RONALD JOHN COUMBIS
versus
KINGDOM BANK LIMITED

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 23 November 2016 and 30 June 2017

**Opposed Matter**

Adv *L. Uriri,* for the applicant
*F. Siyakurima,* for the respondent

CHIWESHE JP: This is an application for rescission of judgment made in terms of Rule 449 (1) (a) of the High Court Rules 1971. Rule 449 (1) (a) reads as follows:

> "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, *meru moto* or upon the application of any party affected, correct, rescind, or vary any judgment or order –
>
> (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or"

The facts according to the applicant are these. Under case number HC 589/13 the respondent was granted a default judgment against the applicant and other parties in terms of which it sought to recover certain monies advanced as loans to a company. The applicant was cited therein as surety and co-principal debtor.

According to the applicant, it was common cause that Stir Crazy Group of Companies, first defendant in HC 589/13, does not exist and that first respondent therein ceased to exist due to its merger with Afrasia Bank Limited, culminating in the creation of Afrasia Kingdom Bank. The new merged entity is now in liquidation.

The above facts were not disclosed to the court which proceeded to grant default judgment against the applicant. The respondent now wishes to execute the default judgment by selling the applicant's immovable property. Because the judgment was granted in his absence and because the judgment affects him substantially, the applicant argues that he is entitled to impugn the judgment on the basis of the errors indicated above. Specifically, that

there was no plaintiff under case HC 589/13 as the respondent had ceased to exist due to the merger with Afrasia. Secondly, the respondent being a company under liquidation ought to have been represented by its liquidator. It had no *locus standi* to appear before the court as plaintiff or any other party without the liquidator. Thirdly, the applicant avers that the loan, the subject of the default judgment under HC 589/13, had been advanced to a non- existent company. Now because there was no first defendant in that sense, the applicant could not properly be sued on the basis of a surety agreement made in favour of a non-existent entity.

If the court had been made aware of these errors, it would not have granted the default judgment. This in a nutshell is the factual basis upon which the applicant launched this application. He seeks rescission in terms of r 449 (1) (a).

The respondent's opposing affidavit is sworn to by Joel Chandibata, the Recoveries Manager of Afrasia Bank Limited. Certain preliminary points are raised. I need not be detained by these. On the merits the respondent deposes as follows. The order the subject of this application was not sought or issued in error. The respondent's contention is that it is the applicant who misrepresented the correct names of his company, Stir Crazy Investments (Private) Limited of which he was its alter ego. He deliberately misrepresented the company as being Stir Crazy Group of Companies (Private) Limited in some of the documents between the respondent and his company, whilst in other such documents, he correctly stated the company's name. He was also the Managing Director of the correctly named company. For that reason the applicant must be estopped from seeking to avoid the contract because the respondent acted on the basis of his misrepresentation to its prejudice. He at all times represented the "non-existent" company. Further, the respondent submits that the innocent misrepresentation of the principal debtor's name is a non-material mistake which cannot void the contract. In fact money was advanced to this "non-existent entity" and the applicant himself, apart from being its Managing Director, was a signatory to the various accounts held by the company. He was also responsible for most withdrawals and repayments on the loan account. He signed the suretyship deed in support of the "non-existent" company. The respondent further avers that the claim under HC 589/13 against the company in question was withdrawn, not because the company was non-existent but because it had gone into liquidation. The same company instituted action under HC 10569/14 claiming $7 187 089.76 from the respondent under the same contracts that applicant says were contracted by a non-existent company. The same non-existent company has in writing admitted liability and has

sought a set off against outstanding debts owed to the respondent. The respondent asserts that at the time the contracts were executed, the applicant's company had not merged with Afrasia Bank, such merger only occurring in February 2015, after the default judgment had been entered in November 2014.

The respondent submits that the provisions of r 449 (1) do not apply in this case because the applicant has not disclosed the nature and extent of the error that the court made in entering default judgment against his company. The mistake in the name of the principal debtor, argues the respondent, was a non-material mistake which has no bearing on the contracts. The applicant bound himself as surety and co-principal debtor, hence his liability is not in doubt.

I agree with the respondent that the mistake in the name of the company concerned is a non-material mistake. Put differently, if the judge who dealt with the application for default judgment had been advised that the name of the defendant should read STIR CRAZY INVESTMENTS (PRIVATE) LTD and not STIR CRAZY GROUP OF COMPANIES as reflected on the papers, would he have declined to grant the order merely on account of that error? I should think not. A reasonable judge would have allowed an amendment correcting that error or even proceeded to correct the error himself and, in either case, he would thereafter have proceeded to grant the default judgment in terms of the draft order so amended. Nothing further would have turned on that kind of error. The error does not affect the applicant in any substantial way, if at all, and should not lead to the rescission of a judgment that was in all material respects, properly entered.

The rest of the errors alleged by the applicant have not been properly shown or proved by way of documentary or other evidence. The onus is on the applicant to prove its case. I will therefore, in the absence of such evidence, assume the respondent's averments to the contrary not to have been disproved.

By the same token the point *in limine* raised by the respondent with regards section 213 of the Companies Act is not raised in the opposing affidavit but only in its heads of argument. It is not properly before the court and I am unable to relate to it in the present application.

Rule 449 does not only provide for rescission of judgments entered in error. It also provides for the variation and correction of such judgments. It is not every error that calls for

rescission of judgment. The error as to the name of the applicant's company can be corrected.

Accordingly it is ordered as follows:

1. The application to rescind the default judgment given under case number HC 589/13 on 5 November 2014 be and is hereby dismissed.
2. The default judgment granted under case number HC 589/13 on 5 November 2014 be and is hereby corrected by the deletion of "Stir Crazy Group of Companies (Private) Limited" wherever it occurs and the substitution, in its place, of "Stir Crazy Investments (Private) Limited.
3. The Applicant shall pay the costs.

*Scanlen & Holderness*, applicant's legal practitioners
*Sawyer & Mkushi*, respondent's legal practitioners