TENDAYI JOSHUA GOVERE
(in his capacity as the Executor Dative in the estate of the late David Govere DR 2814/22)
versus
NORMAN BVEKWA
and
THE MASTER OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 21 January 2025 & 2 May 2025

Opposed Application-Rescission of default judgment

T Magwaliba, for the applicant
T Bvekwa, for the 1st respondent

MUSITHU J: This is an application for rescission of a default judgment that was filed in terms of r 27(1) of the High Court Rules, 2021 (the Rules). The default judgment was granted by this court on 11 June 2024. The applicant also sought an order of costs in the event that the application was opposed.

Background to the Applicant's Case

The applicant's founding affidavit was deposed to by Tendai Joshua Govere in his capacity as the Executor Dative of the estate of the late David Govere registered under DR 2814/22. The applicant averred that there was good cause for the rescission of the default judgment. The applicant further averred that the default judgment in HCH3710/23, which was one for a *declaratur* and an interdict, was granted after the applicant was barred for the late filing of heads of argument in that matter. However, at the time of the hearing of the matter, heads of argument had already been filed of record. The late filing of the heads of argument had been occasioned by a misunderstanding of the rules by the applicant's legal practitioners. They believed that in terms of the proviso to r 59(21) of the rules, heads of argument could be filed at least five (5) days before the hearing of the matter.

The applicant summarised the events leading to the default order as follows. The first respondent purported to have purchased a property known as Stand 2 Gutu Township measuring 4 047 square metres (the property) from an entity known as Medworth Properties (Pvt) Ltd (the company), in which the deponent's late father David Govere (the deceased) was a director. There was a resolution dated 10 August 2012, purporting to authorise the company to sell the property. The agreement of sale of the property was purportedly signed on 22 April 2013. The applicant averred that the purported agreement of sale was a sham. It was a simulated transaction in terms of which the deceased agreed with the first respondent, his long-time legal practitioner, to hide the property away from creditors of the company.

According to the applicant, the first respondent failed to produce the proof of the payment of the purchase price, which confirmed that the agreement of sale was simulated. The first respondent relied on a statement in the preamble to the agreement which stated that at the time the agreement of sale was signed, the purchase price had already been paid. The applicant denied that such payment had been made and challenged the first respondent to produce the proof of payment, which he failed to do. The first respondent had also failed to produce the proof of payment to the liquidator of the company when he was requested to do so.

The applicant also averred that the power of attorney which the first respondent relied upon for claiming ownership of the property, and in terms of which he sought to obtain transfer of the property did not refer to the property in issue. It was vague. The applicant further averred that the transaction was afflicted by a conflict of interest because the first respondent was the deceased's legal practitioner at the relevant time. The first respondent gave a power of attorney to himself so that he could transfer his client's property to himself. Having prepared the power of attorney and obtained his client's signature thereto, the first respondent's interests conflicted with those of his client.

Further, the power of attorney did not appoint a third party as conveyancer. Rather, it appointed the first respondent to appear before the third respondent and transfer the property to himself on behalf of his client. It was also alleged that upon the deceased's death, the first respondent purported to raise statements of account for fees dating back to 2014. The fees were not only inflated, but there was no reason why such fees were not charged during the lifetime of the deceased. The first respondent refused to submit his claims for fees to the second respondent for payment as part of the creditors of the estate. He also withheld the files in respect of all the legal matters involving the deceased. The applicant contended that all this arose

because of the first respondents conflicted position. He was an officer of the court and subject to the supervision and control of the court. He could not hold on to a default judgment which was obtained based on unethical transactions.

The deponent also averred that on his deathbed, the deceased told him that the transaction in issue was simulated as it was intended to put away the property from the reach of the creditors of the company. The deponent had attached to his notice of opposition in the main application, supporting affidavits from the directors of the company at the relevant time who included Tapiwa James Maguwu, who confirmed that the company never convened a board meeting and never passed a resolution to sell the property. The deceased never informed the company's board that the property had been sold. The former secretary of the company, George Musafare Mutonhori, resigned from that position in 2011. He could not confirm that the property was sold in 2013 and that the purchase price was paid in full.

The claims for a *declaratur* and the interdict were based on purported rights flowing from the agreement of sale between the first respondent and the company. Yet the first respondent decided not to cite the company as a respondent in the main proceedings. That amounted to a fatal non-joinder. The joinder arose from necessity and the principal proceedings could not be completed without hearing the company.

The applicant also averred that prescription defeated the first respondent's claim in the principal proceedings. The agreement of sale relied upon was concluded in 2013. No claim for a *declaratur* or for an interdict had been made before the expiry of three years from the date of the agreement of sale. The agreement of sale was signed on 22 April 2013. The first respondent's claim therefore expired on 21 April 2016.

The applicant further averred that the first respondent lacked *locus standi* in the principal proceedings. He was not the owner of the property and had no rights in the property. He could not litigate on behalf of the company. It was only the company which at law could obtain an order to the effect that the property did not belong to the deceased.

It was further averred that it was in the interests of justice that the principal proceedings be argued on the merits. Heads of argument had already been filed when the default judgment was granted. At the hearing of the matter, counsel appearing for the applicant had applied for the postponement of the matter pending the filing of an application for the upliftment of the bar. The request was declined. The refusal by the respondent to consent to the upliftment of the bar was intended to prevent the court from engaging with the merits of the matter.

Attached to the founding affidavit was the supporting affidavit Tinevimbo Gatawa, a partner in the law firm E. Gijima Attorneys At Law. The firm represented the applicant in the principal proceedings in HCH 3710/23. While they were representing the applicant, the first respondent instituted separate proceedings under HCH 348/24, wherein he sought the transfer of the property that was the subject of the dispute in the principal proceedings. The principal respondent in that matter was the company, which opposed the proceedings through the said law firm.

There was extensive communication between the legal practitioner and the first respondent's legal practitioners in connection with the two matters. In one such communication, the first respondent had advised that he was considering abandoning the principal proceedings and persisting with the claim in HCH 348/24 in which more substantive relief was being sought. The deponent took the view that there would be no need to prepare and file heads of argument in the principal proceedings. The deponent claims that he proceeded to prepare heads of argument in HCH 348/24 in time and filed them. The understanding was that once that matter was resolved, it would be unnecessary to proceed with the proceedings in HCH 3710/23.

The deponent claimed that he was surprised when the first respondent caused the set down of the principal proceedings. When he saw the set down, he engaged the first respondent on his previous undertaking not to pursue the main matter and how it ended up being set down. The first respondent was of the view that the principal matter should be prosecuted to finality. The deponent claimed that he engaged the first respondent's counsel on whether he would have objections to the uplifting of the bar for the late filing of heads of argument, and also whether it was not in the interests of justice that the two matters be consolidated and heard together since they were related. The first respondent's counsel undertook to revert to the deponent after getting further instructions from the first respondent.

According to the deponent, the first respondent's counsel suggested that as parties, they could resort to r 59(210(ii) of the rules since the first respondent had not applied for a bar. The first respondent's counsel did not revert with a definitive position on the issues. The deponent proceeded to prepare the heads of argument and filed them on 6 May 2024. The hearing was scheduled for 11 June 2024. The deponent also believed that the heads of argument could be filed at least five days before the date of the hearing without falling foul of the rules.

The deponent was requested by the client to brief an advocate to appear and argue the matter. The advocate advised him that the proviso to the rules which allowed the filing of heads of argument at least five days before the hearing applied in situations where a matter was set down for hearing without affording a respondent the full ten days within which to file heads of argument, after being served with the applicant's heads of argument. The deponent owned up to the error and requested counsel to seek the first respondent's consent to uplift the bar or failing that, for the matter to be postponed so that a proper application for the upliftment of the bar would be filed. The request for the postponement of the matter was refused by the court and the default judgment was entered in favour of the first respondent.

First Respondent's Case

The first respondent denied that the applicant had demonstrated any good cause for the rescission of the default judgment. The applicant had no case and his defence in the main matter was an abuse of court process. The failure to file heads of argument in the main matter showed that there was a deliberate disregard of the rules. The default was therefore wilful. The applicant filed heads of argument some eight months after being served with the first respondent's heads of argument. The first respondent's heads of argument were served on the applicant on 1 September 2023, while the applicant's own heads were filed on 6 June 2024.

The first respondent averred that the filing of the application for rescission was just academic. The bar operating against the applicant would remain operational even if the rescission was granted. The applicant had not sought condonation for the late filing of the heads of argument.

As regards prospects of success, it was averred that the issue for resolution was whether a property that was registered in the name of a company should be included in the inventory of a deceased estate of an individual. The first respondent also dismissed the notion that the transaction was simulated. He also averred that the resolution was valid as it ensured that the transaction would sail through. The author of the resolution had filed a supporting affidavit in the main matter confirming his signature.

It was averred that the agreement could not have been a sham when two directors of the company were involved. The resolution stated that a meeting of the directors was held. The first respondent averred that whatever was not done in accordance with the internal processes of the company had nothing to do with him. The first respondent further averred that at the time of the sale, there was a caveat against the title deed of the property in favour of NMB

Bank, a judgment creditor. There was therefore no way the property would have been hidden away from creditors.

The first respondent also claimed that the proof of payment of the purchase price was the clause in the agreement of sale which stated that the purchase price had been paid. There was no law that required that proof of payment of the purchase price must be availed when the agreement of sale already acknowledged that payment was made. The applicant could not deny the existence of a payment as he was never a director of the company at the relevant time. It was also averred that the power of attorney was not vague as alleged. At any rate, these were new issues being raised by the applicant in his affidavit. They were never pleaded in the main matter. The first respondent also dismissed the alleged conflict of interest claiming that no law that prohibited such a transaction.

It was further averred that there was no rule cast in stone which stated that it was only the seller who appointed a conveyancer. The parties' wishes, as expressed in their contract had to be respected. The fact that the deceased signed the power of attorney to pass transfer was enough.

The first respondent also contended that it was not necessary to cite the company in the main matter. This was because the position of the company's properties was not in dispute. The first respondent also denied that prescription arose in the main matter. The claim had not prescribed, and the applicant could not raise that defence at this stage.

As regards the supporting affidavit of Tinevimbo Gatawa, the first respondent denied expressing an intention to abandon the main matter. This was because the two matters dealt with different issues. When the matter to compel transfer was instituted, the applicant was already barred because of its failure to file heads of argument.

The court was urged to dismiss the application with costs on the legal practitioner and client scale.

Submissions and analysis

Mr *Magwaliba* for the applicant urged the court to consider the fact that at the time the default judgment was granted, the applicant had already filed his heads of argument. Condonation for the removal of the bar operating because of the late filing of heads of argument was refused by the court. Also rejected was the request to have the matter postponed to enable the applicant to file a written application for the removal of the bar.

Counsel urged the court to have regard to the applicant's prospects of success in the main matter. The circumstances in which the property was allegedly sold to the first respondent was also the subject of the dispute. There was also a dispute as to whether the company passed a resolution to sell the property in the first place. There was also the issue of whether the first respondent was not conflicted in the whole transaction. He appointed himself as conveyancer of a property that he wanted to transfer to himself.

Counsel also submitted that the first respondent did not have the requisite *locus standi* to challenge whatever was included in the estate. It was further submitted that the first respondent's claim had prescribed by operation of law. Mr *Magwaliba* also moved for the removal of the bar for the late filing of heads of argument, and in that connection, sought an amendment of para 2 of the draft order to include a clause for the removal of the bar.

In response, Mr *Bvekwa* for the first respondent submitted that an executor of a deceased estate was not permitted to deal with property registered in the name of a company. The deceased did not own the property that was the subject of the dispute herein. In its papers, the applicant had made this concession, which he had not withdrawn. Mr *Bvekwa* argued that the issue of prescription could not be raised in the present application as it was never raised in the main application.

Mr *Bvekwa* also submitted that the applicant had not asked the court to lift the bar. The heads of argument in the main matter would still be out of time even if the default judgment was rescinded. It was further submitted that the court could not grant that which a litigant had not asked for.

In his brief reply, Mr *Magwaliba* submitted that the position of the law was that where there was a notice of opposition filed or record, the court could not ignore it. The filing of a notice of opposition was a juristic act. It was not proper for the court to enter a default judgment in the face of that opposition.

Analysis

One of the hallowed principles in litigation discourse is the principle of finality in litigation. Litigation is not an enchanting sport where participants are assured of getting some financial reward for their exertions. Litigation is a highly strenuous and at times a nerve-racking affair which must be concluded in the shortest possible time to allow parties to move on with their lives. It is time consuming and costly. No person of sound mind would prefer it as some source of amusement. One of the key provisions of the rules which underpins the principle of

finality to litigation is r 39(5)(b). That provision permits a party that has been barred to make a chamber application for the removal of the bar or an oral application at the hearing of the matter for the removal of such bar.

The essence of permitting a litigant to make an oral application for the removal of a bar is one of convenience. For instance, where a party has been barred for failing to file their heads timeously, but those heads have since been filed at the time of the hearing, then the court must be slow to deny that party a right of audience because there would have been substantial compliance with the rules of court. There would be absolutely no prejudice to anyone if the bar is removed to allow the matter to progress. Further, litigation itself is not some kind of hide and seek game where a litigant waits to spring a surprise at the hearing of the matter. It must unfold and progress in a transparent manner. As officers of the court, legal practitioners must readily concede to the removal of a bar especially in those instances where heads of argument would have been filed at the time the matter is set down for hearing. The making of uninformed objections will only yield more interlocutory applications, which will in turn lead to a waste of resources on the part of litigants and the courts.

A litigant who religiously files all the pleadings right to the point of the hearing of the matter evinces an intention to be heard on the merits of the matter. In my respectful view, first respondent ought not to have pushed for the matter to proceed on the basis of a default in the face of a validly issued notice of opposition and heads of argument which were already before the court at the time of the hearing of the matter. In any event, the parties were involved in other matters with the applicant filing the relevant pleadings timeously in line with the rules of the court.

The dispute between the parties raised very important legal questions that cannot be resolved merely on the basis of a default judgment. The parties conflicting positions on the status of the property and the legality of the sale of the property to the first respondent must be reconciled after the court has heard both parties on the merits. Further, the court also noted that the company was not cited as a party in the proceedings that yielded the default judgment. Yet the company had an interest in the property which is the subject of the dispute. There is also the question of the conflict of interest involving the first respondent bearing in mind his past relationship with the deceased and the company. Serious allegations of conflict of interest and abuse of his position as the deceased's counsel were raised against him. These allegations and their bearing on the dispute must be properly ventilated in the main matter.

The applicant's counsel also raised the question of the first respondent's *locus standi* to challenge whatever was included in the deceased's estate. There was also the question of whether the first respondent's claim had prescribed. The argument was shot down by the first respondent's counsel on the basis that it was raised for the first time in the proceedings before me. These are questions of law which the court seized with the main matter must deal with.

Counsel for the respondent submitted that nothing would be achieved by the setting aside of the default judgment since the applicant had not sought the removal of the bar for the late filing of the heads of argument. Counsel for the applicant sought an amendment of the draft order and further urged the court to remove the bar if it was persuaded to grant the application for the rescission of the default judgment.

Earlier in the judgment I observed that r 39(5)(b) of the rules serves an important purpose in that it brings in convenience and allows for the expeditious resolution of disputes where are bar can be removed without any prejudice to the parties. It permits a litigant to motivate the removal of the bar through an oral application and allow the parties to argue the merits of their case.

In the exercise of my discretion, I consider this to be an appropriate case for the court to rescind the default judgment as well as grant the request for the removal of the bar to give the parties an opportunity to argue the main matter. This is the kind of matter where the first respondent should have consented to the removal of the bar in order to achieve the expeditious resolution of the dispute. Further, given the circumstances of the case and the nature of the relationship that existed between the deceased and the first respondent, this application should not have been opposed at all. In fact, I dare say that this is the kind of matter that parties must attempt to resolve amicably.

Costs

In the exercise of its discretion, and having considered the circumstances of the matter, the court finds it befitting that the relief sought be granted with each party bearing its own costs of suit.

Resultantly it is ordered that:

1. The application for rescission of the judgment of this honourable court handed down in default by the Honourable TSANGA J in case number HCH 3710/23 on 11 June 2024 be and is hereby granted and the said judgment is hereby rescinded and set aside.

2. The bar operating against the applicant for the late filing of heads of argument in case number HC 3710/23 be and is hereby removed, and the applicant's heads of argument shall be deemed to have been filed on the date they were issued.
3. Each party shall bear its own costs of suit.

MUSITHU J……

E. Gijima, applicant's legal practitioners.
Bvekwa Legal Practice, 1st respondent's legal practitioners.