UPENYU MASHANGWA
versus
ALFRED W. ASHBY

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 20 November, 2015, 25 September, 2017 and 12 September 2018

Opposed Application

T. Gonese, for the applicant
D. Sanhanga, for the respondent

CHITAPI J: The applicant was the defendant in case no. HC 3982/12 and the respondent was the plaintiff. Case no. HC 3982/12 is a summons or action matter in which the applicant was sued for various sums of money in damages allegedly caused by the applicant to the respondent's property which he rented in terms of a lease agreement. In addition to damages, the applicant was also sued for outstanding rentals and bills, interest and costs on the higher scale of legal practitioner and client. The total sum claimed from the applicant was put at US$12 122.17. My own addition of the figures show the total amount as US$14 922.17. The variance is not material to my judgment and in any event it has come to be accepted as a general observation that lawyers and figures are not the best of friends.

Case no. 3982/12 progressed to pre-trial conference stage and was set down for pre-trial conference on 27 January, 2015 at 11.30am before my sister DUBE J. The Sheriff served the notice of setdown of pre-trial conference on the respondent's legal practitioners on 8 January, 2015. On the same date the Sheriff attempted service of the notice of set down on the applicant's legal practitioners. They refused to accept service of the notice because they had renounced agency for the applicant on 6 November, 2014. The applicant's erstwhile legal practitioners were Messrs Mushangwe and Company. The record shows that Messrs Gonese Law Chambers assumed agency

for the applicant on 24 February, 2015. The applicant was therefore not legally represented between 8 January, 2015 and 24 February, 2015.

In the notice of renunciation of agency, the applicant's erstwhile legal practitioners gave applicant's last known address as 50 Lomagundi Road, Emerald Hill, Harare. Failing service of the notice of set down by the Sheriff on Messrs Mashangwe & Associates on 8 January, 2015, the respondent's legal practitioners then used the services of an employee in their employ to serve the notice of set down at "50 Lomagundi Road, Avondale, Harare." The employee, Canaan Chikowo prepared a certificate of service certifying that he served the notice of set down " .. on defendant by serving a copy thereof by letter box at 50 Lomagundi Road, Avondale, Harare, being the defendant's last known address as provided on the Renunciation of Agency form by defendant's former legal practitioners, Messrs Mushangwe & Company." A legal practitioner Kim Helen Manley certified by endorsing on the certificate of service that she had satisfied herself by personal enquiry of Canaan Chikowo that service has been effected as detailed by the employee. The certificate of service is dated 15 January, 2015. It was filed on 16 January, 2015. A striking feature of the certificate is that the employee Canaan Chikowo did not sign it. The space above his name where he should have appended his certificate is blank. The space for signature by the certifying legal practitioner is duly signed by the legal practitioner.

On 27 January, 2015 the respondent's legal practitioner attended the pre-trial conference according to the endorsement made by DUBE J. The applicant was in default. The judge made the following order.

"Result

1. The defendant's defence is struck off the roll.

2. The matter is referred to the unopposed roll for proof of claim."

On 26 June, 2015 the respondent's legal practitioners filed an application for judgment on the unopposed roll. The application was set down on 6 July, 2015. The applicant's legal practitioners filed a notice of opposition to the said application and an opposing affidavit. The main ground of opposition to the application was that the applicant had on 24 February, 2015 filed a court application for reinstatement of the applicant's "defence and plea" under case no. HC 1687/15 and that the application was pending determination. A copy of the application was attached to the opposing affidavit. A notice of opposition had been filed in that application by the

respondent on 10 March, 2015. When the application for judgment was placed before MAFUSIRE J on 6 July, 2015 it was struck off the roll as it was now an opposed matter. The application for judgment has therefore remained in limbo pending the determination of the applicant's court application for reinstatement of his defence and plea in case no. HC 3982/12.

The application for reinstatement of "the defence and plea" is the one which requires my determination. At the commencement of the hearing, the respondent's counsel purported to raise what she termed a point *in limine*. The point taken was that the applicant was not being candid with the court by denying that he was served with the notice of set down of the pre-trial conference. It was argued that the address where service was effected housed a company in which the applicant was a director and shareholder together with his wife. It was further submitted that the applicant was acting *mala fides* and had not explained what he did between the dates that he admitted to the notice of set-down being brought to his attention on 16 February, 2015 and 24 February, 2015 when the applicant filed the application for reinstatement of his defence and plea. Counsel referred me to the judgment of CHIGUMBA J in *Joseph Sibanda & Anor* v *Makone Industries & Ors* HH 292/15. It is a long judgment. Apart from benefitting from the learned judge's exposition on the law on liquidations and winding up of companies, I failed to find its direct relevance to the purported point *in limine* taken by the respondent's counsel. I should mention in passing that counsel when citing irrelevant authorities in a show of grand standing hardly assist the court and unnecessarily wastes a judge's time as the judge must then read the authorities only to find them to be of no relevance to the matters requiring determination.

The applicant's counsel countered the purported point *in limine*. He argued that the issues raised had not been raised in the opposing affidavit. He submitted that the *bona fides* of the applicant was an issue for consideration in determining the merits of the application. He further argued that the applicant had a right to be heard on the merits before the court made a determination.

I was not persuaded that the points raised by the respondent's counsel were legal points *in limine* which would dispose of the application. On the contrary the points could not be determined without going into the merits of the application. Whether or not a litigant has acted *mala fides* or *bona fides* is a conclusion which can only be reached upon a consideration of the factual foundation from which such inference can be drawn. From the opposing affidavits, the respondents based the

purported *mala fides* of the applicant upon allegations that the applicant deposed to half-truths and misrepresented facts. A court cannot make a finding of *mala fides* without determining the veracity of the truthfulness or otherwise of the applicant's deposition. A finding as to whether an untruth or a misrepresentation has been made is a factual finding not capable of resolution without addressing the merits of the case. The point *in limine* was not well taken and it not being a matter of law which can be raised at any stage of the proceeding, the respondent should have raised the issues in the opposing affidavit.

The material facts grounding this application are common cause. The applicant was in default at a scheduled pre-trial conference. The respondent and / or counsel were present. The learned judge was satisfied that the applicant was in default and ordered that the applicant's plea and defence be struck out "from the roll". The learned judge obviously must have intended her order to read that the applicant's defence be struck out meaning that it was no longer to be considered as part of the record hence leaving the respondent's case as unopposed. The respondent was granted leave to set down his claim on the unopposed roll as it involved proof of damages for which evidence would have to be led. The application before me presupposes the parties' acceptance that the learned judge did not strike out the defendant's defence from the record. No such order would have meaning.

It is common cause that the notice of set down was not served upon the applicant personally nor upon a responsible person at the address given in the purported certificate of service. I have already made the observation that the certificate of service in the main record which was set down for pre-trial conference was not signed by the person who purportedly served the notice. The certificate bears the original stamp of the Registrar. There can be no doubt that the anomaly must have escaped the attention of the learned judge. Surprisingly, the certificate of service which is a copy attached to the notice of opposition to this application is signed by the maker Canaan Chikowo. What could have happened is that the one filed in case no. HC 3982/12 was inadvertently not signed and the Registrar retained it on record and gave the signed one to the respondent's legal practitioners. The other scenario is that the said Canaan Chikowo might have signed the one which was retained by the respondent's legal practitioners *ex post facto* its filing.

Either way, it appears to me that the learned judge must have considered the certificate on record as proof that the applicant had been served with the notice of set down left "by the letter

box". Rule 42 B (1) (b) of the High Court Rules is peremptory in its wording. It provides that proof of service of any process "by a legal practitioner or a responsible person in his employ "…" shall be by certificate of service in Form No. 6 or 7 as the case may be." In this case the certificate of service was in Form No. 7. I have already captured its wording *ex tenso.* The person who has effected service is the one who speaks to what the person did. The person does so by recording who he is, what he did where and when in relation to serving the process. He can only authenticate his deposition as to service by signing the certificate the certificate. The legal practitioner is supposed to enquire of the person whether what the person alleges to have done happened. Where the person has not signed the certificate to authenticate what the person did, the court cannot infer that what the legal practitioner enquired upon was what appears on the unsigned certificate. Certainly, the certificate of service if unsigned by the person who has effect service is invalid. In the absence of a deposition by the legal practitioner that what he/she enquired of the person serving the process elicited a response as *per* the unsigned certificate by the employee as in this case, it would be inappropriate to accept the validity of the certificate.

A point of law can be raised by counsel for the parties or *mero motu* by the court even if is has not been dealt with in the papers. The court should be able to raise the point of law because it is a court of law and a court of law has a duty to make a decision based on and informed by the law. In *Cusa* v *Tao Ying Metal Industries* 2009 (2) SA 204 at 225 NGEEOBO J remarked:

> "Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court of law is not only entitled, but is obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality."

In *Paddlock Motor (Pty) Ltd* v *Igesund* 1976 (3) SA 16(A), the court held that:

> " it would create an intolerable position if a court were to be precluded from giving the right decision on accepted facts merely because a party failed to raise a legal point, (on paper) as a result of an error of law on his part."

The cases I have cited above correctly reflect the position of the law in my view. Courts are constitutionally mandated to apply the law and are guardians of the law. The rules of this court and more specifically r 449 allows this court to *mero motu* correct, vary or rescind its judgment where the same was erroneously sought or granted in the absence of a party affected by it. An

affected party, who was also absent when the court made its decision can move the court to exercise its powers under the rule. In the event that a court rescinds its judgment, the *status quo ante* of the parties is restored. The case of *Matambanadzo* v *Govsen* 2004 (1) ZLR 399 (S) is in point in which SANDURA JA at p 404 adopted what was stated in *Theron N.O* v *United Democratic Front & Ors* 1984 (2) SA 532 to the effect that r 42 (1) (the equivalent of r 449 (1)) is a procedural step designed to correct an irregularity and restore the parties to the position they were before the irregular order was granted.

It cannot be argued but that judges are human beings and are prone to making mistakes. Rule 449 (1) is as common cause, a departure from the *functus officio* doctrine in terms of which a court's jurisdiction is exercised upon pronouncing its judgment on a matter see *Tiriboyi* v *Jani & Anor* 2004 (1) ZLR 470 (H). The rule is a welcome intervention upon a slavish adherence to the *functus officio* doctrine because I cannot foresee any justification to oust a court's jurisdiction to correct or set aside an erroneous judgment granted in the absence of an affected party where the court would not have granted the order had it been alive to the error. That the rule is limited to instance where the affected party was absent is clearly fair and just in that such party stands prejudiced as one cannot say that the party would not have resisted judgment on the basis of the error or advanced argument on the effect of the error.

When I noted the unsigned certificate of service, I resolved to bring the issue to the attention of the parties legal practitioners and to hear their views on the same. The legal practitioners attended in chambers on 22 September 2017. Fortunately I did not have to make a ruling because it was agreed that there had been a clerical error and that a properly executed certificate of service would be filed. Indeed copy of a duly executed certificate of service was filed of record under cover of a letter from the respondent's legal practitioners.

I now determine the application on the merits. CHIGUMBA J in the case *Godknows Jonas* v *Rhoma Shalwyn Mabwe* HH 72/16 held that an order given in the absence of a party for failure to attend a pre-trial conference was a default judgment which could only be rescinded by the court in terms of either rr 63 or 449 or by applying for rescission at common law. The learned judge held that the rules of court did not provide for an application for reinstatement of a plea or defence struck out at a pre-trial conference on account of the default of appearance by the defendant. I agree with the judge's observations. This application is therefore a misnomer to the extent that it

purports to be an "application for reinstatement of defence and plea). In the case *Zimbabwe Electricity Transmission and Distribution Co* v *Ruvinga* SC 20/13, ZIYAMBI JA had to deal with an appeal against the dismissal by a judge of this court of an application for reinstatement of the defendant's plea which had been struck out at the pre-trial conference for default of attendance by the defendant. The learned judge dismissed the appeal after finding that it had not merit. The issue of whether or not the rules provided for an application for reinstatement of a plea struck out at the pre-trial conference on account of the defendant's default did not arise for argument.

In my judgment there is probably no need for the rules to specifically provide for the reinstatement of a plea or defence struck out at the pre-trial conference. The rules provide for the setting aside of a judgment given in default at the instance of the party who was in default. Rule 63 is way clear in its wording that the party against whom judgment has been given "whether under these rules or under any other law" may apply to court not later than one month after the defaulted party has had knowledge of the judgment for the judgment to be set aside. In terms of r 63 (2) if the court is satisfied that the applicant has demonstrated good and sufficient reasons for the default, it can 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. It must follow that the application *in casu* should aptly be described as an application for rescission of default judgment. The judge presiding at the pre-trial conference ruled that the defendant was in default. The judge then granted a default judgment whose terms included that the defendant's defence be struck out. In *casu*, the applicant should just have sought the setting aside of the default judgment. Once set aside, the issues of reinstatement of the plea and defence do not arise because if the judgment is set aside, it is no longer there. It would be wrong to then refer to its terms by seeking reinstatement of the plea. Nothing sits on or arises out of nothing. The setting aside of the judgment means that the parties are restored to the position they were at as far as the pleadings were concerned prior to the grant of the default judgment unless rescission is sought on part only of the default order. If for example the defaulting party has no issue with some parts of the order, he can specify in the draft order, the parts of the order he wants rescinded and those he does not query can remain. In *casu* it is the whole order whose setting aside is sought. It would be sufficient to pray for the setting aside of the default judgment. *Ex abundanta cautela*, part of the draft order could then specify that the Registrar be directed to rest the matter for another pre-trial conference.

The issue of costs as usual are a preserve of the court and an appropriate costs order will invariably be made by the court.

I am not persuaded that rescission following a judgment granted in default at the pre-trial conference should be applied for via rule 449 by a party to the pre-trial conference who was in default. Rule 449 should in my view be restrictively interpreted as giving additional powers to the judge or court to consider representations by affected parties other than the parties to the case, at least, in so far as rescission of default judgment is concerned. For purposes of rescission of judgment, r 449 should not be interpreted and construed as an escape rule for utilization by a party who finds himself out of time in relation to r 63. Equally, the common law powers of a court should not be similarly construed. Rule 63 caters for rescission of default judgments given under the High Court Rules and any other law. In *casu*, the default judgment was given in terms of the rules of this court and in particular in terms of r 182 (11). The default rule for seeking rescission is therefore r 63.

The applicant *in casu* did not specify the rule of court which he relied upon for his application. The fact that he headed his application as one for reinstatement and that this is a misnomer will not result in the dismissal of the application for want of form in this case. It would be improper and unfair to do so because the parties did not raise and argue the matter. It is again a matter of law which I saw fit to raise and discuss for posterity after considering CHIGUMBA J's judgment (*supra*) and the rules of court. This court in terms of s 176 of the Constitution has inherent power to protect and regulate its process and to develop the common law and customary law in the interests of justice. Therefore, in my view, the court should at all stages in the discharge of its functions not shy away from interrogating its rules, processes and the procedural law where it sees shortcomings or other matters needing elucidating as this perfects the system.

I will in disposing of the matter consider whether or not the applicant has satisfied the requirements of r 63. The applicant is not time barred because the default judgment sought to be set aside was granted on 27 January, 2015. This application filed on 24 February, 2015. The one month would have expired on the last day of February, 2015.

I now consider whether there is good and sufficient cause for rescission. In this regard, the court considers:

(a) the reasonableness of the applicant's explanation for the default.

(b) the *bona fides* of the application which should not be made merely for purposes of delaying relief otherwise lawfully due to the plaintiff

(c) the *bona fides* of he pleaded defence to the plaintiff's claim.

See *Godknows Jonas* case (*supra*) where CHIGUMBA J at p 5 of the cyclostyled judgment cited decided cases on the court's approach to rescission of default judgment in terms of r 63. The cases are repeated herein by reference.

The applicant explains his delay by stating that the notice of set down of pre-trial conference was not brought to his attention. It was served in a letter box at his former business address. The applicant attached an affidavit deposed to by the person who retrieved the notice of set down from the letter box on 16 February, 2015. The pre-trial conference date had lapsed by that date. The respondent strenuously argued that the applicant had perjured himself by stating that the address where service of the notice of set down was effected was his former business address. The respondent placed reliance on newspaper cuttings, e-mail and letters concerning the applicant and his alleged business said to operate from that place. The applicant responded by denying directorship or shareholding in the company alluded to him as owner. He also stated that the correspondences and –mails relied upon dated back to 2014 and did not reflect the position in 2015. I do not intend to split my head on the fiercely disputed allegations made by the respondent. I am persuaded to accept that there is nothing to disprove the applicants' assertion that he only became aware of the notice of pre-trial conference following advice to him by one Christopher Siwada who retrieved it from the letter box. As already indicated, Siwada filed an affidavit corroborating the applicant. I have no evidence to hold otherwise than what the applicant states as to when and how he became aware that there had been served a notice of set down. The applicant's deposition that he followed up with the registrar as to what had become of the matter in his absence on the scheduled date was not controverted. The applicant's explanation cannot be said to be unreasonable.

As regards the *bona fides* of the application which aspect must be considered together with the *bona fides* of the applicant's defence to the claim, it is clear that there is an arguable defence with prospects of success. The applicant denies that the respondent's claim is well founded in law. He admits being the respondent's tenant but denies that any rental arears and penalties are legally claimable or due. He admits owing US$2000-00 which was however to be set off against the

security deposit and costs of some painting done on the property. It is trite that where a claim is based in damages, the damages must be proved by acceptable evidence. The respondent admitted in para 8 of the opposing affidavit that damages and their quantum are a matter for the court to decide upon.

I have considered the pleadings in the court record HC 3982/12 and I am in no doubt that there are genuine and *bona fide* triable issues regarding both liability of the applicant for the claimed damages and the quantum thereof. Liability for the claim was never admitted from the onset and parties were at pre-trial conference stage with the respondent not having applied for summary judgment as would have been expected had the claim been indefensible. A damage claim always presents problems for the party who avers that the defendant has no defence. This is so because damages unless agreed to remain unliquidated and entail two rungs in the determination process, namely liability and quantum.

I must in passing note that courts are not there to advise parties or their legal practitioners on how best to advance their clients' cases. I would however caution that what parties who engage legal practitioners to assist them with their disputes want is a speedy resolution to disputes with minimal cost. The question of rescission of default judgments has the effect of delaying finalization of the main matters on the merits. Prior to 1993, parties invariably had to argue rescission in court preceded by court application. Rule 63A was introduced by S.I 25/93 by the rule maker to obviate the delays involved with full scale rescission of default judgment applications. Rule 63A provides a window for the parties to file a joint consent to judgment which consent is referred to a judge to grant the same as may be appropriate. I do not seem to see much use by legal practitioners of this progressive rule even in obvious cases where the facts are clear that rescission will be granted. Increased recourse to rule 63A for rescission by consent wherein parties agree on further management of pleadings commends itself to me as the way to go for practitioners unless of course it is clear that the applicant seeking rescission has a hopeless defence which could not have prospects of success.

Taking this application as an example but without suggesting that the parties should have utilized r 63A, it will be seen that the default judgment was granted on 27 January, 2015. The rescission application was filed hardly a month later. The application was initially argued on 11 November 2015. Following inadvertent delays and the court recalling legal practitioners to clear

an issue about a certificate of service in September, 2017, judgment has come almost a year later. The interlocutory application for rescission has had the effect of this 2012 filed case being still pending determination 6 years later and is still not completed. I have expressed these sentiments as an aside in order to remind legal practitioners that an increased use of r 63A in a proper case where the defaulting party has an arguable defence will ensure that the dispute is expeditiously disposed of by a quicker movement or progression of pleadings filing.

As to the disposal of the application before me, in view of the findings I have made, I order as follows:

'(a) The default judgment ordered against the applicant following his default at the pre-trial conference scheduled before Honourable DUBE J in case No. HC 3982/12 on 27 January, 2015 is hereby set aside.

(b) The record is referred to the Registrar for a re-set down of the pre-trial conference.

(c) The costs of this application shall be in the cause in case No. HC 3982/12.

Govere Law Chambers, applicants' legal practitioners
Matizanadzo & Warhurst, respondent's legal practitioners