

NUTRIVEG (PRIVATE) LIMITED
(Under Judicial Management)
(Represented by Budhama Chikamhi in
his capacity as Provisional Judicial Manager)
versus
COMMUNICATIONS & ALLIED INDUSTRIES
PENSION FUND
and
THE SHERIFF OF THE HIGH COURT (N.O)
and
THE MAGISTRATE (N.O)

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 26 June 2017 & 27 September 23017

Opposed motion- Rescission

Mr *J Mutevedzi*, for the applicant
Miss *E Mupanduki*, for the 1st respondent

MUSHORE J: Applicant is seeking rescission of a judgment by Consent in terms of 49
r 449 (1) (c) which provides as follows:

“449 Correction, variation and rescission of judgment and orders.

(1) The court or a judge may, in addition to any 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)

(b)

(c) that was granted as a result of a mistake common to the parties”

The facts as they appear in the case as stated are as follows:

Applicant was leasing premises owned by the first respondent at 5 Shamwari Road, Stapleton, Harare. Due to non-payment of rentals, first respondent obtained an order for applicant's eviction in matter No. HC 4904/14. Applicant was thereafter evicted from the premises on 30 July 2015. The Sheriff's remarks on the return of service were "Ejectment effected at the address for service. Goods left behind to be sold in *situ*". The premises were then leased out to a third party. Applicant then made many attempts to regain possession of the premises leading to applicant managing to set down an urgent application to obtain a stay of execution so that it could regain entry into the premises in matter No. HC 6942/15. An order by consent was granted in that matter by MAFUSIRE J on 5 August 2015 on the following terms:-

- “1. The writ of execution issued under Case No. HC 4904/14 be and is hereby suspended pending the outcome of proceedings under cases HC 2358/15 and HC 7260/15 (application for applicant being placed under judicial management)
2. Execution of the judgment granted by the court in Case No. HC 4904/14 be and is hereby stayed”.

On 9 September 2015, the court placed the applicant under provisional management in matter HC 7260/15, in terms of s 229 of the Companies Act [*Chapter 24:03*]. Since the premises were now occupied by a third party, on 10 November 2015, (Case No. HC 10763/15) the parties appeared before MTSHIYA J and consented to the following order:-

- “1. First respondent (applicant), its agents, assignees and anyone claiming occupation through them shall hereby vacate the property known as number 5 Shamwari Rod, Stapleton Farm, Harare.
2. First respondent's (applicant's) assets shall be removed by the judicial manager from No. 5 Shamwari Road, Stapleford Farm, Harare within one month of this order failure of which the second respondent (Sheriff) shall be empowered to remove the said assets for storage.
3. Should the third respondent remove the first applicant's goods, the costs of such storage shall be borne by first respondent.
4. The first respondent shall bear the costs of this suit on an ordinary scale”

In apparent contradiction to the last-mentioned consent order, applicant diverted to the Magistrates Court seeking a spoliation order to repossess the premises. The Magistrates court granted the application for spoliation.

In the present matter, applicant is seeking rescission of the order it consented to on 10 November 2015.

The issues

Applicant now believes that the order by consent of 10 November 2015 is a nullity because it was granted without the leave of the court having been obtained first, as required in clause 1 (e) of the judicial management order (HC 7260/15). Applicant also alleges that the legal practitioner who represented it when the consent order in HC 10763/15 was agreed to, held no instructions to consent to the order.

First respondent disagrees with the applicant and has averred that even the court itself was aware that leave was required and raised such a query during the hearing of the matter. First respondent submits that when the parties told the court that they had negotiated and agreed to such an order, the court condoned the non-compliance with clause 1 (e) of the provisional management in accordance with r 4 c of the High Court Rules, 1971. This, the court did, in the interests of justice.

In determining whether this court had applied its mind to the need for leave to have been sought, I have been able to ascertain from a perusal of the record that during the hearing, applicant did not challenge the averments made by the first respondent's in paragraphs 7 to 14 of the opposing affidavit. In those circumstances applicant did not contest the following when it appeared before MTSHIYA J:

- (i) That the applicant is acting *mala fide* in trying to prevent the law from taking its course by having made the current application for rescission of the consent order.
- (ii) The parties freely agreed to consent to the order after their respective legal practitioners conducted a joint inspection *in loco* of the premises, and after they had confirmed that there was a new tenant in occupation. The resistance to eviction from the premises by the applicant was thereby rendered pointless in the circumstances of the premises being accepted by a third party.
- (iii) The consent order was entered into in order to bring a finality in litigation.
- (iv) The parties agreed not to be bound by a consent order to stay eviction in matter No. HC 6942/15 by MAFUSIRE J on 5 August 2015, when on 10 November

2015, they consented to the order in question which confirmed the lawfulness of applicant's ejection from the premises. The order by MAFUSIRE J of 5 August 2015 staying execution, thus fell away.

- (v) Applicant ought to have immediately after 10 November 2015 queried the order by MTSHIYA J, if it had a basis to do so, (which basis is denied by the first respondent), instead of trying to undo its consent by making an application for spoliation and restoration of the premises in an entirely different (Magistrates) court.
- (vi) MTSHIYA J took judicial notice of the fact that the previous applications which applicant had tried to make an order to stay the eviction from the premises were made *mala fide*.

Essentially therefore, in the present matter, applicant has not meaningfully resisted first respondent's proposition that applicant has not established a basis for bringing the present application.

Corrections of orders are only made in exceptional circumstances, the general principle being that once a court has made its final pronouncement, it becomes *functus officio*. However, applicant believes that the matter at hand presents such exceptional circumstances. Both parties have drawn my attention to the comments made by NEDSTADT JA in *Tshivhase Royal Council v Tshivhase; Tshivhashe v Tshivhase* 1992 (4) SA 852 (A); where at page 859 E-F he stated that:-

“In relation to para (c), two broad requirements must be satisfied in order for this discretion to be exercised to be exercised in favour of an applicant for rescission. First there must be what the common law of contract terms to be a common mistake, which occurs when both parties are of one mind and share the same mistake (usually a mistake of fact). Secondly, there must be a ‘causative link’ between the mistake and the granting of the order of the order or judgment. This requires that the mistake ‘relate to and be based on something relevant to the question to be decided by the court at the time’. These requirements will be satisfied when evidence which becomes available to the parties after judgment shows that the factual material on which the court's decision was based was, contrary to the parties' assumption incorrect”

It is also a requirement that the applicant should act within a reasonable time of the court pronouncing its judgment or order, as was emphasised by TROLLOPE JA in *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (AD) pp 306-7.

Having perused the record of evidence, and having read the written arguments and after hearing oral arguments from the parties, I made certain observations which I will now deal with.

It would have made sense to me if applicant returned to the court which granted the consent order to obtain clarification, in the light of its grievance that a mistake occurred. I do not understand why the applicant did not return to the court concerned, or why applicant ventured to an entirely different court (the Magistrates Court) for a spoliation order. I therefore see no basis for applicant to now complain about the proceedings which led in the order by consent. To that end the applicant's actions are at odds with its submission that it had a grievance about the proceedings in question. Which then brings me to question the motivation behind judicial manager's actions in applying for and obtaining a spoliation order in a different court, in circumstances where he was aware that the order of eviction in matter number HC 4904/14, had been granted as a consequence of applicant's delinquency on payments of rent.

The court which granted the consent order in this matter was obviously aware that the applicant was under judicial management given its specific mention of a judicial manager in its order. The consent order which it granted did not have the effect of altering that status or impinging upon it. In fact and judging by the context within which MTSHIYA J ordered a preservation of applicant's assets (refer: paragraph 2 of the order by consent of 10 November 2015), by ensuring that they should not be disposed of, it appears that the court on that occasion was acutely aware that it should not interfere with the objective of judicial management. To that end the order was not given erroneously. If there had been an oversight in raising the issue of leave, it amounted to a procedural oversight and not a substantive error.

In casu the judicial manager did not act with haste to set the present matter down for hearing. In point of fact, it is the first respondent who appears to be aware of the need to finalise this matter by virtue of the fact that the first respondent initiated the set down of this matter when it filed its Heads of argument on 15 April 2016. Applicant (who ought to have been the driver of this case) then responded by filing its heads on 6 May 2016. Further, I take judicial notice of the fact that it took applicant 3 months to reply to first respondent's opposing affidavit. Such delays make it obvious to me that the present application has been presented to the court for the sole purposes of delay.

It is unreasonable for the applicant to expect that it can ever enjoy a right to occupation after it was evicted in 2014 by an order of the court. The purpose of requiring the leave of this court in judicial management cases is to preserve any assets; *ergo* any rights which the company under management can claim to enjoy, in order that the company be resuscitated where possible.

From the above I have formed the view that there was no mistake in common between the parties, neither was there a mistake made by the court in granting the order by consent. I am also inclined to believe first respondent's account that the issue of leave was raised and disposed of by the court which dealt with the matter. Applicant has not convinced me that it is acting *bona fide*.

First respondent is applying for a punitive order of costs. I see no reason to deny first respondent's such an order given my observations regarding applicant's delaying tactics and abuse of court processes. Further there is no merit in the current application. Applicant was unable to challenge unfavourable facts which were raised by the first respondent and avoided taking the court into his confidence on salient facts. Applicant's concealment of such important issues and attempts to present an unblemished account of its actions and motives will be met with an order of costs on a legal practitioner and client scale.

In the result, I order as follows:-

“Application is dismissed with costs on a legal practitioner and client scale.”

Mutamangira & Associates, applicant's legal practitioners
Coghlan, Welsh & Guest, 1st respondent's legal practitioners