GLENIS MUWONWA
versus
KATT CONSTRUCTION (A DIVISION OF PLANNING AND DESIGN STUDIO CONSULTANTS (PVT) LTD
and
SIMON MUZENDA COOPERATIVE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 6 July 2021 and 12 July 2023

Opposed application

Mr *N Mugiya*, for the applicant
Mr *J Mugogo*, for the respondent

CHINAMORA J:

Background facts

This is an application for rescission in terms of r 63 of the old High Court rules 1971. The application is opposed. It bears giving the background to this matter so as to put the relief being sought in context. The applicant in this matter seeks to rescind an order of this court granted to the first respondent in the absence of the applicant on the 4 December in 2019. The default judgment is annexed to the applicant's founding affidavit as Annexure "A". Sometime in November 2019 the first respondent approached this court seeking to evict the applicant under HC 9065/19. The applicant was served with the application and filed their notice of opposition. Having been served with the same, the respondent proceeded to set the matter down on the unopposed roll and obtained an order for eviction which the applicant now seeks to rescind.

The applicant's case

The applicant avers that she was served with the application on 25 November 2019, and was unaware of any proceedings instituted against her. She then filed her notice of opposition,

and contends that, once that was before the court, the application became opposed. The applicant also argues that she only became aware that the matter had already been heard when she was served with a notice of removal by the Sheriff on 30 September 2020. Consequently, she seeks to the rescission of this judgment obtained in her absence. The applicant's submission is that she was never served with the notice of set down, hence she was not in willful default. In addition, the applicant maintains that she has good prospects of success on the merits. On the merits, the applicant states that when they obtained the order for eviction, the respondents relied on an order under HC4909/19, which has since been set aside by an order under HC 9316/19.

Thus, the applicant argues that, since the first respondent was declared to not be the lawful owner of stand number 4025 Simon Muzenda Housing Cooperative, the first respondent cannot seek the eviction of the applicant. Furthermore, the applicant contends that the agreement which the first respondent relied on was cancelled, which effectively means that the first respondent has no legal right to evict the applicant. Additionally, the applicant submits that there are material disputes of fact which cannot be resolved without resort to the hearing of oral argument, and the first respondent ought to have proceeded by way of a trial. On these grounds, the applicant submits that she ought be granted the relief of rescission of judgment, and be afforded the right to be heard fully on the merits.

The first respondent's case

The application is opposed. The first respondent raised the point *in limine* that the application was not properly before me as it had been filed out of the time permitted by the rules of

this court. However, I hasten to mention that at the hearing of this matter the first respondent abandoned the point in *limine* and conceded that the applicant be granted condonation for the late noting of the application for rescission of judgment. The first respondent's substantive opposition is as follows: Firstly, they aver that the applicant was served with the application on 7 November 2019 at 10:15, and they have attached certificates of service as annexures "B1"-"B2" to their opposing papers. The contention continues that, having been so served the applicant stood barred by 21 November 2019, and any papers filed after that time were not properly before the court. In fact, as far as the first respondent was concerned, there was no opposition to their application. This explains why the notice of set down was never served to the applicant.

The first respondent submits that the application must fail because the applicant was in willfull default, because she was aware of the application which had been served on her helper. On the merits, the first respondent avers that there are no prospects of success for the applicant. The argument put forward was that the eviction was based on the cancellation of the agreement. It was further argued that, contrary to the applicant's averments the agreement between the first and second respondents is still valid and extant based on an affidavit of the chairperson of the second respondent attached to the first respondent's opposing papers. The first respondent additionally argued that the applicant is in breach of the same lease they are relying on because she has not paid the requisite fees that would entitle her to cling on to the same.

The applicable law

The law on rescission is a well-beaten path and easy to understand. In the case of *Mushoto* v *Mudimu & Anor* HH-443-13, the court said 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 of the High Court Rules, or r 449 (1) (a), or in terms of the common law. An applicant is at liberty to elect to use whichever one of those three vehicles best suits the circumstances of their case. Whichever route he chooses, the court would have to consider the question of length of time that has elapsed since the judgment sought to be rescinded was granted. To qualify for relief under r 63, a litigant must show that:

1. The judgment was given in the absence of the applicant under these rules or any other law;
2. The application for rescission was filed and set down for hearing within one calendar month of the date when the applicant acquired knowledge of the judgment;
3. Condonation of late filing has been sought and obtained where applicant fails to apply for rescission within one month of the date of knowledge of the judgment.
4. There is "good and sufficient cause" for the granting of the order.

The term "good and sufficient cause" has been interpreted to mean that the applicant must
(a) give a reasonable and acceptable explanation for his 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 has a *bona fide* defense to the plaintiff's claim.

On the other hand, to qualify for relief under r 449 (1) (a) a litigant must show that: the judgment was erroneously sought or erroneously granted; the judgment was granted in the absence of the applicant or one of the parties; and the applicant's rights or interests were affected by the judgment. Finally, in order to qualify for relief in terms of the common law power afforded to the court to rescind its own judgments, a litigant must show that, having regard to all the circumstances of the case, including the applicant's explanation for the default, it is a proper case for the grant of the indulgence.

Analysis of the case

The starting point is that there was an opposition on record at the time default judgment was granted against the applicant. The record shows that the applicant filed her opposition on 25 November 2019, and that the first and second respondents were served with same. They were aware of it, regardless of the fact that it was filed outside the *dies induciae*. That fact made the opposition an irregular pleading. The respondents were then enjoined to treat that irregular opposition as follows: As clarified by GILLESPIE J in *Founders Building Society* v *Dalib (Pvt) Ltd & Ors* 1998 (1) ZLR 526, the respondents' legal practitioners ought to have advised the applicant of the irregularity of their opposition. Consequently, the respondents would have become entitled to seek either default judgment or to strike out the irregular pleading. In applying for default judgment, as was done, the respondents were supposed to inform the court of the irregular opposition, and give reasons why the court should exercise its discretion in their favour. It is noteworthy that, GILLESPIE J stressed that the preferable course was an application to strike out the applicant's irregular opposition, coupled with a prayer for default judgment. This was not done. This was a judgment of two judges of this court and, as such, it is binding on this court.

The obvious error is that the above course was not followed. This court was not alerted to the existence of the applicant's opposition on record. Its irregularity would have activated the approach suggested in *Founders Building Society* v *Dalib (Pvt) Ltd & Ors supra.* The fact that this was not done means that default judgment was erroneously sought and granted. It must be

vacated. I believe that the applicant has made a case for relief under r 449 (1) (a) of the High Court Rules and, as such, I make the following order:

Disposition

In the result, I grant the following order:

1. The application be and is hereby granted.
2. The default judgment granted by this court under HC 9065/19 on 4 December 2019 be and is hereby rescinded.
3. The applicant shall file and serve her opposing papers under HC 9065/19 on the first and second respondents within five (5) working days of the date of service of this order.
4. Thereafter, the application under HC 9065/19 shall proceed in terms of the High Court Rules.
5. Each party shall bear its own costs.

Mugiya and Muvhami Law Chambers, applicant's legal practitioners
John Mugogo Attorneys, respondent's legal practitioners