HB 53-19
HC 658/18
XREF HC 1165/05
XREF HC 1617/18

CLAUDE ARTHUR ZANGEL
versus
HARRY PETER WILSON
and
REGISTRAR OF DEEDS, N.O
and
ADDITIONAL SHERIFF OF ZIMBABWE, BULAWAYO, N.O

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 27 MARCH 2018 AND 11 APRIL 2019

Opposed Application

S Siziba for the applicant
S Collier for the 1st respondent

MAKONESE J: This is an application for rescission of a default judgment brought in terms of Order 49 rule 449 of the High Court Rules, 1971. The judgment sought to be set aside was granted in favour of the 1st respondent on the 4th October 2012. The applicant contends that the judgment was entered without his knowledge and that he only became aware of its existence on 17th January 2018 when his legal practitioners were served with a letter from 1st respondent's legal practitioners dated 16 January 2018. The applicant avers that the default judgment was erroneously sought and obtained. It is argued on behalf of the applicant that the error that vitiates the validity of the judgment is that 1st respondent applied for default judgment in the main action, in case number 1166/95, when applicant who was the defendant in that matter had entered appearance to defend but was never barred in terms of the procedure set out in rule 81 of the High Court Rules. First respondent has opposed this application and contended that no error occurred in the granting of the default judgment. Further, 1st respondent argues that the application for rescission of judgment was not, amongst other things, timeously filed.

Factual Background

The 1st respondent now resides in England. The applicant is also resident in New Zealand. On 1st November 2003 and at Bulawayo the parties entered into a written agreement of sale in terms of which defendant sold to the plaintiff a certain piece of land being stand 9035 Bulawayo Township of Bulawayo. The 1st respondent contends that he has paid the full purchase price, a fact denied by the applicant. Various e-mail communications were exchanged between the applicant and 1st respondent's legal practitioners regarding the settlement of the purchase price. In an e-mail dated 23 November 2004, 1st respondent's legal practitioners advised the applicant in the following terms:

> *"According to the sale agreement if Wilson does not pay the full amount due by 14th November 2003 you are entitled either to see for specific performance or cancel the contract. You must act in accordance with the agreement if you proceed further.*
> *Due to a conflict of interest we are not permitted to act for you or Wilson any further. We have indicated as such to Ben Baron and Partners. The file is thus closed and our account is attached for your kind attention…." (emphasis mine)*

I shall comment on the propriety of 1st respondent's legal practitioners acting for him inspite of their clear indication that they were conflicted in this matter.

On 30th June 2005, summons were issued out of this court by Messrs Ben Baron and Partners against the applicant. The summons and declaration was served on the applicant on 10th November 2005 by registered post. Applicant through the agency of Messrs Calderwood Bryce, Hendrie and Partners filed an appearance to defend on 2nd December 2005. A Notice of Intention to bar was filed with the court. On 7th June 2007 the bar was purportedly effected against the applicant. Pursuant to that bar and on 4th October 2012, the 1st respondent entered judgment against the applicant. In terms of the order issued by the court, the applicant was ordered to transfer to 1st respondent stand number 9035 Bulawayo Township of Bulawayo into the 1st respondent's names within 30 days of the order.

On 16th January 2018, Messrs Webb, Low and Barry wrote to applicant's legal practitioners advising them that the property in dispute had already been transferred to 1st respondent on 21st November 2017 under Deed of Transfer number 1726/2017. The applicant contends that he became aware of the judgment against him after receiving this letter from

Messrs Ndove and Associates. The applicant was surprised with the turn of events and indicated his displeasure at the fact that 1st respondent's legal practitioners had decided to take up the case against him when they had earlier advised him they were conflicted in the matter.

APPLICANT'S POINT IN LIMINE

Advocate Siziba, appearing for the applicant passionately argued that 1st respondent's legal practitioners were seriously conflicted in the matter. He pointed out that it is an undisputed fact that Messrs Webb, Low and Barry once represented both the applicant and 1st respondent in the same matter concerning the sale of the very same property which is the subject of these proceedings. 1st respondent's legal practitioners have now chosen to represent him against the applicant inspite of their earlier position that they would not do so by reason of a conflict of interest. I have earlier made reference to that conflict of interest in an excerpt of an e-mail directed to applicant on 23rd November 2004. In responding to the allegation of a conflict of interest, 1st respondent's legal practitioner avers that there is no conflict of interest, and that in any event, there has been no allegation that 1st respondent's legal practitioner had acquired information from the drafting of the agreement of sale which could be used to the disadvantage of the applicant. Further, 1st respondent argues that the allegation of conflict of interest was not properly raised, such allegation having been raised in an answering affidavit. 1st respondent contends that applicant fails to seek any relief on the basis of the point *in limine*.

The reason why legal practitioners are required to avoid matters involving a conflict of interest was aptly stated by MAKONI J (as she then was) in *Base Minerals Zimbabwe (Pvt) Ltd and Others* v *Chiroswa Minerals and Other (Pvt) Ltd* HH 21/16, where at page 4 and 5 of the cyclostyled judgment she quoted SMITH J, in *Pertsilis* v *Calcateria and another* 1999 (1) ZLR 70 at page 74 as follows:

> *"Legal practitioners owe their clients a duty to loyalty. They are duty bound to advance and defend their client's interests. A legal practitioner is expected to devote his or her energy, intelligence, skill and personal commitment to the single goal of furthering the client's interests as those are ultimately defined by the client…. A legal practitioner who represents the adversary of his own client in litigation would clearly be violating his or her own duty of loyalty and the common rules against conflict of interests…."*

I entertain no doubt that the conduct of 1st respondent's legal practitioners is not only acceptable but does not measure up to laid down principles regarding attorney and client privilege. 1st respondent's legal practitioners clearly indicated to the applicant that they would not institute legal proceedings against the 1st respondent because they would be conflicted. A few years down the line, the same legal practitioners took instructions to represent 1st respondent in a matter against applicant. There was a clear breach of trust. This court has the duty to regulate the conduct of legal practitioners and to ensure that they comply with the high ethical standards that are expected of them. This principle was enunciated in the case of *Robinson* v *Van Hulsteyn and others* 1925 AD 12 where WESSELS JA said:

> *"According to our law, a solicitor is an officer of the court; the court exercises a jurisdiction over him and will see that in the conduct of his professional work he displays towards the court and towards his clients a very high standard of conduct."*

Ordinarily, therefore, the 1st respondent's legal practitioners would not be permitted to represent their client as they are clearly conflicted. It seems to me however, that in this matter the applicant is not seeking specific relief based on the point *in limine*. In any event, the application before the court, is for rescission of judgment in terms of rule 449 of the High Court Rules. This rule provides that a court or judge, may, in addition to any power it may have, *mero motu* or on application by any party affected, correct, rescind or vary any judgment or order, *inter alia*, in which there is any ambiguity or patent error or omission, but only to the extent of such ambiguity, error or omission. It is my view that the court must go into the merits and determine whether the judgment sought to be set aside was properly sought and obtained.

WHETHER THE DEFAULT JUDGMENT WAS ERRONOUSLY SOUGHT AND OBTAINED

It is the applicant's contention that the applicant was not properly barred in terms of the rules. The Notice of Intention to Bar was effected on 7th June 2007. From the submissions made by *Mr Collier*, appearing for the 1st respondent it was not clear when the Notice of Intention to Bar was filed with this court. He did however, suggest that it was filed on the 6th November 2018. The date stamp endorsed on the Notice of Intention to Bar by the Registrar is not clear and one is

not able to make out the date with accuracy. The procedure for barring is set out in order 12 Rule 81 of the High Court Rules which provides as follows:

> *"81. Procedure for barring*
> *On the expiry of the time limited by the notice, the party who has served the notice may bar the opposite party by filing a copy of the notice with the registrar. The endorsement on Form No. 9 shall be duly completed before filing and it shall be signed by the party who has given the notice or his legal practitioners."*

The requirements of the above rule were articulated by the Supreme Court in the case of *Heating Elements (Pvt) Ltd and Others* v *The Eastern and Southern African Trade Bank (PTA BANK)* SC 13/02. The court held at pages 6 to 7 of the cyclostyled judgment as follows:

> *"Thus the endorsement on the copy of the notice of intention to bar filed with the Registrar of the High Court in terms of rule 81 was not duly completed and no certificate of service was filed with the Registrar as required by rule 81. The provisions of rule 81 were not, therefore, complied with. In the circumstances the chamber application for a default judgment was not in order because the respondent did not comply with the barring procedure set out in rule 81. The appellants were, therefore, not barred and the learned JUDGE PRESIDENT should not have granted the default judgment."*

In the *Heating Elements* case, the court indicated that the default judgment had been a nullity for want of compliance with rules 81. In this matter, there was clearly no certificate of service filed and in addition the registrar did not make any indication by stamping the notice to indicate that the bar had been effected. It is not clear when the notice to bar was filed. As a result, the subsequent default judgment was erroneously sought and granted. The default judgment should not be allowed to stand.

WHETHER THE APPLICATION IS OUT OF TIME

The 1st respondent contends that the application for rescission is out of time and was not made timeously. It is a trite position that there is no timeline provided in the Rules for an application for rescission of judgment pursuant to the provisions of rule 449.

In the matter of *Khan* v *Muchenje and another* HH 126/13, MAKONI J (as she then was observed at page 6 of the cyclostyled judgment as follows:

"It is now settled in our law that the requirements for the grant of an order for rescission under rule 449 are that:

(i) the judgment was erroneously sought or granted

(ii) the judgment was granted in the absence of the applicant, and

(iii) the applicant's rights are affected by the judgment."

Once these requirements are satisfied, the applicant is entitled to succeed and the court should not inquire into the merits of the matter to find good cause upon which to set aside the order. The courts have required that applications for rescission under rule 449 must be filed within a reasonable time and without undue delay. No specific time frames are laid out in our rules. The question whether there has been an unreasonable or inordinate delay in bringing the application is a question of fact which is determined by the explanation tendered for the delay and each case should be considered on its own merits. In this matter, the facts indicate that applicant was alerted of the default judgment on the 17th January 2018. Although the judgment was obtained in 2012 there is no indication that the applicant was previously aware of the judgment. What is not disputed is that soon after learning of the existence of the default judgment the applicant took immediate action to have the default judgment rescinded. This court retains a discretion to rescind the default judgment upon consideration of all the relevant circumstances surrounding the granting of the default judgment. In the result, it is my view that the applicant has made a good case for this court to exercise of its discretion to rescind the default judgment.

Accordingly, it ordered as follows:

1. The default judgment granted under case number HC 1166/05 on the 4th October 2012 be and is hereby set aside.
2. The applicant be and is hereby directed to file his plea or other answer to 1st respondent's claim within 5 days of the granting of this order.
3. The registration of stand number 9035 Bulawayo Township of Bulawayo Township Lands, situate in the district of Bulawayo, measuring 568 square metres under Deed of Transfer Number 1726/17, dated 21st November 2017 from the names of applicant into the names of 1st respondent be and is hereby cancelled with the property reverting to the

deed immediately preceeding the one being cancelled, namely Deed of Transfer Number 1475/79 dated 20th June 1979.

4. The 2nd respondent be and is hereby ordered to give effect to the cancellation of Deed of Transfer number 1726/17 dated 21st November 2017 by making appropriate endorsements in the Deeds Registry.
5. Each party to bear its own costs.

Ndove and Associates, applicant's legal practitioners
Messrs Webb, Low & Barry, 1st respondent's legal practitioners