

SUSAN CHAWOTA
and
DAVID TINOTENDA CHAWOTA
versus
LL PROMOTIONS (PVT) LIMITED
and
LANDTON TAPIWA CHAWOTA
and
DAVID CHAWOTA
and
CBZ BANK OF ZIMBABWE
and
THE SHERIFF N.O.
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 28 November 2017 and 22 February 2018

Opposed matter

Ms *L Gaba*, for the applicants
C Mukome, for the 1st – 3rd respondents
Ms *M Mangwiro*, for the 4th respondent

MWAYERA J: On 28 November 2017 I gave an *extempore* judgment wherein I dismissed the application with costs. The applicants have requested for the written reasons for my disposition. The reasons for judgment are tabled herein.

The applicants approached the court seeking for rescission of judgment under case HC 11071/16. The application for rescission was mounted in terms of r 449 (1) of the High Court Rules, 1971. Rule 449 (1) (a) provides that:

“...the court or a judge may, in addition to any 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 ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission, but only to the extent of such ambiguity error or omission, or
- (c) that was granted as a result of a mistake common to the parties.

2. The court or judge shall not make any order correcting or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed.”

The brief background to the order which the applicants sought rescission is as follows. The first respondent LL Promotions represented by the third respondent Langton Tapiwa Chawota borrowed money from the fourth respondent CBZ Bank. As security for the loan obtained in 2014, the second respondent mortgaged property stand No. 1589 Prospect Township of stand 1346 Prospect Township. Pursuant to the registration of the bond, the respondents failed to service the loan. The parties negotiated and came up with a deed of settlement which occasioned the consent order in HC 11071/16. After the registration of the mortgage bond, the first applicant and the second respondent obtained a divorce order under HC 912/15. As part of proprietary settlement, the second respondent donated his half share in the matrimonial property, to the first applicant.

In applications for rescission of judgment under r 449 (1) (a) the requirements are different from rescission under r 63 which requires the court before setting aside the judgment to be satisfied that there is good and sufficient cause and that the party so applying was not in wilful default. With rescission under r 449 (1) the court has to consider the following requirements

1. That the judgment was erroneously sought or granted.
2. The judgment was granted in the absence of the applicant.
3. The applicant's rights of interest are affected by the judgment.

These factors are to be considered under pinned on whether or not the judgment was issued in error. See *Banda v Pitluk* 1993 (3) ZLR 60 and also *Moonlight Provident (Pvt) Ltd v Sebastian and Others* HB 254/16.

In the case *Zindi v Zimbabwe Farmers Development Company Limited* HH 309-15 it was stated as follows at p 2:

“Application for rescission of judgment in terms of r 449 as discerned from the mere wording of the rule has a different requirement for consideration. The court has to look at whether or not the judgment which is sought to be rescinded was erroneously granted in the absence of any party affected. It gives further requirement on whether or not there was an ambiguity and whether or not the judgment was granted as a result of a mistake. The rule does not seek to draw the attention of the court to “good and sufficient cause” as outlined in r 63, it is my considered view that the distinction in application for rescission of judgment in terms of r 63 and r 449 cannot be under played. It is quite central for determination of the present case. It is apparent the requirements which came into consideration are different. In r 449 (1) the court has to consider whether or not a relevant fact which ought to have been placed before it. The court need not go into whether or not there is good and sufficient cause once it is established that a certain fact was not brought to the attention of the Judge at the time of grant of order or

judgment then that is sufficient and the end of the matter in an apition to correct rescind or vary any judgments order in terms of r 449.” (underlining my emphasis)

In the present case, the applicant cannot seek to rescind a judgment which was issued as the applicant together with her then husband the third respondent, facilitated registration of a mortgage bonds in favour of the second respondent CBZ in 2009. This information was before the court when the order sought to be rescinded was issued. The order was not sought or granted in error.

The loan and mortgaging of the property as security occurred before the divorce of the first applicant and respondent. Both parties signed to facilitate the registration of the mortgage bond. The applicant consented to, and facilitated the registration of mortgage bond so as to secure the loan. This was before the divorce of the parties. Given the sequence of events and that the applicant assisted in facilitating the registration of the bond, the consequences of failure to service the loan would lead to the obvious execution of judgment and the mortgaged property would fall for execution. The divorce agreement occurred after the loan agreement. Further, the order that was obtained declaring the property executable was by consent of the parties. The mortgage bond was registered on 29 July 2009, consequent to failure to pay, the property would be executable.

In the absence of substantial and satisfactory evidence, the applicant cannot just allege her signature was forged. In the circumstances of this case, the judgment which was entered by consent cannot be said to have been erroneously made. It is a clear judgment which follows the natural sequence of events, the failure to service a loan, followed by execution of the mortgaged property offered in security by the parties. There was no mistake as regards what would follow upon registering a mortgage bond to secure a loan in the event of failure to service the loan. The applicant was aware that the fourth applicant would enforce the order of execution in the event of failure to service the loan. The mortgage bond was lawfully registered and it was never challenged by the applicant. Given the knowledge the applicant had of the mortgage bond, one cannot conclude that the order sanctioning that the mortgaged property was executable was erroneous. The alleged fraud was just a bold assertion.

The applicant was aware of the mortgage bond. The bank communicated with her on intended execution but she did not seek to be joined. The applicant’s conduct amounted to waiver. In the circumstances the requirements of r 449 have not been met and thus the application for rescission of judgment ought to fail.

Accordingly the application is dismissed with costs.

Takawira Law Chambers, applicant's legal practitioners

M.C. Mukome, 1st-3rd respondent's legal practitioners

Gambe Legal practitioners, 4th respondent's legal practitioners