MV MOOLJEE AND SONS
versus
SAMUEL MAKUMBE
and
LOVEMORE NYAUSARU
and
REGISTRAR OF DEEDS HARARE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 5 October 2017

Opposed matter

O Mushuma, for the applicant
Ms *L Chiperesa*, for the respondent

MAKONI J: At the hearing of this matter l delivered an *ex tempore* judgment. The applicant has requested for the written reasons. These are they.

This is an application made in terms of r 4491(a) of the High Court Rule 1971 which empowers this court to either *mere motu* or upon application by any affected party, correct or rescind any judgment or order that was erroneously sought or erroneously granted in the absence of any party affected thereby.

The issue before me is whether the judgment granted by this court on the 7th of September 2015 under HC2518/2015 was erroneously sought or erroneously granted. The applicant contents that judgment was erroneously sought and thereafter granted on the basis that the applicant was not served with the summons. The applicant was not aware that there were proceedings against him. This is because the second respondent, who was the plaintiff in HC2518/15, had served the summons on the address indicated in the agreement of sale. In other words, he had had the summons served on the *domicilium citandi*.

It is the applicant's contention that it never entered into that agreement of sale with the respondent. It never authorized the second respondent to represent it in that agreement of sale. Therefore, service on the *domicilium citandi*, cited in a fraudulent agreement, was not service in

terms of the Rules. He submits that the registered address of the company is 85 Cameroon Street Harare and not 36 Jameson Street Mutare as indicated in the agreement of sale.

It is the second respondent's contention that service was effected properly as it was effected at the *domicilium citandi*, that is reflected in the agreement of sale, that was placed before the court that granted the default judgment.

The applicant also contents that it has requested for the resolution that is referred to in the agreement of sale that was the basis of the first respondent's case in HC2518 and up to date it has not been produced.

The question that arises is whether the court, in HC 2518, if it had been aware that there might be no resolution issued by the applicant in this matter would it have proceeded to grant default judgment based on that agreement. In other words, would the court have considered that that agreement was a valid agreement and therefore proceeded to grant default judgment. This is for two reasons:

1. Whether the second respondent was authorized by the applicant to enter into the agreement of sale.
2. Whether the service of the summons was proper.

The case law is very clear and I think both parties have been able to elucidate the law very clearly. In this jurisdiction we have the Supreme Court case of *Munyimi* v *Tauro* 2013 (2) ZRL 291 (S). This case came out later than the *Tiriboyi* v *Jani* 2004 (1) ZLR 470. The *Munyimi* case, *supra*, will be binding in this case as *Tiriboyi, supra*, is a High Court matter. In *Munyimi supra*, GARWE JA had this to say,

> "It is a general principle of our law that once a final order is made correctly reflecting the true intention of the court, that order cannot be altered by that court. Rule 449 is an exception to that principle and allows a court to revisit a decision it has previously made, but only in a restricted sense. Where a court is empowered to revisit its previous decision, it is not generally speaking confined to the record of the proceedings in deciding whether a judgment was erroneously granted. The specific reference to Rule 449 to a judgment or order granted in the absence of any party affected thereby envisages a situation where such a party may be able to place facts before the later court which facts would not have been before the court that granted the order in the first place. See *Grantune Private Limited & Another* v *UDC Limited* 2000 (1) ZLR 361 (S) at 364 H - 365 A-B."

What that case establishes is that if a party, who is affected by a judgment that was entered in his absence, is able to place facts before the later court which facts would not have been before the court that granted the order in the first place, such a party can be able to have that judgment set aside in terms of r 449. So what are the facts that have been placed before me that were not placed before the court that granted the default judgment.

It is the fact that the agreement of sale records that the second respondent was duly authorized by the first respondent to represent the applicant and it makes reference to a resolution. That resolution was not produced before the court. In the first place it was not attached to the agreement of sale and it was not produced before the court. It has now come to the attention of this court that that resolution might not exist. The applicant has made submissions that it has made efforts to have sight of that resolution without success. The first respondent could have obtained that resolution from the legal practitioners who drafted the agreement if it is available. It could have obtained that resolution from the second respondent who claims to have been given the authority or the mandate to represent the applicant. But the first respondent did not produce any evidence to show that either it exists or any efforts that it made to try and obtain that resolution.

If it turns out that there is no resolution, then it follows that that agreement of sale is invalid and the court which proceeded to grant judgment was not aware of that fact. It is my finding that there are facts that have been placed before me which were not before the court that granted the judgment in the first place.

Looking at *Munyimi, supra,* again at p 296 E GARWE J continued and said,

> "In the present matter, the papers placed before OMERGEE J clearly pointed to a discrepancy. The cause of action in the declaration was the agreement of sale between the appellant and one January Tauro. The agreement attached in support of that claim was an agreement of sale signed between the appellant and Francisco Tauro with January Tauro signing as a witness."

It then goes on to say:

> "Had OMERGEE J been aware of these obvious discrepancies in the papers before him, he would not in all probability, have granted a default judgment against January Tauro when the agreement of sale clearly indicated the seller to have been Francisco Tauro. Had OMERGEE J been aware of these facts it is highly unlikely that he would have found it permissible or competent to make an order against a party that had signed the agreement simply as a witness."

He went on to set aside the order.

This addresses the concerns of the first respondent as submitted by Ms *Chiperesa* that the applicant was making submissions on the merits and yet when we are having regard to r 449 you are not supposed to have regard to the merits. I would say there is a fine line between the two because if the discrepancy can only be shown by the merits of the matter then the court might have to look at the merits of the matter for purposes of establishing the discrepancy and not for purposes of showing a bona fide defence as is the position when one proceeds under r 63.

In view of that I will grant the application as prayed for in terms of the draft order.

Mushuma Law Chambers, applicant's legal practitioners
Mkuhlani Chiperesa, 1st respondent's legal practitioner