

REPORTABLE (62)

Judgment No. SC 67/03

Civil Appeal No. 280/01

John Harries Jones V Kim Graham Strong

SUPREME COURT OF ZIMBABWE

SANDURA JA, CHEDA JA & GWAUNZA JA

HARARE, NOVEMBER 24, 2003 & JUNE 10, 2004

J B Wood, for the appellant

I E G Musimbe, for the respondent

CHEDA JA: The appellant and the respondent are involved in a dispute in which the appellant challenges the appointment of the respondent as executor of the estate of the late Patricia Read.

When the matter was heard at the High Court, the appellant was applying for rescission of judgments given against him in case numbers HC 18261/99 and HC 3149/00.

The respondent contended that the appellant was not properly before the High Court as both applications were filed out of time and no condonation had been granted or sought.

The appellant contended that he had no obligation to seek condonation to comply with Rule 63 of the High Court Rules ("the Rules"), as he was entitled to seek rescission in terms of Rule 449 of the Rules or under the common law.

Rule 63 of the Rules provides as follows:

"63 Court may set aside judgment given in default

(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."

The appellant in this case failed to meet the requirements of the above Rule. He did not apply for rescission within the period provided in the Rules. Having failed to do so, there was a need for him to apply for condonation, but no such application was made.

Confronted with this situation, the appellant still made no application for condonation, but maintained his argument that he was not obliged to apply for condonation as he was entitled to apply for rescission of judgment in terms of Rule 449 of the Rules.

Rule 449 provides as follows:

"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) 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 the result of a mistake common to the parties.

(2) The court or a 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."

In terms of rule 63, when condonation is sought the applicant has to explain the reasons for the default, the reason why the application for

rescission was not made within the period of one month as required by this rule, and show that he, the applicant, has a good defence to the action on the merits.

In this case, however, the court *a quo* found that the application for rescission was made in terms of rule 63, which requires that condonation should be sought first for the application. In the absence of any application for condonation the application had to fail for want of compliance with that rule.

The court *a quo* also found that there was nothing to show that the application was made in terms of either rule 449 or the common law. Generally, applications of this nature are made in terms of rule 63. I agree with this finding and the finding that the issue of rule 449 was an afterthought by the applicant when he realised that it would be difficult to proceed with the application the way it was presented without applying for condonation.

Ms *Wood*, who appeared for the appellant, submitted that the only application before the court *a quo* was for postponement. However, the respondent said she argued the merits as well. The appellant's heads of argument do contain argument on the merits. It follows that although the court *a quo* chose not to deal with the merits in its judgment, it had heard the applications for postponement and rescission and the arguments on the merits before it made its decision.

The appellant seems to have failed to appreciate that in order to place himself properly before the court condonation was required. This seems to be on the basis of the incorrect assumption that the application could be considered in terms of rule 449.

In a case where the application is out of time, and condonation is required in terms of rule 63, failure to obtain it is fatal to the application. It cannot be heard without the party concerned placing himself properly before the court by seeking condonation.

On the merits the appellant does not have a good case either. In each of the two cases he failed to file his pleas, even when threatened with being barred. No proper explanation was given for the failure to enter his pleas.

Even after that, there was still a long and unexplained delay in applying for rescission. His suggestion that he was not aware that default judgments had been entered against him cannot assist him as he was aware that threats had been made to bar him if he did not act accordingly. This shows a deliberate neglect of the rules.

I therefore find no fault in the court *a quo* refusing a postponement and dismissing both applications for rescission.

I see no merit in the appeal and it is dismissed with costs.

SANDURA JA: I agree.

GWAUNZA JA: I agree.

Byron Venturas & Partners, appellant's legal practitioners

I E G Musimbe & Partners, respondent's legal practitioners