JUSTICE CHENGETA N.O
and
COMMISSIONER GENERAL OF POLICE
and
POLICE SERVICE COMMISSION
and
MINISTER OF HOME AFFAIRS
versus
TYMON TABANA

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 17 January 2018

Opposed Application

S. M Hashiti, for the applicant
O. Marwa, for the respondent

CHIGUMBA J: "*Vigilantibus non dormientibus jura subveniunt-the law will help the vigilant not the sluggard".* See *Ndebele* v *Ncube* [1]. This is an application for rescission of judgment in which the relief sought is the setting aside of the judgment of 21 December 2016, handed down by this court under case number HC11456-16. The application is brought in terms of both r 63 and r 449 of the rules of this court, as well as the common law according to the notice of application filed of record on 26 January 2017. The order granted under HC11456-16, which is the subject matter of this application, reads as follows:

1. It be and is hereby declared that the applicant has a constitutional right as set out in s 55 and 64 of the Constitution of Zimbabwe not to perform forced labour, and freedom of profession, trade or occupation by being denied the right to retire upon reaching pensionable service.

[1] 1992 (1) ZLR 288 (S)

2. The respondents' conduct of barring the applicant from retiring from the police service on reaching pensionable age be and is hereby declared unlawful.
3. The radio signal dated 9 November 2016 directing the arrest of the applicant be and is hereby declared unlawful, null and void, and of no effect.
4. The bonding agreement which the applicant and the 2nd respondent signed in 2010 be and is hereby declared unenforceable.
5. The respondents shall pay the costs of this application on the higher scale of attorney and client, jointly and severally, the one paying the other to be absolved.

The founding affidavit was deposed to by Ms *O. Zvedi,* a deputy director in the Civil Division of the Attorney General's Office, who averred that she had firsthand knowledge of this procedural application. She averred further, that this application was made in terms of r 63 as read with r 449 of the rules of this court, as well as the common law, and that;-the default judgment sought to be set aside came before this court via the urgent chamber book. The declaratur which was granted affects the applicant's operations and administrative programmes, since more than half the police force is on study leave. The order granted was obtained fraudulently and wrongfully because the interim relief ought not to have been confirmed on the same papers as the final relief, therefore the procedure adopted was not correct. The applicant was only obliged to oppose the confirmation of the interim relief granted upon being served with a fresh application for a confirmation order.

It was denied that the applicant was in willful default since the parties had communicated and agreed that there was no need to get the declaratur granted by the court. The respondent's discharge was subsequently approved as a direct result of out of court engagements. Respondent manipulated his knowledge of the applicant's administrative set up to give the impression that papers had been served on the applicant when in fact they had not. The final relief granted is unacceptable to the applicant because it implies that applicant's policy deliberately and intentionally violates two sections of the Constitution, when the applicant owes its very existence to the same Constitution. A declaratur of unconstitutionality was not the best way of resolving the dispute between the parties.

The opposing affidavit was filed of record on 7 February 2017, and it was deposed to by the respondent who made the following averments;- the third respondent, the Police Service

Commission was not opposed to his retirement and was in the process of expediting it, therefore the application for the rescission of the judgment in which his constitutional rights were declared to have been violated was ill conceived and doomed. Annexures A1-A3 were attached as proof of this averment. He denied that the confirmation order set out herein was fraudulently or wrongfully obtained. The interim order was served on the applicants on 23 November 2016. Subsequently, a new draft order seeking a final order was filed and served on the applicants. The interim relief granted on 23 November 2016 gave the applicants ten days within which to file opposing papers. The applicants acted sluggardly and are now trying to pull wool over the court's eyes. He denied manipulating his knowledge of applicant's administrative set up to make it appear as if he had served papers correctly and reiterated that papers were indeed served correctly on the applicant. The respondent averred that the applicants were not above the law of the Constitution and that, they were correctly reminded of the need for their policies to comply with the provisions of the Constitution.

The answering affidavit was filed of record on 1 March 2017. It averred that the contract between the third applicant and the respondent was a standard one which applied across the board to all beneficiaries of study arrangements in the police force. To that extent the judgment which is sought to be rescinded is of national importance as it impacts seriously on the applicant's operations. The applicant insisted that it was not in willful default due to perceived anomalies in the manner of service of the application for confirmation of the provisional order on its premises by the respondent. The applicant averred that it was in the interests of justice that the real dispute between the parties be ventilated on its merits. Mr *Sylvester Hashiti,* an advocate and an officer of this court, filed an affidavit on 1 March 2017 in which he denied the averments which appear in the opposing affidavit and which refer to him and the alleged role which he played in the service of the application for a confirmation of the interim relief.

After reading both parties' heads of argument, I was convinced that the issue which arises for determination before this court is not one of whether the applicant was or was not in willful default and therefore entitled to rescission of the judgment sought to be impugned. The issue that firstly arises for determination is that of whether the applicant is properly before the court. I will proceed to set out an excerpt of views which I have expressed before in two previous judgments

of mine. This excerpt is from the case of *Godknows Jonas* v *Rhona Shawlyn Mabwe*[2]. In that case, it was stated that:

> "The rules of this court also provide for correction, variation or setting aside of judgments in terms of Order 49 r 449, and in terms of the common law. In the case of *Motor Cycle (Pvt) Ltd* v *Old Mutual Property Investments Corporation Ltd*[3] HH 4/07 @ pp 5-6, this court stated that:
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> > "… Mr *Mushonga* submitted that the applicant was seeking rescission in terms of r 449 as read together with Order 9 r 63. Firstly, applicant does not refer to r 63 in its pleadings. Rule 63 was first mentioned in the oral submissions and therefore was not pleaded. Secondly, I am not sure whether the two rules can be read together. It is my view that there are three separate ways in which a judgment in default of one party may be set aside. This can be done in terms of r 63, or r 449 (1) (a) or in terms of the common law'".

It is my view that, in order to qualify for relief under r 449 (1) (a) a litigant must show that:

1. the judgment was erroneously sought or erroneously granted.
2. the judgment was granted in the absence of the applicant or one of the parties;
3. the applicant's rights or interests were affected by the judgment. See *Mutebwa* v *Mutebwa and Anor* [4].
4. there has been no inordinate delay in applying for rescission of the judgment.

It is my view that, in order to qualify for relief under r 63, a litigant must show that:

1. Judgment was given in the absence of the applicant under these rules or any other law.
2. The application was filed of record within one calendar month of the date when applicant acquired knowledge of the judgment.
3. Condonation of late filing has been sought and obtained where applicant fails to apply for rescission within one month of the date of knowledge of the judgment.
4. There is "good and sufficient cause" for the granting of the order. See *Viking Woodwork* v *Blue Bella Enterprises* 1988(2) ZLR 249 (S) @ 251 B-D, *Highline Motor Spares 1933*

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[2] HH72-16

[3] *HH 4/07 @ pp 5-6,*

[4] *2001 (2) SA 193*

(Pvt) Ltd & Ors v *Zimbank Corp Ltd* 2002 (1) ZLR 514 (S) @ 516 C-E, 518A-B, *Sibanda* v *Ntini* 2002 (1) ZLR 264 (S), *Pastor Jameson Moyo & 3 Ors* v *Reverend Richard John Sibanda & The Apostolic Faith Mission* SC 6/10.

5. The phrase 'good and sufficient cause' has been construed to mean that the applicant must:
   (a) give a reasonable and acceptable explanation for his/her default;
   (b) prove that the application for rescission is bona fide and not made with the intention of merely delaying plaintiff's claim; and
   (c) show that he/she has a *bona fide* defense to plaintiff's claim. See *Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210)

It is also my view that, in order to qualify for relief in terms of this court's common law power to rescind its own judgments a litigant must show that:

1. The court' discretion that it is being asked to exercise is broader than the requirements of both rr 449 and 63.

2. Whether, having regard to all the circumstances of the case, including applicant's explanation for the default, this is a proper case for the grant of the indulgence. See *Gondo & Anor* v *Stfrets Merchant Bank Ltd* 1997 (1) ZLR 201, and *de Wet & Ors* v *Western Bank Ltd* 1979 (2) SA 1031 @ 1043 (I have expressed these views before in one of my previous judgments *Jonas Mushosho* v *Lloyd Mudimu & Anor*[5])

The applicant purports to bring this application in terms of r 449 as read with r 63 of the rules of this court as read with the common law. In para 5 of the founding affidavit we find the curious averment that, in addition to these two rules of this court, the application for rescission of default judgment is made in terms of the common law "*ex abundante cautella*" and to avoid multiplicity of causes. Herein lies the fatal defect that is bedeviling this application, in my respectful review. The applicant is not at liberty to throw the whole kitchen sink at the court and ask the court to guess which dishes need washing and which ones need drying. Quite obviously,

[5] HH 443-13

the ingredients and equipment used in the washing process differs significantly from those used in the drying process. One cannot wash dishes if there is no washing powder provided for instance. Kitchen analogies aside, the first thing to note is that, none of the averments necessary to bring the applicant properly before the court in terms of the common law, r 63, and or r 449 were set out in the founding affidavit.

To illustrate this point let us begin with r 449. There is no averment in the founding affidavit that the judgment which is sought to be impugned was erroneously sought or erroneously granted, or that, the judgment was granted in the absence of the applicant or one of the parties; or that, there has been no inordinate delay in applying for rescission of judgment. These are all essential averments which must be made in order for an applicant to qualify for the relief granted under r 449. The only thing which the applicant tells us in the founding affidavit is that its rights were affected by the judgment. We conclude that applicant has not set out the necessary averment to qualify to use r 449 as a sword.

Does the applicant meet the criteria to be entitled to use r 63 as a sword? The applicant averred correctly in its founding papers that judgment was given in its absence under these rules or any other law. There is no averment that the application was filed of record and set down for hearing within one calendar month of the date when applicant acquired knowledge of the judgment. This renders an application in terms of r 63 fatally defective. There is no averment that condonation of late filing has been sought and obtained where applicant fails to apply for rescission within one month of the date of knowledge of the judgment. (Viking Woodwork *supra*) There is no averment that there is "good and sufficient cause" for the granting of the order. (Highline Motor Spares *supra*). Although an explanation was proffered for the default I did not find it reasonable or acceptable. No evidence was adduced, other than a bald assertion, that the respondent somehow obtained papers to make it look like it had served the application for confirmation of the provisional order when he had not done so.

Even Mr *Hashiti* dissociated himself from certain averments made which mentioned his alleged role in this saga. There was no averment that the application is *bona fide* and not made for purposes of delay. What was worrying was the lack of response to the respondent's averment that the third respondent was not opposed to the order sought to be impugned, and that in fact he and the third respondent had come to accommodation. To compound matters, in my respectful

view, the order sought to be impugned is unassailable. The applicant has zero to no chance of winning the matter on the merits, therefore has no *bona fide* defence, and another of the essential averments of an application in terms of r 63 is again not met, that of establishing "good and sufficient cause".

This leaves applicant to clutch at the good old common law, perhaps not as a sword, but as a shield? It is trite that, in terms of the common law remedy which allows judgments to be rescinded, the court's discretion that it is being asked to exercise is broader than the requirements of both rr 449 and 63. The court must determine whether, having regard to all the circumstances of the case, including applicant's explanation for the default, this is a proper case for the grant of the indulgence. It is this court's considered and respectful view that, for all the reasons already set out in respect of rr449 and 63 above, this is not a proper case for the grant of the indulgence. It is this court's view that, if applicant has specifically and expressly relied on the common law broad power to be granted rescission as an indulgence pure and simple, it might have stood a better chance of having this court's discretion exercised in its favor. The fact that the third respondent, which is the applicant's principal is not opposed and indeed has settled the matter in favor of the third respondent moves the applicant away from the moral high ground (this matter is of national importance) and leaves it clutching at straws.

We are left with an application which has not been properly pleaded, which fails to establish the requirements of the alternative rules of this court which we were invited to elect and choose from. This application fails to find traction even in the good old common law. The applicant cannot be shielded it from an ill-conceived, procedurally defective founding affidavit which does not qualify to entitle the applicant to have an applicant for rescission of judgment ventilated. There is no application for rescission of judgment before us, not in terms of r 449, or r 63, or the common law. The necessary averments do not appear in the founding affidavit. This application is fatally defective. It fails for that reason. It is dismissed for that reason, and for the other reasons set out above. It therefore be and is hereby ordered that the application is dismissed with costs.

Civil Division of the Attorney General's Office, applicant's legal practitioners
Rubaya & Chatambudza, respondent's legal practitioners