INNOCENT MANYANGE
versus
DANBRO HOLDINGS (PRIVATE) LIMITED
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 14, OCTOBER, 2019 and 4 December, 2019

Opposed Matter

T Mpofu, for the applicant
F. Girach, for the 1st respondent

MANGOTA J: The applicant applies for rescission of judgment which was entered against him under HC 7478/16. The application is filed in terms of r 449 (1) (a) of the rules of court.

The background of the application runs in the following order:

On 5 October, 2005 the applicant concluded an agreement of sale with one Jealous Marimudza ("Marimudza") who purported to represent the first respondent in the sale. He purchased from the first respondent, through Marimudza, stand numbers 2367 and 2368 of Arlington Estate, Harare ("the property"). The same is registered under deed of transfer number 4592/1996.

The applicant successfully applied under HC 6876/07 for transfer of the property into his name. He alleges that the first respondent wrestled his title to the property in an application which it unsuccessfully filed under HC 14578/12. The first respondent, he avers, appealed HC 14578/12 and the Supreme Court remitted the case to the court *a quo* with the directive that the same be decided on the merits. He states that the first respondent successfully applied under HC 7478/16 for cancellation of the title deed in terms of which the property was registered in his name. He alleges that he did not oppose HC 7478/16 because he was made to believe that Marimudza fraudulently sold the property to him. He claims that it was only during the criminal

trial which occurred in the regional court under case number R621/17 in which he caused the arrest and prosecution of one Sakutukwa, a Legal Practitioner, alleging that Marimudza defrauded him that he discovered that the directors of the first respondent lied when they told him that they did not know Marimudza. He avers that the directors' non-disclosure of the vital information misled the court to find in the first respondent's favour. He insists that the directors of the first respondent knew Marimudza as they dealt with him in the agreement of sale of the first respondent which occurred on 18 August, 2005. He states that, in terms of the mentioned agreement, Marimudza acquired shares in the first respondent as well as the latter's assets which included the property which is the subject of this application. He alleges that, by misleading the court and denying any connection between Marimudza and it, the first respondent starved the court of vital information which, if disclosed, would have persuaded it to rule in his favour. He avers that the first respondent's non-disclosure of the information convinced him that Marimudza fraudulently sold the property to him. He insists that HC 7478/16 was erroneously sought and granted. He moves me to rescind it so that the issue of his title to the property would be heard on the merits.

The first respondent opposes the application. The second did not file any notice of opposition to the same. I assume that he intends to abide by my decision.

The statement of the first respondent is that Marimudza did not have its authority to sell the property to the applicant. It avers that the agreement of sale which Marimudza and him concluded is invalid. It admits that the applicant did not oppose HC 7478/16. It insists that its property had been sold to the applicant fraudulently. It alleges that Marimudza was not authorized by, and was never employed or related to, it. It denies that Marimudza purchased its assets. It states that its agreement with him was null and void on account of Marimudza's failure to fulfil the condition precedent which was in the contract of sale. It alleges that, when Marimudza purported to sell the property to the applicant, he knew that his contract with it was null and void as well as that his conduct was a fraud. It moves me to dismiss the application with costs.

Unlike r 63 of the rules of court which offers a discretion to a party against whom default judgment has been entered to apply for its rescission within a month of his knowledge of the same, r 449 of the High Court Rules, 1971 offers a discretion to the court or a judge to correct, rescind or vary any judgment or order which it or he has made. The rule allows it or

him to make substantial changes to its or his judgment or order so that it remains in consonant with the notion of real and substantial justice. Rule 63 is to a party what r 449 is to the court or a judge. It/he uses the mentioned rule to correct its/his judgments and/or orders.

The rationale of the rule is not difficult to discern. It acknowledges this simple fact which is that judges, like all human beings who occupy the face of the earth, are not infallible. They are, as all living creatures, not immune to mistakes. They make errors. They must, therefore, be accorded an opportunity to correct those where, after judgment has been entered, their attention is, in some way or other, drawn to the same. It is for the mentioned reason, if for no other, that the rule, as couched in subrule (1), states that:

> "(1) The court or a judge may ..... *mero motu* correct, rescind or vary any judgment or order ....." (Emphasis added)

It is pertinent to mention that the error, mistake or ambiguity which the court or the judge is empowered to correct, vary or rescind under r 449 is not that of a party. It is the error, mistake or ambiguity which the court or the judge makes in the course of its or his work as such. The rule allows it or him to correct any of its or his above-stated failures without it or him falling foul of the *functus officio* principle.

MAKARAU J (as she then was) brings out the issue of the justifiable violation of the *functus officio* principle under r 449. She states in *Tiriboyi* v *Nyoni Jani & Anor* HH 117/04 that:

> "The purpose of r 449 appears to me to enable the court to revisit its orders and judgments to correct or set aside its orders and judgments given in error and where to allow such to stand on the excuse that the court is *functus officio* would result in an injustice and will destroy the very basis upon which the justice system rests. It is an exception to the general rule and must be resorted to only for the purpose of correcting an injustice that cannot be corrected in any other way."

The Supreme Court weighed in on the same matter when it stated, in *Grantully (Pvt) Ltd & Anor* v *UDC Ltd*, 2000 (1) ZLR 361, that:

> "Rule 449 was a procedural step, designed to correct expeditiously an obviously wrong judgment or order. The rule goes beyond the ambit of mere formal, technical, and derical errors and may include the substance of the order or judgment." (emphasis added)

Three circumstances characterise the operation of r 449 of the High Court Rules, 1971. These are where the order:

(a) was erroneously sought or granted in the absence of the party who is affected by the same; or

(b) contains an ambiguity or a patent error or omission; and/or

(c) is granted as a result of a mistake which is common to the parties.

This application is anchored upon the first of the above-mentioned three circumstances. The allegation is that the order which the court granted under HC 7478/16 was erroneously sought or granted in the absence of the applicant.

The context in terms of which the first circumstance should be understood is important. The circumstance occurs where, for instance, the defendant, in an action, files his notice of appearance to defend within the *dies induciae* but, owing to some unexplained factor, the notice does not find its way into the record when the plaintiff obtains default judgment against him. It also occurs where, in motion proceedings, the respondent files his notice of opposition to an application within the period of time which is prescribed in the rules of court which notice, due to some inexplicable delay, remains unfiled in the record when the applicant moves the court to grant judgment to him on the basis that no notice of opposition has been filed by the respondent.

In either of the abovementioned examples, the defendant or the respondent, as the case may be, will not only have expressed an intention to defend. He will, in addition, have taken the necessary steps to defend the proceedings. It is in such stated context that r 499 (1) (a) remains applicable. It is applicable on the basis that the defendant or the respondent filed his notice of appearance to defend or his notice of opposition within the requisite time when judgment was entered against him.

It follows, from a reading of the foregoing, that if the notice of appearance to defend or of opposition to the application was filed of record when judgment was sought, the court or the judge would not have granted it. The order which it or he grants when the notice has been timeously filed by the defendant or the respondent is, in effect, erroneously sought or granted in the absence of the defendant or the respondent. The order adversely affects the plaintiff's or the applicant's adversary. It would, therefore, be rescinded.

Wector Enterprises (Pvt) Ltd v *Luxen (Pvt) Ltd*, 2015 (2) ZLR 57 (SC) at 60 brings out in a lucid manner the above-described set of circumstances. It reads:

> "Rule 449 of the Rules has been invoked where there is a clerical error made by the court or judge; where entry of appearance had been entered but not filed at the time default judgment was entered…"

The above-citation is distinguishable from the case of the applicant. He states, in para 14 of his affidavit, that when the first respondent applied for cancellation of his title in the property, he did not oppose the same. He claims that he did not do so because he believed that Marimudza fraudulently sold the property to him.

Whatever the applicant's frame of mind was remains detrimental to his own cause. He made a conscious decision not to oppose the application. He made a deliberate choice to allow HC 7478/16 to sail through without any obstacles being placed in its way. He cannot, as the first respondent correctly states, be said not to have been in wilful default. He, if anything, wilfully defaulted.

Wilful default occurs when a party, with the full knowledge of the service or set down of the matter, and of the risks attendant upon default, freely takes a decision to refrain from appearing [see *Hutchson* v *Logan* 2001 (2) ZLR 1 (H)].

The above captures the attitude as well as the conduct of the applicant towards HC 7478/16. He cannot state, as he is doing, that judgment was entered against him in his absence. He had the clear choice to oppose the application. He refrained from doing so. He cannot now turn around and allege that HC 7478/16 was erroneously sought or granted. It was not. It was properly granted.

The applicant does not claim that the judge who issued the order under HC 7478/16 acted in error. Nothing was placed before him to issue an order which was / is different from the one which he issued. He issued the order on the strength of what was placed before him. The order has nothing to do with the views which the applicant held. Those are separate and distinct from the process which the judge dealt with under HC 7478/16.

The applicant should have shown that he was not in willful default. Where, as *in casu*, he was in wilful default, his application cannot succeed. He has no justification to move for its rescission. He created the situation which he is complaining of. His case falls outside Rule 449 (1) (a) of the rules of court. It is one of self-inflicted injury, if a comparison may be favoured.

The applicant takes what l may refer to as a wild leap into the dark. He claims that, if the court had known of what he terms vital information, it would have ruled in his favour. That

is an empty statement which carries little, if any, weight. It is not supported by any cogent evidence. It is not so for the simple reason that, when Marimudza purported to have concluded the agreement of sale with some of the directors of the first respondent, he was representing a legal entity which is known by the name of Temoso Trading CC. It is that company and not Marimudza which would have acquired the assets of the first respondent, if the sale had gone through.

The allegation of the applicant which is to the effect that Marimudza acquired the first respondent's assets remains hollow. It is hollow for the simple reason that there is no evidence which shows that Temoso Trading CC acquired the first respondent or that it passed the same onto Marimudza. The broken chain of evidence makes it highly unlikely that the court which issued the order under HC 7478/16 would have issued the order which is different from the one it issued, let alone one which is in the applicant's favour.

The applicant failed to prove his case on the balance of probabilities. The application is, in the result, dismissed with costs.

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners
Manokore Attorneys, 1st respondent's legal practitioners