THE MILTON GARDENS ASSOCIATION
and
SYRIL MUPANGURI MUPANGURI
versus
TECLA MVEMBE
and
CHAMPION CONSTRUCTORS (PVT) LIMITED
and
THE REGISTRAR OF DEEDS, HARARE
and
THE SURVEYOR GENERAL

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 8 October 2015 & 3 February 2016

Opposed Matter

D. Ochieng, for applicants
E. Matinenga, for respondents

DUBE J: This is an application for rescission of a default judgment granted under HC 7398/11.The application is brought in terms of r 449.

The first applicant is an association of members and will hereinafter be referred to as The Association. Its members purchased stands at a property known as Newark of Hilton of Subdivision in Waterfalls, (hereinafter referred to as Newark). The second applicant is the chairperson of The Association. The first respondent is the original owner of Newark and will hereinafter be referred to as Mrs. Mvembe. The second respondent is Champion Constructors (Pvt) Ltd, a land developer. The third and fourth respondents are cited in their official capacities.

The facts of this matter reveal a drawn out battle for the control of Newark. On 6 November 2000, Mrs. Mvembe sold Newark to Max Management (Pvt) Ltd, hereinafter referred to as Max. The company obtained a subdivision permit and created stands and sold them. Mrs. Mvembe was to be paid from proceeds of the sale of the stands. Mrs. Mvembe retained some of

the stands. Applicant's members began construction on the stands. Max delayed in servicing and passing transfer of the stands sold. There were allegations of double allocation of stands and complaints of gross maladministration resulting in numerous legal suits between the stand holders and Max. The problems resulted in the formation of the first applicant which was mandated to deal with the management of Newark. Some 40 stand holders issued summons against Max and Mrs. Mvembe under HC 5065/06 seeking an order compelling Mrs. Mvembe was to complete servicing the stands. Mrs. Mvembe was to accept payment from the plaintiff. The matter was withdrawn. Prior to this order, The Association had obtained a provisional order under HC 7312/06 against Max, Sandriver Properties, the Registrar of Deeds and Mrs. Mvembe. Mrs. Mvembe did not oppose the application. A consent order was entered into between The Association and Max on 11 March 2008. Mrs. Mvembe was not part of the consent order. The parties agreed that Max would release and transfer the respective stands to the purchasers upon payment of certain sums of money and The Association would take over the development project from Max. On 15 April 2010, Max and the Association entered into an agreement of assignment wherein Max agreed to cede its rights, title and interest in certain stands in Newark to the first applicant. Mrs. Mvembe was not involved in this arrangement.

Max struggled to pay the full purchase price for Newark. 01 May 2007, Mrs. Mvembe issued a notice to Max to remedy the breach. If it failed to pay outstanding monies from the purchase of Newark, within 30 days of the date of the letter, Mrs. Mvembe would cancel the agreement of sale. Champion Constructors claims that it bought Newark from Mrs. Mvembe after she cancelled the agreement of sale in September 2007. On 14 November 2011, Champion Constructors filed an application seeking transfer of Newark to it. The applicants were not joined to the proceedings. Mrs. Mvembe did not oppose the application resulting in default judgment being granted against her, the third and fourth respondents under HC 7398 /11. The default judgment ordered the Registrar of Deeds to pass transfer of ownership from Mrs. Mvembe to Champion Constructors and the Surveyor General was ordered to cancel a general plan issued by him in respect of Newark whereby stands were created and sold to members of The Association. The order was premised on the supposed sale agreement of Newark between Mrs. Mvembe and Champion Constructors.

As soon as the applicants became aware of the default judgment, they instituted an urgent application for a provisional order under HC 10716/11 which was granted in their favor. The

provisional order interdicted Mrs. Mvembe, the registrar or the Deputy Sheriff from signing and accepting any documents passing transfer of Newark. The Surveyor General and Director of Urban Planning were interdicted from implementing a new plan in place of the previous plan. Sadly for the applicants, the provisional order was discharged on 22 January 2014 on the basis of the following

a) that there was no evidence to rebut Mrs. Member's allegation that she had cancelled the agreement of sale by virtue of a notice of cancellation to Max, for non-payment.
b) that Mrs. Mvembe was not a party to the consent order under HC 7312/06 for the release and transfer of stands to the purchasers of the stands and takeover of the development project by The Association . Further that the arrangement did not confer any obligations on Mrs. Mvembe, the owner of the property concerned.
c) the assignment entered into by Max and The Association did not bind Mrs. Mvembe as transfer of the property was never made to Max and that it could not transfer or assign any rights to anyone in respect of the property. That Max could not legally transfer any rights to the first applicant's members without it having acquired ownership first
d) that there was nothing to prevent the resale to Champion Constructors
e) the default judgment of 14 September 2011 remained extant.
f) that The Association and its members had no rights or interest to enforce against Mrs. Mvembe and Champion Constructors, the subsequent purchaser.

The applicants appealed the decision to the Supreme Court on the basis mainly that the application before the court was an application for rescission of judgment and that the court had erred in refusing to rescind the default order of 14 September 2014.The applicants also intended to lead further evidence on appeal. The matter was subsequently struck off the roll.

In this application, the applicants seek rescission of the default judgment of 14 September 2014. The applicants claim that they and their members' rights were adversely affected by the default judgment and seek its rescission and also seek to be joined to the matter. They aver that both Mrs. Mvembe and Champion Constructors were aware that the default judgment would affect the applicants and that they had an interest in Newark and yet they were not cited and served with the application. The applicants aver that since the default judgment, new and additional evidence has come to light, which if it had been disclosed in HC 7398/11 the order would not have been granted. The applicants have attached to this application affidavits from

legal practitioners who attended to the transfer of Newark to Max. The applicants contend that the affidavits reveal that the purchase price had been paid in full prior to the alleged cancellation of the agreement of sale and that the Mvembe/ Champion Constructor's agreements of sale are fictitious. The applicants submitted that they derive rights from the cession agreement that they entered into with Max. The applicants further aver that is members are affected by the default judgment and that they have an interest in Newark that they can enforce against Champion and Mrs. Mvembe. They submitted that had the applicants and its members been cited and served they would have opposed the application. The applicants maintain that they have shown a case for rescission of judgment and for then to be joined in HC 7398/11.

Only the second respondent defends the application. The respondent challenged the fact that this application is being brought three and a half years after the default judgment. The respondent submitted that the applicants have always known about the order and that the purpose of r 449 is to expeditiously vacate an obviously erroneous order and that the applicants ought to have applied for condonation of late filing of the application for rescission of judgment. It argued that the failure to seek condonation of the late filing of the application for rescission of judgement is fatal to the application and urged the court to dismiss the application.

On the merits, the respondent argued that the applicants have no cause of action against respondent. The respondent submitted that the applicants maintain that they derive rights from Max arising out of an assignment and yet Max is not a party to these proceedings or those sought to be reopened. The respondent maintained that for the applicants to bring themselves within the rubric at r 449 they must have a direct ad substantial interest in the subject matter of the litigation and not merely a financial interest. That the applicants have not shown that they have anything more than a financial interest in Newark. The respondent submitted that the owner of the land did not participate in the assignment and she cannot be bound by it when she was not a party to it. Further that Max did not challenge the cancellation of the sale agreement and moreover that the applicants do not have any rights against Champion Constructors but merely a personal right against Max.

The respondent further submitted that the applicants have sought rescission before and have not been granted that relief. They approached the Supreme Court arguing that the court should have allowed their application for rescission. The respondent did not pursue the challenge related to prescription.

I must make observations concerning the heads of argument filed on behalf of the applicants in this matter. These stretch up to 127 pages. Heads of argument are meant to be simply that. The purpose of heads of argument is to set out briefly the main heads of argument and are by no means a platform to set out fully one's arguments. Heads of argument are required to be drawn up in a clear and concise manner. It is inappropriate to file voluminous papers and expect the other party as well the court to plough through such a voluminous pile of papers and still be able to make sense out of them. What these heads contain is basically every fact and argument concerning this matter. This is most inappropriate. In fact, this is an abuse of court process. This style of drafting heads of argument and conduct ought to be discouraged. The eventual consequence of such conduct results in delays in delivery of the judgment concerned. Litigants who bombard the court with voluminous papers and information deserve to be penalized even if they are eventually successful in the litigation. This sort of conduct deserves censure by this courts. Worse still, where they lose the application, they deserve to be mulcted with an order of costs on a punitive scale. I find support for this proposition in the case of *Banda* v *Pitluk* 1993 (2) ZR 60 @ 64 (H) where the court held that a litigant who places a lot of matter in a 449 application cannot get their costs even if they are successful.

I will deal first with the point related to condonation of late filing of the application for rescission of judgment. The rescission sought is provided for under r 449. Rule 449 reads as follows;

> "(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."

Rule 449 provides for the correction, rescission and variation of a judgment or order granted in error in the absence of a party affected by the judgment or order. This rule is worded in similar fashion to r42 of the South African Uniform Court Rules of South Africa. In Herbstein and Van Wines, *The Civil Practice of the High Courts of South Africa* , 5th edition at p 930 the authors state as follows with respect to the rule,

> "Although rule 42 lays down no time limit which rescission of a judgment should be sought, delay or acquiescence in the execution of the judgment would normally bar success in an application to rescind as it will be regarded as acquiescence in the granting of the judgment. The court will normally exercise its discretion in favor of an applicant who through no personal fault , was not afforded an opportunity to oppose the order granted against him and who, having ascertained that such an order has been granted , takes expeditious steps to have the position rectified."

In *Grantuilly & Anor* v *UDC* 2000 (1) 200 ZLR 361 (SC), the court expressed the spirit behind the rule as follows,

> "I consider that he was justified, in the exercise of his discretion, in dismissing the application by reason of the inordinate lapse of time. After all, r449 is a procedural step designed to correct expeditiously an obviously wrong judgment or order', per Erasmus J in Bakoven's case *supra* at 47 E-F. See also *Firestone South Africa PTY Ltd* v *Genticuro supra* at 306 H''

In *First National Bank of Southern Africa Ltd* v *Jurgens & Ors* 1994 (1) SA 677 (T), the court emphasized the requirement to deal with applications of this nature expeditiously. The court remarked as follows,

> "It is interest of justice that there should be relative certainly and finality as soon as possible concerning the scope and effect of orders of court. Persons affected by such orders should be entitled within a reasonable time after the issue thereof to know that the last word has been spoken on the subject. The power created by r 42(1) is discretionary (see **Tshivhase Royal Council and Anor v Tshivhase and Anor v Tshivhase and Anor 1992 (4) SA 852 (A) at 862 in fine – 863A**) and it would be a proper exercise of that discretion to say that, even if the applicant proved that r 42(1) applied, it should not be heard to complain after the lapse of a reasonable time. A reasonable time in this case is substantially less than three years referred to."

Rescission under r 449 is distinct from that brought in terms of r63. Rule 63 makes provision for the time within which an application for rescission of a judgment or order is to be brought. An application under r 449 is not time barred. Although r 449 does not set time frames within which rescission of a judgment should be sought, it is required that an r 449 application be made expeditiously. The nature of the application envisaged under r 449 is one where an applicant is expected to take expeditious steps to vacate an obviously erroneous order. It was not envisaged that a party who is aware of an erroneous order would delay in bringing the application and hence the lack of a provision setting out the time frames within which the application for rescission under r449 is required to be brought.

There is no provision requiring an applicant who has delayed in bringing an application under r449, to explain the reasons for the delay in bringing the application in terms of our rules. Case authority makes it clear that a party who delays in taking remedial measures to correct an order erroneously sought or granted may be taken to have acquiesced to the order. The court will only exercise its discretion favorably towards a litigant who has had a judgment awarded against him, who through no fault of his, was not afforded an opportunity to oppose an order and who upon being aware of the order takes expeditious steps to correct the order. A person bringing the application is expected to take expeditious steps to have the position rectified within a reasonable time. If the application is not so made, an applicant is non- suited.

The purpose of this requirement is to ensure relative certainty and finality of matters. Whilst the rules do not require that a party who has delayed in bringing the application make an application for condonation of the late filing of the application, a statement explaining the circumstances surrounding the delay is pertinent and should form part of his application. The purpose of this is to equip the court in assessing the reasonableness of the delay. Failure to do so results in his application being thrown out.

The applicants were required to explain their delay in bringing this application. The applicants have given an account of their efforts to protect their rights. The applicant contend that they sought rescission of the order timeously in that they filed an urgent application for rescission of judgment which Mtshiya J dealt with and he refused to grant them an order for rescission resulting in them filing this application. Whether the applicants failed to bring an application for rescission of judgment within a reasonable time is the remaining issue.

The default judgment was granted on 11 September 2011 and this application was filed on 11 February 2013 giving a delay of 3 years 5 months. The applicants were aware of the order from the year 2011. The respondent argued that the relief sought has been sought before and was declined by Mtshiya J resulting in the applicants approaching the Supreme Court arguing that the court should have allowed their application for rescission of judgment and that they cannot seek rescission of the order again. The delay in bringing this application was lengthy and inordinate. What caused the delay is that instead of making an application for rescission of the order in terms of r 449, the applicants chose to file an ordinary urgent application which sought to reverse the gains of the default order. I failed to get the wisdom of choosing to do so when they could easily have rescinded the order .Out of ineptitude, the applicants went on a merry go round.

The urgent application was not an application for rescission of the order. Had the provisional order been confirmed, its effect would have been to reverse the effects of the default order. If the intention of the applicants was to rescind the order, they adopted the wrong procedure. It is inappropriate to seek rescission of judgment by way of an urgent application. I am unable to find that the applicants applied for rescission of the order when they sought the provisional order. The applicants wasted more time by going to the Supreme Court to argue that Mtshiya J ought to have rescinded the default order when they had not made any application for such relief. That argument was clearly misplaced. I agree with Mtshiya J that the order was still extant and that it was incompetent for him to confirm the provisional order. The Judge must have found himself in an awkward position where he was dealing with an application for confirmation of the provisional order, which had the effect of rescinding a default order that was extant. The court correctly found that it was unable to grant or deny the order sought because no application for rescission of the default order had been made. Had he acceded to the request for the relief sought, he would have unprocedurally rescinded the order of 14 September 2011.This matter was poorly prosecuted.

The objective of expeditiously vacating an obviously erroneous order or judgment cannot be achieved if parties take forever to bring proceedings for correction of orders. It is unacceptable by any means for a party who has been aware of an order to bring it three and a half years down the line for correction.. This is so especially when one considers that the applicants have tried everything else to reverse the order granted in default and seemed to avoid making the correct application. I find that the applicants took unreasonable steps in seeking to rescind the default order by way of an urgent application and without seeking the relief they ought to have sought. They insisted that they were entitled to rescission and went as far as the Supreme Court with that argument, wasting time. As a result, I find that the delay in making this application was unreasonable. The applicants have in the result non -suited themselves.

Even if I am wrong in this approach, the applicants are going nowhere slowly as they seem not to have a cause of action against the respondents.

I find myself in an invidious position where I am required to go over the same issues as did Mtshiya J. The merits of this application have already been dealt with. However, my view is that the applicants have not met the requirements of the application. The purpose of the rule is to allow a court to correct a judgment or order erroneously sought or granted, to apply to have it

rescinded. See *Theron No* v *United Democratic Front and Ors* 1984 (2) SA 532, *Matambanadzo* v *Goven* 2004 (1) ZLR 399(S), *Mutebwa* v *Mutebwa* 2001(2) SA 193.

One of the requirements of r 449 is that an applicant shows that he is "affected" by the judgment or order. The authors Herbestein and Van Winsen in *The Practice of the High Courts of South Africa* 5th ed @ 931 state that it is only a limited class of persons who are entitled to bring an application for an order setting aside or varying a judgment of court. The authors rely for this proposition on the case of *United Watch and Diamond Co (Pty) Ltd and Ors* v *Disa Hotels Ltd and Anor* 1922 (4) SA 409 @ 415 A-C where the court said the following on *locus standi,*

> "In my opinion, an applicant for an order setting aside or varying a judgment or order of court must show, in order to establish *locus standi,* that he has an interest in the subject matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted."

Mtshiya J was of the same view that the applicants have no direct and substantial interest entitling them to intervene in HC 7398/11. In his judgment, Mtshiya J relies on *Silberberg and Schoeman, The Law of Property, (Lexis Nexis-Butterworths)* 5th ed for the requisites of transfer and he quotes from p73 as follows,

> "The seller of a thing which does not belong to him or her must first acquire it for him or herself to then transfer it to the buyer… in other words, "nobody gives something he does not have" (*nemo dat qui non habet)* This rule is based on the old Roman Law maxim ',''no one can transfer more rights to another than he himself *has (nemo plus iuristransferrepotest quam ipse habet).* This may be described as the ''golden rule'' of the law of property''

The court relied on this position at law as the main basis of his judgment. He observed that transfer of Newark was never made to Max and that Max could not transferor assign any rights to anyone respect of the property. I agree with the concerns raised by Mtshiya J in HH 20/14 with respect to Max's and the applicants' rights and interests. On p 14 of the cyclostyled judgment, he notes the following,

> "It should further be noted that the consent order of 11 March 2008 was the final position prior to this court's order of 14 September 2011. The consent order took note of what had transpired up to that date. That order, in my view, cancelled all previous arrangements, except that it failed to recognise that Max had no rights to assign to anyone. It was only the second respondent who could assign rights. However, notwithstanding the fact that the parties knew that the second respondent held title to the property, no responsibility/obligation was placed on her. Without the participation of the second respondent the said consent order could not be implemented. The

same applied to the purported agreement of assignment of 15 April 2010 concluded between Max and the applicant. In the absence of title and clear rights, Max had nothing to cede. That point should have been revealed to the court before the consent order was granted. The applicant acknowledges that Max, a developer of the property, had no title.''……the applicant's members have no relationship whatsoever with the second respondent (Mrs. Mvembe). They are at liberty to claim their monies from Max"

The applicants allege that they derive rights from Max through the assignment. The agreement of sale was entered into between Max and Mrs. Mvembe. The owner of the property is Mrs. Mvembe and remains so. Nevertheless, when the agreement of assignment was entered into, the owner of the property was not involved. An assignment of rights can only be valid if it involves the creditor who in this instance is the owner of the property concerned. The assignment could only have any legal standing with the involvement of the owner of the property concerned .The assignment cannot bind the owner and hence there is no relationship between the applicants and the owner. The property had not been transferred to Max and it had no rights with respect to the property which it was capable and entitled to cede or transfer because it had not received transfer from the original owner. Ownership of property can only be transferred where the transferor has title to tithe applicants have no legal rights arising out of the assignment. They have no rights to enforce and they have not established any justification for the relief sought. What complicates this application is that Max has not contested the cancellation of the agreement of sale and Mrs. Mvembe has not opposed this application.

I am alive to the fact that the first applicant's members were at the time of the default judgment in occupation of some of the undivided stands .and that members of the applicant bought stands in Newark and paid for them. This interest amounts to merely a financial interest. They have is a personal right against Max which they can enforce against Max I am unable to find that the applicants have shown the existence of sufficiently direct and substantial interest to warrant rescission of the default order.

Having found that the applicants have no substantial interest in the subject matter of these proceedings, I will not delve into the merits of this application.

In the result it is ordered as follows,

The application is dismissed with costs on an attorney client scale.

Granger & Harvey, applicants' legal practitioners
Dodo and Partners, respondent's legal practitioners

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