AMER KHAN
versus
INNOCENT MUCHENJE
and
CHARM MUCHENJE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 23 February 2012 and 27 February 2013

**Opposed Matter**

*L Uriri* (SC), for the applicant
*A P de Bourbon* (SC), for the respondents

MAKONI J: On 29 April 2010 and in case number HC 2816/10 the applicant instituted action proceedings against the respondents claiming the sum of GBP 39 848-00, interest on that amount at the prescribed rate from date of summons to date of payment in full and costs of suit on a legal practitioner client scale and collection commission. The defendant filed a Special Plea and Exception. There was no response to the Special Plea and Exception. The defendants proceeded to set the matter down on the unopposed roll. On 11 August 2010 the Special Plea and Exception were upheld and the plaintiff's claim was dismissed with costs.

On 12 October 2010 and in HC 7205/10, the first respondent instituted action proceedings against the applicant claiming delivery of the original Deed of Transfer number 12197/01 and costs of suit. The applicant entered appearance to defend. On 2 February 2011 the first respondent filed a court application for summary judgment. On 16 February 2011 the applicant filed a "Respondent's Opposing Affidavit." On the same date the first respondent's legal practitioners, in response to a letter from the applicant's legal practitioners, advised the applicant's legal practitioners on the procedural problems in relation to the summary judgment proceedings. There was no response from the applicant's legal practitioners. The first respondent proceeded to set the matter down on the unopposed roll seeking an order to have the 'Respondent's Opposing Affidavit', struck off of record and an order for summary judgment. The order was granted on 9 March 2011.

On 23 March 2011, the applicant then approached this court seeking that the two default judgments in HC 2816/10 and HC 7505/10 be set aside and that the respondents, jointly and severally pay the costs of suit. The main basis for the application is that his erstwhile legal practitioners Messrs Chigwanda Legal Practitioners had not been served with notices of set down of the hearing of both matters.

In the same application, the applicant seeks condonation of the late filing of the application for rescission of judgment in HC 2816/10. His basis is that immediately upon learning about the judgment he instructed his erstwhile legal practitioners to file an application for rescission of judgment. He made several follow ups with his legal practitioners without success. He then sought the assistance of his present legal practitioners. There were further delays as he could not give full instructions to them. They later managed to get some papers from the applicant's legal practitioners. When these were furnished, his legal practitioner, Mr Bull, had to go on a short leave. He only managed to file the application after his return.

On the merits, the applicant avers that he has a sound claim for reimbursement of the money on an agreed sum of GB39 584-00. He was given title deeds and keys to the first respondents' immovable property in Marlborough as security. He further avers that the summary judgment be rescinded if the court sees it fit to reinstate his money claim. This is because the subject matter of the summary judgment, namely the claim for the return of title deeds, is prescribed. There is a supporting affidavit by Mr Bull where he outlines procedural deficiencies in the money claim which, in his view, entitles the applicant's claims to be reinstated. These are:

(i) In terms of r 138, the exception and special plea is to be set down for hearing in accordance with the provisions of r 223 (2).

(ii) Rule 223 (2) specifically provides that, *inter alia*, exception, applications to strike out and other applications which are <u>opposed</u> (his under lining) shall be set down for hearing (a) in Harare, on a business day agreed to with the registrar, by filing a notice of set down with the registrar not less than six business days before the day of set down.

In respect of the summary judgment order, Mr Bull avers that the founding affidavit does not correctly states all facts as how the first respondent acquired possession of the first respondent title deed.

Secondly, he avers that the first respondent does not deny owing the entire amount and therefore it will be unfair for the court to oblige the applicant to release the title deed held as security.

Thirdly, the claim for the title deed has expired. Lastly the notice of set down should have been served on the applicant’s legal practitioners as the applicant intended to oppose the matter because he filed what is entitled “Respondent’s Opposing Affidavit.”

The application is opposed mainly on two grounds.

Firstly, it is averred that the applicant was in default and he has failed to file an explanation from his erstwhile legal practitioners as to why he did not respond to the special plea and exception and as to why they did not file an application for rescission when instructed to do so.

Secondly, on the merits, the first respondent does not owe the applicant any money but he is owed by third parties.

Mr Moyo filed a supporting affidavit to which he responded to the procedural aspects raised by Mr Bull. He avers that there is nowhere in the rules where it is prescribed to set down on the unopposed roll a special plea and exception. As regards the summary judgment order, he avers that the applicant’s erstwhile legal practitioners did not file an explanation as to why they did not file a proper notice of opposition. Further, they did not respond to the letter from him pointing out the irregularity.

At the hearing of the matter, Mr *de Bourbon* took issue, in *limine*, with the manner the applicants handled the issue of his heads of argument. Mr *de Bourbon* submitted that the applicant’s heads of argument were filed on 20 September 2011 and were only served on 29 September. There is no explanation at all regarding the delay. This is an applicant who is seeking the court’s indulgence.

In response, Mr *Uriri* submitted that a bar does not take effect because of non-service of the heads. There was no prejudice suffered by the respondents as they filed supplementary heads.

The respondents in this matter filed their heads of argument on 6 September 2011 and they were served on the same day. They prepared the record and applied for set down. The applicant filed its heads of argument on 20 September 2011. These were only served on 29

September 2011 on the respondents' legal practitioners. The respondents' legal practitioners then filed supplementary heads of argument on 24 November 2011.

The issue being taken by Mr *de Bourbon* is that once heads of argument are filed, they should immediately be served on the other side and failing an explanation the other party would be barred.

In terms of r 238, it is imperative on a party filing heads of argument to immediately deliver a copy of the heads of argument to every other party and file with the registrar proof of such delivery. The rule is silent on what happens when the heads are not immediately afterwards served. In my view, where a party does not immediately serve heads of argument and it is put in issue, it must give an explanation as to why it failed to serve heads of argument as soon as is reasonably possible in the circumstances. Where the delay does not cause prejudice to the other party that should be the end of the matter. Where there is prejudice then the defaulting party must be visited with costs.

In *casu*, the respondents did not suffer any prejudice as they were able to file supplementary heads of argument before the hearing of the matter. I will therefore dismiss the point in *limine.*

Mr *Uriri* for the applicant submitted that although the founding affidavit made out a case for rescission of judgment in terms of r 63, the undisputed facts of the matter brings the application squarely within the provisions of r 449. The orders in question were wrongfully sought and granted in error in the absence of the applicant.

In the money claim, the respondents set down the exception as unopposed in the erroneous view that party upon whom an exception is served must oppose the exception in the same way an application is opposed under the rules.

In the summary judgment proceedings, the applicant filed an opposing affidavit but did not do so under cover of a notice of opposition. The respondents then set down the matter on the unopposed roll and argued that there was no notice of opposition.

Mr *de Bourbon* submitted that the change of direction from r 63 to r 449 comes out in the heads of argument and not in the founding affidavit. There is no mention of error in the founding affidavit. The change was mainly because the applicant had no arguable case on the merits.

He further submitted an application in terms of r 449 that must be brought expeditiously. In this matter there were inordinate delay caused by the applicant. The

respondents had to arrange for the set down of the matter. The public policy rule of finality to litigation should be applied to decline to grant the relief that the applicant seeks.

He further submits that both orders were properly granted. Regarding the money claim, the applicant restricted his arguments to the exception. There is no mention of the special plea of prescription. Therefore the applicant concedes that there was no error. As regards the exception, the applicant did not indicate whether it opposed the exception. There was no error when the judge dealt with the matter as unopposed.

In the summary judgment proceedings, there was no opposition filed in terms of the rules. There was no need to give notice of set down to the applicant. No error was committed in granting the order.

**Change of Direction**

I agree with the submissions made by Mr *de Bourbon* on this point. The applicant belatedly sought to change the whole thrust not only on the application itself but of the argument thereof from r 63 and r 449. Rule 449 is mentioned for the first time in the heads of argument. There is no mention of error in the founding papers. In effect, the applicant painstakingly, sought to address the requirements of r 63 viz condonation for the late filing of the application for rescission, the explanation for the default and the merits of his claim in the money claim and his defence in the summary judgment proceedings. Even Mr *Uriri* floundered when asked by the court the basis for r 449 in the founding papers. He however pointed the court to para 5 of the founding affidavit and para 4 of the supporting affidavit. However, he could not explain the averments by the applicant in para(s) 8 and 19. My view is that the applicant decided, midstream, to resort to r 449 so that he can avoid to deal with the prospects of success.

It is trite that an application stand or falls on its founding papers. The applicant did not make out a case for setting aside of the orders in terms of r 449.

Assuming I am wrong I will proceed to consider whether the orders were erroneously sought or granted and in the absence of the affected party.

Rule 449 allows this court either *mero motu* or upon the application of any party affected, to correct, rescind, or vary any judgment or order, *inter alia*, that was erroneously sought or erroneously granted in the absence of a party affected thereby. The purpose of the rule as stated by SANDURA JA in *Matambanadzo* v *Govsen* 2004 (1) ZLR 399 (S) at 404 A

– C by reference to the South African equivalent of the rule as described in *Theron NO* v *United Democractic Front & Ors* 1984 (2) SA 532 © at 536 D-F were it was stated:

> "Rule 42 (1) entitles any party affected by a judgment or order erroneously sought or granted in his absence, to apply to have it rescinded. It is a procedural step designed to correct an irregularity and to restore the parties to the position they were before the order was granted. The court's concern at this stage is with the existence of an order or judgment granted in error in the applicant's absence and, in my view, it certainly cannot be said that the question whether such an order should be allowed to stand is of academic interest only."

MAKARAU JP (as she then was) in *Tiriboyi* v *Jani  Anor* 2004 (1) ZLR 470 (H) at 472 D-E makes the same point but puts it differently:

> "The purpose of r 449 appears to me to be to enable the court to revisit its orders and judgments to correct or set aside its orders or judgments given in error and where to allow such to stand on the excuse that the court is *functus officio* would result in an injustice and will destroy the very basis upon which the justice system rests. It is an exception to the general rule and must be resorted to only for the purposes of correcting an injustice that cannot be corrected in any one way.
>
> The rule goes beyond the ambit of mere formal, technical and clerical errors and may include the substance of the order or judgment. See *Grantully* (*Pvt*) *Ltd* v *UDC Ltd* 2000 (1) ZLR 361 (S)."

It is now settled in our law that the requirements for the grant of an order for rescission under r 449 are that:

(i) The judgment was erroneously sought or granted;

(ii) The judgment was granted in the absence of the applicant; and

(iii) The applicant's rights or interests are affected by the judgment. See *Tiriboyi supra* at 473 B-C.

Once these requirements are met, the applicant is entitled to succeed and the court should not inquire into the merits of the matter to find good cause upon which to set aside the order or judgment. See *Tiriboyi supra* at 473 C.

**The Money Claim**

The applicant contends that the exception was set down as unopposed because of the erroneous view that a party upon whom an exception is served must oppose the application in the same way as an application is opposed under the rules. There is no rule for opposition to an exception. Once an exception is filed it must be set down in terms of r 138 (a) and (b).

The underlying requirement of r 138 (a) is the consent of both parties and that of r 138 (b) is the filing of Heads of Argument and a request for set down within a further four days in terms of r 223 (2) of failing to secure consent.

The respondents challenge the applicant’s contention from two fronts. Firstly the applicant, in its Heads of Argument is only attacking the set down of the exception. He is not challenging the set down of the special plea. Secondly that the special plea and exception were not opposed and were therefore properly set down on the unopposed roll.

The observation by Mr *de Bourbon* is correct. The applicant in its Heads of Argument attacked the set down of the exception. There is no mention whatsoever of the Special Plea of prescription. There was an obligation of the applicant to oppose the Special Plea as it bore the onus to defeat the claim of prescription. It appears the applicant is conceding that there was no error in dismissing the claim of the ground of prescription. If that is the position, then the claim was properly dismissed. There was no error in granting the order as the claim had prescribed.

In respect of the exception, a litigant is obligated to indicate to the court and the other party whether or not he opposes the exception despite the fact that there is no rule which specifically provides for that. Where there is no indication that the exception is opposed there would be no error to treat the matter as unopposed.

In order to bring an exception within r 223 (3) for set down on the opposed roll, the matter must be opposed. Rule 223 (2) provides:

“Set down of other matters on notice.

(1) …

(2) Subject to subrr (3), (4), (5) and r 238, exceptions, applications to strike out and other applications which <u>are opposed shall be</u> set down for hearing –

(a) …” (my own underlining)

The rule uses the words “which are opposed”. This can only be known to the Registrar and the other party if intimation of such opposition has been given. These words also suggest that matters which are not opposed are set down in terms of a different rule altogether. My view is that the drafters of the rules could not have intended that every exception be set down in terms of r 138 as an opposed matter. This would lead to an absurdity which would adversely interfere with the administration of justice. The rules have provided for an avenue or mechanism to speedily allow matters that are unopposed to be

dealt with. Such matters can be set down in terms of r 223 (1) on unopposed applications. The respondents were therefore correct in setting the matter down on the unopposed roll.

It must be appreciated that rules are practical ones for the proper administration of the courts and a court must never be a slave of its own rules. See *Scottish Rhodesian Ltd* v *Honiball* 1973 (2) SA 747 (R) where BECK J (as he then was) said at p 748:

> "The 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 Rules."

See also *Nxasana* v *Minister of Justice & Anor* 1976(3) SA 74 S (D) at 781 where DIDCOTT J stated:

> "The rules, after all, are the court's tools, fashioned for its own use. They are more flexible, and more easily adapted to meet particular needs, than a statute can ever be."

Sentiments to the same effect were expressed by WINSEN AJA (as he then was) in *Federated Trust Ltd* v *Botha* 1978 (3) SA 645 A at 654 when he said:

> "The court does not encourage formalism in the application of the rules. These rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts."

The above remarks apply to r 138. Rule 223 (1) 'provides to secure the inexpensive and expeditious completion of litigation before the courts..'

**Summary Judgment Proceedings**

It is common cause that the applicant filed its opposing affidavit timeously. He did not file a notice of opposition. The respondent's legal practitioner, but letter dated 16 February 2011 advised the applicant's erstwhile legal practitioners of the procedural problems relating to the matter. There was no response. The second respondent applied to have the opposing affidavit struck off the record and for default judgment. He proceeded to set the matter down on the unopposed roll. He did not serve the applicant in the application.

Mr *Uriri* submitted that failure to attach a notice of opposition is not fatal to the application. It is not peremptory as suggested by the respondent. There was substantial compliance with r 233 (1) and the court could have condoned the technical non-compliance in terms of r 4C. He also referred to *Founders Building Society* v *Dalib* (*Pvt*) *Ltd & Ors* 1998

(1) ZLR 526 for the proposition that the correct procedure would have been to file a motion to strike out the irregular pleading on notice to the other party.

Rule 233 (1) reads:

> "The respondent shall be entitled, within the time given in the application in accordance with r 232 to file a notice of opposition in Form 29 A, together with one or more opposing affidavits."

The use of the word 'shall' relates to the entitlement to oppose an application and not to the filing of the notice of opposition. The purpose of filing a notice of opposition is to notify the other party that the application is being opposed. The opposing affidavit then sets out the basis upon which the application is challenged. I agree with Mr *Uriri*'s position that failure to attach an opposing affidavit to the notice of opposition is not fatal and is not a bar to the respondent to the grant of its relief. There was an irregular pleading before the court.

I however do not agree with his interpretation of what GILLESPIE J said in the *Founders Building Society supra*. At p 534 D he stated:

> "If he opts for the former course, then he must, in his application, and in fulfilment of the well recognised duty of full disclosure in *exparte* proceedings, inform the court (or the judge) of the relevant irregularity and give reasons as to why the court's discretion should be exercised in favour of the plaintiff. The fuller, and the more preferable course is an application on notice, to strike out cojoined with a prayer for default judgment."

My view is that the plaintiff is being given a choice between the two as GILLESPIE J used the term "preferable course". The first one being to advise the defendant of the irregularity and then making an application for default judgment. In the application for default judgment he must inform the court or judge of the irregularity and why the court should grant him the relief that he seeks. The second one is an application, on notice, to strike out coupled with a prayer for default judgment.

In *casu*, the second respondent's legal practitioner informed the applicant's legal practitioner of the irregularity and there was no response. He then made an application to have the irregular proceeding struck out giving a basis why it should be struck out and why he should get the relief that it sought. The application was not on notice and that is not fatal.

My view is therefore that there was no error in granting the order for summary judgment. The court was aware that there was an irregular pleading before it and went on to grant the application to strike it out based on the application filed by the second respondent.

**<u>Delay</u>**

An application under r 449 must be brought expeditiously. See *Grantully* (*Pvt*) *Ltd Anor* v *UDC Ltd* 2000 (1) ZLR 361 (SC) at 366 where GUBBAY CJ stated:

> "After all, r 449 is "a procedural step designed to correct expeditiously an obviously wrong judgment or order; per ERASMUS J in *Bakoven*'s case *supra* at 471 E-F."

Judgment in the money claim was given on in August 2010. The applicant filed the present application on 23 March 2011. The notice of opposition and opposing affidavits were filed on 6 April 2011. These were commissioned in Australia. The answering affidavit was filed on 5 July 2011. The respondent then filed its Heads of Argument on 6 September 2011 and arranged for the matter to be set down. The applicant filed its Heads of Argument on 20 September 2011. The above narration indicates that the applicant was not in a hurry to have the application expeditiously dealt with. It took him thirteen weeks to file an answering affidavit yet the first respondent, who was in Australia, filed his notice of opposition within the ten days stipulated in the court application. After a further period of eight weeks, the respondents then filed their Heads of Argument and arranged for the matter to be set down. It took the applicant two weeks to file his Heads of Argument and these were only served on the respondents some nine days after they were filed. There has to be finality to litigation and even if the applicant had brought himself within r 449 I would have used my discretion to decline to grant the relief sought due to the delays.

In the result I will therefore dismiss the application with costs.

*Atherstone & Cook*, applicant's legal practitioners
*Gill Godlonton & Gerrans*, respondents' legal practitioners