BAISHUN MINING COMPANY PRIVATE LIMITED
versus
CHINDA RESOURCES PRIVATE LIMITED
and
THE PROVINCIAL MINING DIRECTOR FOR MASHONALAND CENTRAL PROVINCE
and
THE MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 04 OCTOBER 2022

OPPOSED APPLICATION FOR RESCISSION

Mrs R. Mabwe, for the applicant
T. Runganga, for the 1st respondent
No appearance for 2nd and 3rd respondents

NDLOVU J: At the end of the hearing l gave an ex tempore judgment giving brief and key reasons why l dismissed the application. Counsel for the applicant immediately indicated that her instructing attorneys had told her of the applicant's desire to appeal my judgment, and l undertook to make available my written judgment to facilitate the desired appeal. Her it is.

INTRODUCTION

This is an application for rescission of a default judgment in terms of Rule 29(1)(a) of the High Court Rules, 2021 (the Rules). The application is opposed.

Rule 29(1)(a) of the Rules provides as follows;

"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 judgement erroneously sought or erroneously granted in the absence of any party affected thereby; or…"

The parties had a contractual business relationship beginning on 11 October 2021.

BACKGROUND FACTS

In April 2022, the 1st respondent issued out of a court application out of this court against the applicant. The applicant was the 1st respondent in that matter, HC 2439/22. The court application was meant to be served and was served at 15 Drew Road, Chisipite, Harare on 14 April 2022 by the Sherriff of the High Court of Zimbabwe. The address for service is the address recorded in the applicant's CR5 form as the applicant's principal place of business or registered office. This service was affected at the said address because the parties to the contract did not include in the contract either party's domicilum *citandi*. It is common cause that the service was in full compliance with Rule 15(13)(e) of the Rules.

On the Sherriff's Return of Service, the following is endorsed;

"A copy of court application for the 1st Respondent served on Obvious a self-identified Caretaker at No. 15 Drew Road, Chisipite, Harare, who accepted service on behalf of the 1st Respondent at 1228hrs". ***(my underlining).***

There having been no Notice of Opposition filed by the respondents in HC2439/22, the applicant therein/1st respondent in this case went on and filed for and was granted a default judgment on by this court. It is that default judgment that has given birth to this application for rescission.

APPLICANT'S CASE

On 8 June 2022, the applicant through one of its Directors and deponent to its Founding Affidavit in this matter one Chen Baoguo came to know of the default judgment in HC2439/22. On 14 June 2022 the applicant lodged the application *in casu*. In its Founding Affidavit sworn to on 13 June 2022 the applicant among other things had the following to say;

> *"I was completely unaware that the 1st Respondent had filed a court application for a declarator against Applicant … as we were not served with the same. The court application was served on an address in Chisipite which address we never gave to 1st Respondent … The return shows that the application was allegedly accepted by "Mr Obvious", who is a stranger to Applicant and myself. I have been residing in Borrowdale Brooke since 7 January 2022 … I was therefore never made aware of the court application and neither was any other representative of Applicant.*

... They accordingly served the application at that address at their own instance and at their own doing. The address is not the Applicant's domicilum citandi because neither the original agreement nor the addendum specifies the parties,' domicilium citandi. *The address is also not the applicant company's registered address and neither is it the registered address of any of the Applicant's directors. The application ... was consequently served at an invalid address ... that service was invalid in that service of the application was not effected at any address that our law permits on a corporate entity."* **(*my underlining*)**

On 27 June 2022, just a day before the *dies induciae* expired, the applicant filed a supplementary Founding Affidavit in which the following aspects of it are worthy repeating herein and there read as follows;

"... even if the Sherriff served the application ... at the correct address, I stress the point made in the founding affidavit to the effect that the person that they served the papers on is unknown to us and at any rate that person never brought the papers to our attention. Furthermore, the directors ... had travelled to Mozambique at the time that the application was purportedly served, and they only retuned when the default order had been granted." ***(my underlining)***

At the hearing the applicant argued in the main as stated in founding affidavit. It went on to add that Obvious was not in the applicant's employment and as such was not responsible person or employee as contemplated in the Rules. If sought either by the 1st respondent or the court, he would not be found because he did not indicate his surname and his identity document number. That the presumption of regularity of the Return of Service or its contents is rebuttable and once rebutted the onus shifts to the respondent to prove the validity of the service and that in this case the 1st respondent should have obtained an affidavit from the Sherriff. Finally, applicant argued that the applicant is entitled to the rescission on the basis that it was not in wilful default and its defence enjoys good prospects of success as required by the former order 63 of the then High Court Rules.

1st RESPONDENT'S CASE

The 1st respondent's case is as follows;

That the applicant's application should be dismissed because among other things the applicant has chopped and changed the reasons for its default to a degree that the respondent and the court are left with two versions being the reasons for the default.

In the Founding Affidavit sworn to on 13 June 2022 the applicant's case was that besides the Chisipite address not being its *domicilum citandi* per the agreement between the parties that address, 15 Drew Road, Chisipite, Harare was not its registered address. It was an invalid address making the service invalid too. In that Founding Affidavit its deponent further stated that he travelled to Mozambique from 5 May to 7 June 2022.

However, in the supplementary Founding Affidavit sworn to 10 days later on 23 June 2022, the applicant therein stated that even if the Sherriff served at the correct address and the services was proper serice he did so on an unknown person and that person did not bring the papers to the Directors' attention. It went on to state that at the time the application was purportedly served its Directors and shareholders had travelled to Mozambique and only retuned after the default judgment had already been granted.

The 1st respondent argued that, the applicants cannot approbate and reprobate, in that Service was done on 14 April 2022. The deponent earlier said earlier that he travelled to Mozambique on the 5th of May 2022 but was now saying that at the time of Service (14 April 2022) its Directors had travelled to Mozambique. The 1st respondent argued that all said and done the applicant does not deny its relationship with the Chisipite address in question. The 1st respondent went on to argue that as far as the facts are concerned the parties signed only one agreement on 11 October 2021, which agreement was cancelled by the applicant by letter dated 29 November 2021 and that cancellation was duly accepted by the 1st respondent by letter dated 28 December 2021 and delivered at 15 Drew Road, Chisipite, Harare. It argued that there was no new agreement dated 8 December 2021 and challenged applicant to produced it, which it failed to. The 1st respondent further argued that the long hand alterations on the Agreement of Sale was a fraud by the applicant and went on to point out that the dates on the said 2nd Agreement or addendum and the original Agreement of Sale is the same, 11 October 2021.

THE ISSUE

The issue for determination are;

1. Whether or not the default judgment was erroneously sought or erroneously granted in the absence of the applicant entitling it to have the default judgment rescinded in terms of Rule 29(1)(a).
2. In the alternative, whether or not the applicant was in wilful default.
3. Whether or not the applicant has established a good and sufficient cause for the court to rescind the default judgment.

THE LAW

The general principle of our law has always been that once a final order or judgment has been made and pronounced, that order or judgment cannot be altered by that very court as long as it reflects correctly the intention of the court that made it. This is so because that court becomes *functus officio* in the matter. It follows therefore that, R29 is an exception to the general principle as it allows a court to revisit its order or judgment in the interests of justice, but only in a restricted sense and must of necessity be sparingly applied. ***Munyimi -v- Tauro SC41/13***.

Under R29(1)(a) for the applicant to succeed he or she must show that;

(1) the judgment was erroneously sought or granted

(2) the judgment was granted in his or her absence

(3) the applicant's rights or interests are affected by the judgment.

Put differently a court is only obliged to decide whether or not the judgment was entered in error. It found to have been erroneously entered the applicant is entitled to rescission.

RESOLUTION

It is clear therefore, that in order to decide whether or not to rescind the judgement or order the court must in a way turn back the clock of time and ask itself whether or not it would have granted the judgment or order had it known the facts and the circumstances as currently being explained to it by the applicant. The court has to be persuaded by the applicant's explanation of his default.

In the case *in casu*, it admits to no argument that the service was proper and valid as it was done at the applicant's registered office or principal place of business. In that regard sight should not be lost of the fact and law that primarily service in a case like this should be on the company not on a Director of the company. Service on the company Director is one of the options available to the Sheriff. A company remains a separate legal persona from other persons**.** ***Phili v Gweru Investments Ltd and Otrs HH 195/16.***

The matter however does not end there. The next question and a critical one for that matter in this case is whether or not the person who received the application brought it to the attention of the applicant's Directors.

In answering that question, an acceptance of a mere say so by the applicant must be avoided and the explanation by the applicant be scrutinised and analysed in order to determine its degree of its probability before it is accepted or refused because to do otherwise, may lead to unnecessarily upsetting the long held principle that a court is generally barred from revisiting its own decision, and by extension give an unintended lifeline to the sluggard litigant.

In this case, service was done at the appropriate premises of the applicant. It was done on an individual who however did not give his full names or national identification number. That individual told the Sherriff that he was the caretaker at the premises. That individual accepted service on behalf of the applicant. The service was done during the day at 1228hrs. The applicant has not put in issue or denied that what is endorsed on the Return of Service is what as a matter of fact happened. The *prima facie* proof of what is stated therein has graduated to be a proven fact**.** ***Gundani -v- Kanyemba 1988 (1) ZLR (S) 226***.

It therefore cannot be true that Obvious is not known to the applicant and or its Directors. It is, to a high degree improbable that a stranger would avail himself at some premises, coincidental meet a Sheriff, conveniently identify himself as a caretaker of those premises and accept service on behalf of the occupiers of those premises, when he above all is not known to the occupiers of those premises who happen to be the person(s) targeted for Service by the Sheriff. Denying something is not rebutting it. It would have made sense if the applicant had put more facts (if any) in contradiction to what Obvious is said to have said to the Sheriff. In that exercise the applicant could have done the rudimental, that is, tell the court whether or not there is a caretaker at the premises in question. If there is, what are the names of that caretaker. The applicant's explanation is silent on whether or not there was a person at

the premises on 14 April 2022 at 1228 Hours. It is rather telling, in my view, that in its Founding Affidavit the applicant has identified Obvious as being male yet nowhere in the Return of Service is it indicated whether Obvious is male or female. In my view Obvious is known to the applicant's Directors and by extension is known to the applicant. It is not true in my view that the applicant's Directors were not aware of the application.

That the Director(s) of the applicant were then resident at Borrowdale Brook is neither here nor there because the litigant was the company and the Service was proper and valid. The lease agreement pleaded by the applicant is therefore of no assistance to the applicant's case as it does not relate to the applicant. An affidavit from Mr Obvious stating that he did not bring the application to the attention of the applicant's Directors would in all probability have altered the conclusion of this application. I find no goo

It is trite that an application stands or falls on its Founding Affidavit. The Founding Affidavit and the supplementary one in this matter carry a clear contradiction as to who had travelled to Mozambique and when among or between the applicant's Directors. I can do no better than repeat the words of ***Ndou J***. (as he then was) in ***Anabas Services (Pvt) Limited -v- Minister of Health & Otrs HB88/03*** wherein he stated as follows;

> *"The courts should in my view … discourage material non disclosures, mala fides or dishonesty."*

The applicant in this matter has been dishonest.

CONCLUSION

I concluded that, the default judgment by this court was neither erroneously sought nor erroneously granted. Rule 29(1)(a) cannot therefore avail to the applicant. The applicant through its Directors was in wilful default. No good and sufficient cause has been established to move me to rescind the default judgment under case number HC 2439/22.

It was therefore ordered as follows;

IT IS ORDERED THAT :

(1) The application is dismissed with costs.

Matizanadzo Attorneys, Applicants Legal Practitioners.

Mbano Gasva & Partners, 1st Respondents Legal Practitioners.