

GARY ROBERT BROWN
and
NGONI MAZANGO
versus
MICHAEL AUTHOR STRYDOM
and
GREGORY MARTIN STRYDOM

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 15 JULY AND 30 JULY 2015

Opposed application

Advocate *H Moyo* for applicants
S Chamunorwa for respondents

MAKONESE J: This is an application for rescission of judgment in terms of Order 49 rule 449 of the High Court Rules, 1971. This is one of several applications that have been filed in this matter. It is important to underline that this is the second application for rescission of judgment in this matter. The first application for rescission of judgment was filed on 30 July 2012 under cover of case number HC 2528/12. That application was dismissed for want of prosecution by order of this court on 8 November 2013. This application is strenuously resisted by the respondents who contend that this is an abuse of court process.

I have taken the trouble to examine all the records related to this application. I note that more than ten records under various case numbers have been opened in these matters. I shall endeavour, however to pay close attention to the application presently before me. To that extent I observe that the application is predicated upon the allegation that the judgment granted on 8 November 2013 was obtained in error. It is alleged that when the application for an order dismissing the application under case number HC 2528/12 was placed before the judge, he was not made aware that both parties had filed their heads of argument in the main matter and that the

parties awaited a date of hearing. That unfortunately is not the case. When the application for dismissal for want of prosecution was placed before me in chambers I issued a directive on 27 June 2013 requesting the applicant to serve a copy of the application upon the respondent (now applicant). The record reflects that the application for dismissal for want of prosecution was indeed served upon the respondent. The respondent made a feeble attempt to oppose the application. The respondent (applicant now) filed an opposing affidavit and an affidavit sworn to by Mr *Herbert Shenje* sets out the grounds of opposition in the following terms:

“The respondents have since filed an Answering affidavit and I am in the due process of filing the heads of argument and as such the matter cannot be dismissed for want of prosecution. I refer the court to answering affidavit to show that the respondents are eager to prosecute the matter.” (emphasis mine).

It is false to allege therefore that at the time the order was granted heads of argument had been filed because at that time applicant stated unequivocally that the heads of argument were still to be filed. It is equally untrue to assert that the court was not aware of the fact that the applicant was attempting to defeat the application by a belated attempt of filing an answering affidavit. In other words, the court applied its mind fully and before granting the order ensured that the defaulting party was served with the application. It is curious to note that in his affidavit referred to above, Mr *Shenje* alleges in the last paragraph of the opposing affidavit as follows:

“I have also been advised by the respondent to instruct an advocate to draft and file heads of argument in this matter. I am advised that the advocate will need at least 30 days to draft the papers.” (emphasis mine).

These averments serve to illustrate the casual nature with which the applicant approached the whole matter. The respondent needed 30 days to prepare heads of argument and yet time was of the essence in prosecuting the application for rescission of judgment.

I now want to consider the provisions of order 49 rule 449 of the High Court Rules. The rule which provides for the correction, variation and rescission of judgments and orders states as follows:

“1. The court or 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
- (b) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission, or
- (c) that was granted as a result of a mistake common to the parties.”

In the case of *Motor Cycle (Pvt) Ltd vs Old Mutual Property Investments Corporation (Pvt) Ltd*, HH 45/07, the court held at page 2 of the cyclostyled judgment as follows:

“The prerequisites for granting rescission under this rule are the following:

Firstly, the judgment must have been erroneously granted; secondly, such judgment must have been granted in the absence of the applicant, and lastly, the applicant’s rights or interests must be affected by the judgment.”

See also the cases of *Mutebwa v Mutebwa and another* 2001 (2) SA 193, and *City of Harare v Cinamon* 1992 (1) ZLR 361 (s).

My view is that the judgment was not granted in error for the following reasons:

- (a) The application for dismissal for want of prosecution was served on the applicant.
- (b) The applicant did not in their opposing papers show that they had legal basis for opposing the application as they failed to file the answering affidavit within 30 days as required by the rules.
- (c) The judge considered the application and granted the order.

I must observe here that the applicants’ approach in this matter leaves a lot to be desired. They blame everyone but themselves for failing to protect their interests. The applicants have blamed their lawyers. They have blamed the courts. The applicants must shoulder the entire blame for their failure to act timeously. No reasonable excuse has been advanced in this application as to why the applicants have been dragging their feet all the way stretching back to the year 2012.

In *Ndebele v Ncube* 1992 (1) ZLR 288, the court sounded a stern warning to legal practitioners and stated at page 290 as follows:

“The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt* – roughly translated the law will help the vigilant but not the sluggard.”

In the circumstances, whilst the courts always strive to serve justice to all litigants, there is need for the courts to finalise litigation. All litigants must observe time limits and comply with the rules of the court. A high degree of dilatoriness has been exhibited by the applicants in their handling of this matter.

I am satisfied, therefore that this application has no merit. I tend to agree with the respondent's legal practitioner that this is a proper case to award costs on a punitive scale. The applicants have taken a care free attitude towards the prosecution of their matter, resulting in a multiplicity of actions arising out of this matter.

I accordingly, dismiss the application with costs on a legal practitioner and client scale.

Shenje and Company, applicants' legal practitioners

Calderwood, Bryce Hendrie and Partners, respondents' legal practitioners