HB 134/19
HC 3000/18

JULIET MTETWA

And

EPHRAIM MTETWA

Versus

BENBERT INVESTMENTS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 7 JUNE & 29 AUGUST 2019

Opposed Application

A. Sibanda for the applicants
V. Mapepha for the respondent

MAKONESE J: This is an application for rescission of judgment in terms of Order 49 Rule 449 (a) of the High Court Rules, 1971. The application is opposed by the respondent who contends that the application is entirely devoid of any merit.

Factual background

Inspite of the voluminous nature of the application before this court the facts giving rise to this application may be summerised for convenience as follows. The applicants filed a court application on 5th April 2018 and served it on the respondent on 16th April 2018. Despite having filed their answering affidavit on the 11th of July 2018 and serving the same on the respondent on 12th July 2018, the applicants did not file their heads of argument within the stipulated period of one month after serving the answering affidavit. The applicants did not set the matter down for hearing as contemplated by the rules of this court as provided in Rule 236. The respondent then filed and served an application for dismissal of application for want of prosecution as provided under Order 32 Rule 236 (4) (b) of the High Court Rules. The application for dismissal for want of prosecution was granted by MOYO J in chambers on the 29th October 2018. The applicant has lodged its application on the basis that the judgment granted by the learned judge was granted in

error, in that the matter was opposed as there was on the record a notice of opposition. Further, the applicant avers that the chamber application for dismissal was wrongly headed "High Court Harare" instead of "High Court Bulawayo".

Whether the application is properly before the court

This court must determine whether on the factual background detailed above, this application is properly before the court, and whether the court can invoke the provisions of Rule 449 and set aside the judgment granted on 29th October 2018. I must indicate from the onset that the applicant has either misread the rules of this court or has attempted to misrepresent the facts in order to bring this application in the ambit of Rule 449. It is trite law that once an applicant fails to file heads of argument as provided for under Rule 236, nor set the matter down for hearing, then such party is automatically barred from filing any further pleadings or other documents. The recourse open for the applicant was to file an application for the removal of the automatic bar burdening them. Consequently, because of the automatic bar operating against them, the filing of the notice of opposition outside the time limits stipulated in the rules was of no consequence. This application for rescission of judgment ought to have been preceded by an application for condonation seeking the indulgence of the court in seeking to file any documents whilst the automatic bar was in operation.

In *Viking Woods (Pvt) Ltd* v *Blue Bells Enterprises (Pvt)* 1998 (2) ZLR 249, it was underscored that:

> "*Where there is a judgment disregarded of the rules, a court is entitled to dismiss that application on that basis alone,"*

The applicants herein do not attempt to seek condonation, instead, they seek to obfuscate the issues by raising peripheral issues without dealing with the basis of the application that led to the dismissal of their application for want of prosecution. The applicants seek to give the impression that the learned judge granted the order in error, and yet, they are well aware that the reason the order was granted was their failure to file heads of argument as provided by the rules.

The applicants pretend as if they are quite unaware that they were required to file heads of argument or set the matter down within the one month period after filing their answering affidavit. It is evident that once a litigant flagrantly disregards the rules of the court, there is need to explain why an indulgence should be granted by the court. In this matter the applicants raise issues that are not pertinent to the merits of the applicants such as the heading on the papers which makes reference to the "High Court, Harare". I observe here that these documents are in fact stamped by the Registrar at Bulawayo. They were served on the applicants in terms of the rules. What is not forthcoming from the applicants as its explanation at all, why the indulgence of the court should be invoked. In any event, even before the indulgence of the court could be requested, the applicants could have approached the respondent seeking its consent for them to allow for the upliftment of the automatic bar. They did not do so.

It is my view that the application for rescission of judgment is clearly not properly before the court. It is a well established position in our law that litigants who disregard court rules should not be entertained by the courts. See *Mudzingwa* v *Mudzingwa* 1991 (4) SA 17 (ZS) where GUBBAY JA (as he then was) stated as follows:

> *"… certainly a litigant who is himself negligent and the author of his own misfortune will fail in his quest for rescission*."

This stern warning by the learned judge applies with equal force in this matter. The applicants have been sluggish in the manner they have handled the matter and consequences should visit them. The applicants are at pains to explain that they filed a notice of opposition in response to the application for dismissal for want of prosecution. The applicants may not however succeed in their quest to have the order set aside unless they purge their failure to comply with the rules. Once a bar is in operation no subsequent pleadings will be entertained by the court, save for an application for removal of the bar. See *Petras* v *Petras* SC-71-91 and *Standard Bank of SA Ltd* v *Kirkos* 1957 R & N 144.

It is my view that the learned judge properly granted the application for dismissal for want of prosecution in accordance with the provisions of Rule 236 (4) (b). The application was

properly dealt with in chambers and the insinuation that the judgment was granted in error is an attempt to smuggle an application for rescission of judgment under the guise of Rule 449. The applicants' conduct is clearly designed o avoid the consequences of having to deal with the removal of the automatic bar which in effect is still in operation. See *Moon* v *Moon* HB-94-15.

In concluding, I observe that even if the notice of opposition was filed it will not have any effect because of the bar operating against the applicants. This point is well illustrated by the case of *Moyo* v *Minister of Energy & Power Development & Anor* HH-313-15 where MATHONSI J (as he then was) stated at page of 2 of the cyclostyled judgement as follows:

> *"The filing of the respondent's notice of opposition was irregular as it was done without seeking condonation for the late filing. That opposition is therefore improperly before me and the matter is, to the extent that the 1st respondent is concerned, unopposed.…… To the extent that the second respondent is represented by a legal practitioner he is therefore barred in terms of Rule 238 (2) (b) of the High Court Rules. No application for upliftment of the bar has been made. The purported filing of heads of argument on behalf of the respondents on 23 March 2015, 2 days before the set down date without condonation was therefore an exercise in mischief especially as in the prelude to those heads of argument, it is stated;*
>
> *An application for the condonation of such non-compliance (not filing opposition in time, nothing is said about the bar for filing heads out of time), with the rules will be accordingly made at the hearing."*

In this matter, it has to be noted that it is the making of an application for condonation for non-compliance with the rules of the court that should trigger the discretion to allow the filing of any further pleadings outside the prescribed time limits. In the absence of such application, the application for rescission would be clearly improperly before the court. See; *Forestry Commission* v *Moyo* 1997 (1) ZLR 254.

For the aforegoing reasons, the application for rescission of judgment is not properly before this court, and the court may not invoke the provisions of Rule 449 of the High Court Rules.

In the result, the application is dismissed with costs.

Mhaka Attorneys c/o Majoko & Majoko applicants' legal practitioners
Allen Moyo Attorneys at Law c/o Gula Ndebele & Partners respondent's legal practitioners