Case 1
TECHNOIMPEX JSC
versus
RAJENDRAKUMAR JOGI
and
TECHNOIMPEX JC [PRIVATE] LIMITED
and
SARAH HWINGWIRI
and
THE REGISTRAR OF DEEDS [N.O]
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE [N.O]

Case 2 **HC 6784/19**
TECHNOIMPEX JSC
versus
RAJENDRAKUMAR JOGI
and
SARAH HWINGWIRI
and
MUSTAK GIRACH
and
THE REGISTRAR OF DEEDS [N.O]
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE [N.O]
and
G. MAPAYA
(Practising law and trading as
Mapaya & Partners Legal Practitioners)
and
TECHNOIMPEX JC [PRIVATE] LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 29 September 2022 & 10 January 2024

Opposed Applications-Condonation and Rescission
of Default Judgment and Interdict

Mr *S Banda*, for the applicants
Ms *D Sanhanga* with *P Mukumbiri*, for the 1st respondent
Mr *L Uriri*, for the 2nd and 3rd respondents

MUSITHU J: This is a composite judgment which deals with two matters which were consolidated and argued at the same time at the request of the parties' counsel. In HC 2524/22, which is Case 1 herein, the applicant applies for condonation for non-compliance with the rules of court and an extension of time within which to file a court application for rescission of a default judgment. The applicant is also seeking the rescission of the default judgment which was granted by this court in HC 2971/17. In HC 6784/19, which is Case 2 herein, the applicant is seeking the confirmation of a provisional order that was granted by TAGU J on 9 October 2019.

Paragraph 1 of that provisional order interdicted the first respondent in Case 2 from transferring to the third respondent in Case 2, a property known as Lot 12 of Lot 15 Block C of Avondale, also known as Bath Mansions Flats, 32 Bath Road Avondale, Harare (the property), previously held in favour of the applicant under Deed of Transfer No. 1657/89, and currently held in favour of the first respondent under Deed of Transfer No. 1080/19 and certificate of registered title No. 1081/19. In terms of paragraph 7 of that provisional order, the Sheriff was interdicted from carrying out any eviction at the property pending the determination of the application for rescission of the default judgment granted in HC 2971/17 and HC 11246/17, whichever occurred later. The fate of Case 2 was to some extent therefore reliant on the outcome of Case 1.

Background to the Applicant's Case in Case 1

The application was made in terms of r 29(1)(a) of the High Court Rules, 2021 (the Rules). That rule deals with the correction, variation and rescission of judgments granted in error. The applicant's founding affidavit was deposed to by one Borislav Trifonov Boynov in his capacity as the applicant's representative in Zimbabwe. According to the deponent, the applicant is registered in accordance with the laws of Bulgaria. The applicant claims to be the owner of the property in terms of a title deed which was registered in its name on 16 February 1989. The applicant asserts that it acquired title in the property before the second respondent was registered. According to the

applicant, the value of the property currently stands at over US$3,500,000.00. The deponent to the applicant's affidavit claims to have been in occupation of the property for twenty-three years. He claims to have been responsible for the management and maintenance of the property on behalf of the applicant.

On 13 August 2019, the deponent received from the applicant's caretaker, a bill for water and rates in respect of the property from the City of Harare, which was in the name of the first respondent. The deponent visited the offices of the City of Harare the following day to establish why the bill was in the name of the first respondent. He discovered that the account was now in the name of the first respondent. On 15 August 2019, the deponent visited the offices of the City of Harare to uplift all the relevant documents for purposes of seeking legal advice. He was informed that the City of Harare's Treasurer's department was also in possession of an application for a Rates Clearance Certificate, which showed that the first respondent was now in the process of transferring title in the property to a third party, the third respondent in Case 2.

The deponent engaged his legal practitioners, whose investigations revealed the following. On 29 September 2017, the first respondent obtained default judgment against the second respondent in HC 2971/17. The Sheriff's return of service showed that a copy of the summons was served on a "Mr J Moyo, an employee of the defendant" at No. 32 Baths Rd Avondale, Harare. In the summons matter, in HC 2971/17, the first respondent herein was the plaintiff, while the second respondent herein was the first defendant. The fourth respondent was the second defendant, while the fifth respondent was the third defendant. The plaintiff's claim was for an order directing the first defendant to attend the Zimbabwe Revenue Authority (ZIMRA) interviews and undertake all processes that were necessary to facilitate the registration of the property into the plaintiff's name within 14 days of service of the order. In the event of the first defendant's failure to comply with the plaintiff's demands, the third defendant was authorized to do all such acts and sign relevant papers to facilitate the transfer of the property into the plaintiff's name.

The investigations by the applicant's legal practitioners also revealed that the agreement of sale accompanying the application for default judgment stated that the purchase price of the property was US$750,000.00. The proof of payment attached to the application showed that only

US$550,000.00 had been paid. The first respondent applied for default judgment on 27 September 2017, and judgment was granted on 29 September 2017. The first respondent did not act on the default judgment for more than one year until November 2018, when he applied for a rates clearance certificate for the property from the City of Harare.

The applicant claims that the first respondent has been a party to litigation involving the same property since March 2018, in HC 2011/18, while the third respondent was involved in litigation for the same property in HC 12074/16, HC 2011/18 and HC 2012/18. The applicant also claims that it never sold the property to anyone, and for that reason, it instructed its legal practitioners to approach the court for the rescission of that default judgment.

The application for rescission was filed on 19 August 2019 under HC 6771/19. That matter was heard on 19 August 2019, together with HC 6784/19, which sought the confirmation of the provisional order granted by TAGU J. According to the applicant, the matter was struck off the roll by TAGU J, for want of authority by the person who deposed to the founding affidavit. The matter was taken up on appeal and the Supreme Court determined that the appeal against the striking off of the matter from the roll was invalid, whereas the appeal against the discharge of the provisional order was valid. The court directed the registrar to set down for hearing, the part of the appeal that was valid.

The applicant claims that it became aware of the judgment sought to be rescinded on 15 August 2019, and filed an application for rescission of the judgment on 19 August 2019. This was some four days after it became aware of the judgment. The matter was pending before the court until judgment was handed down on 13 August 2020. Thereafter an appeal was noted against the said judgment on 20 August 2020, under SC 361/20. The appeal was pending before the Supreme Court until judgment was handed down on 22 February 2022. From 19 August 2019, the matter was pending before the High Court and Supreme Court for two years and seven months. From 22 February when the Supreme Court judgment was handed down, the delay in seeking condonation was 41 days. The applicant averred that the delay was therefore not inordinate.

As for the explanation for the delay, the applicant averred that it was unaware that the first respondent had issued summons and obtained judgment against it. The person on whom summons were allegedly served was non-existent. He was unknown to the applicant.

As regards prospects of success, in respect of the main matter, the applicant averred that it had good prospects of success because the default judgment was obtained through fraud. The same *modus operandi* had been used to fraudulently obtain default judgment and title to a property in respect of the applicant's sister company, Bulchimex GmbH Import-Export Chemikalien und Produkte's property in HC 2972/17. That judgment had since been rescinded by MUZOFA J in HC 2011/18. The same person upon whom service was made in HC 2972/17 is the same person upon whom service was made in the present matter. Judgment in HC 2972/17 was rescinded on the basis that the returns of service were contrived in order to obtain default judgment. The caretaker, one Jona Mutsengi, had denied ever receiving service of the court process.

The applicant further averred that when he relied on the default judgment to procure transfer of the property, the first respondent was already aware that there was an extant court order under HC 12074/16 interdicting the transfer of the property. The transfer of the property was therefore procured fraudulently in breach of an extant court order.

Further, according to the applicant, the inconsistencies in the first respondent's summons and the application for default judgment pointed to fraud. The agreement of sale stated that the purchase price was US$750,000.00, and had been paid in full, yet the proof of payment showed that only US$550,000.00 was paid. The declaration stated that the purchase price was US$650,000.00, and the amount had been paid in full.

The sale of the property was said to have occurred in 2013, before the registration of the second respondent as a legal entity. It followed that the entity which entered into the transaction with the first respondent was non-existent at the time of the alleged sale. The applicant also averred that it defied logic that the first respondent would purchase the property in 2013, pay the full purchase price and then go for four years without seeking occupation or transfer of title or claiming rentals from the occupants.

The applicant also averred that the judgment was granted in error. At the time that the default judgment was granted in HC 2971/17, MANGOTA J was already seized with an application for confirmation of a provisional order interdicting the transfer of the same property. That provisional order had been granted on 2 December 2016. When the court granted the default judgment, it had not occurred to it that it was already seized with the matter for confirmation of an order that sought to prevent what it was being asked to do through the default judgment. The error even became apparent with the confirmation of the provisional order in April 2018.

The applicant contends that had the court been aware of the foregoing position, then it would not have granted default judgment in favour of the first respondent. The court was therefore at large to correct its error in terms of r 29(1)(a).

Attached to the applicant's founding affidavit, was the supporting affidavit by Jona Mutsengi. He is the caretaker at the property. He resided in a cottage at the property. He claimed to have resided at the property for the past fifty-two years. He denied ever receiving any court document from the Sheriff during his entire stay at the property. He did not know of any person by the name Johannes Moyo on whom process was allegedly served.

The First Respondent's Case

The opposing affidavit raised two points *in limine.* The first point was that the applicant approached the court with dirty hands. This was because the applicant had failed to pay the first respondent's costs in HC 6771/19, SC 22/21, SC 364/20 and SC 379/20. The applicant was therefore in willful contempt of court. The second point was concerned with the absence of *locus standi* on the part of the applicant to institute the current proceedings. The applicant called itself Technoimpex JSC. The default judgment that the applicant sought to have rescinded was concerned with an entity called Technoimpex JC. The applicant had not established the connection between these two entities. The applicant had also not established the authority to act on behalf of Technoimpex JC. It was also averred that in HC 6784/19, which was an urgent chamber application filed by the applicant, the same applicant had filed a supplementary affidavit in which it disassociated itself from Technoimpex JC. There was therefore no legal basis upon which the applicant could seek rescission of a judgment that it was not a party to.

Concerning the merits, the first respondent averred that on 7 December 2013, he entered into an agreement of sale with an entity called Technoimpex in respect of the property. The purchase price was paid in full, but transfer of title was not made into his name. In April 2017, he caused summons to be issued under HC 2971/17, to compel the transfer of the property into his name. The summons was served at the property in dispute, the same property that the deponent to the applicant's affidavit claims to have lived at for the past two decades. The first respondent further averred that the Sherriff's return of service was *prima facie* proof of what was stated therein. The court could not dispute the contents of a return of service purely on allegations made by one party. Unless the Sheriff deposed to an affidavit agreeing with the applicant's version, then the return of service had to be taken as a true reflection of the events.

Although the applicant denied receiving the summons in May 2017, the same applicant had, in previous litigation (HC 2012/18 and HC 2011/18), admitted that it had become aware of the service of the summons around February/March 2018. Despite having that knowledge, the applicant had done nothing to defend the summons. The delay had to be reckoned from February/March 2018 to 13 April 2022, a period of more than three years. The applicant could not seek to rescind a judgment on the basis that it was granted in error when it knew of the existence of the summons for more than three years. There was no explanation as to why the applicant had not acted for all that time.

The first respondent dismissed the application as being *mala fide*. He claimed to have purchased the property for US$ 750,000.00, which property the applicant claimed was now valued at over US$ 3 million. The first respondent insisted that he purchased the property innocently. He denied allegations that the property was sold without due authority or fraudulently, insisting that had nothing to do with him. Rather, that was an issue between the members of Technoimpex who included the applicant, the second and third respondents and one Ivan Kostadinov Pantchev, who accepted the first respondent's payment on behalf of Technoimpex. The payments were made on the 9th and 10th of December 2013 respectively. Attached to the opposing affidavit were two acknowledgments of receipt signed by Ivan Kostadinov Pantchev. On 9 December he

acknowledged a payment of US$ 550,000.00 from the first respondent. On 10 December 2013, the same Pantchev acknowledged receiving US$ 200,000.00 from the first respondent.

The first respondent further averred that the entity against whom default judgment was obtained was known as Technoimpex JC (Private) Limited. The exclusion of Private Limited in the application for default judgment was a typo.

The first respondent denied that he was aware of the extant court order under HC 12074/16 that sought to prevent the transfer of the property. He argued that he was not cited in that matter, and he only became aware of the said order after transfer had already commenced. In any event, the judgment under HC 12074/16 had been set aside in its entirety by the Supreme Court. The first respondent also averred that even if the judge who granted the default judgment was aware of the proceedings in HC 12074/16, he would still have granted the default judgment because he was not cited as a party in that matter. Further, that matter did not deal with the sale of the property to the first respondent. In addition, the applicant in HC12074/16 was Technoimpex Sofia Bulgaria JSC, and not the applicant in *casu*.

As regards his failure to take action after purchasing the property, the first respondent averred that part of his business empire involved real estate. He had lots of properties which he sold on a regular basis, so he was under no pressure to pursue this latest acquisition. He also claimed to have been in contact with Ivan Pantchev who kept assuring him that transfer of the property into his name would be undertaken.

Finally, the first respondent averred that contrary to the applicant's contention that there would be no prejudice if the application were granted, the first respondent would suffer immense prejudice. The applicant had not paid the first respondent's costs from previous matters that it had lost. The applicant was also abusing the court process by filing meritless applications which the first respondent was expected to respond to thereby incurring further legal costs. Further, the first respondent was also losing out on income from the property, and it was unlikely that the applicant would be in a position to pay damages that the first respondent continued to suffer should he decide to sue the applicant.

As regards the supporting affidavit of Jonah Mutsengi, the first respondent dismissed it as being of no moment in the absence of supporting evidence from the Sheriff who served the process. The court was urged to dismiss the application with costs on the attorney and client scale.

Second and Third Respondents' Opposing Affidavit

The opposing affidavit was deposed to by the third respondent in her personal capacity as third respondent and also in her capacity as a director of the second respondent. The opposing affidavit raised two preliminary points. The first was that the applicant lacked *locus standi* to institute the current proceedings. The contention was that the judgment that the applicant sought to rescind was concerned with a property that the applicant did not own. The title deed of the property was in the name of an entity called Technoimpex, which was different from the applicant herein. The applicant was registered as Technoimpex JSC, which made it different from the Technoimpex.

Still on the same point, the second contention was that the applicant was seeking the rescission of a default judgment made against an entity which was different from the applicant. Default judgment was granted against Technoimpex JC (Pvt) Ltd, the second respondent herein. It therefore affected the interests of that entity and not the applicant.

The second preliminary point was that the application was invalid for want of authority on the part of the deponent to depose to the applicant's founding affidavit. The board resolution attached to the applicant's founding affidavit was partly in English and partly in a language that was not English. The official language for court proceedings was English. The document ought to have been translated into the official language in accordance with the rules of court. The founding affidavit was defective making the application equally defective. Consequently, there was no valid application before the court.

Concerning the merits, the second and third respondents averred that in view of the extent of delay and the factual disputes inherent in the matter, the application for condonation should have been made separately from the substantive application for rescission. The substantive application was not properly before the court.

The respondents averred that in determining whether to grant the application for condonation and extension of time within which to file a court application for rescission of judgment, the paramount consideration was whether the demands of fair play and justice required that condonation be granted. In making that assessment, the court had to balance the need to do justice between parties and finality to litigation. The judgment that the applicant sought to rescind was four years and seven months old. The delay was just too inordinate. Even assuming that the delay was not inordinate, there had to be a reasonable and credible explanation for the delay. The reasons given for the delay were simply not adding up.

As regards prospects of success in the application for rescission of judgment and the summons matter, the second and third respondents argued that both matters were devoid of merit. This was because the applicant lacked *locus standi* to seek rescission of the default judgment as well as defend the summons matter. The question of *locus standi* was down to the relationship between the litigant and the relief that the court would ultimately give. The applicant had failed to establish a direct and substantial interest that would be affected by the outcome of the litigation herein. The applicant had failed to prove ownership of the property that was the subject matter of the litigation herein. It had also failed to show that it had been authorized by the registered owner to institute proceedings on behalf of the owner.

The court was urged to dismiss the application with costs on the legal practitioner and client scale.

The Applicant's Answering Affidavit

The applicant denied that it was in contempt of court because of the alleged nonpayment of costs as such costs had not been taxed. The applicant insisted that it had the *locus standi* to seek the rescission of the default judgment because TAGU J had, in HC 6771/19 and HC 6784/19, found that the applicant was the owner of the property. This was also confirmed by the Supreme Court in its judgment in SC 361/20.

The applicant insisted that the first respondent was not a *bona fide* purchaser but was complicit to the fraud that was perpetrated by the second and third respondents. The applicant also

contended that the issue of whether the first respondent was a *bona fide* purchaser did not arise herein as the matter was not concerned with a double sale.

The applicant also averred that a forensic examination had established that the signatures ascribed to the late Ivan Kostandinov Pantchev were not genuine but contrived. The forensic examiner's report was attached to the answering affidavit. That report triggered a response by the first respondent. He approached this court for leave to file a supplementary affidavit which dealt with that report. Attached to his supplementary affidavit was issued and filed on 26 August 2022, was a supporting affidavit of one Kurauone Madzivanyika, an Internationally Qualified Russian Trained Forensic Expert employed by the Zimbabwe Forensic Science. He attacked the findings made by the applicant's forensic examiner. He concluded that the comparison material available for examination in this case, being the standard samples, were not sufficient to reach a conclusive expert opinion. That leaves the court with two conflicting opinions on a very crucial issue.

Also attached to the answering affidavit was the English translated notarial seal accompanying the resolution, which had been tendered in a language that was not English.

The Submissions

Locus Standi

In her submissions Ms *Sanhanga* for the first respondent submitted that the owner of the property as confirmed by the title deed was an entity called Technoimpex. That entity was different from the applicant which identified itself as the owner of the property. Yet both entities were incorporated in accordance with the law. The applicant had also not produced any company documents to prove who it was. The applicant's claim to title was therefore questionable. According to counsel, the same issues were raised in the application for rescission of judgment before TAGU J. The learned judge established that there was no connection between the applicant and Technoimpex.

Counsel further submitted that even when TAGU J's judgment was taken on appeal, the issue of the applicant's *locus standi* was not resolved in the applicant's favour. The findings by TAGU J on the point therefore remained extant. The applicant had filed yet another application which did not explain the discrepancies in the names of the entities allegedly involved in the

property. Counsel also submitted that the applicant was not the party against whom default judgment was granted. The applicant was therefore not a party to that matter and neither had it sought to be joined to those proceedings. The applicant had therefore failed to show that it had a direct and substantial interest in the matter.

Counsel denied that TAGU J had made a finding that the applicant was the owner of the property if regard was had to the judgment by TAGU J in HC 6784/20 (judgment HH 524/20).

Mr *Uriri* appearing for the second and third respondents abandoned the preliminary point on the propriety of the applicant's founding affidavit and the need by the applicant to have separated the application for condonation from the application for rescission of judgment.

Counsel persisted with the respondents' contention that the applicant had no *locus standi* to institute the current proceedings. His submissions on the point were not materially different from those made on behalf of the first respondent. It shall therefore not be necessary to regurgitate them herein.

In his reply, Mr *Banda* for the applicant submitted that the question of *locus standi* stood to be resolved upon a consideration of the merits of the matter. Counsel submitted that the suffix 'JSC' to the applicant's name was an acronym for Joint Stock Company for Bulgarian entities. This is how the applicant was identified in Bulgaria. He further submitted that the second respondent was only formed in 2016 to validate the first respondent's agreement of sale for the property. It was not possible for a company formed in 2016 to have entered into an agreement of sale in 2013. Counsel insisted that even though the title deed only referred to Technoimpex, that entity was the same as the applicant as the words "JSC" were merely an acronym. The default judgment therefore had the effect of alienating a property that had no connection to the second respondent.

Mr *Banda* also submitted that in its narration of facts, the Supreme Court in its judgment in SC 29/22, had acknowledged that the applicant was the owner of the property.[1]

The Analysis

[1] *Tecnoimpex JSC v Rajendrakumar JOG & 4 Ors* SC 29/22

The issue of the proper identity of the owner of the property in dispute is central to the resolution of the dispute herein. It is also critical to the resolution of the question of the *locus standi* of the applicant herein. In *Allied Bank Limited* v *Dengu & Ano*[2], MALABA DCJ (as he was then), had this to say about *locus standi:*

> "The principle of *locus standi* is concerned with the relationship between the cause of action and the relief sought. Once a party establishes that there is a cause of action and that he/she is entitled to the relief sought, he or she has *locus standi*. The plaintiff or applicant only has to show that he or she has direct and substantial interest in the right which is the subject-matter of the cause of action."

In simple terms, *locus standi* is a condition precedent to the institution of legal proceedings, and it must be demonstrated by a litigant at the time of instituting such proceedings. A party must show that they have the capacity to institute proceedings for the relief that they seek before a court of law.

In the present matter, the applicant must be able to assert a direct and substantial interest in the property which forms the subject matter of the litigation. For it to achieve that, the applicant must establish a connection with the property which can only be done through proof of ownership of the property. Ownership of a property is affirmed through the registration of title in the name of whoever claims ownership of that property. In pleading its case, the applicant claimed ownership of the property, and in so doing it attached a copy of the Deed of Transfer registered on 16 February 1989. That title deed is registered in the name of an entity called Technoimpex.

The default judgment that the applicant wants rescinded by this court was granted against an entity called Technoimpex JC, at the instance of the first respondent. The respondents' argument is that the applicant and the entity in whose name the property is registered are two different entities. The applicant cannot claim ownership of a property that is registered in the name of another entity. The applicant did not tender any evidence to show that it was the same entity as the one in whose name the property was registered. Mr *Banda* explained the discrepancy in the names by averring that the suffix "JSC", which accompanied the applicant's name was an acronym

[2] SC 52/16 at p 6 of the judgment. See also *Sibanda & Ors v The Apostolic Faith Mission of Portland Oregon (Southern African Headquarters) Inc* SC 49/18 and *Museredza & Ors v Minister of Agriculture, Lands, Water and Rural Settlement and 10 Ors* CCZ 1/22

for Bulgarian registered entities. These averments were made during oral submissions in court. Nothing was placed before the court to confirm that this is indeed the position of the law in respect of registered entities in Bulgaria.

I am persuaded by the respondents' submission that the applicant ought to have explained the discrepancies in the names of the entities in its founding affidavit, since it was not the first time that the same issue had been raised by the respondents. In HC 6771/19 and HC 6784/19 (judgment HH 524/20), TAGU J dealt with a hybrid application for rescission of the same default judgment that the applicant seeks to have rescinded herein. The applicant sought rescission of the default judgment in terms of the then o 49 r 449 of the old High Court rules on the basis that it was granted in error. The applicant also sought the rescission of the same judgment on the basis that it was obtained through fraudulent misrepresentation by the first respondent in that matter (the first respondent herein). In that matter, the same respondents raised as one of their preliminary points, the absence of *locus standi* on the part of the applicant. At p 16 of the cyclostyled judgment, TAGU J dealt with the issue as follows:

> "I, therefore, cannot assume an error in the registration of these companies in Bulgaria or in the entries made by the Registrar of Deeds in this jurisdiction in respect of the property in question. There has neither been an allegation of, nor evidence of an error. I must rely on the documents as they appear.
>
> I accordingly find that on the papers before me, Tecnoimpex JSC as a registered company is not the same entity as Technoimpex Sofia Bulgaria JSC also a registered company. These two entities are both not the same entity as Technoimpex JC which also appears to be a registered company in its own right. The result is that in addition to MUSTAK GIRACH and G. MAPAYA not being parties to HC 12074/2016, the applicant was not a party to the same case…….Further, as the property in issue was registered to Technoimpex JC at the time transfer was effected to the first respondent and subsequently sold to Mustak Girach, the applicant has no interest in case number HC 2971/2017 in which Technoimpex JC was sued as a company in respect of a property registered to it as such. The applicant thus, on the papers before me, has no interest in HC 2971/2017 and in the property the subject of the judgment in that case."[3]

Having made those observations, TAGU J dealt with the matter on the basis that the application was not properly the court for want of authority by the deponent of the applicant's founding affidavit. He struck the matter off the roll on that basis. The court went on to discharge

[3] At pages 52 and 53 of the record

by consent, the provisional order granted in HC 6784/2019, having determined that it was the agreement of the parties that the fate of that matter was tied to the outcome of the application for rescission of judgment. For the sake of completeness, the order by TAGU J reads as follows:

> "In the result I make the following order:
> 1. The application is struck off the roll with costs.
> 2. The Provisional Order granted in case number HC 6784/2019 on 9 October 2019 is, by consent of the parties, discharged with costs."

The matter was taken on appeal to the Supreme Court under SC 361/20. Two issues arose before the Supreme Court, and these were: whether or not the appellant (applicant herein) consented to the order granted in para 2 of the court *a quo's* order and could therefore not appeal against it; and whether or not the appellant could appeal against the order issued in HC 6771/19 without the leave of the court. The Supreme Court determined that the parties did not agree that the fate of the provisional order granted by TAGU J in HC 6784/19 was to be determined by the striking off of the application in HC 6771/19. The court found that the parties' agreement was that the fate of the provisional order was to depend on whether the application for rescission in HC 6771/19 was granted or dismissed. The court ultimately determined that appellant's appeal against para 2 of the order by TAGU J was properly before the court.

As regards para 1 of the order granted by TAGU J, the Supreme Court determined that the application before TAGU J was a nullity because the deponent to the applicant's founding affidavit had no authority to represent the company. There was therefore nothing before the lower court to dismiss and the appropriate order was to strike the matter off the roll. For that reason, the Supreme Court further determined that the appellant could not appeal against the court *a quo's* interlocutory order without the leave of the court. The appeal before the court, being against an interlocutory order, was fatally defective. The Supreme Court then granted the following order:

> "It is therefore ordered that:
> 1. The notice of appeal against para 1 of the court *a quo*'s order is a nullity.
> 2. The matter is hereby struck off the roll.
> 3. The notice of appeal against para 2 of the court *a quo*'s order is valid.
> 4. The appeal against para 2 of the court *a quo*'s order should proceed to a hearing on the merits.
> 5. The Registrar is instructed to set it down before the same bench for hearing at the earliest convenient date.

6. Each party shall bear its own costs."

The appellant's appeal (applicant herein) therefore remained valid in the context of paragraph 2 of the order by TAGU J. The parties counsel herein confirmed that in compliance with para 5 of the order of the Supreme Court above, the matter was set down before the same Court which then remitted it to the High Court for hearing by another judge.

What is clear from the foregoing, as rightly submitted by counsels for the respondents herein, is that the findings by TAGU J on the question of the applicant's *locus standi* remained uncontroverted. The applicant's counsel did not apply his mind to the very pertinent observations made by TAGU J on the question of *locus standi*. From my reading of the judgment by TAGU J, the same arguments that were placed before the learned judge on the question of *locus standi* are almost similar to the arguments that were made before me. It was therefore remiss of the applicant to proceed in the same manner as it did in the matter before TAGU J, fully aware that the question of its *locus standi* to institute the proceedings for rescission of judgment was a contested issue. The failure to place any supporting evidence to back up its claims that it owned the property in dispute, and that it is the same entity as Tecnoimpex is its undoing.

In his oral submissions, Mr *Banda* submitted that in its judgment in SC 361/20, the Supreme Court made a finding that the applicant was the owner of the property. Counsel did not mention that the Supreme Court said so in its summation of the factual background of the appellant's case.[4] The court did not make a finding on the merits that the applicant was indeed the owner of the property in dispute because that was not one of the issues before it.

Submissions were also made on behalf of the applicant to the effect that at the time that the default judgment was granted, MANGOTA J was already seized with an application for a provisional order interdicting the transfer of the property. That provisional order was granted on 2 December 2016 by FOROMA J under HC 12074/16. In that matter, the applicants were BULCHIMEX GmbH IMPORT-EXPORT CHEMIKALEN und PRODUKTE (first applicant) and TECHNOIMPEX SOFIA BULGARIA JSC (second applicant). The first respondent was BULCHIMEX GMBH IMPORT EXPORT CHEMIKALIEN und PRODUKTE (PRIVATE)

[4] Page 2 of the cyclostyled judgment and p 56 of the record

LIMITED, second respondent was SARAH HWINGWIRI, and the third respondent was the Registrar of Deeds. Although the provisional order was also concerned with the property in dispute herein, the applicant and the first and second respondents herein were not parties in that matter. That submission does not therefore help the applicant's cause or create a connection between the applicant and the property.

In the final analysis, the court determines that there is merit in the respondents' preliminary point on the lack of *locus standi* on the part of the applicant to institute these proceedings for the relief sought. The applicant has failed to demonstrate that it has a direct and substantial interest in the property in dispute. It has failed to prove that it owns the property which happens to be registered in the name of a different entity. The applicant has also failed to demonstrate that it has an interest in the judgment that it seeks to have rescinded since it was not a party to those proceedings. The same finding was made by TAGU J in his judgment.

There appears to be a lot of confusion surrounding the proper identities of these entities that answer to the appellation Technoimpex. There is Technoimpex, the entity in whose name the property was registered before title was transferred to the first respondent. The applicant is another version of Technoimpex. Then there Technoimpex JC, the entity against whom default judgment was obtained. There is also the third respondent. Then there is also Technoimpex Sofia Bulgaria JSC. All these entities claim to have some connection with the property. The applicant appeared to be unflustered by all this maze of confusion emanating from these different identities that had a direct bearing on its standing as an interested party. In so doing the applicant took an unnecessary risk of failing to prove its *locus standi* as it has done herein.

The application must fall on this point alone. Once the court makes a finding that the applicant lacks the requisite *locus standi* to institute proceedings, then the applicant's claim must be dismissed. This is because there is no proper applicant before the court. Having reached that conclusion, it follows that there is no need to traverse the remaining preliminary points as well as the merits of the matter.

Case 2 HC 6784/19

In HC 6784/19, the applicant approached the court on an urgent basis seeking the following relief:

"**TERMS OF FINAL ORDER SOUGHT**

That you show cause to this Honorable Court why a final order should not be made in the following terms:-

1. The transfer of title from Applicant to 1st Respondent in respect of Lot 12 of Lot 15 Block C of Avondale commonly known as Baths Mansions Flats, 32 Bath Road Avondale, Harare and recorded under Deed of transfer no. 1080/19 and certificate of registered title no. 1081/19 be and are hereby deleted and expunged from the record of title held with the Registrar of Deeds.
2. The Registrar of Deeds be and is hereby ordered not to transfer stand number Lot 12 of Lot 15 Block C of Avondale commonly known as Baths Mansions Flats, 32 Bath Road Avondale, Harare and recorded under Deed of Transfer number 1637/89, in terms of any order or judgment obtained by any person in respect of the property after 14 September 2016 without leave of the High Court of Zimbabwe sitting at Harare.
3. The application for leave of Court in terms of paragraph 2 of this order shall be on notice to the Applicant at Applicant's legal practitioner's address Mutumbwa Mugabe & Partners, 151 Kwame Nkrumah Ave, Harare.
4. The Sheriff shall not carry out any evictions at Lot 12 of Lot 15 Block C of Avondale commonly known as Bath Mansions Flats, 32 Bath Road Avondale, Harare previously held in favour of Technoimpex JSC under deed of transfer no. 1657/89 until all the High Court matters pending between Applicant and any litigant claiming ownership of the said property including 1st and 2nd Respondents herein has been finalized.
5. For the purposes of paragraph 4 of this order the Sheriff of the High Court shall request written confirmation from Applicant's legal practitioners confirming whether there is still pending litigation in which any party in any Court within Zimbabwe is claiming ownership of Lot 12 of Lot 15 block C of Avondale commonly known as Bath Mansions Flats, 32 Bath Road Avondale, Harare.
6. The party opposing the granting of the final order in this matter shall pay Applicant's costs of suit on a legal practitioner and client scale.

INTERIM RELIEF SOUGHT

That pending determination of this matter on return date, the Applicant is granted the following relief:-

1. The 1st Respondent be and is hereby interdicted from transferring Lot 12 of Lot 15 Block C of Avondale commonly known as Bath Mansions Flats, 32 Bath Road Avondale, Harare previously held in favour of Technoimpex JSC under Deed of Transfer no. 1080/2019 and certificate of registered title no. 1081/2019 to 3rd Respondent or any other persons.
2. 1st, 3rd, 4th and 5th Respondents be and are hereby interdicted from transacting on and/or facilitating any process for the transfer of Lot 12 of Lot 15 Block C of Avondale commonly

known as Bath Mansions Flats, 32 Bath Road Avondale, Harare previously held in favour of Technoimpex JSC under Deed of Transfer no. 1657/89 and currently held in favour of 1st Respondent under Deed of Transfer no. 1080/2019 and certificate of registered title no.1081/2019 unless with specific leave of the court hearing this matter.

3. The application for leave of court in terms of paragraphs 2 and 9 of this order, shall be on notice to the Applicant at Applicant's legal practitioner's address Mutumbwa Mugabe & Partners, 151 Kwame Nkrumah Ave, Harare.
4. The Registrar of Deeds and all the Respondents cited herein be and are hereby interdicted from facilitating or passing further transfer of Lot 12 of Lot 15 Block C of Avondale Harare, previously held under Deed of Transfer Number 1637/89 and currently held in favour of 1st Respondent under Deed of Transfer no. 1080/2019 and certificate of registered title no. 1081/2019, commonly known as Bath Mansions Flats, 32 Bath Road Avondale, Harare.
5. The 1st, 2nd and 3rd Respondents be and are hereby interdicted from advertising, selling, pledging, ceding, mortgaging, donating or in any way encumbering or alienating Lot 12 of Block C of Avondale Harare.
6. Pending the determination of this matter and High Court Case no. 2012/18, whichever is the late, the Sheriff of the High Court be and is hereby directed to serve notices, court process, pleadings, orders issued by any person or litigant be served on Applicant's legal practitioners mentioned in para 3 above.
7. Pending the determination in High Court Case no. HC 12074 or the application for rescission of default judgment granted in High Court matters HC 2972/17 and HC 11246/17 whichever will be the later, the Sheriff of Zimbabwe be and is hereby ordered not to carry out any eviction at 32 Bath Road Avondale Harare in terms of any litigation commenced after 13 September 2016 by any person without the leave of the Court hearing the present matter.

SERVICE OF PROVISIONAL ORDER

The applicant's legal practitioner or Deputy Sheriff are hereby authorized to serve a copy of this Court Order on the Respondents."

The provisional order was granted by TAGU J on 9 October 2019. After the first respondent obtained default judgment in 2971/17, he had the property transferred into his name. The circumstances under which the applicant discovered that the property was now registered in the name of the first respondent are detailed in the background to Case 1. It was at that point that the applicant discovered that the first respondent was in the process of transferring title in the property to the third respondent. It was that discovery that triggered the approach to the court on an urgent basis.

Following the granting of the provisional order, the first respondent opposed the confirmation of the provisional order. Its notice of opposition raised two points in *limine:* the first was that the matter was afflicted by material disputes of fact in view of the allegations of fraud, collusion and falsification of documents by first respondent leading to the transfer of title in the

property into his name. There was also the averment that the title deed was not registered in the name of the applicant but a different entity; the second point was that the deponent to the applicant's founding affidavit had no authority to depose to that affidavit on behalf of the applicant.

As regards the merits, the first respondent insisted that he purchased the property, and it was properly transferred into his name. He also denied that the applicant ever owned the property as title was never registered into its name.

The second respondent also opposed the confirmation of the provisional order. Her notice of opposition challenged the deponent's authority to depose to the founding affidavit on behalf of the applicant The power of attorney from which the deponent derived authority authorized someone else to depose to the affidavit and not the deponent. She also alleged the existence of disputes of fact that were unresolvable on the papers. As regards the merits, the second respondent denied that there was any fraud in the transactions that culminated in the transfer of the property to the first respondent.

Analysis

At the conclusion of oral submissions in respect of HC 2524/22, counsels were agreed that the outcome in HC 2524/22, would also have a bearing on the fate of HC 6784/19, and arguments made in the earlier matter should be considered in the latter. Counsel chose to abide by their papers in that regard. Ms *Sanhanga* abandoned the preliminary point on the existence of material disputes of fact. She however incorporated by reference her submissions on the question of *locus standi* in respect of HC 2524/22 and urged the court to consider them herein in the disposal of this matter. Mr *Uriri* abandoned the preliminary point on the absence of authority by the deponent and adopted the same approach as Ms *Sanhanga*. Mr *Banda* had nothing further to add to the papers and the submissions already made.

As already noted, the parties counsel agreed that the court takes into account the submissions already made in HC 2524/22 in determining the fate of HC 6784/19. The question of the applicant's *locus standi* to institute the proceedings herein features prominently as it did in HC 2524/22. The provisional order which the applicant wants confirmed deals with the same

property as is the case in HC 2524/22. The cause of action therefore revolves around the same property.

In its judgment in SC 361/20 (judgment SC 29/22), the Supreme Court noted that the agreement of the parties was that the fate of the provisional order by TAGU J in HC 6784/19 was dependent on whether the application for rescission in HC 6771/19 was granted or dismissed. I have already stated that once the court makes a finding that a party lacks the requisite *locus standi* to institute proceedings, then those proceedings must be dismissed because there is no proper applicant before the court. The reasons for determining that the applicant lacked *locus stand* have been set out in the analysis of Case 1. It is unnecessary for me to restate them herein. They relate to the same parties. The parties that are critical to the resolution of both matters are the same.

Further, in line with the agreement of the parties that the fate of HC 6784/19, would be dependent on whether the relief sought in HC 2524/22 is granted or dismissed, it follows that in view of the court's finding that the application HC 2524/22 must be dismissed, the provisional order granted by TAGU J in HC 6784/19 must also be discharged.

COSTS OF SUIT

The general rule is that costs follow the cause. I find no reason to depart from this general principle. Even though costs were sought on the punitive scale in the event of the court finding against the applicant, in the exercise of my discretion, I find it befitting to make an order of costs on the ordinary scale.

DISPOSITION

Resultantly it is ordered that:

In respect of Case 1 HC 2524/22:

1. The application for condonation for non-compliance with the High Court Rules, 2021 and extension of time within which to file an application for rescission of judgment be and is hereby dismissed,
2. The application for rescission of the default judgment handed down on 29 September 2017 in HC 2971/17 be and is hereby dismissed.
3. The applicant shall bear the first, second and third respondents' costs of suit.

In respect of Case 2 HC 6784/19:

1. The provisional order issued by TAGU J on 9 October 2019 in HC 6784/19 is hereby discharged.
2. The applicant shall bear the first and second respondents' costs of suit.

Case 1
Sinyoro and Partners, applicants' legal practitioners
Rubaya-Chinuwo Law Chambers, first respondent's legal practitioners
Farai Nyamayaro Law Chambers, second and third respondents' legal practitioners

Case 2
Mutumbwa Mugabe & Partners, applicant's legal practitioners
Mazhetese and Partners, first respondent's legal practitioners
Farai Nyamayaro Law Chambers, second respondent's legal practitioners