MAXWELL SHUMBA **1ST APPLICANT**

And

SIBUSISIWE SHUMBA **2ND APPLICANT**

Versus

THE APOSTOLICT FAITH MISSION OF PORTLAND OREGON (SOUTHERN AFRICA HEADQUARTERS) **RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
CHEDA AJ
BULAWAYO16 OCTOBER 2012 & 24 JANUARY 2013

N. Mazibuko for applicant
S. S. Mazibisa for respondent

Opposed Court Application

CHEDA AJ: This is an application for rescission of a default judgment granted in favour of the respondent against the applicants on 22 October 2009.

The applicants are husband and wife. In the applicants' founding affidavit Mr Shumba says the respondent issued summons against them in case number HC 1556/07 and then subsequently applied for summary judgment in case number HC 1154/08. Judgment was handed down on the 2nd of April 2009 and he was ordered to pay certain monies as well as vacate certain premises known as Greengables Farm, the remaining extent of subdivision B of Dunstal, Bulawayo. He says they appealed the judgment to the Supreme Court. While the appeal was pending the respondent issued fresh summons under case number HC 900/09 asking for the same relief. They defended the matter and respondent applied for summary judgment on 15 July 2009 which was also opposed. Instead of filing its heads of argument and setting down the matter, the respondent issued a notice of intention to bar on 4th September 2009. By this time they had no money and failed to pay the legal practitioner's fees. He goes on to say "As a summary judgment application was pending the notice to bar was irregular". The respondent then applied for default judgment which was granted on 22 October 2009. The prayer in his draft order is that the default judgment entered on 22nd October 2009 be rescinded and the *status quo ante* be restored which is to say that 1st and 2nd applicants be and are hereby restored, with immediate effect, into occupation of Greengables Farm.

The application is opposed by the respondent. The respondent points out that the application is out of time and there is no application for condonation. He goes on to deal with

the merits of the original claim and the history of the case. The respondent denies that the notice of intention to bar was irregular.

Although the applicants filed what was called a consolidated file, it was not properly consolidated, and the supporting documents for the various matters referred to are not in it. Instead there are a number of files showing that indeed, at some stage there were the following cases: 900/09 application for default judgment; 1112/09 application for summary judgment; 1894/12 application for rescission.

To begin with, it seems the applicants are reluctant to fully inform the court regarding the factual situation in this case. The papers relevant to each of the cases referred to are incomplete. There is neither an order nor a judgment for any of the applications. There is no copy of the notice of appeal although it seems there was at some stage an appeal to be heard at the Supreme Court. The fate of that appeal case is not disclosed.

The respondent's papers reveal that the matter proceeded to execution stage, after the original judgment in case number 900/09 and that at some stage the parties attempted to negotiate a settlement. The respondent does not deny giving notice of intention to bar but does not explain the purpose for that if they had already got summary judgment. The respondent filed its heads out of time but did not seek condonation.

There was no need for the procedure adopted by the respondent. The applicant did not file any supporting documents, but both parties argued on the rescission of a judgment which was not filed. A party seeking rescission against a judgment issued by a court should file such judgment. The court cannot rescind an alleged judgment whose existence and contents or order is not clear and such judgment or reasons for it are not provided.

In my view, the issue that resolves the matter is that the order sought by the applicants, which they say should have the effect of restoring them into the occupation of the respondent's property cannot be granted. It is a different judgment from the one to be rescinded. The applicants seem to mix the judgments against them. Even if the second judgment, in this case the default judgment, was irregular, the original claim against them had been proved and they have not shown that they successfully appealed against that decision.

I agree with the applicants that if the respondent had already got summary judgment on the same case there was no basis for another summons, judgment and the notice of intention to bar which is referred to. Also if that judgment had been valid the applicants would still need to show why rescission was not applied for in time.

The applicants also raised argument to the effect that the respondent was barred as he had not filed heads within the time limits. Without any condonation the respondent would indeed be barred.

The end result is that the second judgment was null and void.

I consider that it was indeed irregular for the respondent to issue double process for the same claim and relief.

On that basis the second judgment should be set aside. The fact that the applicant did not enter appearance when called upon to do so is irrelevant.

However, the setting aside of that judgment cannot result in an order as prayed for by the applicant. There is still a valid judgment which proceeded to execution stage. It is on the basis of that judgment that it was ordered that the applicants be evicted from the respondent's property. That order cannot now be joined with the rescission of the other judgment.

Accordingly, the subsequent judgment granted in default is set aside. The judgment in case number 900/09 is to stand. Since both parties were not complying with the Rules regarding condonation I make no order for costs in favour of either party and each party will bear its own costs.

Calderwood, *Bryce Hendrie & Partners*, applicants' legal practitioners
Cheda & Partners, respondent's legal practitioners