MOTOR CYCLE (PRIVATE) LIMITED
versus
OLD MUTUAL PROPERTY
INVESTMENTS CORPORATION (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 24 May 2007

Opposed Application

Mr Mushonga, for applicant
Mr Mutasa, for the defendant

CHATUKUTA J: This is an application for rescission of the judgment granted in default of the applicant in case number HC 2898/06. The background to this application is that on 22 October 2002 the parties entered into a lease agreement in terms of which the respondent leased to applicant property known as Unit 3 of Stand 4491 Lisburn Road, Harare. On 22 May 2006, the respondent issued summons claiming (a) the payment of $67 428 009.94, being the sum due to the respondent as arrear rentals plus interest, (b) holding over damages, (c) cancellation of the lease agreement and (d) ejectment from the leased premises. On 29 May 2006, the applicant purported to enter an appearance to defend. The appearance to defend was entered by a representative of the applicant and not by a legal practitioner. In a letter dated 10 July 2006, the respondent brought to the attention of the applicant that the notice of appearance was defective as it ought to have been entered by a legal practitioner because companies cannot represent themselves in the High Court. The applicant did not remedy the appearance to defend resulting in the application by the respondent for default judgment filed on 25 July 2006 and granted on 18 July 2006.

It is in respect of this order that the applicant applies for an order for rescission. Mr *Mushonga,* for the applicant, submitted that the applicant seeks the rescission of the judgment in terms of r 449 read together with r

63 of the High Court Rules of Zimbabwe. The basis for the application is that the court was misled on the law relating to whether or not a company can enter an appearance to defence in the High Court without the assistance of a legal practitioner. The applicant submitted that on the basis of the decision in the case of *Lee Import & Export (Pvt) Ltd* v *Zimbank* 1999 (2) ZLR 36 (S) the applicant can, through its officer, represent itself in the High Court. The applicant further submitted that on the basis of the decision in *Heating Elements Engineering (Pvt) Ltd* v *Eastern and Southern African Trade and Development Bank* 2002 (1) ZLR 351 (S) the default judgment is a nullity.

Rule 449 provides for the rescission of a judgment:

> "(1)(a) that was erroneously sought or erroneously granted in the absence of any party affected thereby;"

The prerequisites for granting rescission under this rule are the following: firstly, the judgment must have been erroneously granted; secondly, such judgment must have been granted in the absence of the applicant; and, lastly, the applicant's rights or interests must be affected by the judgment. (see *Mutebwa* v *Mutebwa and Anor* 2001 (2) SA 193 which discusses r 42(1) of the Uniform Rules of Court of South Africa which is identical to r 449(1)(a)).

It is not in issue that the judgment was granted in the absence of the applicant. Neither has it been put to issue that the rights and interests of the applicant must have been affected by the judgment. It is my view that the issue for determination is whether or not the judgment was granted in error. It is my view that the order was not erroneously granted as it was granted in accordance with the common law position that a limited company cannot represent itself in the High Court except through a legal practitioner. *Lees Import & Export (Pvt) Ltd* v *Zimbank* 1999 (2) ZLR 36 (S) sets out the general common law position. At p 40G-41C, GUBBAY CJ (as he was then) cited with approval the reasoning by SMITH J in *Diana Farm (Pvt) Ltd v Madondo NO & Anor* 1998 (2) ZLR 410 (H) and stated:

> "Within two months of the judgment in the *Pindi* case being delivered, SMITH J considered its reasoning in *Diana Farm (Pvt) Ltd* v

Madondo NO & Anor 1998 (2) ZLR 410 (H). He strongly disapproved of the view that the effect of the provisio to s 9(2) of the Legal Practitioners Act permitted a company to be represented by a person other than a legal practitioner. He said at 417F-G that the proviso:

> 'merely provides that subs (2)(a) shall not prevent such representation. Therefore, the Magistrates Court Rules, which authorize such representation, are not inconsistent with s 9(2)(a) and so cannot be held to be *ultra vires*. As pointed out in *Pumpkin Construction* case (*supra)*, there is no equivalent provision in the High Court Rules. Until such time as a similar provision is inserted in the High Court Rules, a company cannot, in my opinion, be represented by a director or officer in proceedings before the High Court'.

I respectfully agree with this interpretation".

At 43A-F GUBBAY CJ (as he was then) cites authorities in other countries establishing that a company has no common law right to be heard except through legal counsel. He, however, at 43F-44A stress that whilst this is the general position the court can use its discretion in exceptional circumstances to permit a person other than a legal practitioner to appear before the High Court. In that case, the court also considered the constitutional issue raised by the applicant that the common law rule falls foul of s 18(9) of the Constitution. He had this to say on the issue at 48G-49B -

> "An application of this interpretative approach, with the legal consequences of the organic doctrine in mind, persuades me that the common law rule offends s 18(9) of the Constitution, certainly to the extent that it prohibits the duly authorized organ or *alter ego* of a company the right to appear in person before the High Court or the Supreme Court of this country. In short, the right given to 'every person' under this constitutional mandate includes within its reach a corporate body appearing through its *alter ego*. In this sense it is that body which is exercising the right.
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> **This view does not undermine the rule of practice. It merely provides an exception to it.** For it does not permit a company to appear before the superior courts through someone who is a mere director, officer, servant or agent. The decision, therefore in *Law Society* v *Lake* 1988 (1) ZLR 168 (S) still holds good. Companies, which cannot be said to be embodiment of a human body, will not qualify under s 18(9) because no human being personifies the company "in person". In general, small companies should be able to avail themselves of the exception." (own emphasis).

It is therefore clear from the above that the common law rule still applies. The case of *Heating Elements Engineering (Pvt) Ltd* v *Eastern and Southern African Trade and Development Bank* (*supra)* does not take the matter any further. The court did not determine the issue whether or not the applicant could appear before the court without legal representation. SANDURA JA observed as follows:

> "The appellant appeared in person, with the first and second appellants appearing through their chief executive and *alter ego*, in accordance with the principles laid down by this court in *Lees Import and Export (Pvt) Ltd* v *Zimbank* 1999 (2) ZLR 36 (S)……."

The circumstances of the appellants in that case which led the court to accept that the parties could appear through their *alter ego* were not explained.

The question before me is, therefore, whether or not the applicant's circumstances amounts to exceptional circumstances warranting the deviation from the general common law. The applicant submitted that it is a sole trader company run by its managing director Joseph Mutandiri assisted by his spouse Tambudzai Mutandiri. It was submitted that Joseph Mutandi is the directing mind of the company. In support thereof, the applicant filed, with his Answering Affidavit, a copy of a form under the Companies Act [*Chapter24:03*], Form No CR 14, which indicate on its face a company called Spijker Trading (Private) Limited. The directors listed are Angelo Pereira (who is indicated to have resigned), Joseph Mutandiri and Tambudzai Mutandiri. Mr *Mushonga* submitted that on the basis of the Form No CR 14, the applicant falls within the exception.

The respondent submitted that the applicant has four directors; G Potzas, B Nyakatawa, A Nyakatawa and J Mutandiri. It was submitted that decisions affecting applicant are made through resolutions of the directors of applicant. In support of the latter assertion, applicant produced a copy of a resolution of applicant's directors authorizing the company to enter into a lease agreement with respondent. The resolution was passed on 31 July 2002 and the administrator was one George Mapolisa. Three directors passed the resolution namely; G. Potzas, B Nyakatawa and A Ambala

Nyakatawa. Mr *Mutasa,* for the respondent, submitted that Joseph Mutandiri is therefore not the applicant's *alter ego*. He further submitted that the appearance to defend does not indicate who had signed the notice and in what capacity. The respondent asserted that applicant does not, therefore, fall under the exception.

What is clear from the papers filed of record is that the applicant operates through its directors as evidenced by the resolution of three directors. As indicated earlier, the applicant filed a Form No CR 14 for a company called Spijker Trading (Private) Limited. Mr *Mushonga* attempted to explain that the applicant was the trading company of Spijker Trading (Pvt) Ltd. What Mr *Mushonga* attempted to do was to give evidence from the bar as this fact was not raised in any of the applicant's pleadings, more particularly the answering affidavit despite the respondent having put the directorship of the applicant in issue in its opposing affidavit. He did not oppose the production of the resolution by applicant's directors. It therefore follows that the evidence by the respondent regarding the directors of the applicant stands unchallenged. The applicant was given an opportunity to correct the appearance to defend in the letter dated 10 July 2006 and it failed to do so. The applicant has not refuted this neither has it indicated that it raised the issue with the respondent then that it was a company falling within the exception to the common law rule.

Arising from the above, it is my view that the applicant does not fall under the exception and therefore has failed to meet the prerequisites for granting an order for rescission under r 449(1)(a). Mr *Mushonga* submitted that the applicant was seeking rescission in terms of r 449(1)(a) as read with order 9 r 63. Firstly, applicant does not refer to r 63 in its pleadings. Rule 63 was first mentioned in the oral submissions and therefore was not pleaded. Secondly, I am not sure whether the two rules can be read together. It is my view that there are three separate ways in which a judgment in default of one party may be set aside. This can be done in terms of r 63, or r 449(1)(a) or in terms of common law (see *Gondo & Anor* v *Syfrets Merchant Bank Ltd* 1997 (1) ZLR 201 at 205G and *Mutebwa* v

Mutebwa and Anor (*supra)*. The requirements for granting rescission under r 449 have been set out above. A rescission of judgment under r 63 and under common law can only be granted where the applicant shows “good and sufficient cause” for the granting of the order. The phrase 'good and sufficient cause' has been construed to mean that the applicant must:

(a) give a reasonable and acceptable explanation for his/her default;

(b) prove that the application for rescission is *bona fide* and not made with the intention of merely delaying plaintiff's claim; and

(c) show that he/she has a *bona fide* defence to plaintiff's claim. (See *Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210)

The applicant only pleaded that the judgment granted against it was granted in error. It therefore did not plead rescission under r 63 or common law and did not address the requirements for rescission under r 63 and common law.

The respondent had prayed for the dismissal of the application with cost on higher scale. Mr *Mutasa* did not make any submissions on why the applicant should be ordered to pay the punitive costs. Therefore, I will award costs on an ordinary scale.

In the result, the application is dismissed with costs.

Mushonga & Associates, applicant’s legal practitioners
Gill, Godlonton & Gerrans, respondent’s legal practitioners