

JOSEPH MAVHIZA

versus

NOMUSA MUSA MUPANDI

and

GOODWELL NYAKUDYA N.O

In his capacity as the Executor Dative of the Estate of the Late Yvonne Mhlanga

and

REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE

**MAMBARA J**

HARARE; 17 and 25 September 2024

*Opposed application*

*R. E. Nyamayemombe*, for the applicant

*K. P. Munyongani*, for the first respondent

MAMBARA J:

This is an application for the rescission of a judgment granted in favour of the applicant, Joseph Mavhiza, which ordered him to set down his 2005 matter within 30 days. The applicant contends that he was unaware of the judgment until three months after it was issued, by which time the 30-day period had already lapsed. A further three months passed before the applicant was able to gather the necessary financial resources to engage legal representation and file the present application for rescission. The applicant is now six months out of time, seeking the court's indulgence to rescind the judgment and allow him to set down the matter afresh.

The key issue for determination is whether the failure to set the matter down on the opposed roll constitutes a procedural error justifying rescission. In making this determination, I must analyse two conflicting judgments of this court: *Lake Harvest Aquaculture (Pvt) Ltd v Revesai* HH 242/17, decided by CHITAPI J, (hereinafter referred to as "Lake Harvest") and *Permanent Secretary: Ministry of Higher and Tertiary Education v College Lecturers Association & Others* HH 688/15, decided by MATHONSI J (hereinafter referred to as "Permanent Secretary"). These two judgments present divergent views on whether the failure to place a matter on the opposed roll is an error that requires rescission under Rule 29 of the High Court Rules, 2021.

**Factual Background:**

The applicant, Joseph Mavhiza, initially purchased a property for his late mother in the year 2000. A dispute arose regarding the transfer of the property, and the applicant instituted legal proceedings in 2005 under case number HC1811/05. Over the years, the case was delayed, and by 2023, it had not been set down for hearing. The 1st respondent, Nomusa Mupandi, filed an application for dismissal of the 2005 case for want of prosecution. The applicant opposed this application, and it became an opposed matter.

On 19 May 2023, this court granted an order in favour of the applicant, allowing him to set down the 2005 matter within 30 days. The applicant did not receive notice of the judgment and only became aware of it after three months had passed. By that time, the 30-day period had already lapsed, and the applicant was out of time. Faced with financial difficulties, it took the applicant another three months to raise funds to instruct legal practitioners to file the present application for rescission.

The applicant argues that the judgment was granted in error because the matter was not placed on the opposed roll, despite his opposition. He seeks rescission under Rule 29 of the High Court Rules 2021, contending that had he known about the judgment, he would have complied with the 30-day timeframe.

The respondents oppose the application, arguing that the applicant's delay is unjustifiable and that the failure to set the matter on the opposed roll does not constitute a procedural error warranting rescission. They contend that the applicant's application is vague and that the case has been overtaken by events, including the death of parties and changes in property ownership.

**Issues for Determination:**

1. Was the failure to set the matter down on the opposed roll a procedural error that renders the judgment erroneously granted?
2. Should the court grant condonation for the applicant's six-month delay in bringing this application for rescission?
3. Does the fact that the judgment was in the applicant's favour affect the analysis of whether rescission should be granted?

This application as already mentioned, is brought under Rule 29 of the High Court Rules, 2021, which governs applications for rescission of judgment. The rule provides that a party affected by a judgment granted in default may apply for rescission if the judgment was

erroneously granted or if there is a valid explanation for the default. In the relevant part the Rule 29 reads:

“1) The court or a judge may, in addition to any other powers it or he or she may have, on its own initiative or upon the application of any affected party, correct, rescind or vary – (a) an order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby; or  
(b) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or  
(c) an order or judgment granted as a result of a mistake common to the parties”

The key question in this case is whether the failure to set the matter down on the opposed roll constitutes an error sufficient to invoke Rule 29. The two conflicting judgments, **Lake Harvest** and **Permanent Secretary** provide differing interpretations of this issue. In **Permanent Secretary** this is what MATHONSI J (as he was then) said;

“I have said that Part D is concerned with chamber applications which do not have to be set down for argument and which, if not urgent, the registrar should ‘in the normal course of events’ refer to a judge for consideration in chambers. In my view a chamber application that is opposed is treated like a court application and must be allocated to a judge for set down on the opposed roll. I agree with Mr Muccheche for the applicant that a rule of practice has evolved in terms of which such matters are dealt with that way,

There is no way in which an opposed chamber application can be disposed of without the parties filling heads of argument and seeking a set down of the matter on the opposed roll. That would infringe the *audi alterem partem* rule. I do not agree with Mr Mahlangu for the respondent that the filing of heads of argument and requesting a set down is discretionary. If it was discretionary there would have been another method of prosecution opposed chamber applications without resort to that. There is none. The use of the word ‘may’ in r 243 does not help the respondents at all because that rule has no application whatsoever to the present matter. It merely allows a party who has filed a chamber application to attach to it heads of argument justifying why the application has been made without notice and in support of the order sought to be granted without notice to the other party.”

On the other hand CHITAPI J in the **Lake Harvest** matter offers a contradictory view. He writes,

“I have exercised my mind on the judgment of my learned brother. The question that has kept ringing in my mind is whether it can be laid down as correct interpretation of the rules that the filing of opposing papers by a respondent who has been served with a matter which has been filed as a chamber application in terms of the rules converts such an application to ‘all intents and purposes’ to a court application. I have also asked myself whether there is a lacuna in the rules. Further if as stated by my learned brother that a rule of practice has echoed in terms of which such matters are treated as opposed court applications, what form has such rule of practice taken because for it to be authoritative it must be issued as a practice direction which is a supplementary protocol to existing court rules normally issued by authority of the Chief Justice to plug procedural lacuna or gaps.”

In **Lake Harvest**, **CHITAPI J** took a pragmatic approach to procedural errors, holding that the failure to set a matter down on the opposed roll does not automatically constitute a procedural error requiring rescission. The court emphasized that procedural irregularities must be assessed in terms of whether they cause material prejudice to the parties involved.

**CHITAPI J** acknowledged that while there is an established practice of setting opposed matters down on the opposed roll, this is not a rigid rule. The failure to follow this procedure does not automatically render the judgment erroneous unless it leads to a miscarriage of justice or significantly prejudices one of the parties.

Applying this reasoning to the present case, it can be argued that the failure to set the matter down on the opposed roll did not prejudice the applicant because the judgment was ultimately in his favour. The applicant was granted the right to set down the 2005 matter within 30 days—a favourable outcome. Under the **Lake Harvest** reasoning, the procedural lapse would not justify rescission because it did not cause any prejudice at the time the judgment was granted.

1. In **Permanent Secretary**, **MATHONSI J** took a stricter view on procedural compliance, holding that the failure to set an opposed matter down on the opposed roll constitutes a procedural error that automatically warrants rescission. **MATHONSI J** emphasized the importance of adhering to the principle of *audi alteram partem* (the right to be heard), which requires that both parties be given an opportunity to present their case in full.

**MATHONSI J** reasoned that once a matter becomes opposed, the registrar has a duty to set it down on the opposed roll, and failure to do so results in a denial of the right to a fair hearing. The use of the opposed roll is not discretionary, and any deviation from this practice constitutes a procedural error that affects the fairness of the proceedings.

Applying this reasoning to the present case, **Permanent Secretary** suggests that the failure to set the matter down on the opposed roll was a procedural error, regardless of the fact that the judgment was in the applicant's favour. According to **MATHONSI J**'s interpretation, the procedural error invalidates the judgment because it deprived the applicant of the opportunity to be fully heard before the judgment was granted.

In this case, the applicant seeks to rescind a judgment that was in his favour but required him to take further action within 30 days. The applicant argues that the failure to place the matter on the opposed roll prevented him from receiving notice of the judgment in time to act

within the prescribed period. The court must determine whether this failure constitutes an error that warrants rescission under Rule 29.

Under **Lake Harvest**, the failure to set the matter down on the opposed roll would not automatically render the judgment erroneous. The critical question is whether the applicant suffered any prejudice as a result of this procedural oversight. Since the judgment was in the applicant's favour, allowing him to set down the 2005 matter within 30 days, it would seem that the applicant did not suffer any prejudice at the time the judgment was granted.

However, the applicant's contention is that he was unaware of the judgment due to the procedural oversight, and as a result, he missed the 30-day window to act. This raises the issue of whether the applicant's ignorance of the judgment caused him prejudice. While **Lake Harvest** suggests that procedural lapses should not automatically invalidate a judgment, **Permanent Secretary** would hold that the failure to set the matter down on the opposed roll was inherently erroneous and warrants rescission.

In this case, the procedural error may not have caused immediate prejudice to the applicant, but it did lead to a situation where the applicant was unable to comply with the judgment in a timely manner. As such, there is a valid argument for rescission based on the procedural oversight.

The applicant became aware of the judgment three months after it was granted and then took an additional three months to raise funds for legal representation. The respondents argue that this six-month delay is unjustifiable and that the applicant should not be granted condonation for the late filing of the present application.

The court must consider whether the applicant's explanation for the delay is reasonable. The applicant's financial difficulties provide a plausible explanation for the second three-month period, while his ignorance of the judgment explains the first three-month period. Courts have discretion to grant condonation where there is a reasonable explanation for the delay and where the delay is not inordinate.

In *Bessie Maheya v Independent Africa Church SC-58-07*, MALABA JA (as he was then) emphasized that the court must weigh the reasons for the delay and the extent of the delay against the importance of finality in litigation and most importantly, that it has to do justice. In this case, the applicant's explanation for the delay is reasonable, and the delay, while significant, is not excessive in the context of the applicant's financial situation. Again, this is a matter that has never been dealt with on the merits and looking at the circumstances of the

matter this is just one of those matters where parties must be given an opportunity to ventilate their issues.

The fact that the judgment was in the applicant's favour complicates the analysis of whether rescission should be granted. Normally, rescission is sought by a party who has suffered an adverse judgment. However, in this case, the applicant seeks to rescind a judgment that was favourable to him because he was unable to act within the prescribed time.

The court must consider whether the applicant should be penalized for failing to act on a judgment that was in his favour, despite his lack of knowledge of the judgment. The applicant contends that had he known about the judgment; he would have complied with the 30-day timeframe. The failure to notify the applicant in a timely manner (due to the failure to set the matter on the opposed roll) deprived him of the opportunity to act within the prescribed time.

While the judgment was favourable, the procedural error affected the applicant's ability to comply with the judgment. Under **Permanent Secretary**, this would be sufficient grounds for rescission, as the procedural irregularity deprived the applicant of the opportunity to act in time.

Having considered the conflicting authorities and the unique circumstances of this case, I am inclined to follow the reasoning in *Permanent Secretary: Ministry of Higher and Tertiary Education v College Lecturers Association & Others*. The failure to set the matter down on the opposed roll constituted a procedural error that deprived the applicant of the opportunity to be fully heard and to comply with the judgment in a timely manner.

While the judgment was in the applicant's favour, the procedural error resulted in the applicant being unaware of the judgment until after the 30-day period had lapsed. The applicant's six-month delay, while significant, is explained by his financial difficulties and ignorance of the judgment. In the interests of justice, the applicant should be granted the last opportunity to act on the judgment within a new timeframe.

In the result, it is ordered as follows;

1. The application for rescission of judgment is granted.
2. The applicant is granted leave to set down the matter under case number HC1811/05 within 30 days from the date of this judgment.

3. There is no order as to costs.

**MAMBARA J:** .....

*M. C. Mukome*, applicant's legal practitioners

*Mutindi Bumhira Legal Practitioners*, first respondent's legal practitioners