CHIDZIVA ESTATE (PRIVATE) LIMITED
versus
CLIFFORD SAIMON CHIDZIVA
and
EVELYN CHIDZIVA
and
MUNESHKUMAR BABUBHAI NAROTAM
(In his capacity as the Executor of Estate Late Melchior Gore Chidziva)
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 17 & 24 March 2025 &19 May 2025

Opposed Application-Rescission of default judgment

M B Mudhau, for the applicant
M Chiramba, for the 1st respondent
P Mavhura with V Muza, for the 2nd respondent
K Mangwiro, for the 3rd respondent

MUSITHU J: This is an application for the rescission of an order of this court granted in default in favour of the first respondent against the applicant and the rest of the respondents on 1 March 2023 in HCH 7962/22. The order had the effect of placing a caveat on a property known as a certain 2841,0704 hectares of land called Ellerton Estate situate in the District of Salisbury (the property). The fourth respondent was ordered to register a caveat on the property within 48 hours of receipt of the order. The applicant's founding affidavit was deposed to by one Norlex Nobody Chabata, in his capacity as a director of the applicant.

Background to the Applicant's Case

The deponent claimed that the applicant was not aware of the proceedings in HCH 7962/22, which yielded the default order. The deponent further claimed that the applicant only became aware of the order on 19 September 2024 when he made an enquiry on the status of the applicant's property. The applicant was advised of the existence of the caveat by the fourth respondent.

The court application in HCH 7962/22 was served at 49 Bubye Way, Old Marimba Park, in Harare. The deponent averred that the applicant had never conducted any business from this particular address. He further claimed that whoever received the application at this particular address did not transmit it to the applicant. The applicant's physical address was Ellerton Farm, Harare.

The deponent averred that the applicant had good prospects of success in the main matter. The applicant owned the immovable property in respect of which the caveat had been registered at the instance of the first respondent. The first respondent had no ownership rights in the property. Although the first respondent was a beneficiary in the third respondent's estate, that did not clothe him with *locus standi* to institute proceedings for placing the caveat on an asset of the applicant.

The deponent further claimed that the first respondent failed to appreciate the distinction between the applicant, the first and the third respondent. The applicant was a separate legal *persona* with its own directors and shareholders. At the time the main application was launched, the third respondent was not yet deceased. He was critically ill. He was a director of the applicant alongside other directors.

It was also contended that the applicant intended to deal with its assets as it saw fit. The caveat placed on the property hindered the applicant from enjoying its real rights in the property. The applicant should therefore be accorded the opportunity to defend the proceedings in HCH 7962/22.

The First Respondent's Case

The first respondent claimed that when the order was granted on 1 March 2023, the directors of the applicant were the deceased and the second respondent. The second respondent was aware of the order and that the caveat had been placed on the property. He averred that the issue of the deponent's knowledge of the court order was not material. The directors were very much aware of the caveat and the intention behind its placement. The applicant was therefore aware of the default judgment.

Further, according to the first respondent, the deponent to the applicant's founding affidavit was only made director by appointment on 24 August 2024. He claimed to have become aware of the order on 19 September 2024. He was ignorant of the fact that the directors who were in office before his appointment were aware of the order and did not act on having

the caveat lifted. Whatever decisions were made by the directors then were binding on all the directors, old and new. The order could not be rescinded for such flimsy and unfounded reasons.

The first respondent averred that there were factions within the deceased's family due to fights over estate assets. The first respondent himself claimed to have been dragged before the criminal courts by the second respondent on allegations of fraud, which turned out to be unfounded. They had been family fights, but the family members were in agreement on the importance of keeping the caveat on the property as it safeguarded the assets of the estate. The first respondent insisted that he had the right to make the application for the caveat, and the court granted the relief sought as it was uncontested. He claimed to have the requisite *locus standi*, because the other director who happened to be his father, was old frail and vulnerable and hence the need to have the caveat in place to protect the deceased's interests and legacy.

The first respondent claimed that there were new directors who were fraudulently appointed, and these were the ones who were seeking to uplift the caveat after they had failed to dispose of the applicant's land due to the caveat. The deponent was not given any right to act in the capacity in which he purported to act.

The court was urged to dismiss the application with costs on the punitive scale for want of merit. The application had also been filed more than a year after the granting of the order and no condonation had been sought before the court.

Second Respondent's Case

The second respondent averred that the board resolution tendered by the deponent to the applicant's founding affidavit was fraudulent and a legal nullity. The deponent was challenged to furnish proof of the notice of the board meeting dated 19 September 2024, as well as the minutes of the said meeting that purportedly gave the deponent the authority to act on behalf of the applicant. The second respondent averred that the deponent to the applicant's affidavit had no authority to represent the applicant and that the purported resolution was a nullity. The second respondent also averred that she was unaware of Farai Chinoda who signed the resolution as a director. The deponent was challenged to furnish proof of Farai Chinoda's appointment as a director in a lawfully constituted meeting of the applicant. The resolution was dismissed as a bogus document issued by bogus directors.

It was also averred that the application was not properly before the court since no condonation had been sought to file the application some thirty days after the order was granted. The court was urged to dismiss the application with costs on the punitive scale.

It was also averred that Messrs Chikono and Gumiro who were acting for the applicant were seriously conflicted. This was because they had also acted for the second respondent in a matter related to the issues placed before the court and against the same parties. The legal practitioners were holding privileged information that they acquired from the second respondent as a director of the applicant and they could not be seen suing their former client. It was a serious violation of legal ethics and minimum standards of professional discipline for the law firm to act in that manner. The court was urged to grant an order barring the law firm from acting on behalf of the applicant.

The second respondent averred that the application was a total abuse of court process. The order placing the caveat was correctly granted in order to protect the applicant's asset from dissipation by some of the deceased's children who included the first respondent. The first respondent was alleged to have forged the CR 14 for Chidziva Investments (Pvt) Ltd and caused a huge piece of land in Helensvale, Harare, to be subdivided resulting in serious financial prejudice to the company. The first respondent allegedly disposed of the subdivided stands and converted the proceeds of sale to his own use. It was therefore in the applicant's interests that the caveat remained until all the beneficiaries under the M.G. Chidziva Trust stopped fighting and were united in promoting the interests of the Trust and all the companies in which the Trust had an interest.

The second respondent claimed that the rescission of the judgment was being sought by the Trustee of the M.G. Chidziva Family Trust who was using the deponent to fight their own wars. They planned to subdivide the applicant's farm without a resolution of shareholders and directors and were seeking the removal of a caveat in order to clear the way for the illegal subdivision in which they had a personal interest and had nothing to do with the interests of the applicant.

The second respondent also averred that as a director of the applicant, she became aware of the default order around March 2023, after the first respondent brought it to her attention. She did not take action as a director because she found the caveat convenient and in the interests of the applicant. The allegation that the applicant was unaware of the order was therefore false.

The first respondent dismissed as bogus, the Form No. C.R.6 (Particulars of Directors and Secretaries), attached to the applicant's founding affidavit. She claimed that the document was filed fraudulently without her knowledge, nor the knowledge of the legitimate directors of the applicant. She further claimed that she was taking all the necessary steps to have the

document set aside. She also averred that the document was bogus because from around May 2024, all new company documents filings were being issued online, and were coming out in digital versions.

The Third Respondent's Case

The third respondent deposed to his opposing affidavit in his capacity as the Executor to the estate of the deceased. The opposing affidavit raised a preliminary point challenging the authority of the deponent to the applicant's founding affidavit. The third respondent averred that the appointment of the deponent as a director of the applicant was procedurally irregular and invalid. The process leading to his appointment did not comply with the procedure stipulated in the applicant's articles of association or the applicable corporate governance laws. The third respondent claimed that clauses 67 and 75 were not complied with as the second respondent and the deceased were the only directors of the applicant at the time of the deceased's death.

The irregularities regarding the appointment of the deponent to the applicant's founding affidavit were highlighted as follows:

- No proper notice for the resolution to appoint the deponent as director was given to all shareholders as required by law. No meeting was ever called for the purposes of appointing the new director.
- There was no valid quorum present at the meeting during which the deponent's appointment was purportedly made.
- The necessary filings with the Companies and Intellectual Property office (CIPO) were not completed, or if they were, they were done after the event, and without proper authority.
- No annual general meeting nor any meeting was actually called for. If one was indeed called for, then the deponent to the applicant's founding affidavit was challenged to produce proof of same.

In the absence of the requisite proof, it was averred that the deponent lacked authority to represent the applicant. The application had to be dismissed with costs on the legal practitioner and client scale for want of authorisation.

Concerning the merits of the application, it was averred that the applicant was aware of the court order, as the second respondent and the deceased, the two sole directors of the applicant were made aware by the third respondent. Upon discussion, it was established that

keeping the caveat in place was in the interests of the applicant, even though the first respondent had acted out of his own interests.

The Answering Affidavit

In his response to the first respondent's opposing affidavit, the deponent to the applicant's founding affidavit insisted that the applicant was not aware of the court application and the subsequent court order. The court application was served at the wrong address, which was not the applicant's *domicilium*. For that reason, the purported service was invalid. The applicant was therefore denied its right to oppose the matter. The matter was erroneously set down by the first respondent in the applicant's absence.

The deponent also denied that the applicant's directorship was not properly constituted. The other director had passed on and only one director remained. The sole director who remained did not draw the attention of the applicant to the existence of the default judgment. The first respondent was not a director or shareholder of the applicant, and neither did he have a say in the operations of the applicant. The applicant's property did not form part of the deceased estate.

As regards the second respondent's opposing affidavit, the deponent insisted that the resolution attached to the founding affidavit was proper. The directors of the applicant were as they appeared in the Form No. C.R.6 (Particulars of Directors and Secretaries), attached to the applicant's founding affidavit as Annexure C. The second respondent was accused of not attending the directors meeting, but there was a quorum for the meeting which proceeded to conduct the business of the meeting. The deponent also insisted that he was a director of the applicant and was authorised to represent it by virtue of the resolution attached to his affidavit.

Concerning the third respondent's opposing affidavit, the deponent denied that he was not authorised to litigate on behalf of the applicant. He averred that all that was required was for the court to satisfy itself that enough evidence was placed before it to show that it was indeed the applicant which was litigating and not some unauthorised person. In the present matter, it was the applicant with vested real rights and interests over the immovable property. The deponent was authorised by other directors to act on behalf of the applicant as a fellow director.

The deponent also averred that the appointment and assumption of office as director by Mr F. Chinoda was above board in line with the provisions of the law and clauses 29, 54, 55, 57, 70, 74 and 78 of the Memorandum and Articles of Association of the applicant.

The Submissions

The parties first appeared before the court on 17 March 2025. The first respondent was barred for not filing heads of argument timeously. Mr *Chiramba* for the first respondent made an oral application for the removal of the bar, accepting the blame for not having filed the heads of argument timeously. He further requested a postponement of the matter to enable him to file the said heads which he submitted had been prepared and ready for filing. The application was opposed by Mr *Mudhau* for the applicant who submitted that no reasonable explanation had been given for the non-filing of the heads of argument.

I granted the application for the removal of the bar after Mr *Mudhau* conceded that any prejudice occasioned by the postponement of the matter could be cured by an order of costs which were to be borne by the first respondent. The matter was postponed to 24 March 2025 to allow for the filing of the first respondent's heads of argument. The court also ordered the first respondent to pay the applicant's wasted costs for the day on the legal practitioner and client scale. The second and third respondents did not claim any costs arising from the postponement of the matter.

On the resumption of the hearing on 24 March 2024, counsel for the first respondent appeared in court late, well after Mr *Mudhau* had proposed that the court could consider the first respondent's opposition in determining the matter on the merits. I will first determine the preliminary issues raised by the respondents.

Whether the application was properly before the court

Ms *Mavhura* for the second respondent submitted that the application was improperly before the court as it was filed after 30 days in breach of r 27(1), of the High Court rules, 2021. The applicant had approached the court almost a year after the order was granted. The order was granted on 1 March 2023, and the deponent averred that the applicant only became aware of the order on 19 September 2024. Yet the second respondent who happened to be a director of the company since its inception, claimed that the applicant had been aware of the order from the time that it was granted. She deliberately chose not to oppose the application or seek the rescission of the order. The deponent to the applicant's founding affidavit was only appointed director of the applicant on 24 August 2024, a year after the default order was granted.

For the third respondent, Mr *Mangwiro* associated himself with the submissions made on behalf of the second respondent on this point. He further submitted that the third respondent had made the directors aware of the court order, but they decided not to challenge it.

Condonation was therefore required before the applicant could approach the court for the setting aside of the order.

In his response, Mr *Mudhau* submitted that the applicant became aware of the court order on 19 September 2024, and the present application was filed a month thereafter. He argued that it was not clear how the second and third respondents became aware of the order in the absence of a proof of service confirming service of the order on them. The mere fact that the second and third respondents were aware of the order did not necessarily mean that they had brought it to the attention of the applicant.

Analysis

Rule 27(1) and (2) in terms of which the present application was filed provides in part as follows:

> "***27. Court may set aside judgment given in default***
> (1) 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, ……..
> (2) If the court is satisfied on an application ……that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute the action, on such terms as to costs and otherwise as the court considers just."

It is common cause that the order that the applicant sought to have rescinded was granted by this court on 1 March 2023 in HC 7962/22. In that matter, the first respondent herein was the applicant, while the present applicant herein was cited as the third respondent. The second respondent herein was the second respondent in that matter. The deceased, who is now represented by the third respondent herein was the first respondent. It is also common cause that at the time that the said order was granted, the deponent to the applicant's founding affidavit was not yet a director of the applicant as he was only appointed on 24 August 2024. The directors of the applicant were the deceased and the second respondent herein.

The court's view is that at the time that the default order was granted, the people who could speak authoritatively on behalf of the applicant were its directors then. Those are the people who represented applicant's interests, bearing in mind that the applicant was also cited as a respondent in that matter. The second and the third respondents intimated that they were aware of the order and they chose not to contest it because as the directors of the applicant, they considered it to be in the best interests of the applicant to have the caveat in place.

The deponent to the applicant's founding affidavit finds himself in a very precarious position. This is because once the people who were the custodians of the applicant's affairs at

the material time claimed to have been aware of the court order at the time that it was granted, then his argument that the application was not properly served on the applicant, and that there was no proof of service of the court order on the second and third respondents becomes unsustainable. The deponent only became a director of the applicant a year after the order was granted. He is therefore bound by the decisions that were made by the directors who represented the applicant before his appointment. He cannot authoritatively speak on behalf of the applicant and its directors then, on issues that occurred before he assumed the position of a director.

What further complicates the deponent's own cause is that his ascension to the position of director in the applicant is contested by his fellow directors. Also contested is the resolution which purportedly authorised him to institute these proceedings on behalf of the applicant. That resolution was signed by the Farai Chinoda whose position as director is also contested by the second and third respondents. The deponent was challenged to furnish proof of the notice of the board meeting of 19 September 2024 and the minutes of the same meeting that yielded the maligned resolution. He did not furnish the requested information in his answering affidavit.

It is from this maze of confusion that the deponent's claim that the applicant became aware of the order on 19 September 2024 must be considered. In light of the second and third respondents avowed position of not only disputing the deponent's directorship, but the resolution which led to the institution of these proceedings, it must have occurred to the applicant that his assertion of when the applicant became aware of the judgment was untenable.

This court is least satisfied that the applicant only became aware of the court order on 19 September 2024. The court is satisfied with the second and third respondents' submission that as the directors of the applicant, they were aware of the court order as far back as March 2023, being the time that it was granted. The applicant ought to have made the application for rescission of the order within one month of becoming aware of its existence. The deponent cannot conveniently seek to attribute the applicant's knowledge of the default order to the time of his appointment as its director, when there were other directors who were already aware of the existence of that same order long before his appointment. In *Cape Valley Properties (Private) Limited & 2 Ors* v *Chiduku & Ors* SC 113/23, at pages 3-4 of the judgment, the court reiterated the need to comply with the rules of court when it said:

> "[17] A party who seeks the assistance of the court must do so in terms of the court's rules. Disregarding the court's rules renders the applicant's application fatally defective and a nullity…… "

The above principle is even more apposite in those instances where the rules of court clearly delineate the time frames within which certain processes must be undertaken. The applicant's failure to file this application within thirty days of becoming aware of the default order made the application defective. The applicant ought to have sought condonation before approaching the court with the present application. There is merit in the second and third respondents' preliminary objection that the application is not properly before the court. Having reached that conclusion, it is unnecessary for the court to traverse the merits of the application.

Costs

The general rule is that costs follow the case, and I find no reason not to relate to this general principle and award costs to the second and third respondents as the successful parties.

Resultantly it is ordered that:

1. The application is hereby struck of the roll for being improperly before the court.
2. The applicant shall bear the second and third respondents' costs of suit.

MUSITHU J:……

Mbano Gasva & Partners, legal practitioners for the applicant
Mupindu Legal Practitioners, legal practitioners for the first respondent
Muza & Nyapadi, legal practitioners for the second respondent
Muneshkumar Babubhai Narotam, legal practitioners for the third respondent