ASSEMBLIES OF GOD (SPIRITUAL MOVEMENT)
versus
LUCKMORE ZINYAMA
and
PHILIP ZINYAMA
and
DAVID MAKWINDI
and
ASSEMBLIES OF GOD

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 23 September 2024

Opposed Matter

E Mubaiwa, for the applicants
B Magogo, for the respondent

MUNANGATI-MANONGWA J**:** The applicants approached this court seeking rescission of a default judgment granted against the 3rd and 4th applicants in case number HC 5359/23. The order granted in default seeks the eviction of the said applicants and all those occupying the premises through them from the church premises being Stand 2666 Rujeko Township Marondera.

Facts of the matter are set out in greater detail by the 3rd applicant as follows; The 1st applicant and respondent are separate and independent churches within the International Assemblies of God fellowship which presently has over hundred and sixty member churches in Zimbabwe. No single church including respondents has exclusive entitlement to the use of the name Assemblies of God. The applicant states that it is evident from the respondent's billboards affixed at its various churches and in its procedures which are part of its Constitution specifically sections 1.5, 1.6 and 1.6.1 that the respondent is also known as Assemblies of God -Back to God. The applicants aver that the first applicant has been using the name Assemblies of God since its

formation in 1978 but as from 2015 it started using the name Assemblies of God -Spiritual Movement mainly to distinguish itself from other Assemblies of God churches like the respondent.

The applicants state that the 1st applicant entered into a lease agreement with the Municipality of Marondera and has been paying rates and other services since then. They are claims that they have been in peaceful lawful occupation of the church stand in issue upon completing construction in 1982 which was done without the respondent's input. Be that as it may, the respondent started to lay claims to the property and noted an action claim against all applicants in case number HC 4324/21. Another action claim was instituted against all four applicants in case HC 5359/23 after which the present applicants being defendants in that case filed a notice of appearance to defend with defects. They failed to serve the notice of appearance to defend contrary to the requirements of r 20(6) of the High Court Rules, 2021.Efforts to rectify the defects were to no avail resulting in the matter being set on unopposed roll-on 27 September 2023. Resultantly, a default judgment was granted against the 3rd and 4th applicants on 4 November 2023. The applicants made an acknowledgement that although the default judgment was because of an error on their part vis the handling of the appearance to defend, it was not willful.

It is common cause that the 1st and 2nd applicants are not parties to the default judgment. They aver that they filed this application because the default judgment affects and seriously prejudices them in the sense that eviction sought is not just against the parties to the proceedings thereof but seeks to evict all those who claim occupation through the 3rd and 4th respondents. They further state that the order also has adverse effects on them regard being made to the pivotal roles the cited parties play in the 1st Applicant and the positions they occupy as the national church leader and finance secretary respectively.

The applicants allege that none of the four applicants have ever been a member of the respondent whilst the respondents submit otherwise. They further state that the Respondent has its own churches with separate membership and leaderships in areas where 1st Applicant also has churches.

The application is opposed. The respondents contend that the applicants were former members of the respondent and that it owns the property in question. In the process of opposing the application, the respondent raised several points in *limine* to the effect that:

i) The 1st and 2nd applicants lack *locus standi.*

ii) The application is defective.

The first preliminary point raised on *locus standi* is premised on the fact that the default judgment sought to be rescinded was given against the 3rd and 4th applicants only in the absence of the 1st and 2nd applicants hence, it is argued that they lack *locus standi* to file the present application in terms of r 27(1) of the High Court Rules. The respondent drew the attention of the court to the meaning in r 27(1) of the Rules as cited on the cover of the application by the applicants to the effect that it only makes provision for rescission only by a party against whom a default judgment was granted. They claim that the 1st and 2nd applicants should have sought refuge in R29 not R27 of the rules of this court. The applicants in response contend that although they were not parties to the default judgement, the judgement has a direct and substantial effect on them as it seeks to evict not only the cited applicants but all those claiming occupation through them thus incorporating them. The 3rd and 4th applicants being national leaders in the applicant, their eviction affects those who follow them.

Faced with a situation like the present one, the courts are guided by what is contained in the papers rather than what appears on the cover of the application. Pertinent are the sentiments of BHUNU JA in *Ahmed* v *Docking Station Safaris Private t/a CC Sales* SC 70/18 where it was held that:

> "It is trite that an application stands or falls on its founding affidavit. ……In cases where the headings on the cover of an application tell one thing and the contents of the founding affidavits tell another, the nature of the application that is before the court is determined by the contents of the founding affidavit and not the heading on the cover of the application. ……"

Regard being made to the principle adopted in *Ahmed* case *supra*, the court notes that 1st and 2nd applicants clearly stated in their affidavits that they have *locus standi* to seek rescission of the default judgment because they have a direct and substantial interest in the matter a requirement envisaged in r29 of the High Court Rules. By virtue of being in occupation of the property through their leaders the 3rd and 4th applicants, their eviction and that of those occupying through them have a direct effect on them. In *Allied Bank Limited* v *Dengu & Another* SC 52/16 MALABA DCJ (as he then was) ruled that:

> "Principle of locus standi is concerned with the **relationship between the cause of action and the relief sought**. Once a party establishes that there is a cause of action and that he or she is entitled to the relief sought, he or she has locus standi,
>
> It is trite to note that ***locus standi*** **exists when there is a direct and substantial interest in the right which is the subject matter of the litigation and the outcome thereof**. A person who has locus standi has the right to sue which is derived from the legal interest recognized by the law."

Given the aforegoing, the applicants have *locus standi* to rescind the default judgment in terms of R29 of the High Court Rules. Thus, the preliminary point lacks merit and ought to be dismissed.

The second preliminary point raised is that the application is defective for failure to comply with the rules of this court. The respondent classified the defects in three phases:

i) that the application is supported by three founding affidavits and a supporting affidavit from one Adonia Masawi.
ii) That the application does not specify in terms of which rule of the High Court Rules, 2021 it is being made.
iii) The affidavits of the 2nd, 3rd and 4th applicants are not properly commissioned.

Firstly, the respondent states that the application is defective on the basis that it is supported by three founding affidavits deposed by the 2nd, 3rd and 4th applicants instead of one founding affidavit which will then be supported by supporting affidavits of the others. The respondent referred to r59 (1) as read with R60 (1) of the High Court Rules which states that a court application shall be supported by one or more affidavits setting out the facts upon which the applicant relies. The applicants as among themselves contend that, since all three natural persons have placed their founding affidavits, the application is not defective. From the perusal of the record, the 3rd applicant who is also a party to these proceedings deposes a composite affidavit on behalf of the 1st applicant as well as for himself. He has been authorized to act for the 1st applicant through a resolution passed by the National Executive Committee of the 1st applicant on the 7th of November 2023.

It is the court's view that ***each*** applicant must depose to a founding affidavit laying out his or her case. An applicant cannot file a supporting affidavit for the simple reason that, as an applicant, one has to provide a basis for his or her claim and that is done through a founding affidavit. This must be the position despite the applicants having the same cause of action. In a case involving

multiple applicants an applicant may choose to file an abridged affidavit asserting that he or she identifies with the contents deposed to in another's affidavit where the facts are identical and the deponent does not seek to regurgitate facts but certainly, an applicant has to depose to a founding affidavit. In that regard, the objection that the application is supported by three founding affidavits hence is defective is without basis and wrong at law as a founding affidavit is a requirement in a court application since it is from such an affidavit that the applicant presents and establishes his or her case. The point *in limine* is thus dismissed.

Secondly, the averment that the application is defective on the basis that it does not state the rule of this court under which it is being made lacks merit. The respondent states that the applicants did not specify the specific rule applicable. This issue is intertwined with the one that has been dealt with earlier where the court has already made a finding that it is guided by the contents of the affidavits. It is clear that the parties have highlighted the basis of their application, and the contents of the affidavits clearly point to the rule applicable. For the furtherance of justice, the parties speak through their legal representatives who are responsible for drafting and specifically know which rule is applicable to a case. It is these legal representatives who should ensure that the applicable rule is precisely cited. As the court has ruled in the aforegoing paragraphs, the issue complained about is not fatal and does not make the proceedings defective.

Further, the respondent made submissions during hearing that the affidavits of the 2nd, 3rd and 4th applicants are not properly commissioned by virtue of an endorsement of a computer-generated date. It further submits that a computer-generated date is not recognized by law and the affidavits ought to be struck off. The applicants contend that there is no law requiring how a date should be imputed on an affidavit. They argue that a challenge on a computer-generated date is a matter of fact which must be raised in an affidavit and not from the bar.

It stands to reason that there is no specific legislation that regulates in what manner a date should be endorsed by a commissioner of oath on an affidavit. The matter is one governed by general practice (see *First Cellular (Pvt) Ltd* v *Netone Cellular (Pvt) Ltd* SC 1/2015). The Justice of the Peace and Commissioner of Oaths Act [*Chapter 7:09*] is silent on that aspect. What is certainly clear is that the deponent must take an oath in the presence of the commissioner of oath who then appends his signature and date after administering the oath. These acts must occur contemporaneously (see *Mike Mandishaika* v *Maria Sithole* HH 798/15).

From perusing the record, the founding affidavits are affixed with a computer-generated date bearing the date of 8 November 2023. Without the leading of evidence, one cannot dispute that the commissioner of oaths administered the oaths on that same day the computer-generated date was affixed. This is why such an issue cannot be raised from the bar as the challenge has to be timeously raised and raised from the onset particularly in the affidavit of the person challenging the manner in which an affidavit has been commissioned. The dictum in *Zimasco (Pvt) Ltd* v *Tariro Ndlovu & 2 Ors* HMA 02/24 is distinct from this case as the commissioner of oaths confirms under oath that she indeed commissioned and endorsed the affidavit on the day as affixed by the computer-generated date. In the absence of evidence to the contrary, the court cannot therefore say that an affidavit was not properly commissioned by virtue of an affidavit bearing a computer-generated date. Regard being made to the aforegoing, the preliminary point lacks merit and is dismissed.

All the preliminary points having been dismissed this matter has to be decided on merits. The requirements for rescission of default judgment are well settled. They are well-articulated in *Rydale Ridge Park (Private) Limited* v *Ruth Muridzo N.O* SC 17/23 where MAVANGIRA JA held that in an application for rescission of default judgment, there should be an existence of a good and sufficient cause to rescind the order, *bona fides* of the application and prospects of success.

On whether there exists a good and sufficient cause to rescind the order, the applicants submitted that firstly they are not in willful default as the default judgment emanated because of defective appearance to defend. On the contrary, the respondents argue that the default was willful as the applicant's legal practitioner upon being notified of the defect did not act to rectify it through an amendment. From the record, it is apparent that the applicants tried to rectify the defect but to no avail. The respondent's legal practitioner was informed of the defect on 7 September 2023 and advised of the applicant's request to amend. No response was forthcoming until 23 September 2023 when the respondent's legal practitioner responded in the negative. As regards the 3rd and 4th applicants the respondent avers that the applicant's legal practitioner did not make a mistake and could not have made a mistake in not filing a notice on behalf of the 3rd and 4th applicants. Apparently, a notice to defend had been entered in the Appearance book and proof of the entry is available. The legal practitioner of the applicants even took the blame for the defective notices of appearance. Given these circumstances, attributing the error to the applicants will result in

injustice. It is the courts' view that when parties approach the courts, they place trust in lawyers to take a lead in drafting of court processes. The error was not deliberate on the part of the applicants, they had instructed the legal practitioners to defend and the error in filing a defective appearance to defend was done by the legal practitioners. If it were not for that error the applicants could have properly defended the matter and avoided the granting of a default judgment against them. It is the court's finding that the default was not willful on the part of the applicants. On their part the 3rd and 4th applicants had taken steps to approach legal practitioners timeously and rendered instructions to contest the matter, and the legal practitioners had acted timeously only that one thing went wrong when a mistake was made.

This court is satisfied that the applicants have met the requirement of the existence of a good defence, and that the application is *bona fide*. The applicant has placed before the court an agreement of sale of the stand in issue entered into with Marondera Municipality signed for on one part by the 2nd respondent and witnessed by 3rd and 4th applicants. Further, receipts for the payment of rent and water services have been provided by the applicants. The applicants further attest to the construction of the Church building on the disputed stand. The respondent has not placed before the court any evidence on acquisition of the property serve to allege that it has exclusive rights to the property in issue where eviction is being sought. It is the court's view that the applicants have a triable case warranting the setting aside of the default judgment. There is need to facilitate the matter to proceed to trial to enable clarity on whether Extension of Assemblies of God which was represented by the 2nd applicant upon purchase of the property with the Municipality is the same as the respondent. Such clarity is relevant as eviction being sought ought to be done by someone who holds rights to the property in question. The applicants have good prospects of success and certainly the court is convinced that this application is genuinely made and is thus *bona fide*.

Given the aforegoing and the fact that respondent had sued 1st applicant in HC5359/23 as a separate entity, and even conceded that the 1st applicant and respondent are distinct churches it is in the interest of justice that the judgment be rescinded and proffer the applicants a legal opportunity to defend their right to the property. Apparently, the 3rd and 4th applicants prayed for upliftment of bar and condonation and such relief was not contested at the hearing. Thus the court also finds it fit and proper to uplift the bar operating against the applicants and further condon the failure of the applicants to serve their appearance to defend on the respondent. This relief flows

from the court's discretion to grant such orders upon application and the applicants had applied for such relief.

That being the case, the court finds that there is good and sufficient cause to rescind the default judgment operating against the 3rd and 4th applicants in case number HC5359/23. Suffice that even though the 1st and 2nd applicants would have been entitled to rescission of judgment no such relief was ultimately sought as only the 3rd and 4th applicants prayed for such relief.

It is accordingly ordered as follows:

1. The Application for Rescission of Default Judgment is hereby granted.
2. The order granted by default in case HC 5359/23 against 3rd and 4th Applicants is hereby rescinded.
3. The bar imposed against 3rd and 4th Applicants in case HC 5359/23 is hereby uplifted.
4. The failure by the 3rd and 4th Applicants to serve their Notices of Appearance to Defend on the Respondent is hereby condoned.
5. The time within which the 3rd and 4th Applicants must serve their Notices of Appearance to defend is extended by a period of 5 (five) days after the granting of this court order.
6. There is no order as to costs.

Mufuka and Associates, applicant's legal practitioners
Maposa Mahlangu Attorneys, respondent legal practitioners.