SLASHWOOD MINING (PVT) LTD
and
ZENITGROUP LIMITED
versus
ONTAGE RESOURCES (PVT) LTD

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 17 November 2020 and 3 May 2022

Opposed Application

K Musoni, for the applicants
Ms D Sanhamga, for the respondents

ZHOU J: This is an application for the revival of an order by consent that was granted in Case Number HC 13123/12, and for costs of suit. The order in question was granted on 5 December 2012. The application is opposed by the respondent.

The background facts to this application are as follows: on 5 December 2012 this court granted an order pursuant to an application instituted by the respondent herein under Case Number HC 13123/12. The applicants herein are the respondents in that case. The order granted incorporated the terms of a deed of settlement which had been signed by the parties on 19 November 2012.

The applicant's case is that the order granted in HC 13123/12 has superannuated and therefore must be revived by order of this court. The respondent opposes the application on the following grounds:

a) That the provision pertaining to superannuation of judgements and their revival was repealed, which means that the application is unnecessary;
b) That the order that is being sought to be revived has itself been overtaken by events and; in any event, was superseded by another deed of settlement which was executed by the parties on 20 December 2012 under Case Number HC 14382/12,
c) That the deponent's directorship of the first applicant is being challenged on the basis that he was fraudulently appointed as director.

The respondent raised the further point that the second applicant is not properly before the court as it has not authorised its participation in the proceedings. The applicant, through counsel, conceded this point in argument. The concession was proper, since there is no resolution by the second applicant authorising the proceedings. Even the deponent to the founding affidavit does not claim to represent it. Properly it should have been cited as a respondent since it is a party to the order which is being sought to be revived. In the premises, in the absence of an application to join it to the instant application or authority for it to participate in the proceedings, the second applicant's name is struck out. The other objection by the respondent to the non-joinder of Tapiwa Gurupira is meritless. The said Tapiwa Gurupira is not a party to the order in Case Number HC 13123/12/. The objection is dismissed.

On the merits the respondent's contention is that following the repeal of r 448 of the now repealed High Court Rules, 1971, superannuation of judgments no longer applies, hence the application *in casu* is unnecessary. This issue has been resolved by this court in the case of *Nzara and others* v *Kashumba NO & Others* HH 151-16 where it was held that the repeal of the rule simply meant that the common law relating to superannuation of judgments now applies. The court pointed to the continued existence of r 324 of the 1971 Rules. Significantly, the same provision has been maintained under r 69(3) of the High Court Rules, 2021. This provision merely restates the common law position with respect to superannuation of judgments.

In the heads of argument and at the hearing of the application, Ms *Sanhanga* advanced the argument that superannuation applies only to those judgments that are enforceable through a writ of execution. Put differently, the submission was that since the judgement which is being sought to be revived is not one that is enforceable by writ of execution, such a judgment is not covered by r 69(3) of the High Court Rules 2021, which was r 324 of the now repealed ruled of court. It is common cause that the judgment *in casu* is not sounding in money, hence it is not enforceable by writ of execution. The issue of the ambit of the rule relating to revival of superannuated judgment was dealt with by this court in *Nzara & Others (Supra)* at p 21 in which, after an examination of the rule in question MAFUSIRE J said: "In my view, the superannuation rule may not apply to all judgments *carte blance*." This reasoning applies to the present case because the judgment in question is not one which is enforceable by writ of execution. On this ground, I would dismiss the application.

In view of my conclusion that the judgment being sought to be revised is not one to which the rule relating to superannuation applies, the issue of whether the deed of settlement was substituted becomes immaterial. I do not accept, though, that the deed of settlement was overtaken by events. The deed of settlement in HC 14382/12 does not purport to vary the order which was granted in HC 13123/12. The pending challenge to the directorship of the deponent to the applicant's founding affidavit does not defeat this application. He is still the director. The objection based on this ground is therefore dismissed.

It the result, IT IS ORDERED THAT

1. The application be and is hereby dismissed.
2. First applicant shall pay the costs of suit.

Musoni Masasire Lawn Chambers, 1st applicant's Legal Practitioners
Mangwiro Tandi Law, Respondent's Legal Practitioners