MINISTER OF FOREIGN AFFAIRS AND
INTERNATIONAL TRADE
versus
DESTINY VENTURES (PROPRIETARY)
LIMITED (BOTSWANA)

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE; 1 March 2023 & 25 February 2025

Opposed Court Application

CHITAPI J: This application for rescission of default judgment is made by the Minister of Foreign Affairs and International Trade in his official capacity as such. The Minister Frederick Shava deposed to the founding affidavit. The brief background to this application is as detailed hereunder.

The respondent company Destiny Ventures (Propriety) Limited Botswana instituted proceedings in this court under case No. HC 741/21 against United Nations Children's Education Fund (UNICEF). A default judgment was granted in favour of the respondent company on 7 July 2021 by MANGOTA J. The terms of that judgment were as follows:

> "IT IS ORDERED THAT:
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> 1. The award by Mohamed Abdil Raouf 20th of October 2020 as read together with his decision dated 17 December 202 in the arbitration between the applicant and respondent is set aside.
> 2. There be no order as to costs unless respondent opposes this application in which event the respondent shall pay applicants' costs of suit."

The default judgment pertained to a court application that comprised a princely 794 pages brought against the respondent for an order crafted in the terms on which it was granted. The certificate of service indicated that the application was served upon a receptionist, Patrick Vaviray, at the respondents' address being No 6 Fairbridge Avenue, Belgravia Harare on 17 March 2021at 1512 hours.

The background to the judgment and in summary of case No HC 741/21 was as follows. On 20 August 2012 the parties executed a contract in terms of which the applicant would undertake the reliabilitation of water supply and sewerage systems in Plumtree Town in Zimbabwe. A dispute arose pertaining to outstanding payments claimed by the applicant against the respondent. The respondent refused to pay the applicant for a variety of reasons. The respondent also counter claimed for damages against the applicant for unfinished works which had to be completed by other contractors. The dispute was referred for arbitration presided by Dr Mohammed Abdal Raouf who issued an award which was largely in favour of the applicant and marginally in favour of the respondent. It is not necessary for purposes of this judgment to dwell in any notable detail on the finer details of the award. The reason is the view which I take on other grounds on which the applicant seeks to challenge the default judgment should I grant rescission of the same.

The applicant filed for default judgment as already noted and was granted the order sought. It is common cause that the applicant was not party to case No HC 741/21. It follows that the applicant is not party to the judgment order subject of rescission, yet he applies for rescission. The respondent has *inter-alia* taken the point that the applicant being a stranger to the litigation in case No HC 741/21 cannot validly at law seek rescission of the judgment granted therein. The point will be traversed in due course.

It is common cause that this application was filed following the granting by this court of an order for condonation of late filing of the current application and the grant of an extension of time to file it. The order for condonation was granted in case No HC 6470/21 by MHURI J in her judgment No HH 532/22 dated 10 August 2022. The judgment of MHURI J remains extant. This current application was filed consequent upon the grant of the condonation aforesaid. The judgment of MHURI J is relevant to this applicant as will become apparent.

Applications for rescission of judgment are common in the courts. The principles guiding the courts in determining them are well trodden. It is not necessary to saddle this judgment with many authorities as the approach is not subject of contest in this jurisdiction. In the judgment of MAVANGIRA JA in the case, *Rydale Ridge Park (Pvt) Ltd* v *Ruth Muridzo* N.O, the learned judge after noting that rescission of judgment as provided for in r 63 of the High

Court rules 1971 requires that the party who seeks rescission should apply for rescission within one month of getting knowledge of the default judgment and must satisfy the court that there is good and sufficient cause to rescind the default judgment, stated at para 20 of the cyclostyled judgment:

> "20. The requirements for setting aside a judgment granted in default have been enunciated in numerous case authorities including *Zinondo* v *CAFCA Limited* SC 64/17 where at p 4 of the judgment the court said."

"In an application for rescission of a default judgment the court must be satisfied that there is good and sufficient cause to rescind the order. In *Makoni v CBZ Limited* HH 357/16 CHITAKUNYE J quoted the case of *Stockil* v *Griffitlis* 1992(1) ZLR 172(S) at 173 D-F wherein GUBBAY CJ aptly noted that-

> "The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving "good and sufficient" as required to be shown by r 63 of the High Court Rules 1971 are well established. They have been discussed and applied in many decided cases in this country. See for instance *Barclays Bank of Zimbabwe* v *CC International (Pvt) Ltd* S 16/86 (not reported), *Roland and Another* v *Mcdonnel* 1986(2) ZLR 216(S) at 226 E-H *Sougose* v *Olwine Industries (Pvt) Ltd* 1988(2) ZLR 2010 (5) at 211 C – F. They are :-
> (i) The reasonableness of the applicants' explanation for the default.
> (ii) The *bona fides* of the application to rescued the judgment; and
> (iii) The *bona fides* of the defence on the merits of the case which carries some prospect of success.
> These factors must be considered not only individually but in conjunction with one another and with the application as a whole."

The requirement in r 63 of the repealed High Court rules 1971 that rescission of default judgment may be applied for within one month of the default judgment coming to the knowledge of the applicant who applies for rescission and that the court will in its discretion grant rescission of the default judgment if the court is satisfied that there is good and sufficient case to do so was imported as r 27 without modification in the current High Court Rules 2021. The courts decisions which interpreted r 63 of the repealed rules remain good and equally applicable to r 27. This court will be similarly guided.

It is observed that this court already determined an application for condonation of and granted leave to the applicant to file a rescission of judgment application. MHURI J in granting the applicant for condonation and extension of time to file this application set out, considered

and applied requirements for an applicant to satisfy or establish in an application for condonation of failure to comply with the rules. The learned judge relied on the case of *Kodzwa* v *Secretary for Health and Anor* 1999(1) ZLR 313 at 315 C – D and listed the requirements as follows:

(a) The degree of non-compliance

(b) The explanation for the delay

(c) The prospects of success

(d) The importance of the case

(e) Respondents' interest in the finality of the case

(f) The convenience of the court

(g) The avoidance of unnecessary delay in the administration justice.

The learned judge opined that the first three were "most critical." Whilst they indeed are crucial the requirements are cumulatively considered. The point I however note is the impact of a finding that MHURI J condoned the delay, accepted the explanation for the delay as reasonable and ruled that the applicant enjoyed reasonable prospects of success in his defence.

The learned judge in her judgement referred to the applicants' proposed defence as follows at p 2 of the cyclostyled judgment:

> "UNICEF is a member of the United Nations and enjoys the privileges and immunities provided in the 1948 convention. In view of these privileges and immunities enjoyed by UNICEF, the court had no jurisdiction to entertain the matter. It therefore ought to have declined jurisdiction."
> The learned judge reasoned and noted as follows still at p 2 to 3."
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> "It is common cause that UNICEF is a member of the United Nations. It is not disputed that it enjoys the privileges and immunities provided the (sic) 1948 Convention on Privileges and Immunities of the United Nations.
> It is also not in dispute that under clause 22 of their contract, the Parties agreed that they will be bond by any arbitration award rendered as the final adjudication of any controversy, claim or dispute. The issue of waiver by UNICEF is disputed on the basis of clause 22 and that the arbitration proceedings were not done in Zimbabwe but in South Africa. On that basis I find that applicant has good prospects of success.
> The issues raised by the applicant vis-à-vis that of immunity, jurisdiction waiver in respect of foreign organs of the United Nations are of great importance and applicant shall therefore be afforded the opportunity to argue them in court. It will be in the interests of justice to bring finality to this litigation.
> While the delay was not satisfactory explained, I am of the view that despite that, the application should be granted on the basis of the good prospects of success, the importance of the case and the need to bring finality to this litigation."

It will be seen that on the facts placed and argued by the parties before MHURI J, she determined the questions of the reasonableness of the delay, the *bona fide* of the applicants proposed defences of immunity of UNICEF, jurisdiction and waiver of immunity, the last of which the respondent raised. The parties in the judgment of MHURI J are the same ones in this application. MHURI J's judgement is extant. Admittedly, the judgment focused on prospects of success in the rescission of judgment application so it can be argued. However, in the absence of new facts being raised in the rescission application by either parties as to change the factual landscape placed before Mhuri J then, the learned judges determination on those points must stand. In this regard, the idea of considering revisiting the rules to provide for a simultaneous hearing of condonation and rescission becomes compelling to avoid the traversing of the same facts and arguments if the applications are individually dealt with.

In *casu*, the applicant seeks rescission of the default judgment on the basis of not of having been a party to that suit but as an interested party on behalf of the Government of Zimbabwe which has a real and substantial interest in the matter. The Minister as applicant repeated his standing as submitted in the condonation application that in his capacity as Minister of Foreign Affairs he was obligated in terms of international law to protect the interests of International organisations in Zimbabwe. I would say that in this matter the court is dealing with a United Nations agency. The fact that the United Nations and its agencies enjoy privileges and immunities in member states of the United Nations is a given. The fact that it is the duty of the member states to *abide* the United Charter and to *inter alia* ensure the United Nations and its agencies are granted the immunities and privileges as provided for in the United Nations Charter is again a given.

Before MHURI J, the respondent raised the issues of lack of *locus standi* on the part of the applicant. That point was not persisted in and in the submissions of the applicants counsel which were not denied, the point was abandoned hence MHURI J did not have to deal with it. In any event, the fact that the learned judge proceeded to hear the matter and determined it on the merits and no appeal was filed gives credence to the finding that the point was not persisted in. The respondent again raised the issue *in casu*. It does not appear to be proper in my view for the respondent to seek to have the same court determine the same issue twice. The respondents

counsel to his credit was not advised to and did not further the challenge all be it he did not expressly abandon the objection. The issue is in any event answered by the dismissal of the *locus standi* objection as it was already determined if not abandoned before MHURI J. In any event, in the circumstances of this case, and upon understanding of United Nations instruments, the Government of Zimbabwe is duty bond to intervene in cases involving conduct which impacts on the privileges and immunities of United Nations bodies. The Government will do so through the Minister charged with the Foreign Affairs portfolio. Note should also be taken that r 29(1)(a) of the High Court Rules allows any party affected by a default judgment granted in such party's absence to seek its rescission. The rule does not limit the remedy of rescission to cited defendants/respondents but to "any affected party."

The application in seeking rescission explained the delay in filing for rescission. It seems to me that once condonation is granted, the position is that the applicant is in the position where it has purged its delay and need not deal with that issue any more.

In regard to prospects of success, the applicant averred *inter alia* that the applicant was legally bond to ensure the enjoyment of the privileges and immunities due to UNICEF. He averred that the court did not have jurisdiction to set aside the arbitral award in question more particularly in that it had no jurisdiction over UNICEF as an International United Nations organisation or agency. The applicant posited that the arbitral award was final and binding and did not give room for its revisitation. Consequently, the applicant submitted that the court should not have set aside the arbitral award.

MHURI J in her judgment (supra) significantly stated on p 3 of the cyclostyled judgement:

> "The issues raised by the applicant vis that of immunity, jurisdiction and waiver in respect of foreign organs of the United Nations are of great importance and applicant should therefore be afforded the opportunity to argue them in court. It will be in the interest of both parties to bring finality to this litigation."

The learned judged ended the judgment by stating:

> "While the delay was not satisfactorily explained, I am of the view that despite that, the application should be granted on the basis of good prospects of success, the importance of the case and the need to bring finality to litigation."

It seems to me that with the findings of MHURI J being extant, the respondent would have to allege and establish new facts not placed before and been considered by MHURI J to move this court to make contrary findings on prospects of success of the applicant if allowed to defend the matter. Where factual findings have been made by the court in an application for condonation of late application for rescission, those findings hold in the subsequent rescission of judgment application if they are similarly pleaded. It is anomalous to speak of prospects of success in the application for condonation being different from prospects of success for purposes of rescission unless the parties positions change with new facts being pleaded. It would be rare for a party to budget facts during the condonation application as ammunition to use in the rescission application if condonation be granted. Invariably therefore the same facts averred in the condonation application are regurgitated in the application for rescission of judgment. It is the position herein.

I carefully considered the respondents opposing affidavit. There are no novel or new facts advanced in opposition which are different from the defence or opposition facts which were pleaded and considered by MHURI J in the condonation application. Just to show that I have considered the opposing affidavit of the respondent, it raised the *locus standi* of the applicant to make this application. The objection taken *in limine* has no substance and the reasons for this have been discussed discussed herein. The further point made *in limine* that UNICEF itself does not say that it is aggrieved by the judgment impacts on the *locus standi* of the applicant is a matter of substance which the court dealing with rescission will deal with. I would venture to say with respect to counsel for the respondent and to the respondent itself that with the court through the judgment of MHURI J having found that the applicant was legally suited to apply for condonation, this court which in fact is considered one court with the one presided by MHURI J cannot reach a different conclusion in the absence of facts not previously pleaded being placed before it. None were placed.

The respondent also pleaded waiver of immunity and pleaded that the applicant waived immunity by participating in the arbitration. It also submitted that the finality of the arbitration adjudication did not bar the filing of an article 34 application for setting aside an arbitration award in terms of the Arbitration Act. It submitted that UNICEF was immune from litigation in

local courts but not immune from article 34 applications. The respondent was also critical of the reasons given for delay in filing the application. It noted that there were some unexplained gaps of inaction on the part of the applicant from the time that it knew of the judgment. The problem with this line of opposition is that the court answered the issue of delay in the condonation application and it is difficult to envisage the same delay being adjudged differently when the explanation remains the same.

Rescission of default judgment is a remedy in which the court exercises judicious discretion in considering whether to grant or refuse rescission. I hold that the applicant has shown good and sufficient cause for the grant of the relief of rescission of the default judgment. The applicant has *bona fide prima facie* defences to the application for setting aside the arbitral award and it cannot be said that he wants to defend the matter as a delaying mechanism. The issues involved in this matter are of international character and have to do with the observance of United Nations member states relationships. It is in the interests of justice as MHURI J found in the application for condonation that finality to the matter be brought about by having the dispute brought before the court with affected parties being heard and a decision made on the merits.

The remaining issue pertains to costs. In matters such as rescission and other applications where the applicant seeks an indulgence, it is the usual practice to order that costs are in the cause in the main matter. Such an order shall be made herein.

Accordingly, the following order is made to dispose of this application.

IT IS ORDERED THAT:

1. The default judgment dated 7 July 2021 entered against UNICEF in case No HC 741/21 is hereby set aside with costs in the cause.
2. The application shall file its opposing affidavit to the application within 10 days of the granting of this order.

Civil Division Attorney Generals' Office, applicants' legal practitioners
Scanlen Holderness, respondents' legal practitioners