SAVE SAFARIS (PVT) LTD

Versus

H. J. VOSTER (PVT) LTD

And

PARKS AND WILDLFIFE MANAGEMENT AUTHORITY

And

**MINISTER OF LANDS, AGRICULTURE &
RURAL RESETTLEMENT N.O.**

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 29 JUNE 2022 & 20 JULY 2023

Opposed application

J. Mugova for the applicant
B. Dube for the 1st respondent
No appearance for the 2nd respondent
No appearance for the 3rd respondent

TAKUVA J: This is an application for rescission of a court order. The applicant has approached this court in terms of Order 49 Rule 44 of the High Court Rules, 1991, seeking rescission of the court order under HC 3183/17 and court order under HC 2031/18, the latter being a variation and amendment of the former.

The 1st respondent is opposed to the relief sought. The 2nd and 3rd respondents have not filed any papers in this matter, hence they are barred and not before the court.

Background facts

Sometime in 2005 the land in dispute was acquired by the State in terms of section 16B (4) of the former Constitution of Zimbabwe. It was subsequently ceded to the 2nd respondent for the protection and management of wildlife therein. Applicant and 2nd respondent entered into a five (5) year lease agreement wherein applicant would occupy Lot 4 of Devuli Ranch held under Deed of Transfer 5251/92 and conduct hunting business on it. This lease agreement was entered into on 13th December 2017, a week after 1st respondent had issued summons in

HC 3183/17. In that case, 1st respondent was the plaintiff, 2nd respondent was the 1st defendant and 3rd respondent was the 2nd defendant. The applicant was not a party to these proceedings.

The question before the court in HC 3183/17 was whether the land in question had been acquired or not. The 2nd respondent filed a notice of opposition and a plea. On the other hand, the 3rd respondent did not oppose the matter. The 1st respondent then withdrew its case against the 2nd respondent and proceeded to apply for a default judgment against the 3rd respondent. A default judgment was granted on 19th April 2018. In that judgment the land in dispute was described as "Mapati Ranch under Deed of Transfer 4152/12". This description was incorrect as the title deed number should have read "5251/92".

As a result of this error, the 1st respondent filed an application under HC 2031/18 to vary or amend the order in HC 3183/17. MAKONESE J in chambers issued the following order:

(a) The order under HC 3183/17 granted on the 19th April 2018 by the Hon. Justice MATHONSI be varied or amended to read as follows;

1. An order that the 2nd defendant or his office be permanently interdicted from giving any rights to a third party (whether lease or sale) in violation of the plaintiff's title of the Mapari Ranch under Deed of Transfer 5251/92.

2. An order declaring null and void any land acquisition, encumbrance by the government or 2nd defendant's office and Mapari Ranch held under Deed of Transfer 5251/92 on account of it being indigenously owned or not necessary for resettlement.

3. There be no order as to costs for this application."

This order was granted on 24 July 2018.

For completeness' sake, MATHONSI J's order had been granted four months earlier on 19th April 2018. The order reads as follows;

"1. An order that the 2nd defendant or his office be permanently interdicted from giving any rights to a third party whether lease or sale) in violation of the plaintiff's title of the Mapari Ranch under Deed of Transfer 4152/92.

2. An order declaring null and void any land acquisition, encumbrance by the government or 2nd defendant's office over Mapari Ranch held under Deed of Transfer 4152/92 on account of it being indigenously owned or not necessary for resettlement.

3. There be no order as to costs."

Unhappy with the orders the 2nd respondent filed an application for rescission in terms of Rule 449 of the High Court Rules 1971. This was under HC 2105/19. The court found that the 2nd respondent being the party that had given rights of lease to the applicant had no *locus standi* to rescind the court orders. This application was dismissed on 11th May 2020. Aggrieved again 2nd respondent appealed to the Supreme Court under SCB 40/20. The appeal was dismissed.

The 3rd respondent filed an application for rescission of judgment in terms of Rule 449 under HC 2208/19. For unknown reasons, the 3rd respondent abandoned this application. It should be noted that it was after 2nd and 3rd respondents' applications had failed that 1st respondent filed summons to evict applicant from the property under HC 1504/19.

The summons matter under HC 1504/19 was set down for trial on 22nd of June 2021. On the day of trial, the applicant suddenly woke up from its slumber and filed this application. The 1st respondent opposed this application on a number of preliminary points.

Firstly, the 1st respondent contended that the applicant lacks *locus standi in judicio* to pursue this matter. Secondly, it was argued that the matter is *res judicata.* Thirdly, it was submitted that the application was not brought within a reasonable time.

Locus standi in judicio

The 1st respondent's case is that applicant has no *locus standi in judicio* to pursue this matter in that at law all land rests with the 3rd respondent. Applicant or 2nd respondent have no ownership rights in the land in question. As a result, the only party that can or could have brought such an application in the context of this case, is the 3rd respondent. It was further contented that this court has already dealt with a similar application for rescission under the same rule brought by the 2nd respondent under case number HC 2105/19 and in that application, the court determined that the 2nd respondent (being the one that granted the lease to the

applicant) had no *locus standi* at all to bring this application and for that reason, it follows that the applicant also has no requisite *locus standi.*

According to the applicant a full explanation and narration of the history of the matters from HC 3183/17 up to the filing of this application will assist in capturing fully its argument.

1. In case umber HC 3183/17, the 1st respondent issued summons against the 2nd and 3rd respondent in December 2017. Specifically, summons were issued on 6 December 2017. The applicant entered into a lease agreement on the 13th December with the 2nd respondent. Quite clearly from the commencement of the matter, the applicant could not have been party to the proceedings. The 1st respondent realized that the 2nd respondent could not speak into the subject matter of the dispute being land acquisition and proceeded to withdraw against the 2nd respondent. After that, it obtained an order from the court per MATHONSI J (as he then was). The order was granted against the 3rd respondent.

2. After obtaining the order the 1st respondent realized a mistake on the Title Deed number. An application for variation or amendment of the order was filed under HC 2034/18. The order was granted per MAKONESE J. The 2nd and 3rd respondents then filed HC 2515/18 seeking condonation to rescind the orders. The application was placed before MOYO J who dismissed it and 2nd and 3rd respondents did not appeal the order.

3. The 1st respondent then filed summons to evict the applicant from the property under HC 1504/19. Second and third respondents filed independent applications for rescission of judgment in terms of Rule 449 of the old rules of this court under HC 2105/19 and HC 2203/19 respectively. They cited each other in both applications. Under HC 2105/19 brought by the 2nd respondent, the 3rd respondent did not file any papers and the matter was heard as between 1st and 2nd respondents only. The matter was dismissed on the grounds that the 2nd respondent did not have the requisite *locus standi* and that the matter was an abuse of court process by the 2nd and 3rd respondents After this judgment, 3rd respondent abandoned HC 2208/19.

4. Aggrieved by MAKONESE J's judgment under HC 2105/19, the 2nd respondent appealed to the Supreme Court under SCB 40/21. The appeal was dismissed and the summons matter under HC 1504/19 for eviction of the applicant was set down for trial on 22 June 2021. On the morning of the trial, the applicant then brought this application and used it to stay the proceedings of the trial. While all these cases were being filed, heard and dismissed since 2017 to date, the applicant was aware of the raging disputes. In fact, the applicant admits in its papers before this court that it knew of the court orders shortly after they were granted – para 35 of the founding affidavit.

5. It was submitted that despite such knowledge, the applicant sat on its laurels and did nothing while the matters were being determined only to bring the present application on the day the case of its eviction was set for trial. The question is why did the applicant not apply for joinder in terms of the rules? Applicant should have shown that it had a real and substantial interest in the matter from the onset. It did not. It is common cause that the applicant is a lease holder over the property that was at issue in HC 3183/17 and HC 2031/18 and by extension to the present case, the lease having been granted to it by the 2nd respondent. Meanwhile the 2nd respondent has been found under HC 2105/19 and by Supreme Court under SCB 40/20 not to have *locus standi* to bring a similar court application under the same rule.

6. The applicant is not the acquiring authority and has no rights in acquisition and allocation of State land. It follows that the applicant's position is worse than that of the 2nd respondent in that it has no direct relationship with the acquiring authority being the 3rd respondent herein.

Consequently, applicant just like 2nd respondent does not have *locus standi* to speak into issues of acquisition and allocation of acquired land or challenge thereof. Therefore, the lease agreement cannot at law be said to be giving the applicant *locus standi* in case numbers HC 3183/17 and HC 2031/18.

Applicant's points *in limine*

At the hearing the applicant abandoned the points *in limine*. On the other hand, the applicant has maintained that it has *locus standi* to make the present application for the following reasons;

1. The court will be slow indeed to deny *locus standi* to an applicant who, seriously allege that a state of affairs exists within the court's area of jurisdiction, "whereunder a serious dent to the revolution has been, about to be, and will continue to be unlawfully made."

2. The court should not or circumscribe the class of persons who may request the relief for the "protection of the revolution."

3. The power created by rule 449 is discretionary and should be used to achieve justice.

4. As a party that was in occupation of the land in question, it must have been cited.

5. Applicant has rights to carry out hunting activities on the ground in terms of section 37 of the Parks and Wildlife Management Act [Chapter 20:14].

6. Applicant stands to be evicted on the strength of a court order that was fraudulently obtained.

7. Further, applicant stands to lose its US$250 000,00 investment which it paid when it concluded the lease agreement with the 2nd respondent.

(my emphasis)

The law

The test of *locus standi* was stated in *Matambanadzo* v *Goven* 2004 (1) ZLR 399 (S) as whether in fact an applicant 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." (my emphasis)

In casu, the subject matter of the judgments under HC 3183/17 and HC 2031/18 revolves around ownership of the piece of land in question. Specifically the issue was whether

or not the land was acquired by the State. In my view, the applicant did not have any legal interest in the determination of this issue. One wonders what sort of substantial submissions applicant could have added to those advanced by the 2nd and 3rd respondents regarding acquisition of land in terms of the law. It is common cause that applicant was a lessee occupying the land on certain terms and conditions. The facts of this case reveal that the 3rd respondent who is the acquiring authority presented his case and failed. The same applies to the 2nd respondent whose case failed on the ground that it lacked *locus standi* to apply for rescission of the judgment. See HC 2105/19. Aggrieved, the 2nd respondent unsuccessfully appealed to the Supreme Court – see SCB 40/20.

In my view, the applicant is simply resurrecting these long buried cases. I say so because the cause of action under HC 3183/17 did not arise from the terms and conditions of the lease agreement. Applicant must find a cause of action that arises from the lease agreement. To demonstrate that the applicant's lease was not affected, the applicant continued hunting and enjoying financial interests while the battle over ownership was raging in the court. Applicant was aware of these battles.

While dealing with a similar rescission application by 2nd respondent under HC 2105/19 MAKONESE J said *inter alia:*

> "In terms of our law, all rights in the acquisition and allocation of State land vests with the 2nd respondent (3rd respondent herein). The applicant is Parks and Wildlife Management Authority whose rights and obligations are regulated by statute. Applicant does not have any legal or residual rights in the allocation and distribution of land belonging to the State … The applicant in these proceedings clearly has no *locus standi in judicio* to institute legal action in this matter …"

These comments apply with equal force to the applicant in that the lessor is Parks and Wildlife Management (which was found to lack *locus standi*). The applicant as the lessee, cannot have better rights than those enjoyed by the lessor who had a direct relationship with the acquiring authority. I take the view that the lease agreement cannot at law be said to be giving the applicant *locus standi* in case numbers HC 3183/17 and HC 2031/18.

In the result I find that the applicant has no *locus standi* to bring the matter to this court.

Assuming I am wrong, there is another point *in limine* that also has merit in my view. The point is that such an application has to be made within a reasonable time. There is no prescribed time limit under r449. However, it is trite that such an application must be made within a reasonable time. See *Traster (Pvt) Ltd t/a Takataka Plant Hire* vs *Golden Ribbon Plant Hire (Pvt) Ltd* HB-4-18 where MATHONSI J (as he then was) said:

> "I have already made reference to the fact that there must be finality in litigation. That cannot be achieved were the process of seeking rescission allowed to be adulterated in that way. It is probably for that reason that rule 63 (1), allows a party to seek rescission of judgment within one month after having knowledge of the judgment. Rule 449 is silent as to the time frame for making an application <u>but surely that does not mean that the application can be made at any time. It must be within a reasonable time, especially in a case such as the present where the applicant has had knowledge of the judgment for well over two years."</u> (my emphasis)

In casu, the applicant had knowledge of the judgment/orders shortly after they were granted. This is common cause – see para 35 of applicant's founding affidavit. This application was filed on the 22nd of June 2021. The order under HC 3138/18 was granted in 2018. Over three years have lapsed while applicant with full knowledge of the order did nothing to have it set aside. In order to evade the consequences of this unduly delay the applicant argued that the delay was not for 3 years but 7 months. The intention being that the relevant period should be after the Supreme Court dismissed the 2nd respondent's appeal. I disagree for the reason that there was no legal impediment to an independent and separate application for rescission. The crux of the matter is that the applicant became aware of the order shortly after it had been granted in 2018 and chose not to do anything until three years later when an eviction summons was served. When the applicant had noticed that the 2nd and 3rd respondents had failed at all intervals to rescind the said orders at issue, it resorted to rule 449 claiming that it is an interested party citing all the parties that argued and exhausted their matters in the High Court and Supreme Court.

It is the policy of the law that there should be finality in litigation. See remarks by MCNALLY J in *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S) at 290C-E. In *Traster (supra)* the court said;

"Indeed the point being made is that while the rules provide for three circumstances for the making of a rescission judgment, that is in terms of rule 56, rule 63 and rule 449, it cannot be said that the framers of the rules by that meant that a party is allowed to spend years and years of skipping from one rule to the other, kangaroo style, in an attempt to have the same judgment rescinded." (my emphasis). The conduct of the three (namely, applicant, 2nd respondent and 3rd respondents fits squarely into the situation described in the *Traster* case *supra*.

I agree with counsel for the 1st respondent when he submitted that;

"In essence the applicant knows very well that it sat on its laurels while matters were being argued and is before the court fighting a proxy war on behalf of the 2nd and 3rd respondents that have failed … While these proceedings were proceeding in court, the applicant was fully aware but sat back and did nothing. The applicant only rises and screams rescission in terms of rule 449 when the 2nd and 3rd respondents," have exhausted all available avenues. The applicant comes to court presenting the same arguments that were presented by the 2nd and 3rd respondents.

Summons for eviction roused the applicant to act.

In the result I take the view that this point *in limine* has merit in that applicant failed to bring this application within a reasonable time even assuming it was brought after seven (7) months. No reasonable explanation for the delay was proffered.

There is one other matter I must comment on. It is that this court is entitled to examine its own records. In this regard, I have looked at HC 1504/19, a summons matter for the eviction of the applicant from the farm in question. The 5 year lease agreement between applicant and the 2nd respondent expired in December 2022. The court granted the eviction order against the applicant. As it stands applicant has no valid lease over the property. It is not in occupation of the property. One wonders what applicant intends to do when the order under HC 3183/18 is rescinded.

Disposition

The application for rescission is dismissed with costs.

Mlotshwa & Maguwudze, applicant's legal practitioners
Mabundu, Ndlovu Law Chambers 1st respondent's legal practitioners