GOSPEL OF GOD CHURCH INTERNATIONAL,1932
versus
MAGAGA MASEDZA
and
RUEBEN MASEDZA
and
RUSAPE TOWN COUNCIL
and
ZIMBABWE REPUBLIC POLICE
and
COMMISSIONER GENERAL OF POLICE
and
MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 9 October 2023 and 13 October 2023

Urgent Chamber Application

Adv *S M Hashiti*, for the applicant
Adv *L Uriri*, for first and second the respondents
Mr *S Murondoti*, for the third respondent

CHINAMORA J:

Introduction

Before me are three matters which were consolidated by agreement of the parties so that they could be heard and determined at the same time. The first was an application for rescission of a default judgment obtained by the first and second respondents against the applicant under HC 1769/23. The order obtained in default was for the exhumation of the remains of the late Madzibaba Johanne Masowe to be exhumed from a shrine belonging to the applicant. Also as part of the consolidated records was an urgent chamber application by the applicant for stay of

execution of order granted in HC 1769/23. The final matter was an urgent chamber application by the first and second respondents seeking an order to enforce the default judgment.

On the date of hearing, I heard the application for rescission of judgment first, as the parties agreed that a decision on this application would be dispose of the need to hear the urgent chamber application for stay of execution. The background to this hearing can be captured as I will now outline. On 10 May 2023, the first and second respondents obtained an order in default of appearance by the applicant. In its founding affidavit, the applicants avers that it was not aware of the application which gave rise to the default order. The applicant says that, on 18 March 2023, the clerk of the law firm, *Mushangwe & Company*, went Gandanzara Shrine in Rusape to serve a court application that had been filed in the High Court by the first and second respondents. Additionally, the applicant states that the application was served on one Nerrious Maturure ("Maturure") who was at the shrine at that time. Indeed, the record shows that Maturure signed confirming receipt of the documents filed under HC 1769/23. Further to this, the applicant asserts that Maturure was made to sign for two separate applications, namely, the application under HC 1769/23 and another one for consequential relief under HC 1785/23 (which he was not given). As a result of this, the applicant deposed that it only managed to file opposing papers and subsequent pleadings in HC 1769/23, since it was the only matter they were aware of. The applicant is categorical that, although HC 1785/23 was signed for, it was never delivered.

In addition, the applicant asserts that it only became aware of the order when it received a letter that the first and second respondents, advising that they were proceeding with execution. It is the applicant's case that had the application in HC 1785/23 also been served, opposition papers would have been filed. The applicant then filed the application for rescission of judgment which is now before me, as I have already said. It is during the pendency of the hearing of the rescission application that the applicant filed an urgent chamber application for stay of execution of the order under HC 1796/23. This application is one of the three applications before me. The first and second respondents raised some points in *limine.* The first point is that the application was file in terms of Rule 29 of the High Court Rules, yet the requirements of this Rule were not complied with, in that no error has been demonstrated to warrant this court setting aside the order granted in HC 1796/23. The second objection is that the applicant is not properly before the court

as it is a common law *universitas* and cannot institute proceedings on its own. Finally, the first and second respondents raised the objection that the applicant's founding affidavit is constituted by hearsay evidence and/or was based on falsehoods, and should not be accepted by the court. Let me consider these preliminary points in turn, starting with the first one.

The points *in limine*

The point raised by the first and second respondents is that application for rescission of judgment does not comply with Rule 29 of the High Court Rules. It is imperative for me to examine this Rule in order to determine the validity or otherwise of this objection. In this respect, Rule 29 provides as follows:

> "**Correction, variation and rescission of judgments and orders**
>
> (1) The court or a judge may, in addition to any other powers it or he or she may have, on its own initiative or upon the application of any affected party, correct, rescind or vary—
>
> (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; or S.I. 202 of 2021 1131
>
> (b) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
>
> (c) an order or judgment granted as a result of a mistake common to the parties.
>
> (2) Any party desiring any relief under this rule may make a court application on notice to all parties whose interests may be affected by any variation sought, within one month after becoming aware of the existence of the order or judgment.
>
> (3) The court or a judge shall not make any order correcting, rescinding or varying an order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed".

To unpack this Rule in simpler language, in order to qualify for relief a litigant must show that:

(1) the judgment was erroneously sought or erroneously granted.
(2) the judgment was granted in the absence of the applicant or one of the parties;
(3) the applicant's rights or interests were affected by the judgment.

See *Mutebwa* v *Mutebwa and Anor* 2001 (2) SA 193.

In *casu*, the applicant error which the applicant alleges and relies on is that the confirmation of service signed by Maturure was for the wrong case. In this regard, the argument

is that a wrong certificate of service was used to obtain the default order in HC 1769/23. In fact, the applicant goes so far as to content that the default judgment was fraudulently obtained. The substance of their case is that the copy of the certificate of service that is on record pertains to an application for a declarater, and should not have been the basis upon which a default judgment was obtained. It is for this reason that the applicant submits that it brought the application for rescission of judgment under Rule 29. Adv *Hashiti*, for the applicant contended that judgment was erroneously sought and granted, because a misrepresentation was made that the applicant was in willful default because service was properly effected. Counsel added that, in terms of Rule 59 (6) and Form 23 of the High Court Rules, the application advises a recipient of his rights to file opposing papers within the *dies induciae* given in the application, as well as the consequences of not acting. As the applicant maintains that no service of the application under HC 1785/23 was made, the court was urged to find that the default judgment under HC 1769/23 was obtained by fraud.

For the first and second respondents, *Adv Uriri* argued that the applicant's founding affidavit never said that there was no service effected on the applicant. The respondents' submission is that it is only in the answering affidavit that the applicant for the first introduced this issue. Hitherto, the applicant had averred that the application was served, but the person who effected service retrieved the original application. In addition, the first and second respondents argue that there was no error or fraud established by the applicant, because the certificate of service that was used to obtain judgment was attached to opposing papers. I note that *Mhungu* v *Mtindi* 1986 (2) ZLR 171 (SC) entitles me to look at records of this court and consider their contents where those records are relevant to the matter before me. Indeed, I looked at the record in which the default judgment was granted, Contrary to the case put forward by the applicant, the certificate does not support the applicant's allegation of fraud or that it did not relate to the application in respect of which a judgment was granted. In fact, the certificate confirms that on 18 February 2023 at 5.30 pm, a *Court Application for Consequential Pursuant to a Declarater* was served on Mataruse at the applicant's Gandanzara Shrine.

Analysis of Rule 29 against the facts

Having had the benefit of examining the certificate of service in the default judgment record, I must now consider whether the point in *limine* based on Rule 29 can be sustained. The issue of the basis for rescission under Rule 29 has been extensively considered by our courts in the context of Rule 449 of the old High Court Rules. In this respect, in *Dhlamini & Ors v Ncube & Ors* HH 11-18, MATHONSI J explained the import of Rule 449 (now Rule 29) as follows:

> "It cannot be doubted that an error exists where a judgment or order has been granted when the judge who granted it was unaware of a relevant fact. In deciding an application for rescission of this nature the court is not confined to the record of proceedings. This is because the wording of rule 449 (1) (a) allows a party seeking rescission of a default judgment to place before the court all facts which were not before the court which granted the default judgment. See *Mushosho* v *Mudimu and Another* 2013 (2) ZLR 642 (H) at 652G". **[My own emphasis]**

Let us recall that the applicant's argument is that, in granting default judgment in HC 1769/23, the court made the error of not appreciating that a certificate of service unrelated to the matter before it was used to obtain judgment. On the documents before it, which included the certificate of service which I referred to above, no error can be imputed on the part of the court. It was apparent from the certificate of service supporting the application for a default judgment that the application had been served on the applicant in *casu*. From the decided cases, Rule 29 allows a party seeking rescission of judgment to place before the court all facts which were not before the court which granted default judgment. Apart from the allegation that a wrong certificate of service was produced, and the court was moved by it to grant the default judgment, no other facts have been placed before me. In the circumstances, I am unable to fault the court which granted the default judgment. Additionally, I have considered the argument that, because the application was not served with the application which gave rise to the default judgment, the error is that it was not alerted to the *dies induciae* and the consequences of failing to act. However, having seen the certificate of service which was before the court in HC 1769/23, the argument of failure to comply with Rule 59 (6) and Form 23 is untenable.

Before I make my conclusion on non-compliance with Rule 29, it is relevant to consider the applicant's argument that, even if Rule 29 was not the proper rule to found the application, the court can still deal with the application as one under Rule 27. This rule provides as follows:

> "(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has knowledge of the judgment for the judgment to be set aside …
>
> (3) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute the action …"

It was argued for the plaintiff that the court can hear this application under Rule 27 based on two judgments of the Supreme Court, namely, *Mukambirwa & Ors v Gospel of God International 1932* SC 8-14 and *Barbarosa de Sa* v *Barbarosa de Sa* SC 34-16. I did not read the Mukambirwa matter as being authority for the proposition that a party can file a Rule 29 and the argue that if the requirements of Rule 29 are not satisfied it should be heard as a Rule 27 application. The requirements in the two rules are different, and a party relying on lack of willful default must certainly demonstrate its absence. The applicant's case makes it difficult to relate to it in terms of Rule 27, because of the certificate of service confirming service on Mataruse.

I also observe that in *Barbarosa de Sa v Barbarosa de Sa supra,* GUVAVA JA made the point that a judge dealing with a Rule 63 (now Rule 27) may set aside a judgment granted in error if the facts show that. The Supreme Court did not confirm the argument by Adv *Hashiti*. On the contrary, the following passage from the *Barbarosa de Sa case supra* seals the fate of the applicant's argument:

> "The question which remains to be determined is whether the considerations for r 63 are similar to the consideration to be made in an application for rescission in terms of r 449 (1) (a). This point was discussed in *Munyimi v Tauro* SC 41/2013 where the court stated that: "Further it is also established that once a court holds that a judgment or order was erroneously granted in the absence of a party affected, it may correct, rescind or vary such without further inquiry. There is no requirement that an applicant seeking relief under r 449 must show "good cause" – *Grantually (Pvt) Ltd & Anor* v *UDC Ltd* 2001(1) ZLR 361at p 365, *Banda v Pitluk* 1993 (2) ZLR 60 (H), 64 F-H; *Mutebwa* v *Mutebwa & Anor* 2001 (2) SA, 193, 199 I-J and 200 A-B."

In conclusion, I am satisfied that the point in *limine* that the application for rescission of judgment is not properly before the court on account of non-compliance with Rule 29 has merit. I am inclined to uphold this point, and this conclusion makes it unnecessary to consider the other preliminary points of to make a determination on the merits of the case. In addition, let me state that, as I have found that there is no application before me, it necessarily means that the applicant's urgent chamber application falls away since it was hinging on the pendency of the

main application for rescission of judgment. On the issue of costs, the usual rule is that they follow the result. The first and second respondents have asked for costs on the attorney and client scale. However, in the exercise of my discretion I have decided to award costs on the ordinary scale, since a party should not be penalized for taking a different position on the law. (See *Netone Cellular (Pvt) Ltd v Reward Kangai* HH 441-19). Lastly, I need to comment on the papers filed by the third respondent, which have been objected to by the first and second respondents. While Mr Murondoti had initially argued that the papers were filed in terms of Rule 60 (8) of the High Court Rules, on engagement with the Court, he conceded that this rule does not allow a party to willy nilly file any document that the party feels may assist the Court. That concession was properly made since it is clear from a reading of the rule that the decision to call any party to testify or provide information is one made by the judge. In light of this, I accede to the first and second respondents' request to have the document expunged from the record.

Disposition

In the result, I grant the following order:

1. In HC 6087/23, the point in *limine* that this application is not properly before the court be and is hereby upheld.
2. The application in HC 6087/23 be and is hereby struck off the roll.
3. The urgent chamber application in HC 6141/23 be and is hereby removed from the roll.
4. The document filed by the third respondent in HC 6087/23 be and is hereby expunged from the record.
5. The applicant shall bear the first and second respondents' costs on the ordinary scale.

Veturas & Samukange, the applicant's legal practitioners
Mushangwe & Company, the first and second respondents' legal practitioners
Absolom Attorneys at Law, respondents' legal practitioners