

TRASTAR (PVT) LTD t/a TAKATAKA PLANT HIRE
versus
GOLDEN RIBBON PLANT HIRE (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 17 JANUARY 2018 AND 25 JANUARY 2018

Opposed Application

V Bhebhe with *O Abraham* for the applicant
Ms P Mudisi for the respondent

MATHONSI J: This is an application which turns on whether it is competent for a party against whom a judgment has been entered in default to approach this court in terms of rule 63 of the High Court of Zimbabwe, 1971 seeking a rescission of the default judgment and having been unsuccessful in that earlier approach to then return to this court now in terms of rule 449 seeking a rescission of the same judgment on the basis that it was erroneously sought and erroneously granted. The principal question therefore is whether once the court has failed to find “good and sufficient cause” to rescind a default judgment which is the hallmark of an application in terms of rule 63 it can be called upon to engage in an inquiry in terms of rule 449 in respect of the same judgment whether it was erroneously sought and granted in the absence of another party.

It therefore calls into question the issue of whether the matter could be said to be *res judicata* and the court *functus officio* as argued by the respondent. More importantly, it is an application which brings into the fore the seminal remarks of McNALLY JA in the case of *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290C – E that:

“It is the policy of the law that there should be finality in litigation. On the other hand one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and

for other delays either by the individual or his lawyer have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute. The time has come to remind the legal profession of the old adage, *vigilantibus non dorminientibus jura subveniunt* – roughly translated, the law will help the vigilant but not the sluggard.”

Apart from that the same issues raised by the applicant in this matter have been the subject of judicial pronouncement by this court, which counsel did not see the need to even disclose to me, in *Trastar (Pvt) Ltd t/a Takataka Plant Hire v Golden Ribbon Plant Hire (Pvt) Ltd and Another* HB355/17 (as yet unreported) where, in concluding that the impugned judgment was not obtained through fraud and that there exists no error whatsoever in the manner in which the judgment was sought and granted TAKUVA J stated, with disarming eloquency at p5;

“I turn to the application itself. It is common cause that the default judgment was granted on 18 June 2015 and this application was filed on 29 August 2017 i.e. a period of two years and two months. It is also common cause that the applicant applied for rescission of the same default judgment in terms of rule 63 of this court’s rules. This application was dismissed with costs on the 7th day of June 2016. In that application applicant sought to challenge the amount owing, arguing that it owed only US\$66 788, 52. It also argued that the relationship was that of a contractor and subcontractor. These arguments were dismissed by BERE J in HC 2696/15 rendering them *res judicata*. In order to properly assess the prospects of success in *casu*, it is necessary to establish whether or not an error was committed. The facts show that the summons was served together with a declaration. The Sheriff’s return of service shows that the summons was served. It cannot be seriously contended that the Sheriff should have added the words ‘and declaration’ on the return of service. In any event assuming the declaration was not attached, why would applicant who was legally represented fail to invoke rule 112? In my view, this so-called ‘discovery’ is an afterthought designed to further delay the inevitable. As usual, the applicant blames everybody including its erstwhile legal practitioners for the failure.”

The fact that the applicant and its counsel did not disclose to this court the existence of such damning pronouncement contained in a judgment delivered on 9 November 2017, more than two months before the present application was heard, should not surprise anyone. There is quite a lot that they have not disclosed in this application. In its founding affidavit, deposed to by Renson Mahachi, a director, the applicant does not disclose that it filed a rule 63 rescission of

judgment application in HC 2696/15 and that the said application was dismissed by this court, per BERE J, on 7 June 2016.

The applicant did not disclose that subsequent to that its very same director, Renson Mahachi lay a claim to the property attached in execution of the same judgment now sought to be rescinded in terms of rule 449, which claim resulted in an interpleader application being made by the Sheriff in HC 2931/16. Again the applicant conveniently did not disclose that Mahachi's claim to the property was dismissed by this court on 26 July 2017, per MAKONESE J, who declared it executable. True to form, the applicant did not disclose that after failing to prevent execution by laying a claim to the attached property, Mahachi then made a payment plan on behalf of the applicant with the respondent's legal practitioners which the applicant failed to honour resulting in instructions being given that execution be proceeded with.

Indeed it was only after execution was again pursued by the respondent that this application was made. Accompanying the application was an urgent application the applicant filed in HC 2314/17 seeking a stay of execution pending the determination of this application. It was during the course of dismissing that urgent application as lacking in merit that TAKUVA J made the pronouncement which I have related to above.

In this application the applicant seeks a rescission of the default judgment entered against it on 18 June 2015 in HC 2491/15 in the sum of \$87 288-52 together with interest and costs of suit on the ground that it was erroneously sought and erroneously granted because:

1. The sheriff's return of service relied upon in seeking default judgment indicates that only the summons was served and is silent on the service of the declaration. In fact the return of service is a form in which the sheriff only fills in the blank boxes. The relevant column only has the word "summons" and not declaration. The sheriff appended an "x" under that word to indicate the process being served.
2. As the return of service does not indicate that a declaration was served with the summons the issuance of a notice to plead and intention to bar which resulted in the applicant being barred and default judgment being entered was incompetent the bar having been filed prematurely.

3. In those circumstances, coupled with the fact that the the certificate of service of the notice of intention to bar is defective, the default judgment was erroneously sought and erroneously granted and therefore susceptible to rescission in terms of rule 449 of this court's rules.

The application is opposed by the respondent which has taken the point that the applicant having made an earlier approach to this court in HC 2696/15 which was dismissed on 7 June 2016, the applicant cannot return to this court making the same application albeit under rule 449 because the matter is now *res judicata* and this court is *functus officio*.

Mr *Bhebhe* for the applicant submitted that the principles of *res judicata* and *functus officio* do not apply in an application for rescission of judgment made in terms of rule 449. He relied on the authority of *Harare Sports Club and Another v United Bottlers Ltd* 2000(1) ZLR 264 (H) 268 C-D where GILLESPIE J made the remarks:

“--- where the judgment sought to be rescinded was given in default, no question of a final judgment having been given on the merits can arise. Hence, no considerations of *functus officio* or *res judicata* apply to thwart an application for rescission. In such a case, even at common law, it is recognized that the court has a very broad discretion to rescind (on sufficient cause shown) a judgment given by default.”

The learned judge went on to express the view that the court is not held to be *functus officio* in the instances specified in rule 449 by reason that it always retains the residual right to rescind the default judgment. The correctness of those pronouncements cannot be denied. It is however the context in which they were made which is slightly different from the present matter. In this case, *res judicata* and indeed *functus officio* were on the basis that rescission of the default judgment has been decided by this court in HC 2696/15 where the court rejected all the arguments advanced in trying to show “good and sufficient cause” for such rescission. For that reason the same arguments cannot be made in a fresh application ostensibly under rule 449. I do not think that the court in the case of *Harare Sports Club and Another, supra*, had in mind a situation such as the present where a party against whom a judgment is given in default keeps returning to court seeking a rescission which has already been dismissed.

In fact the court dealt with *res judicata* first and foremost in the context of the default judgment itself being regarded as *res judicata* and not the application for rescission of judgment

which would have been decided being the basis of the *res judicata* argument. It ruled that where the judgment sought to be rescinded is given in default it is open to the court re-visiting it for rescission and such court cannot possibly be *functus officio* or the matter *res judicata*.

The situation obtaining in this case is that of the same applicant having brought an application for rescission which has been dismissed. It has now come back citing a different rule for seeking the same rescission. The essentials for the defence of *res judicata* were outlined by CHIDYAUSIKU CJ in *Flowerdale Investments (Pvt) Ltd and Another v Bernard Construction (Pvt) Ltd and Others* 2009 (1) ZLR 110 (S) at 116E thus:

“The essential elements of *res judicata* are—

- (a) The two actions must be between the same parties;
- (b) The two actions must concern the same subject matter; and
- (c) The two actions must be founded upon the same cause of action see *Hiddingh v Dennyssen* (1885) 3 Menz 424 at 450; *Bertram v Wood* (1893) 10 SC 1.80; *Pretorius v Barkly East Divisional Council* 1914 AD 407 at 409; *Mitford’s Executors v Elden’s Executors and Others* 1917 AD 682; *Le Roux v Le Roux* 1967 (1) SA 446 (A); *Voet* 44.2.3.”

I accept that of the three elements for *res judicata* the third one, that is, that the two actions must be founded upon the same cause of action, has not been satisfied in this matter. This is because the rescission of judgment application made in HC 2696/15 was founded on the provisions of rule 63, namely good and sufficient cause to rescind the judgment wherein the applicant sought to establish that it was not in willful default because at the time that the notice of intention to bar was served on its erstwhile legal practitioners on 31 March 2015 it was no longer in good books with them and was in the process of terminating their mandate which is why no action was taken on it and that it has a *bona fide* defence to the claim because it owed only \$66 788-52 which shall only become due in terms of the agreement once the applicant itself has been paid by Marange Resources (Pvt) Ltd.

The present application is based on the allegation that the default judgment was erroneously sought and erroneously granted because the respondent had not served the declaration and for that reason the notice of intention to bar was premature. The second cause of action is different from the first application. However that is neither here nor there because there is, in my view a public policy issue to be decided in this matter. It is whether a party should be

allowed to bring a rescission of judgment application based on rule 63 and when it fails, to then seek the same rescission in terms of rule 449, the latter application being made one year three months after the dismissal of the first and almost two years after the first application was filed.

BECK J, had a very valid point in *Scottish Rhodesian Ltd v Honiball* 1973 (2) SA 247 (R) that;

“Rules of court are not laws of the Medes and Persian and in suitable cases the court will not suffer sensible arrangements between the parties to be sacrificed on the alter of slavish obedience to the letter of the rules ---.”

The point is that rules are the court’s tools fashioned for its own use. See *Nxasana v Minister of Justice and Another* 1976 (3) SA 74. Indeed the point being made is that while the rules provide for three instances for the making of a rescission of judgment, that is in terms of rule 56, rule 63 and rule 449 it cannot be said that the framers of the rules by that meant that a party is allowed to spend years and years skipping from one rule to the other, kangaroo style, in an attempt to have the same judgment rescinded.

Such a construction of the rules cannot sit side by side with the concept of justice. As they say justice must be rooted in confidence. That confidence will no doubt be shaken to the core should that state of affairs be allowed to eventuate. In my view a party seeking a rescission of default judgment must posit its application on either rule 63 or rule 449 depending on the grounds therein. Where the party relies on both those rules it must make the application in the alternative. It cannot have a go at one rule and when that fails then have another go at the other rule. That does not accord with justice and it could not have been the intention of the framers of the rules that they be used, or is it abused, in that manner.

I have already made reference to the fact that there must be finality in litigation. That cannot be achieved were the process of seeking rescission allowed to be adulterated in that way. It is probably for that reason that rule 63 (1), allows a party to seek rescission of judgment within one month after having knowledge of the judgment. Rule 449 is silent as to the time frame for making an application but surely that does not mean that the application can be made at any time. It must be within a reasonable time, especially in a case such as the present where the applicant has had knowledge of the judgment for well over two years.

Even if I were wrong in concluding that a rescission of judgment application cannot be made twice, I would still not grant the application for yet another reason. It is that there appears to be no error whatsoever in the grant of the default judgment on 18 June 2015. The papers that were placed before the judge who granted the order contained a summons and declaration issued on 27 October 2014. Although the declaration itself is not stamped by the registrar, it is not unusual that the registrar stamps the summons and omits to stamp the declaration which documents in practice are usually issued and served at the same time.

It is also conventional that in completing the return of service form the Sheriff usually only appends an “X” under the column marked “summons” which does not contain the words “and declaration” to signify service of both which is what happened in this case. Those are the papers that were placed before the judge who granted the application for default judgment. In addition to that there was also the notice of appearance to defend filed on behalf of the applicant as well as the notice of intention to bar and the bar that was effected when the applicant failed to file a plea. With those documents, and in the exercise of judicial discretion, the judge was entitled to enter default judgment regard being had that the applicant had not invoked the provisions of rule 112 entitling it to bar the respondent from declaring if indeed the summons had been served without a declaration.

I therefore tend to agree with TAKUVA J’s remarks in *Trastar (Pvt) Ltd, supra* at page 5 that the filing of the second rescission of judgment application on the basis that the declaration was not served with the summons “is an afterthought designed to further delay the inevitable.” In any event I am not persuaded that the applicant has a defence to the respondent’s claim in the main cause which it should be allowed to prosecute. It admits owing at least \$66 788-52 which it has not paid. It has not even made a case for why the balance is not due and to say that which it admits owing will only be paid after Marange Resources (Pvt) Ltd has paid the applicant cannot be a serious argument. It has all the hallmarks of a litigant who will do anything and say anything including the absurd only to avoid paying what is owed.

This application is clearly without merit and the applicant’s lack of probity is there for all to see. It is an application which should not have been made at all and constitutes a palpable abuse of the process of the court which deserves to be penalized by an award of punitive costs.

In the result, the application is hereby dismissed with costs on a legal practitioner and client scale.

Chinyama and Partners, applicant's legal practitioners
Messrs Mutendi, Mudisi and Shumba, respondent's legal practitioners