GIFT CHAAPO MADHLAYO
And
G.M. FINANCIAL SERVICES (PVT) LTD
Versus
MEGALINK INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE 7 March & 19 October 2022

Opposed application

H. *Gwanyanya*-for the applicants
Adv G. *Madzok*a-for respondent

CHILIMBE J

> "An "error" in common and ordinary parlay, is defined as: a mistake, fault, blunder, boo-boo, slip, slip-up, inaccuracy and miscalculation. The law is settled, on the issue of if or when and whether this court ought to grant rescission of its own judgments in terms of rule 449"-CHIGUMBA J[1]

BACKGROUND

[1] Applicants aver that labouring under a number of "boo-boos", the court issued a judgment in their absence in a matter affecting their interests. In that respect, applicants have moved the court to set aside that 2 February 2020 judgment (per PHIRI J), in terms of rule 29 of the High Court Rules 2021 (the successor to r 449 in the old High Court Rules 1971). This rule permits a party to approach the court in circumstances where a judgment was erroneously granted, in its absence and in a matter affecting that party`s interests. Determination of this matter hinges in the main, on application of the phrase "erroneously granted" to the facts before the court

[2] First applicant("Madhlayo") describes himself as a businessman and vastly experienced banker. He is also the managing director of second applicant ("G.M. Financial"). It is not in dispute that sometime in 2015, Madhlayo represented G.M. Financial Services in a mandate to

[1] In *Jonas Mushosho v Lloyd Mudimu & Anor* HH 443-13 at page 10.

secure documentary letters of credit (LCs) valued at US$3,582,500 on behalf of respondent ("Megalink"). The LCs were meant to facilitate importation of 25 Zhongtong buses from China. Madhlayo avers that G.M. Financial delivered on mandate. The LCs were duly established and Megalink paid an amount of US$170,168 as mandate fees. It is also common cause, (though rather unclear as to why) that this fee was paid into an offshore bank account belonging to a foreign entity named Polo Trade Finance.

[3] Whilst Madhlayo deposed in his founding affidavit that the LCs were successfully procured and fee duly earned, Megalink argues to the contrary. They aver that G.M. Financial established the wrong LCs which were rejected by Zhongtong Buses China. As a result, G.M. Financial were compelled to refund the mandate fee. It is common cause that Madhlayo subsequently executed, on behalf of G.M. Financial, an acknowledgement of indebtedness to Megalink in the sum of US$170,168 on 30 April 2016.The acknowledgment of debt confirms on the face of it that G.M. Financial failed to deliver on mandate.

[4] G.M. Financial failed to honour the terms of acknowledgement of debt and Megalink issued summons against Madhlayo and G.M. Financial on 12 July 2019 claiming an amount of US$170,168,75. The acknowledgement of debt and alleged defective performance by G.M. Financial formed the basis of Megalink`s claim. In the declaration, Megalink also alleged that Madhlayo was the alter-ego of G.M. Financial. This claim is not robustly refuted by Madhlayo nor by Lucy Madhlayo, the company secretary to G.M. Financial ("Lucy"). Lucy deposed to brief, supporting affidavits to Madhlayo`s founding and answering affidavits, a matter that basically lends credence to the alter-ego claim by respondent. Madhlayo`s argument however is that he is neither the alter-ego of G.M. Financial, nor is he responsible for its obligations. He pleaded the defence of incorporation and separate legal personality.

[5] That notwithstanding, judgment was taken in default on 2 February 2020 in the capital sum of US$170,168,75 plus ancillary relief. This is the judgment which Madhlayo and G.M. Financial now seek to reverse.

REQUIREMENTS OF A RULE 29 RESCISSION OF JUDGMENT

[6] The applicable test for rescission of judgment under r 29 is well-established. Firstly, (a) the judgment must have been erroneously sought or erroneously granted, (b) that the judgment was so granted in the absence of the applicant or a party sufficiently, directly and substantially affected by it (c) that "sufficient, direct and substantial interest" entails a judgment and effect thereof impacting a party`s legal (not just pecuniary) rights or interests[2].I will deal with these requirements in turn .It may be noted that the last requirement is common cause and raises no argument.

[7] It is also not in dispute that the 2 February 2020 order of this court per PHIRI J was granted in default of the applicants. The applicants Madhlayo and G.M. Financial argue that the matter ought to end there since the judgment was indeed granted in their absence. Megalink argued that the applicants were properly served with summons commencing action in HC 5831/19 and were in wilful default. There was some argument on this point with Megalink seeking to prove that the summons was indeed served at number 29 Corwall Road, Avondale West, Harare being G.M. Financial` s registered address.

[8] I will avoid a fuller discussion of this issue save to draw attention to the fact that the gist of Megalink`s argument reposes in an old legal maxim. In *Standard Chartered Bank Zimbabwe Limited* v *Matsika* 1997 (2) ZLR 389 KORSAH JA had this to say page 389 G; -

> "A cardinal principle of the common law is expressed in the aphorism: "*nemo ex proprio dolo consequitur actionem*", which translates: no one maintains an action arising out of his own wrong. Complementary to this principle is another which stipulates:" *nemo ex suo delicto meliorem suam conditionem facere potest*", which means: no one can make his better by his own misdeed."

[9] Megalink is merely arguing that Madhlayo and G.M. Financial should not be permitted to benefit from their deliberate disdain of the rules of court. They were served with court process but ignored it. Now they approach the same court whose authority they slighted. As stated, the matter is open to some doubt as to whether the court process was indeed served on Madhlayo

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[2] See *Grantully (Pvt) Ltd & Anor v UDC LTD* 2000 (2) 361, *Mutebwa* v *Mutebwa* 2001 (2) SA 193 (TkH*), Banda v Pitluk* 1993 (2) ZLR 60 (H), and on the issue of "rights and interests" -Herbstein and van Winsen`s 5th edition of The Civil Practice of the High Courts of South Africa at page 931 B.

and G.M. Financial, or that the process was brought to their knowledge. In any event, as discussed later, the authorities do not require a party seeking a r 29 rescission to prove that it was not in wilful default. Nonetheless, I will return to this maxim later as it has some relevance to other matters intrinsic to the disposal of this matter.

[10] The next requirement is to establish if the judgment was erroneously granted. Herbstein and van Winsen (*ibid*), opine thus on what an error in the issuance of a judgment is at page 931; -

> "The question of what constitutes ab error for the purposes of rule 42 [the South African equivalent to our r 29] has been the subject matter of a number of decided cases. It has been stated that it seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment"

[11] Madhlayo and G.M. Financial submitted five (5) grounds as constituting the source of error. They argued that (a) summons were not served on applicants, (b) that the judgment was granted on the basis of a contract tainted by fraud and illegality, (c) that the order granted an award sounding in United States Dollars, (d) that the order against Madhlayo was incompetent and (e) that the order was granted in respect of a claim that had prescribed.

[12] The heads of argument filed on behalf of applicant amplified these five (5) sources of error quite considerably. The net effect of these grounds is to proffer a fully-fledged defence to the claim that was brough against the applicants. It is clear that applicants have gone to great lengths to demonstrate "good and sufficient cause" as well as the existence of a plausible defence. That is not a requirement on the part of those seeking a rescission of judgment under r 29. The Supreme Court pronounced that position in *Grantully (Pvt) Ltd & Anor* v *UDC Ltd* (supra) and reiterated the same point in *Munyimi v Tauro* SC 41-13.

[13] In addition, it could not have been the intent of the drafters that a judgment in default will be deemed as having been erroneously granted because the defendant`s defence was not placed

before the court. Such an approach would automatically oust and defeat the entire principle and facility of granting of judgments in default.

[14] Whilst on this point, CHIGUMBA J made an important distinction between the three scenarios in respect of which a party may approach a court seeking the rescission of judgment in *Jonas Mushosho v Lloyd Mudimu* (supra); *Godknows Jonas* v *Rhona Shawlyn Mabwe* HH 72-16; and; *Chengeta N.O & 3 Ors v Tabana 23-18.* These three scenarios being (a) the present r 29 option, (b) a rule 27 application for rescission of judgement where a party needs to demonstrate that it was not in wilful default, is making a bona fide application based on a bona fide defence which enjoys prospects of success and (c) a common law application praying for the court`s discretion to set a default judgment in order to avert an injustice. The importance of these distinctions lies in how a party will plead its case in a particular category. In *Chengeta N.O & 3 Ors v Tabana* (supra), the applicants were disentitled from relief on the basis that their application was brought under the wrong category and thus wrongly pleaded. It was necessary for applicants to identify the specific scenario applicable to their circumstances and plead same by fully addressing the specific requirement under that particular head. This they have not done.

CONTRACT IN FRAUDEM LEGIS

[15] Madhlayo further argues in his founding affidavit hat Megalink cannot validly seek to recover funds that were paid to Polo Trade Finance in contravention of the "Exchange Control Regulations (1982), as read with the Finance Act". This point is amplified in the heads of argument and quite strenuously too. The essence being that it was erroneous for the court to grant this judgment given the regulatory invalidity attaching to the payment. One may revert to maxims of *nemo ex suo delicto meliorem suam conditionem facere potest* and *nemo ex proprio dolo consequitur actionem* on this issue. The founding affidavit does not detail the circumstances under which the payment was made minus exchange control approval. Was this payment not, after all, effected at G.M.Financial`s command? The circumstances of the LCs mandate necessarily demanded that all regulatory requirements be fulfilled. Not only did Madhlayo profess to be a seasoned banker and businessman who demonstrably appreciated the importance of such, there is no explanation why (a) G.M. Financial failed on mandate (b) remitted the transactional fee offshore and (c), why it did not observe the statutory requirements attendant to such remittance. Notwithstanding the doubts regarding the sustainability of this

argument, it nonetheless, amounts to a full defence as opposed to a specific pointer to an error on the part of the court which granted judgment. The relief which applicants seek under r 29 is discretionary and these considerations become relevant.

THE DEFENCE OF PRESCRIPTION

[16] Applicants argued that the matter had prescribed in terms of s 15 (d) of the Prescription Act *[Chapter 8:11]* when it was presented before PHIRI J for the issuance of a default judgment. The applicants deigned to state that s 20 of the Prescription Act precludes a court from taking note, on its own volition, of prescription. It therefore means that there was no error on the part of the court which issued the default judgment.

DISPOSITION

[17]. The application has not satisfied the requirements of r 29 for rescission of judgment and as such the application will fail.

It is accordingly ordered; -

That the application for rescission of judgment be and is hereby dismissed with costs on the ordinary scale.

P. Makora Commercial Law Chambers - applicants` legal practitioners`
Hatinahama & Associates -respondent`s legal practitioners

CHILIMBE J _____19/10/22