

REPORTABLE

(13)

**MAXWELL MATSVIMBO SIBANDA
V
(1) ZAMBE NYIKA GWASIRA (2) NZ INDUSTRIAL AND
MINING SUPPLIES (3) REGISTRAR OF DEEDS (4) THE
SHERIFF OF ZIMBABWE**

**SUPREME COURT OF ZIMBABWE
GOWORA JA, GUVAVA JA & BHUNU JA
HARARE: MARCH 5, 2019 & MARCH 18, 2021**

The appellant in person

F Mahere for the first respondent

No appearance for the second respondent

No appearance for the third respondent

No appearance for the fourth respondent

GOWORA JA:

THE FACTS

**Judgment No. SC 14/21
Civil Appeal No. SC 173/18**

1

[1] On 13 July 2011, under Case No HC 6750/11, the appellant caused summons to be issued out of the High Court against NZ Industrial and Mining Supplies as defendant to the suit. In the summons he claimed the following relief:

- a) A declaration that the parties did enter into a valid agreement for the harvesting of timber in respect of a portion of an area known as Glen Forest, Gairezi, Nyanga.
- b) Delivery of 1120m³ of sawn timber to the plaintiff'
- c) Alternatively, payment of USD\$392 000.00 being the equivalent of 1120m³ of timber at USD\$350.00 per cubic metre.
- d) Payment of USD\$4 000.00 being the balance payable in respect of the agreement.
- e) Interest on the above amounts at the prescribed rate of interest with effect from 1 May 2010 to the date of final payment.
- f) Costs of suit on the scale as between client and legal practitioner.

Judgment No. SC 14/21
Civil Appeal No. SC 173/18

2

[2] The second respondent duly entered appearance to defend the suit. It was not legally represented and the first respondent, who was its managing director, signed the papers indicating an intention to defend the action. He also filed a plea on the merits of the claim. Thereafter the parties were summoned to attend a pre-trial conference before a judge in chambers. The first respondent was advised by the presiding judge that he could not represent the second respondent in the suit as he was not a registered legal practitioner. It was suggested that he should obtain the services of a legal practitioner to represent the company. He undertook to do so. The pre-trial conference was postponed *sine die*.

[3] The first respondent engaged one Kaseke to represent the second respondent in the suit. Subsequent to this, on a date not stated in the papers, the first respondent's immovable property was attached in execution. An investigation revealed that the legal practitioner engaged to represent the second respondent had defaulted when summoned to appear at a resumed pre-trial conference. The appellant had, as a consequence, obtained a default judgment against the second respondent, and, somehow, the first respondent's name had been added as a defendant together with that of the second respondent. It transpired that the appellant had filed an amended draft order which reflected the defendant to the suit as Zambe Nyika/Gwasira NZ Industrial & Mining Supplies. The record however shows that the declaration described the defendant, the second respondent herein, as a company duly registered as such in accordance with the laws of Zimbabwe.

Judgment No. SC 14/21
Civil Appeal No. SC 173/18

3

[4] The appellant was unable to execute against the writ of execution. He, therefore, filed an application under Case No HC 7244/14 in which he sought the following relief:

“IT IS ORDERED AS FOLLOWS:

1. That the application for a mandament restraining the first respondent from disposing of or otherwise alienating the immovable property be and is hereby granted.
2. That the immovable property known as Stand 13552 Salisbury Township of Salisbury Township lands held by the first respondent under Deed of Transfer Number 5750/94 dated 21 September 1994 be and is hereby declared especially executable.
3. That the first respondent shall pay costs of suit.”

[5] The first respondent opposed the application. In his opposing papers, he also sought, as a counter-application to the relief sought by the appellant, to have the default judgment rescinded. The court was of the view that the counter-application for rescission had not been brought in

accordance with the rules of court. The first respondent's wife also opposed the application. She contended that she had a personal interest in the immovable property by virtue of her marriage to the first respondent.

[6] The court *a quo* was disinclined to uphold the opposition and on 28 November 2014 it granted the order described above in favour of the appellant.

[7] Consequent to the issuance of this order, on 27 January 2015 a writ of execution was issued in which the property described above was placed under attachment at the instance of the appellant. The record is silent as to the fate of the writ.

[8] On 29 July 2015, Everjoy Meda, the estranged wife to the first respondent, filed an application with the Constitutional Court alleging a violation of her rights in the immovable property arising from the suit and the writ of attachment in execution. The application was dismissed with costs on a higher scale. The view of the court was that she should have appealed the judgment of the High Court instead of bringing a constitutional application when no constitutional issue fell for determination before the High Court and the Constitutional Court itself.

[9] On 22 February 2016, under Case number HC 1655/16, Everjoy Meda and her son filed an application for the rescission of the judgments granted under Case Numbers HC 6750/11 and HC 7244/12 respectively, on the grounds that they were issued in error. They approached the court in terms of r 449 of the High Court Rules 1971. On 2 November 2016, the High Court

dismissed the application with an order of costs on the high scale. The court concluded that they had not shown that they had any legal interest in the validity of the judgments in question.

[10] On 10 November 2016, the first respondent filed a chamber application in terms of r 449 for the rescission of the judgments granted under Case Numbers HC 12599/11, and 7244/12 on the premise that they were judgments granted in error.

PROCEEDINGS BEFORE THE COURT A QUO

[11] Before the court *a quo*, the first respondent contended that the appellant had erroneously added his name as a party to the suit when in reality he had not been cited when the summons was issued. He argued further that the court *a quo*, labouring under the mistaken apprehension that the first respondent was a party to the proceedings, had granted a default judgment whose enforcement was being implemented by the appellant. He argued that the appellant had not proffered a meaningful explanation as to why he had joined the first respondent without due process. He concluded that his joinder to the proceedings was in error, which error should be corrected by the rescission of the two judgments.

[12] The thrust of the argument by the appellant in opposing the relief sought in the court *a quo* was that the first respondent had not been diligent in pursuit of his rights. In making this argument the appellant sought reliance on *Grantully (Pvt) Ltd & Anor v UDC Ltd* 2000 (1) ZLR 361 (S). The argument made was that various applications had been brought to court by the first respondent and his wife and son. All these applications had been ill-conceived. It was argued that in relation to the application in which the immovable property was declared especially executable, the first respondent was present during the proceedings and he could not, therefore,

avail himself of relief under r 449. It was further contended that the court had dismissed his bid for rescission and the judgment in question had not been appealed against. Thus, it was contended, the matter was *res iudicata* and could not be reopened through an application under r 449. To that end, the judgment refusing leave for rescission was extant and he was disabled from relief under r 449.

[13] On 26 July 2017 the High Court rendered its decision in the matter. As regards the rescission of the judgment under Case Number HC 6750/11, the default judgment, the court observed that:

“In *casu*, it is not disputed that when the default judgment was granted in HC 12599/11 or HC 6750/11 the second respondent was not in attendance. It had defaulted at the pre-trial conference. Again it is not disputed that when the summons was issued in the matter, the applicant was not a party to the proceedings. From nowhere his name was only included for the first time at replication stage in the replication by the first respondent who was the plaintiff in the matter. At the pre-trial conference when N.Z. Industrial and Mining Supplies did not attend, a court order with the applicant’s names was obtained by the first respondent. The first respondent failed to explain in his opposing papers in the present matter how the name of N.Z. Industrial and Mining Supplies metamorphosed to include the name of the applicant. The applicant has therefore made a good case for this court to rescind the default judgment that was granted in HC 6750/11 initially erroneously granted under case number HC 12599/11 as it is clear that it was erroneously sought and granted in the absence of the applicant and it affects his rights and interests.”

[14] The court *a quo* also adverted to the question of the delay in bringing the application under r 449. The court considered, on the principle set out in *Grantully (supra)* that the delay was inordinate but that, notwithstanding the delay, the circumstances were such that the first respondent had made out a good case for the grant of the relief he sought. The court said:

“It was only after 4 years 8 months of the default judgment having been granted that the applicant woke up from his slumber and brought this application. The delay is inordinate. However, in view of the nature of the error that prompted the making of the application, this is an exceptional case where I am inclined to grant the rescission despite the inordinate

delay. The error goes to the root of the matter because judgment ended up being granted against a person who is different from the one who had been sued. In the summons and declaration, the defendant was cited as N.Z. Industrial and Mining Supplies which is a company. At replication stage, the first respondent who was the plaintiff simply changed the name of the defendant to Zambe Nyika/ Gwasira N.Z Industrial & Mining supplies. The name of the defendant was now a combination of the applicant's name and his company's name. I believe the first respondent was taking advantage of the fact that N.Z. Industrial and Mining Supplies was being represented by the applicant who is a layperson and not by a legal practitioner. Upon N.Z. Industrial and Mining Supplies defaulting court at pre-trial conference, the first respondent prepared a draft order with the name of the defendant as Zambe Nyika/ Gwasira N.Z Industrial & Mining supplies and obtained an order bearing these names. Such a defendant who is a combination of an individual and a company is non-existent. The judgment cannot, therefore, be allowed to stand. I will thus grant the application for rescission in HC 6750/11.”

[15] The court *a quo* was, however, disinclined to grant rescission in respect of the judgment granted in HC 7244/12, which judgment declared the first respondent's immovable property to be especially executable. The court *a quo* was of the view that the applicant had failed to satisfy the requirements provided for in r 449. The court *a quo* found that the first respondent was present at the hearing and had filed papers in opposition to the application. On that premise, the court *a quo* considered that the first respondent was disabled from arguing that it was a judgment granted in error in his absence. The court *a quo* found that the application fell foul of r 449. I do not think that to that extent the reasoning of the court *a quo* can be faulted.

Judgment No. SC 14/21
Civil Appeal No. SC 173/18

7

ARGUMENTS ON APPEAL

[16] The appellant appeared in person. Prior to the matter being set down for hearing the appellant had the benefit of legal representation. Those representing him at the time had filed extensive heads of argument on his behalf. He submitted that he would abide by these heads of argument. He maintained that the court *a quo* should not have granted rescission due to the inordinate delay that preceded the filing of the application for rescission.

[17] In the heads of argument, the contention made is that the first respondent had acquiesced to the default judgment in which the court dismissed the application brought by his wife and son under r 449. It was contended further that the court *a quo* should have upheld the defence of *res iudicata* raised by the appellant in that the dispute had been determined and the first respondent had participated fully. Based on the agreement executed by the parties, it was contended that there was no error in the description of the defendant to the default judgment. The appellant made reference to *Tiriboyi v Jani & Anor* 2004(1) ZLR 470(H).

[18] Miss *Mahere*, who appeared for the first respondent argued as follows. The default judgment was granted in error. The appellant's legal practitioners had themselves acknowledged this error in a letter addressed to the registrar of the High Court. The letter had attached to it an amended draft order in which the defendant was a merger of the company and the first respondent as the defendant to the suit.

[19] With regard to the immovable property, she contended that the appellant had fraudulently launched an application to have the property declared especially executable based on the erroneous order. As it pertained to the application brought by the first respondent's wife and son, it was clear that the application was dismissed on the premise that the two did not have legal interest in the matter. It was not decided on the merits. As a consequence, the argument that the principle of *res iudicata* was applicable to the facts of this appeal was misplaced and should be discounted by the court.

[20] As regards the judgment issued under Case Number HC 7244/12, it was her further argument that the judgment was based on a nullity. The judgment granted in default was granted against a party that did not exist and a party who was not a litigant to the *lis*. The setting aside of that judgment affected the status of the later judgment. The latter had its genesis firmly on the first and, once the earlier judgment was no more, there could be no life breathed into the second judgment. She urged the court to exercise its review powers under the Supreme Court Act [Chapter 7:13] and set it aside as being irregular.

ISSUES FOR DETERMINATION

[21] The disposition of this appeal hinges on the construction of r 449. The critical questions in that determination are the following: whether indeed there was an error in the judgment and, secondly what is the meaning to be ascribed to “absence” in the said rule.

Judgment No. SC 14/21
Civil Appeal No. SC 173/18

9

ANALYSIS OF THE FACTS

[22] The appellant has never denied that when summons was issued the first respondent was not cited as a party. He has also not denied that the first respondent’s name was improperly added to the proceedings. He cannot say how this happened. The first respondent was not joined as a party. The appellant does not argue that the first respondent was properly joined as a party.

Herbstein & Van Winsen state:¹

“In an application for a default judgment, the impression was created that a division of ABSA Bank purported in its own right to have instituted various actions. The court was satisfied that the party which instituted the actions was ABSA Bank which had *locus standi*, but was wrongly described in the summons. As there was no possibility of any prejudice to the defendants the court granted the amendments applied for. In another case in which there was an incorrect citation of parties, the court granted an amendment, as it did not involve the substitution of one legal entity for another but merely corrected an

¹ P 498 5ed Civil Practice of the High Courts of South Africa

incorrect description of the original plaintiff. An amendment will not, however, be granted when a defendant's name has been omitted from the summons, or when a summons has been issued in the name of a plaintiff who was no longer alive at the time of issue. Where the named plaintiff is not a legal persona, the summons is invalid."

[23] In this case, there was no joinder of the first respondent as a party to the proceedings nor was there even an application to amend the citation of the parties to the suit. There was an addition of the name of the first respondent which addition created a non-existent party. In *L & G Cantamessa v Reef Plumbers: L & G Cantamessa (Pty) Ltd v Reef Plumbers*: 1935 T.PD. 56, the court had to consider whether or not a summons can be amended to include a defendant who was not cited in the original summons. At pp59-60, TINDALL J stated as follows:

"The magistrate, in his reasons stated that he allowed the amendment to the summons under sec. 105 of the Magistrates Court Act; that he regarded the name of the defendants in which they were sued, viz; L & G Cantamessa as a mere misnomer, and that the mistake was covered by sub-sec. 3 of sec 105 of the Magistrates Court Act. In my opinion, it is quite plain that, in taking that view, the magistrate erred. This is not a case of a mere misnomer. The effect of the amendment was to introduce a new defendant into the case. The original defendant, L & G Cantamessa was either a partnership or two individuals. It would seem that it was intended to cite L & G Cantamessa as a partnership because the summons was served only on one of the parties under Order VI. In any event, whether the summons was against a partnership or two individuals, it is clear that the limited company is an entirely different persona in law and that it was not merely a matter of a misnomer. A different persona was introduced into the proceedings, and in my opinion, that was not permissible under sec. 105."

Judgment No. SC 14/21
Civil Appeal No. SC 173/18

10

And later at pp60-61:

".....That being so, in my opinion, there was no satisfactory answer to the review that there was a gross irregularity that a defendant who had not been cited and was not before the court, had been introduced into the action as the defendant at the conclusion of the case."

[24] It seems to me that those remarks apply with equal force to the facts of the case in the appeal before the court. The principle set out above was confirmed in the later case of *Greef v Janet en 'Ander* 1986(1) SA 647. The judgment is in Afrikaanse but the headnote reads:

“There would appear to be no authority for the proposition that a court, upon application by a plaintiff, can oblige a non-party to a dispute, without the latter’s consent (and by way of an amendment of the summons), to replace the defendant. If the plaintiff suspects that he has sued the wrong party, he can either, in appropriate circumstances, attempt to have the right party joined, or issue summons anew against him.”

[25] I respectfully associate myself with that statement. The first respondent was never a party, was not joined, and should not have been added to the process in the manner done in this case. If he had been joined he would have been a separate party to the company. What is clear is that the defendant appearing on the order granting default judgment does not exist. There is no such person. This a clear irregularity as found by the court *a quo*. Whether or not the first respondent participated in subsequent proceedings does not change the substance of the irregular order issued in default against him. In *Tiriboyi v Jani & Anor(supra)*, MAKARAU J (as she then was) said²:

Judgment No. SC 14/21
Civil Appeal No. SC 173/18

11

“The purpose of r449 appears to me to enable the court to revisit its orders and judgments to correct or set aside its orders and judgments given in error and where to allow such to stand on the excuse that the court is *functus officio* would result in an injustice and will destroy the very basis upon which the justice system rests. It is an exception to the general rule and must be resorted to only for the purposes of correcting an injustice that cannot be corrected in any other way.

The rule goes beyond the ambit of mere formal, technical, and clerical errors and may include the substance of the order or judgment. (See *Grantully P/L 2000 (1) ZLR 361 (SC)*).

Rule 449 is a procedural step to correct an obviously wrong judgment or order.”

[26] There can be no doubt in this case that the first respondent’s interests were affected by the judgment granted in default against him. There is no doubt that he was not cited as a party to the suit, was not served with the summons, and even when his name was added he was not

² -at 472D-F

notified. The judgment given fits all the requisites of a judgment granted in the absence of a party. When considering whether or not the first respondent should succeed the court *a quo* set out the requirements under r 449 as being:

“Rule 449 (1) (a) reads as follows.

“449. Correction, variation, and rescission of judgments and orders

- (1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order—
- (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby.”

For relief under r 449 (1) (a) to be granted the following requirements have to be met.

- a) The judgment must have been erroneously sought or granted
- b) The judgment must have been granted in the absence of the applicant and
- c) The applicant’s rights or interests must be affected by the judgment. See *Mashingaidze v Chipunza & Others* HH 688/15.

It is therefore clear from these requirements that a party can only seek to rescind a judgment in terms of r 449 (1) (a) if he was absent when the judgment he seeks to rescind was granted. If the party was present, he cannot seek rescission.

Judgment No. SC 14/21
Civil Appeal No. SC 173/18

12

[27] *In casu*, no attempt was made to bring the first respondent before the court. He was absent from the proceedings. The contention made in the heads of argument that he had acquiesced to the judgment by participating in the processes launched by his wife and son cannot sway the court. The initial proceedings were marred by serious irregularities in the manner in which the appellant sought to bring the first respondent before the court and the first respondent cannot be considered as having acquiesced to a process that amounts to an irregularity.

[28] In the circumstances of this case, the appellant cannot be heard to argue that the court misdirected itself. The first respondent was never heard. He was not present. The default

judgment was not only granted in error it was also granted in his absence in every respect. In my view, the appeal is devoid of merit and must be dismissed.

[29] The first respondent did not appeal against the dismissal of the application in respect of the judgment that declared his immovable property especially executable. The reasoning of the judge in the court *a quo* cannot be faulted in finding that, in relation to the application before the court, it did not meet the criteria set out in r 449 for rescission of judgments granted in error. It seems to me that the rescission of the first judgment necessarily affects the status of the second judgment. This is because the second judgment had the first judgment as its genesis, in other words, the second judgment would not have existed in the absence of the first. I am fortified in this view by the *dicta* in *Naidoo v Somai* 2011 (1) SA 219, at 221G-H wherein LOPES J had this to say:

“If indeed the facts of that case are on all fours with the facts of this one, as contended for by Mr *Van Rooyen*, then I am respectfully in disagreement with the conclusion.”

Judgment No. SC 14/21
Civil Appeal No. SC 173/18

13

Once it is conceded, as it has been in this case, that the default judgment falls to be set aside, then the consequences of the default judgment also fall to be set aside. Those consequences include the issue of a writ of execution, the writ of ejection, and the attachment of the applicant’s property and his ejection from the premises.”

[30] I think the above remarks are most apposite to the facts of this appeal. In my view, the existence of the second judgment authorizing attachment and execution against the immovable property in the absence of the default judgment constitutes an irregularity. It stands on nothing and is liable to be set aside in the exercise of the review powers of this Court under s 25(2) of the Supreme Court Act [*Chapter 7:13*], which provides:

“PART V

GENERAL

25 Review powers

- (1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction, and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.
- (2) The power, jurisdiction, and authority conferred by subs (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.”

[31] It was contended by Miss *Mahere* on behalf of the first respondent that the orders in HC 12599/11 and 6750/11 are invalid as they cite a party who is not a party to the proceedings. I agree with that submission. The party against whom judgment was obtained is not the party summoned to court through the process issued by the appellant. In addition to this, the judgment authorizing execution of the first respondent’s property is itself based on a nullity warranting its setting aside.

**Judgment No. SC 14/21
Civil Appeal No. SC 173/18**

14

DISPOSITION

[32] The appeal in the main lacks merit as the appellant obtained a default judgment against a party who was not a litigant in the suit that the appellant had brought to court. As a consequence, the default judgment itself is a gross irregularity. Over and above the foregoing, the judgments in contention were a nullity. The first was obtained against a party who was not cited as a party to the suit and the second was obtained pursuant to the irregular judgment.

In the premises the following order will issue:

IT IS ORDERED THAT:

1. The appeal is dismissed with costs.
2. In the exercise of the powers of the Supreme Court in terms of s 25 (2) of the Supreme Court Act [*Chapter 7:13*], the judgment of the High Court being HH 677/14 under Case Number HC 7244/12 and dated 28 November 2014 be and is hereby set aside.

GUVAVA JA : I agree

BHUNU JA : I agree

Judgment No. SC 14/21
Civil Appeal No. SC 173/18

15

Chinawa Law Chambers, legal practitioners, for the first respondent