JULIOUS CHIVIZHE
versus
CBZ BANK LIMITED
and
EMMA USHE

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 10 May 2016, 10 August 2016

Opposed Application

R. Zimudzi, for applicant
T. C. Mashamba, for 1st respondent
N. M. Phiri, for 2nd respondent

CHIGUMBA J: This is an application brought in terms of Order 49 r 449 (1) of the High Court Rules 1971 for the setting aside of the judgment which was granted in default in case number HC2330-14. The 1st respondent is a commercial bank which loaned and advanced money to the second respondent. The applicant agreed to guarantee the due performance of the second respondent of her obligations to the first respondent in terms of the loan agreement. Title deeds to the applicant's property, stand 1257 Chadcombe Township of stand 1257 Chadcombe Township, measuring 423 square metres (the property) are in the possession of the first respondent. The property has been placed under judicial attachment pursuant to the judgment in default, and is due to be sold. The applicant denies that he signed a formal suretyship or guarantee agreement, or that he signed a power of attorney authorizing the first respondent to place a mortgage bond over his property. He denies being served with summons commencing action or of being notified that legal proceedings had been instituted against the second respondent. He now seeks to set aside the judgment which was granted against the second respondent.

In his founding affidavit, the applicant avers that he only surrendered the title deeds to the property to the second respondent for purposes of 'showing them' to the first respondent. The understanding between him and the second respondent was that the title deeds would be returned to him, pending the signature of a formal guarantee agreement. It is now common cause that the second respondent had a poor credit rating history, and that she had defaulted on two previous loans with two different financial institutions, on or about, April 2011. The applicant avers that he was not aware of this history, at the time that he surrendered the title deeds of his property, to the second respondent. On 14 April 2011, second respondent was granted a loan facility for working capital requirements by the first respondent, in the sum of USD$23 000-00. The amount claimed in the summons, is USD$39 718-78The total amount due, as at 16 October 2014, was USD$46 973-24. It is common cause that summons commencing action in case number HC2330-14 was only served on the second respondent, at her *domocilium citandi et executandi*, in terms of the agreement between her and the second respondent. It is common cause that, at the time that the summons was served on this address, the second respondent was no longer in occupation at that address, number 32 Derwent Court, 9 Josiah Chinamano Street, Harare. It is common cause that the applicant was not a party to those proceedings. Annexure c to the summons, at record p 29, the mortgage bond over the property, purports to have been entered into by the applicant and the first respondent. The agreement is not attached in full, there is a single page. The court was not able to see if the agreement was signed by the applicant.

Judgment in default was granted on 24 April 2014. The applicant avers that judgment was granted in error because he was not a party to the proceedings, yet the summons sought an order declaring his property to be specially executable. He avers that there is good and sufficient cause that the judgment be set aside. He denies having signed any agreements to authorize the first respondent to hypothecate his property, or to use it as security for the second respondent's loan. He avers that he has good prospects of success on the merits of the first respondent's claim against his property. In the opposing affidavit filed of record in case number HC2330-14, presumably in opposition to an application for stay of execution, Mr. T.T. Gambiza, on behalf of the first respondent, averred that the property had already been sold by public auction on 24 October 2014, and that the applicant had never signed a document guaranteeing the loan facility advanced to the second respondent. It was averred further, that first respondent did not have a

legal obligation to cite the applicant as a party to the proceedings between the first and second respondent, because he was not a party to their agreement.

In the first respondent's opposing affidavit to this application, the following averments were made;- applicant cannot seek to set aside the default judgment because he was not a party to it, the applicant has no real interest in the proceedings between the first and second respondent, he should have practiced due diligence before agreeing to guarantee the second respondent's loan, it is the first respondent's practice that it is not necessary that a suretyship agreement be signed by those who agree to guarantee loans, applicant signed a power of attorney authorizing the hypothecation of the property and is perjuring himself when he denies this, proper service of the summons was effected on the second respondent, and that, there is no good and sufficient cause for setting aside the judgment.

In his answering affidavit, applicant denied that he had no *locus standi* in the matter between the first and second respondent, or that he did not have a real interest, because of the order which was granted to declare the property to be specially executable. He reiterated that he neither signed a suretyship agreement, nor a power of attorney to pass a mortgage bond over his property. The issue that arises for determination is whether or not the judgment in HC2330-14 was granted in error and whether the applicant has established that he has a real and substantial interest in that judgment, justifying an order to set it aside in the interests of justice. I will deal with the preliminary issues first. In order to establish whether the applicant can be heard by the court, in this matter where it is common cause that he was not a party to the proceedings, we must determine whether he has a 'real and substantial' interest in this matter.

> One of the leading cases which set out the law that governs the legal principle known as *locus standi*, is the case of ***Zimbabwe Teachers Association & Ors* v *Minister of Education***[1], where the law is stated at 57B, as follows:
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> "It is well settled that, in order to justify its participation in a suit such as the present, a party such as second applicant has to show that it has a ***direct and substantial interest*** in the subject-matter and outcome of the application. In regard to the concept of such a "direct and substantial interest", CORBETT J in *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and*

[1] 1990 (2) ZLR 48

Another 1972 (4) SA 409 (C) quoted with approval the view expressed in *Henri Viljoen (Pty) Ltd* v *Awerbuch Brothers 1953 (2) SA 151*(O) that it connoted -

> '. . . **an interest in the right which is the subject-matter of the litigation** and . . . not thereby a financial interest which is only an indirect interest in such litigation.' and then went on to say:

This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division . . . and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court .This requirement of a legal interest as opposed to a financial or commercial interest also received judicial endorsement in *Anderson v Gordik Organisation* 1962 (2) SA 68 (D) at 72B-E." See *Zimbabwe Congress of Trade Unions & 10 Ors* v *George Nkiwane & 12 Ors*[2].

It is common cause that the applicant was not cited as a party to proceedings in which an order was sought for the sale of an immovable property which is registered in his name. It is common cause that he was not served with the pleadings. Can it be said that the applicant does not have a legal interest in these proceedings which was prejudicially affected by the judgment which he seeks to set aside? In my view it cannot. The sale of this immovable property, in the circumstances set out in the founding affidavit, give rise to an inference that the hypothecation of the applicant's property was not done in a manner which is consistent with his rights as its registered owner. Applicant should be joined to these proceedings to avoid multiplicity of actions between the plaintiff and the defendant and himself. See *Lazurus Chasiya & Anor* v *Registrar of Deeds*[3]. I am satisfied that not only does the applicant have *locus standi* to make this application, he ought to be joined as a party to the proceedings so that he is afforded an opportunity to be heard before his property is sold in execution. It is trite that a court can, *meru motu*, order a party to be joined to proceedings where it is in the interests of justice. See Herbstein & Van Winsen[4].

In order to determine whether a judgment was granted in error and if so whether it should be set aside, Order 39 r 449 (1) stipulates that a Court or a Judge may, in addition to any other power that it may have, *mero motu* or upon application by any party affected, correct, rescind, or

[2] HH 462-15. See also, on the interpretation of the phrase 'real and substantial interest'; HH 731-15;HH772-15;HH480-15;HH480-15;HH442-15;HH312-15

[3] HH 128-004; Building Electrical and Mechanical Corp Salisbury Ltd v Johnson 1950 (4) Sa 303 SR; Burdock Investment Pvt Ltd & Anor v The Registrar of Deeds & Anor HH 193-004

[4] The Civil Prcatise of the High Courts and the Supreme Courts Of Appeal of South Africa p208-reasons for joinder

vary any judgment or order that was erroneously sought or granted in the absence of any party affected thereby. The couching of the powers of the court in this rule suggests that the court may have some other power which it can rely in if it wishes to set aside a judgment in these circumstances. For the sake of completeness, let us have regard to the following excerpt from another judgment which dealt with the power of the court to correct its own judgments or to rescind them.

> "In order to qualify for relief under r 449 (1) (a) of the rules of this court, a litigant must show that:
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> 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* 2001 (2) SA 193 .
> 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 and set down for hearing 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 (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

The question is, what sort of error will suffice to bring an applicant squarely within the ambit of r 449 (1) (a). Is it an error of fact, an error of law, or both? An "error" in common and ordinary parlay, is defined as: a mistake, fault, blunder, boo-boo, slip, slip-up, inaccuracy and miscalculation. The law is settled, on the issue of if or when and whether this court ought to grant rescission of its own judgments in terms of r 449. In South Africa,

In *Bakoven Ltd* v *G J Howes (Pty) Ltd* 1992 (2) SA 466 (E), at 471 F, ERASMUS J said of the almost identically worded r 42(1) (a) of the South African Uniform Rules:

> " It is an abuse of the process of the court to bring such an application some five years and eight months later. Matters must have some finality and r 449 was not designed to let defendants have a second bite at the cherry by raising a defense which should have been raised when the summons was issued."

The Zimbabwean courts have followed some aspects of the South African position and rejected others.

In *Grantuilly (Pvt) Ltd & Anor* v *UDC Ltd* 2000 (1) ZLR 361 (SC) the court held that,

> "The judgment had been granted because at the time of its issue the judge was unaware of a relevant fact, the provisions of the clause in the acknowledgment of debt. Had he known of the clause, he would not have granted the judgment he did. There was ample precedent for the proposition that a court to which application is made for rescission is not confined to the record of proceedings in deciding whether a judgment was erroneously granted. The wording of r 449(1)(a) of the High Court Rules made it clear that a party against whom default judgment had been granted was entitled to place before the correcting, varying or rescinding court facts which had not been before the court granting the default judgment. It was held, further, that it is not necessary for a party seeking relief under r 449 to show "good cause". If a court holds that the default judgment was erroneously granted, it may be corrected, rescinded or varied without

> further enquiry. The court also found that rule 449 is one of the exceptions to the general principle that once a court has pronounced a final judgment or order it is functus officio and has itself no authority to correct, alter or supplement it… *See Firestone South Africa (Pty) Ltd* v *Genticuro AG 1977 (4) SA 298 (A) at 306 F-G; Stumbles & Rowe v Mattinson; Mattinson* v *Stephens & Ors 1989 (1) ZLR 172 (H) at 174 D-F; Tshivhase Royal Council & C Anor* v *Tshivhase & Anor; Tshivhase & Anor* v *Tshivhase & Anor 1992 (4) SA 852 (A) at 862 I-J.*"

It is clear that, to qualify for relief under r 449 (1) (a), mistakes of fact are not precluded, although it is apparent that the mistakes referred to are not trivial or petty clerical ones. The mistake must have been made on the part of the party seeking the judgment in default, or of the judge who grants it, and the applicant ought to show that he was prejudiced as a result, or that there was a miscarriage of justice. In other words, despite having a good defense on the merits, judgment was given against him in error, as a result of such mistake. The law is also clear, that any fact which was not brought to the attention of the court at the time judgment in default was given, may be placed before the court dealing with an application to rescind judgment in terms of r 449. See *Jonas Mushosho* v *Lloyd Mudimu & Anor* [5].

The Supreme Court has given the following guidance on rescission of judgments by this court in terms of rule 449;-

> "…The High Court is a superior court with inherent jurisdiction to protect and regulate its own process and to develop the common law, taking into account the interests of justice. In the exercise of this inherent power, the High Court promulgates rules of court designed to expedite and facilitate the conduct of court business of the court. In terms of r 449 (1) the court has the power to correct, vary or rescind a judgment, either on its own motion or upon the application of a party affected by the judgment in issue.
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> Under the rules the judge is empowered to invoke r 449 *mero motu*, or upon application, and in the event that the Church had not done so, the court could have on its own volition dealt with the matter under r 449. In view of the inherent powers of the High Court it is open to the court to correct any of its orders which exhibit patent errors. The inherent power of the High Court was affirmed by LEVY J in *SOS Kinderdorf International v Effie Lentin Architects* 1993(2) SA 481, at 492 as follows:
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> > "Under the common law the courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient cause shown. This power was entrusted to the discretion of the Courts. This discretion extended beyond and was not limited to the grounds provided in Rules of Court 31 and 42 (1)…'"

[5] HH 443-13

The first thing to note is that r 449 does not require that there be 'good and sufficient cause' before the judgment or order is set aside. It merely requires that the applicant show evidence of prejudice of a legal right that was affected by the judgment or order, or that the applicant show that there was a miscarriage of justice which resulted when the judgment or order was granted in his/her absence. It is my view that a finding of prejudice or miscarriage of justice by necessity involves an assessment of the circumstances to determine whether the applicant has a genuine legal right that was affected. In other words, a consideration of the merits of the applicant's claim. From the papers file of record, the first respondent has no signed agreement in which the applicant expressly agrees that his property be placed under hypothecation as a guarantee of the second respondent's performance of obligations in terms of the loan facility.

This is not only highly irregular, it lends credence to the sworn statement, by the applicant, that the title deeds to the property were submitted to the first respondent, by the second respondent, without his knowledge or his consent. This assertion was not successfully refuted by the first respondent. The first respondent did not take the court into its confidence to explain how this undesirable state of affairs came about, that a mortgage bond was placed over the property in the absence of an express agreement by the applicant, that his property be sold in execution if the second respondent defaulted on her loan repayments. It is not clear why no supporting affidavits were attached to the papers, by the 1st respondent, sworn to by anyone who was present and who witnessed the signature, by the applicant, of the power of attorney to pass a mortgage bong over the property. Not even the second respondent swore a supporting affidavit to buttress this assertion by the first respondent. There is no doubt that the applicant has been prejudiced in these circumstances, of his legal right to defend himself and to demand that cogent evidence of his consent to the hypothecation of his property be placed before the court. There is no doubt that there would be a miscarriage of justice if the judgment were to be allowed to stand in these circumstances.

The error which was made was not in the granting of a judgment in favour of the first respondent, as against the second respondent. The error was in the seeking and the granting of an order declaring the property of a third party (applicant) to be especially executable when that party was not cited as a party to the proceedings. The first respondent did not an agreement with the applicant in which he authorized it to proceed with execution against his property without

further notice to him. The first respondent has not satisfied the court, on a balance of probabilities, that the applicant signed a power of attorney authorizing it to place a mortgage bond over his property. To allow the sale in execution of the applicant's property, for a debt in the second respondent's name, in these circumstances, based on what is in the papers which were filed of record, would not only be a miscarriage of justice, it would be a travesty of justice. The first respondent's judgment against the second respondent will stand. There is nothing filed of record which shows that the second respondent takes issue with the judgment granted against her in favor of the first respondent. The court will exercise its discretion in favor of setting aside that part of the judgment which pertains to the applicant's property.

We have been urged to grant a punitive order of costs against the first respondent on the basis that there is no meaningful opposition before us. We have been asked to be guided on this aspect by the case of *Neil* v *Waterberg Landbouuwers Ko-Operative Verreeniging.* [6] We consider it just in these circumstances, after a consideration of the principles that a court ought to have regard to in acceding to an application for a punitive order as to costs, to grant the application. The applicant was put to expense by this litigation. The conduct of the first respondent, based on the papers filed of record, from the outset when the loan was granted to the second respondent, and the applicant's property was hypothecated without proper legally binding paperwork, leaves a lot to be desired. To discourage such conduct in future, and a warning to financial institutions not to take short cuts but to ensure that legal procedures are properly adhered to when loan are given to their customers in future, an award of costs on a legal practitioner client scale is given. In the result, IT BE AND IS HEREBY ORDERED THAT;-

1. Julious Chivizhe be joined as a party to the proceedings in HC2330-14 as the second defendant.
2. The order in HC 2330-14 declaring the property known as number 2247 Chadcombe Township of stand 1257 Chadcombe township in the name of Julious Chivizhe specially executable be and is hereby set aside.
3. The writ of execution in HC2330-14, in so far as it relates to an order against Emma Ushe in favor of CBZ bank shall remain extant, but shall be expunged in that portion that may

[6] 1946 AD597@607

relate to the immovable property referred to above. The first respondent shall pay costs of suit on a legal practitioner client scale.

Zimudzi & Associates, applicants' legal practitioners
Muvingi & Mugadza, 1st respondent's legal practitioners