MAIDEI MOREBLESSING NYAMAYARO

Versus

ALBERT CHITAUNHIKE N.O (IN HIS CAPACITY AS EXECUTOR DATIVE OF THE ESTATE LATE IGNATIUS NHANDO MATUNGAMIRE)
And

TENDAI NYATEKA

HIGH OF ZIMBABWE
CHILIMBE J
HARARE 24 February & 12 October 2022

T. *Makamure*-for applicant
A. *Muchandiona*-for first respondent
No appearance for second respondent.

Application for rescission of judgment

CHILIMBE J

BACKGROUND

[1] Applicant seeks the setting aside of a judgment entered in her absence. She also pursues, as consequential relief, joinder to the same proceedings in HC 1202/21. The application is brought under rule 29 of the High Court Rules SI 202/21 (rule 449 of the old High Court Rules 1971). Applicant`s claim herein is based on what she describes as her direct and substantial interest, as a lessee, in a farm from where she now faces eviction.

[2] First respondent represents the estate of the late Ignatius Nhando Matungamire who passed away in December 2016.The late Mr. Matungamire had been allocated, during his lifetime, a farm titled Subdivision 3 of Subdivision C of Learig Farm in Acturus, Goromonzi District ("the farm") under the government`s Land Reform and Resettlement Programme. Applicant contends that she entered into a ten (10) year verbal lease agreement with the deceased sometime in 2015.The lease permitted applicant, at a rental of US$200 per month, to carry out agricultural activities on the property. The existence of this lease agreement was disputed by first respondent who however confirmed recognition of second respondent as a (former) legitimate tenant of the late Mr. Matungamire. It is against second respondent and all claiming

through him, that first respondent instituted proceedings and obtained the order now under contest. It is common cause that applicant was not cited as a party to such proceedings.

[3] Applicant deposed in her founding affidavit that she had erected greenhouses worth US$15,000, purchased tractors and irrigation equipment to the value of US$40,000 apart from committing to obligations in the region of US$1,000,000 under the Command Agricultural Scheme for the 2019 season. There are further claims on the papers that applicant caused the electricity transformer to be "fixed" and purchased a meter to connect the property to the national grid. These claims constitute facts key to the demonstration of direct and substantial interest as shall be shown below.

THE DEFAULT JUDGMENT IN HC 1202/21

[4] It is common cause that following the death of Mr. Matungamire, applicant and first respondent corresponded through their legal practitioners of record. The communication was set in train by the letter dated 12 February 2021, addressed by Messrs *Rubaya and Chatambudza*, applicant`s legal practitioners, to Messrs *Danziger and Partners* for first respondent. Several letters and emails were subsequently exchanged between the parties. Their net effect was that applicant declared her interest in the farm, stating that she had concluded, in 2015, a verbal lease agreement with the late Mr. Matungamire, whilst first respondent, on the other hand, disputed that claim[1].Instead, first respondent insisted that applicant was, at most, an unrecognised subtenant to second respondent and as such, had to vacate the farm. Applicant`s proposals to secure a compromise were rejected and first respondent indicated his intention to institute legal proceedings to eject second respondent and all those claiming through him. First respondent`s legal practitioners thereafter sought confirmation, from Messrs *Rubaya and Chatambudza*, of mandate to receive process on behalf of applicant. It not disputed that this communication was not responded to.

[5] Summons commencing action were indeed issued in HC 1202/21 in April 2021, and served on second respondent at number 1,25th Avenue, Mabelreign Harare. A default judgment was

[1] Applicant`s claims of having invested variously on the farm were dismissed as "false and misleading", among other averments, in the letter issued on first respondent`s behalf by Messrs Danziger and Partners dated 2021.

entered by this court per MANGOTA J on 21 July 2021.Its execution at the farm apparently prompted this application.

REQUIREMENTS FOR A RULE 29 RESCISSION OF JUDGMENT

[6] Applicant claims to have satisfied the requirements of, and thus qualifies for relief under r 29 as set out in the South African case of *Mutebwa* v *Mutebwa* 2001 (2) SA 193 -(a)that the judgment was erroneously sought and granted, (b) that the judgment was granted in the absence of the applicant, and (c) that the applicant's rights or interests are affected by the judgment. Whether or not these requirements have been met becomes a question answerable by examining the facts placed before the court by the parties. In *Grantully (Pvt) Ltd & Anor v UDC LTD* 2000 (2) 361, [s], the court made the following observation at 365 B; -

> "Moreover, the specific reference in r 449 (1) (a) to a judgment or order granted "in the absence of any party affected thereby" envisages such party being able to place facts before the correcting, rescinding or varying court, which had not been before the court granting the judgment or order."

[7] The question arising is; -what facts have been placed before the court to justify the order sought? I draw attention to the following issues in progressing the answer to such question. Firstly, the parties consulted, prior to commencement of proceedings in HC 1202/21.These engagements were lawyer-assisted efforts to ascertain the parties` respective attitudes toward claims raised against each by the other. Secondly, these discussions revealed the parties were patently polarised positions. Applicant's claims of legitimate tenancy were firmly rejected by first respondent. Likewise, first respondent`s demand that applicant claimed through second respondent and was thus obliged to vacate the farm were strongly refuted. Thirdly, given this stalemate, first respondent unequivocally communicated his intent to institute legal proceedings against all occupants, applicant included.

[8] Fourthly, and flowing from that, first respondent filed a detailed opposing affidavit to this present application. This affidavit robustly countered the material allegations of fact made in the founding affidavit. The objections went beyond mere argument and were backed by a number of attachments meant to support the first respondent`s position. First respondent

claimed, that second respondent was the only recognised lessee to the property. A written lease agreement supporting this averment was attached to first respondent`s papers. It was also argued that second respondent was an uncle to applicant and had sublet without authority, a portion of the farm to applicant. This being the basis upon which first respondent sought to eject the principal lessee (second respondent), and all those claiming through him (including applicant). First respondent further insisted that applicant`s account to the court was fraught with inconsistencies. The receipts attached to the founding affidavit as proof of payment of rentals to the late Mr. Matungamire were disowned by first respondent who stated that the recipient was unknown and unconnected to the deceased. Applicant claimed to have been leasing the farm whose extent she put at 15 hectares. First respondent argued that the 15-hectare description tendered by applicant only represented about half the size of the farm which was nearly 30 hectares in extent. First respondent also stated that applicant`s identity particulars were inconsistent, and that he was unaware of her residential address.

[9] As a fifth point, for reasons not explained to the court, applicant did not file an answering affidavit in this matter. That failure stands as a critical omission. I say so for the following reasons; - It has been stated that in motion proceedings, the applicant`s case stands or falls on the founding affidavit. Some authorities state that proposition in terms that may be misconstrued as suggesting that the answering affidavit is inconsequential. The import of such decisions must indeed be properly understood-that a party must not bolster its causa in the answering affidavit by introducing new evidence or fresh facts. The answering affidavit remains a useful and relevant stage in motion proceedings. The purpose of an answering affidavit has been well-explained by our courts and was crystallised in *Loveness Serengedo v Eric Cable N.O* HH 32-08, in the following terms by MAKARAU JP (as she then was) at page 2; -

> "In my view, the purpose of an answering affidavit is akin to that that of a replication in an action. It is filed not merely for the form but to specifically meet and traverse all the averments made in the opposing affidavit that have the effect of defeating the applicant's claim. Like in any pleading filed with the court, all issues that are not specifically denied and traversed in the answering affidavit are to be taken as if they have been admitted. It is my further view that answering affidavits, like all other affidavits, must be drafted with precision and must meet the sting of the defence being raised in the opposing affidavit. [underlined for emphasis]

[10] Relating the above dictum to the present matter, applicant failed to replicate to the issues raised in the opposing affidavit. This being the same affidavit that had disputed the most fundamental of applicant`s claims that (a) she had concluded a lease agreement with the deceased and (b) was in occupation of the farm as a principal. was obliged to confirm that the order was erroneously granted because as an interested party she was not cited. Reference was made by Mr. *Makamure* for the applicant, to the Supreme Court`s remarks in *Drum City (Pvt) Ltd v Brenda Garudzo* SC 57-18 as authority exhorting courts to recognised fatality of non-joinder of third parties with direct and substantial interest in a matter. The facts of that matter differed materially from those in the present matter. In *Drum City*, confirmation proceedings to determine the validity of proceedings regarding an employee`s dispute with her employer had taken place in her absence and that was considered irregular. In this instance, the executor of a deceased estate elected to institute proceedings against an individual with whom he reasonably believed the deceased had concluded a written lease agreement. I also note that when the same executor-first respondent inquired, through his legal practitioners after the engagements referred to in [4] above, if applicant`s legal practitioners had authority to received service of process, their request was ignored. Innocuous as this point may appear, I find it quite relevant to the present application for the reasons set out below.

[11] No explanation was tendered, in the first instance, as to why applicant`s lawyers did not respond to that inquiry. Further, no explanation has been offered as to why applicant`s lawyers, who have since come to court expressing applicant`s keenness to be joined to the proceedings, did not simply confirm authority to receive service of process on behalf of applicant. Instead, applicant’s counsel found it necessary to lay blame, during their submissions in court, on first respondent for not having served process in manner deemed appropriate according the legal practitioners` sole discretion. These being the very same legal practitioners who had declined to accept service of process on behalf of applicant. This present application would have been averted by the simplest and most convenient of arrangements had service been accepted, or an alternative address provided as requested.

[12] These circumstances become relevant if one considers that a party who applies for the rescission of a court`s judgment essentially seeks to draw that court out of its cloistered refuge of *functus officio*. That quest should not, by any means, be taken as trivial. It entails asking the

court to stay or reverse the rights, privilege and advantage which the other party would have secured from the court`s earlier judgment. Rescission of a court`s judgment is therefore a significant discretionary step exceptionally taken by the court to avert an injustice where no other remedy is available. On that basis, a party applying for rescission of judgment must demonstrate every entitlement to such relief. Despite the patent congruency between the two, an application for the rescission of a judgment taken in the absence of a party not-equals an application for joinder.

WAS THE JUDGMENT ERRONEOUSLY GRANTED IN THE FIRST INSTANCE?

[13] This question derives its answer from how the authorities have variously defined the term "erroneously granted" based on facts before them. Firstly, where a court entered judgment unaware of the existence of a document whose provisions were relevant to the calculation of the amount due, on appeal, the Supreme Court ruled such judgment as having been erroneously granted[2]. Secondly, in *Banda v Pitluk* 1993 (2) ZLR 60 (H), a judgment entered in default but after an entry of appearance of defend, was held as having been erroneously entered. Thirdly, in the South African decision of *Mutebwa* v *Mutebwa* 2001 (2) SA 193 (TkH), a fraudulent return by the Deputy Sheriff induced a court to grant a decree of divorce which was subsequently set aside on the grounds that it had been issued erroneously. Fourth, in Maxwell *Matsvimbo Sibanda v Zambe & 2 Ors SC 14-21*, the court considered a judgment issued against a party who neither received process nor participated in the proceedings and concluded that the judgment had been erroneously granted. Recently, this court set aside a default judgment on recognising that the judgment had been issued on the basis of a return of service relating to a different file or case[3].

[14] Finally, in *Rudo Tiriboyi v Albert Jani & Anor* (supra), it was held that a court could not feasibly identify all parties with a potential interest in a matter before it. In that decision, the court was faced with a factual background where a judgment ordering the transfer of an immovable property had been obtained against the double-seller of that property. A co-claimant

[2] *Grantully (Pvt) Ltd* v *UDC Ltd* 2000 (1) ZLR 361 (S),
[3] *Melody Chinouriri v Mohammed Rezwan Khan & 2 Ors HH 682-22. See also the authorities cited therein. Although the application in this matter had been brought under rule 27, it is nonetheless relevant to rule 29 applications for rescission.*

who approached the court subsequent to the issuance of the first judgment failed to convince the court that the earlier judgment had been erroneously granted. The guidance of MAKARAU J (as she then was) in that matter, was pellucid; -

> "The issue that falls for determination in this application is whether the order against Sithole was erroneously granted. In my view, it was not. It appears to me that misjoinder, where the court is unaware of the interested party who has not been cited is not an error on the part of the court granting the order and cannot be corrected in terms of r449. It could only be an error on the part of the court if the court, having been made aware of the interests of the noncited party, proceeds notwithstanding the absence of that party to pass a judgment that will affect the rights of that party. There is no indication that the rights of the applicant were brought before the court that granted the order against Sithole. I would distinguish between the lack of knowledge on the part of the court in this instance from the lack of knowledge on the part of the court in the three authorities cited above. In the *Grantully* case, the court was unaware of the provisions of a document that had been placed before it as evidence. In the *Banda* case, the court was unaware of the appearance to defend that the defendant had filed with the court. In *Mutebwa's* case, the situation was slightly different. The Deputy Sheriff, a court official, had filed a false return with the court upon which the divorce was granted. When the court became aware of the correct position, it set aside its judgement as it had granted it in error. The applicant herein has not shown the error committed by the court in this instance."

DISPOSITION

[15] As noted, absence of applicant`s answering affidavit left significant disputations of fact by first respondent uncontroverted. First respondent `s position disputations of applicant`s claims regarding direct and substantial interest in the matter were cromulent. Applicant's interest was refuted and reduced to a claim through second respondent. Apart from that, *Tiriboyi v Jani & Another (supra)* held that mere interest, uncommunicated to the court will not render the judgment as having been erroneously granted. First respondent argued that applicant was a subtenant and relative to second respondent. This claim was not controverted

by applicant. First respondent moved to institute proceedings against second respondent and all those claiming through him. According to first respondent, applicant fell as one of those persons claiming through second respondent. Whilst the judgment may have been issued in the absence of applicant (on the simple basis that she was not cited in the proceedings) it was not issued in error. Imperative to the determination of this matter is that the issue of applicant`s direct and substantial interest in the matter has been put into contention. As noted in van Winsen quoted above, the interest must not necessarily be financial only. It must draw from a legal basis and in this instance, the existence of the verbal lease agreement between applicant and the late Mr. Matungamire has been disputed.

[16] On that point, I sidestep Mr. *Muchandiona*`s further argument that even if applicant and the late Mr. Matungamire had indeed concluded a lease agreement, such contract would have been invalid by reason of its contravention of section 28 of the Land Commission Act *[Chapter 20:29]*. This provision prohibits sub-letting of agricultural land and declares, by s 28(2), any such lease to be of no force or effect. I do note the decision of my brother ZISENGWE J in *Rangarirai Mago v George Rusere & Anor* HMA 54-21 upholding this position. My view is that an interrogation of these issues would more properly take place before a court seeking to determine the parties' dispute on the merits as in *George Rusere*.Further, an inquiry into illegality of contracts demands a careful navigation of the principles of *ex turpis causa* and *in pari delicto*, a (rather daunting) journey undertaken by ZIYAMBI JA in *Agson Mafuta Chioza v Smoking Williams Siziba* SC 4-15.

[17] For reasons stated herein, I am unable to find that good and sufficient cause has been furnished to justify the rescission of this court`s judgment in HC 1202/21 and as such the application must fail.

Accordingly, it is hereby ordered that; -
The application be and is hereby dismissed with costs.

Rubaya & Chatambudza -applicant`s legal practitioners
Danziger & Partners-first respondent`s legal practitioners.

CHILIMBE J _____12/10/22