WAKIE YULE
versus
CLOUDIO JUME
and
REGISTRAR OF DEEDS N.O
and
THE SHERIFF OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 13 July 2020 & 8 December 2021

Application for rescission of judgment Order 9 Rule 63

N Tonhodzayi, for the applicants
Z T Zvobgo, for the 1st respondent
No appearance for the 2nd and 3rd respondents

CHINAMORA J:

Introduction

On 3 June 2019 under Case No. HC 3872/19, a default judgment was entered against the applicant in favour of the respondent. This is a court application for rescission of that judgment filed in terms of Rule 63 of the High Court Rules, 1971.

Background

The applicant avers that on 13 February 2010 he entered into a written agreement of with the 1st respondent in respect of Stand 9462 Budiriro Township of Stand 11265 Budiriro held under Deed of Transfer No. 4508/09 ("the property"). He further avers that he fully paid the purchase price of US$30.000-00 in 2010. In addition, he said that the 1st respondent could not be located after receiving the purchase price. The applicant stated that his lawyers advised him to apply for an order to compel transfer of the property, but it was only six years later that they called him to sign the founding affidavit. Sometime in April 2017, the applicant filed an application under HC

3647/17 for an order to compel the 1st respondent to sign the documents necessary to effect transfer of title, rights and interests in the property to the applicant. A default judgment was granted.

The 1st respondent applied for rescission of judgment under HC 3872/19 and the application was granted in default of appearance, as aforesaid. It is this order that the applicant seeks to have rescinded. In *casu*, the applicant explained that, on 9 May 2019, when he was served with the application under HC 3872/19, he was advised by the 1st respondent not to oppose the application since he intended to set aside the default order obtained by the applicant. He added that the 1st responded said opposition was not necessary because he (the 1st respondent) wanted to enable proper transfer to be made to the applicant as his (applicant's) previous lawyers had fraudulently obtained the order under HC 3647/17. Further, the applicant averred that the 1st respondent written a letter to him dated 29 April 2019, saying that his (the applicant's) legal practitioners had committed a serious offence that would implicate the applicant. He stated that he did not seek legal advice since *"I was in the midst of confusion as to the right step to take next as I was in a predicament because of my ex-legal practitioner's mistake".* [See paragraph 3.4 of founding affidavit, at page 7 of the record]. The applicant also stated that the 1st respondent had threatened to report him to the police, hence he did not oppose the application filed under HC 3872/19. In conclusion, the applicant asserted that he was not in willful default as he had made the decision not to oppose under threat, confusion and the hope of getting his property back. For completeness of the record, let me refer to the letter of 29 April 2019, which said:

> "Dear Sir,
>
> **Re: Cancellation of Agreement of Sale in respect of property known as Stand No. 9462 Budiriro Township, Harare**
>
> I hereby notify you that I have, with immediate effect, cancelled the agreement of sale entered with you on 12/02/2010.
>
> This has been actuated by the fact that you used fraudulent documents in order to effect transfers over my property described above. Your malicious documents resulted in the High Court of Zimbabwe granting the order against me with the help of your legal practitioner by the name Obedience Machuvaire, who has since been deregistered by the Law Society of Zimbabwe. I attach hereto my complaint against your legal practitioner dated 17/10/2018 to the Law Society of Zimbabwe, and his subsequent letter of deregistration labelled as annexures A and B, respectively.
>
> Kindly make urgent arrangements with me over how you can obtain the purchase price and sign this letter acknowledging cancellation of the said agreement of sale. By coyp of this letter I advise you that I reserve my rights to report you to the Zimbabwe Republic Police as I verily believe you displayed an active role in the fraudulent activity.

Please be guided accordingly and kindly treat this matter with the urgency it deserves".

I will return to this letter later on in this judgment when I deal with the merits of the case.

In respect of the merits, the applicant submitted that he fully paid the purchase price in terms of the agreement of sale he had signed with the 1st respondent. Additionally, he averred that he had met his obligations per the agreement and was entitled to transfer, and that it was not true for the 1st respondent to allege that he had not paid the full purchase price. To bolster his version, the applicant contended that the 1st respondent had not said how much he was paid and what remained outstanding and, in fact, had not made a demand for it. Further to this, the applicant averred that he took occupation on payment of the full purchase price as stipulated in the agreement of sale. He asserted that he has been in occupation since 2010. [See paragraph 2.3 of founding affidavit, at page 4 of the record]. The applicant also argued that the respondent only sought to cancel the agreement of sale once he had obtained a rescission of the default judgment the applicant had obtained against him. He further submitted that he was served with the order in HC 3872/19 on 16 June 2020 and had filed his application for rescission of judgment on 1 June 2020. Finally, the applicant submitted that his application ought to succeed as he had shown that he was not in willful default and had shown good cause for the relief sought.

The 1st respondent opposed the application. He raised three points in *limine*, namely, that the application was filed out of time without condonation having been granted; that the applicant ought to have cited Mr Obedience Machuvaire; and that two matters (the matter in casu and HC 1495/13) dealing with the same issue cannot run concurrently. I will deal with these preliminary points before moving on to the merits.

Points in *limine*

<u>The application was filed out of time</u>

The 1st respondent argues that the application for rescission of judgment was filed outside the time stipulated in the High Court Rules 1971, and the applicant should have first sought condonation before filing the present application. He was vehement that the applicant received the order in HC 3872/19 earlier than 16 June 2020, because court records show that on 10 June 2019, he filed an application for rescission of judgment of the same order under HC 4844/19. The 1st

respondent urged the court to find that the applicant had lied under oath in order to bring his application within the 30 day period of knowledge of judgment required by Rule 63 of the High Court Rules 1971. The court application filed by the applicant under HC 4844/19 has been attached to the application before me, and appears on pages 9-14 of the record. In his answering affidavit, the 1st respondent has not denied that such an application was made seeking to set aside the default judgment granted under HC 3872/19. It is important to note the contents of paragraphs 4 and 5 of the 1st respondent's founding affidavit in HC 4844/19, which read:

> "4. The application is for rescission of default judgment granted by this honourable court in Case No.3872/19 on the 29th May 2019.
>
> 5. The applicant avers that he was not in willful default and he was duped by the 1st respondent in that he will face criminal charges if he will not have the house transferred into his wife's favour".

It is evident from the said founding affidavit that it was signed by the applicant on 6 June 2019, meaning that, by that date he was aware of the order granted in HC 3872/19. Certainly, that is the date from which the one month period stated in Rule 63 must be calculated. The said Rule provides that a court may set aside judgment given in default in the following terms:

> 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, he court may set aside the judgment 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."

What can be unpacked from Rule 63 are two critical things. Firstly, a party against whom a default judgment has been given can apply to this court for its rescission, not later than one month after he has had knowledge of the judgment. Secondly, this court can set aside any judgment entered in default if satisfied that there is good and sufficient cause. However, the second consideration only arises if the application has been filed within the time prescribed by Rule 63 (1). Of note in the context of this case is that, the Rule only requires the affected party to know of the judgment and then file his application within one month of such knowledge. No other interpretation can be given to this Rule as it creates no ambivalence. I therefore, do not agree with the 1st respondent when he

argues in his answering affidavit that he filed the application in *casu* after he had been served with the order in HC 3872/19. Consequently, I uphold the 1st respondent's point in *limine.*

Conclusion

In view of the conclusion I have reached on the issue of the non-timeous filing of the application for rescission of judgment, it is neither necessary for me to address the other preliminary points, nor to delve into the merits of the case. The applicant has not disputed that he did not seek and obtain condonation for the late filing of the application. In the circumstances, my finding means that there is no application in terms of Rule 63 which is before the court, and I have to strike off the application filed by the 1st respondent. I am now left to consider the issue of costs.

Costs of suit

In relation to costs, the respondent has asked for costs on the ordinary scale in the event the application failed. Ordinarily costs follow the result, and I see no reason from departing from that general rule. Therefore, in the exercise of my discretion I will award costs sought by the 1st respondent.

Disposition

In the result, I make the following order:

1. The application is struck off the roll.

2. The applicant shall pay costs of suit

Musendekwa-Mtisi Legal Practitioners, applicants' legal practitioners
CZ Attorneys, 1st respondent's legal practitioners