

ZIMBABWE CANVAS WORKS (PVT) LTD
versus
CANAAN KUSANGAYA
and
ROBRAY COMPANY
and
KARIBA MUNICIPALITY

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 23 October, 21 December 2023 & 15 February 2024

Opposed Application

G Makina for the applicant
B Maponga, for the 1st respondent

TAKUVA J: This is an application for rescission of a default judgment issued against the applicant under HC 1648/21. The application was made in terms of r 63 of the old High Court Rules 1971 on the basis that there is good and sufficient cause to do so.

BACKGROUND FACTS

The first respondent was employed by a company called Kariba Canvas (Pvt) Ltd that was subsequently purchased by the applicant. First respondent was residing at the property in question as a condition of employment. Upon termination of the contract of employment, first respondent remained in occupation of the house. By letter dated 28 June 2002 first respondent was advised to vacate the property in question by the first of October 2002. It is common cause that the property belongs to the applicant. Instead of vacating the house the first respondent under HC 1648/21 approached this court seeking an order to compel the second respondent to cede the rights, title and interest in the immovable property into his name. The application according to the certificate of service filed of record was served on one Keisha Jacobs at number 76 Hillside Road Msasa Harare an address unknown to the applicant. As a result, applicant failed to attend the hearing and a default judgment was granted against the applicant. The applicant only become aware of the existence of such an application upon receiving the order

from the Registrar of this court on 28 January 2021. This led applicant to file this application arguing that it was not in wilful default and that it has reasonable prospects of success on the merits. Further, it was submitted that the first respondent should not have proceeded by application procedure as there is a material dispute of facts which can not be solved by application.

It was disputed that first respondent who was awarded the immovable property as terminal benefit through a verbal agreement.

The application was opposed by the first respondent who raised two points *in limine*. The first was that the application is improperly before the court since it was filed out of time and secondly that applicant has failed to provide the correct and relevant rule applicable to its application. On the merits, the application is opposed on the basis that applicant was in wilful default and that it has no defence to respondent's claim in the main matter.

The second point *in limine* is premised on the fact that applicant in its founding affidavit stated that the application is in terms of r 63 of the old rules. However, in its heads of argument, applicant purportedly relied on r 29(1)(a) of the current rules of court. This rule is similar to r 449 of the old rules. Rule 63 and r 449 were fundamentally different. Equally so r 27(1)(2) and r 29 of the current rules are materially different in that they have different essentials or requirements. The confusion that arises is that the application is apparently based on two rules. Simply put, applicant should have migrated from r 63 to r 27 or from r 449 to r 29. Applicant argued a case it did not place before the court.

The court is left bewildered as to which law to apply. For this reason I find that this application is not only defective but irregular.

Accordingly, it is struck off the roll with costs.

Muvhami Attorneys, for the applicant
Shambamuto Law Chambers, for the 1st respondent