

TIMOTHY SACHITI
and
ALICE SACHITI
versus
GIFT MUKARONDA

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 21 June 2021

Opposed Application: Reasons for Judgment.

Applicants in Person
D. Tandiri, for the Respondent

MUZENDA J: This is an application for Rescission of Judgment made in terms of Order 49, Rule 449 of the High Court Rules, 1971, where the two applicants who are husband and wife are seeking the following relief.

“IT IS ORDERED THAT:-

- 1. Rescission of judgement be and is hereby granted in favour of the applicants*
- 2. The order in case No. HC 19/18, be and is hereby set aside.*
- 3. An order be issued to cancel all documents issued to effect this order.*
- 4. The record be and is hereby referred to the Registrar for a re-set down*
- 5. The respondent to bear all costs.”*

The application is opposed by the respondent.

Background Facts.

On 13 July 2018 parties signed an order by consent before MWAYERA J (as she then was) and resolved a dispute between the applicants and respondent pertaining to change of ownership of Toyota Ipsum Registration number ABO 4985 into the names of the applicants. Applicants agreed to effect transfer of title in respect of stand 3279 Umtali Township Lands to Onesmo Bhasera and sign all documents required for transfer. The order by consent was consolidated by a Deed of Settlement signed by the applicants, Gift

Mukaronda, and Mr *D Tandiri*, representing Mr Mukaronda. The parties signed the deed on 7 August 2018 which had patent errors on the numbering of paragraphs to the draft order where the paragraphs or clauses started from 6 to 9 then 5 to 6. The order issued by the Deputy Registrar dated 23 October 2018 reflects the paragraphs as being 6 to 11. On 24 October 2018 applicants noted the errors and alerted respondent's legal practitioners in order to attend to the errors in numbering the paragraphs. On 15 March 2021 a corrected order was issued by the Registrar capturing virtually the same contents of the Deed of Settlement. A number of correspondences were exchanged between the parties dealing with the substance of the order and fulfilment of each party's obligations arising out of the deed of settlement. On 31 March the applicants approached this court with the current application. In their founding affidavits they outlined the history of the matter and state that although the history of the matter state that respondent took occupation of the immovable property he breached the deed of settlement by failed to pay capital gains tax to the Zimbabwe Revenue Authority, failing to pay City of Mutare bills and did not transfer ownership of the car to them. The two applicants contend that the agreement of sale had prescribed. The applicants went on to blame respondent's legal practitioners for producing a wrong document calling it order by consent and that the order by consent was produced in their absence. They went on to allude to the wrong numbering of paragraphs as outlined herein above. The applicants further aver that the order by consent was issued on 7 August 2018 and they became aware of same on 18 October 2018 and they went on to cite Rule 63 of the High Court 1971 stating that for one to proceed in terms of Rule 63 one should show good and sufficient cause to have the judgment set aside. They added that in terms of Rule 449 of the High Court Rules, a court can make an order correcting rescinding or varying a judgment that was erroneously granted in the absence of a party.

The applicants indicated in their founding affidavits that they are seeking rescission on the grounds that the default judgment was granted in error and therefore should be set aside. They pointed out that there are clear differences in content between contents of the deed of settlement and order by consent. Having said that applicants went on to state that the respondent has no intention of complying with what was agreed on and signed by the parties in the deed of settlement and the two prayed for the order specified in the draft.

The respondent raised a preliminary point relating to the delay in filing an application for rescission of judgment. Applicants took two and half years to lodge the application, respondent averred. No explanation for such delay was not supplied by the applicants and

they used the wrong Rule of High Court Rules, applicants ought to have used rule 56 to have an order by consent set aside, not to apply for rescission of judgement in terms of Rule 449, they were expected to apply for the setting aside of the judgment by consent and on paper the applicants have failed to satisfy the requirements to have a judgment by consent be set aside.

On the merit of the application, respondent disputes that he breached conditions of the deed of settlement. He is willing to pay capital gains tax, he has since changed ownership of the car to reflect first applicant's name and applicants refused to accept the motor vehicle's number plates. On 31 July and 7 August 2018 parties attended a pre-trial conferences which culminated, in the presence of both applicants. According to the respondent applicants refused to sign the application for capital gains tax clearance certificate. Respondent goes on further to state that both rules 63 and 449 of High Court Rules, 1971 do not apply in this matter because no default judgment was granted by the court. In any case the court did not make any error and if there was an error that error could have originated from the parties. As a result the respondent sees no basis for the rescission of the judgment by consent and prayer for the dismissal of the application with costs on legal practitioners-client scale.

The law

Order 9 Rule 63 provides that a court may set aside judgment given in default.

1. *“A party against whom judgment has been given in default whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.*
2. *If the court is satisfied on an application in terms of Subrule (1) that there is good and sufficient cause to do so, he court may set aside the judgment 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.”*

Order 8 Rule 56: Court may set aside judgment given by consent

“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 the 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”

Order 49 Rule 449: Correction variation and rescission of judgment and orders.

1. **The court or a judge may in addition to any other power it or he may have, *mero molu* 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.

Analysis

The order being sought by the applicants to be rescinded was borne out of a consent order and not granted in default of the other party. Both applicants appended their signatures to the draft and the draft become final order when the judge signed it. It cannot be adjudged to have been granted in error or default judgement at all. Hence where a judgement was entered by consent rule 63 of the High Court Rule, 1971 does not apply in my view. If the applicants were not happy with the judgment by consent their recourse lies in rule 56 and such an order by consent can be set aside on grounds of fraud, discovery of new documents, error or irregularities in procedure¹ the success or otherwise of such an application depends on the circumstances which gave birth to the consent order. I am satisfied that the judgment in dispute was borne out of the parties genuine efforts to settle the dispute by way of a consent order, and the applicants effort to have order rescinded is to withdraw from the entire agreement between them and respondent.

Rule 449(1) of the High Court Rules, 1971 requires an applicant to establish that the judgment was erroneously sought or granted, the judgment was granted in the absence of the applicant or one of the parties and that the applicant's rights or interests were affected by the judgment². I did not hear applicants submitting any argument to prove any of these grounds. I am equally satisfied that applicants did not establish requirements of rule 449 and equally so used a wrong procedure. In their founding papers the applicants juggled between rule 63 and rule 449. Its not clear as to which rule they wish to rely on in the application.

Respondent's preliminary points are valid and the application is dismissed with costs.

TandiriLaw Chambers, Respondent's legal practitioners

¹ Washaya v Washaya 1989 (2) ZLR 195, Mukundadzviti v Mutasa 1990 (1)ZLR 342

² Mshosho v Mudimu & another HH443/13

Mutebwa v Mutebwa & another 2001(2) SA 193