

NEVER PAVARI
versus
PRUDENCE CHIROVA
and
DELATFIN CIVIL ENGINEERING (PVT) LTD
and
FELIX MUNYARADZI

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 5 June & 26 October 2023

Opposed Application

T Machaka, for the applicant
A Masango, for the 1st respondent
N Mupure, for the 2nd & 3rd respondents

MANGOTA J: I heard this application on 5 June, 2023. I dismissed it with costs.

On 3 August, 2023 the applicant wrote requesting me to give him reasons for my decision. These are they:

In March, 2022 the first respondent successfully applied, through the urgent chamber book, for a provisional order in terms of which he interdicted the applicant from carrying out construction work at Stand number 3914, Westgate, Sandton, Harare as well as evicting the applicant from the property. He filed his suit under HC 1696/22. He sued the applicant, the second and third respondents.

The court confirmed the provisional order on 11 May, 2022. The confirmation of the provisional order constitutes the applicant's cause of action. He applies for rescission of the confirmed order. He applies under R 29(1)(a) of the High Court Rules, 2021. He claims that the default judgment was erroneously sought and granted in the absence of service upon him of the provisional order which the court entered in favour of the first respondent. He moves me to grant his application as per his prayer which is contained in his draft order.

The first respondent opposes this rescission application. His statement is to the contrary. He avers that the provisional order was confirmed not in the absence, or without the knowledge, of the applicant. He asserts that the provisional order was obtained after TAGU J's clerk had called and advised the parties to the case that the judgment which the judge had

reserved was to be delivered in the motion court. He states that all the parties were made aware of the date of the handing down of the judgment and were requested to collect the provisional order and the judgment. He insists that the applicant was aware, or ought to have been aware, of the provisional order which, according to him, was incorporated in the judgment which granted the provisional order. He avers that, on 4 April 2022, his legal practitioners served the provisional order upon the applicant's legal practitioners who, in a letter dated 5 April 2022, wrote advising that the applicant would abide by the terms of the provisional order pending confirmation or discharge of the same. He moves me to dismiss the application with costs which are at attorney and client scale.

Rule 29(1)(a) is, in substance, the equivalent of the repealed R 449(1)(a) of the rules of this court. The rule in terms of which this application is filed offers an avenue to me to revisit my order and, where warranted, to make substantial changes to it in the interest of fairness and justice. It reads as follows:

“(1) The court or a judge may....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”.

For the applicant to succeed in an application of the present nature, he (includes she) must allege and prove, on a balance of probabilities, that:

- i) the order or judgment was made in his absence- and
- ii) the error which occasioned the issuance of the order or judgment is that of the court and not that of the applicant or the respondent.

It is, for instance, an error on the part of the court to enter default judgment against a litigant who timeously filed his notice of appearance to defend which notice the court either overlooked or did not, for some reason or other, become aware of.

Where the court becomes aware of the error which it has made, the law, as envisaged in the rules of court, allows it to revisit its order or judgment, on its own volition or upon an application by the applicant who is adversely affected by the erroneous order or judgment. The law, in short, allows the court or judge to correct, rescind or vary such order or such judgment.

The meaning and import of the rule are spelt out in a clear and succinct manner in *Tiribhoyi v Jani & Another*, 2004 (1) ZLR 470. The rule, according to the case authority, was designed to allow a court or a judge to revisit his order or judgment which he erroneously

issued. He can, in terms of the rule, correct, rescind or vary his judgment or order without being seen to have violated the *functus officio* principle.

The Supreme Court placed further clarification on the rule when it stated in *Munyimi v Tauro*, 2013 (2) ZLR 291 (S) that the rule constitutes an exception to the generally accepted principle which is to the effect that, once a final order has been made, correctly reflecting the true intention of the court, that order cannot be altered by that court.

The rule is therefore an exception to the *functus officio* principle which lies at the center of our justice delivery system. The principle is that, once a judgment has been entered for, or against, a party it cannot be altered by the court which made it but by some superior court on appeal or review or by the same court in an application for rescission of default judgment such as the present one.

The rule is born out of the fact that judges, like any human beings which are on planet earth, are not infallible and that, because they are fallible, they must be accorded some latitude to, at times, correct, rescind or vary the orders or judgments which they make in the course of their judicial work.

So much for the rule and the mischief which it seeks to address. The question which begs the answer is: did the judge who confirmed the provisional order on 11 May 2022 confirm it erroneously or correctly. Was the confirmation, in other words, erroneously sought and granted to the first respondent. The answer to the question is in the negative. The judge did not, in other words, confirm the provisional order in error. He (includes she) looked for the applicant's notice of opposition to the confirmation or discharge of the provisional order. He found no such notice of opposition and he confirmed the provisional order as he correctly did.

The reasons which the applicant advances for not having filed his notice of opposition to the confirmation or discharge of the provisional order are most unconvincing. His claim which is to the effect that the default judgment was erroneously sought and granted in the absence of service upon him of the provisional order is without substance. It is devoid of merit for the following reasons:

The first of those reasons relates to the service of the urgent chamber application upon the applicant. The trite position of the matter is that the applicant received the application and he, in turn, engaged his legal practitioners of record to assist him to prepare as well as file his opposing papers to the application.

The applicant was therefore aware, as far back as the 18th of March, 2022 -the date that he filed his notice of opposition to the first respondent's urgent application-that, in the event of the provisional order being entered against him and others and that, if he intended to oppose confirmation of the provisional order, he had to file a notice of opposition in Form No 29 B.... within 10 days after the date on which the provisional order and annexures are served upon him. He also knew that, if he did not file an opposing affidavit within the period which is specified in para (4) of the face of the provisional order, the application would be set down on the unopposed roll for confirmation of the provisional order. Reference is made in the mentioned regard to the face of the provisional order which is at p 43 of the record, specifically to para(s) (3) and (4). If the applicant did not read and acquaint himself with those paragraphs when he received the urgent chamber application, then he has no one to blame but himself. He cannot blame anyone for his own failures.

It is hair-splitting for the applicant to suggest, as he is doing, that the first respondent served a copy of TAGU J's judgment upon his legal practitioners, on 4 April 2022, but did not attach the provisional order to the same. The attachment of the provisional order on to the judgment is neither here nor there. This is a *fortiori* the case when regard is had to the fact that TAGU J's judgment contains the provisional order. There was, in the circumstances of the case, no need on the part of the first respondent to have attached the provisional order onto the judgment which contained the same.

The applicant is not being candid with me when he states, as a reason for not having filed his notice of opposition to the confirmation of the provisional order, that the first respondent did not serve the provisional order upon him. Annexures C and D which he attached to his application show the naked lie which he is telling.

Annexure C appears at p 32 of the record. The annexure is a letter which the first respondent's legal practitioners wrote to the applicant's legal practitioners on 31 March, 2022. It reads, in part, as follows:

"As you are aware, we appeared before Justice TAGU who reserved judgment. Please, find attached provisional order"

In a letter which is dated 5 April, 2022 and in response to the letter which the first respondent wrote to the applicant through his legal practitioners on 31 March, 2022 the applicant's legal practitioners wrote, in part, as follows:

"Our client has taken note of the judgment by the Honourable Justice TAGU which judgment granted the provisional order pending the confirmation or discharge of the same.

In the interim, our client will abide by the terms of the provisional order pending confirmation or discharge of the same.”

The applicant cannot, by any stretch of imagination, be said not to have been unaware of the provisional order. He, if anything, was very much aware of the same. His legal practitioners were candid enough to state that the applicant had taken note of the judgment by Justice TAGU which judgment granted the provisional order. They were also candid to advise the first respondent, through the latter’ legal practitioners, that the applicant would abide by the terms of the provisional order.

It is inconceivable that the applicant’s legal practitioners did not advise him of the birth of the provisional order but also what it entailed. They could not have written, as they did, that the applicant was opposed to the granting of the final relief if he did not instruct them to write as such. His instruction to them to oppose the granting of the final relief evinces his awareness of the provisional order. He became aware of the fact that the first stage of the provisional order had been considered and determined against him and others. He became alive to the fact that he had to act in respect of the next stage by filing his notice of opposition to the confirmation or discharge of the provisional order. He, for some unexplained reason, failed to file his notice of opposition as he should have done.

It is a trite law of practice and procedure that an applicant for rescission of default judgment should allege and prove, on a preponderance of probabilities, that the default which occasioned the judgment which operates against him was not wilful on his part. Where he fails to show that the default by him was not wilful, his application for rescission of judgment cannot succeed.

Wilful default occurs when a party, with full knowledge of service upon him or set down of the matter and of the risks attendant upon default, freely takes a decision to refrain from appearing: *Hutchison v Logan*, 2001 (2) ZLR 1 (H); *Zimbabwe Banking Corporation Ltd v Masendeke*, 1995 (2) ZLR 400 (SC).

The definition of ‘wilful default’ as enunciated in the cited case authorities, is *in sync* with the conduct of the applicant. He became aware of the provisional order. He refrained from opposing confirmation of the provisional order. He, in fact, made every effort to mislead me into believing that the provisional order was erroneously sought and granted when it was not. He has no explanation at all for his inaction to the confirmation or discharge of the provisional order. His statement which is to the effect that he filed a notice of opposition to the urgent chamber application in terms of which he insists the case should

have proceeded as opposed shows the applicant's lack of understanding of the law of practice and procedure. He cannot have me believe that the notice of opposition which he filed on 18 March 2022 towards the birth, or otherwise, of the provisional order should have served as his notice of opposition to the confirmation or discharge of the provisional order. He is well advised, if his legal practitioners did not care to, that urgent applications operate on a two-pronged approach. These are:

- i) the urgent application which, when served upon the respondent, enjoins the latter to oppose it, if such is his intention – as the applicant did on 18 March, 2022-and
- ii) confirmation or discharge of the provisional order – where such has been entered – in terms of which the respondent who intends to oppose such must file the second notice of opposition as the applicant *in casu* should have done but did not do.

The application is misplaced. It is premised on the wrong rule of court. The applicant was, and remains, in wilful default. His application cannot succeed. It is, in the result, dismissed with costs.

G S Motsi Law Chambers, applicant's legal practitioners

Muronda, Malinga, Masango Legal Practice first respondent's legal practitioners

Machiridza Commercial Law Chambers, second & third respondent's legal practitioners