seeking would affect applicant's title to the property in question. She was also aware applicant was relying on this title in seeking the eviction of the first respondent from the property in question. The legal practitioner was further aware of the nature of applicant's plea which put all the allegations by the first respondent into issue. Further upon obtaining the judgement aforesaid the legal practitioner kept that information to herself till two days before the date for the eviction trial. When asked to furnish applicant's legal practitioner with a copy as is expected amongst professional lawyers, she did not. On the date of trial itself she waited till she was cross examining applicant to produce the order. Clearly the manner in which respondent's lawyer conducted herself fell short of what is expected of her as a legal practitioner. her conduct smacks of dishonesty in an attempt to win her client's case.

As noted by GILLESPIE J in *Founders Building Society* v *Dalib (Pvt) Ltd. & Others* 1998 (1) ZLR 526(H) at p529A-B

> "Repetitively, as all aspects of practice unfold, the practitioner finds an insistence on fair dealing and good faith whether in his relationship with his client, his adversary, or any other. Integrity has been emphasised as a required 'fundamental quality' of all who would practice law … attorneys are often under pressure from clients to engage or assist in some impermissible act or omission, assertion or concealment, which clients hope will extricate them from some difficulty or gain them some advantage. That being so, especial effort must be made by every practitioner to ensure that all his dealings are strictly honourable.' (quoting from Lewis *Legal Ethics* 123).

The learned judge went on to say that:-

> "The courtesy of giving fair warning to other lawyers of an intention to take a technical point is one rather jealously guarded by the profession. One knows of a standard question, put to all who are obliged to take the professional oral examination in ethics. It is designed to elicit the response that the failure to give fair warning, before steps are taken, for instance, to bar an opponent or to take a technical point, is a discourtesy. It may result in an adverse order of costs against an attorney should costs be incurred in undoing what was done without warning." (@ p 529B-C)

At p 534E-F the learned judge further stated that:-

> "…. the party who proceeds to claim default judgment in circumstances where he may be accused of snatching at a judgment may well be held accountable for unnecessary proceedings generated by his deviousness or pigheadedness."

See also *Minister of Home Affairs & Others* v *Vuta* 1990(2) ZLR 338(S).

In *casu*, the respondent's legal practitioner upon getting a default judgment in circumstances alluded to above sought to use it against applicant in a manner that was unethical. She sought to spring it as a surprise in the cross examination of applicant to show that applicant no longer had title to the property he was seeking the eviction of the first respondent from. But surely that title had been surreptitiously cancelled in dishonourable circumstances.

Despite this first respondents legal practitioner fiercely resisted the setting aside of the default judgement obtained when common sense should have dictated that the order, in as far as it affected applicant's title, ought to be set aside. The legal practitioner's resistance was not in good faith at all, I detect an element of *mala fides*.

The applicant has been unnecessarily put out of pocket by the conduct of that legal practitioner in having to launch this application in a matter whereby if the first respondent's legal practitioner had been honest and acting in good faith she ought to have consented to the rescission of the default judgment. Whilst mindful of the fact that costs *de bonis propriis* should not be lightly awarded I am of the view that such is deserved in this case. It is only fair that that legal practitioner, Ms Ruth Mukozho, be ordered to pay the costs for this application.

I believe that should be adequate censure. I did not find much insistence on the legal practitioner reimbursing her client for the default judgment under HC2469/ and so such will not be ordered.

I am also not inclined to order that she reports herself to the law society. This judgement should suffice for a closer monitoring of her conduct.

Accordingly the application is hereby granted as follows:-

1. The default judgment obtained by 1st respondent under HC 2469/13 on the 10th July 2013 be and is hereby set aside.
2. The costs of this application shall be paid by the 1st respondent's legal practitioner, Ruth Mukozho *de bonis propriis* on the legal practitioner client scale.

Messrs Mawere & Sibanda, applicant's legal practitioners
Messrs Sinyoro & Partners, 1st respondent's legal practitioners