GIGEN HAPPI INVESTMENTS
versus
TRANSACTION PAYMENT SOLUTIONS

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 19 September 2013 & 18 December 2013.

Ms P.C Paul, for the applicant
Advocate T. Mpofu, for the respondent

MTSHIYA J: Through a Chamber Application filed on 3 April 2011 the respondent obtained the following default judgement:

"IT IS ORDERED THAT:

1. The Defendants jointly and severally the one paying the other to be absolved pay the sum of US$ 402 271-87 with 4% interest per annum from the 1st August 2010 to date of full payment.
2. An order that the immovable property being Subdivision A of Lot 14 of Subdivision B of Jarvis and Shorts Plot of Avondale situate in the District of Salisbury be declared specially executable.
3. The Defendants jointly and severally the one paying the other to be absolved, pay costs of suit on an attorney and client scale.
4. The Defendants jointly and severally the one paying the other to be absolved pay collection commission in terms of the Law Society Tariff."

The above order was granted on 29 April 2011. The respondents had applied for same as follows:-

"1. The summons having been issued on 3 March 2011.
2. The summons and declaration having been served on the first to third Defendants on the 14th of March 2011 (Annexure 'A')
3. The Defendants having failed to enter an appearance to defend within the time in terms of the Rules of this Honourable Court.
   The defendants are therefore barred in terms of the Rules of this Honourable Court. Judgement may be entered against the Defendants as claimed in summons."

Indeed as already indicated, judgement was granted in terms of the prayer in the summons.

This application was filed on 16 May 2012 in order for this court to correct its default judgement of 29 April 2011 in terms of r 499 of the Rules of the High Court 1971. The said rule provides as follows:

> ‘‘Correction, Variation and Rescission of Judgements and Orders
> (1) The court or judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgement or order –
> (a) That was erroneously sought or erroneously granted in the absence of any party affected thereby; or
> (b) In which there is an ambiguity or a patent or error or omission, but only to the extent of such ambiguity, error or omission; or
> (c) That was granted as the result of a mistake common to the parties.
> (2) The court or a judge shall not make any order correcting, rescinding or varying a judgement or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed.”

This application is from a party that was not cited in the default judgement to be corrected and is being brought a year after the judgement was granted. There is no explanation given.

In its founding affidavit, the applicant, through its director Genevieve Happi Kamseu, who is the wife of the third defendant in the main action states, in part, as follows:-

> ‘2) That on the 29th day OF April 2011 Respondent obtained a default judgement against E-Top Up (Pvt) Ltd, Thomas Mutasa and Gilbert Happi for payment of the sum of $402 271.87 together with interest and costs. There was also an order that sub-division A of Lot 14 of sub-division B of Jarvis and Shorts Plot be declared specifically executable. The principle debtor was E-Top Up (Pvt) Ltd and the other Defendants were sued by virtue of suretiship that they had issued.
>
> 3) That my company was not party to that action and although Respondent maintains that Applicant was also a surety, no amount was claimed from my company and as stated above my company was not a party to that action and was not served with any papers.
>
> 4) In para 9 of the declaration to that summons it was stated as follows “As security for the repayment of the debt the Defendants registered a first mortgage bond over Sub-division A of Lot 14 of Sub-division B of Jarvis and Shorts Plot of Avondale situate in the District of Salisbury and held under deed of transfer No 11393/02 dated the 8th of October 2002.’’
>
> 5) The clear implication of this paragraph was that the property belonged to the Defendants or one or more of them and that they one or more of them held the property under the said Deed of transfer.

6) These implied averments were to the knowledge of the respondent false in that the property belonged to my company and not to any of the defendants in case No 2462/11 and none of the defendants had passed a mortgage bond over the property in favour of respondent.

7) In the circumstances the court was mislead into granting the declaratory order and the court would not have done so if it had known that the property belonged to a third party who was not before the court.

8) On the strength of the declaratory order, Respondents has issued a writ of execution and has purported to attach and sell in execution our property being sub-division A of Sub-division A of Lot 14 of Sub-division B of Jarvis and Shorts Plot Avondale.

9) Applicant objected to the sale but Sheriff may feel that he is obliged to confirm the sale as long as the declaratory remains in place."

The applicant goes further, in para 13 of its founding affidavit, to make the following averment:

"13. I believe that Respondent has deliberately misled the court into believing that the property belonged to one of the defendants. Even if this was done innocently, the order declaring this property to be executable was clearly granted erroneously in the absence of ourselves as a party affected by it and I pray, in terms of Rule 449, that the order be rectified by the deletion of the declaratory order. Even if the order was not obtained fraudulently, I believe that Respondent should be penalised in an order of cost in that it has attempted to cling on to a judgement which was clearly wrong. I pray that the costs of this application be paid by Respondent on a legal practitioner and client scale.''

In its opposing affidavit the respondent states in part, as follows:-

"2. Applicant seeks an order "*correcting*" the judgement granted by this Honourable Court on the 29th April 201 in HC 2462/11 in terms of which Judgement Subdivision A of Lot 14 of Subdivision B of Jarvis and Shorts Plot of Avondale was declared specially executable.

3. I will give a brief history of the circumstances leading to the judgement in HC 2462/11 as follows:-

3.1 The 2nd Defendant (Gilbert Happi) in HC 2462/11 and the deponent to the Founding Affidavit in the present case are husband and wife and both are the directors and shareholders of the Applicant, Gilgen Happi Investment (Private) Limited. I attach hereto and mark as "1"the form CR 14 for the Applicant Company.

3.2 On 27 July 2010, the two as directors of the Applicant resolved to register a first Mortgage Bond over the property in question in favour of the Respondent. The bond was meant to secure indebtedness by the 1st Defendant (E. Top up) in HC 2462/11. Gilbert Happi is a Director of E Top Up. I attach hereto as Annexure "2"Resolution signed by Genevieve Happi, the deponent to the affidavit of the present application in terms of which the Applicant resolved to register the Bond in question. I also attach hereto Power of Attorney to pass Bond signed by Gilbert Happi as Annexure "3".

3.3 Both Annexure 2 and 3 refer to Econet Wireless (Private) Limited. E Top Up however owed money to the Respondent herein. The reference to Econet was an error which was corrected by a cession of the bond in favour of the Respondent. I attach hereto a copy of the Mortgage Bond registered as Annexure "4" from which the cession will be noted.

3.4 E Top Up and its directors failed to meet their obligations to the Respondent and legal action was taken in terms of HC 2462/11.

3.5 The summons was served upon all three (3) Defendants in HC 2462/11 including the 3rd Respondent, a director and shareholder of the Applicant herein. 3rd respondent would have been expected to take issue with the relief that was sought and mount a defence on behalf of applicant if the relief sought was incompetent and unlawfully affected his estate. 3rd respondent did not do that because there was nothing to defend.

3.6 The writ of execution was served upon all three (3) Defendants including the 3rd Defendant as far back as 6th June 2011 and the property in question attached as far back as 17th June 2011. The property was sold in execution as far back as 26th August 2011. Applicant does not explain why it sat on its rights for all this long if it really believed it had such rights. The court is respectfully urged to draw appropriate inferences from applicant's failure to act.

The Respondent states that the third defendant, who is a shareholder and Director in applicant, was served with summons but never took issue with same. Furthermore, service of the writ of execution was effected on the three defendants named in the order and that included Mr Gilbert Happi, the husband to the deponent to the founding affidavit herein. That service was effected on 6 June 2011, almost a year ago before this application was filed. The respondent further avers:

"3.7 I am advised by my legal Practitioner which advice I have accepted that what the Applicant seeks is in effect a Rescission of the judgement granted by this court on the 29th April 2011. The application cannot be for correction of an error as there is no error made by the Honourable Court. I say so because the Declaration on the

basis upon which judgement was entered did not claim that the property belonged to the defendants. It simply took the ineluctable point that a mortgage bond was registered against the property. Such registration has not been attacked in these proceedings and there is no prayer to seek the setting aside of the registration."

Given the fact that the deponent to the founding affidavit herein was involved in the issue of the Mortgage Bond (i.e. having signed the resolution relating to the registration of the Mortgage Bond) the above is a valid argument. Her signature to the resolution was never challenged.

The respondent proceeds to state that:-

"3.8 To the extent that the judgement granted by his lordship is founded upon the registered mortgage bond, it cannot be set aside unless the mortgage bond has also been set aside. Regrettably, such bond cannot be set aside in these proceedings.

3.9 I am further advised by my legal practitioner that the applicant has sought to proceed in terms of "*correction of an error*" and not rescission in order to run away from the requirements of an Application for Rescission of Judgement which would call upon the Application to explain why she did not make the Application within a month of knowledge of the Judgement and more importantly provide her defence on the merits of the claim by the respondents.

3.10 It is clear from the above that there has been an inordinate and unexplained delay in bringing this Application to court. The Applicant would also have no defence on the merits as it is liable to the Respondents for the money due in terms of the judgement. The immovable property owned by the Applicant is what was used as security for the debt due by E. Top Up and 3rd Respondent, Gilbert Happi and his wife authorising use of the property as security.

4. While the deponent's status in the Applicant is accepted, I dispute that she is authorised to act on behalf of the company. If there was a real dispute, it would have been raised by the deponent's husband more than a year ago who has always known that the property was being proceeded against. The deponent cannot also seriously expect the court to believe that she was unaware of the action of the proceedings. ----------.

8. As explained under clause 3.6, the property was indeed attached and sold in execution on 26 August 2011. It is significant that no proceedings were brought to challenge that sale. Further, the fact that the property was sold means that there is now a third party whose rights are affected by this application. Applicant has always known about that but has not bothered to cite the affected party. The court grant relief in this matter if such relief will operate against a party who is not before it. ----------.

9.2 On 27 July 2010, the deponent of the Founding Affidavit in this Application and her husband Gilbert Hapi signed the Power of Attorney and Resolution which in error refers to Econet Wireless instead of the Respondent hence the registration of the cession. There was therefore cause for such cession. ----------.

10. There is accordingly no error to be corrected by this court and the application should be dismissed with costs on attorney and client scale. The court was given a correct set of facts and properly proceeded to act on the basis of those facts. If it is felt that its judgement is wrong, then an application for rescission must be lodged. The present application unfairly puts the judicial process under scrutiny and is one to be frowned upon."

Indeed the record confirms that on 27 July 2010 the "family" signed a Power of Attorney authorising a Deed of Hypothecation in respect of the property.

Notwithstanding the fact that the mortgage bond referred to in the declaration was indeed in place and the applicant's submissions herein, I believe that this application should be disposed of on the basis that the applicant has no *locus standi*. The order sought to be corrected does not cite the applicant as a party. This is not an interpleader application and as such it is the parties to HC 2462/11 who can seek the said correction if at all there was any correction to be made. The parties to (HC 2462/11) were:

Transaction Payment Solution	Plaintiff
versus	
E Top Up (Pvt) Ltd	1st Defendant
and	
Thomas Mutasa	2nd Defendant
and	
Gilbert Happi	3rd Defendant

Gilgen Happi Investments (Pvt) Ltd (applicant) was not a party to that action (HC 2462/11).

In the absence of a joinder, it is only the parties to the default judgement who can seek to interfere with it.

The rule being relied on refers to "any party affected" and as such, since these are not interpleader proceedings, the applicant should have sought a joinder before making the application. The same would apply even if this was an application for rescission.

I am aware of Rule 87 of the High Court Rules 1971 which provides as follows:-

(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues or questions in

dispute so far as they affect the rights and interests of the persons who are parties to the cause of the matter.

(2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application-
   (a) Order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
   (b) Order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party;

   but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

(3) A court application by any person for an order under subrule (2) adding him as a defendant shall, except with leave of the court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter.(My own underlining)

In casu, although no interpleader proceedings were filed, the applicant claims that it has an interest in the matter by being the owner of the property. It says so in para 6 of its founding affidavit. It was therefore within its rights to seek a joinder to the main action, which it was always aware of. As I have already said, I believe it is only parties to the main action who can bring an application of this nature.

In view of the foregoing, it is clear to me that the applicant is not properly before the court. I am therefore estopped from going into the merits of the matter.

The application is dismissed with costs.

Messers Winterstons, applicant's legal practitioners
Messers Mtetwa & Nyambirai Legal Practitioners, respondent's legal practitioners