ZAMBE NYIKA GWASIRA
versus
MAXWELL MATSVIMBO SIBANDA
and
N.Z. INDUSTRIAL & MINING SUPPLIES
and
THE REGISTRAR OF DEEDS
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 23 May 2017 & 26 July 2017

Opposed application

Z.W. Makwanya, for the applicant
Mrs *R Mabwe*, for the first respondent

MUREMBA J: This is an application in terms of r 449 (1) (a) of the High Court Rules, 1971, wherein the applicant seeks the rescission of firstly, the default judgment which was granted in HC 6750/11 and secondly, the judgment which was granted in HC 7244/12. Consequently, upon the rescission of the two judgments the applicant seeks the cancellation of the writ of execution that was issued pursuant to the judgment in HC 7244/12.

The background of the matter according to the applicant can be summarised as follows. The first respondent, on 13 July 2011, issued summons against the second respondent in case number HC 6750/11. The second respondent is a duly incorporated company in terms of the laws of Zimbabwe. Its certificate of incorporation was tendered and it shows that its full names are N.Z Industrial & Mining supplies (Pvt) Ltd and it was incorporated on 22 June 1992. It entered an appearance to defend as a self-actor represented by its Managing Director, the applicant. When the pleadings were closed the parties attended the pre-trial conference where the judge indicated that since the second respondent was a company it needed to seek legal representation and that the parties needed to hold an out of court discussion with a view to settling the matter. Consequently, the second respondent engaged a legal practitioner by the name of Batsirayi Kaseke to represent it and to enter into out of court discussions with the first respondent. Despite this a default judgment was later

entered in favour of the first respondent at the pre-trial conference. Apparently, the second respondent had not been represented at the pre-trial conference.

The applicant said that in trying to make enquiries about what had happened, he realised that his legal representative, Mr Kaseke was no longer locatable. The Law Society advised that he had been deregistered. Enquiries with the registrar of this court revealed that a default judgment had been granted in the matter on 7 March 2012, but instead of it being a default judgment under HC 6750/11 it was granted under case number HC 12599/11. Over and above that the applicant's name was also appearing on the court order together with that of the second respondent and they appeared as one name. Instead of the defendant's name appearing as N.Z Industrial& Mining supplies as it appears on the summons and declaration it now appeared as Zambe Nyika/ Gwasira N.Z Industrial & Mining supplies on the court order. Apparently the case number had been erroneously cited as 12599/11 instead of 6750/11. The then first respondent's legal practitioners picked the error and wrote to the judge for correction of the error and even furnished the judge with an amended draft order bearing the correct citation of the case number. However, the first respondent's legal practitioners did not correct the names on the amended draft order. The amended draft order that was tendered to the judge still bore the names of both applicant and the second respondent as one name. The applicant attached both the letter in question and the amended draft order as annexures to this application.

The applicant stated that pursuant to the default judgment that was granted in HC 6750/11, the first respondent made an application under HC 7244/12 against him for an interdict barring him from disposing of his immovable property namely Stand no. 13552 Salisbury Township and for an order declaring that immovable property specially executable in order to satisfy the default judgment. The applicant annexed the judgment in HC 7244/12 to this application. The judgment states that in his opposing affidavit to the interdict, the applicant in the present matter sought to have the default judgment in HC 6750/11 rescinded which was irregular because he had not filed a counter claim as a stand-alone application for rescission. In other words, instead of responding to the interdict and then making a counter claim, the applicant had sought to make a claim for rescission of the default judgment in the notice of opposition and opposing affidavit to the interdict. The purported counter claim not being in terms of the rules of this court was said to be improperly before the court and it was not entertained. Since the applicant had not opposed the relief the first respondent was

seeking, the interdict was granted and the applicant's immovable property was declared executable.

The judgment in HC 7244/12 consequently gave rise to the issuance of the writ of execution against the applicant's immovable property which was declared executable.

The applicant stated that he seeks a rescission of the default judgment under HC 12599/11 or 6750/11 because his name was erroneously included as a party in the court order when he was not. He further seeks rescission of the judgment granted in HC 7244/12 and the cancellation of the writ of execution that was issued pursuant to it as the granting of the judgment in HC7244/12 was based on the wrongly cited defendant in HC 6750/11.

The applicant averred that the default judgment granted in HC 6750/11 was granted in error because no application was ever made to amend the pleadings for purposes of altering the identity of the defendant or to join him as a party to the proceedings. The applicant averred that he noticed that his name was included for the first time in the pleadings at replication stage in the replication which was filed by the first respondent who was the plaintiff in the matter. He stated that the subsequent issuance of a default judgment bearing his name as a defendant was therefore a nullity. He said that had this court been aware of the improper joinder of the applicant or alteration of names it would not have granted the default judgment in HC 6750/11 bearing his name as a defendant.

The applicant averred that the erroneous judgment in HC 6750/12 resulted in his immovable property being declared executable in HC 7244/12. Its attachment and it being sold in execution will deprive his family of its only home. He said that the writ of execution that was issued pursuant to HC 7244/12 is invalid because it is based on a judgment which was erroneously granted.

In response to this application, the first respondent averred that having obtained a default judgment in HC 6750/11 which bore the names Zambe Nyika/Gwasira N.Z Industrial& Mining supplies as the defendant he failed to locate any movable assets belonging to the applicant. He then approached this court for relief in HC 7244/12 and obtained a judgment declaring the applicant's property executable. The applicant had opposed the matter and personally attended the hearing. He has not appealed against that judgment and as such it remains extant. The first respondent stated that following that judgment he had a writ of execution issued out but has not been able to execute because the applicant's wife Everjoy Meda subsequently filed several applications relating to that judgment as she claims to have a share in the immovable property. She even went as far as

the Constitutional Court on 2 occasions, but she did not succeed. Apparently, Everjoy Meda had successfully applied to be joined as a co-respondent with the applicant in HC 7244/12 when the first respondent in the present matter was seeking an order declaring the applicant's immovable property executable. She had applied to be joined in the matter on the basis that she had an interest in the property.

The first respondent averred that he had no knowledge as to how the names of the applicant ended up being included as a party to the proceedings. He said that his erstwhile legal practitioners, Scanlen and Holderness were the ones who were responsible for handling the matter. He gave the impression that they would know better what transpired which resulted in the name of the applicant being included as a defendant. He attached the corrected court order. It shows that the case number was corrected to HC 6750/11, but the names of the defendant remained as Zambe Nyika/ Gwasira N.Z Industrial & Mining supplies.

In the answering affidavit the applicant averred that the first respondent was not being candid with the court as he had in another matter HC 1655/16 stated that the amendment of the names had been properly done by the consent of the parties.

At the hearing of the present matter Mrs *Mabwe* raised a point *in limine* which she said would dispose of the matter once and for all. She submitted that this matter was *res judicata* as it had already been dealt with and decided by MAWADZE J in HC 1655/16 and HH 650/16. In that matter the applicant's wife Everjoy Meda and his son Zvikomborero Nyika filed an application for rescission in terms of rule 449 of judgments granted in HC 12599/11 or HC 6750/11 and HC 7244/12 and the writ of execution which was issued pursuant to HC 7244/12. In that application the applicant and the first respondent in the present matter were cited as co-respondents. The applicant did not oppose the applicant, but the first respondent did. MAWADZE J dismissed the application. It should be noted that the reliefs that the applicant's wife and son were seeking are the same reliefs the applicant is now seeking in the present application. What has changed now is that it is the applicant who is now suing the first respondent. The parties in the present matter have thus changed.

It was Mrs *Mabwe's* argument that by not opposing the application in HC 1655/16 the applicant had acquiesced to the judgment and as such he cannot make the present application as it is now *res judicata*. Mr *Makwanya* argued that the matter was not *res judicata* as the applicants in HC 1655/16 were the applicant's wife and son and not the applicant himself. Mr *Makwanya* said that the major reason why that application was dismissed was that MAWADZE J stated that the applicant's wife and son had no legal interest in HC 6750/11 (HC 12599/11).

Mr *Makwanya* submitted that the fact that the applicant had not responded to the application in HC 1655/16 did not make the matter *res judicata*.

The essential elements of *res judicata* are:

(i) The action in respect of which judgment has been given must concern the same parties.

(ii) The action or judgment must involve the same subject matter.

(iii) The action in which judgment is given must be founded in the same cause of action or complaint.

(iv) With respect to requirement of the judgment, it must be a final and definitive judgment. See *Flowerdale Investments (Pvt) Ltd and Another* v *Bernard Construction (Pvt) Ltd and Others* 2009 (1) ZLR 110 (S); and *Banda & Ors* v *Zisco* 1999 (1) ZLR 340 (SC).

In view of these requirements I am not persuaded by Mrs *Mabwe*'s argument that this matter is *res judicata.* The matter cannot be *res judicata* because the parties in the present matter and in HC1655/16 are different. In HC 1655/16 the applicant and the first respondent were being sued together as co-respondents. In the present matter, these former co-respondents are now suing each other. Under the circumstances the matter cannot therefore be *res judicata.* I *thus* dismiss the point *in limine.*

Rule 449 (1) (a) reads as follows.

> "***449. Correction, variation and rescission of judgments and orders***
> (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."

For a relief under r 449 (1) (a) to be granted the following requirements have to be met.

a) The judgment must have been erroneously sought or granted
b) The judgment must have been granted in the absence of the applicant and
c) The applicant's rights or interests must be affected by the judgment. See *Mashingaidze* v *Chipunza & Others* HH 688/15.

It is therefore clear from these requirements that a party can only seek to rescind a judgment in terms of r 449 (1) (a) if he was absent when the judgment he seeks to rescind was granted. If the party was present, he cannot seek rescission.

In the respondent's heads of argument issue was taken with the long time the applicant took before making this application. It was submitted that an application in terms of

r 449 should be made within a reasonable time. The default judgment was granted on 12 March 2012 and this application was made on 10 November 2016, 4 years 8 months later. It was submitted that the applicant has not been diligent in the pursuit of his rights which he ought to have done expeditiously. Reference was made to the case of *Grantully (Pvt) Ltd & Anor* v *UDC Ltd* 2000 (1) ZLR 361 (SC) wherein it was held that:

> "I consider that he was justified, in the exercise of his discretion, in dismissing the application by reason of the inordinate lapse of time. After all, r 449 is "a procedural step designed to correct expeditiously an obviously wrong judgment or order": per ERASMUS J in Bakoven's case supra at 471E-F. See also *Firestone South Africa (Pty) Ltd* v *Genticuro AG* supra at 306H.
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> In *First National Bank of Southern Africa Ltd* v *van Rensburg NO & Ors*: In re *First National Bank of Southern Africa Ltd* v *Jurgens & Ors* 1994 (1) SA 677 (T), Eloff JP (with whom VAN DER WALT and PREISS JJ concurred) stressed the important need to proceed rapidly in applications of this nature. He said at 681E-G:
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> > "It is in the interest of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of orders of court. Persons affected by such orders should be entitled within a reasonable time after the issue thereof to know that the last word has been spoken on the subject. The power created by r 42(1) is discretionary (see *Tshivhase Royal Council & Anor* v *Tshivhase & Anor*; *Tshivhase & Anor* v *Tshivhase & Anor* 1992 (4) SA 852 (A) at 862 in fine- 863A) and it would be a proper exercise of that discretion to say that, even if the appellant proved that r 42(1) applied, it should not be heard to complain after the lapse of a reasonable time. A reasonable time in this case is substantially less than the three years referred to.
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> I respectfully agree with these observations"

Several other authorities which state that an application for rescission in terms of rule 449 should be made within a reasonable time were cited. This issue having been raised for the first time in the first respondent's heads of argument the applicant did not respond to it. Even at the hearing the applicant's counsel did not address the issue.

In *casu* it is not disputed that when the default judgment was granted in HC 12599/11 or HC 6750/11 the second respondent was not in attendance. It had defaulted at the pre-trial conference. Again it is not disputed that when the summons was issued in the matter, the applicant was not a party to the proceedings. From nowhere his name was only included for the first time at replication stage in the replication by the first respondent who was the plaintiff in the matter. At the pre-trial conference when N.Z. Industrial and Mining Supplies did not attend, a court order with the applicant's names was obtained by the first respondent. The first respondent failed to explain in his opposing papers in the present matter how the name of N.Z. Industrial and Mining Supplies metamorphosed to include the name of the applicant. The applicant has therefore made a good case for this court to rescind the default

judgment that was granted in HC 6750/11 initially erroneously granted under case number HC 12599/11 as it is clear that it was erroneously sought and granted in the absence of the applicant and it affects his rights and interests.

I agree with the first respondent's counsel that that an application for rescission of a default judgment in terms of r 449 should be made expeditiously and within a reasonable time. The history of this case shows that the applicant once made an attempt to have the default judgment rescinded when he was sued by the first respondent in HC 7244/12 in 2012. In response to the application to have his property declared executable, he improperly made a claim for rescission of the default judgment in the opposing affidavit. Consequently, the claim for rescission was not entertained by the court. It was not dismissed as the respondent's counsel sought to put it in the heads of argument. In 2016 the applicant's wife and son brought an application for rescission of the same default judgment in terms of r 449 which they lost on the basis that they were not interested parties. It is not clear why the applicant was not taking the initiative to make the application for rescission himself. However, it appears to me that the applicant is a person who lacked proper legal advice on how to deal with the matter, his major problem being that for the greater part of the time he was involved in litigation he was a self-actor. He was not being legally represented. Even when his company, the second respondent was sued by the first respondent he represented it up to pre-trial conference stage where he was then told by the pre-trial conference judge to find a lawyer to represent the second respondent.

It was only after 4 years 8 months of the default judgment having been granted that the applicant woke up from his slumber and brought this application. The delay is inordinate. However, in view of the nature of the error that prompted the making of the application, this is an exceptional case where I am inclined to grant the rescission despite the inordinate delay. The error goes to the root of the matter because judgment ended up being granted against a person who is different from the one who had been sued. In the summons and declaration the defendant was cited as N.Z. Industrial and Mining Supplies which is a company. At replication stage the first respondent who was the plaintiff simply changed the name of the defendant to Zambe Nyika/ Gwasira N.Z Industrial & Mining supplies. The name of the defendant was now a combination of the applicant's name and his company's name. I believe the first respondent was taking advantage of the fact that N.Z. Industrial and Mining Supplies was being represented by the applicant who is a lay person and not by a legal practitioner. Upon N.Z. Industrial and Mining Supplies defaulting court at pre-trial conference, the first

respondent prepared a draft order with the name of the defendant as Zambe Nyika/ Gwasira N.Z Industrial & Mining supplies and obtained an order bearing these names. Such a defendant who is a combination of an individual and a company is non- existent. The judgment cannot therefore be allowed to stand. I will thus grant the application for rescission in HC 6750/11.

In respect of the judgment granted in HC 7244/12, upon applying the requirements of r 449 (1) (a), I cannot grant the application for rescission. This is because when the matter was heard the applicant had filed opposing papers and he was in attendance at the hearing. The judgment was therefore granted in his presence. He cannot seek to have the judgment which was granted in his presence rescinded as if it was granted in his absence. This is therefore an application which falls foul of the requirements of r 449 (1) (a). Consequently, the writ of execution that was issued pursuant to this judgment in HC 7244/12 cannot be set aside since the judgment remains extant.

Costs

The applicant partly succeeded in his claim. I will thus award him costs, but under the circumstances there is no justification for an order for costs on a higher scale. I will thus award him costs on the ordinary scale.

In view of the foregoing, it be and is hereby ordered that:

1. The default judgment that was granted in HC 6750/11 (initially erroneously granted under HC 12599/11) is rescinded.
2. The application to rescind the judgment in HC 7244/12 is dismissed.
3. The application to set aside the writ of execution that was issued pursuant to HC 7244/12 is dismissed.
4. The first respondent is to pay costs to the applicant.

Chinawa Law Chambers, applicants' legal practitioners
Coglan Welsh & Guest, 1st respondent's legal practitioners