ALSHAMS GLOBAL BVI LIMITED
versus
EQUITY PROPERTIES PRIVATE LIMITED
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 5 November 2018 & 21 November 2018

Opposed Application

Advocate Ochieng, for the applicant
Advocate T T G Musarurwa, for the respondent
No appearance for the 2nd respondent

MUZENDA J**:** This is an application for rescission of a default judgment in terms of r 449 (1) (a) of the High Court Rules, 1971 made by the applicant seeking the following relief:

> "IT IS HEREBY ORDERED THAT:
> 1. The order granted by this Court, on the 6th of June 2018 in case No. HC 2463/18 be and is hereby rescinded as it was granted in error.
> 2. The costs of this application shall be borne by the first respondent and its legal practitioners, Mr T Uchena of Mambosasa legal practitioners, jointly and severally, the one paying the other one to be absolved, on the legal practitioner client scale"

The facts underlying this action are that on 24 July 2017 under case no. HC 3254/17 Honourable CHIGUMBA J granted first respondent an order in part to the following effect.

> "1……
> 2……..
> 3. The applicant is granted leave to serve the summons and declaration in respect of the claim for vindication of its property and attendant delictual damages against the respondent, together with a copy of this order, upon the respondent's legal practitioners, Messrs Dube, Manikai and Hwacha at 6th Floor, Goldbridge, Eastgate, Harare"

On the 16th of March 2018, the first respondent filed an application for vindication against the current applicant and second respondent. Applicant served the process on the 16th of March on Dube Manikai and Hwacha in compliance with CHIGUMBA J and according to the applicant after Dube Manikai and Hwacha received the application they forwarded it to Danziger and Partners the 19th of March 2018. The applicant's legal practitioners Danziger and Partners filed

applicant's opposing papers on the 4th of April 2018 and served them on first respondent on the 6th of April 2018. On 16 May 2018 first respondent applied for default judgment against the applicant and served on the applicant's legal practitioners. On the 21st of May 2018 applicant's lawyers noted that the matter had been set for hearing on unopposed roll on the 23rd of May 2018. The applicant's lawyers wrote a letter to this court's registrar protesting that the application should not be slotted on the unopposed roll. On the 23rd of May 2018 the matter was removed from the roll by consent. On the 6th of June 2018 first respondent re-enrolled the application. The applicant became aware of the set down date and attended the hearing. Advocate *O O Takaindisa* instructed by applicant's legal practitioners attended the hearings. The parties appeared before MUNANGATI-MANONGWA J who briefly stood down the matter allowing the parties to engage and when the application was heard she ruled that the applicant's papers were not properly before her and granted default judgment in favour of the first respondent. The 6th of June 2018 judgment is the one which applicant seeks to be rescinded.

The applicant's grounds for the application are that the 6th of June 2018 judgment was granted in error and had the judge been informed that the applicant had filed opposing papers, she could not have granted the default judgment. It also contends that to the full knowledge of the first respondent, the applicant's known legal practitioners were Messrs Danziger and Partners and not Dube Manikai and Hwacha. The first respondent should not have served the application on Dube Manikai and Hwacha, so the service was improper they submitted. The service of the application effected on the 19th of March 2018 on Danziger and Partners was done by the first respondent after they had noted that error. They go on further contending that they timeously filed their papers. The applicant avers that although it is a peregrinus on whom court process could only be served in terms of an order of court, what, the first respondent served on Dube Manikai and Hwacha was not a summons but an application and hence that application served on Dube Manikai and Hwacha did not have the sanction of a court order and was to it null and void. It goes on to attack Mr T Uchena who applied for default judgment and alleges fraud and dishonesty on his part. The basis to that allegation is that he did not inform the court that the applicant had filed its opposing papers on time and that non-disclosure amounted to fraud. The first respondent's lawyers had a duty to include the applicant's opposing papers when they bound and paginated the record which was

subsequently placed before the court. As a result applicant prays for the rescission and that the first respondent and its attorney at law pay costs on a higher scale.

The first respondent in its opposing papers has a different interpretation of CHIGUMBA J's order as well as the effect of the opposing papers filed by the applicant on the 4th of April 2018. In the first place the first respondent contends that the address of service stipulated by CHIGUMBA J provided unequivocally for the address of service for any application or action or summons embarked upon by the first respondent relating to vindication of its property and or action for damages. Hence they aver that they properly served the application on Dube Manikai and Hwacha on the 16th of March 2018. To the first respondent the applicant filed its papers belatedly. They ought to have filed them by the 3rd of April 2018. As a result the first respondent had been automatically barred. For it to be heard by the court it ought to have negotiated for upliftment or properly apply for such and up to this date the first respondent is still barred. That is why the matter was slotted on unopposed roll. The application by the applicant is misplaced and the grounds used by the applicant for this court to invoke r 449 (1) (a) had not been laid, first respondent submitted. The applicant was heard by the court and the court ruled against the applicant and granted the default judgment. As such respondent prayed that the application be dismissed with costs on a higher scale.

DIES INDUCIAE

The first respondent applied for default judgment under HC 2463/18 on the parameters that the *dies induciae* had lapsed on the 4th of April 2018. In its computation it calculated the dates from 16 March 2018. During the hearing of the application Mr TTG *Musarurwa* had difficulties in computing the *dies induciae* and later on agreed with the court that if the applicants were served on the 19th of March 2018 then the last day for it to file its opposing papers was the very date of 4th April 2018. This concession is reasonable in the circumstances. Messrs Dube Manikai and Hwacha after realising that they had acknowledged receipt of the application immediately cancelled their stamp and the first respondent admits that. What is in dispute is what happened after they (Dube Manikai and Hwacha) disowned the receipt of the application. The applicant says that first respondent was informed and the latter re-served the application properly on Danziger and Partners. The first respondent on the other hand contends that Dube Manikai and Hwacha delivered the application to Danziger and Partners. As to who took the application to the applicants

is to me irrelevant, the uncontested fact is that at the time the first respondent served the applicant with the papers/the application, Dube Manikai and Hwacha were not representing the applicant, so the date of service of the application on the applicant was the 19th March 2018. Hence the *dies induciae* was as admitted by both parties the, 4th of April 2018. The applicant filed its opposing papers within the prerequisite ten (10) days and the opposing papers were thus properly filed and the applicant ought to have been heard.

WHETHER RULE 63 OR 449 (1) (a) IS APPLICABLE

The first respondent in its papers contended that the applicant ought to have proceeded in this matter by using r 63 of the High Court Rules. The applicants were heard in court before MAUNANGATA-MANONGWA J and were barred because of late filing of the opposing papers. Hence they were to file for rescission of judgment or if they were not happy with the outcome of the order they were free to appeal. According to the first respondent r 449 (1) (a) only applies where a party was not present on the day the default judgment was granted. The applicant on the other had submitted that once this court accepts that the first respondent deliberately omitted to attach the opposing papers as part of the application for default judgment and also failed to appraise the Judge, then that constituted a fundamental error which forms the bedrock for the application of r 449 (1) (a). Had the Judge been informed of the presence of the opposing papers she should have proceeded to grant default judgment, the applicant added. The question for decision is whether r 449 (1) (a) applies and whether the default judgment should rescinded?

I have already concluded that the *dies induciae* was the 4th of April 2018. On the 6th of June 2018 when the default judgment was granted applicant's opposing papers were properly before the court. It is my considered view that Honourable MUNANGATI-MANONGWA granted a default judgment against the applicant erroneously due to the submissions made by the first respondent's legal practitioners to her (See *Banda* v *Pitluk* 1993 (2) ZLR 60). As clearly spelt out by ROBISON J at p 63 dealing with r 449 (i) (a).

> "In my view when considering the question of rescission of a default judgment under r 449 (1) (a) on the ground that it was erroneously granted in the absence of any party affected thereby once the court finds, as it had found in this case, that the judgment was erroneously granted against the defendant….then that is an end to the matter and the court should rescind the judgment"

As outlined in the matter of *Catherine Muvungani* v *Newham Financial Service (Pvt) Ltd & Ors* HH 57/17 it was held that "under r 449 once the court is satisfied that an order was erroneously granted in the absence of any party affected thereby then that is the end to the matter. The court should rescind the matter. The court went on to outline the requirements as follows:- the applicant must satisfy:

(1) That the default judgment must have been erroneously sought or erroneously granted;

(2) Such judgment must have been granted with absence of the applicant and

(3) Applicant must be affected by the judgment

(See also *Mutetwa* v *Mutetwa & Anor* 2001 (2) SA 193, *Munyumi* v *Tauro* 2013 (2) ZLR 291 (5), *Moonlight Provident (Pvt) Ltd* v *Nobert Sebastian & Ors* HB 254/16).

In *Munyumi* v *Tauro* (*supra*) the Supreme Court defined an "error" to be a case in which a judge was unaware of facts which he had been made aware of, he would not have made the judgment he made.

As already spelt out in the foregoing the judge in this matter was that privy to the fact that the applicants opposing papers were within time and were properly before the court. I am satisfied that the applicant has met the requisite grounds for this court to invoke r 449 (1) (a) and the application succeeds and it is ordered as follows:

1. The order granted by this court on the 6th June 2018 in case No. HC 2463/18 be and is hereby rescinded as it was granted in error.
2. 1st respondent to pay the costs.

Danziger & partners, legal practitioners for the applicant
Mambosasa legal practitioners, 1st respondent's legal practitioners