

REMNANT CHRISTIAN CHURCH  
versus  
T.M.S. HOLDINGS (PVT) LTD  
and  
THE SHERIFF OF HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
MWEYERA J  
HARARE, 8 February 2018 & 6 June 2018

**Opposed Matter**

*W Mandinde*, for the applicant  
*B Ndlovu*, for the 1<sup>st</sup> respondent

MWAYERA J: The applicant lodged an application for rescission of judgment granted by this court on 16 September 2015 under HC 7752/15. The application is being made in terms of Order 49 r 449 (1) a of the High Court Rules 1971. The applicant's contention being that the default judgment was erroneously sought and or erroneously granted in the absence of a party affected thereby and in the alternative sought the default judgment to be set aside on the basis that the judgment was granted as a result of fraudulent misrepresentation.

The order sought to be rescinded is an eviction order which occasioned eviction of Elevate Academy PBC, Innocent Sibanda and all those claiming occupation through them. The order also included payment of utility bills and holding over damages. The default order was occasioned by failure to enter appearance to defend by the respondent as represented by Innocent Sibanda the Pastor as well as education and youth director of Remnant Christian Church. The summons and declaration thereto were served on Esline Sibanda the wife of the second respondent Innocent Sibanda. As clearly observed from pleadings in HC 9916/15 the applicant lodged an application

for rescission of judgment in terms of order 9 r 63. The matter involves the same parties and is based on the same cause of action and the relief sought is the same as what is sought in the present proceedings.

I am alive the fact that it is discretionary for the court to uphold or dismiss a defence of *lis alibi pendens*.

The circumstances of the case came into scrutiny when it comes to the exercise of the discretion. In this case the application for rescission of default judgment in HC 9916/15 on grounds that the Return of Service is not original from the Sheriff's office is the same relief sought under the umbrella that the return of service which occasioned default judgment is fake. In the circumstances of this case the duplicity of proceedings by the same parties on the same cause of action for the same relief hinges more on abuse of court process. It would not be proper to allow duplication of proceedings in the circumstances of this case. In this case the defence of *lis alibi pendens* has been properly raised. However in the exercise of my discretion I decided to deal with these proceedings. It was submitted by counsel for respondent that he has lodged an application for dismissal for want of prosecution of the application in HC 9916/15. I will leave it to the other court to dispose of that matter and will deal with this application on the merits.

My position is fortified by the fact that it is apparent the requirements for rescission of judgment under order 9 r 63 are cumbersome to meet for the applicant. The default judgment was granted in 2015. It appears the applicant mounted the present application to circumvent the time period hurdle under r 63.

In this case the appellant is seeking rescission under r 449. The application for rescission under r 449 has three requirements namely;

1. That the judgment was erroneously sought
2. That the judgment was erroneously issued.
3. That the judgment was granted in the absence of any party affected by it.

The purpose of r 449 has clearly been spelt out in several cases by this court. In the case of *Tiriboyi v Jani and Another* 2004 (1) ZLR 470 the court made the following pronouncement on the import of r 449:

“The purpose of r 449 is to enable the court to revisit its orders and judgments, to correct set aside its orders and judgments given in error in situations were to allow such to stand on the excuse that

the court is *functus officio* would cause injustice and would 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 another way. The rule goes beyond the ambit of mere formal, technical and clerical errors and may include the substance of the order or judgment.”

In the present case, the judgment was not erroneously sought neither was it erroneously issued. The applicants were properly served with summons and they did not enter an appearance to defend. A default judgment was properly and competently issued. The applicant has not met the requirements of rescission as envisaged in r 449.

Further, the applicant appears bent on flouting the law. As clearly from pleadings, Elevate Academy of Remnant Christian Church as represented by Innocent Sibanda is not registered in terms of the Education Act [*Chapter 25:05*]. That further compounds the applicant’s problems as strictly applying the dirt hands principle the applicant has no right of audience. Hiding behind a finger in the clear circumstances of the main body, the church, operating the unregistered school does not change the complexion of the matter. See *Econet Wireless (Pvt) Ltd v The Minister of Public Service Labour & Social Welfare and Others* SC 31/2016. The relief sought is rendered incompetent. I chose not to strike the matter off the roll on the preliminary points so as to deal with the matter to finality. This, I believe is in the interest of justice as the applicant appears bent on abusing court process.

In any event the relief sought is incompetent as it has been overtaken by events since the applicants were evicted three years back. The respondent as the legal owner of property in issue cannot be forced to accommodate the applicant based on a cancelled contract.

The court should not stand to make contracts for the parties and it should not issue an order that is *brutum fulmen*. See the case of *Conjwayo and Ors v M nangagwa* 1992 (2) ZLR 171. In this case the issue is, in light of the non-payment of rentals would an order in the main matter be in favour of the applicant. The answer is in the negative and to that end therefore the application for rescission of judgment which was properly issued ought to fail.

Having stated that the applicant appears bent on abusing court process by duplication of process by the same parties on the same cause of action and seeking the same nature of relief, the court ought to express its displeasure, of abuse of court process by giving an order of costs on a higher scale.

Accordingly, it is ordered that:

1. The application be and is hereby dismissed.
2. The applicant shall bear the costs on a legal practitioner client scale.

*Chikwari & Company*, applicant's legal practitioners  
*Messrs Both Ndlovu Attorneys*, 1<sup>st</sup> respondent's legal practitioners