DICRON INVESTMENTS (PVT) LTD
versus
ELIPHAS KAWA
and
ZEXCOM (PVT) LTD (in liquidation)
and
VICTOR MUZENDA N.O.
and
ASSISTANT MASTER OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS
and
GEORGE ZINGANI

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 16 January 2017 & 2 March 2017

Court application

T Mpofu, for the plaintiff
P Charasikwa, for the defendant

DUBE J: A preliminary point of law is one that if properly taken in an application or action, is capable of disposing of a matter without the need for the court to delve into the merits of the matter. The party raising the preliminary point must be properly before the court and so should the matter. A respondent who fails to file a proper notice of opposition to an application which is not properly before the court cannot be deemed barred. Such an application cannot have consequences. An application made to uplift a bar operating against a respondent in an application that is improperly before the court is of no consequence and need not be determined by the court. A litigant who is improperly before the court and raises a preliminary point with intend to bar a respondent in circumstances where he clearly has no cause of action or is not properly before the court , only has himself to blame if the court declines to entertain his preliminary point or application to uplift the bar by the other side.

The rules of our court do not make provision for what happens where a litigant wishes to apply to rescind a default judgment in a case where an appeal is subsequently filed in the

Supreme Court and the appeal is pending against an order or judgment granted in default. Further, the rules do not rescission of judgment followed by joinder of a party where an order has been granted and in circumstances where the order or judgment is subject of an appeal in a superior court. A practice has developed where courts will not permit an applicant to vary or set aside a judgment which is subject of an appeal in the Supreme Court. The consideration behind this approach is to avoid restricting and torpedoing the functions of the Supreme Court. To allow such a state of affairs would amount to a lower court usurping the functions of a superior court and result in a procedural quagmire. A litigant who is aggrieved by decision to grant default judgment is required to await the outcome of the appeal, to decide on the way forward.

In this application I entertained an application to uplift a bar operating against the respondent. I have declined to make a ruling on the preliminary application because I was not satisfied that the application for rescission of judgment itself is properly before me.

The background to this application goes thus. The applicant seeks an order to strike out a paragraph in an order granted under HB 10/14 for the reasons that it affects the applicant, who was not cited as a party to the proceedings leading to this judgment. The application is brought in terms of Order 49 r 449 of the High Court Rules, 1971. The judgment sought to be rescinded is subject of an appeal filed in the Supreme Court under SC 33/14.The third respondent is the liquidator of the second respondent. The applicant purchased stand number 2652 held under lease number TT2/1970, herein after referred to as the property from the second respondent who was represented by the third respondent. The applicant avers that it fully paid for the said property and the property was ceded to it. Sometime in 2013 the first respondent made a court application to nullify all actions of whatever nature, performed or undertaken by the third respondent in his capacity as the liquidator. The applicant was not cited as a party to these proceedings.

The applicant submitted that the effect of the judgment was to nullify everything done by the liquidator including the agreement entered into between the applicant and the second and third respondents. The applicant was supposed to be heard before on adverse decision affecting its rights was taken. The applicant submitted that the order granted is now affecting the applicant in that its tenants are no longer paying rentals to it contending that the property does not belong to it. He wishes to be joined to the matter. On the pendency of the matter on appeal, the applicant maintains that although the order has been appealed against by the

disgruntled party, the appeal does not benefit the applicant because it is not a party to it. The applicant seeks an order rescinding Para 3 of the order which reads as follows

> "It is hereby declared that 1st respondent (Victor Muzenda) does not hold the office of liquidator of the 2nd respondent and accordingly all actions all deeds of whatever nature performed or undertaken by him while purporting to hold the office of liquidator be and is hereby declared null and void and of no force or effect."

The first respondent opposed the application on the following basis. The judgment sought to be rescinded is the subject matter of an appeal in the Supreme Court and consequently this court cannot grant this application for rescission of judgment whilst that appeal is still pending and determination by the esteemed court. The respondent further submitted that the order for nullification sought is incompetent as r 449 (1) provides that a court may correct, rescind or vary any judgment and makes no provision for nullification of a judgement. It maintained that the property which is the subject of this application was excluded from the application. The respondent further maintains that the judgment was not granted in error and hence no basis has been shown for the application brought in terms of r449.

At the hearing of the application, the plaintiff raised a preliminary point. The preliminary point turns on whether the notice of opposition filed by the respondent was properly filed. The opposing affidavit was filed together with a notice to file an answering affidavit instead of a notice to file and opposing affidavit in terms of Form 29. A respondent wishing to oppose an application is required to file notice of opposition together with one or more opposing affidavits. The respondents' opposition papers were filed under cover of a filing notice for an answering affidavit. The filing notice indicated that what was being filed was an answering affidavit. The respondent acknowledged that it failed to comply with the rules and was barred after failure to file a proper notice of opposition. The defendant did subsequent to this concession, make an oral application to uplift the bar operating against it. It submitted as follows. The court must condone the non-compliance with the rules in terms of r 4C. It submitted that the error made is not grave and that there was substantial compliance with the rules in that a notice of opposition was indeed filed though under cover of an answering affidavit. It submitted that the applicant suffers no prejudice should the non-compliance with the rules be uplifted.

The plaintiff opposed the application on the basis that an application for upliftment of bar is made on an affidavit, thus a sworn statement giving the reasons and explanation for the failure to comply with the rules. No such explanation has been preferred especially from the

legal practitioner who filed the supposed notice of opposition. The plaintiff submitted that there is no explanation for the failure to comply with the rules and that effectively there is no application before the court. The court was urged to dismiss the application for condonation and allow the application for rescission of judgment in favour of the plaintiff.

After the preliminary application I did not immediately make my ruling. I directed the parties to make submissions on the merits of the matter and indicated that my ruling on the preliminary point will be part of the main judgment. The plaintiff asked the court to grant the application for rescission of judgment on the basis of the papers filed after ruling on the preliminary point.

The application is premised on Order 49, r 449 of the High Court Rules 1971, provides 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; 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".

The rule permits a court to vary, correct, rescind or vary a judgment or order erroneously sought or granted or in which there is ambiguity or a patent error, a mistake or omission and granted in the absence of any party affected.

The order was granted in the absence of the applicant who was not been cited as party. After default judgment was granted, the third respondent filed an appeal with the Supreme Court. No doubt, a superior court is now seized with the matter. In *Mabwe Minerals Zimbabwe (Pvt) Ltd* v *Chiroswa Minerals* and 4 Ors HH 56/14 @p 8, *the* court dealt with a matter where an applicant sought an order pending an appeal in the matter. The court remarked as follows:

> "Clearly, the court cannot as a matter of procedure, purport to correct, vary or rescind the judgment while it is pending appeal before the Supreme Court. The operation of the order has been suspended. A superior court is now seized with it.
>
> There is no basis on which this court can purport to deal with such a judgment, and r 449 does not in any way confer us with power to set aside a judgment that is the subject matter of an appeal, on the basis that it was erroneously sought or obtained. To rescind judgment in chambers, on an urgent basis in these circumstances would be turning our rules of procedure on their head, and ill conceived."

In *Mushaishi* v *Lifeline Syndicate and Anor* 1990 (1) ZLR 284 (HC) the court held that that the High Court will not entertain matters which are *sub judice* the Supreme Court . Further that the matter is now the subject matter of an appeal to the higher court and that it is not possible for the High Court to intervene. In *Econet Wireless* v *Dardale Investments and Anor* 2014 (2) ZLR 662 *(*H) I declined to entertain a review of a matter that was *sub judice* the Supreme Court and found that to do so would amount to usurping the functions of the Superior Court.

I am being asked to entertain an application for rescission of judgement brought in terms of rule 449 pending an appeal. In effect the applicant avers that he has an interest in that matter and wishes to be joined to the matter. The respondent does not in its heads of argument address the point regarding pendency of the matter in the Supreme Court. There is no rule of law that allows a litigant to rescind an order or judgment and permit joinder of a party to a cause pending an appeal of the order on test in a superior court. Rule 449 does not confer on an inferior court the power to vary or set aside or alter or reverse an order which is subject of an appeal that is pending in a superior court. An inferior court cannot reverse an order or judgment against which an appeal is pending in the Supreme Court.

A practice has arisen where if an appeal has been noted as regards the operation of an order in a superior court, no other court action or application in an inferior court to reverse , corrector vary the decision which is subject of the appeal is entertained .This practice has developed out of courtesy for the superior court. To do so would amount to torpedoing the functions of the superior court. This rule has been developed by precedent and must be adhered to. Once an appeal was lodged with the Supreme Court, the operation of the order was suspended .The fact that the applicant seeks his joinder does not distinguish this case from the cases I rely on. Joining a litigant at this stage would seriously complicate and convolute issues. Nothing further can be done about the matter until the Supreme Court has pronounced itself on the matter. The court cannot ignore the appeal hat is pending in the Supreme Court. Until the Supreme Court pronounces itself on the matter this court's hands are tightly tied . The applicant may not be joined to the action at this stage . It is undesirable for a court to determine an application for rescission of a judgment which is subject of an appeal. This matter is *sub judice* the superior court.

For this reason, I am unable to accede to the applicant's request to entertain the application for rescission of judgment. The application must fail.

In the result it is ordered as follows:

The application is dismissed with costs.

Mahuni & Matatu, applicant's legal practitioners
Joel Pincus, Konson & Wolhuter, 1st respondent's legal practitioners