SINIKIWE DHLIWAYO
versus
JOHN TRANOS MATUKUTIRE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 27 February 2022 and 26 May 2023

Opposed Application

Adv *T L Mapuranga*, for the applicant
Adv *F Mahere*, for the respondent

CHINAMORA J:

This is an application for rescission of default judgment made in terms of Rule 27 of the High Court Rules, 2021. The order which the applicant seeks to rescind was granted by this court under Case Number HC 1816/21, can be captured as follows:

> IT IS ORDERED THAT:
>
> 1. The application for upliftment of bar be and is hereby dismissed.
> 2. The court application for confirmation of cancellation of agreement of sale be and is hereby granted.
> 3. The respondent shall pay costs of suit.

In summary, the facts which culminated in the application in *casu* are that, the applicant and the respondent entered into an agreement of sale in respect of Stand Number 1244 Good Hope Township of Lot 16 of Good Hope, measuring 2035 square metres. In terms of the agreement, the respondent sold the property to the applicant for US$45 000.00, who paid US$32 500.00 towards the purchase price. The applicant averred that the outstanding sum of US$ 12 500.00 was in the custody of her legal practitioners. It was contended that whenever applicant

made a payment towards the purchase price, such payment would be made to respondent and his wife who would issue receipts for the payments.

Sometime in 2020, the respondent instituted spoliation proceedings under HC 7132/21 and claimed that the applicant never purchased the property from him. On 28 April 2021, the respondent filed an application for confirmation of cancellation of the agreement of sale. The basis was that the applicant had not paid the full purchase price, and that breach had not been remedied. This application was opposed by the applicant who maintained that she had paid the full purchase price. It was also argued that a material dispute of facts existed, which required a full trial. She added that she had not been served with a copy of the notice of breach. The respondent filed his heads of argument on 7 June 2021, with the applicant filing hers on 16 July 2021. The delay in filing of the applicant's heads of argument was attributed to a clerical error, as well as that the applicant's legal practitioners' offices were closed since an employee of the firm had contracted Covid 19. Mr Everson Chatambudza, the applicant's legal practitioner and Mr Collins Mandizvidza filed supporting affidavits explaining the cause of delay. The matter was set down for hearing on 9 February 2022 and the court considered the application as unopposed in terms of Order 59 Rule 22 of the High Court Rules, 2021. A default judgment was granted against the applicant, hence the present application to rescind this judgment.

In response, the respondent denied receiving any payment from the applicant towards the purchase price. He went on to state that he never mandated his wife to receive payment on his behalf. In support of this denial, he relied on clause 2 of the agreement which states that payments were supposed to be made to him. He submitted that clause 13 of the same agreement of sale stipulates that the terms and conditions of the agreement of sale were to be adhered to. The respondent was adamant that he sold the property, but the applicant failed to pay the purchase price resulting in cancellation of the agreement. The respondent also denied that there were material dispute of facts, since the issue was whether or not the applicant paid the purchase price or not in terms of the agreement of sale. Additionally, the respondent asserted that during the hearing for upliftment of the bar (in HC 1816/21), the applicant raised the same issues and the court did not accept the reasons. As a result, the respondent contended that this question is *res judicata*.

The requirements for this plea are settled in this jurisdiction. In this respect, in *Flowerdale Investments (Private) Limited & Ano*r v *Bernard Construction (Private) Limited & Others* SC 5-09, CHIDYAUSIKU CJ, summarized the law as follows:

> "The essential elements of *res judicata* are -
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> (1) the two actions must be between the same parties;
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> (2) the two actions must concern the same subject-matter; and
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> (3) the two actions must be founded upon the same cause of action.
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> See *Hiddingh* v *Dennysen* 3 SC 424 at 450; *Bertram* v *Wood* 10 SC 180; *Pretorius* v *Divisional Council of Barkly East* 1914 AD 407 at 409; *Mitford Exors* v *Elden Exors* 1917 AD 682; *Le Roux* v *Le Roux* 1967 (1) SA 446 (AD); and *Voet* 44.2.3".

For me, the starting point in this matter is Rule 27 of the High Court Rules, 2021, which empowers this court to set aside or rescind a judgment given in default if a party against whom the judgment was given files a court application no later than one month of knowledge of the judgment. The applicant must demonstrate that there is good and sufficient cause to set aside the judgment. It is on this ground alone that I find the respondent's argument that the matter is *res judicata* without merit. There is a good reason for my conclusion. What was before the court on 10 February 2022, was an application for the lifting of a bar that was operating against the applicant and not an application for rescission. I am convinced reasons advanced by the respondent do not support a case for the plea of *res judicata*.

As indicated above in order for this court to set aside the default judgment, the applicant must show good and sufficient cause. In *Stockil* v *Griffiths* 1992 (1) ZLR 172 (S) at 173 D-F, the Supreme Court considered the factors to be considered when examining "good and sufficient cause". They are: (i) the reasonableness of the applicant's explanation for the default, (ii) the *bona fides* of the applicant to rescind the judgment; and (iii) the *bona fides* of the defence on the merits of the case which carries some prospects of success. These factors must be considered cumulatively. The applicant's default was explained as shown above, and I am satisfied with that explanation. The legal practitioner responsible and the clerk concerned filed supporting affidavits explaining their oversight. In my view, this is a plausible explanation as the period under question was during Covid – 19 lockdown. I take judicial notice that the courts were not operating normally. Having accepted the explanation, it follows that this application was made in good faith.

On the merits, the applicant claims that she paid the purchase price in full and the respondent has no reason to cancel a valid agreement of sale signed by the parties. She vehemently asserted that she paid the purchase price to respondent's wife, who generated the proof of the payments. Although no such proof was produced before me, I am inclined to take the view that the assessment of such evidence will be appropriately done in the main cause. Furthermore, I observe that the respondent has not been consistent in his case. At one point, he argued that he never sold the property to the applicant. That position is not in sync with his other version that the agreement was cancelled for breach, since payments were not made in terms of the agreement. These issues can only be properly ventilated in the main matter and as indicated above. I am therefore satisfied that the relief sought ought to be afforded.

In the result I make the following order:

1. The application to set aside default judgment be and is hereby granted.
2. The court order dated 10 February 2021 entered as a default judgment against applicant in case number HC 1816/21 be and is hereby rescinded.
3. The applicant be and is hereby deemed to have filed her heads of argument dated 16 July 2021 under HC 1816/21 timeously and the matter is to proceed in terms of the rules.
4. Each party to bear its own costs.

Rubaya & Chatambudza, applicant's legal practitioners
Mugiya & Muvhami, respondent's legal practitioners