ELEVATE ACADEMY PBC
and
INNOCENT SIBANDA
versus
TMS HOLDINGS PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 30 May, 2019, 10 & 11 July 2019

Opposed Matter

R Chikwari, for the Applicants
O D Mawadze, for respondent

MUNANGATI-MANONGWA J: The applicants herein seek rescission of a default judgment which was granted by MUSAKWA J on the 16th September 2015 in favour of respondent. The application is opposed by the respondent. I set the matter down for the 30th May 2015. At the hearing the respondent raised a point in *limine* that the judgment that the applicants seek to rescind has already been set aside by the Supreme Court in a judgment under SC 473/18 involving an entity called Remnant Christian Church.

The brief background of this matter is that the respondent bought a property in Borrowdale and sought eviction of the applicants and all those claiming through the applicants together with ancillary relief. Upon attainment of a default judgment in HC7752/15 (for which rescission is sought) the applicants were evicted together with Remnant Christian Church, pastors and members thereof. The applicants then filed this application. Apparently at about the same time that the applicants applied for rescission, Remnant Christian Church also sought the rescission of the very judgment of MUSAKWA J. That application was dismissed by MWAYERA J, leading to an appeal in the Supreme Court by Remnant Christian Church. The appeal succeeded and the Supreme Court issued the following order:

1. The appeal be and is hereby allowed with no order as to costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

"The default judgment granted by the court in HC 7752/15 be and is hereby set aside with costs."

Given the aforegoing development, respondent thus maintained that the judgment which the applicant seeks to rescind has already been set aside by the Supreme Court. The respondent can not itself execute it as there is nothing to execute upon. The applicants believed otherwise.

I gave a directive to parties to file heads of argument on the issue:

"What is the effect of the Supreme Court order in the matter of Remnant Christian Church v TMS Holdings and another SC 473/18 to the present matter?"

The applicant in such heads of argument and in oral submissions insisted that the Supreme Court order was granted in favour of a completely different party being Remnant Christian Church whilst the present proceedings have been instituted by Elevate Academy PBC. The applicants mantained that TMS Holdings (Pvt) Ltd can still execute upon the order. Mr *Chikwari* for the applicant submitted that the default judgment ordered the applicants to pay substantial amounts of money and property was attached and sold in execution. The application had to be heard as this would give applicants an opportunity to file their plea. He further submitted that the Supreme Court Order gave no room for applicants to defend the action as it only covered Remnant Christian Church. In that regard the application being brought under Rule 63 of the High Court Rules was different from that brought by Remnant Christian Church under Rule 449. Applicants thus sought to distinguish rescission of default judgment as per the rule relied on.

The Black's Dictionary of Law 8th Edition describes the word "set aside" to mean:
"*cancelling, annulling, revoking, putting aside, disapproving rendering null and void"* whilst the Oxford Dictionary of Law 5th Edition defines the word as follows
"*An order of a court cancelling or to render or make void some other order or judgment or some step taken by a party in the action"*

Given the above meanings, the stance by the respondent that there is no default judgment in existence is correct. Same was set aside by the Supreme Court. It need be noted that the appellant was not party to the proceedings in HC 7752/15 and the order did not refer to HC 7752/15 as relating to appellant. A blanket order to the effect that the default judgment in HC 7752/15 was set aside was given. In essence there is no judgment in existence or in operation in HC 7752/15. If that is the case what is the court being called upon to decide on? There is nothing to rescind. There is no order in existence as same was revoked, cancelled or set aside and hence there is nothing

impacting upon the rights of the parties as nothing flows from that cancelled judgment. It matters not how the rescission came about the result is the same, reversal of the default judgment. This the respondent has always been saying to the applicant. Mr *Mawadze* for the respondent even indicated in court that the respondents cannot execute on the default judgment as it is not there. The applicants cannot seek to pursue something which is not there.

Suffice that Mr *Mawadze* had prior to set down written to the applicant's counsel advising that pursuing the application is unnecessary and that the applicants should withdraw. This advice fell on deaf ears, if anything Mr *Chikwari* insisted that the matter should be heard. This is one case the court fell short of asking that Mr *Chikwari* pays cost *de boniis proprii.* Where a colleague has advised on a point of law, it is important to carefully consider the point and not adamantly maintain an untenable position.

The judgment in HC 7752/15 is no more it having been revoked or set aside by the Supreme Court hence there is nothing for the court to set aside. The application having been overtaken by events it was prudent for the applicants to withdraw the application to save costs and the court's time.

Accordingly the point *in limine* has merit and is upheld. The application is dismissed with costs on a legal practitioner client scale.

Chikwari & Company, Applicants' legal practitioners
Mawadze and Mujaya, respondent's legal practitioners