MILDRED FADZAYI MASHANGU (NEE CHIWARA)
versus
WEDZERAI MASHANGU
and
SIMBARASHE HONDE

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE,20 September 2024 & 25 March 2025

Opposed Application

R Mabwe,for the applicant
R A Sithothombe, for the 1st respondent
No appearance for the 2nd respondent

MANYANGADZE J: The applicant made a court application for rescission of a default judgment in which she prays for an order in terms of the draft, which reads as follows:-

"1. Application for rescission of Judgment under Case No. 1292/23 be and is hereby granted.
2. 1st Respondent is ordered to pay costs of this Application on a Legal Practitioner and client scale."

The facts forming the background to this application are set out in the pleadings filed of record.

The applicant is a specialist medical doctor based in Western Australia. The first respondent is the applicant's husband. The two are embroiled in divorce proceedings which are pending in this court. The applicant is represented by Kadzere, Hungwe and Mandewere legal practitioners in the divorce proceedings.

The first respondent filed an urgent chamber application which was in the nature of a *rei vindicatio* in respect of a motor vehicle, Toyota Fortuner ARF 5398 ("the vehicle"), which had allegedly been taken away from him by the applicant with the assistance of the second respondent. The nature of the relationship between the applicant and the second respondent is not clear. It is not clear whether he is a mere employee or has a closer relationship with the applicant. Be that as it may, the urgent chamber application was heard by TSANGA J, who gave a default judgment as the applicant was not in attendance. The default order, granted under HCH 1292/23 was in the following terms.

> "1. The respondents, jointly and severally, be and are hereby ordered to forthwith return the Toyota Fortuner ARF 5398 to the applicant (in any event not later than 24 hours upon granting of this order).
> 2. In the event that the respondents have surrendered the vehicle of (*sic*) any third parties, that the Sheriff be and is hereby authorised to recover the said motor vehicle from any such third party.
> 3. The respondents shall pay costs of suit on a punitive scale."

The applicant seeks rescission of the cited default order. She avers that she was not in wilful default, as she is based in Australia. The first respondent is aware of this fact. The applicant avers that Mr Mandewere, of Hungwe, Kadzere and Mandewere law firm, had no instructions to represent her in the urgent chamber application, though the law firm is her legal practitioners of record in the divorce matter. Mr Mandewere informed the presiding judge, TSANGA J, that he had appeared out of courtesy to advise the court of this fact i.e. that the legal practitioners had received no instructions to appear on behalf the applicant. The learned judge adjudged the applicant to be in default, and granted the relief sought by the first respondent (then applicant).

In the instant application, the first respondent initially raised two points *in limine*, to the effect that:

(i) The application has been brought under the wrong rule, being r 63 instead of rule 27 of the High Court Rules, 2021.

(ii) The applicant is in contempt of court, as she is holding onto the vehicle in defiance of TSANGA J's order.

Subsequent developments in the matter led to a change in the preliminary points.

At the hearing of the matter, the first respondent abandoned the first point *in limine*, which related to the citation of the wrong rule.

The first respondent also abandoned the other point, as it had been overtaken by events. The vehicle had since been returned to the first respondent.

In view of this development, the first respondent raised another preliminary point, which was to the effect that there was no longer a live issue between the parties. With the subject matter of the urgent chamber application now in the possession of the applicant thereto, the matter had become moot. There was no actual controversy between the applicant and the first respondent.

What complicates matters for the applicant is the stance she took in resisting the contempt allegations. In her heads of argument, she avers that surrendering the property would be tantamount to acquiescing to the default judgment. She could not thereafter pursue

rescission of the same. She could not challenge a judgment she would have acquiesced to. The following excerpts from para(s) 13.1 to 13.5 of the applicant's heads of argument are telling:

> "The applicant is challenging the court order which the first respondent obtained in default. She cannot acquiesce to the default judgment and challenge it at the same time by virtue of two common law doctrines:
>
> Firstly, the doctrine of acquiescence stipulates that if a party complies with a court order, he or she loses the right to challenge it. The doctrine is part of our law and has been applied in this jurisdiction. This was settled by the Supreme Court in *Mining Commissioner -Masvingo N.O. & Others* v *Finer Diamond (Pvt) Ltd* SC 38/22
> In the case of *Dhliwayo* v *Warman Zimbabwe (Pvt) Ltd* HB-12-22 this court pronounced on this issue as follows:
> *"According to the common law doctrine of peremption, a party who acquiesces to a judgment cannot subsequently seek to challenge a judgment in which he has acquiesced."*
>
> Secondly, if the applicant complies with the court order the matter would be rendered moot and academic by virtue of the doctrine of mootness. There would be no longer a live dispute for the court to determine and consequently the main matter would be rendered academic.
> The question of mootness was applied in *Khupe & Anor* v *Parliament of Zimbabwe & Ors* CCZ 20/19 as follows:
> *"A court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. The position of the law is that if the dispute becomes academic by reason of changed circumstances the Court's jurisdiction ceases and the case becomes moot."*

This, in my view, puts paid to the applicant's contention that she can still pursue this matter. She cannot turn around and argue to the contrary. That would be a classical instance of approbating and reprobating. The case should be disposed of on this basis alone. This would be by an order striking it off the roll, as it would not have been disposed of on the merits.

Even if I am wrong in upholding this preliminary point, I am of the considered view that the application still fails on the merits.

In order for the court to set aside a default judgment, the applicant must show good and sufficient cause. In the leading case of *Stockil* v *Griffiths* 1992 (1) ZLR (S) at 173 D-F, the Supreme Court set out the factors to be considered when examining "good and sufficient cause". These are;

I. The reasonableness of the applicant's explanation for the default.
II. The *bona fides* of the applicant to rescind the judgment.
III. The *bona fides* of the defence on the merits of the case which carries some prospects of success.

The first issue for determination is whether or not the applicant was in wilful default. The applicant submits that she was in Australia at the time of service and was not served personally. The applicant also avers that she did not instruct Kadzere, Hungwe and Mandewere

to represent her in the urgent chamber application. In this regard, she relies on the case of *Law Society of Zimbabwe* v *Murambatsvina HH 48-23* which highlights that a lawyer-client relationship is that of mandate, and a lawyer can only act according to the client's instructions. The applicant alleges that the court was accordingly advised that Kadzere, Hungwe and Mandewere, on whom the application was served on, had no instructions to act on the applicant's behalf in the new matter. The applicant also referred to the case of *Liberty Muchena* v *Police Service Commission & Another HB 160-22,* where it was stated:

> "Where a litigant serves process on a legal practitioner who such litigant knows represented the other party at some stage, such service cannot be good service. The process has to be served on that party in terms of the rules and only when such party instructs a legal practitioner and subsequently such legal practitioner responds to the process giving such legal practitioner's address as the party's address of service can the litigant serve any subsequent process on the legal practitioner."

The applicant asserts that the urgent chamber application was not duly served in terms of the rules. The applicant avers that there is just cause that the applicant was not in wilful default as there was the absence of actual service. Therefore, she moves that the default judgment be set aside.

In countering the applicant's averments, the first respondent chronicled a series of events to highlight the point of wilful default. The first respondent indicated that the default was on 1 March 2023, which is the day the order under Case No. HC1292/23 was granted by TSANGA J. He asserts that TSANGA J conducted an inquiry to ascertain if the applicant was aware of the urgent application. The first respondent avers that the applicant's then legal practitioners, Kadzere, Hungwe and Mandewere, were in attendance and had advised the applicant of the urgent application but the applicant had not given them instructions on how to deal with the matter. The first respondent asserts that such averments are contained in the record.

In this regard, the first respondent relies on the case of *Mhungu* v *Mtindi 1986(2) ZLR 171(S),* which asserts that the court is entitled to look at the contents of its records. The first respondent further asserts that his legal practitioners served the applicant with the urgent application and notice of set-down by way of an email. The respondent also claims that there was correspondence between the first respondent's legal practitioners of record and the applicant, in terms of which the applicant was made aware of the urgent application, notice of hearing and need to arrange for legal representation for the hearing. The first respondent relied on the case of *Beitbridge Rural District Council* v *Russell Construction Co 1998 (2) ZLR 190 (S) 193 G* where SANDURA JA pointed out that the law will help the vigilant and not the sluggard.

The first respondent avers that the applicant did not do what a vigilant litigant would do, that is, to secure her representation in the urgent matter, despite being served or being made aware of the application. Indeed, there was an element of negligence in the manner the applicant reacted to the urgent application. In her founding affidavit, she says she chooses lawyers according to their expertise in different areas of the law, thus implying that she chose not to instruct her divorce lawyers to handle the matter. This is baffling, given that this dispute was tied to, and was ancillary to the divorce proceedings, in the sense that she claims the vehicle is part of matrimonial property. As this was an urgent application, she could ill afford the luxury of considering and researching on which lawyers would best handle the matter. She already had lawyers seized with the divorce matter. I am sure her lawyers in the divorce matter were at a loss as to how to proceed, being seized with the divorce proceedings and yet not receiving instructions on an urgent application with a bearing on such proceedings. The applicant has not, in the circumstances, satisfactorily explained her default.

Even if the court were to bend over backwards and find that she was not in wilful default, that is not the end of the enquiry. This aspect must be counterbalanced with the other factors.

The other factors for consideration are whether or not the applicant is *bona fide* in bringing up such an application and whether there are prospects of success on the merits. The applicant asserts that the order obtained by the first respondent through the default judgment invariably affects the applicant's rights in a matrimonial asset acquired during the subsistence of their marriage. The applicant asserts that the vehicle in question forms part of their matrimonial assets. The applicant referred to the case of *Nyoni* v *Zhou*, HB 143/22 case where the court made the following remarks at p 6:

> "I cannot slam the door shut on a litigant who is seeking to be heard in a matter where the background does show that there may be some prejudice to him if he is not given an opportunity to present his side of the story.... It is my considered view that indeed the applicant should be given an opportunity to present his side of the story in the circumstances so that the court dealing with the real dispute between the parties gets to the bottom of it and a fair and just outcome is achieved. I cannot at this juncture hold that the applicant's case is entirely hopeless and a waste of time deserving that the door be slammed shut...I cannot hold at this juncture that the application is most likely doomed to fail and thus that there are no prospects of success, as clearly, a lot of issues need to be canvassed and a proper finding be made vis-à-vis the respective rights of the parties."

The applicant implores the court to rescind the default judgment as she asserts that she has a good and sufficient cause for its rescission.

The first respondent, in opposition, argues that the applicant does not have any prospects of success. The first respondent alleges that the applicant is claiming ownership of the vehicle, basing on the claim that, "*she was advised that in terms of the laws of England and Wales which are applicable to our marriage, property obtained during the subsistence of the marriage which a party has use of is matrimonial property notwithstanding in whose name the said property is registered"*. The first respondent points out that it is not in dispute that he is the owner of the vehicle. He purchased the motor vehicle through a vehicle loan scheme provided by Lafarge Cement Zimbabwe and the vehicle is registered in his name.

In this regard, the first respondent referred to the case of *Ishemunyoro* v *Ishemunyoro*, SC 14/19. GWAUNZA JA (as she then was) clarified s 2 of the Married Persons Property Act [*Chapter 5:12*]. The learned judge made the following remarks;

> "The import of this provision is that a spouse whose name appears for instance, in the Title Deed of any immovable property enjoys full ownership rights therein. He or she can deal with the property in any way he wishes, including alienating his rights therein or otherwise encumbering such property. Similarly, if both spouses are registered as joint owners of the property, each one enjoys full ownership rights over his or her share in the property. I have already found that *in casu*, the appellant and the first respondent legally and independently own an undivided half share in the property in dispute. On the basis of common law as well as our matrimonial property regime, the shares owned by each of them, being real rights, cannot be lightly interfered with."

The first respondent avers that there is no court order limiting his rights to the vehicle, hence the applicant has no prospects of success on the merits. The first respondent points out that the applicant instituted divorce proceedings in Zimbabwe and should be guided likewise, and not rely on the laws of England and Wales. He contends that the applicant cannot award herself assets when the proceedings have not been finalized, which is telling of her intention. With that, the first respondent seeks that the application for rescission be dismissed.

The applicant has no basis for resisting the first respondent's vindication of the vehicle. This is so given the admitted facts on its acquisition and registration, which repose real rights in the first respondent. She can only hope that it may be awarded to her in the distribution of assets consequent to a decree of divorce. That is not guaranteed. That is a matter within the discretion of the judge who will be seized with the divorce matter, guided by provisions of the Matrimonial Causes Act [*Chapter 5:13*].

After a cumulative consideration of all the factors, it is the court's view that the applicant has not shown good and sufficient cause why the default judgment granted against her should be rescinded. The application cannot succeed under the circumstances and must be dismissed. The first respondent has asked for costs on the higher scale of legal practitioner and

client. It is the general rule that costs shall follow the cause and l see no reason for departure from the general rule.

In the result, it is ordered that:

1. The application be and is hereby dismissed.
2. The applicant bears the first respondent's costs.

MANYANGADZE J: ----------

V Nyemba & Associates, applicant's legal practitioners
Mtetwa &Nyemba, first respondent's legal practitioners
Jiti Law Firm, second respondents' legal practitioners