IRENE ZINDI
versus
ZIMBABWE FARMERS DEVELOPMENT
COMPANY LIMITED

HIGH COURT OF ZIMBABWE
MWAYERAJ
HARARE, 27 January 2015 & 25 March 2015

Opposed Application

J. Samukange, for the applicant
N.Muholo, for the respondent

MWAYERAJ: The respondent obtained default judgment against the applicant on 21 July 2011. The default judgment was pursuant to a claim for $77 546-56 from a contract of purchase and sale concluded by the parties. The applicant approached the court for rescission of judgment in terms of r 449:

> Rule 449 correction, variation and rescission of judgments and orders
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> (1) The court or a judge may in addition to any other power it or he may have*, mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order.
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> (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby, or
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> (b) in which there is an ambiguity or patent error or omission, but only to the extent of such ambiguity, error or omission or
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> (c) that was granted as a result of a mistake common to the parties.

I must mention that the applicant filed Heads of Arguments late and that annexed to the heads of Arguments was notice to the respondent of intention to apply orally for upliftment of bar. The opposed application was entertained and a ruling and reasons were given in favour of upliftment of the bar.

In allowing the application and condoning the late filing of heads of Argument the court made a finding that the explanation for late filing was credible and appeared

genuine. The respondent apposed the application on the basis that rules of this court had been flouted. It is indeed appreciated the rules of this court have to be adhered to. The time frames are certainly in place to serve a purpose in justice delivery. Any wanton disregard of rules cannot be condoned. There are however exceptions, in situation were the matter demands that the interests of justice can only be met by fully ventilating the matter then the court may grant the application. In the present case the respondent although opposed to the application cited no prejudice which would be occasioned by the acceptance of the appellant's heads of arguments, though filed late. The respondent confirmed they were alive and appreciative of the heads of arguments and that they were ready to argue the matter. Generally the courts are loathe to grant upliftment of bar in circumstances were the applicant has for ingenuine reasons flouted the rules of the court. The court of necessity in exercising its judicious discretion has to consider whether or not the other party will be prejudiced, whether or not the interest of administration of justice will be prejudiced. The issue of credibility of the explanation, the circumstances of the case, balance of convenience and or prejudice all have to be weighed cumulatively in order to come up with a just and fair decision which will enhance the very tenets of justice which the courts seek to protect. In *casu* no prejudice will be occasioned by the uplifment of bar and the court accepts the explanation for delay as not only credible but genuine. Misfiling occasioned during vacation and on realisation the applicant sought to rectify by serving, filing and advising the respondent and also giving notice for the oral application. The circumstances of the matter demand that the matter be fully ventilated hence grant of the condonation of late filing of heads and upliftment of bar.

It is with this background that the application for recession of judgment under r 449 was ventilated.

The applicant's contention was that she only became aware that there was a judgment

against her on 6 March 2014 when she retrieved a letter from the pigeon hole at parliament. The letter was to the effect that the respondent had obtained a judgment against her and was about to execute her properly.

The applicant contended that she was not aware of proceedings instituted against her and that the summons and declaration were not served on her. She was only shown the record

by the legal practitioners whom she consulted on 6 March 2014 upon receiving letter that there was a judgment against her. The basis of the applicant's argument was that she was not aware of all the process culminating in the default judgment and that the judge who granted the order was not aware of the applicant's lack of knowledge of the process leading to the default judgment. The respondent in turn opposed the application for recession of judgement in terms of r 449. The basis of the opposition being that the applicant was served with the summons and declaration through the farm manager Cliff Mukowamombe at Burma Valley Farm Mutare South. The respondent argued that the application has no merit as the applicant has no "good and sufficient" cause in other words the respondent contended that the applicant has no explanation for the default and also that the application has no *bona fides* as it lacked genuiness. In the present case what falls for scrutiny is whether or not in the circumstances of this case the applicant has made a good cause for rescission as provided for in r 449. I propose to deal with application for rescission of judgment as outlined in r 63 first. A court may set aside judgment given in default.

1. A party against whom judgment has been given in default, where under these rules or under any of the 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 in terms of sub rule (1) 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 his action, on such terms as to costs and otherwise as the court considers just. "Good and sufficient" "cause" has been shown in many cases as amounting to the party having an explanation for default and having *bona fides* in defence.

It appears recession of judgment under r 63 requires the court to assess whether or not the default which occasioned the default judgment was wilful. The court has of necessity to make a conscious assessment of whether or not the applicant with full knowledge of the matter and appreciative of the consequences attendant thereto makes a decision to refrain from appearing. Wilful default was ably defined by McNally JA in the case *Zimbabwe Banking Corp Ltd* v *Masendeke* 1995(2) ZLR 400 and I seek guidance there from. The court in dealing with an application for rescission of judgement in terms of r 63 goes further consider not only the aspect of wilfulness of default but the bona fides of the defence. Once these two wilful default and genuiness are considered and viewed as amounting "good and

sufficient" cause "as outlined in r 63(2) will have been established warranting rescission of default judgment.

Application for rescission of judgment in terms of r 449 as discerned from the mere wording of the rule has different requirements for consideration. The court has to look at whether or not the judgment which is sought to be rescinded was erroneously sought or erroneously granted in the absence of any party affected. It gives further requirements on whether or not there was an ambiguity and whether or not the judgment was granted a result of a mistake. The rule does not seek to draw the attention of the court to "good and sufficient cause" as outlined in r 63. It is my considered view that the distinction in application for rescission of judgment in terms of r 63 and r 449 cannot be under played. It is quite central for determination of the present case. It is apparent the requirements which come into consideration are different. In r 449(1) the court has to consider whether or not a relevant fact which ought to have been placed before the court has not been placed before it. The court need not go into whether or not there is good and sufficient cause. Once it is established that a certain fact was not brought to the attention of the judge at the time of grant of order or judgment then that is sufficient and the end of the matter in an application to correct rescind or vary any judgment order in terms of r 449. The case of *Grantually (Pvt) Ltd and Another* v *UDC Ltd* 2000 (1) ZLR 361 is relevant. In the case of *Banda* v *Pitluk* 1993 ZLR 60 Robinson J at 64 D – F captured the issue of the difference on considerations for rescission under r 63 and r 449 as follows:

> "Let me reiterate immediately that rescission of a judgment under r 449 1(1)(a) is entirely different and must therefore be distinguished from an application for rescission of a default judgment under r 63 which require the court, before it sets aside a judgment under that rule, to be satisfied that there is good and sufficient cause to do so".
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> Nor is the court concerned with the issue of whether the defendant has a "good *prima facie* defence to the action" the test to be applied by the court under r 66(1)(b) when considering application for summary judgment"

See also *Tiriboyi* v *Joni and Another* HH 117-2004 and *National Blankets Limited* v *Zimbabwe Textiles Workers Union* HB 16 -2011. Recourse to r 449 is to enable the courts to correct an otherwise injustice which would be occasioned by an order erroneously sought or granted.

In *casu* the respondent did not seek to oppose the application for being

premised in terms of r 449 but sought to argue that for the application to succeed sufficient and good cause has to be shown. The above discussion has clearly shown the distinction between the requirements for the rescission of judgement under r 63 and r 449. The applicant in the present case has to show facts before rescission of the judgment which were not placed before the court which granted the judgment which forms the subject of the matter. Once a relevant fact which was not placed before the court at time of judgment is established then the judgment ought to be corrected, rescinded or varied in conformity with r 449.

The respondent's argument that the applicant has to show sufficient "good cause" for rescission to be granted is not a requirement under r 449. The case of *Grantully (Pvt) Ltd and Anor* v *UDC Ltd* 2000(1) ZLR 361 (S) the honourable CJ Gubbay as he then was ably and lucidly outlined the purpose of r 449 when he ruled that once it is established that a relevant fact which ought to have been placed before the court was not placed before it, there is no need for further inquiry for there is no requirement for an applicant seeking relief under r 449 to establish "good cause".

In my view r 449 is availed to cater for situations were a judgment erroneously sought or issued in era if allowed to stand would occasion on injustice. In Grantually (Pvt) Ltd and Anor *supra* Gubbay CJ held as follows:

> "Nonetheless, the existence of such lack of diligence, and the deliberate decision taken not to file a plea, while effectively barring the success of an application brought in terms of r 63 for recession of default judgment, was of no relevance to the application made, for. For there is no requirement that an applicant seeking relief under e 449 must establish "good cause". If the court holds that a judgment or order was erroneously granted in the absence of a party affected it may be corrected, rescinded or varied without further enquiry".

I subscribe to the reasoning in the Grantually case moreso given relief under r 449 is clearly a procedural step meant to restore the parties to a position they were in prior to an order being erroneously sought or granted.

In the circumstances of this case were the applicant argues information about her relocation and lack of knowledge of process can only be redressed under e 449.

The applicant from submissions filed of record argued that she was not served with summons in question and that the process was not brought to her attention as she left or relocated from the farm was way back in the year 2009. This assertion was not challenged or rebutted and thus supporting that the applicant was not aware. Generally service on an employee or agent or responsible person is deemed appropriate Rule 39 (1) & (2). However, the applicant's position that the process was not brought to the attention remained unrebutted.

Moreso when one considers that the respondent delivered the letter dated 27 February 2014 notifying of impending execution by inserting in the pigeon hole of the applicant at parliament and the applicant saw it on 6 March 2015. If the respondent was certain of the address of the applicant they ought to have properly served, even for impending execution at the farm. The move to serve execution at parliament gives credit to the applicant's position that she was not aware process had been served at a farm from which a form she had relocated from in 2009. It was not proper for the respondent to apply for default judgment in circumstances were they were not sure if proper service had been effected and as such not certain if the applicant with full knowledge of process and service had refrained from defending the matter.

The issue of relocation by the applicant and service not having been effected properly as she remained unaware of process till communication was via the pigeon hole at parliament was not placed before the court at time of judgment. Having said that the applicant did not with full knowledge of process and appreciative of the consequences refrain from defending the matter the default judgment cannot stand. Material and relevant evidence that the summons were served on a 3rd party after the applicant had relocated was not placed before the court when the default judgment was granted. It is such scenarios were judgment would have been erroneously sought and granted which r 449 seeks to redress. Once facts which had not been before the court granting the judgment or order are alluded to and brought to light then the basis for rescission, correction or varying judgment will have been established.

In the premises the application for rescission of judgment is granted. In exercise of my discretion I find no reason why cost should not be costs in the cause.

It is hereby ordered that:

1. The order granted under HC 1525/11 be and is hereby set aside.
2. The applicant is given leave to file her plea within 10 days of this order.
3. Costs shall be in the cause.

Venturas and Samukange, applicant's legal practitioners
Chinogwenya and Zhangazha, respondent's legal practitioners