Judgment No. HB 6/12
Case No. HC 2044/09
X REF HC 815/09; 865/09; 1370/03; 1461/04; 3256/04
1873/02; 136/03; 2580/04; 122/04; 341/03; & SC 257/04

KAISER ENGINEERING (PVT) LTD

Versus

MAKEH ENTERPRISES (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 21 FEBRUARY 2011 & 19 JANUARY 2012

Advocate P. Dube for the applicant
C. P. Moyo for the respondent

Judgment

NDOU J: There is a long history of litigation between the parties as evinced by the cross-references cited above. The history can be summarized as follows. The parties' relationship stems from a lease agreement originally signed between applicant and a company called Endurite (Pvt) Ltd. The respondent bought the property the occupancy of which is at the centre of the dispute from Endurite (Pvt) Ltd. At the time, the applicant was a sitting tenant. The applicant remains a tenant of the respondent by operation of law. In or about May 2009 the respondent issued summons in the main matter. Almost immediately after, in June 2009, the respondent issued an urgent chamber application. By the time it was served on the applicant a provisional order had been granted. I do not think that there is need to discuss the contents of the provisional order in detail, save to state that it shut the applicant down on the basis of perfecting the landlord's hypothec. The applicant's business has been closed since June 2009 as a result of this latest batch of litigation. When the summons was served, the director of the applicant was out of the country. On his return he emailed detailed instructions to his erstwhile legal practitioner Mr *Majoko* providing answers and defences to both the summons and the chamber application. For some reason I cannot understand, Mr *Majoko* agreed to represent the applicant notwithstanding that he had previously acted for the respondent. In this email, the applicant evinced a strong desire to defend the case and the applicant proffered defences to the claims. The applicant left everything to its legal practitioner Mr *Majoko* under the belief that the matters were being defended. Instead of defending/opposing the matters, Mr *Majoko* chose to negotiate with the respondent. Mr *Majoko* was trying to achieve an amicable solution to the dispute. No papers were filed timeously on behalf of the applicant during these negotiations. This resulted in a default judgment granted in favour of the respondent against the applicant under case number HC 815/09. This application is for

rescission of the said judgment. The applicant moves this application for rescission on two alternative grounds. The first and principal is that the default judgment was granted by error. It is submitted by the applicant that this judgment should be set aside in terms of Order 49 Rule 449 of the High Court Rules, 1971, as it was granted by error.

The alternative ground upon which rescission is sought is the ordinary ground, being that the papers filed by the applicant show good and sufficient cause for rescission of the judgment. I propose to consider these grounds in turn.

Judgment granted in error

It is trite law that the court has both a statutory and a common law power to reverse a judgment that has been granted in error or under circumstances that indicate some irregularity. In *Mudzingwa* v *Mudzingwa* 1991 (4) SA 17 (ZS) GUBBAY JA (as he then was) made the following statement –

> "Furthermore, it is firmly established that a judgment can only be rescinded under the common law on one of the grounds upon *restiitutio in integrum* would be granted, such as fraud or some other just cause, including Justus error … Certainly a litigant who is himself negligent and the author of his own misfortune will fail in his request for rescission – see *Voet 2.4.14; Groenewald* v *Gracia (Edms) Bpk* 1985 (3) SA 968 (T) at 972C-D and G – H." See also *Jones* v *Strong* SC-67-03 and *Yong Goo Cho* v *Stalin Mau Mau* SC-3-05.

It was submitted that there was Justus error in this case. Such error, it was submitted, was on the part of the court, and was induced by certain non-disclosures and misrepresentations made by the respondent in its papers founding the urgent chamber application. In its papers under HC 815/09, the respondent failed to disclose to the court the existence of an order previously granted in a similar dispute over rent between the parties. That order was granted in case number HC 3256/04 and reads in the material part, as follows:

> "The parties agree that CB Richard Ellis shall determine a reasonable market rental in respect of the said premises from the 1st December 2004, and for the entire duration of the respondent's occupation of the premises."

This order was granted by consent of the parties. It sets down a conflict resolution procedure for any further disputes on rentals between the parties. A neutral arbiter was appointed by consent, to assess reasonable rentals for the disputed premises from time to time, for the entire duration that the applicant (who was the respondent under case number

HC 3256/04) would be in occupation of the premises. It is common cause that the present dispute was in the main, a dispute over rentals. It is also beyond dispute that the dispute arose during the applicant's occupancy of the premises. It is clear from the papers that the respondent did not have the rentals determined by the above-mentioned estate agent. The respondent unilaterally set the rentals and then demanded these rentals from the applicant, who disputed them. The dispute, as alluded to above, fell to be determined squarely under the consent order. The respondent was supposed to have disclosed the existence of this consent order when it made the application under HC 815/09. It is trite law that the court may set aside a judgment granted in error, where the judgment would not have granted had the court been fully of certain facts – *Nyingwa* v *Moolman N O* 1993(2) SA 508 (Tk); *Topol* v *Ls Group Management Services (Pty) Ltd* 1988(1) SA 639 (W) and *Holmes Motor Co* v *SWA Mineral and Exploration Co* 1949(1) SA 155 (C).

In my view the non-disclosure of the above-mentioned consent order did lead to the judgment being granted in error. The court would not have granted the judgment had it been aware of the existence, and provisions of the consent order.

Accordingly, on this point alone the default judgment must be rescinded.

It is therefore ordered as follows:-

1) That the judgment entered by this court against the applicant in case number HC 815/09 be and is hereby rescinded.
2) That the respondent pays costs of this application on an ordinary scale.

Lazarus & Sarif, applicant's legal practitioners
Messrs Moyo & Nyoni, respondent's legal practitioners