NYAHONDO FARM
and
KIM BIRKETOFT
and
MELLISA BIRKETOFT
and
VANESSA BIRKETOFT
versus
DENISE ROSAMOND BIRKETOFT

IN THE HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 26 January 2018 and 25 April 2018

Opposed Matter

Advocate T. Magwaliba, for the applicants
Matizanadzo, for the respondent

MWAYERA J: The applicants approached the court seeking for rescission of judgment in terms of order 49 rule 449 (1) of the High Court Rules, 1971. The issue that falls for determination is whether or not the judgment sought to be rescinded was erroneously granted.

It is worth noting that the second applicant is the Managing Director of the first applicant. The second to fourth applicants are shareholders to the first applicant. The second applicant and the respondent are a divorced couple. The applicant sought amendment on citation to reflect the first applicant as a private limited company. Given the common cause aspect that the order sought be rescinded under HC 9608/16 correctly spell out the then respondent as a private limited company and that the company was party to the proceedings therein in my view there is no prejudice which will be occasioned on the respondent by the amendment of pleadings to reflect the first applicant properly as a private limited company.

The brief background of the matter has to be put into perspective. The respondent obtained a judgment from this court under HC 9608/16. The order granted the respondent's application for liquidation and it dismissed the applicants' opposition over none filing of heads of arguments. Effectively the applicants were held to have been barred.

The applicants in approaching the court argued that the judgment in HC 9608/16 was issued in error as the applicants had timeously filed their heads of argument and the court proceeded as if the heads had not been filed. Despite allowing both parties to make oral submissions the judge in HC 9608/16 concluded that the applicants were not before him and thus treated the application as an unopposed application. The applicants further argued that the judgment under HC 9608/16 was issued in error as the court granted a final order at the first instance instead of giving a provisional order with a return date where the provisional order would be confirmed or set aside. The judgment in HC 9608/16 makes it clear that the court concluded that the applicants were erroneously heard as they had not filed heads of argument and where barred giving the impression the applicants' side of the story was not heard thus breaching the principles of natural justice *audi alteram partem* rule. This was despite the clear index of the matter before the court reflecting that applicants' heads of argument were part of the record. The applicants argued that the judgment was issued in error as the parties were not called to address the issue of heads of argument which might have been missing from the record.

The indication of heads being part of the record and the index should not have been brushed aside by the court. The respondent opposed the application arguing that the applicants were heard and in attendance. The respondent further made interesting concessions that the last two paragraphs of the judgment which forms the subject of the application was issued in error. The respondent suggested that the applicants should apply for correction of judgment by expunging the last two paragraphs as there was a patent error in terms of r 449 (1) (b).

The question that begs an answer is how one can remove or sever only a portion of the judgment occasioning an order. The concession by the respondent goes to the root of the matter as it is indeed a clear concession of an error in judgment. The relevant passages which the respondent conceded were erroneous and had to be expunged on p 9 read as follows:

> "The respondent's opposition cannot stand for the further reason that they were heard in error. They had no right of audience before the court as they did not file any heads of argument. I overlooked that matter when I set it down for hearing. The oversight arose from the fact that item 27 of the consolidated index referred to the respondent's heads as having been filed at pp 145-158 of the record, as it stands, end at p 144.
>
> The respondent's heads do not form part of the record. The respondents were therefore, barred and they should not have been heard. They did not apply for upliftment of the bar or condonation. There was, in essence, no opposition to the application. The application is accordingly, granted as prayed."

What the applicant seeks here is rescission of judgment which was erroneously granted as provided for in r 449 (1) of the High Court Rules, 1971. The rule provides as follows:

> "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.
>
> (a) That was erroneously sought or erroneously granted in the absence of any party affected thereby."

The requirements for rescission are:

1. That the judgment was erroneously sought or granted

2 That the judgment was granted in the absence of the applicant

3. That the applicant's rights or interest are affected by the judgment.

See *Moonlight Provident (Pvt) Ltd* v *Sebastion and Ors* HB 254/16 and also *Banda* v *Piluk* 1993 (2) ZLR where the court held that in deciding an application of this nature the court is only obliged to decide if the judgment was entered in error or not. If it was erroneously entered the applicant is entitled to rescission.

The Honourable judge in the Banda case *supra* had this to say at p 64 E to F:

> "Let me reiterate immediately that rescission of a judgment under r 449 (1) (a) is entirely different and must be distinguished from an application for rescission under r 63 which requires the court, before it sets aside the judgment under that rule, to be satisfied that 'there is good and sufficient cause to do so'. Nor is the court concerned with the issue of whether the defendant had 'a good prima facie defence to the action."

See also *Zindi* v *Zimbabwe Farmers Development Company United* HH 309-15, and *Mutembwa* v *Mutembwa and Anor* 2001 (2) SA 193. In the present case the court came up with a judgment on the assumption that there were no heads of arguments filed by the then respondents and that the latter was barred. The judgment cannot escape scrutiny for having been issued as a result of a mistake. The court proceeded to make a finding that the application was not opposed as there were no heads of arguments filed and that the respondents were barred. This assumption given the facts of the matter and concession by the respondent is the error which would avail the remedy of rescission of a judgment issued in error and by mistake. The heads of argument had been filed timeously and so the respondents in that matter HC 9608/16 were not barred. The fact that the respondents made oral submissions does not cure that judgment was issued in error. This is moreso when one considers that the judge disregarded the presence of the respondent whom he said had been heard in error and that there were no

heads of argument filed hence no opposition. The heads which were filed timeously were not considered.

Given the obvious error occasioned by treating the matter as unopposed on the basis that no heads had been filed, when in actual fact the respondent's heads had been filed the judgment which was issued in error and by mistake ought to be rescinded.

Accordingly it is ordered that:

1. The application for rescission of the judgment under HC 9608/16 be and is hereby granted.
2. The costs to be in the cause.

Mberi Chimwamurombe Legal Practice, applicants' legal practitioners
Matizanadzo and Warhurst, respondents' legal practitioners