MONICA SIBINDI
and
MATRMON SIBIBDI TRUST
versus
HERMISH KATSANDE
and
MARTIN SIBINDI
and
SHERIFF OF THE HIGH COURT
and
REGISTRAR OF DEEDS
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 7, 8, February & 2 June 2023

Urgent Chamber Application

J S Mandizha with N C Zhou, for the applicant
S M Bwanya, for 1st respondent.

CHITAPI J: When the parties appeared before me to present their arguments, they agreed that I should adopt a rolled up approach in terms of which the parties would argue the preliminary points and merits at the same time whereafter in judgment, I would consider the preliminary points first and if I am persuaded to uphold them, then I give an appropriate order. If the points *in limine* fail, I would then proceed to give judgment on the merits as well.

The applicants and the first and or second respondents are embroiled in an ownership dispute over land called the Remainder of Lot 12 of Tynwald, Harare held under deed of transfer No 4209/86. There have been and still remain various litigations between the parties concerning the aforesaid piece of land. I will concern myself mostly with case No HC 6744 in setting out in brief the background to this urgent application.

On 16 November, 2022 by default judgment, TAGU J (may his soul rest in peace) made an order in favour of the first respondent herein:

The parties were listed as follows:

Hermish Katsande (in his capacity as the Execution Dative of Estate late Denford Katsande) -applicant

Martin Sibindi- 1st respondent

The Sheriff of Zimbabwe N.O -2nd respondent

The Registrar of Deeds N.O- 3rd respondent

Master of the High Court N.O - 4th respondent

The two applicants in this application were not parties to the litigation in case No HC 6747/22. The order granted in default read as follows:

"IT IS ORDERED THAT

1. The application for default judgment be and hereby granted
2. The 1st respondent be and is hereby ordered to effect transfer of title to the plaintiff of land amounting to approximately 7.3 hectares held under deed of transfer number 4209/86 remainder Lot 12 Tynwald. Harare, which at the time of the sale, the residential stands were identifiable and known as land shares3, 7, 8, 9, 23, 24, 28, 28A, 43, 44, 97, 98, 99, 100, 146, 147, 148, 149, 150 and 151.
3. The respondent is hereby directed to sign all the necessary and relevant transfer of papers in respect of the property mentioned in paragraph (a) and to comply with paragraph (a) above within (7) days of handing down of the judgment in respect of the matter.
4. The 2nd respondent or his lawful deputy is hereby ordered to sign all the necessary and relevant transfer papers on the 1st defendant behalf and to do anything necessary to effect transfer in the event of 1st defendant failing to comply with paragraph (a) and (b)."

The applicants filed an application case No HC 8411/22 on 13 December 2022 for rescission of the default judgment granted in HC 6447/22. The application HC 8411/22 is stated to have made in terms of rule 29(1)(a) of the High Court Rules 2021 in terms of which the court may rescind a default judgment granted in error. The applicants averred in case No HC 6747/22 the record of which I perused in order to appreciate the nature of the rescission application, that the first respondent did not cite them in case No HC 6747/22 yet he knew of their interest since he had previously cited them as respondents in case No HC 9355/19 where the same relief had been

claimed. Case No HC 9355/19 was abandoned because the first respondent as applicant did not at the time of instuting the case have letters of administration of the Estate of his late father. Denford Katsande which he represents. On filing a fresh application under case No HC 6747/2 the first respondent did not include the applicants as respondent. Whether or not the omission grounds an error as envisaged in r 29(1)(a) will be for the court hearing the application for rescission of the judgment to answer. My views remain treasured in me.

What became of relevant interest to me was to note that despite the opposing affidavit in the rescission of judgment case No HC 8411/22 having been filed on 6 January 2023, the application has not been progressed since then. The record contains a letter dated 24 January 2023 from the applicant's legal practitioners in which they were protesting the non-joinder of the applicants to case No HC 6747/22. Beyond that, no further action to prosecute the rescission of judgment was taken. The applicants proceeded to file the current application HC 788/23 under an urgent certificate on 3 February 2023. In so far as case No HC 8411/22 is concerned, the applicants in their affidavits filed in the current case did not apart from stating the existence of the rescission application, explain its progression to finalization and why it appears to have been abandoned by inaction. I shall revert to this later when I answer the issue of urgency raised by the first respondent as a preliminary objection to this application.

The relevant background facts which place the matter in context are simple. They are outlined in case No HC 8411/22. The immovable property at play was owned by the Denford Katsande. The first respondent was appointed as the executor of the Estate of the late Denford Katsande who was the applicant's father. The property was sold by the second respondent who was married to the first applicant. The deed of transfer to the property being No 4209/86 was registered in the name of the first respondent. The applicants claim that the property belonged to the second respondent to whom the property was donated by the first respondent. The second respondent is a Family Trust formed for the benefit of the first applicant, second respondent and their three children. The applicants aver that the property in issue was by virtue of the judgment of MANZUNZU J in the case *Monica Sibindi* v *Martin Sibindi* HH 704/19 declared to be the property of the second plaintiff. The first respondent still challenges the ownership claim on the basis that the property still remains in the name of the second respondent. I do not answer the parties contentions at this stage. I should however note that this same court also ordered transfer of the

property to the first respondent and the effect of the conflicting judgments, if they are found to conflict, is a matter to be addressed on determining the rescission application.

In casu, after considering the papers filed of record the parties arguments, I address the issue of urgency. When the applicants filed the application, they sought in their provisional order a similar and interim final orders that execution of the judgment in case No HC 67444/22 that be stayed pending the filing and determination of an application for a declaratur on ownership of the disputed property. They subsequently filed amended order in terms of which they now sought a stay of execution pending the determination of an application for a declaratur filed under case No HC 873/23. This application had been filed on 3 February 2023. The initial hearing was held on 7 February 2023. The applicants did not indicate that they were in the process of preparing and filing a declarataur. On 7 February 2023 the first respondent sought a postponement to 8 February 2023 to enable him to file his opposing papers. On 8 February 2023, the applicants sought a postponement to study the opposing papers which they had been served with in the morning. Again no indication was made that there was under preparation an application for a declaratur. The hearing was postponed to 9 February 2023 when the applicants handed over the bar an answering affidavit filed on 8 February 2023 without the leave of the court. The answering affidavit introduced the existence of case No HC 873/23as well as the amended provisional order. Although the amended draft order was allowed after the objections raised by the first respondent's counsel were abandoned, the manner in which the applicants have gone about prosecuting their application does not escape scrutiny.

Dealing with the urgency objection, I am inclined to agree that this application does not merit being accorded urgency hearing status. The applicants have not acted with any urgency in dealing with the rescission application which they filed in case No HC 8411/22. When a party is faced with a default judgment granted against it and that party feels adversely affected and seeks to have the court set the default judgment aside, that party must act with noticeable urgency to have the judgment rescinded. Rule 29 for example grants a period of 30 days from the date that the party against whom a default judgment has been granted has knowledge of the judgment to file for rescission. Time is of the essence therefore in terms of this rule.

The applicants *in casu* seek rescission of the default judgment in terms of r 29(1)(a). The order provides as follows:

"Correction, variation and rescission of judgment and orders

29(1) The court or a judge way, in addition to my other powers it or he or she may have; on its own initiative or upon application of any affected party, correct rescind or vary-

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby ; or

(b) ……..(c)……."

The principles which inform the court whether a matter is urgent or not are well trodden. In the case of *Gumbo* v *Porticullis (Pvt) Ltd* SC 360, the now Deputy Chief Justice (then as JA) GWAUNZA JA re-affirmed the authority of the case of *Kuvarega* v Registrar *General & Anor* 1998 (1) ZLR 188 and quoted from p 193 F-G where it is stated:-

> "What constitutes urgency is not the imminent arrival of the day of reckoning. A matter is urgent if at the time the need to act arises, the matter cannot wait. Urgency which sterms from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules."

The main relief or remedy that will protect the applicants rights is the remedy of rescission. It is that remedy of having the rescission application swiftly determined which ought to have been pursued with urgency. Upon filing that application the applicants ought to have at the same time sought an interim order to suspend the operation of the order or judgment whose rescission is sought unless they had obtained a prior undertaking by the party in whose favour judgment was granted to mutually hold over execution. Since the filing of the application for rescission of default judgment does not have the effect of staying the judgment whose rescission is sought, the judgment remains extant and executable. Where the applicant does not seek an immediate stay of execution and instead only comes to court on an urgent basis because the holder of the judgment has taken steps to execute the order or judgment, which that party is entitled to at law, the urgency of coming to court to seek a stay becomes self-created.

The applicants as in this a case deliberately did not seek a stay at the time that the judgments of TAGU J in case No HC 6744/22 came to their attention. They had no assurance from the first respondent that the execution of the order or judgment would be stayed. They waited for the obvious and expected to happen and then rushed to court. The court cannot under the circumstances come to the aid of the applicants and grant the case an urgent hearing status where

the applicants sat on their laurels and waited for doomsday to come before being jostled from their slumber by acts of executing the judgment which was and is still extant. The non-prosecution of the rescission of judgment application is a further downside of their claim to urgency. In my view, where a party affected by a default judgment files a rescission application but does not prosecute it diligently and with speed but proceeds about it lackadaisically, it has itself to blame if the party in whose favour the rescission default judgment was granted executes on it in the face of the pending rescission application where execution is put into effect, urgency cannot arise from such execution. Urgency should not available to a litigant for the asking. The applicant in an application for rescission of default judgment must show urgency of action from the time the applicant becomes aware of the existence of the judgment

The applicants averred in para 19-2 of the founding affidavit as follows in averring harm and prejudice:

> "19-2 Moreover the land held under D/T 4209/86 constitutes the second applicant's most valuable property as it is over 30 hectares. The property has already been developed, subdivided and sold to third parties. Should execution be allowed to proceed, the prejudice to three applicants is irreparable and cannot be quantified."

If the land has already been dissipated, then execution has already taken place at least in part. The affected persons who have bought the land are not cited. Rule 29(3) of the High Court Rules provide that:-

> "(3) The court or judge shall not make any order correcting, rescinding or varying on an order of judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

Whilst it not my function to determine the rescission of judgment application. I am entitled upon reference to the pleadings in that case (see *Mhungu* v *Mhindi* 1986(2) ZLR 17 (SC) to note that the interested parties are not cited therein as they are similarly not cited herein. A defective urgent application cannot be enrolled on the urgent roll until corrected and will be struck off the roll thus losing its urgent sting.

The import of the test for urgency in this case must therefore begin and end with the consideration whether or not the applicant can obtain redress in due course if execution is not stayed. The applicant should convince the court on a balance of probabilities that the courts

immediate intervention is required and that should the court not intervene immediately, the relief sought if subsequently granted will not be capable of providing the protection needed. See *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZRL 188 (HC). The applicants can still vindicate their land because once they prove ownership and that they did not alieviate their land, then they can vindicate it from any person holding it illegally. If the second respondent had no legal right to sell the property, a fact which the applicants say they can prove easily, then the sales to third parties will be invalid and the property can be recovered by the true owners. It is a trite principle of law that if an act is void it is a nullity and no rights arise from it see *Macfoy* v *United Africa Company Limited* (1961) 3 All ER 1169 (PC). Further it is also a principle of law that no legal rights flow from a fraud. If the second respondent had no right to alleviate the land to the first respondent's father, then the sale was a fraud. In the case of *Katirawa* v *Katirawa & Others* HH 58/07. MAKARAU JP (as she was then was) stated as follows at p 5 of the cyclostyled judgment.

> "…Nothing legal can flow from a fraud. His appointment was null and *void ab initio* on account of fraud. It is as if it was never made. It is a nothing and upon which nothing of consequence can hang."

It follows in my view that if the applicants as they allege can prove title to the property, they cannot suffer irreparable or irreversible harm as they state because they can vindicate their property back. Immovable property is not perishable.

I briefly comment on case No HC 873/23 which was filed by the applicants in the course of the hearing. There is no explanation as to why it was not filed upon the filing of the urgent application. The applicants seek a declaration that where a court has granted relief in relation to a non-existent property, then there can be no execution upon the nonexistent properties. There is with respect nothing requiring a declaration on this as it is an elementary issue of law. The necessity for case No HC 873/23 is not clear to me because should rescission be granted, the applicants will defend case No HC 6744/22 and in their defence they can make counter claims or seek the declaration separately filed in case No HC 873/23. Significantly however, case No HC 873/23 cannot also anchor an urgent application because it deals with matters which the applicants were aware of all along from the time that they knew of judgment HC 6744/23.

This application does not in my view pass the urgency criteria and must be struck off the roll of urgent applications. The only issue which remains is that of costs. Costs are in the discretion

of the court and generally follow the event. Wasted costs have been incurred by the first respondent having to urgently defend this application when it is not urgent and the applicants lacking urgency in asserting their rights by not vigorously pursuing the rescission of judgment case No HC 6744/22. There is no reason to depart from the general rule on costs. Counsel for the applicants did not make submissions in relation to costs in the event that the application was adjudged not urgent.

In the result, IT IS ORDERED THAT:

1. The application is not urgent
2. The application be and is hereby struck off the roll of urgent matters with wasted costs of the first respondent to be paid by the applicants, jointly and severally, the one paying , the other to be absolved.

Mandizha & Company, applicant's legal practitioners
Jiti Law Chambers, first respondent's legal practitioners