ARETHA MANASE
versus
ANEX INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 25 July & 12 September 2023

Opposed Application

T S T Dzvetero, for the applicant
T Magwaliba, for the respondent

CHIKOWERO J:

INTRODUCTION

1. This is an application for the setting aside of a default judgment. The application is made in terms of s 27(1) of the High Court Rules, 2021. In the alternative, the applicant seeks the rescission of the default judgment on the basis that it was erroneously granted in her absence. The alternative cause of action is grounded on s 29(1)(a) of the High Court Rules, 2021 ("the High Court Rules")

GOOD AND SUFFICIENT CAUSE

2. Section 27(2) of the High Court Rules reads as follows:

> "(2) 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, on such terms as to costs and otherwise as the court considers just"

3. The concept of good and sufficient cause has always been a requirement for the setting aside of a default judgment in this and other jurisdictions. See High Court Rules, 1971 R 63(1) and (2) and the long line of cases in which that principle was interpreted and applied. The cases include *Songore* v *Olivine Industries (Private) Limited 1988* (2) ZLR 210 (SC);

Zimbabwe Banking Corporation Ltd v *Masendeke* 1995 (2) ZLR 400 (S*) and Chihwayi Enterprises (Pvt) Ltd* v *Atish Investments (Pvt) Ltd* 2007 (2) ZLR 89 (S*).*

4. Although making the point that *"sufficient cause"(or "good cause")* defies precise or comprehensive definition, since many and various factors require consideration by the court in an application for the rescission of a default judgment, the South African Supreme Court in *Chetty* v *Law Society*, Transvaal 1985 (2) SA 756 (A) acknowledged that in principle and in the longstanding practice of the courts in that jurisdiction two essential elements of "sufficient cause" for rescission of default judgment are:

    (a) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

    (b) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success.

    This has always been the legal position in Zimbabwe as demonstrated by case law in which the old R 63 was applied. I have already cited some of the pertinent Supreme Court judgments.

RESCISSION OF DEFAULT JUDGMENT GRANTED IN ERROR

5. Rule 449(1)(a) of the High Court Rules, 1971, provided for the rescission of a default judgment granted in error. The entire R 449 has now been repealed and substituted with s 29 of the current rules. The new feature in s 29 is the requirement that the application for rescission of a default judgment granted in error must be brought within one month after the affected party has become aware of the existence of the order or judgment. The repealed R 449 did not specify a time frame within which the application had to be brought.

6. If the court concluded that the judgment or order was erroneously granted in the absence of a party affected, it had the discretion to rescind that judgment or order without further enquiry. See *Grantully (Pvt) Ltd and Anor* v *UDC Ltd* 2000 (1) ZLR 361 (S). Put simply, all that the court was required to determine was whether the judgment or order was granted in error and in the absence of a party (the applicant) affected by that judgment or order. A Rule 449(1)(a) applicant was not required to show good and sufficient cause for rescission of a judgment or order granted in its absence.

7. I proceed on the basis that in a s 29(1)(a) application, all that the applicant is required to do is to show that judgment was granted in its absence, it is affected by that judgment and that the judgment was granted in error. Drawing from Grantully (supra), I am mindful of the fact that the applicant can place facts before me, which were not before the court which granted the judgment sought to be rescinded, in an endeavour to show that the judgment was granted in error.
8. I pause to record that I find it convenient to contemporaneously interrogate the main and alternative causes of action and, in that vein, dispose of the matter.

THE FACTUAL BACKGROUND

9. On 27 July 2022 the respondent, as plaintiff, issued summons and declaration, under case number HC 5024/22, against the applicant, who was then the defendant.
10. What was sought was the eviction of the applicant and all those claiming through her from occupation of premises called 6 Cannock Gardens, Cannock Road, Mount Pleasant, Harare; payment of arrear rentals in the sum of eighty-seven thousand five hundred South African Rand; holding over damages at the rate of seventeen thousand five hundred South African Rand per month from the date of summons to date of eviction and costs of suit on the legal practitioner and client scale.
11. The summons and declaration reflected the applicant's address for service as Tolgate Holdings (Private) Limited, 4 Fairman Close, Mount Pleasant, Harare.
12. In the declaration, the respondent pleaded that:
    (a) On 4 February 2019, the parties entered into a lease agreement in terms of which the applicant let its premises, known as Number 6 Cannock Gardens, Cannock Road, Mount Pleasant, Harare to the applicant.
    (b) The applicant would pay monthly rentals to the respondent, in the sum of seventeen thousand five hundred South African Rand, payable on or before the first day of each month.
    (c) Due to non-payment of rentals, the respondent demanded vacant possession of the premises from the applicant through a notice dated 28 April 2022.
    (d) This was followed up by two more letters demanding that the applicant vacates the premises by 31 May 2022.

(e) Despite the notice and several demands, the applicant failed, neglected and /or refused to pay arrear rentals and deliver vacant possession of the property, hence the respondent sought the relief that I have already set out.

13. On 5 August 2023 the Sheriff served the summons and declaration on the applicant at Tolgate Holdings (Private) Limited, 4 Fairman Close, Mount Pleasant, Harare. He did this by affixing copy of the summons and declaration to the black sliding gate after hooting and knocking without eliciting any response. The service was effected at 10:14hours.
14. On 30 August 2022, Stuart Hay, the respondent's director, deposed to an affidavit of evidence on behalf of the respondent. He, in that affidavit, said the lease agreement was oral. He attached a Whatsapp communication addressed to him by the applicant, dated 4 February 2019, wherein the latter made a counter-offer to increase the monthly rental to R17 500, payable in South Africa. I think it useful to set out that Whatsapp message in full:

> "Aretha Manase
>
> 4 February 2019
>
> Hi Stuart, the Zim position is too fluid and prevents us from planning and budgeting adequately. The figures you have mentioned above require us to make an outlay of over $5000. In view of our current rental this is an excessive increase. We therefore propose to pay you R17 500 in SA every month. This will help us to be consistent because the Zim logistics are a nightmare at present. Let me know your thoughts and we will take it from there"

15. To the affidavit of evidence was attached copy of the deponent's message, dated 28 April 2022, to the applicant. It reads:

> "Aretha Manase
>
> 28 April 2022
>
> Afternoon Preston and Aretha,
>
> As discussed via Whatsapp above, I am seriously concerned about the rental amount due on 6 Cannock Gardens. To date, we are outstanding the months of February, March and April, with May due in the next few days before month-end. I have been actively chasing up arrears since 10th February and to date have not received payment. In light of this, and very sadly I would like to let you know of my intention to terminate the lease agreement should funds not be received by Saturday 30th April 2022. This should be for the four months February, March, April and May 2022. I am happy to give 30 days'

> notice, so the premises should be vacated by 31st May 2022. Thank you for your understanding."

16. This message was met with the following response from the applicant:

> "Hi Stuart, I have receive your email. I hope to have good news timeously"

17. To which Stuart Hay, for the respondent replied:

> "Thank you Aretha, I know you are good people, I just can't carry on like this so hope payments can be made."

18. The applicant reassured Hay:

> "I understand I will be in touch."

19. On 6 May 2022 Hay sent his message to the applicant:

> "Dear Preston and Aretha, unfortunately no rental payments have been received as per the set deadline being yesterday, Thursday 5th May 2022. To date, you are in arrears for the months of February, March, April and May, which we can no longer sustain. As communicated in numerous WhatsApp messages, we are terminating the lease agreement, effective immediately. Please could I ask that the premises is vacated by end of this month being 31st May 2022."

20. The previous day, Hay send an email to the applicant the contents of which reads thus:

> "To: 'Aretha Manase' arethaman@gmail.com; pgoredema@tolgateholdings.co.zw
>
> Morning Preston and Aretha,
>
> I just wanted to confirm that the termination of our lease agreement still stands as per email and WhatsApp messages dated 28/April 2022, 06 May 2022 and 09 May 2022.
>
> I have received no written and signed commitment that a payment plan is being made, and have absolutely no assurance that the arrears will be brought up to date.
>
> Without this, I am unable to extend your tenure at number 6 Cannock Gardens, and as mentioned before I would appreciate it if the Unit were vacated no later than 31st May 2022.
>
> Many thanks.
> Stuart."

21. The court application for default judgment was set down on the unopposed roll. Having perused the same, in particular the affidavit of evidence, annexures, summons, declaration,

return of service and draft order and heard counsel, the court, on 14 September 2022, granted default judgment.

DISPOSITION

22. I agree with Mr *Magwaliba* that the applicant has failed to give a reasonable and acceptable explanation for not entering an appearance to defend the main matter.
23. In entering into a written lease agreement in respect of the same premises for the period 1 August 2016 to 31 July 2017, the applicant chose her address for service as c/o Tolgate Holdings (Pvt) Ltd, 4 Fairman Close, Mount Pleasant, Harare. The respondent chose the leased premises as its address for service. In terms of para 16.1 of that lease agreement the parties agreed that they could change their respective addresses for service by written notice to the other.
24. I am aware that the written lease agreement expired. But the correspondence between the parties, which I have referred to in extensor, satisfies me that the applicant remained in occupation of the same premises initially as a statutory tenant before the parties entered into the oral lease agreement on 4 April 2019 on a monthly rental of R 17 500.
25. In her founding affidavit, the applicant neither alleged nor proved that at the time that the summons and declaration was served Number 4 Fairman Close, Mount Pleasant, Harare had ceased to be her address for service. She neither alleged nor proved that there was nobody occupying those premises and that therefore no responsible or other person ever saw the summons and declaration and that nobody brought the same to her attention. In terms of 15(13)(i)(ii) of the High Court Rules, it is sufficient service for the Sheriff, after diligent search at an address, to affix copy of the summons and declaration at a conspicuous position at the address for service. The Sheriff hooted and knocked at the black sliding gate. Neither the applicant nor a responsible person responded to those efforts. The Rule in question, in those circumstances, allows the Sheriff to effect service in the manner that he did.
26. That the Sheriff did not effect service of the summons and declaration at the leased premises does not render such services as was effected defective. I have already observed that the party which chose the leased premises as its address for service, in terms of the expired lease agreement, was the respondent. What this means in the peculiar circumstances of this matter is that service of the summons and declaration at that address for service would have

been tantamount to service at the respondent's own address for service, which would equate to service on the respondent. It could not have been the intention of the makers of the rules, to wit, that a plaintiff should cause the Sheriff to serve summons and declaration on the plaintiff itself.

27. It must not be forgotten that the applicant never suggested, in the founding affidavit, that she either gave notice to or otherwise informed the respondent, either during the currency of the written lease agreement or after it had expired, that its address for service had changed from Number 4 Fairman Close, Mount Pleasant Harare to some other address.
28. Indeed, the applicant deliberately decided to avoid commenting on that which she had to confront in this matter in so far as service of process in the main matter is concerned. The default judgment was granted on the basis that the applicant had been served with the summons and declaration on 5 August 2022 at Tolgate Holdings (Pvt) Ltd, Number 4 Fairman Close, Mount Pleasant, Harare. The manner of such service is by now, clear. Instead of alleging and proving that she no longer had any connection with this address for service, that nobody occupied those premises and, if that was not the case, that those who did so did not know where the applicant could be found for service of court process to be effected on her, what does the applicant say? She says, in para 7 of her founding affidavit:

> "7. On a date unknown to me, the respondent issued summons in this Honourable Court for my eviction in HC 5024/22. I have since uplifted a copy of the summons and declaration, copies of which are attached hereto as Annexure "D". These summons were not served on me or otherwise brought to my attention. I had to run around to uplift the record at the High Court Registry and that is when I discovered that there was a return of service indicating that the service had been effected by affixing the summons and declaration at number 4 Fairman Close, Mount Pleasant yet respondent was aware that I could be served at the premises which are the subject of the lease agreement. See Annexure 'E'."

29. The applicant deposed to the founding affidavit on 18 October 2022. The summons and declaration was served on 5 August 2022. At the time that the applicant made her deposition she knew that the summons and declaration had been served at Number 4 Fairman close, Mount Pleasant in Harare. She knew when and how such service had been effected. She knew that the court had been satisfied that such service was good, hence it had granted the application for default judgment. Despite this knowledge, she avoided addressing the issue of service on the day and at the place at which such was effected. I

think it would have been the easiest thing in the world for the applicant to allege and prove, in her founding affidavit, that the summons and declaration was not brought to her attention because there was nobody who brought the existence of the process to her attention. That she chose not to attack the goodness and sufficiency of the service actually effected means that there is no positive evidence to rebut the presumption of regularity of the return of service, which return is in the prescribed format: See *Gundani* v *Kanyemba* 1988 (1) ZLR 226 (S) and *T M Supermarket (Private) Limited* v *Avondale Holdings (Private) Limited and Anor* SC 37/17.

30. An alternative basis exists for upholding the regularity of service of the process effected on 5 August 2022. In opposing the application, the respondent pointed out that Number 4 Fairman Close, Mount Pleasant, Harare was also the applicant's place of business or employment at the time that service of the process was effected. This evidence was never controverted. Instead, in a lengthy statement the applicant said in her answering affidavit:

> "AD PARA 5-13
> 2. What is important for purposes of the application for rescission of default judgment is whether or not the respondent served me with the summons and declaration in the main matter. The answer is in the negative. When I entered into the initial and cancelled lease agreement, my address for service therein was 4 Fairman Close, Mount Pleasant. However when this agreement was cancelled and when the new verbal agreement came into being, no discussion was held as to the parties addresses for service.
>
> 3. Respondents is not being candid with the court in averring that my address for service is 4 Fairman Close when its legal practitioner, Mr *Isaac Manikai*, on or about 27 June 2022, attended at 6 Cannock Gardens, Mount Pleasant to serve me with some acknowledgment of debt which they had attempted to serve me at 4 Fairman Close and was received by a caretaker, who knew my proper address for service, namely 6 Cannock Garden, Mount Pleasant, the property in dispute. I clearly indicated to the said legal practitioner that my address for service was 6 Cannock Gardens and not 4 Fairman Close anymore. I attach hereto a copy of the unsigned acknowledgement of debt which the respondent's legal practitioners, Messrs *Dube Manikai Hwacha* drafted and wanted me to sign and served me at 6 Cannock Gardens, which document clearly shows *ex facie* that they knew that my address for service is 6 Cannock Gardens, Mount Pleasant as Annexure "A". Mr *Manikai* attended 6 Cannock Gardens before the summons and declarations was issued and served. In the circumstances I aver that service at 4 Fairman Close was a deliberate attempt for me not to be aware of the summons and declaration.
> 4. The fact that the caretaker at 4 Fairman Close coincidentally knew where to find me did not make 4 Fairman Close my address for service considering the circumstances of this case and the fact that the respondent had proceeded to serve me with an acknowledgement of debt at 6 Cannock Gardens, Mount Pleasant. <u>That caretaker, at the</u>

> material time, had since left 4 Fairman Close and there was no one who could have brought the summons and declaration to 6 Cannock Gardens or make me aware of the same.(emphasis is mine)
>
> 5. I have not averred that service of the summons and declaration was improper for lack of personal service-no. My averment is that there was no service at all. There is a difference between not serving someone at all and not serving them personally. I am advised that though the service by affixing at the gate may be deemed as proper service in some instances, in this case, it is not applicable in the manner alleged by the respondent. I am further advised that the affixing of the summons at the wrong address can never suffice as service for purposes of the esteemed rules of this Honourable Court.
>
> 6. This shows the error which entitles me to the relief which I am seeking."

31. Nowhere in the foregoing long deposition did the applicant deny that Tolgate Holdings (Private) Limited Number 4 Fairman Close Mount Pleasant Harare was her place of business or employment at the time the summons and declaration was served. Everything else that the applicant said, which I have reproduced, is what should have been contained in the founding affidavit. It was not as if the allegation was made in the opposing affidavit, for the first time, that the applicant's address for service was c/o Tolgate Holdings (Private) Limited. Summons in the main matter was issued on 27 July 2022. The citation of the defendant, and her address for service, is telling. The face of the summons reads, in relevant part:

> "IN THE HIGH COURT OF ZIMBABWE — CASE NO 4024/22
> In the Matter Between
> ANEX INVESTMENTS (PRIVATE) LIMITED — Plaintiff
> And
> ARETHA MANASE — Defendant
> of Tolgate Holdings (Private) Limited, 4 Fairman Close,
> Mount Pleasant Harare."

32. At the foot of the summons, the Sheriff is directed to serve the summons on the applicant, indicated as the defendant, with the same address for service repeated. For good measure, the defendant's (applicant's) e-mail address is reflected.
33. The second paragraph of the declaration identifies the defendant, her status and the same address for service. So does the tail-end of that process. It adds another detail, being the defendant's (applicant's) mobile number. The pattern of citation of the applicant, as

defendant, and her address for service, is repeated in the respondent's affidavit of evidence in the main matter, deposed to on 30 August 2022.

34. An application stands or falls on the founding affidavit and the annexures thereto. See *Muchini* v *Adams & Anor* 2013(1) ZLR 67 (S). An applicant cannot make new allegations and set out new evidence in an answering affidavit in a bid to construct a new basis for an application which had already been respondent to in an opposing affidavit. If what I have reproduced as being part of the answering affidavit be the basis for complaining that the applicant did not see the summons, there was nothing precluding the applicant, in view of the contents of the summons, declaration, return of service and affidavit of evidence (all of which were before the applicant as she prepared her founding affidavit) from making these allegations and adducing the necessary evidence in her founding affidavit. In short, I have disregarded the offending portions of the answering affidavit in finding that the applicant has failed to place before me positive evidence to rebut the presumption of the regularity of the return of service in question.
35. This conclusion necessarily means that reliance on the return of service in granting the default was not an error on the part of the court.
36. On the merits, the applicant is without a *bona fide* defence which, *prima facie*, carries some prospect of success.
37. The correspondence between the parties, which I set out elsewhere in this judgment, can only mean one thing. The verbal agreement of lease, the basis of the law suit in the main matter, was entered into between the applicant and the respondent. That documentary evidence speaks for itself. I am aware that the applicant urges me to find a *bona fide prima facie* defence in her contention that the lease agreement upon which the main matter was predicated was entered into between the respondent and a South African company called Xylem Trading (Pty) Ltd. The applicant did not attach any supporting affidavit deposed to by a representative of that company. That all or some of the rentals were actually paid by Xylem Trading (Pty) Ltd, in South Africa, proves nothing. All that the respondent wanted was that the rentals agreed between it and the applicant, for occupation of the former's premises by the latter, be paid. Whether Xylem Trading (Pty) Ltd or indeed any other person paid those rentals does not translate, in my judgment, to a *bona fide prima facie*

defence as contended by the applicant. I do not agree with Mr Dzvetero that the present is an application which raises material disputes of fact incapable of resolution on the papers. It would be an insult to the intelligence of this court were I to find, in spite of the documentary evidence, that there is a *bona fide prima facie* defence which carries some prospect of success. See *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009 (2) ZLR 132 (H). See also, generally, *Zimbabwe United Passenger Company Limited* SC 13/2017 v *Packhorse Services (Pvt) Ltd* SC 13/2017.

38. I agree with Mr *Magwaliba* that, on the facts of this matter, it cannot be said that the rental payment arrangement was prima facie illegal. I put it in this manner because the applicant herself did not argue that the lease agreement itself was illegal. I am not required, in the circumstances, to make any pronouncements on whether the lease agreement itself was illegal. I must, as I do, confine myself to decide whether there is a *bona fide prima facie* defense carrying some prospect of success in the argument that the payment agreement is prima facie illegal. To begin with, it was neither alleged nor contended that the source of the funds for payment of the rentals (which rentals were, as was common cause, payable in South African Rand) originated in Zimbabwe. Accordingly, I do not think that there is a *bona fide prima facie* defence that the payment arrangement violated the Exchange Control Regulations 1996. *Macape (Pty) Ltd* v *Executrix Estate Forrester* 1991 (1) ZLR 315 (SC) involved the outflow of foreign currency. It is distinguishable. *McCosh* v *Pioneer Corporation Africa Ltd* 2010 (2) ZLR 211 (H) involved the inflow of foreign currency. It too is distinguishable.

39. Even if I had found that the payment arrangement in respect of the lease agreement is *prima facie* illegal, that would still not entitle the applicant to a rescission of the default judgment. That lease agreement was terminated. The applicant has since been evicted from the premises. The applicant cannot seek to be restored into occupation of the respondent's premises, and stay there without paying any rent because the rental payment arrangement is supposedly illegal. If I had found that the rental payment arrangement was *prima facie* illegal, what it would have entailed is a situation where both partners would be in *pari delicto potior est condition possidentis*, meaning "where the parties are equally in the wrong, he who is in possession will prevail." The applicant offered to pay rentals in South

African Rand, payable in South Africa. The respondent agreed. The lease agreement was terminated. The applicant was evicted consequent to a court order. The respondent is in possession of the premises. Its position, of possession of those premises, would prevail.

40. Finally, the applicant filed a supplementary affidavit after the opposing affidavit had been filed and served. Therein, the applicant sought to persuade me to find that the main matter had become moot because the rental arrears had since been paid. This cannot be of any consequence. If it be the case that the rental arrears have now been liquidated all it means is that this would impact on the extent of the indebtedness of the applicant. It would result in either the reduction or liquidation of the arrear rentals, holding over damages and the punitive costs awarded against the applicant in the main matter. The lease agreement itself is no more. It was terminated. The applicant has been evicted. There would be no point in rescinding the default judgment. Even on the applicant's version there is no longer any live dispute between the parties necessitating a rescission of the judgment and, thereafter, determination of a main matter. There is no more main matter to talk about.
41. The respondent's success will carry the costs of the application.
42. In the result, **IT IS ORDERED THAT**:

    1. The application be and is dismissed.
    2. The applicant shall pay the respondent's costs of suit.

Antonio and Dzvetero, applicant's legal practitioners
Dube Manikai and Hwacha, respondent's legal practitioners