CHIDO JUBILEE MAKAZHU
versus
ALICE HILDA MIDZI
and
FREDDIE CHIMBARI
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 12 October 2022 and 23 February 2023

**Opposed Application**

Applicant in person
*W Chishiri*, for the first respondent
No appearance for 2nd and 3rd respondents

WAMAMBO J: This is an application for rescission of judgment. The applicant who appears in person is the daughter of the late Amos Bernard Muvengwa Midzi (deceased) who passed on in 2015 and whose estate is registered under DR 1467/15. The first respondent is deceased's surviving spouse. She is a stepmother to the applicant. The second respondent was an executor of the estate of the deceased. The third respondent is cited in his official capacity responsible for administration of deceased estates.

On 17 November 2021 under HC 5765/21 MANGOTA J rendered an order which appears below under HC 5765/21, the applicant therein was the first respondent in the instant matter. The first respondent therein is the second respondent in the instant matter. The second respondent therein is the applicant in the instant matter while the third respondent therein is also the third respondent in this case.

The order under HC 5765/21 reads as follows:

> "1. The first respondent be and is hereby removed as an executor in the estate of the late Amos Bernard Muvengwa Midzi DR No 1467/15.
> 2. The first respondent be and is hereby ordered to return to the third respondent, the letters of administration issued to him.
> 3. Third respondent be and is hereby directed to appoint joint executors one from applicant's side and another from the second respondent's side.
> 4. The first respondent be and is hereby ordered to pay costs of this application on the scale of legal practitioner and client."

The above order was granted in default of all the respondents. It is the above order which applicant seeks to rescind.

The first respondent is opposed to the application. The other respondents though served with both the heads of argument and notices of set down did not file any papers. They were also not in attendance on the date of the hearing.

The applicant has filed a lot of documents some of which are not directly relevant to the application she has launched. I will either not refer to the ones I find irrelevant or make passing comments about them where necessary.

The issue at stake is whether or not applicant has satisfied the requirements enabling her to obtain rescission of judgment.

The applicant based her application on Rule 63 of the High Court Rules 1971 which rules have since been repealed. The applicable rules are the High Court Rules 2021. The applicable rule in this case is Rule 27 which reads as follows:

> "27(1) A party whom judgment has been given in default, whether under these rules or under any other law may make a court application not later than one month after he has had knowledge of the judgment to be set aside, and thereafter the rules of court relating to the filing of opposing heads of argument and set down of opposed matters, if opposed shall apply.
> (2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute the action on such terms as to costs and otherwise as the court considers just."

A number of decided case have closely examined and interpreted the requirements to be considered on a rescission of judgment application. I note here that Rule 263 of the High Court Rules 1971 and Rule 27 of the High Court Rules 2021 are worded almost exactly the same. The discussion of decided cases will therefore encapsulate case law decided during the High Court Rules 1971 era as well as the new Rules.

In *Stockil* v *Griffiths* 1992(1) ZLR 172(SC) the Supreme Court at p 173D-F said:

> "The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving "good and sufficient cause" as required to be shown by Rule 63 of the High Court of Zimbabwe Rules, 1971 are well established. They have been discussed and applied in many decided cases in this country. See for instance, *Barclays Bank of Zimbabwe Ltd* v *CC International (Pvt) Ltd* S-16-86 (not reported) *Roland & Anor* v *McDonnell* 1986(2) ZLR 216(S) at 226E-H, *Songore* v *Olivine Industries (Pvt) Ltd* 1988(2) ZLR 210(S) at 211 C-F. They are (1) the reasonableness of the applicant's explanation for the default (11) the *bonafides* of the defence on the merits of the case which carries some prospects of success. These factors must be considered not only individually but in conjunction with one another and with the application as a whole."

The applicant avers that she was never served with a notice of set down. She effectively points out that the legal firm's representative representing the first respondent are misrepresenting facts to the court. Contrary to these averments, however, is documentary proof reflecting that applicant was indeed served as per the Rules of court.

Notably at page 15 of the record appears a document of applicant's notice of change of address. She changed her address of residence and calls for the noting of the information "and direct all future correspondence" to the new address. The document reflects that it was received by Saunyama Dondo Legal Practitioners, Messenger of Court, Harare and the Registrar of the High Court.

Her old address is given as 19532 Damofalls Park, Ruwa while the new address is given as 62 North Road, Greendale, Harare.

At page 49 of the record appears a certificate of service reflecting that one Tinarwo Paradza employed by Saunyama Dondo Legal Practitioners on 25 October 2021 served a copy of the application on applicant by placing a copy inside a letter box at 62 North Road, Greendale, Harare. The reason for placing the application is given as that the gate was locked and there was no response from inside. The return of service reflects that service was effected at 0830 hours.

Further to the service at Greendale, the return of service reflects that additional service was done at 19532 Damofalls, Phase 2, Ruwa where a copy of the application was handed over to applicant personally at 1132 hours in the presence of her mother.

Against this certificate of service, applicant argues that it infact reflects untruths. She avers that the letter box at the Greendale address is too small to accommodate a court application document. She further argues that she was never served at the Damofalls address. Effectively her argument is that the employee of the Saunyama Dondo Legal Practitioners who certified having done the above service was lying. Further that the legal practitioner who was satisfied by personal enquiry from the serving employee was equally lying or at best was misled.

Now to suggest that a letter box cannot accommodate a document is somewhat unusual. A letter box by its nature is supposed to accommodate letters. The submission that the letter box at Greendale was too small was not substantiated. Rule 15(13) (i) provides for service through placing a copy in a letter box at or affixed to or near the outer or principal door of, or in some conspicuous position at the residence, place of business or employment address for service or office as the case may be.

Placing the document in a letter box as provided for above is sufficient service.

In this case the legal practitioners for the first respondent went further and served the applicant herself. That much is reflected on the face of the certificate of service.

Applicant resists this assertion. Her mother is said to have been present during the service. Applicant avers that she was never served as reflected. She is the one seeking rescission on the basis *inter alia* of non-service. She could proffer an affidavit from her mother rebutting the same or proffer any other proof that she was not at the Damofalls address at the given date at the given time. None of this is forthcoming.

It does not end there. First respondent's legal practitioners went further to send emails informing applicant of the intention to make an application to remove the executor. See page 14 of the record.

In the light of the above I find that applicant was aware of the set down date for the application under HC 5765/21 but chose not to attend. She was therefore in unlawful default. I therefore find that her explanation for the default is unreasonable in the circumstances.

Applicant seeks that the order removing the executor from administering her father's estate be rescinded. I find the application not bona fide for the following reasons.

Applicant wrote several letters seeking essentially what the order she seeks to impugn provides. Applicant complained bitterly to the Master of the High Court on the conduct of second respondent in his capacity as the executor. The letters written by applicant are at pp 51-55, 57-60, 62-68, 75-76, 77-79, 80-89.

I must point out that at times very strong language was employed by applicant in the complaints against second respondent's alleged conduct.

There is no letter revising the strong allegations she levels at the second respondent. There is no letter where she concedes that she was mistaken or misled to make the allegations. To now argue that what she effectively was seeking should now be rescinded suggests to me that the application is not *bona fide*.

The order granted under HC 5765/21 effectively protects the estate and appears on the face of it fair to all parties. I say fair, for the following reasons.

The order granted protects the interests of the first respondent as well as those of the applicant particularly under clause 3 of the order where it provides for the appointment of two executors one from applicant's side and the other from first respondent's side. That effectively means applicant's interests will be safeguarded and protected by an executor appointed by her.

There has not been any suggestion on the papers that the applicant would prefer a fairer course than the appointment of two executors as provided for under clause 3 of the order under HC 5765/21.

I note as well that the executor who was removed under HC 5765/21 did not oppose the application therein. The order itself reflects that he was in default. In this case although the second respondent was served with first respondent's heads of argument and a notice of set down there was nothing filed by him nor an appearance by him on the set-down date.

In the circumstances I find that there are no prospects of success of applicant's application on the merits. To that end I ordered as follows:

Application for rescission of judgment under case No. HC 5765/21 be and is hereby dismissed.

Applicant in person
*Saunyama Dondo*, first respondent's legal practitioners