SAMSON MAGORA
and
ELISON MABIKA
and
JEVAS NYONI
and
PROSPER CHAKAVANDA
and
FRANCES MAKORE
and
ELIZABETH SIZIBA
and
LINET MASHANDURE
and
NOREST MUTARANI
and
FORWARD BOTARAWA
and
DOLANI MSIMANGA
and
GEORGE GWERENA
and
SEKAI MATSA
and
MANVEL CHAZETI
and
ANAR MATUVHE
and
JAMESON MABIKA
and
LENA MALUNGA
and
FANI PHIRI
and
THANDIWE SHAVA
and
TENDAI MADZIVA
and
CONSTANTINE MAKAMURE
and
LAMECK PHIRI
and
EUNICE ROVI
and
KENEDY ZINHATA
and
SHARON GONDO
and

MEMORY DZIVA
and
WEZA AKIKA
and
FUTURE SIBANDA
and
GEORGE GANIZANI
and
ABIGAIL KOKE
and
SIBONGILE SIBANDA
and
SHARON KOKE
and
NDHLERA PATRICIA
and
EMERESS MHARE
and
DAVID ZIHWA
and
versus
RUNDE RURAL DISTRICT COUNCIL
and
ZVISHAVANE TOWN COUNCIL
and
CHIEF MASUNDA
and
THE DISTRICT ADMINISTRATOR ZVISHAVANE
and
MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING
and
MINISTER OF LANDS, AGRICULTURE, WATER CLIMATE AND RURAL RESETTLMENT
and
FBC BUILDING SOCIETY

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 12 October 2021 & 2 November 2022

Opposed Application-Special Plea Res judicata

Ms G. Makina, for the plaintiffs
Mr R. Chatereza, for the 1st, 2nd and 3rd defendants
Ms P. Matutu, for the 7th defendant

BACKGROUND

MUSITHU J: The plaintiffs are all residents of Mudereri Village under Chief Masunda in the Zvishavane Communal area. By virtue of its proximity to Zvishavane Town, the village is fast transforming into a peri-urban residential settlement under the jurisdiction of the Zvishavane Town Council, the second defendant herein. A dispute has however arisen between the plaintiffs and the defendants following what the plaintiffs consider to be the forced annexure of their land by the fifth defendant and incorporating it into the area under the second defendant's jurisdiction. As a result of that dispute, the plaintiffs' caused summons to be issued out of this court claiming the following relief against the defendants:

> "WHEREFORE PLAINTIFFS PRAY THAT:
> 1. The agreement of sale between the 7th Defendant and the 1st and 2nd Defendants be and is hereby declared null and void and accordingly set aside.
> 2. The forced removals, evictions and demolitions of the Plaintiffs' homes, farmland and pastures by the Defendants be and are hereby declared unlawful and wrongful.
> 3. The Defendants are ordered to pay costs of suit on client-attorney scale jointly and severally, one paying the others to be absolved."

All the defendants entered appearance to defend save for the fourth defendant. The first, second, third and seventh defendants proceeded to file special pleas of *res judicata* in response to the plaintiffs' claim. This judgment is concerned with those special pleas.

The Plaintiffs' Case

The plaintiffs' claim is set out in the declaration as follows. They had always lived peacefully at Mudereri Village, until quite recently when the Minister of Local Government, Public Works and National Housing, the fifth defendant herein, without any prior notice to them, annexed their land, homesteads and pastures and incorporated them in the area under the second defendant's jurisdiction. The plaintiffs further alleged that the defendants then connived to sell their land to FBC Building Society, the seventh defendant herein. They only woke up to reality when the seventh defendant started servicing the area, pegging stands and opening up roads around January 2020.

The plaintiffs also contend that a proclamation made in relation to the annexed lands was done unlawfully. The defendants had since ordered the plaintiffs off their land, and they had even threatened to demolish their structures if the directive was not complied with. The plaintiffs' further contend that it was the defendants' unlawful conduct that forced them to approach the court for the relief sought herein. The defendants further averred that the

defendants' actions were actuated by malice, especially when one considered that they were not consulted or afforded an opportunity to express themselves on the matter. Such conduct therefore deserved censure through an award of costs on the legal practitioner and client scale.

The defendants' special pleas of *res judicata*

In their special plea, the first second and third defendants averred that the plaintiffs' action was *res judicata*. The same action was heard, determined or otherwise disposed of to finality under case numbers HC 2744/20 and HC 1018/20.

The seventh defendant also raised the same special plea of *res judicata*. It submitted that the parties were the same in the action proceedings under HC 1018/20. Those proceedings were dismissed by this court pursuant to a court application under HC 2744/20. The two matters that is HC 1018/20 and 4349/20 were essentially founded on the same cause of action. The dispute between the parties was therefore conclusively dealt with in HC 2744/20. The defendants prayed for the dismissal of the present action with costs on the legal practitioner and client scale.

The Replication

The plaintiffs denied that there existed a definitive judgment which all but disposed of their claim on the merits. A matter was only *res judicata* when a final and definitive judgment was granted on the merits. According to the plaintiffs, that was not the case herein. The dismissal of their claim in HC 1018/20, as alluded to by the defendants was not even one on the merits.

The Submissions

Mr *Chateredza* appearing for the first, second and third defendants submitted that it was common cause that the parties before the court were the same parties in HC1018/20. The cause of action was the same. The only issue was whether HC 1018/20 was a final judgment or not. Counsel further submitted that the case of *Darare & Anor v Chiyangwa*, relied upon by the plaintiff in their heads of argument was in conflict with the established principle of the law that when a default judgment was granted, the party affected by the default judgment had to apply for its rescission instead of instituting fresh proceedings. The judgment was also in conflict with Supreme Court judgments which had dealt with that point. The court was urged to vacate the *Darare* judgment, as the judgment did not represent the correct position of the law.

Following the dismissal of their claim under HC1018/20, the plaintiffs ought to have applied for the rescission of the judgment that dismissed that claim since it was granted in default. Counsel further submitted that the court would not have granted the application for the dismissal of the claim in HC 1018/20, if it was not satisfied that the application was meritorious. The court had therefore made a determination on the merits.

Ms *Matutu* for the seventh respondent submitted that a judgment dismissing a matter was final and definitive. He further submitted that the dismissal of a matter in terms of r 31 was a dismissal on the merits. The court in HC 2744/20 dealt with the merits of the matter filed in terms of r31. He made reference to the authority of *Makoto v Mahwe*[1], where the court discussed the legal principles that were considered in determining if a matter was frivolous or vexatious. In that matter, the court held that a matter was frivolous if it was marked by lack of seriousness, inconsistent with logic and good sense and so groundless and devoid of merit that a prudent person could not possibly expect to obtain relief from it. The word vexatious was used in the sense of a question being put forward for the purpose of causing annoyance to the opposing party in the full appreciation that the matter cannot succeed.

In its heads of argument, the seventh defendant submitted that a summary dismissal of a matter in the context of o11 r75 was a determination on the merits, and that explained why the rules required a defendant to file a plea on the merits before making such application. In was further submitted that in HC 2744/20, the court dealt with an application filed in terms of o11 r75. The court found that the plaintiff's case in HC 1018/20 was devoid of merit. It was on that basis that it was argued that the current proceedings would amount to a re-determination of the same cause of action, which had already been determined when HC 1018/20 was dismissed. The plaintiff ought to have applied for the rescission of the default judgment that remained extant. The court was urged to dismiss the plaintiff's case with the costs at the legal practitioner and client scale since the seventh defendant was unnecessarily put out of pocket by the conduct of the plaintiffs.

In her brief reply to the oral submissions, Ms *Makina* for the plaintiffs argued that the seventh defendant was not a party to the proceedings in HC 1018/20 and HC 2477/20. It could not therefore raise the plea of *res judicata* as it was not a party to those proceedings. The cause of action was totally different.

[1] CCZ 03/20

The Analysis

HC 1018/20 was a summons action issued and filed on 11 February 2020. The parties were exactly the same as they are herein save for the seventh defendant. In that matter, the seventh defendant was FBC Bank Limited (hereinafter referred to as FBC Bank). The relief sought therein was similar to the relief sought herein, save for paragraph 2 of the prayer therein. In paragraph 2 of their prayer, the plaintiffs' wanted the annexation of their land by the defendants declared unlawful and wrongful, and consequently set aside. In HC 2744/20, FBC Bank applied for the dismissal of the plaintiffs' action proceedings under HC 1018/20 in terms of o11 r75(1)(2) and (3), of the then High Court rules, 1971, on the grounds that the said proceedings were frivolous and vexatious.

On 1 July 2020, PHIRI J granted the following order in favour of FBC Bank in default of appearance by the plaintiff's herein:

> "IT IS ORDERED THAT:
> 1. The instant application succeeds.
> 2. The 1st-34th respondents' summons and declaration under HC 1018/20 be and are hereby dismissed.
> 3. The 1st-34th respondents' shall pay the applicant's costs of suit on the ordinary scale for both the present application as well as the dismissed summons action under HC 1018/20."

I pause to note that on 17 August 2020, the day that the plaintiffs instituted the current proceedings under HC4349/20, they also instituted separate proceedings under HC 4348/20. The relief sought under HC 4348/20 is as follows:

> "a) The proclamation made by the 5th Defendant annexing the land at Mudereri Village under Chief Masunda to the 2nd Respondent's jurisdiction be and is hereby declared unlawful and wrongful and accordingly set aside.
> b) The annexation of the Plaintiffs land at Mudereri village under chief Masunda, by the Defendants be and is hereby declared unlawful and wrongful and accordingly set aside.
> c) The Defendants be and are hereby ordered to pay costs of suit on a legal practitioner client scale jointly and severally one paying the other to be absolved."

An appearance to defend was filed on behalf of the first, second and third defendants in that matter. The said defendants went on to apply for further particulars to the plaintiffs' declaration. The record does not show if those particulars were ever furnished. At a glance, one would wonder why the proceedings involving the same parties and the same subject matter, would be instituted under different case numbers but on the same day. HC4348/20 and HC 4349/20 were all instituted after the dismissal of HC 1018/20 by PHIRI J on 1 July 2020. Paragraph (b) of the plaintiffs' prayer under HC 4348/20 is identical to paragraph (2) of the prayer that was being sought under HC1018/20. In both instances the plaintiffs sought the

annexation of their land by the defendants declared unlawful and wrongful and consequently set aside.

Paragraph (2) of the plaintiffs' prayer under HC4349/20 is identical to paragraph 3 of the prayer under HC 1018/20. The plaintiffs want their forced removals, evictions and demolitions of their homes at the instance of the defendants, declared unlawful and wrongful. There was therefore clearly no reason why a claim involving the same parties and the same cause of action had to be split, when in HC1018/20, it was brought as a composite claim. Such an approach leads one to reach the conclusion that some mischief was intended.

The mischief behind the splitting of the claims under HC 4348/20 and HC4349/20 is not difficult to decipher. It was meant to deceive the court. If these matters were placed before different judges, it meant that in HC4348/20, one judge could be persuaded to declare the annexation of the plaintiffs' lands by the defendants unlawful. Similarly in HC 4349/20, another judge could be persuaded to find that the forced removals, evictions and demolitions of the plaintiffs' homes was wrongful and unlawful. Yet it is the same relief that the plaintiffs were seeking under HC1018/20, which matter was dismissed by PHIRI J. In simple terms the two actions were intended to circumvent the consequences of the dismissal of the main claim under HC1018/20 by PHIRI J. This takes me to the next stage, which is to determine the effect of the dismissal of HC 1018/20 by PHIRI J.

The effect of the dismissal of the plaintiffs' case.

In their heads of argument, the plaintiffs submitted that a matter was only *res judicata* when a final and definitive judgment was granted on the merits. Their argument was of course premised on the view that the default judgment granted by PHIRI J dismissing their claims under HC 1018/20 was not a final and definitive judgment. In so arguing, the plaintiffs relied on the authority of *Darare & Another v Mike Chiyangwa*[2], where the court said:

> "I propose to deal with the plea of *res judicata* first. It is important to note that the claim in the court *a quo* under MC 7417/14 was dismissed for non-appearance by the claimant. Such a dismissal was not on merit and was not a final or definitive judgment. The dismissal for non-appearance by the plaintiff occasioned the resuscitation of the claim under MC 7872/15. The question that arose was whether or not by dismissal of the claim for no appearance the matter was *res judicata*.
>
> It is trite that a matter is regarded as *res judicata* if the following requisites are met;
>
> 1. The previous matter was between the same parties or their privies.
> 2. The subject matter must have been the same.
> 3. The matter is founded on the same cause of action.
> 4. The earlier court must have given a final and definitive judgment on the matter.

[2] HH 102/17

> See *Kawondera* v *Mandebvu* SC 12/06 and *Banda and Others* v *ZISCO* 1999 (1) ZLR 340 in which SANDURA JA quoted *Prestorious* v *Barkley east Divisional Council* 1914 AD 409 in outlining the essential ingredients of *res judicata*.
> In this case the matter was dismissed for non-appearance by the respondent who was then the plaintiff. The re-set down of the matter was a recourse which was clearly open to the respondent in his capacity as the plaintiff. Had it been the appellants as the defendants who had been in default then their course of action would have been an application for rescission of judgment. The point *in limine res judicata* cannot be sustained in the circumstances of this case. The second point *in limine lis pendenis* equally cannot be sustained because there was no pending case based on the same cause of action involving the same parties. The court *a quo* properly exercised its discretion."

In the *Darare* case, the court determined that the dismissal of a claim by the court for non-appearance at the hearing by the plaintiff was not one on the merits and therefore did not yield a final or definitive judgment. The recourse available to the plaintiff under the circumstances was to reset the matter down for hearing. The court further determined that had it been the defendants who were the victims of that default judgment, the recourse open to them would have been to seek the rescission of that default judgment. In the *Darare* case, the plaintiff defaulted court on the date of the hearing, leading to the dismissal of his claim. Instead of seeking the setting aside of the judgment that dismissed his claim, the plaintiff simply resuscitated his claim by issuing fresh summons. On appeal, the appellants had raised two preliminary points namely *res judicata* and *lis pendens*, which were determined by the court on appeal in terms of the dictum above.

The requirements for a plea of *res judicata* were set out in *Kawondera* v *Mandebvu*[3] as follows:

> "The requisites for a successful plea of *res judicata* based on a judgment *in personam* are threefold, namely, that the prior action:
>
> - must have been between the same parties or their privies;
> - must have concerned the same subject matter; and
> - must have been founded on the same cause of action."

It is common cause that the parties in the present matter were similar to those in HC1018/20, save for the seventh defendant. It does not matter in my view that in HC 1018/20, the seventh defendant was the FBC Bank, whereas *in casu* it is FBC Building Society. As correctly argued by the defendants, the same cause of action or question arising *in casu*, was similar to the question that arose in HC 1018/20. The cause of action is the alleged deprivation

[3] Supra at p3 of the judgment

of the plaintiffs' pieces of land by the defendants. It is the same question that PHIRI J was seized with under HC 2744/20.

In the *Darare* judgment, it was held that a dismissal of a plaintiff's claim in default is dissimilar to a default judgment granted against a defendant. According to the dictum in *Darare*, a plaintiff whose claim was dismissed did not have to approach the court for rescission of that judgment. Such plaintiff could approach the court for the resuscitation of their claim by setting it down or simply instituting fresh proceedings. In determining this issue, one must understand the nature of the order that was granted by PHIRI J dismissing the plaintiffs claim in HC 2744/20. Was the order by PHIRI J a default judgment or was the defendant absolved from the said suit within the context of o9 r62? In my view it was a default judgment. I reckon so for the reasons that follow hereunder.

In *Marovatsanga* v *Chiwaridzo & 2 Ors*[4], the court dealt with a r63 application made by a plaintiff whose claim was dismissed at the pre-trial conference stage after he defaulted court together with his counsel. At the hearing of the application for rescission of the default order, the first and second respondents raised a preliminary point arguing that the application was misplaced and incompetent at law because there was no default judgment issued against the applicant. They argued that a dismissal order did not amount to a default judgment which could be rescinded. The preliminary issue for determination by the court was whether the order issued by the learned Judge in the absence of the plaintiff could be rescinded or set aside in terms of r 63. In dismissing the preliminary point, BHUNU J (as he was then) held as follows:

> "The Rules do not define the word judgment we therefore have to look at the ordinary dictionary meaning of the word. According to the Thesaurus Dictionary a judgment is synonymous with, a ruling, decision, finding, verdict, sentence conclusion, result or decree. Thus the word judgment has a broad meaning. That being the case, restricting its meaning may lead to injustice. This explains why the legislator conferred a wide discretion on judges and the court to depart from the rules in order to do justice between the parties.
> It appears to me that by whatever name the order given in the absence of the other party may known, it can be rescinded, set aside or reversed on good cause shown. It does not matter from whatever angle you may look at r 62 and 63, the net result is the same. The common purpose is to achieve justice on the merits rather than technicalities."[5] (Underlining for emphasis).

I associate myself with the views of the learned judge on the treatment of an order/judgment that is granted in default of appearance by a plaintiff. I am of course aware that the *Darare* case was determined by two judges sitting on appeal, and to that extent the *ratio*

[4] HH 532/15
[5] At p3 of the judgment

decidendi emanating from that case is more persuasive than that of a single judge. However, I am inclined to associate myself with the views of the court in the *Marovatsanga* case upon a consideration of the old r63, which applied to the rescission of a default judgment then. It states as follows:

> "***63. Court may set aside judgment given in default***
> (1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.
> (2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just." (Underlining for emphasis).

The wording of r63 is instructive in my view. It refers to a party against whom judgment has been given in default. If the intention of the drafters of the rules was to reserve the rescission of a default judgment procedure to a defendant/respondent, then they would have simply stated so. Subrule (1) should have simply made reference to a defendant/respondent, and not to a "party against whom judgment has been given in default". Further, in terms subrule 2, a plaintiff against whom judgment has been granted in default may have that judgment set aside and given leave to prosecute his action.

It therefore follows that a plaintiff or an applicant whose claim has been dismissed for default of appearance at the hearing of the matter must contend himself with the rescission of that default judgment if they wish to progress that claim further. The plaintiff cannot simply abandon the case in which a default judgment was granted and institute fresh proceedings or simply reset the matter down again without rescinding that default judgment. The plaintiff must deal with that default judgment first.

Did PHIRI J determine the plaintiffs claim on the merits?

The application before PHIRI J under HC 2744/20 was one for the dismissal of the plaintiffs case in terms of o11 r75 of the old High Court rules. That provision states as follows:

> "***75. Application for dismissal of action***
> (1) Where a defendant has filed his plea, he may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious.
> (2) A court application in terms of subrule (1) shall be supported by affidavit made by the defendant or a person who can swear positively to the facts or averments set out therein, stating that in his belief the action is frivolous or vexatious and setting out the grounds for his belief."

Mr *Chateredza* urged this court to find that PHIRI J determined the application for the dismissal of the plaintiffs' claims in 1018/20 on the merits. The court would have declined to

grant that application had it not been satisfied that it was meritorious. Ms *Matutu* also submitted that the dismissal of the action under HC 1018/20 was on the merits. This court is constrained from making a finding that the plaintiffs' claims were dismissed on the merits in the absence of a written judgment stating the basis upon which the plaintiffs claim was dismissed by the court in HC 2744/20.

The order by PHIRI J was clearly granted in default of appearance by the plaintiffs. It is not clear whether in dismissing the plaintiffs' claims the court considered the merits of the claims or it merely granted default judgment on account of the failure by the plaintiffs and their counsel to appear in court. In the absence of a written judgment, this court cannot on the basis of conjecture, conclusively determine that the PHIRI J determined the application under HC 2744/20 on the merits. This court cannot safely conclude that in dismissing the plaintiffs' claim in HC 1018/20, PHIRI J gave a final and definitive judgment on the merits of the matter.

I have already determined that the cause of action in HC 1018/20 and the cause of action herein is not materially different. The complaint is the same. The plaintiffs could not have approached this court on the same facts and against the same parties without purging their default under HC2744/20 and HC 1018/20. In instituting proceedings under HC 4348/20 and HC 4349/20, and seeking the same relief as they earlier sought in HC 1018/20, the plaintiffs were obviously aware of the implications of the default judgment by PHIRI J and sought to undermine it. That conduct borders on outright dishonesty. It was meant to deceive the court. In fact it is tantamount to forum shopping, in the absence of an explanation as to why those claims were split in that manner.

In the final analysis, it is the finding of this court that the plaintiffs ought to have rescinded the default judgment by PHIRI J, instead of undermining that judgment by approaching this court and seeking the same relief under HC 4348/20 and HC 4349/20. There is therefore merit in the defendants' objection to the extent that it seeks to impugn the plaintiffs' claim on the basis that the plaintiffs approached this court afresh in the face of the default judgment granted by PHIRI J, which dismissed their claim in HC 1018/20. The plaintiffs must deal with that default judgment first before approaching this court in the manner they did. That matter remains live.

COSTS

The defendants' counsel urged the court to dismiss the plaintiffs' claims with costs on the attorney and client scale. I see no reason for the court not to accede to this request. The

conduct of the plaintiffs' and their counsel was clearly calculated at deceiving the court. It deserves some censure through an order of costs on the higher scale.

DISPOSITION

It is ordered that:

1. The plaintiffs' claims in HC4349/20 be and are hereby dismissed.
2. The plaintiffs shall pay the first, second, third and seventh defendants' costs on the attorney and client scale.

Mugiya & Muvhami Law Chambers, legal practitioners for the plaintiffs
Danziger & Partners, legal practitioners for the 1st, 2nd and 3rd defendants
Dube Manikai & Hwacha, legal practitioners for the 7th defendant