EVISON ZUZE
versus
THE TRUSTEES FOR THE TIME BEING OF BONGAYI RUSHWORTH MLAMBO TRUST
and
JEALOUS MARIMUDZA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 29 November, 2017 and 31 May 2018

Opposed Application

L Madhuku, with *D Mundia* for the applicant
H Mutasa, for the 1st respondent

CHITAKUNYE J. This is an application for the rescission of a default judgement granted in favour of the first respondent against the second respondent in case number HC 9554/16. The application is brought in terms of Order 49 Rule 449(1) (a) of the High Court Rules 1971, as amended. The applicant sought an order that:-

1. The default judgment granted in the matter HC 9554/16 be and is hereby rescinded.
2. The applicant be and is hereby joined in the proceedings in HC 9554/16 as second defendant
3. The first Respondent shall pay the costs of this application.

The facts leading to this application may be summarised as follows:

On the 23rd February 2006 B R Mlambo Trust represented by Bongayi Rushworth Mlambo in his capacity as Trustee purchased two pieces of land called Stand 126 and 127 Carrick Creagh Township Borrowdale, measuring 1, 4934 and 1,5779 hectares respectively from Drawcard Enterprises (Pvt) Ltd. Thereafter in June 2006 the Trustees for the time Being of Bongayi R Mlambo Trust (the first respondent herein) entered into an agreement of sale of the said two Stands to Jealous Marimudza (the second respondent).

The purchaser undertook to pay the purchase price within 3 months of the conclusion of the agreement of sale. The second respondent took occupation of the property notwithstanding that he had not fully paid the purchase price.

The second respondent in turn entered into an agreement for the sale of a portion of the property in question described as Stand 8 of subdivision of Stands 126-127 Carrick Creagh Township, Borrowdale measuring 2190 square metres to the applicant Evison Zuze. This agreement of sale was apparently entered into on the 30th January 2007. The applicant alleged that he paid the purchase price in instalments and took occupation of the purported 'subdivision' in that same year. The applicant has been in occupation of the 'subdivision' since then.

On the 20th September 2016 in HC 9554/16, the first respondent sued second respondent alleging that the second respondent had breached the terms and conditions of their agreement of sale of June 2006 in that he had failed to pay the full purchase price. As a result of the breach the first respondent had cancelled the agreement of sale. The first respondent thus sought the eviction of second respondent, his subtenants, assignees, invitees and all persons claiming occupation through him from the property in question.

As fate would have it, a default judgement was granted against the second respondent in HC 9554/16. Consequently, a warrant of eviction was issued against the second respondent and all those in occupation of the property and this led to the eviction of the applicant.

It was as a consequence of the default judgement and the subsequent eviction that the applicant approached this court seeking the rescission of the default judgement in terms of rule 449(1) (a) of the High Court Rules. In this regard applicant alleged that the default judgement in HC 9554/16 was erroneously sought and granted in his absence.

Though initially the first respondent raised a point *in limine* challenging the *locus standi* of applicant to bring such an application when he was not party to case number HC 9554/16, this *point in limine* was abandoned as it was clearly misplaced.

It is trite that an application in terms of r 449 can be brought by 'any party affected' by the judgment even if they were not cited as party in the matter. 'Any party affected' has been held to mean any person who "has an interest in the subject –matter of the judgment or order sufficiently direct and substantial to entitle him or her to have intervened in the original application upon which the judgement was given or order granted."

See *United Watch & Diamond Co. (Pty) Ltd* v *Disa Hotels Ltd* 1972(2) SA 409 (C) at 414-418; *Parkview Properties* v *Haven Holdings* 1981 (2) SA 52(T) at 54-55; and *Standard General Ins. Co.* v *Gutman* 1981(2) SA 426(C) at 433-434.

The abandonment of the point *in limine* was thus proper.

On the main matter the first respondent opposed the application contending that the application has no merit at all as the default judgement was not granted in error.

Rule 449(1) (a) upon which the applicant premised his application states, *inter alia*, that:-

> "(1) The court or a 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 judgment or order—
> *(a)* that was erroneously sought or erroneously granted in the absence of any party affected thereby;.."

The purpose of the rule was aptly encapsulated in *Tiriboyi* v *Jani & Another* 2004(1) ZLR 470(H) where court held that:-

> "…. the purpose of r 449 is to enable the court to revisit its orders and judgments to correct or set aside its orders and judgments given in error, in situations where to allow such to stand on the excuse that the court is *functus officio* would result in an injustice and would destroy the basis on which the justice system rests. It is an exception to the general rule, and must be resorted to only for the purposes of correcting an injustice that cannot be corrected in any other way. The rule goes beyond the ambit of mere formal, technical, and clerical errors and may include the substance of the order or judgment. The rule is designed to correct errors made by the court itself and is not a vehicle through which new issues and new parties are brought before the court for trial. The three requisites that have to be satisfied for relief under the rule are:-
> (1) that the judgment was erroneously sought or granted
> (2) that the judgment was granted in the absence of the applicant
> (3) that the applicant's rights or interests are affected by the judgment.
> Misjoinder, where the court is unaware of the interested party who has not been cited, is not an error on the part of the court granting the order and cannot be corrected in terms of r 449."

See also *Grantully Private Limited & Another* v *UDC Ltd* 2000(1)ZLR 361(S), *Mutebwa* v *Mutebwa* 2001(2)SA 193(Tk), *Khan* v *Muchenje A Anor HH126/13 Matambanadzo* v *Goven 2004(1)ZLR 399(S) , Jonas Mushosho* v *Lloyd Mudimu & Anor* HH 443/13.

Further, in *Wector Enterprises (Pvt) Ltd* v *Luxor (Pvt) Ltd* 2015(2) ZLR 57(S) the Supreme Court held, *inter alia*, that:-

> ".. r 449 of the Rules has been invoked, among other instances, where there is a clerical error made by the court or judge; where entry of appearance has been entered but was not in the file at the time that default judgement was entered; where, at the time of issue of the judgement, the judge was unaware of a relevant fact namely clause in an acknowledgement of debt and where if the court 's attention had been drawn to a particular fact, it would not have proceeded to grant the relief."

It is imperative that the applicant must place before the court the fact or facts which were not before the court or which were not brought to the attention of the court granting the judgment. The fact or facts must be such that had the court or judge been aware of it, it or he would not have granted the judgement.

See *Gondo & Anor* v *Syfrets Merchant Bank Ltd* 1997(1) ZLR 201(H).

In casu, the applicant alleged that the default judgement was granted in his absence as he was never cited despite the fact that he purchased the property from which he was now being evicted in 2007. He also has been in occupation of that property since that year. It has thus become his home. The two errors he alluded to in the circumstances were that:-

1. The first respondent obtained an eviction order notwithstanding not being the owner of the property in question and without any clear basis for a right to evict an occupier.
2. The Applicant had established a "home", within the contemplation of section 74 of the Constitution of Zimbabwe, 2013 and was evicted without being heard.

As regards the first alleged error, the applicant alleged that the attention of court that granted the judgment was not drawn to the fact that the first respondent, as plaintiff in HC 9554/16 was not the owner of the property in question. As can be noted, in the declaration, the plaintiff is described as a mere purchaser of the land in question. He thus argued that a mere purchaser without more has no right to evict persons in possession. Had the attention of the court been drawn to the status of the plaintiff the default judgement would not have been granted.

The first respondent contended on the other hand that there was no error in this regard as the rights that first respondent sought to enforce against second respondent were in terms of a contract. The first respondent contended that it did not need to be the registered owner in order to evict as it was proceeding in terms of a contract wherein the purchaser had breached the contract by not paying the full purchase price. By virtue of having purchased the property from Drawcard Enterprises (Pvt) Ltd, first respondent acquired certain rights and interests which it purported to sell to second respondent. Since second respondent has breached the agreement first respondent is entitled to claim its property back by seeking the eviction of second respondent and all those who may be occupying the property through him. It was first respondent's contention that in as far as its claim was based on contract concluded between it and second respondent the question of ownership did not arise. All it had to show is that it had taken possession of the property from the previous seller, Drawcard Enterprises (Pvt) Ltd.

It is settled that a purchaser who, although he has not received transfer of the property, has obtained *vacua possessio* of the property from the seller is entitled to sue for the eviction of whoever is in occupation of the property against his will.

For instance in *Buchholtz* v *Buchholtz* 1980 (3) SA 424 at 424 Court held that:-

> "where the purchaser of immovable property has obtained possession thereof, she has obtained a right *in rem* to the property. Accordingly such a purchaser has *locus standi* to apply for an ejectment order in respect of the immovable property."

See also *Gwarada* v *Johnson & Others* 2009(2) ZLR 159

The fact that first respondent received vacant possession from Drawcard Enterprises (Pvt) Ltd cannot be denied because it was pursuant thereto that the first respondent sold the property to second respondent and allowed him to take occupation. When second respondent breached the contract of sale first respondent was thus entitled to evict him and regain the occupation he had given to second respondent. The applicant as someone who purchased a purported 'subdivision' from second respondent cannot have a greater right to the property than second respondent once the agreement that led to second respondent taking occupation of the property had been cancelled.

It is apparent that when court granted the default judgment it was alive to the fact that such a relief was a result of the cancellation of an agreement of sale between first respondent as seller and second respondent as purchaser and that in the event other persons had taken occupation through the second respondent they also had to be evicted.

It is thus not correct to say that court made an error in this regard.

The second 'error' raised by applicant was to the effect that the applicant had established a 'home' within the contemplation of section 74 of the Constitution of Zimbabwe 2013 and was evicted without being heard. The applicant contended that had section 74 of the Constitution been brought to the attention of the court the default judgement would not have been granted.

Applicant's counsel conceded that section 74 does not prohibit evictions but imposes procedural requirements before eviction. In *casu*, the eviction has already been effected and there is nothing to prevent.

It is my view that this was a desperate measure on the part of the applicant. The circumstances obtaining in this case are such that the applicant's eviction was not arbitrary but was in terms of a court order. It would indeed have been ideal had the applicant been cited but in my view that is neither here nor there as his circumstances are such that the result would have been the same. His occupation was premised on his agreement of sale with second respondent. The cancellation of the agreement of sale between first respondent and second

respondent meant that even applicant's occupation was adversely affected as the property reverted to first respondent.

The first respondent also challenged the validity of the agreement of sale between second respondent and applicant as such agreement was in contravention of section 39 of the Regional, Town and Country Planning Act, [*Chapter 29:12*] in that there was no subdivision permit for the subdivision he purported to buy.

The said section 39(1) states that:-

"(1) Subject to subsection (2), no person shall—
(*a*) subdivide any property; or
(*b*) enter into any agreement—
(i) for the change of ownership of any portion of a property; or
(ii) for the lease of any portion of a property for a period of ten years or more or for the lifetime of the lessee; or
(iii) ……..; or
(iv) …….; or
(*c*) ……;
except in accordance with a permit granted in terms of section *forty:"*

The section clearly prohibits the sale of a portion of an immovable property where there is no subdivision permit. In *casu*, the applicant did not deny the fact that there was no subdivision permit in respect of the 'subdivision' he purportedly purchased from second respondent. Clearly, and without much ado, the purported 'subdivision' is invalid. The sale agreement was thus *void ab initio* and court cannot enforce a contract that is a nullity.

In *Tsamwa* v *Hondo & Others* 2008(1) ZLR 401 court held that:

".. the plaintiff's claim must be dismissed as at the time the parties entered into the agreement, there was no subdivision permit in existence. An agreement made in such circumstances is forbidden by s 39(1) (b) (i) of the Act. Any purported agreement for the change of ownership of a portion of a property is a nullity and no effect can be given thereto."

See also *X-Trend-A-Home (Pvt) Ltd* v *Hoselaw Investments (Pvt) Ltd* 2000(2) ZLR 348. *In casu*, therefore the agreement of sale of a purported 'subdivision' to applicant by second respondent was a nullity and thus not enforceable.

I am of the view that whilst it is true that the judgment was granted in the absence of the applicant and that applicant is affected by such judgement; the applicant has not proved that court made an error in granting the judgment warranting a rescission of the default judgment.

Accordingly therefore, the application is hereby dismissed with costs on the general scale.

Mundia & Mudhara, applicant's legal practitioners
Gill, Godlonton & Gerrans, first respondent's legal practitioners.