MOSES NHACHI
versus
MOSSWOOD INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 12 December 2022 and 22 March 2023

Opposed Application

Advocate *C Mubaiwa*, for the applicant
Mr *V Mhungu*, for the respondent

CHINAMORA J

Factual background

This is an application for rescission of a default judgment made in terms of r 27 of the High Court Rules 2021. The background is that on 3 November 2021, the first respondent instituted eviction proceedings under case number HC 6085/21 to eject the applicant from a property known as No. 17 Ridgeway North, Colne valley Harare ("the property"). The application was opposed and the matter was eventually set down for hearing on 2 June 2022 before MANGOTA J. Despite being served with papers, the applicant did not appear on the date of hearing, and the learned judge granted a default judgment in favour of the first respondent. The first respondent had sought to execute the said judgment, prompting the applicant to file an urgent chamber application for stay of execution pending the determination of the present application. Both applications were placed before me. On the date of hearing, I elected to first deal with the application for rescission of judgment, since I took the view that the determination of that application would dispose of the urgent chamber application for stay of execution.

The applicant seeks a rescission of the default judgment granted in HC 6085/21. In his founding affidavit, the applicant explains that he failed to come to court because he was not aware

of the set down as the notice had been served on his gardener, who is mentally challenged while he was in South Africa. To substantiate this allegation, the applicant attached a copy of his passport stamped at the Beitbridge border post on the 22 May 2021. He states that this was his departure date and he returned home on 6 June 2021.

The applicant further avers that he was not in wilful default and only became aware that the default judgment when the Sheriff served the judgment on him on 17 June 2021. That is when he inquired from his staff at his residence if any of them had received documents that required his attention, and the gardener produced the notice set down. Subsequent to that, the applicant filed the present application. The first respondent opposed the application. In its opposition the first respondent raised a preliminary point, namely, that the remedy of rescission is not available to the applicant because the matter was *litis contestatio*. The first respondent's submission was that the parties had filed their full set of papers before the matter was set down for hearing on 2 June 2022. It contended that, although the order was granted in the absence of the applicant, it was an order based on the papers filed of record. The argument continued that the applicant could not apply for rescission of judgment, but should proceed by way of appeal.

Let me quickly address the first respondent's preliminary by directing attention to the case of *Zvinavashe* v *Ndlovu* 2006 (2) ZLR 372 (S) at 375, where the Supreme Court appositely stated:

> "… the giving of reasons for the default judgment in question by the court *a quo* was unnecessary and, consequently, of no force or effect. It does not convert the default judgment into a judgment on the merits."

See also *Chaza* v *Chawareva* SC 2-18

This resolves the point in *limine* which I dismiss for lack of merit. I move to examine the law relevant to the merits of the case.

The applicable law

When he initially, mounted this application as a self-actor, the applicant relied on r 27 (1) of the Rules, which spells out the requirements for setting aside of judgments granted in default. This rule provides as follows:

> "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 had knowledge of the

> judgment for the judgment to be set aside, and thereafter the rules of court relating to the filing of opposition, heads of argument and the set down of opposed matters, if opposed, shall apply."

Advocate *Mubaiwa* for the first respondent, referred to the case of *Barbarosa De Sa* v *Barbarosa De Sa* SC-34-16 for the approach the courts should take. He argued that, in deciding a case for rescission of judgment, the court has the power to *mero motu* to elect the rule that best suits the circumstance of the case. In the *Barbarosa De Sa* case *supra* the Supreme Court stated:

> "In considering the application for rescission, it is common cause that the learned judge invoked the provisions of r 449 in rescinding the judgment and thus dealt with the order as one made in error. It is correct, as contended by the appellants, that the Church had not premised its application on the grounds of an alleged error, but rather as an application for rescission of a judgment granted in default, as provided under r 63. The learned judge did not in her judgment make reference to r 63. She referred to r 449."

The same judgment goes forward to posit that the High Court is a court of inherent jurisdiction which has authority to regulate its own processes so to ensure that the interests of justice are satisfied. The courts specifically stated that:

> "The High Court is a superior court with inherent jurisdiction to protect and regulate its own processes and to develop the common law, taking into account the interests of justice. In the exercise of this inherent power, the High Court promulgates rules of court designed to expedite and facilitate the conduct of business of the court. In terms of r 449 (1) the court has the power to correct, vary or rescind a judgment, either on its own motion or upon the application of a party affected by the judgment in issue."

In light of the foregoing pertinent pronouncements by the Supreme Court, in the interests of justice, this court will decide this application in terms of r 29 of the Rules. I will give my reasons for preferring such an approach. Rule 29 states as follows:

> "Correction, variation and rescission of judgments and orders 29.
>
> (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."

When choosing to rescind a judgment granted in default in terms of r 29, the court must be satisfied that the judgment was granted in error in the absence of the aggrieved party. In this respect, I note that in *Collen Dhlamini and Ors* v *Herbert Ncube and Ors* HB 11-18, MATHONSI J made the following apposite remarks:

> "Clearly therefore a litigant seeking relief under rule 449 (1) qualifies for such relief where it can be shown that the judgment or order was erroneously granted in his or her absence. The question which arises therefore is whether in approaching the court without citation of the applicants the first and second respondents committed an error. Allied to that is the question whether when it granted the order that it granted the court was aware of all the relevant facts impacting on the grant of that order. 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."

From the decided cases, the law is clear that in an application of this nature, the most important consideration is whether the judgment was sought and granted in error. In my analysis of the case, I will examine the errors which justify a r 29 intervention by this court.

Analysis of the case

As already highlighted, rescission of judgment under r 29 will only be granted if a default judgment was sought and granted erroneously. I agree with Counsel for the applicant that the judgment which is the subject of this application was, firstly, granted in error and, secondly, in the absence of the applicant. The first error that the applicant identifies is that, the order for eviction of the applicant was made without first considering the provisions of s 74 of the Constitution, which reads:

> **"74 Freedom from arbitrary eviction**
> No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances." **[My own emphasis]**

I understand this provision to mean that when the order for eviction was granted the court ought to have considered all the relevant factors. The only way to consider the relevant factors was to hear the applicant's side of the story consider all the evidence placed before the court before granting the eviction order. It is apparent that the applicant was not afforded the opportunity to be

heard and place pertinent information for consideration by the court as contemplated by s 74 of the Constitution. I say so because the order for eviction was granted in the absence of the party sought to be evicted. According to *Mhungu* v *Mtindi* 1986 (2) ZLR 171 (SC), this court is entitled to look at its own records and consider their contents where such records are relevant to the case before it. Because of this, I perused the record in HC 6085/21 to find out if an enquiry into relevant circumstances was made when default judgment was granted. None is evident from the record.

Clearly, s 74 of the Constitution requires a court that issues an order which evicts someone from their home or demolishes that home to consider the circumstances of both parties before allowing the eviction or demolition. *In casu*, the record in HC 6085/21 ought to have shown that the court indeed took into account relevant factors when it granted the default order for eviction of the applicant. Perhaps, it is helpful to take lesson from how other jurisdictions have defined relevant circumstances in the context of a constitutional prohibition against arbitrary evictions of demolitions. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties Pty (Ltd)* 2012 (2) SA 104 (CC), the South African Constitutional Court held that relevant circumstances included legal status of the occupants; the period of occupation; and whether the eviction or demolition would leave the affected people homeless. As I have already observed, there is nothing in the record in HC 6085/21 that confirms that the aforesaid factors were enquired into by the court. Consequently, my conclusion is that the order for eviction of the applicant was made without considering relevant circumstances as required by s 74 of the Constitution.

Thus, the order for eviction in HC 6085/21 in so far as it did not take into account the requirements of s 74 of the Constitution, was erroneously sought and granted. A second important factor to consider in this matter is that, despite the existence of a Notice of Opposition on the record, the court treated the matter as unopposed. The court could not do this in the absence of an order striking off the notice of opposition and opposing affidavits from the pleadings or referring the matter to the unopposed roll. For this position of the law, the case of *Lesley Faye Marshe (Pvt) Ltd t/a Premier Diamonds & Ors* v *African Banking Corporation of Zimbabwe (Pvt) Ltd & Ors* SC 4/19 is relevant. It necessarily follows that, if the judgment or order was erroneously sought and granted in the absence of a party affected by it, that judgment or order may be corrected, rescinded or varied without further inquiry. See *Grantully (Pvt) Ltd and Another, supra* at 365 G; *Tshabalala and Another* v *Peer* 1979 (4) SA 27 (T) at 30 D-E; *Topol and Others* v *L S Group Management*

Services (Pty) Ltd 1988 (1) SA 639 (W) at 650 F-G. As I have concluded that the order granted in HC 6085/21 in the absence of the applicant was made erroneously, it is unnecessary for me to decide the urgent chamber application for stay of execution. Obviously, the relief of stay of execution was sought pending the determination of the application for rescission of judgment.

The general rule is that costs follow the result, meaning that costs are usually awarded to the successful party. However, it should also be borne in mind that costs are in the discretion of the court. While I have decided to grant the application for rescission of the order granted in default, I do not find any reason for saddling the first respondent with costs of suit. My view is that there is nothing in the way the first respondent pursued its opposition to the application that shows that it was motivated by bad faith. If anything, it had every reason for seeking to hold on to the default judgment it had obtained in the absence of the applicant.

Disposition

In the result, **IT IS ORDERED THAT**:

1. The point in *limine* be and is hereby dismissed.
2. The application for rescission of default judgment under HC 6085/21 be and is hereby granted
3. The parties are hereby ordered to set down the matter under case number HC 6085/21 for hearing in terms of the rules of court
4. Each party shall bear its own costs.

Mutuso, Taruvinga & Mhiribidi, applicant's legal practitioners
Chasi, Maguwudze Legal Practice, first respondent's legal practitioners