PLUMED HORSE (PVT) LTD
And
STELLA NYANDORO
And
GEORGE NYANDORO
Versus
DUNDURN (PVT) LTD
And
REGISTRAR OF DEEDS
And
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE
And
THE MASTER OF THE HIGH COURT
ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 20 MAY AND 16 JULY 2020

Opposed Application

C Nhemwa, for the applicants
Z C Ncube, for the 1st respondent
2nd, 3rd and 4th respondents, in default

MABHIKWA J: The three applicants made this application purportedly in terms of the Common Law or alternatively Rule 449 of Order 49 of the High Court Rules 1971, for the rescission of the court order in case No. HC 2127/18. They aver that this Honourable court was misled into granting the order through fraud or that it was erroneously sought and erroneously granted in their absence.

Precisely the three (3) applicants seek relief in the following terms that;

1. The order in case No. HC 2127/18 dated 13th September 2018 be and is hereby set aside.

2. The 1st, 2nd and 3rd respondents file their Notices of Opposition in HC 2127/18 within ten (10) days of the date of this order.

3. That the 3rd respondent cancel Deed of Transfer No. 2352/18 dated 27th December 2018 in the name of the 1st respondent and revive Deed of Transfer No. 1617/2012 dated 17 of June 2002 in the name of the 1st applicant.

4. The 1st respondent pays costs of suit on an attorney and client scale.

The brief history of the matter is that one Hamilton Mandizvidza , issued summons against the 2nd and 3rd applicants and obtained judgement against them for, *inter alia*, contractual damages in the sum of US$30 000-00. The said judgement in favour of Hamilton was obtained on 11 February 2016. On 23 February 2016 Hamilton issued a writ of execution against the property in issue in this case, No. 517 Jacaranda Road Victoria Falls. In a bid to avoid the property being sold for a forced value by the Sheriff through a public auction, the 2nd applicant, by private treaty, sold the immovable property to the 1st respondent in an oral agreement. The rationale and agreement was that part of the purchase price payable by the 1st respondent would be paid to Hamilton Mandizvidza in liquidation of the judgement debt of US$ 30 000-00, and the balance would then be paid to 2nd and 3rd applicants. The 1st respondent dully settled the US$30 000-00 payment as verbally agreed. Hamilton then got off the 2nd and 3rd respondents' backs.

I must say that perhaps in a show of lack of candour with the court, this important history is completely missing from the applicants' papers. Instead, it is the 1st respondent's contention that after the conclusion of the agreement and after being relieved of their obligation of the judgement debt of US$30 000-00, the 2nd and 3rd respondents started to renege on their contractual commitment. This led to the urgent chamber application under case No. HC 2127/18. On 7 August 2018, my sister MOYO J issued a provisional order against the 1st, 2nd and 3rd applicants. On 13 September 2018, my brother MAKONESE J confirmed as final, the terms of the relief sought. Following the final order being granted, the Sheriff of the High Court in December 2018 signed all necessary documents to effect transfer of ownership as directed by the court. Stand No. 517, Victoria Falls was dully registered in the name of the 1st respondent.

More than seven (7) months later on 26 April 2019, the applicants filed the current application. They contend that the two (2) learned Judges above, both in the granting of the interim order and in the final, had been misled through fraud to grant the orders. They contend further that there had been no proper service and consequently no proper returns on both occasions. In fact they literally impute improper conduct on the part of the 1st respondent's legal practitioners. They further contend that consequently, they failed to attend

the two hearings as they were unaware of the set down dates and that the orders were therefore sought fraudulently and erroneously granted in their absence.

At the start of the hearing, upliftment of the bar operating against the applicants was sought and lifted by consent of the parties.

The Law Relating to Rescission of Judgement; Willful Default, "Good and Sufficient Cause" and Prospects of Success

I will re-iterate as was held in *Mushosho v Mudimu & Anor* 2013 (2) ZLR 642 (HH 443-13) that there are three (3) separate ways in which a judgement in default of one party may be set aside. This may be done in terms of Order 9 Rule 63 or Order 49 Rule 449(1)(a) of the High Court Rules 1971, or thirdly in terms of the common law. An applicant is at liberty to elect to use whichever one of those three vehicles best suits the circumstances of his case.

To qualify for relief under Order 9 – 63, the applicant must show that;

a) Judgement was granted in the absence of the applicant under these rules or any other law;
b) The application for rescission was filed and set down for hearing within one (1) calendar month of the date when the applicant acquired knowledge of the judgement.
c) Condonation of late filing has been sought and obtained where applicant failed to apply timeously.
d) There is "good and sufficient cause" for the granting of the order.

To qualify for relief under Rule 449(1)(a) a litigant has to show that;

(i) The judgement was erroneously sought or errenously granted, and
(ii) The judgement was granted in the absence of the applicant or one of the parties and the rights of the absent party were affected by it.
(iii) That there is an ambiguity or a patent error or omission, or that the judgement was granted as a result of a mistake common to the parties, that needs correction or rescission.

To qualify for relief in terms of the High Court's Common Law power to rescind its own judgements, a litigant must show that.

(i) The court's discretion that it is being asked to exercise is broader than the requirements in both Rules 449 and 63, and;
(ii) Whether, having regard to all the circumstances of the case, including applicant's explanation for the default, it is a proper case for rescission.

It is well settled law that an applicant seeking the rescission of a judgement granted in default must establish and satisfy the following important facts;

1) That the default was not willful. This would entail giving what could be regarded by the court as "good and sufficient cause" for the default. The court would therefore consider, before coming to a final decision to grant or not to grant the rescission, the applicant's explanation for his default.
2) The applicant's prospects of success on his principal claim in the case of a plaintiff or alternatively, a *bona fide* defence in the case of a defendant.

My brother BERE J (as he then was), stated the following in *ZEDTC v Ruvinga* (1) 2012 (2) ZLR 61 (H)

> "In order to succeed in having an order made in default of appearance set aside, the applicant must show good and sufficient cause. The explanation tendered must negate any willful default. In the context of default judgement, "willful" connotes deliberateness in the sense that the applicant must have had full knowledge of the set down date and the risks attendant upon default; and yet freely took the decision to refrain from appearing, whatever the motivation of that decision may have been."

In *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (SC) MCNALLY JA (as he then was) had the following to say regarding prospects of success or *bona fide* defence in applications for rescission of default judgement.

> "The applicant must show that he has a *bona fide* defence, it being sufficient if he sets out averments, which if established at the trial, would entitle him to the relief asked for. He need not deal with the merits that the probabilities are actually in his favour."

The learned Judge further held that;

> "A defendant who admits that he was negligent in his tardiness may nonetheless be granted rescission if he shows *bona fides*; Indeed the court might be unjustified in

> condemning him for a very short delay, although his explanation for it is inadequate, if defendant where found to be acting *bona fide* and had a *prima facie* defence."
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> See also
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> (i) *Mereki v Forrester Est (Pvt) Ltd* 2010 (1) ZLR 351 (H) per MAKONI J
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> (ii) *Zimbabwe Banking Corporation v* Masendeke 1995 (2) ZLR 400 (S)
>
> (iii) *Mushosho v Mudimu & Another* 2013 (2) ZLR 642

Also in *Uzande v Katsande* 1988 (2) ZLR 47 (H) wherein REYWOLDS J held that there should ordinarily be a two (2) pronged approach or enquiry into the issue of "good and sufficient" cause. He held that;

> "An allegation by a litigant that he was unaware of a pending trial would justify restitutio only if he could establish "a supremely just cause of ignorance free from all blame whatsoever." (section 2.4.14). The first hurdle is to show that *prima facie*, he was blameless. In the present case, his allegations, if true, would establish a supremely just cause of his ignorance." The second hurdle is to establish, on the balance of probabilities, the truth of his allegations."

I do not intend in this application to go deeper into issues of "good and sufficient cause or, as it were, review my fellow judges work. However, applicants allege in the founding affidavit of Claudious Nhema in paragraph 9 that the notice of set down was affixed on the metal gate at 10:00 am on the 7th of August 2018. They further allege that the chamber application is said to have been served on 7 August 2018 on Opah Mpofu whom they allege is a stranger to them at 09:35 am. It is their argument that it is improbable and therefore strange that the papers (Notice of Set Down and the Chamber Application) would be served on the same day within a time of 25 minutes apart. They aver that as a result of the alleged irregular service, the application was heard and an order granted against them without them knowing on the 7th of August 2018 by MOYO J. They allege that consequently, the Provisional Order was again fraudulently set down on the unopposed roll and confirmed by MAKONESE J on 13 September 2018.

A look at the returns of service reveal that the Notice of set down for HC 2127/18 was served on 3 August 2018, the address for service being No. 517 Jacaranda Road Victoria Falls. On remarks, the Sheriff indicated that the matter was before MOYO J on 7 August 2018. The remarks go on to state for all 3 respondents that "service dully effected by affixing on an outer metal gate after an unsuccessful diligent search of any responsible person on the

address." It is on 7 August that the Sheriff served another document at the same place, No. 517 Jacaranda Road, Victoria Falls in case No. 2128/18. This was four (4) days not 25 minutes apart. On the person served, the Sheriff described "Served on a responsible person (named and described below) Ms Opah Mpofu (tenant) at defendant's residence." The remarks state that;

> "Copy of urgent chamber application for a declarator was served on Ms Opah Mpofu who accepted service on behalf of the 1st, 2nd and 3rd respondents at 0935 hours I.D. number 79-08135 H 21."

My sister MOYO J accepted the above returns as proper service as described by the Sheriff and granted the Provisional Order which was subsequently confirmed by MAKONESE J on 13 September 2018, the Provisional Order having been served on the then respondents on 21st August 2018.

I am inclined to agree with *Mr Ncube* for the 1st respondent herein, that the deponent to the applicants' founding affidavit drove himself into confusion as he appears to have made the application before perusing the court records particularly HC 2127/18. He further compounded the confusion by relying on enquiries he made with the Sheriff in Harare instead of the Sheriff in Victoria Falls and thus failed to follow the proper sequence of events. In any event, to ask this Honourable court to revisit the issues of whether Opah Mpofu was a stranger or a tenant in respect of service which this same court accepted as proper service would amount to asking me to review my fellow Judges' work which is not permissible.

As already stated above, the applicants in this application for rescission have relied on Order 49 Rule 449 or alternatively the Common Law.

Order 49 Rule 449 reads thus:

449 "Correction, Variation and Recsission of Judgements and Orders

1. The court or a Judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind or vary any judgements order –

a. That was erroneously sought or erroneously granted in the absence of any party affected thereby; or
b. In which there is an ambiguity or patent error or omission but only to the extent of such ambiguity error or omission.
c. That was granted as a result of a mistake common to the parties."

I have already found that the Sheriff's returns in HC 2127/18 were accepted by MAKONESE and MOYO JJ as proper service and that I have no reason to revisit their decisions. There was no fraud proved. It has not been alleged or established that the orders were granted as a result of an ambiguity, patent error or commission. Thirdly, it has neither been alleged nor established that the two (2) orders were granted because of a mistake common to the parties. Consequently, I find that Order 49 Rule 449 does not apply and cannot be available to the applicants in this matter.

To qualify or succeed under the Common Law power to rescind its own judgements, a litigant must show that;

1. The court's discretion that it is being asked to exercise is broader than the requirements of both Rules 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 and Another v Stifrets Merchant Bank Ltd* 1997 (1) ZLR 201

In *Justice Chengesa N.O & 2 Ors v Tymon Tabana* HH 23-18, the applicants brought an application in terms of both Rules 63 and 449 of the High Court Rules, 1971 as well as the Common Law. CHIGUMBA J had the following to say;

> "The applicant purports to bring this application in terms of Rule 449 as read with Rule 63 of the rules of this court as read with the Common Law. In paragraph 5 of the founding affidavit, w e find the curious acerment that, in addition to these two rules of this court, the application is made is made in terms of the Common Law "*ex abundante cantella*" and to avoid multiplicity of causes. Herein lies the fatal defect that is bedeviling this application in my respectful view. The applicant is not at liberty to throw the whole kitchen sink at the court and ask the court to guess which dishes need washing and which ones need drying." …

I expressed the same sentiments myself in *Anywhere Jonasi* vs *Daimen Sailasi & 2 Ors* HB-108-20 (HC 1086/18) that applications where it is left to the court to guess or surmise as to what rule or law is relied upon or which rule is applicable, though permissible, should be discouraged. An applicant must elect and be clear as to what rule or law he relies on. This is so because quite often, such applications are a fishing expedition. The motive is usually to use an unwary court to salvage a lost cause. To illustrate this point, the application in *casu* was filed some seven and a half (7 ½) months after confirmation of the provisional order. An application for rescission of the judgment was then way out of time and an

application in terms of Order 9 Rule 63 would first require that there be "good and sufficient cause" to rescind the default judgment.

The inescapable impression given in the circumstances of the current application is that the application was made in the form it was, conveniently to duck the requirement to show "good and sufficient cause" as well as the 30 days period within which the application should be brought in terms of Order 9 Rule 63. The requirements are silent and not hard and fast in the case of an application under r449 or the Common Law. Further, it is clear that applicant, in bringing this application was obviously aware of the courts' wrath in cases such as *Trastar (Pvt) ltd t/a Takataka Plant Hire* vs *Golden Ribbon (Plant Hire (Pvt) Ltd* HB-4-18 (HC 2307/17) per MATHONSI J (as he then was) where the learned judge remarked:

> "The principal question therefore is whether once the court has failed to find "good and sufficient cause" to rescind a default judgment which is the hallmark of an application in terms of rule 63, it can be called upon to engage in an enquiry in terms of rule 449 in respect of the same whether it was erroneously sought and granted in the absence of another party."
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> Further in the judgment, the learned judge stresses that;
>
> "Indeed the point being made is that whilst the rules provide for three instances for the making of an application for rescission of a judgment, that is, in terms of rules 56, and rule 449, it cannot be said that the framers of the rules by that meant that a party is allowed to spend years and years skipping from one rule to the other, kangaroo style, in an attempt to have the same judgment rescinded.
>
> Such a construction of the rules cannot sit side by side with the concept of justice. As they say, justice must be rooted in confidence. That confidence will no doubt be shaken to the core should that state of affairs be allowed to eventuate … I have already made reference to the fact that there must be finality in litigation. That cannot be achieved where the process of seeking rescission is allowed to be adulterated in that way. It is properly for that reason that rule 63 (1) allows a party to seek rescission of a judgment <u>within one month after having knowledge of the judgment.</u> Rule 449 is silent as to the time frame for making an application but surely that does not mean that the application can be made at any time …"
> See also *Moonlight Provident (Pvt) Ltd* vs *Norbert Sebastian & 3 Ors* HB 254/16 per MAKONESE J.

Though with slightly different circumstances, the effect and intended outcomes in the current application and the *Takataka (Pvt) Ltd* case (*supra)* were the same. Again there is an underlying element of lack of candidness with the court on the part of the applicants.

Secondly, even more damning is the following. I note with great concern that Mr C. Nhema of C. Nhema & Associates Attorneys at Law), the deponent to 1st applicant's

affidavit was appointed Corporate Rescue Practitioner of 1st respondent in terms of section 133 of the Insolvency Act, (Chapter 6:07) on 25 April 2019. This was 7 ½ months after judgment sought to be rescinded had been granted. It was also just a day before this application was filed on 26 April 2019. However, C. Nhema's founding affidavit at paragraph 6 reveals that on 4 April 2019, well before his appointment and issuance of certificate to him as Corporate Rescue Practitioner, he travelled to Bulawayo to peruse the record HC 2127/18, already working on the matter. He went on to represent the applicants himself in *casu.* The inescapable inference in all this is that in a bid to salvage a long lost cause, the applicants first engaged in an elaborate scheme game to dribble past the court whilst hiding behind the corporate veil in two ways which they would rely on heavily as they now do to circumvent and try to defeat the court order that;

a) The claim that No. 517 Jacaranda Road, Victoria Falls was the only asset of the 1st applicant company and that in terms of section 183 (f) of the Companies Act (Chapter 24:03) a shareholders resolution was required in order for the sale between 2nd applicant and 1st respondent to be valid.

It is now contended that the absence of the shareholders' resolution rendered the verbal agreement null and void *ab – initio.* Applicants argue therefore that the whole transaction between 2nd applicant and 1st respondent falls foul of the bedrock of company law, namely the doctrine of legal personality. However, a look at the founding affidavit of Mr. C Nhema himself at paragraph 15 states as follows;

> "My investigations have revealed that the Board of Directors of the company are 2nd and 3rd applicants. The two have been on separation since 2004 and had not met over the affairs of the 1st applicant before the meeting of the Corporate rescue resolution for over a decade."

In paragraphs 2.1 to 2.3 of her founding affidavit, 2nd applicant (Stella Nyandoro) states;

> "2.1 That I have been on separation from the 3rd applicant for over fifteen (15) years and have not.. him since 2004. I am therefore shocked by the allegations that 2 entered into a verbal agreement with 1st respondent for the sale of a property owned by the 1st applicant, a company dully registered in terms of the Companies Act (Chapter 24:03) and therefore a legal persona, separate and distinct from its incomporators.

2.2 That I was a Director of the 1st applicant at the time of the alleged verbal agreement but I never met the 3rd applicant to pass a resolution to dispose of the property. I am advised by legal counsel …… that outside the powers granted by the Board of Directors I had no authority to enter into an agreement of sale to dispose of the property wholly owned by the company.

2.3 That the property was the only asset of the company and ….. I confirm that there was never a meeting of the Board of Shareholders to pass resolutions required by Law." (emphasis is mine).

The above position is repeated in paragraphs 2.1 to 2.3 of the 3rd respondent (George Nyandoro)'s affidavit. Nyandoro actually states that even in 2004, he only met "his wife" 2nd respondent at Harare Magistrates' Court.

Further, annexture "G" which is part of the 1st respondent's opposing papers is to me a strange handwritten document by 2nd applicant which is difficult to describe what it is. It is a 4 paged document. It is dated 5 February 2019. It starts with the phrase - '**To whom it may concern."**

It thereafter continues as a letter written in affidavit form. Surfice to say that in that document, 2nd respondent tries forcefully to renege from the sale agreement that saved No. 517 Victoria Falls from a possible forced Public Auction Sale. This was three (3) years after the property had been saved and Hamilton Mandizvidza gotten off their backs. It was also (five) 5 months after the provisional order against them had been confirmed. Therein lies the deception. It is this court's finding that there was scheming to regain the property from 1st respondent by deceitful means. However, even in that careful scheming, and as fate would have it, she either completely forgot or had not yet advanced the plan because in that ranting document, she refers to No. 517 Victoria Falls as her personal property throughout. She does not talk of a company property or her directorship of that company This corroborates the 1st respondent's assertion that she sold the property as hers.

Dirty Hands

Firstly, to the extent that in the paragraphs quoted above, the applicants, more particularly the 2nd applicant repeatedly claim that the property in issue is the only asset of the company and that there was no resolution passed as required by law authorising her to dispose of it, the applicants have come to this court with very dirty hands.

It is trite, and a tenet of our law that one cannot approach the court using his own wrongdoing to seek relief especially one that benefits him and prejudices an innocent party. *In casu*, when they spent sleepless nights over Hamilton's debt, it is the applicants only who would have known that No. 517 Victoria Falls is company property, not the 1st respondent. In order to get Hamilton off their backs and before selling the property to 1st respondent, it was the 2nd applicant and her co-director who should have known and had the obligation to meet and make a resolution to sell the property. They did not. They cannot ask the law now to assist them using their own misdeeds and disregard of the law. To borrow MATHONSI J's terminology (as he then was) , such a skewd view of the law "cannot sit side by side with the concept of justice." Justice must be rooted in confidence. That confidence will no doubt be shaken to the core should such a state of affairs be allowed to eventuate, where litigants are allowed to use their own non-compliance with the law to seek from the courts, relief to their benefit. The applicants cannot with juristic confidence approach this court as if to ask it to, "slap the 1st respondent in the face and tell him –Hey wake up, there was no company resolution authorising the sale of the property!"

Secondly, *Mr Ncube* for the 1st respondent could not have put it more aptly when he argued that the alleged 1st applicant company is a company that never was, right from inception.

From the papers before me, it is my considered view that 1st applicant was a company that suffered a still birth, a shell of a company which was nothing more than the mere alter ego or business conduit of a person improperly and fraudently used to the financial loss of another. The court in such a case will have reason to disregard the corporate personality status.

Section 318 (1) of the Companies Act is therefore very pertinent. It provides as follows that;

> "318 (1) – If, at anytime it appears that any business of a company was being carried on:-
>
> a) recklessly
> b) with gross negligence, or
> c) with intent to defraud any person or for any fraudulent purpose.

> The court may, on the application of the Master … or any other creditor or contributory to the company, if it thinks it proper to do so, declare that any of the past or present directors of the company or any other persons who were knowingly parties to the carrying on of the business in the manner or circumstances aforesaid shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct." (underlying is mine)

In *Agricultural Bank of Zimbabwe v Nickstate Investments (Pvt) Ltd and Others* 2010 (1) ZLR 419 (H) GOWORA J (as she then was) held that;

> "A registered company is a legal persona in its own right and endowed with its own separate legal persona which is distinct from its shareholders. However, in certain exceptional circumstances, where the company is controlled in terms of activities and decisions by another person, the courts will allow the corporate veil to be lifted to reveal the real person behind the company. When the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association. Thus, where there has been fraudulent or improper use of a company, a court is entitled to disregard the separate corporate personality of a company and pierce the veil. In a situation where the company was the vehicle through which the directors acquired property to enhance their estate, it would be just and proper to order that the corporate veil be lifted and judgement be entered against both the company and its directors." (the underlining is mine)

The learned Judge could not have put it more aptly. It is clear therefore that where a company is just a shell or vehicle controlled entirely by two persons for their own benefit, the court is entitled to "lift the veil," "peep behind it", and enter judgement against them. It is permissible to hold such persons to account for such acts that are wrong, reckless, negligent, fraudulent, improper, criminal or acts that defeat public convenience, together with their purported company. The court cannot allow people of devious characters to use the vehicle of a company to acquire properties improperly on other people's sweat and then hide behind the company's corporate veil. Such companies are usually comprised of a man and his wife, a man and his child, a man and his friend etc whilst for all intents and purposes, only one person controls the company often wish to the detriment and at the expense of unsuspecting members of the public.

See also *Govere v Ordece (Pvt) Ltd & Anor* 2013 (2) ZLR 257 (s) per PATEL JA

Also in *Deputy Sheriff v Trinpac Investments (Pvt) Ltd & Anor* 2011 (1) ZLR 548 (H) at p 548H-549C, the court, per PATEL J (as he then was) held that:

> "While the cardinal principle of company law is that a company is a separate entity distinct from its members, there are well established exceptions to the principle, grounded in policy

> considerations. When the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association. When the corporation is the mere alter ego or business conduit of a person, it may be disregarded. Where the corporation is organized or maintained as device in order to evade an outstanding legal or equitable obligation, the courts even without reference to actual fraud, refuse to regard it as a corporate entity. Where fraud, dishonesty or other improper conduct is found, the need to preserve the separate corporate identity would have to be balanced against policy considerations which arise in favour of piercing the corporate veil. The court would then be entitled to look to substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie…"

I agree with *Mr Ncube* that by parity of reasoning, the 2nd and 3rd applicants are trying to abuse the corporate personality of the 1st applicant to evade their obligation to satisfy the judgement of this Court under HC 264/15 in favour of Hamilton Mandizvidza. The 1st respondent has already paid the 2nd and 3rd respondents' liability to Hamilton Mandizvidza and there are compelling policy considerations to disregard the corporate veil of the 1st applicant and deal with it as the alter ego of the 2nd and 3rd respondents. Consequently, no good cause is shown by the applicants for the rescission of judgment of this court granted in favour of the 1st respondent under HC 2127/18.

(b) Corporate Rescue of a Company in distress under HC 2127/18

In a brazen show of ungratefulness, the husband and wife schemed to purport to try to" breathe some oxygen" into a company in distress, yet they knew, as shown in (a) above that there was no company to talk about in the first place. The real and true intention was to repossess No. 517 Jacaranda Road, Victoria Falls mafia style. This was being done several years after being saved by the 1st respondent from their indebtedness to Hamilton and several months after judgement had been granted against them. It was even four (4) months after the property had been transferred into the name of the 1st respondent. The intention was clearly to defeat the fulfillment of the court order.

In the case of *Chetty v Harf* 2015 (6) SA 424 SCA at paragraph 28 it was held that;

> "The obvious purpose of placing a company under business rescue is to give it breathing space so that its affairs may be assessed and restructured in a manner that allows its return to financial viability."

In the context of PART XX111 of the insolvency Act, (chapter 6:07) Corporate rescue is meant for struggling but operational companies not "shelf" or "briefcase" companies. A *fortiori*, the court would not allow a situation wherein companies are placed in distress and rescue merely to circumvent execution of court orders that have long been made and enforced. That would be the height of irresponsibility for a court to even contemplate. There must be finality to litigation. Mr C. Nhema should himself have refused to be part of such a scheme. In any event, it is highly unlikely,

and I do not believe anyway, that this company whose directors are husband and wife who claim to have not met for over fifteen years was created to own only one asset which then happens to be the family home in issue. It is this court's finding that the lifeless company (1st applicant), and No. 517 Victoria Falls had no relationship whatsoever, apart from merely being the couple's home.

It is also this court's finding that the applicants have failed to show that the order in HC 2127/18 was either erroneously sought and erroneously granted or that it was granted as a result of fraud. Further, applicants have not shown any good reason why the order in 2127/18 should be set aside.

Consequently the application for the rescission of judgement in case No. HC 2127/18 is dismissed with costs on attorney and client scale.

C Nhema and Associates c/o T Hara, applicants' legal practitioners
Messrs Ncube and Partners, 1st respondent's legal practitioners