SPECTRON MOTORS
and
TOPBRIDGE (PVT) LTD
SOCIETY UNION LIMITED
and
VENA KUFA
and
CAROLINE MATARUTSE
versus
YUSUF ALI ADAM
(In his capacity as the Executor
Dative in Estate Late HH MOOSA DR 70/97)

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 19 October, 2017 and 29 December, 2017

**Opposed Matter**

*S. Simango,* for the applicants
*E. Matinenga,* for the respondent

MANGOTA J: The applicants' journey to justice is long and arduous. Their case passed through the hands of not less than six (6) judges of this court. I am the seventh in the queue of judges. As I write this judgment, the case is not coming to finality soon. I am dealing with an interlocutory matter. Two or more judges may deal with the rest of the case. When they will do so will depend on the outcome of this judgment.

The applicants sued the respondent under case number HC 13855/12. They claimed from him $82 600-00 which they said was compensation for the market value of improvements which they allegedly effected on his property. The suit moved all the way up to the pre-trial conference stage where, for some reason or other, default judgment was entered against them. It was entered on 4 November, 2014.

The applicants applied for rescission of the default judgment. They did so on 9 April, 2015 and under case number HC 3179/15. The rescission of judgment application was heard on 17 September, 2015. The matter was struck off the roll on the basis that the default judgment which they sought to rescind was defective and, therefore, a nullity.

The current application is for reinstatement of the application for rescission of default judgment. The applicants averred that the delay in applying as they did was not *mala fide.* They submitted that they had prospects of success in the main matter. They, therefore, moved the court to grant them their prayer.

The respondent opposed the application. He stated that the applicants violated the rules of court in a very serious manner. He said they employed a wrong procedure when they applied as they did. He submitted that the application was filed out of time and the applicants did not apply for condonation for late filing of the current application. He moved the court to dismiss the application with costs on a punitive scale.

Whatever or not the applicants introduced the application into court through the correct procedure does, in the main, depend on the form which they used. The heading of the application falls under Form 29B of the First Schedule Forms of the rules of this court. The substance of the application, on the other hand, falls under Form 29 of the same.

The respondent, as is evident from the above observed matters, was correct when he stated that the applicants employed a wrong procedure. That is so because each form which a litigant chooses to use has considerations which are different from those of the other form which a party may employ to prosecute its case.

Going by the heading of the application, the applicants were enjoined to set out, in a clear, concise and summarized manner, the grounds for their chamber application. This they did not do as is stated in Form 29B. What they did was to proceed as if their application fell to be dealt with in terms of Form 29. They, in short, mixed procedures which pertain to two different forms and, in the process, they produced a hybrid of both.

The procedure which the applicants employed offends the High Court Rules 1971. The question which, however, begs the answer is whether the same is fatal to the application which they filed. The answer to that questions depends on whether or not the respondent suffered any

prejudice as a result thereof. The applicants did not address that issue. That notwithstanding, I remain satisfied that the procedure which the applicants employed did not prejudice the respondent at all. He, on his part, did not ever suggest that the procedure was prejudicial to him. He raised the issue which related to that aspect of the application as a matter which he observed, in my view.

Rule 63 of the High Court Rules 1971 refers to rescissions of default judgments. It confers a discretion on a party against whom judgment has been given in default to apply to have it rescinded. Such a party, if states, must file its application not later than one month after he has had knowledge of the default judgment.

The record shows that default judgment was entered against the applicants on 4 November, 2014. It shows, further, that these filed their application for rescission of default judgment on 9 April, 2015. They, therefore, appear to have applied way out of the time which is prescribed in r 63. That is all the more so when regard is had to the presumption which operates against them in subrule (3) of r 63 is taken account of.

Subrule (3) reads:

> "(3) Unless an applicant for the setting aside of a judgment in terms of this rule proves to the contrary he shall be presumed to have had knowledge of the judgment within two days after the date thereof." (emphasis added).

Whether or not the rescission application was filed within, or without, the time which is stipulated in r 63 of the High Court Rules 1971 does, in a large measure, depend on the applicants' narration of events which relate to that aspect of the case. The record does not state the date on which they became aware of the default judgment. HC 3179/15 which they filed on 9 April, 2015 is also silent on the same. The nearest which it states on the mentioned matter reads:

> "8. On or around 12 March 2015 our legal practitioners of record Nyikadzino Simango & Associates applied for a pre-trial conference date with the Registrar of the High Court and Respondent's legal practitioners were served with the application. However, that was upon served (*sic*) with the application for pre-trial conference date that Respondent's legal practitioners wrote a letter and advised my lawyers that a default judgment had been granted against us on the 4th of November 2014 after we had served them with all the papers on the 16th of October 2014. Respondent's legal practitioners did not even advise our lawyers that the matter had been set down for pre-trial conference on the 4th of November 2014." (emphasis added).

The date on which the applicants' legal practitioners received the letter which the

respondent's legal practitioners addressed to them remains unstated. That date is critical to the resolution of whether, or not, the rescission application was filed in, or out of, the time which the rules of court prescribe. Rule 63 of the High Court Rules, 1971 is clear and unambiguous on the mentioned matter.

Subrule (3) of the mentioned rule contains a presumption which the applicants must rebut. They did not rebut it. The presumption, therefore, operates against them.

It is paradoxical to observe that the applicants chose to omit to deal with the abovementioned matter which was critical to their case. A *fortiori* when they were represented by a firm of legal practitioners. These are not only presumed to know the substantive law, procedural law but also the rules of court. They, in fact, are recognized to be thoroughly conversant with all the branches of the law.

Mr *Simango* who appeared for the applicants did the unthinkable. He stated, during submissions, that the applicants came to know of the default judgment on 18 March, 2015. That statement was, no doubt, tantamount to giving evidence from the bar. He did not advance any reason as to why the same was excluded from the founding affidavit or from the application for rescission of default judgment. The statement cannot, therefore, hold.

The long and short of the above stated set of circumstances is that the applicants should have applied for condonation for late application of rescission of judgment. The respondent drew their attention to that matter. He stated in clear and categorical terms the need on their part to pursue the stated route. They, for reasons best known to them, ignored that good and useful advice much to their serious embarrassment.

It is common cause that, on 28 October 2015, the respondent filed a chamber application with this court. He did so under case number HC 10342/15. He applied for correction of the default judgment. This was corrected on 9 November, 2015.

The applicants' unchallenged statement was that the respondent did not advise them that the default judgment had been corrected. They submitted, and correctly so, that the default judgment was a nullity as the court ruled on 17 September, 2015. They said they proceeded to set down the main matter for pre-trial conference proceedings.

The striking off of the application for rescission of judgment caused the parties to revert to the status *quo ante* the default judgment. The applicants were, therefore, correct when they proceeded to set the main matter down for pre-trial conference. They were in the driving seat post the ruling of 17 September, 2015. They remained unaware of the fact that the defective default judgement had been corrected.

That the main matter went as far as the pre-trial conference stage is evident from Annexure I which the respondent attached to his opposing papers. Its contents confirms the point that the parties appeared before my sister TSANGA J for pre-trial conference. They did so on 28 June, 2016.

The applicants did not state the date on which they became aware of the corrected default judgment. It appears, from the record, that they did so when they appeared before TSANGA J. Annexure G which the respondent attached to his papers confirms the observed matter. The annexure shows that the applicants withdrew the pre-trial conference proceedings. They did so on the mentioned date.

The statement which the applicants made in para 10 of the founding affidavit is *in sync* with the above observed matter. They said:

> 10. Because applicant desired for the finalisation of this matter he reset the application for rescission of judgment on 21 July 2016 which was set down for hearing on the 29th November 2016. See Annexures E and F in that regard" [emphasis added]

Whilst the contents of the paragraph were not elegantly drafted, its implication is that the applicants applied to have a set down date for their application for rescission of default judgment. The application had, as at the mentioned date, become necessary as the defective default judgment had been corrected. The application was, so they said, set down for hearing on 29 November, 2016.

That the parties appeared before CHIGUMBA J on 29 November, 2016 requires little, if any, debate. The learned judge could not, in earnest, entertain the application for rescission of judgment. She could not do so for the simple reason that the application offended Practice Directive 3 of 2013. She, therefore, removed the application from the roll with an order which enjoined the applicants to re-set it within ninety days of her order.

She further, ordered that, if they did not re-set it down within the mentioned period of time, the application for rescission of default judgment would be deemed to have been abandoned.

Practice Directive 3 of 2013 refers to a matter which is struck off the roll. Its effect is to dispose of matters which are fatally defective and should not have been enrolled in that form in the first –place. It follows, therefore, that if a court issues an order that a matter is struck off the roll, the effect of the order is that such a matter is no longer before the court [See *Matanhire* v *BP Shell Marketing Services (Pvt) Ltd*, 2004 (2) ZLR 147 (D) and *S* v *Ncube*, 1990 (2) ZLR 303 (D).

The above stated matters hold true for the order which the court made on 17 September, 2015. The judgment which the applicants sought to rescind was a nullity. There was, therefore, nothing for the court to rescind. The rescission application was fatally defective.

The applicants became aware of the corrected default judgment on 28 June, 2016. It is at that, and not before that, stage that they should have filed a fresh application for rescission of the default judgment. They could not apply for reinstatement of the application as their application under HC 3179/15 was fatally defective. It had been struck off the roll on 17 September, 2015. It did not further comply with the rules of court because it was filed outside the time which the rules of court prescribe and they did not apply for condonation for late filing of the same.

The applicants' application for reinstatement of HC 3179/15 was misplaced. The same, further, offended the rules of court in that they filed it some five or six months after the event. They did not seek condonation for the same. They assumed the driving seat from the date that they became aware of the corrected default judgment. They should have realised the defects which characterised HC 3179/15. They should, therefore, have dispensed with it in preference to a fresh application which complied with r 63 of the rules of this court.

The applicants' quest for justice is not only understandable. It is also commendable. They, unfortunately for themselves, told their story in dribs and drabs. They presented an incoherent version of events. They left out a lot of loose ends to the same. One had to plough through the voluminous record to come to grips with whatever they intended to convey.

It is trite that an application stands or falls on its founding affidavit and whatever facts are alleged in it [see *Sergeant Chibaya* v *The President Board*, HH 46/16 and also *Amsterdams (Pvt) Ltd* v *Investment Bank & 2 Ors*, SC 92/05].

Both the founding affidavit and the answering affidavit assumed an abridged version of events. I had immense difficulty to try and piece together what the applicants were saying.

Necessary attachments were not made part of the record. Some of them were produced from the bar during submissions. Some attachments were seriously challenged as having been fraudulently brought into existence. When all had been said and done, however, it became apparent that what the applicants imputed as having been the fraudulent work of the respondent was a genuine result of the applicant' work which they committed themselves to doing when they appeared before the court on 28 June, 2016. Reference is made in this regard to Annexure G which appears at p 50 of the record.

The applicants failed to prove their case on a balance of probabilities. They flouted the rules of court in a very serious way. Much of what they suffered resulted from very poor legal advice as well as representation.

Mr *Simango* who appeared for them took the blame for the shoddy work which a junior legal practitioner who works in his firm did for the applicants. The concessions he made could not, however, correct what wrong the junior legal practitioner remains guilty of.

The rules of court are not there for cosmetic purposes. They assist the court and legal practitioners to move matters forward from one stage to the next. Where such are violated, avenues for correction are contained in the same. These should have been taken advantage of by the applicants and the latter's legal practitioners. They were not. The matter cannot, unfortunately, continue to have life in it. The effort on the part of Mr *Simango* to breathe life into it, though commendable, could not assist the applicants' case.

The court has considered all the circumstances of this matter. It is satisfied that the application cannot succeed. It is, accordingly, dismissed with costs.

*Nyikadzino, Simango and Associates*, applicant's legal practitioners
*Bherebhende Law Chambers*, respondent's legal practitioners