NTOMBIZODWA NHOWE
and
RAYMOND TAFADZWA NHOWE
versus
MONICA GONDO
and
GAMA AND PARTNERS LEGAL PRACTITIONERS

HIGH COURT OF ZIMBABWE
**MANYANGADZE J**
HARARE, 16 September 2024 & 27 March 2025

**Opposed application**

*S.T. Mutema*, for the applicants
*K. Gama*, for the 1st respondent

MANYANGADZE J: This is an application for rescission of a default judgment. The applicants seek to rescind an order granted by MHURI J on 19 July 2023 in summons proceedings under Case No. HCH 1056/23. The order granted the first respondent (as plaintiff) the following relief against the applicant (as defendant).:

> "a. The first and second defendants and all persons claiming occupation through them be and are hereby ordered to vacate Stand No. 40 715 Harare Township of Stand 13 687 Salisbury Township, measuring 1000 square metres, held under Deed of Transfer number 7167/2018, otherwise known as Number 9 Vickers Road, Belvedere, Harare, failing which the Sheriff for Zimbabwe shall evict them from the property.
>
> b. First and second defendants , jointly and severally, the one paying the other to be absolved, shall pay the plaintiff holding over damages at the rate of USD 15.00 (or Zimbabwe dollars equivalent thereto at the time of payment), per day from 1 March 2019 to the date on which they shall vacate the abovenamed property, together with interest at the prescribed rate of 5 % per annum from the date of summons to the date of full and final payment.
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> c. First and second defendants, jointly and severally, the one paying the other to be absolved, shall pay costs of suit on a legal practitioner a client scale."

The applicants were found to be in default by reason of their failure to file a plea, having been duly served with a notice to plead by the first respondent.

A factual conspectus of the matter should help put it into perspective.

The first respondent instituted summons proceedings in the Magistrates' Court, seeking the eviction of the applicants from the property known as No. 9 Vickers Road, Belvedere,

Harare ("the property"). She had purchased the property from one Shingirai Fabion Nhowe and the property was transferred to her under Deed of Transfer 0007167/2018.

After a full trial, the Magistrates' Court dismissed the first respondent's claim for want of jurisdiction. It is not clear why that court allowed itself to through a full-length trial, only to decline jurisdiction at the conclusion thereof. One would expect the question of jurisdiction to be dealt with from the outset, having regard to the nature of the claim and the relief sought. However, that is not the issue before me. I am merely making an observation of the pain the court and the parties went through only to have the case turn on a question of jurisdiction.

Aggrieved by the Magistrates' Court decision, the first respondent noted an appeal with this court. In a judgment handed down on 19 October 2022, per MUCHAWA and WAMAMBO JJ, the notice of appeal was found to be defective and the appeal was struck off the roll. The main reason for this order was that the first respondent sought an incompetent relief, being the eviction of the applicants and holding over damages. This was incompetent on appeal, as the court *a quo* had not disposed of the matter on the merits.

The first respondent appealed the High Court decision. The appeal was partially allowed. The Supreme Court order, handed down on 23 January 2023, reads:

> "1. The appeal be and is hereby allowed in part.
> 2. The judgment of the court *a quo* is amended to read as follows:
>
> (a) The appeal be and is hereby struck off the roll with costs.
> (b) In terms of s 3(1)(b)(viii) of the High Court Act [*Chapter 7:06*] the judgment of the court *a quo* is corrected by the deletion of para 1 and is substituted with the following:
>
> "The matter is struck off the roll."

Following the Supreme Court order, the first respondent issued summons afresh, this time in the High Court. She took the view that the Supreme Court order paved the way for institution of fresh proceedings in a court with the requisite jurisdiction.

In response to the summons, the applicants raised a special plea. The plea was that the relief sought by the first respondent was incompetent. She could not seek the same relief that was dismissed by the Magistrates Court, which dismissal was upheld by the High Court and the Supreme Court.

In an order issued on 15 June 2023, KATIYO J dismissed the special plea and directed that the matter proceeds to trial. Aggrieved by this determination, the applicants filed what they refer to as an application for leave to appeal. The papers filed of record however, indicate that what they in fact filed was an application for condonation of late filing of an application for leave to appeal.

Pursuant to KATIYO J's order of 15 June 2023, the first respondent escalated the action proceedings under HCH 1056/23 by filing and serving the applicants with a notice to plead. When the applicants did not file their plea, the first respondent went on to obtain the default judgment in contention. This instigated the instant application.

The application was filed in terms of rule 27 (1) of the High Court Rules, 2021.

The applicants aver that they are entitled to the relief of rescission of judgment as they have shown a good and sufficient cause for such relief. They assert that the judgment was granted in error, in that they were not in default. They contend that since they filed an application for leave to appeal, they were not obliged to file a plea. According to them, the application for leave to appeal had the effect of suspending the summons proceedings.

The applicants further aver that the default judgment was obtained fraudulently by the first respondent. This is so because the first respondent did not disclose to the court that granted the default judgment the fact that there was a pending interlocutory application, being their application for leave to appeal the dismissal of their special plea.

The first respondent raised two points *in limine*. These are that:

(i) The applicants have no right of audience with the court as they have not paid the first respondent's costs.
(ii) The application is defective, in that it has been brought under rule 27 (1), instead of rule 29 (1).

The first point *in limine* was not raised in the opposing affidavit. It was first raised in the first respondent's heads of argument.

This point needs not detain the court. What the first respondent is seeking, essentially, is enforcement of its costs. In my view, the first respondent can achieve this through the various execution mechanisms available at law. He does not have to do this by closing the door of the court to the applicant. Even if he feels their case is devoid of merit, let them be heard and leave it to the court to decide. I find no merit in the first point *in limine* and it is accordingly dismissed.

On the second preliminary point, the first respondent contends that if the applicants' position is that they were not in default at all, and the judgment was obtained erroneously or fraudulently, their recourse is in rule 29 (1)(a) or the common law. They would have to establish the requirements for fraudulent misrepresentation.

The remedy the applicants seek is not available under r 27. Applicants' decision to proceed under r 27 non-suits them. It renders their application fatally defective.

Mr *Gama*, for the first respondent, contended during oral submissions, that if indeed applicants were not in default, and there was no default to explain, then they are not within r 27. If the applicants are saying that the default judgment was erroneously sought and granted, then they ought to have proceeded under r 29.

Mr *Gama* further contended that if the applicants are saying that the default judgment was fraudulently obtained, they should have proceeded under the common law.

On the other hand, the applicants insist that they correctly brought their application under r 27. They contend that r 27 requires that they show good and sufficient cause for rescission of judgment. This is what they have done, by showing that they were not in default and the judgment was erroneously obtained.

Mr *Mutema*, for the applicants, submitted that a rule 27 application has only two requirements, *viz;*

(a) It must be filed within 30 days from the date the applicant has knowledge of the default judgment.
(b) The applicant must show good and sufficient cause for the setting aside of the default judgment.

It is further contended, on behalf of the applicants, that, to the extent that they have proffered an explanation for the default, they are within the requirements of r 27. That explanation seeks to show good and sufficient cause.

It seems to me that counsel for both parties are grappling with semantics. Mr *Mutema* is saying that what the applicants are required to do is to give a reasonable explanation for their default and this is precisely what they have done. On the other hand, Mr *Gama* contends that there is no explanation to talk about if the applicants are saying that they are not in default.

In my view, the applicants have proffered an explanation, the explanation being that they should not be adjudged to be in default because they had filed an application for leave to appeal. That is their explanation. Whether that explanation will be found reasonable by the court is another matter. The court should hear their explanation and determine whether it is reasonable. The court will also determine the other requirements, such as whether there is a *bona fide* defence. All this will be the subject of the substantive application for rescission of judgment.

Thus, the application cannot be defeated without being heard, on the basis that it has been brought under r 27 instead of r 29. An explanation has been tendered on the basis of which is sought to persuade the court that there is good and sufficient cause for the granting of rescission of judgment.

I am therefore unable to uphold the first respondent's second point *in limine* and it is, again, like the first point, dismissed.

I must now proceed to determine the merits of the application. The requirements for rescission of a default judgment are well established. These are;

(i) The reasonableness of the explanation for the default.

(ii) The *bona fides* of the applicant

(iii)The *bona fide*s of the defence which carries with it prospects of success on the merits. See *Chihwai Enterprises (Pvt) Ltd* v *Atish Investments (Pvt) Ltd* 2007 (2) ZLR 89 (S), *Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S), *Stockil* v *Griffiths* 1992 (1) ZLR 172 (S).

The explanation advanced by the applicants is that they filed an application for leave to appeal the judgment that dismissed their special plea. They aver that this was an interlocutory application which, as the law requires, had to be determined first before the main matter. In support of this proposition, the applicants referred to the cases of *AL Shams Global Bvi Ltd* v *Deposit Protection Corporation and Ors* SC 52/22, *Heywood Investments, (Pvt) Ltd t/a Gdc Hauliers* v *Zakeyo* SC 32/13.

In countering the applicants' averments, the first respondent contends that the applicants made a deliberate choice not to plead. They were thus in wilful default, regardless of their application for leave to appeal. That application does not aid them. It does not suspend the summons action, to which the applicants were called upon to plead. By refraining from filing their plea, they placed themselves in default.

The first respondent further pointed out that what had in fact been filed and was pending under a different case number was a chamber application for condonation of an application for leave to appeal.

The record shows that the applicants took a deliberate, conscious decision not to file their plea. They did so despite being served with a notice to plead and intention to bar. The first respondent went further and wrote to the applicants, reminding them of the need to file their plea in response to the notice to plead. The applicants disregarded all this. This left the first

respondent with no option but to file an application for default judgment, on the basis of the bar operating against the applicants.

The applicants, in my view, placed themselves in a legally untenable position. They were served with a notice to plead and an intention to bar. They ignored that. They were advised, through letters, of the need to respond by filing their plea. They again ignored that. Instead, they decided to file an application for condonation of late filing of an application for leave to appeal.

The applicants' explanation for adopting this stance is that they were of the view that the application they filed relieved them of the obligation to file a plea. It is not clear why they did not simply file their plea. In that plea, they could raise, as a point *in limine,* that they had filed, an application for condonation of leave to appeal the dismissal of their special plea, and seek that the main proceedings be stayed pending that application. It would then be up to the court seized with the main proceedings to grant or deny the relief of stay of proceedings. What the applicants did was, without such relief being sought and obtained, treat the proceedings as having been stayed. In other words, they granted themselves the stay without an order or directions from the court. When litigants are appearing before the court in ongoing proceedings, they should not just proceed in any manner they fancy without seeking appropriate directions from the court.

As pointed out by the first respondent, realising this blunder, the applicants now seek stay of the main proceedings in their draft order in the instant application. Unfortunately, they put the cart before the horses and earned themselves a bar and consequent default judgment.

I find the applicants' explanation for the default unsatisfactory in the circumstances. They simply chose not to plead. The first respondent was in fact magnanimous, reminding them of their obligation to plead before filing her application for default judgment.

I therefore find the applicants in wilful default. On this basis alone, I could dismiss their application for rescission of judgment.

However, in case I am wrong in arriving at this conclusion, the application faces insurmountable hurdles on the other crucial leg, that is, prospects of success.

The applicants aver that since the first respondent's appeal was struck off by the High Court, and the High Court's decision was upheld by the Supreme Court, the first respondent ought to have proceeded in term of Practice Direction No. 3 of 2013. She ought not to have issued fresh summons on issues she had already placed before the court. Applicants argue that the first respondent ought to rectify her defective appeal in terms of the Practice Direction.

The applicants' averments display a fundamental misapprehension of Practice Direction 3/13 and the Supreme Court order in question. The relevant portion of Practice Direction 3/13 is para 5, which reads;

> "Where a matter has been struck off the roll for failure by a party to abide by the rules of the court, the party will have thirty (30) days within which to rectify the defect, failing which the matter will be deemed to have been abandoned."

The applicants submit that the first respondent ought to have, within 30 days, filed an application for condonation of their non-compliance with the rules. The applicants go on to buttress this proposition with the case of *Bindura Municipality* v *Mugogo* SC 32/15, in which para 5 of Practice Direction 3/13 was interpreted and clarified.

In my view, reference to Practice Direction 3/13 is misplaced in this matter. The Supreme Court order does not require that the first respondent proceeds in terms of the Practice Direction. The Supreme Court order, *supra*, partially allowed the appeal. It amended the High Court order, which ought to have substituted the operative part of the Magistrates' Court order with the words;

> "The matter is struck off the roll."

What does all this entail? It means that the main matter, the eviction of the applicants, was not disposed of on the merits. The Magistrates' Court declined jurisdiction. The Supreme Court order is giving effect to that decision i.e. decline of jurisdiction by the court of first instance.

The critical point to note here is that the Supreme Court order paves the way for the first respondent to approach a court with the requisite jurisdiction, being the High Court, to institute summons proceedings for eviction of the applicants. This is precisely what the first respondent has done.

In my view, this matter should not have taken the circuitous route it has gone through, had the first respondent not appealed the Magistrates' Court decision. It sems to me there was no need to appeal that decision. That court having declined jurisdiction, it was open to the first respondent to approach the High Court, as a court of first instance with the requisite jurisdiction to deal with the eviction matter. Labouring under the misapprehension that the Magistrates' Court had disposed of the matter on the merits, the first respondent noted an appeal with the High Court, resulting in that appeal being struck off the roll. As already indicated, there was a further appeal to the Supreme Court, which was again struck off the roll. This paved the way

for the filing of the summons in the High Court, which summons were resisted by means of a special plea. The special plea was dismissed, prompting the applicant to seek leave to appeal the dismissal.

The application for leave to appeal which the applicants repeatedly referred to was in fact an application for condonation of late filling of an application for leave to appeal. One wonders why the applicants did not simply state that what they filed was an application for condonation, and not an application for leave to appeal. This information came out of the first respondent's opposing papers. The applicants were not candid with the court on this aspect.

Be that as it may, it is my considered view that the aforesaid application for condonation has very little, if any, prospects of success. The rationale underlying that application is expressed in para 28 of the applicants' founding affidavit. The applicants submit:

> "The application for leave to appeal has prospects of success in that it seeks to challenge the competence of the order of this court which allowed the summons of the matter to be proceeded with notwithstanding that the cause of action in the said summons was disposed of in appeal proceedings when the first respondent failed to comply with the Supreme Court order which struck the notice of appeal off the roll……."

It is not clear how the cause of action was disposed of in the High Court and Supreme Court orders. I have already pointed out what the effect of those orders was. They paved the way for the first respondent to approach a court with the requisite jurisdiction. I do not see how the applicants' intended application for leave to appeal can alter that clear legal position.

The applicants' predicament is compounded by the dim prospects of success in the main matter, i.e. the summons action.

In the summons, the first respondent's claim is for the eviction of the applicants from the property in question and holding over damages. It is pursuant to the first respondent's purchase of the property, and acquisition of title in the property. It is an *actio rei vindicatio*. As shown in the first respondent's submissions, this question has been decided in favour of the first respondent already, rendering it *res judicata*. Thus, the applicants have no *bona fide* defence to the first respondent's claim.

The Supreme Court, in *Monica Gondo* v *Ntombizodwa Nhowe & Ors*, SC 77/22, held that the first applicant (as respondent in the appeal), had no *locus standi* to vindicate the property. The property had been sold to the first respondent (appellant). The Supreme Court set aside a High Court judgment that had declared the sale of the property by the fifth respondent invalid. The Supreme Court found that the first applicant only had personal rights

against her ex-husband, title in the property having been lawfully passed to the first respondent. CHATUKUTA JA remarked, at p3 of the judgment:

> "We agree with Mr *Gama* that the first respondent did not have a direct and substantial interest in the subdivision. The main property and the subdivision were registered in the name of the fifth respondent. As the owner of the properties, he could dispose of the properties. Instead, the first respondent has an indirect interest in that she has a personal right against the fifth respondent. That personal right disentitles her from vindicating the subdivision." (underlining added)

This position was reiterated in *Ntombizodwa Nhowe* v *Registrar of the Supreme Court and Monica Gondo*, SC 79/23, *Ntombizodwa Nhowe & Anor* v *Monica Gondo & Anor* HCH 514I/23, *Ntombizodwa Nhowe & Ors* v *Monica Gondo & Ors*, HH 711/22.

All the developments in this case go to show that the applicants have no *bona fide* defence that carries with it prospects of success on the merits.

Rescission of judgment is intended to allow the defaulting party his or her day in court. It is granted on good cause shown. The applicants have failed to show such good cause. There is no point in allowing the applicants a chance to be heard on an issue they have already been heard, even by the Supreme Court. Definitive pronouncements have been made on the ownership of the property.

The obduracy of the applicants, in the face of all the adverse judgments referred to, both by this Court and the Supreme Court, is astounding. This court has always been slow in granting a prayer for costs on the higher scale of legal practitioner and client. In the circumstances of this case, the first respondent's prayer that the application be dismissed with costs on the punitive scale is justified.

**In the result, it is ordered that:**

1. The application be and is hereby dismissed.
2. The applicants shall bear the first respondent's costs on the legal practitioner and client scale.

**MANYANGADZE J**: ……..

*Stansilous and Associates Law Firm*, applicants' legal practitioners

*Gama and Partners*, first respondent's legal practitioners