

REPORTABLE (17)

(1) CHEVHU HOUSING CO-OPERATIVE SOCIETY LIMITED (2)
CAIN NKALA HOUSING CO-OPERATIVE SOCIETY LIMITED (3)
MASHINGISHINGI HOUSING CO-OPERATIVE SOCIETY LIMITED
(4) TASIMUKA HOUSING CO-OPERATIVE SOCIETY LIMITED (5)
GENEVA HOUSING CO-OPERATIVE SOCIETY LIMITED (6) TUZ
HOUSING PROJECT SOCIETY LIMITED (7) GUKURAIVHU
HOUSING CO-OPERATIVE SOCIETY (8) HIGHFIELD CANAAN
HOUSING CO-OPERATIVE SOCIETY LIMITED (9) HEBERT
HOUSING CO-OPERATIVE SOCIETY LIMITED

v

(1) CREST BREEDERS INTERNATIONAL (PRIVATE) LIMITED
(2) MINISTER OF LANDS AND RURAL SETTLEMENTS

**SUPREME COURT OF ZIMBABWE
BHUNU JA, MATHONSI JA & KUDYA AJA
HARARE, NOVEMBER 9, 2020 & MARCH 25, 2021**

J. Koto, for the appellants

S.M. Hashiti, for the first respondent

MATHONSI JA: The appellants are nine cooperative societies which have been dishing out residential stands at a piece of land known as Saturday Retreat Estate (the land) for quite some time. The land is held by the first respondent by Deed of Transfer number 4035/86 and was acquired by the Government of Zimbabwe for urban development by Acquisition of Land Order dated 20 March 2014.

Following the acquisition, the second respondent herein, who is the acquiring authority, filed an application against the first respondent in the Administrative Court (the court

a quo) for confirmation of the compulsory acquisition order. The matter was settled between the parties as a result of which a consent order was issued by the court *a quo* on 13 January 2015. The consent order confirmed the compulsory acquisition and made provision for compensation due to the first respondent in terms of the agreement of the parties therein.

Almost five years after the consent order was granted in the matter involving the two respondents, the appellants approached the court *a quo* seeking a rescission of that judgment in terms of r 449 of the High Court of Zimbabwe Rules, 1971. The basis of the rescission of judgment application was that the judgment was granted either in error or fraudulently in the absence of the appellants.

Before the court *a quo*, the first respondent raised a number of points *in limine* namely that the application was filed out of time without seeking condonation for the delay; that the appellants lacked *locus standi in judicio* to seek a rescission of an agreement in which they were not a party and that there was no fraudulent misrepresentation in the grant of the consent order.

By judgment delivered on 6 March 2020 the court *a quo* upheld the preliminary points. This appeal is against that judgment of the court *a quo*. This Court finds that the appeal is completely devoid of merit. It ought to be dismissed with costs.

BACKGROUND

By Government Gazette Extraordinary published on 7 September 2001 a preliminary notice in terms of s 5(1) of the Land Acquisition Act [*Chapter 20:10*] of the intent to acquire the land for resettlement purposes was issued. Subsequent to that the acquisition for

resettlement was not pursued presumably upon a realisation that the land was earmarked for urban settlement. Notwithstanding that, the appellants later occupied the land and started parcelling out residential stands to their members. Their case is that they were offered the land for that purpose by the government as it was by then state land given that a preliminary notice of intent to acquire the land had been published in 2001.

As I have said, it was not until 20 March 2014 that the government commenced the process of the lawful compulsory acquisition of the land for urban development. On that date the second respondent issued an acquisition of land order. As required by law, the second respondent brought an application before the court *a quo* under case number LA6/14 for confirmation of the compulsory acquisition and compensation to the first respondent.

The proceedings in the court *a quo* led to the signing of a settlement between the first and second respondents on 18 December 2014 which was incorporated in the consent order sought to be rescinded. The order reads:

“BY CONSENT IT IS ORDERED THAT:

1. The compulsory acquisition of the immovable property being the remaining extent of Saturday Retreat Estate situated in the District of Salisbury measuring One Thousand and Fifty Seven comma three eight one (1057,3810) hectares held under Deed of Transfer 4035/1986 (“the Property”) by the respondent be and is hereby confirmed.
2. The respondent is entitled to full compensation for the compulsory acquisition of its urban land.
3. The manner of compensation shall be as set out in the Memorandum of Agreement entered into between the Government of Zimbabwe and the respondent dated 18 December 2014, a copy of which is annexed to this order as Annexure A.
 - 3.1. The respondent be and is hereby allocated the unoccupied portion of the property measuring 401 hectares.
 - 3.2. The respondent is hereby appointed the sole and exclusive developer of the property defined in the Deed of Settlement measuring 401 hectares.
 - 3.3. The terms and conditions of such appointment shall be governed by the Agreement entered into between Government of Zimbabwe represented by the Ministry of Local Government and Urban Development and the respondent, a copy of which is annexed to this order as Annexure A.

4. The Government of Zimbabwe shall sign all such documents, pass all such instruments, give such instructions and do all things necessary to give effect to this Court order.
5. There shall be no order as to costs.”

Following the consent order, the Deed of Transfer in terms of which the first respondent held the land was endorsed on 18 December 2015 to the effect that it now vests in the President. It is common cause that the appellants became aware of the grant of the court order sought to be rescinded as far back as 2015. The application for rescission of judgment was only filed on 13 December 2019 about 4 years later without seeking condonation.

PROCEEDINGS A QUO

Before the court *a quo* the appellants’ case was that the court *a quo* was misled into granting the consent order and therefore granted the order in error. The error was in the sense that the first respondent was not the owner of the land in question, it having been acquired by the government in 2001 and following such acquisition, it was allocated to the appellants. Further, the appellants have an interest in the land and had to be consulted before the consent order was granted.

In addition, the appellant contended that the consent order was fraudulently obtained in the sense that the first respondent fraudulently misrepresented to the second respondent and the court that it had entered into agreements with them in terms of which the occupants agreed to pay \$4,00 per square metre of land occupied by them. According to the appellants no such agreements were entered into.

The first respondent’s case before the court *a quo* was that the application for rescission of judgment was filed out of time without seeking condonation at the time they had

become aware of the consent order and had thus been complicit for years. Further, the first respondent took the view that the appellants did not have *locus standi* to contest an agreement entered into in settlement of an application for confirmation of compulsory acquisition of urban land and compensation thereof. As they lay a claim through the government, the appellants could not possibly be cited in proceedings brought in the process of acquisition.

Regarding the agreement relating to payment for the land occupied by the appellants' members, the first respondent insisted that indeed it had agreements with individual occupiers. The appellants had been in illegal occupation of the land which was only lawfully acquired in 2014. The first respondent maintained that it had separate arrangements with some of the occupiers who are paying for the land directly to it.

FINDINGS A QUO

The court *a quo* found that the delay of almost 5 years in bringing the application was too long and as such condonation should have been sought giving an acceptable explanation for failure to act expeditiously. It found further that there was need for relative certainty and finality in litigation.

On the aspect of the alleged fraudulent misrepresentation to obtain the consent order, the court *a quo* found that none had been proved in court. Regarding the appellants' *locus standi*, it was the court *a quo*'s finding that none of the appellants were privy to the agreement entered into between the first and second respondents. As such, they had no legal standing to seek a rescission of an agreement they were not party to. As I have already stated, the court *a quo* upheld the points *in limine*.

THE APPEAL

The appellants were aggrieved by the judgment of the court *a quo* and noted an appeal to this Court on four grounds of appeal. They are:

1. The learned judge *a quo* erred at law in failure to dispose of the first point *in limine* by the first respondent.
2. The learned judge *a quo* erred at law in holding that the appellants lacked *locus standi* to apply for rescission of the judgment granted by the court on 13 January 2015.
3. The honourable court erred at law, in so far as it may be taken to have upheld the first point *in limine*, in holding that there was need for the appellants to apply for condonation of the late noting of the application for rescission and that the appellant failed to prove fraud.
4. The honourable lower court erred at law in allowing a judgment obtained through fraudulent means to stand.

The grounds of appeal are inelegantly crafted, they are repetitive and lack clarity and conciseness required by the rules. Be that as it may, only two issues for determination on appeal arise from them. They are:

1. Whether there was a need for the appellants to seek condonation before filing the rescission of judgment application in terms of r 449 of the High Court Rules.
2. Whether the appellants had *locus standi*.

I propose to deal with the issues in turn.

WHETHER CONDONATION SHOULD HAVE BEEN SOUGHT

Mr *Koto* for the appellants submitted that the judgment of the court *a quo* is not clear whether condonation was necessary or not. He submitted that r 449 does not fix any time-frame for bringing the application. To that extent there was no need to seek condonation as it could not be said that the application was out of time.

Per contra, Mr *Hashiti* for the first respondent submitted that the mere fact that r 449 contains no time-frame for the filing of an application made under it is not a licence for bringing the application anytime without seeking condonation. I agree. There appears to exist a misconception among legal practitioners that r 449 provides a gas station for all those who have failed to act timeously to re-fuel and breath life into a cause that has run its course.

It was never the intention of the framers of the rules that there must exist a remedy for eternity. The policy of the law is that there should be legal certainty and finality in the relationship of parties after the lapse of a certain period of time. It is for that reason that society is intolerant to stale claims generally as a result of which a party that fails to enforce a right timeously or within a reasonable time loses the right altogether. See *Ndebele v Ncube* 1992(1) ZLR 288(S) at 290 C-E; *John Conrad Trust v The Federation of Kushanda Pre-Schools Trust & Ors* HH 503/15 at p3 of the cyclostyled judgment.

It ought to be appreciated that r 449 provides for discretionary relief to be granted or refused in the exercise of discretion by a judge or court. The case of *Grantully (Pvt) Ltd & Anor v UDC Ltd* 2000(1) ZLR 361(S) is authority for the proposition that the court may, in the exercise of its discretion, dismiss an application made in terms of r 449 by reason of the inordinate delay in bringing it. At pp365H-366D this Court said:

“Even if the learned judge was wrong in deciding that the judgment granted by MTAMBANENGWE J was not erroneously sought or obtained, 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, r 449 is ‘a procedural step designed to correct expeditiously an obviously wrong judgment or order’: per ERASMUS J in *Bakoven’s* case *supra* at 471 E-F. see also *Firestone South Africa (Pty) Ltd v Genticuro AG supra* at 306 H.

In *First National Bank of Southern Africa Ltd v Van Rensburg NO & Ors; Inre First National Bank of Southern Africa Ltd v Jurgens & Ors* 1994(1) SA 677(T) ELOFF JP (with whom VAN DER WALT and PREISS JJ concurred) stressed the important need to proceed rapidly in applications of this nature. He said at 681 E-G:

‘It is in the interest of justice that there should be relative certainty 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 & Anor v Tshivhase & Anor, Tshivhase & Anor v Tshivhase & 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 appellant 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 the three years referred to.’

I respectfully agree with these observations.” (The underlining is for emphasis)

In my view r 449 is not an open cheque to bring an application for rescission, even where it applies, at any time in the life of a person. It is an expeditious remedy which should be deployed rapidly the moment the party seeking to rely on it becomes aware of the existence of the order. Where, for some reason, the application is not so made, an acceptable explanation must be rendered for failure to act timeously. Such an explanation can only be made in an application for condonation. The court *a quo* cannot be faulted for upholding that preliminary point.

WHETHER THE APPELLANTS HAD LOCUS STANDI

The appellants sought rescission of judgment on the basis that it was induced by fraud and that they should have been consulted before any compromise was reached between

the Government of Zimbabwe and the first respondent. Their interest in the land, so they contended, lay in the sense that the land had long been acquired by the State in 2001 and allocated to them about 2004.

According to the appellants the first respondent had lost any rights in the land upon its acquisition in 2001, with the rights in the land having been transferred to them by the Government. They asserted that the first respondent misled both the Government and the court *a quo* into believing that there existed agreements between it and the appellants when no such agreements were concluded.

A distinction must be drawn between *locus standi* to seek a rescission of judgment in terms of r 449 and the right to overturn a deed of settlement concluded between the government of Zimbabwe and the first respondent. In my view, the former is a procedural issue which can be determined on the preliminary arguments made before the court *a quo*. On the other hand, the latter is a substantive issue going to the merits of the case.

I entertain no doubt that any party affected by the judgment of the court even when not cited in the proceedings has *locus standi* to bring an application for the rescission of the judgment granted in its absence. That is the furthest one can go. As to whether, having made the application for rescission of judgment, the appellants made a case for such rescission, that is an issue going to the merits of the application and not *locus standi* to litigate.

In finding that the appellants had no *locus standi* to rescind the agreement the court *a quo* was deciding the merits of the case. It was unnecessary to do so having upheld the other points taken *in limine*. Our finding in that regard however does not assist the appellants in this

appeal given that the upholding of the other points *in limine* by the court *a quo* cannot be faulted.

Regarding the question of the acquisition of the land, this court settled the issue of the legal effect of a s 5 notice not pursued after being gazetted in the case of *TBIC Investments (Pvt) Ltd & Anor v Mangenje & Ors* SC 13/18. In that case this Court stated that the effect of s 16B(2)(a) of the former Constitution providing that all identified agricultural land vested in the state was to revive, resuscitate and validate the acquisition of all identified agricultural land listed in the 7th Schedule of the then Constitution.

At p7 of the cyclostyled judgment BHUNU JA, writing for the court, stated:

“The language used in s 16(2) of the former Constitution is clear and unambiguous admitting no ambivalent interpretation. The only meaning to be ascribed to the section is that once land is gazetted and listed in Schedule 7 it automatically stands acquired by the State with full title by operation of law. The mere fact that the notice was at one time withdrawn or expired is irrelevant.”

That the land in question was acquired by the State in 2001 does not advance the appellants’ appeal in any way. This is because the case was determined on preliminary points raised by the first respondent and not on the merits. Even the contestation of the agreements allegedly concluded by the first respondent with individual occupiers did not yield any positive results for the appellants.

The first respondent presented evidence, in its opposing affidavit, which the court *a quo* accepted, to the effect that it had concluded agreements with the individual occupiers of the land for them to pay for it directly to the first respondent. This may have annoyed the co-operative societies as they would have wanted the money paid to them. Their annoyance however is of no moment in the administration of justice.

The finding made by the court *a quo* that no fraud was proved was a factual one based on its acceptance that indeed agreements had been made with the individual occupiers. It is well settled that an appellate court will only interfere with the factual findings of the lower court where the decision is irrational to the extent that no sensible court could have made it.

That view was repeated in *Shuro v Chiuraise* SC 20/19 at pp13-14 of the cyclostyled judgment where the following passage appears:

“It is an established tenet of our law that an appellate court should be slow in interfering with the factual findings made by a lower court and that this should happen only where it is clear that the decision of the lower court is irrational, in the sense that no sensible court, seized with the same facts, could have reached such a conclusion In short, an appellate court can only interfere with the findings of a lower tribunal where it is convinced that the findings by the lower court are not supported by the evidence or are otherwise irrational. See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664(S).”

It has not been shown that the findings of the court *a quo* are irrational or that they are not supported by evidence. Quite to the contrary, the court *a quo* considered the evidence and found no fraud as it certainly was not there. No basis for interference has been established.

DISPOSITION

None of the grounds of appeal in terms of which the appeal was motivated have merit. Clearly this is a case of disgruntled illegal land occupiers who are frustrated by the decision taken by the government to intervene and restore order and sanity in the allocation of land for urban settlement.

There is no basis in law for reversing the lawful acquisition of land and the agreement as to compensation which resulted in the consent order sought to be impugned. The appeal is lacking in merit. There is no reason why the costs should not follow the event.

Accordingly, it be and is hereby ordered that the appeal is dismissed with costs.

BHUNU JA: I agree

KUDYA AJA: I agree

Koto & Company, for the appellants

Nyawo Ruzive Legal Practice, for the 1st respondent