ANUCHA THEOPHILUS
versus
GILIAD SHIBTAI
and
REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 14 & 31 May 2021 & 29 June 2022

Opposed Application – Rescission of Judgment

E Mubaiwa, for the applicant
J Mushunje, for the 1st respondent

MUSITHU J: The applicant seeks the setting aside of a judgment granted against him on 12 August 2020. The application was made in terms of o9 r 63 of the then High Court Rules 1971. The relief sought is couched as follows:

> "IT IS HEREBY ORDERED THAT
> 1. The Application for rescission be and is hereby granted.
> 2. The Court Order in default Case number HC 2613/20 on 12 August 2020 be and is hereby rescinded.
> 3. Applicant is to file its Notice of Opposition to the counter claim under HC 2650/19 within 10 days from the date of issuing of this order.
> 4. The first respondent to pay costs of suit."

FACTUAL BACKGROUND

The circumstances leading to the default judgment were as follows. The applicant filed an application for specific performance against the first respondent in HC 2650/19 on 29 March 2020. The application sought to compel the transfer of a property known as Lot 2 of Lot 31 and 33 Block B Avondale, Measuring 3556 Square Meters, held under Deed of Transfer No. 5051/2014 (the property), which the applicant purchased from the first respondent. The first respondent allegedly refused to sign relevant documents to facilitate the transfer of the property to the applicant. The first respondent filed a notice of opposition together with a counter application for a *declaratur*. The *declaratur* sought confirmation of the cancellation of the agreement of sale between the applicant and first respondent.

The applicant filed an answering affidavit to the first respondent's opposing affidavit on 27 March 2020. He did not file an opposing affidavit to the counter-claim. The applicant

filed heads of argument on 26 May 2020 in respect of the court application. The first respondent filed heads of argument on 5 June 2020. The matter was set down for hearing before ZHOU J on 21 July 2020. The applicant claims that on the date of the hearing, counsel for the first respondent informed his legal practitioners that they had applied for default judgment in respect of the counter-claim for the *declaratur*. For that reason, the main matter could not be heard in view of the pending application for default judgment which sought to determine the same issues that were before the court in the main application. The applicant further claims that his legal practitioners were shown a copy of the chamber application for default judgment for the first time in court. The main application was struck off the roll.

The application for default judgment was pending before CHAREWA J. On 22 July 2020, the applicant's legal practitioners wrote to a letter to CHAREWA J's clerk. The letter reads as follows:

> "RE: GILAD SHIBTAI & ANOR vs ANUCHA THEOPHILUS CASE No. 2613/20
>
> ……..
>
> We are Legal Practitioners of the Respondent in the above matter in which the Applicant is seeking a chamber Application for Default Judgment through a Chamber Application under the above reference case number. We represent the Respondents mentioned in the Chamber Application for default judgment.
>
> On 21 July 2020, we appeared in Court before the Honourable Judge Zhou under case number HC 2650/19 on the opposed roll for the determination of an order for specific performance. This is the same matter that has also been placed under justice Charewa through a Chamber Application for Default Judgment.
>
> We got to know of the Chamber application for Default judgment just a few minutes before the hearing before Justice Zhou.
>
> We intent to file an Application for Joinder by the end of day today or morning of the 23rd of July 2020 as we were not served with the Chamber Application in the main matter as well as file our notice of opposition after seeking indulgence from the court to uplift the bar operating against our client.
>
> May you be guided accordingly".

The application for joinder was filed on 23 July 2020 under HC 3909/20. The applicant also filed a chamber application for the upliftment of the bar under HC 4242/20 on 7 August 2020. Before the two applications were heard, CHAREWA J granted default judgment in chambers in favour of the first respondent herein on 12 August 2020. The order reads as follows:

"IT IS ORDERED THAT:

1. The contract of sale in respect of: certain piece of land situate in the District of Salisbury being Lot 2 of Lot 31 and 33 Block B of Avondale, measuring 3556 square metres, held under deed of transfer no. 5051/2014 entered into in September 2018 by Anucha Theophilus and Gilad Shabtai be and is hereby declared lawfully terminated.
2. The costs of this application shall be paid by 1st respondent.

It is that order which founds the application before the court and the concomitant relief sought.

APPLICANT'S CASE

The applicant explains his failure to file a notice of opposition to the counter claim as follows. After receiving the notice of notice of opposition to the main application his legal practitioners prepared an answering affidavit to the opposing affidavit as well as an opposing affidavit to the counterclaim. The papers were given to a secretary for typing. The secretary forgot to print the notice of opposition to the counterclaim. Unbeknown to the firm's principal, the papers were filed at court minus the notice of opposition to the counterclaim. All along the applicant's counsel thought that the notice of opposition had been filed at the same time as the answering affidavit. It was only at the hearing before ZHOU J that the applicant's counsel became aware that the notice of opposition to the counterclaim had not been filed and the first respondent had since applied for default judgment.

The secretary, Ambrose Chitapure, deposed to a supporting affidavit in which he stated that when he was handed over the papers for typing, he had forgotten to type the notice of opposition in time and this was unknown to the principal. He apologised for the error which resulted in the non-filing of the notice of opposition.[1] For the foregoing reasons, the applicant averred that he was not in wilful default.

Regarding the merits, the applicant averred that he had a *bona fide* defence to the counterclaim. He argued so for the following reasons. He paid the purchase price in full before the agreement of sale was signed. The applicant also paid some funds to the third respondent to cover transfer fees and stamp duty. The first respondent sought to cancel the agreement of sale on the basis of non-payment of stamp duty when such funds were already in the hands of the third respondent, who happened to be first respondent's agent. The applicant further averred that the alleged cancellation was bad at law as the applicant was only given five days

[1] Supporting affidavit on p 28 of the record.

to remedy the breach before cancellation yet the purchase price had been paid in five equal instalments. That meant that the applicant was entitled to 30 day notice in terms of the Contractual Penalties Act.[2] The notice of cancellation was through a letter from the first respondent's legal practitioners, Devittie, Rudolph & Timber of 23 January 2019. It reads in part as follows:

> "**RE: AGREEMENT OF SALE – GILAD SHABTAI AND ANUCHA THEOPHILUS**
>
> .....
>
> Our Client notes that you are in breach of the Agreement of Sale in that;
>
> 1. despite requests/demand by Conveyancers and or through their agents for you to tender (within seven days of their request) all documents necessary for the transfer namely:-
>   (i) Original power of Attorney by your agent Ms. Veronica Nyoni accompanied by the duly signed declarations by the said agent for and on behalf of yourself;
>   (ii) the declaration by the purchaser (as signed by yourself) have not been received from yourself.
> 2. despite requests/demand by the Conveyancers and or through their agents for you to tender (within seven days of their request) the stamp duty required for the transfer has not yet been paid.
>
> Consequently in terms of paragraph 5 of the Agreement of Sale you are hereby given 5 days notice of our client's intention to terminate this agreement if the said breaches fail to be rectified."

The applicant stressed that the order obtained in default pertained to the same issue the court was required to decide in the main application in consideration. The applicant contended that he had good prospects of success in the main matter, and for that reason the application should be granted to allow the matter to be heard on the merits. Refusing a request for rescission would allow the first respondent to benefit twice from the same transaction. He would probably pay just 1% in value of what he received and proceed to purchase another property if he had not done so already, while the applicant was going to lose a property he fully paid for. The applicant's property rights were under threat. There was also need for finality to litigation.

FIRST RESPONDENT'S CASE

The opposing affidavit was deposed to by Ofer Sivan in terms of a general power of attorney granted to him by the first respondent. The affidavit starts by raising two points *in limine*. Firstly he contends that the relief sought had become a *brutum fulmen*. The default judgment granted by CHAREWA J on 12 August 2020 declared that the agreement of sale

[2] [*Chapter 8:04*]

between the parties had been terminated in January 2019. On 13 August 2020, the property was sold to a third party who had since paid for it. An agreement of sale attached to the affidavit showed that the property was sold to AICERTINA INVESTMENTS (PRIVATE) LIMITED COMPANY (Aicertina Investments), represented by Munyaradzai Gonyora for US$200,000.00. The agreement of sale was signed on the same date. The deponent herein acknowledged receipt of part of the purchase price in the sum of US$50, 000.00, on behalf of the first respondent on the same day. The relief sought by the applicant was therefore incompetent as it had been overtaken by events.

The second objection pertained to the non-joinder of Aicertina Investments, the new purchaser of the property. It was argued that the application could not be determined without the involvement of the new purchaser who had a substantial interest in the matter.

Concerning the merits, the first respondent narrated events culminating in the dispute as follows. In concluding the agreement of sale of the property, the applicant was represented by Veronica Nyoni, a director of the second respondent, by virtue of a power of attorney granted to her by the applicant. The material terms of the agreement of sale were as follows. The purchase price of US$350,000.00 was to be paid immediately on signature of the agreement into the seller's bank account at Ecobank, Borrowdale Branch, Harare. In terms of clause 1.1, should the full purchase price not have been paid within three days of signature of the agreement, then the agreement was to be deemed to be void *ab initio*. In terms of clause 4.3, the purchaser was to furnish to the conveyancers within seven (7) days of request, the costs of transfer and any other costs or charges payable by the purchaser, and all such data, information and documents duly complete as may have been requested.

Clause 4.5 provided that "the costs of transfer of the property including transfer fees plus VAT, stamp duty and any amount required for purposes of obtaining a rates clearance certificate to transfer the property shall be paid by the Purchaser (in addition to the purchase price)." Clause 5, which dealt with the default by the purchaser provided that 'in the event of the full purchase price having been paid and the purchaser thereafter fails to comply with the remaining terms of this agreement, (at the election of the seller) and upon giving 5 (five) days written notice, the seller can terminate this agreement without derogation from any other legal remedies at his disposal."

According to the first respondent, the purchase price was paid on 7 September 2018. This was confirmed by a proof of payment, as well as in the applicant's founding affidavit in the application for specific performance under HC 2650/19. The applicant was therefore estopped from asserting that the transaction was an instalment sale. The applicant apparently failed to pay stamp duty despite repeated demand. He also allegedly failed to tender the original power of attorney and duly signed declarations by his agent Veronica Nyoni. Attached to the opposing affidavit was an email from Frank Rudolph to Verocy Real Estate dated 7 December 2018. The email addressed to Veronica read as follows:

> "**RE: Documents for signing**
> ……..
> As discussed, I await the documents and payment of stamp duty to the deeds registry so that we can proceed to complete the transaction……"

That email was followed by another one of 10 December 2018 from the Frank Rudolph to Veronica. It reads as follows:

> "We note with concern that we have not received the requested documents for transfer of the property into your Client Mr. Anucha Theophilus name. This has had a consequent delay in transferring the said property. Kindly forward the same as a matter of urgency as the writer shall be going on Holiday at the end of this week and would like to have the matter completed by the conveyancers before then…."

Following the breach, and pursuant to clause 5 of the agreement of sale, the first respondent was served with a notice advising of the breach and a call to rectify the alleged breach. The letter of 23 January 2019 from the first respondent's legal practitioners reads in part as follows:

> "**RE: AGREEMENT OF SALE – GILAD SHABTAI AND ANUCHA THEOPHILUS**
> ……
> Our Client notes that you are in breach of the Agreement of Sale in that;
>
> 1. despite requests/demand by Conveyancers and or through their agents for you to tender (within seven days of their request) all documents necessary for the transfer namely:-
>   (i) Original power of Attorney by your agent Ms. Veronica Nyoni accompanied by the duly signed declarations by the said agent for and on behalf of yourself;
>   Failing which
>   (ii) the declaration by the purchaser (as signed by yourself) have not been received from yourself.
> 2. despite requests/demand by Conveyancers and or through their agents for you to tender (within seven days of their request) the stamp duty required for the transfer has not yet been paid.

> Consequently in terms of paragraph 5 of the Agreement of Sale you are hereby given 5 days notice of our client's intention to terminate this agreement if the said breaches fail to be rectified.
>
> Be advised accordingly."

The first respondent averred that the applicant partly complied with the notice. On 28 January 2019, Verocey Real Estate submitted the original power of attorney and declaration by the purchaser through a letter of the same date. The letter reads:

> "**RE: ORIGINAL SPECIAL POWER OF ATTORNEY AND DECLARATION FOR ACQUISITION – 4 KIRKBY CLOSE EMERALD HILL, HARARE**
>
> Please find enclosed original special power of attorney and declaration by the purchaser both in the name of Veronica Nyoni as the appointed agent of Theophilus Anucha…"

The first respondent claims that the applicant and/or the second respondent failed to pay the stamp duty within the prescribed period. On 30 January 2019, the first respondent terminated the agreement of sale. The termination letter reads as follows:

> "**RE: AGREEMENT OF SALE – GILAD SHABTAI AND ANUCHA THEOPHILUS**
>
> Reference is made to our letter of 23 January 2019, placing you on notice due to the breach of agreement by yourself in the Agreement of Sale (of September 2018) entered into between yourself and our client Mr Gilad Shabtai.
>
> We advise that as the breach has not been rectified in that;
>
> 1. Stamp duty has not been paid in the notice period given of five days as per the contract,
>
> Our client hereby terminates the agreement and hereby tenders payment of the sum of US$350,000.00 (Three Hundred And Fifty Thousand United States Dollars).
> ……."

According to the first respondent, clause 6 of the agreement of sale provided that in the event of a default by the seller, the purchase price immediately became due and payable together with interest thereon at the prevailing bank rate calculated from the date of signature of the agreement. It was for this reason that the first respondent tendered a refund of the purchase price in the notice of termination. The first respondent also claimed to have paid for and obtained a Capital Gains Tax Clearance Certificate (CGT Certificate) to tender transfer in terms of clause 4.4 of the agreement of sale. The CGT Certificate was issued on 7 November 2018. That according to the first respondent, showed that he had no malicious intent.

The stamp duty was allegedly paid on 27 February 2019, after the agreement had been lawfully terminated. In terms of the payment instruction, the amount of US$12,770.00 was paid

from the second respondent's account at Stanbic Bank into the third respondent's account at CBZ Bank Limited.[3]

The first respondent asserts that he no longer possessed the rights that the applicant sought to assert against him. The right to transfer the property was alienated upon his disposal of the property to the second purchaser, which process was backed up by a valid court order. The applicant could not therefore maintain its cause of action to sue for specific performance under the circumstances. He could only transfer the property to Aicertina Investments, and the transfer sought by the applicant would result in a double sale. The court could not be used to aid an illegality.

The first respondent blamed the applicant for its failure to comply with the rules of court. There was no rule obliging a party to serve an application for default judgment. Once a litigant was barred, they had no right of audience in court. That explained why ZHOU J refused to hear the applicant when the main application was placed before him. The applicant for joinder was not necessary because the applicant was already a party to the proceedings. The application for the upliftment of the bar was also incompetent in view of the pending default judgment. That explained why the court was not deterred to grant the default judgment even after having had sight of the applications.

The attribution of the default to a secretary who allegedly forgot to type or print the opposing affidavit was also dismissed as unreasonable. This was because the applicant's legal practitioner was expected to sign the notice of opposition with the applicant signing the opposing affidavit. The legal practitioners should have raised alarm when nothing was produced for signature. A follow up was also expected especially after receipt of heads of argument in the main application, yet no answering affidavit had been received in respect of the opposition to the counterclaim. The wilfulness of the applicant's default was also evident in its decision to prosecute one application and ignoring the other. The applicant ought to have asked himself what befell the *declaratur* in all these months since March 2020. The default was therefore wilful.

The first respondent also averred that the applicant had materially breached the contract through its appointed agency leading to the termination of the contract. That the second respondent and/or Veronica Nyoni was the applicant's agent was confirmed by the following:

[3] See the payment instruction report p 105 of the record.

applicant executed a Special power of attorney in favour of Veronica Nyoni; the agreement of sale was signed by Veronica Nyoni on the applicant's behalf; the second respondent accepted funds from the applicant which it held in trust for payment of stamp duty, transfer fees and clearance of rates arrears; in paragraph 14 of its affidavit in support of the application for specific performance, the applicant stated that he gave an instruction to the second respondent to pay transfer fees and stamp duty from the said funds, yet the second respondent had only paid transfer fees but no stamp duty; the second respondent partly complied with the first respondent's notice of breach as communicated in the letter of 23 January 2019.

It was further contended that the applicant could not invoke provisions of the Contractual Penalties Act[4] since the contract was not an instalment sale. It would only apply if the purchase price was to be paid in three or more instalments, or by way of a deposit and two or more instalments. The additional requirement was that title was not transferred until payment was completed. Yet the applicant herein admitted that he paid the purchase price on 7 September 2018 before the agreement was even signed.

The contract also provided for notice of cancellation which the first respondent claimed he adhered to. The applicant was allegedly in breach for close to six months with repeated calls being made to rectify the breach before the first respondent invoked the cancellation clause. It was further averred that the applicant had failed to demonstrate a *bona fide* defence to the application for the *declaratur*.

The first respondent denied that the applicant would suffer any financial prejudice if the court declined to grant the application for rescission. The purchase price had been tendered upon the cancellation of the agreement in January 2019. It was the applicant that was seeking to benefit from its own wrong doing at the expense of a party that religiously adhered to its contractual obligations. The *caveat subscriptor* rule meant that a party was bound by the terms of a contract they freely and voluntarily signed. The applicant could not seek to rewrite the contract for its own benefit. The applicant was not entitled to the relief that it sought under the circumstances. The balance of convenience clearly favoured the new purchaser. The court was urged to dismiss the application with costs on the legal practitioner and client scale.

[4] [*Chapter 8:04*]

THE ANSWERING AFFIDAVIT

The applicant contended that the first respondent snatched judgment by applying for default judgment without giving notice to the applicant. The court was required to determine the lawfulness of the termination of the agreement of sale in the main application. It had always been the first respondent's intention to benefit twice from a single transaction that's why he quickly tried to sell the property to a third party who was not innocent as he was aware of the dispute between applicant and first respondent. The judgment to be rescinded was one between the applicant and the first respondent and there was nothing stopping such process even if it would eventually affect a third party.

The applicant averred that the sale of the property to a third party was unlawful since the property was the subject of a dispute in the main application. The court was required to determine whether that property should be transferred to the applicant or not. The sale to the third party was sham as it was done a day after the default judgment was granted. Further, the property was under-priced as it was only sold for US$200,000.00, yet the applicant had bought it for US$350,000.00. That applicant averred that the second sale was only meant to defeat the ends of justice. The applicant claimed that there existed an XN caveat at the third respondent's office as a result of the application for specific performance and no *bona fide* third party would involve themselves in a property that was the subject of ongoing litigation. In any event, the sale to the second purchaser was void as the agreement of sale between the applicant and first respondent had not been validly cancelled.

To further back up its claims that the sale was *mala fide*, the applicant alleged that the second purchaser and the first respondent shared the same residential address, that is, 51 Hogerty Hill, Borrowdale, Harare. It also happened to be the first respondent's home address. Munyaradzi Gonyora who signed the agreement of sale on behalf of Aicertina Investments was actually the first respondent's driver. That on its own showed that the sale was meant to subvert the ends of justice by deceiving the court. It was only proper that the default judgment be rescinded and the matter heard on the merits.

The applicant denied that the non-joinder of Aicertina Investments was fatal to its cause. The rules of court were clear that a matter could not be dismissed on account of the non-joinder of a party.

The applicant insisted that the second respondent was the first respondent's agent. It was the first respondent that instructed the second respondent to find a buyer for the property. It was the second respondent that also prepared the agreement of sale in which the applicant was represented by Veronica Nyoni. Nyoni and the second respondent were two different legal persons.

The applicant contended that the purchase price was paid in instalments before the agreement of sale was signed, and for that reason it was an instalment sale. The applicant also averred that the stamp duty was paid to the second respondent, the first respondent's agent who held it in trust, before it was even requested. The failure by the second respondent to remit it timeously could not prejudice the applicant's rights. In any case, the non-payment of the stamp duty timeously, would not have prejudiced the first respondent so as to warrant a cancellation of the agreement of sale. There was therefore no breach to talk about since the applicant performed his obligations timeously.

THE SUBMISSIONS AND THE ANALYSIS

At the commencement of the hearing Ms *Mushunje* for the first respondent abandoned the points *in limine* on material non-joinder of Aicertina Investments and that the relief sought had become a *brutum fulmen*. That was correctly so because it was not demonstrated that the applicant was aware of the sale of the property to Aicertina Investments at the time that the application was launched. Besides, the application was concerned with a default judgment obtained against the applicant by the first respondent. At the time the matter was argued, it was not alleged that the property at the centre of the dispute had been transferred to the second purchaser as yet. The alleged rights of the second purchaser could not therefore impinge upon the determination of the application for rescission of judgment at this stage. That is a matter for another day.

Mr *Mubaiwa* for the applicant motivated the granting of the relief sought from another perspective in addition to the one pleaded in the founding affidavit. He submitted that the default judgment granted by CHAREWA J could be set aside in terms of r 49 r 449 as it was granted in error. A r 449 application could be made orally as it touched on a point of law that could be raised at any stage of the proceedings. Counsel referred to the case of ***TN Harlequin Luxaire Limited (2) Lifestyle Holdings Luxaire Limited v Quest Motors Manufacturing***

***(Private) Limited*[5].** Counsel further submitted that the r 63 approach would be argued in the alternative.

Ms *Mushunje* objected to the proposed approach arguing that the first respondent had been ambushed. It was manifestly unjust as the first respondent had not been put on notice that such point would be raised in argument. Ms *Mushunje* further submitted that the applicant was essentially raising a new of cause of action. A litigant had to stand or fall on the basis of the papers before the court. The matter had to proceed on the basis of r63.

In *The Forestry Commission* v *Varden Safaris (Pvt) Ltd*[6], the court said the following about points of law that are raised for the first at the hearing of a matter:

> "[14] It seems to me that where a point of law is sought to be taken for the first time at the end of a trial or hearing at first instance but before judgment is delivered, the court in which the issue is raised should not lightly disallow it. The court must exercise a discretion as to whether or not to allow the taking of the point in question. It has the resources to hear further evidence, if that proves to be necessary. It may, if so requested, amend the pleadings. In short, there are options open, in these circumstances, to a court of first instance which are not always available to an appellate court[7]. In the end, the aim is to do justice between the parties and this cannot be achieved if it is brought, albeit belatedly, to the attention of the court that an agreement is contrary to statute and the court simply turns a blind eye to that fact because it was not raised in the pleadings."[8]

From a consideration of the authorities, it is trite that a point of law can be raised at any stage of the proceedings. A court must be slow in disallowing the raising of a point of law in the proceedings before it. Ultimately it is the business of the court to consider the law and apply it in the resolution of the dispute before the court. Courts exist to dispense justice between man and man and the law is always the starting point in that process. Any perceived prejudice to the party against whom the point is raised can always be mitigated by a postponement of the matter to allow the other party time to consider the point and its

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[5] SC 30/18 at p5 where the court held:

> "[17] The rationale behind allowing the introduction of a point of law on appeal for the first time is that the appeal court is duty bound to always come to the correct position of the law on the issues that were before the court *a quo* as covered by the pleadings. It is therefore inimical or contrary to its very existence for such a court to overlook the application of a correct principle of law merely on the basis that it has been argued at a late stage in the proceedings. The correct position of the law remains the correct position of the law no matter how late in the day it is discovered. The pursuit of justice comparatively lies more in arriving at a legally correct solution and less in marching the parties along precisely defined pathways at defined times."

[6] SC 58/16
[7] See for example, *Muskwe v Nyajena* SC17/12
[8] At p6 of the judgment

implications to their case. Such postponement may, in deserving cases, be concomitantly accompanied by an order of costs against the party seeking the introduction of that point of law which occasioned the postponement of the matter.

In the exercise of its discretion, the court allowed that the preliminary point be taken and postponed the matter to 31 May 2021, to give the first respondent's counsel time to consider the legal point further. The court also ordered the applicant to pay the day's wasted costs on the ordinary scale as tendered by his counsel. The court further directed counsel to file supplementary heads of argument addressing the new point.

At the resumption of the hearing on 31 May 2021, Mr *Mubaiwa* advanced the r 449 argument in the main. His submission was twofold. Firstly, he submitted that CHAREWA J granted default judgment in the face of two applications which had a bearing on the main application. These were the chamber application for joinder under HC 3909/20, and the application for the upliftment of the bar under HC 4242/20. These had a bearing on the direction the main application would take, and as such the learned judge would not have ignored them had she been aware of their existence. Secondly, counsel submitted that the court granted default judgment in a matter that was *lis pendens*. The effect of her order was to render academic the pursuit of the main application. It was unlikely that the court would have granted default judgment with the intention of defeating a claim in which the applicant was not barred.

Mr *Mubaiwa* further submitted that r 449 undoubtedly applied in view of these errors. It was unconceivable that the court would have granted judgment knowing that in doing it was effectively dismissing matters that were not before it, more so when the matter was *lis pendens* under the same case number. In the supplementary heads of argument, it was submitted that the main application and the counterclaim were two sides of the same coin. It was even apparent before ZHOU J that the determination of one to the exclusion of the other would undermine the other. The matters could not be determined separately even on account of a bar in the other matter.

It was further submitted that r 449 applied where judgment was granted on the basis of an error which would have dissuaded the court from granting the judgment had it been aware of the error. It was that error that justified the invocation of r 449. Such a complaint constituted a question of law which could be raised at any stage of the proceedings, and even *mero motu* by the court. It followed that r 449 could be relied upon notwithstanding that the founding

affidavit was premised on r 63. The court was referred to the cases of *Mukambirwa & Ors* v *The Gospel of God Church International 1932*[9] and *Barbosa De Sa* v *Barbosa De Sa*[10]. It was further contended that r 449, did not require the applicant to explain any delays or prospects of success.

In reply, Ms *Mushunje* submitted that the leave to file heads of argument in order to motivate the r449 point was not a leeway to amend pleadings. There was no r 449 application before the court. Pleadings had long been closed and what was pending before the court was a r 63 application. No new application could be made from the bar. It was further submitted that r 449 was merely a rule and not a legal principle. It set out the procedure to be followed by a litigant or the court when an error occurred within the parameters of that rule.

Counsel further submitted that the applicant ought to have made a proper r 449 application on the appropriate form as prescribed by the rules of court. As the *dominus litis,* the applicant could not seek substantive relief based on r 449 while at the same time flouting the rule itself. There was not a single reference to the rule in the entire pleadings. To support her submissions counsel referred to the case of *Zimbabwe Posts (Pvt) Ltd* v *Communication & Allied Services Union*[11].

Ms *Mushunje* further submitted that the applicant's undecidedness on the correct premise to base its application was prejudicial to the rights of an innocent third party and ought to be penalised by the court. Legal practitioners could not be allowed to ambush other litigants by changing goal posts as the case progressed. In any case, the alleged errors did not warrant the court's attention. The applications for joinder and upliftment of the bar were meritless. The applicant had been barred and there was nothing irregular about the default judgment.

As already noted, the applicant's counsel decided to motivate the application on two bases, namely r 449 which was not pleaded in the founding affidavit and alternatively r 63, which was the original basis upon which the application was instituted. At the hearing counsel argued the r 449 point first. The court will determine the r 449 point first.

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[9] SC 8/14
[10] SC 34/16
[11] SC 20/16 where GOWORA JA (as she then was) stated:

> "The issue that begs an answer is how the court *a quo* should have dealt with the matter given the apparent confusion that had been created by the appellant in setline its papers. An application must be disposed of on the basis of the founding affidavit…."

Whether r449 founds a legal principle on which a point of law can be sustained

Ms *Mushunje* argued that r 449 was not a legal principle upon which argument on a point of law could be sustained. Whether or not an argument based on r 449 can be construed as a point of law is best answered by defining what a point of law really is. The issue was dealt with by the Supreme Court in *Muzuva* v *United Bottlers (Pvt) Ltd* [12]. The court said:

> "… the term 'question of law' is used in three distinct though related senses. First, it means 'a question which the law itself has authoritatively answered to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter'. Second, it means 'a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter'. And third, any question which is within the province of the judge instead of the jury is called a question of law. This division of judicial function arises in this country in a criminal trial presided over by a judge and assessors.……."

While the above sentiments were expressed in the context of a labour dispute, they apply with equal force to the issue before the court. A point of law, often referred to as a question of law, simply means a legal question that the court must determine through the application of appropriate legal principles. It can easily be contrasted with a question of fact. These are two important principles that courts ordinarily have to consider in the resolution of disputes. A question of fact is determined upon a consideration of the facts and evidence that is placed before the court. The court can also draw inferences from the facts that are placed before it. Rule 449 is part of the rules of court that are designed to regulate practice and procedure in the conduct of the court's business. Rule 449(1)(a) provides as follows:

> ***"449. Correction, variation and rescission of judgments 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 judgment or order—
> (*a*) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or
> (*b*) ……"

A r 449 application requires the court to consider the propriety of a judgment in the context of the matters alluded to in sub rule 1(a)-(c). The Supreme Court has had occasion to comment on powers of this court in relation to a r 449 in a matter which is almost on all fours with the present matter. In *Mukambirwa & Ors* v *The Gospel of God Church International 1932,* GOWORA JA (as she then was) set out the position of the law as follows:

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[12] 1994 (1) ZLR 217 (S) at 220 D-G:

> "In considering the application for rescission, it is common cause that the learned judge invoked the provisions of r 449 in rescinding the judgment and thus dealt with the order as one made in error. It is correct, as contended by the appellants, that the Church had not premised its application on the grounds of an alleged error, but rather as an application for rescission of a judgment granted in default, as provided under r 63. The learned judge did not in her judgment make reference to r63. She referred to r 449……
> The High Court is a superior court with inherent jurisdiction to protect and regulate its own process and to develop the common law, taking into account the interests of justice. In the exercise of this inherent power, the High Court promulgates rules of court designed to expedite and facilitate the conduct of court business of the court. In terms of r 449 (1) the court has the power to correct, vary or rescind a judgment, either on its own motion or upon the application of a party affected by the judgment in issue."[13]

Further down in the same judgment, the learned judge went on to make the following pertinent remarks:

> "The founding affidavit in support of the application for rescission clearly adverted to the grounds that the Church had not been in default, but the heads of argument filed on its behalf took the point that the judgment had been erroneously sought, and further that that the judgment had been granted in error. This was a point of law, and in my view, the learned judge in the court *a quo* was entitled to consider the application based on the submissions in the heads of argument notwithstanding that the premise upon which the application for rescission differed to what was being argued.
>
> Under the rules the judge is empowered to invoke r 449 *mero motu*, or upon application, and in the event that the Church had not done so, the court could have on its own volition dealt with the matter under r 449. In view of the inherent powers of the High Court it is open to the court to correct any of its orders which exhibit patent errors. The inherent power of the High Court was affirmed by LEVY J in *SOS Kinderdorf International* v *Effie Lentin Architects* 1993(2) SA 481, at 492 as follows:
>
> > "Under the common law the courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient cause shown. This power was entrusted to the discretion of the Courts. This discretion extended beyond and was not limited to the grounds provided in Rules of Court 31 and 42 (1)…""[14] (Underlining for emphasis).

From the foregoing authority, it becomes clear that the raising of a legal issue, which is premised on the invocation of r 449 is a point law which this court will treat as such. Further, this court can, as a matter of law and in the exercise of its inherent jurisdiction, allow a party to make a r 449 application from the bar in order to deal with any point of law that may arise from an application of that rule. A r449 application can still be made from the bar even though the founding affidavit and the averments therein were based on r63. The court finds nothing irregular with the invocation of r449 at this stage of the proceedings.

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[13] At p11
[14] At pages 12-13 of the judgment. See also *Rogerio Barbosa De Sa v Herlander Barbosa De Sa* SC 34/16 at pages 7-8

Did the applicant make a case for invoking r449?

The purpose of r 449 was explained by MAKARAU J (as she then was) in *Tiriboyi* v *Jani & Anor*[15] as follows:

> "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 purposes of correcting an injustice that cannot be corrected in any other way….."[16]

From a reading of r 449 (1)(a), a party that seeks to have a judgment set aside on the basis that it was erroneously sought or erroneously granted in their absence must establish the following factors: that the judgment was erroneously sought or granted; that the judgment was granted in its absence of the applicant and that the applicant's rights or interests were affected by the judgment.[17]

It is common cause that the main application which had been set down for hearing before ZHOU J on 21 July 2020 could not be heard after it emerged that the applicant had been barred for failing to file his opposition to the first respondent's counter-claim. The first respondent had since applied for a default judgment, and that application was placed before CHAREWA J. On 22 July 2020, the applicant's counsel dispatched a letter to the registrar for the attention of CHAREWA J, advising of the applicant's intention to apply for joinder, as well as to file applicant's notice of opposition to the counter-claim, after seeking the court's indulgence to uplift the bar operating against the applicant. That letter was received by the registrar on the same date as evidenced by the date stamp from the registrar's office.

The court application for joinder was issued and filed on 23 July 2020, while the chamber application for the upliftment of the bar was issued and filed on 7 August 2020. The default judgment was granted by CHAREWA J on 12 August 2020. Two matters with a bearing on the application for default judgment were pending before this court before the default judgment was granted. The question that arises is whether the court would have proceeded to grant the

[15] 2004 (1)ZLR 470 at p472 D-F
[16] See also *Sibanda v Gwasira & 2 Others* SC 14/21
[17] See *Mutebwa v Mutebwa* 2001 (2) SA 193 (TkH)

default judgment nevertheless, even if these matters had been brought to the attention of the court?

Without commenting on the merits or demerits of the two matters one is inclined to conclude that the court would not have ignored a matter in which a party pleaded for the upliftment of a bar so that the dispute in the main application could be determined on the merits. This is more so if one considers that the main application was ready to be argued and the applicant was not barred in that matter. It is the main application which triggered the counter-application which in turn led to the default judgment. The issues to be considered in the counter-application, for which a default judgment was sought were identical to the issues to be considered in the main application. A determination of one of the matters on the merits would have essentially disposed of the other.

There would have been absolutely no prejudice to either party if the application for default judgment was stayed pending the determination of the application for upliftment of the bar. Ultimately, it was the applicant that had instituted litigation first. The applicant was not barred in the main application. That matter, as is clear from the papers, was ripe for argument. The default judgment would render academic the main application which the applicant had religiously pursued up to the point of set down. The first respondent evaded the determination of the matter on the merits by getting judgment through a technicality. In my view, taking into account the steps that the applicant took to assert his rights before the default judgment was granted, the court would, had it been aware of the two pending matters, stayed the application for default judgment more importantly pending the determination of the application for the upliftment of the bar.[18]

It is for the foregoing reasons that I am inclined to grant the relief sought on the basis of the first leg of the applicant's case as argued by counsel. The applicant has satisfied the requirements for the setting aside of the default judgment in terms of r 449 (1)(a).

COSTS

The general rule is that the successful party is entitled to costs on a scale which must be determined depending on the nature of the case and the manner in which litigation was conducted. In the court's view, the conduct of the first respondent leaves a lot to be desired. From a consideration of the facts and how the first defendant conducted itself, one can safely

[18] See also *GMB v Muchero* SC 59/07 at pages 5-7

conclude that the first respondent desired to snatch judgment at all costs, never mind the circumstances. The two matters were identical. A determination of one would have clearly put to rest the other. Both parties needed closure and indeed either of the two matters would have achieved that.

In the circumstances there was no point in hastily seeking a default judgment when the first defendant was aware that the main application was also ready to be argued. Professional etiquette used to be the hallmark of legal practice. Now all that seems to have been thrown out of the window. If the first respondent and their counsel were truly desirous to have the court determine the dispute on the merits, then they ought not to have acted in the manner they did in the face of a matter that was ripe to be argued on the merits. They ought to have brought the anomaly to the attention of the applicant's counsel before rushing to apply for default judgment at the earliest opportunity and behind the applicant's back for that matter. The first defendant's conduct was certainly unreasonable, and an adverse order of costs is justified. The applicant shall however pay the wasted costs it tendered on 14 May 2021, following his application to have the matter postponed.

DISPOSITION

Resultantly it is ordered that:

1. The application succeeds.
2. The court order granted in default by CHAREWA J on 12 August 2020 in favour of the first respondent in HC 2613/20, be and is hereby rescinded as it was granted in error.
3. The applicant shall file its notice of opposition to the counter-claim in HC 2650/19 within 10 days from the date of issuing of this order.
4. The applicant shall pay the first respondent's wasted costs arising from a postponement of the matter at the instance of the applicant on 14 May 2021.
5. The first respondent shall pay the applicant's costs of suit.

Bherebhende Law Chambers, legal practitioners for the applicant
Devittie Rudolph & Timba, legal practitioners for the first respondent