PATRICK MAPHOSA
and
ISAAC MAPHOSA
versus
CHAMPION INSURANCE COMPANY (PVT) LTD
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 30 January 2019 & 6 February 2019

**Opposed Application**

*A Masango*, for the applicant
*K Tsaira*, for the 1st respondent

MATHONSI J: The two applicants have brought an application for rescission of an order of this court issued in default against both of them on 25 July 2018 in HC 324/18 in terms of which they were jointly and severally ordered to pay the applicant the sum of US$15 768.70 together with interest from the date of issue of the summons and costs of suit on a legal practitioner and client scale.

The application is made in terms of r 449 of this court's rules on the ground that the order was granted in error in their absence and as such this court should correct its error by setting aside the order to enable the 2 applicants to pursue their defence to the first respondent's action against them. It is an application which requires a determination of essentially two issues namely what constitutes a plea to a claim in terms of the rules of Civil Practice and Procedure and whether there is an automatic bar imposed on a defendant to an action from filing an exception to the summons outside the period prescribed by r 119 of the High Court of Zimbabwe Rules, 1971. In discussing

those issues one also has to deal with the question whether a defendant is at liberty to file a plea in abatement in response to a notice of intention to bar.

In HC 324/18 the first respondent, as the plaintiff therein, sued the first and second applicants along with one Shadreck Nhiwatiwa for payment of the sum of US$15 768.70 and ancillary relief alleging that the first and second applicants, cited as first and second defendants respectively, had sold to him a Toyota Fortuner motor vehicle belonging to Nhiwatiwa. The first respondent alleged that the 3 defendants in that action had misrepresented the true nature of the motor vehicle as a result of which he had suffered financial loss in the sum of US$15 768.70 paid to ZIMRA after the true value of the vehicle was uncovered. The summons was served together with the declaration upon the first and second applicants on 19 January 2018 and they timeously entered appearance to defend through their legal practitioners on 30 January 2018. It is what then transpired thereafter which has led to this application.

By letter dated 7 February 2018 the applicants registered a complaint to the first respondent's legal practitioners that the summons was defective in that it did not comply with r 11 (c) requiring a summons to contain a true and concise statement of the nature, extent and grounds of the cause of action and of the relief sought. The first respondent was invited to rectify the defect within 7 days or face an exception to the summons. The first respondent was unmoved. Instead, by letter of 12 March 2018, Mundia & Mudhara, the first respondent's legal practitioners, advised the applicants that the time within which they were allowed to file an exception had lapsed. They were required to plead to the summons.

On 20 March 2018 the applicants filed a document with the title: "Defendants' Exception and Application to Strike Out." In essence they excepted to the summons on the basis it did not contain a concise statement of the nature, extent and grounds of the cause of action. In an effort to prosecute that exception the applicants later filed heads of argument and requested a set down. The first respondent ignored all that and pursued another agenda. A day after the exception was filed, that is on 21 March 2018, the first respondent filed a notice of intention to bar demanding that the applicants should file and deliver their plea within 5 days. Mr *Tsvaira* for the first respondent submitted that the first respondent was entitled to ignore the exception because it had been filed out of time and that the only option available to the applicants then was to file nothing else but a plea.

Sensing danger, the applicants reacted to the notice of intention to bar by filing a plea in abatement on 23 March 2018 within the period of the notice given by the first respondent. The plea in abatement is itself a curious one because the applicants made the averments that they were being asked to file a plea which they had already filed one, that they filed a plea in the form of an exception on 20 March 2018 only to be served with a notice to plead the following day and therefore that the notice was improper and should be withdrawn.

The first respondent would not relent. Proceeding as if nothing had happened it filed an application for default judgment on 5 July 2018 stating that the applicants' exception was filed out of time. The critical part of the application for default judgment is para 6 and 7 which state:

> "6. First and second respondents (the present applicants) having been served with the applicant's notice to plead and intention to bar on 21 March 2018;
>
> 7. First and second respondents having been barred on 29 March 2018;
> Judgment in default may be granted in favour of the applicant."

The first respondent did not disclose the existence of the plea in abatement in its application for default judgment and did not attach it to the application. In fact it continued with its trajectory that the applicants were barred in para 19 to 23 of the affidavit of Tambudzai Madzivire, its managing director, which was filed in support of the default judgment application, to wit:

> "19. The first and second respondents then subsequently filed their exception out of time. I attach hereto a copy of the exception as Annexure O.
>
> 20. On 21 March 2018 the first and second respondents were served with the applicant's notice to plead and intention to bar. I attach hereto the notice to plead as Annexure P.
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> 21. I am duly advised, which advice I accept, that in terms of the rules of this honourable court and exception that it filed out of time is a nullity and is not recognised by the court. First and second respondents' exception as filed is a legal nullity and they are duly barred in terms of the rules of this honourable court.
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> 22. They were duly advised to plead on the merits since the time to file their exception had lapsed but they chose to ignore the voice of reason. As we speak there is no plea that the respondents filed and they were duly barred. I attach hereto a copy of the bar as Annexure Q.
>
> 23. In the circumstances applicant applies for judgment in terms of the draft order attached hereto."

I am not sure which rules providing for an automatic bar for failure to file an exception timeously the first respondent was referring to. Mr *Tsvaira* was unable to direct me to any such rules. What is more important though is that when it sought default judgment the first respondent did so on the premise that no response was made to the notice to plead and that no plea had been filed following service of that notice. That is false because the applicants had filed what they called a plea in abatement. When considering the application the court was not made aware that a plea in abatement had been filed within the *dies inducae* prescribed by the notice. Allied to that is the question whether the bar effected by the first respondent on 5 April 2018 was valid in light of the plea in abatement even were one to leave aside the issue of the exception lodged before the notice to plead was filed. I think not.

It is against that background that the applicants have made this application for rescission of judgment in terms of r 449. That rule provides:

> "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) ---
>  (c) That was granted as a result of a mistake common to the parties.
> (2) The court or judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed."

It is apparent from the provisions of this rule that a party relying upon it to seek a rescission of a judgment or order must establish that it was erroneously granted in its absence. The error may have arisen in seeking the judgment or order by the party in whose favour it is granted or in granting the order on the part of the court or judge granting it. In my view where a litigant places before the court or judge all the facts forming the cause of action and then asks the court or judge to grant relief on all those facts, the court or a judge granting that relief does not commit an error within the provisions of r 449 if it or he or she grants a wrong judgment or order. What that means is that the court or judge would have been privy to all the facts and arrived at a wrong decision. In that event, the aggrieved party's remedy is to take the judgment or order on appeal to a higher tribunal.

Rule 449 envisages an error. In a case such as the present where the order sought to be impugned was granted by another judge enjoying the same level of jurisdiction as myself, it would be incompetent in the extreme for me to interfere with the decision of another judge armed with all the facts and then exercising his or her discretion to grant the order. I can only rescind such an order when it is apparent that in granting it, certain facts relevant to the determination of the matter, were withhold from the court. In my view, there can be no doubt that an error exists where a judgment or order has been granted when a judge who granted it was unaware of all the relevant facts. See *Dhlamini & Ors* v *Ncube & Ors* HB 11-18.

Related to that is the fact that it is settled in our jurisdiction that when deciding an application in terms of r 449 the court is not confined to the record of proceedings. The rule allows the applicant to place before the court all facts which were not before the court which granted the default judgment. In the words of GUBBAY CJ in *Grantully (Pvt) Ltd* & *Anor* v *Udc Ltd* 2000 (1) ZLR 361 (S) at 364G – 365A – B:

> "A court is not therefore, so it seems to me, confined to the record of the proceedings in deciding whether a judgment was erroneously granted, as held by ERASMUS J in *Bakoven Ltd* v *G.J Howes (Pty) Ltd supra* at 471E (1992 (2) SA 466 (E)) and as suggested by the learned judge in this matter. See *Stander & Anor* v *ABSA Bank* 1997 (4) SA 873 E at 882C – G. Moreover, the specific reference in rule 449 (1) (a) to a judgment or order granted in the absence of any party affected thereby envisages such a party being able to place facts before the correcting, rescinding or varying court, which had not been before the court granting the judgment or order. I think the rule goes beyond the ambit of mere formal or technical defects in the judgment or order."

The view that I take is that the rescinding court is only entitled to do so where new facts are placed before it which were not before the court or judge granting the judgment or order. The question which then arises in this matter is what facts have been placed before me by the applicants seeking the rescission of the order made on 25 July 2018 which were not placed before the court then as to entitle me to interfere with that order? The applicants have raised 2 factors in that regard namely, that they indeed filed an exception as an answer to the first respondent's claim even before the notice to plead was issued and secondly that on being served with that notice they filed a plea in abatement both of which were disregarded when the first respondent moved for default judgment.

I have already said that when seeking default judgment the first respondent submitted to the court that the exception filed by the applicants had been filed out of time and of no force or

effect. Those are the facts placed before TAGU J before he granted the default judgment. The learned judge, therefore considered that fact and exercised his discretion to grant judgment having the benefit of those facts. It is improper to then suggest an error on the part of the court because in that respect, no error exists. If the applicants were aggrieved with that turn of events their recourse was to appeal the decision and not to bring an application in terms of r 449 which has no application.

Mr *Tsvaira* for the respondent relied on the authority of *Sammys Group (Pvt) Ltd* v *Meyburgh N.O and Others* S 45-15 (unreported) in defending the decision to apply for default judgment on the face of an exception which had already been filed and indeed the earlier decision to issue a notice to plead and intention to bar. I agree that the judgment in question settles that issue totally and as this court is bound by the decisions of the Supreme Court, it has its hands completely tied in that regard.

What was before the court in that case included the meaning of r 119 of this court's rules and how it affects the filing of a plea, exception or special plea. It provides;

> "The defendant shall file his plea, exception or special plea within ten days of the service of the plaintiff's declaration:
> Provided that where the plaintiff has served his declaration with the summons as provided for in rule 113 there shall be added to the period of ten days above referred to the time allowed a defendant to enter appearance as calculated in terms of rule 17."

The rule clearly does not impose an automatic bar upon a failure to file a plea, exception or special plea within the period of 20 days. It is perhaps for that reason that the framers of the rules included r 80 which sets out the procedure for barring commencing with the filing of a notice in Form 9 calling upon the defendant to file a plea or request for further particulars within 5 days. Considering that a plea is any answer to the plaintiff's claim one would want to believe that an exception or special plea can competently be filed in response to a notice of intention to bar.

In interpreting r 119 ZIYAMBI JA, who wrote the unanimous judgment in *Sammys Group (Pvt) Ltd, supra,* stated at para 22:

> "It is true, as the learned judge remarked, that there is no sanction for the late filing of an exception or special plea. However, the provision in the Rules is mandatory and the documents filed in contravention thereof cannot, in the absence of condonation of the non-compliance with the Rules, have any legal validity. The sanction must, in my view be, that the pleading is invalid by virtue of its non-compliance with the Rules. First respondent's exception was filed 15 days out of time. Second respondent's special plea and exception were filed 6 and a half months out of

> time. Both applications were in violation of the Rules without explanation, without condonation, sought or granted. There was, therefore, no legal basis on which they were entertained by the court *a quo*."

The Supreme Court has therefore interpreted r 119 to mean that where a plea, exception or special plea are not filed within 20 days of service of a summons together with a declaration there is need for condonation to be sought by a defendant before the pleading is filed even though r 80 provides for barring such a defendant. I am sure that is the decision which swayed the court to grant default judgment in favour of the first respondent on 25 July 2018. To that extent the judgment cannot be rescinded on that basis in terms of r 449 there being no error as I have said.

It is however in respect of the failure to advise the court that upon the filing and service of the notice to plead and intention to bar the applicants had responded by filing a plea in abatement which I have said was curious indeed that a cause for rescission occured. That plea was filed timeously and the court's attention should have been drawn to it. That was not done. Mr *Tsvaira* for the first respondent submitted that they did not have to do so because the plea in abatement was irregular by reason that it referred to an exception which had been filed out of time. I do not agree. The plea in abatement was an answer to the first respondent's claim and could not possibly be wished away as an inconvenient and insignificant document standing in the way of a quick judgment. In my view that omission provides the court with a foothold with which to interfere with the order in terms of r 449 as it constitutes an error.

In my view it was not open to the first respondent to proceed to judgment as if no response had been filed. The rules of court provide in r 116 that a defendant's answer to the plaintiff's declaration shall be called a plea and shall set out concisely the nature of his defence. Rule 137 (1) allows a party to take a plea in bar or abatement where the matter is one of substance which does not involve going into the merits of the case. It also entitles a party to apply to strike out any offending pleading or part of a pleading "which should properly struck out." Clearly it is not for a party to an action to decide on its own to ignore a pleading. If indeed the first respondent was unhappy with the plea in abatement it should have made an application that it be struck out before seeking default judgment.

I am satisfied therefore that failure to disclose the plea in abatement resulted in an order being granted in error. I have no doubt that had the court been made aware of that plea it would

not have granted default judgment. The applicants have made a case for the relief of rescission of judgment in terms of r 449 (1).

Accordingly it is ordered that:

1. The default judgment granted against the 1st and 2nd applicants by this court on 25 July 2018 in case number HC 324/18 be and is hereby set aside.
2. The 1st respondent shall bear the costs of this application.

*Muronda Malinga Legal Practice,* applicants' legal practitioners
*Mundia & Mudhara,* 1st respondent's legal practitioners