WARD TWO FLATS & HOUSING COOPERATIVE
verses
NEWTON ELLIOT DONGO
and
FINIAS CUTHBERT MOLISEN
and
AMOS EDINGTON MATENGAMBIRI

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE 18 March 2019 & 21 May 2019

Opposed Application

Ms *V J Matenga*, for the applicant
1st respondent in person

MUREMBA J: The applicant is a housing cooperative. Its members contributed money and purchased land and allocated each other a share of the land. Mrs Tsinonis who was once a member got her piece of land (the land now in dispute). She sold it to Clever Mahowa before completing erection of a structure. Clever Mahowa in 2009 sold it to first respondent New Elliot Dongo who breached the contract by failing to pay the purchase price in full. Confirmation of the cancellation of the agreement of sale was done by consent and an order to that effect was granted by this court in case number HC 4076/10 on 26 July 2011. The first respondent was refunded all the money he had paid towards the purchase of the property and he was evicted from the property on 30 September 2011 (by the Sheriff.)

Clever Mahowa then sold the property to Benjamin Mandere who in turn sold it to the third respondent Amos Edington Matengambiri (Finias Cuthbert Molisen)*** who effected improvements on it. First responded irked by this sued the third respondent for eviction and succeeded in obtaining a default judgment. **Not sure** (First respondent sued for rescission and succeeded.) Applicant's claim against first respondent was dismissed **(P 24**) in an order of this in HC 7734/12 dated 1 June 2017. Applicant was ordered to vacate the property and he was ordered

to pay holding damages of $25.00 per day from 4 October 2013 to date of vacation (the judgment was granted in default of the applicant).

The first respondent made a counter attack and pursued a 2013 matter and obtained a default judgment against the applicant, the second and third respondents on 18 July 2018 in HC 10482/18. The default judgment obtained by the first respondent was for payment of holding over damages of $550 per month from 26 July 2010 to 5 October 2013, interest thereon and costs by the applicant and the second respondent. It is this default judgment that the applicant is applying to rescind. The applicant avers that it was not in wilful default because the summons was served in December 2013 on Mr Mazuru who had since ceased to be its secretary in May 2013 and he had refused to accept the summons as evidenced by his lawyer's letter of 13 January 2014 to the first respondent. The applicant averred that the first respondent did not make an effort to serve it properly. The second respondent who was the then chairperson of the applicant had been approached by Mr Mazuru and told about the summons and had promised to take over the issue which he never did as evidenced by the first respondent proceeding to obtain a default judgment 5 years later.

The applicant averred that it had a good defence on the merits because there is no basis for the first respondent's claim for holding over damages against it because it had not been part to the agreement of sale which was entered into by and between Clever Mahowa and the first respondent. Moreover that agreement of sale had been cancelled in HC 4076/10. Any rights the first respondent may have had over the property terminated or ceased when the agreement of sale was cancelled. The applicant further averred that even if the first respondent was entitled to the damages, it (the applicant) is not liable to pay them as it was not party to the agreement giving rise to the damages.

In response to the application the first respondent in his opposing affidavit raised a point *in limine* that there was no document giving the deponent authority to represent the applicant. He averred that the application was thus fatally defective and prayed for its dismissal with costs on a higher scale.

In response to the merits the first respondent stated that the applicant was in willful default because Stander Mazuru was still secretary of the applicant when he received the summons. The letter of resignation he wrote on 26 April 2012 was unstamped and the letter from the Ministry of

Small and Medium Enterprises and Cooperative Development written on 27 September 2013 which confirmed the management committee of the applicant confirmed Stander Mazuru as the secretary thereof.

The first respondent further averred the agreement of sale which was cancelled which he and Clever Mahowa had entered into was illegal as it was in contravention of s 80 of the Cooperative Societies Act in that it was not sanctioned by the Registrar of Cooperatives. The first respondent contended that the applicant had not appealed against the consent order which cancelled it in order to invalidate the illegality of that agreement.

The first respondent said he made improvements to the cooperative property from window level to completion as a member of the applicant because his membership had now been regularised by the relevant ministry and that decision had not been appealed against by anyone. He averred that he was fraudulently evicted from the property by the third respondent and as such the default judgment he obtained is of no legal effect as it is a nullity at law. He averred that it was granted in error.

In the answering Affidavit Chester A. Werret stated that he is applicant's chairperson and it is in this capacity that he was deposing to the affidavit. He averred that he was duly authorised to depose to this affidavit on behalf of the applicant. He denied that he did not have the requisite authority to depose to the affidavit. He contended that the failure by a deponent to attach a resolution granting him authority to depose to an affidavit does not render the affidavit fatally defective. It is sufficient for the deponent to state that they have the requisite authority which was granted in terms of a resolution and such an averment is contained in the founding affidavit. For the avoidance of doubt he went on to attach the resolution which confirmed that he had the requisite authority as Annexure "WT1." He averred that the point *in limine* had not merit and should be dismissed.

On the merits he denied that the summons was served during the tenure of Mr Stander Mazuru as the secretary of the applicant and Mr Mazuru refused to accept it as he was no longer the applicant's secretary and he did not have the requisite authority to accept process on its behalf. He contended that the fact that the Ministry did not stamp Mr Mazuru's resignation letter delivered on 26 April 2913 did not change the position that Mr Mazuru was no longer secretary. He contended that in terms of the law, the Ministry does not have to accept a resignation in order for

it to be valid. The Ministry was notified of such resignation and the applicant cannot shoulder the blame for its failure to update its records. He further averred that the return of service clearly showed that Mr. Mazuru's daughter refused to accept service of the summons. The summons was returned to the first respondent's lawyers on the basis it was served on a person without authority. The summons was thus improperly served and it was incumbent upon the first respondent to ensure that the summons was served on the applicant. He ought to have served the summons on any other committee member who was authorised to accept serve on the applicant's behalf. The first respondent failed to do so and therefore there was no service of the summons on the applicants. The applicant contended that had the applicant been served and afforded an opportunity to defend itself, the first respondent's claim would have been dismissed because he has no valid cause of action against it. The first respondent cannot claim compensation for improvements from the applicant because he never entered into an agreement with it. If the first respondent suffered any loss regarding the property, he should demand compensation from the person who sold the shares to him. The applicant was not privy to the agreement between the first respondent and Clever Mahowa and therefore it cannot be held liable to compensate him. The sale was a private sale which was conducted without the applicant's knowledge and therefore no liability can behalf the applicant.

He averred that the applicant only became aware of the court order on 31 July 2018 through a letter which was written to the Sheriff and delivered to the former chairperson, Mr. Molisen.

The applicant averred that one's membership with it is determined by ownership of shares within the applicant, that is, the people who collectively own the applicant's land. The first respondent does not own any shares to the land as his agreement of sale was cancelled therefore he cannot legitimately claim to be a member. The applicant's basis on which he became a member was cancelled. The admission that the agreement of sale was cancelled is enough to show that the applicant has a *bona fide* defence. The first defendant acquired no other rights to shares in the applicant other than through the cancelled agreement of sale. There is therefore no valid claim against the applicant.

The point in limine

Failure to attach a resolution granting the deponent authority to depose to an affidavit is not fatal to an application. It is sufficient for the deponent to state that they have the requisite authority to do so. For the avoidance of doubt the applicant's representative attached the requisite resolution to the answering affidavit. So the point *in limine* should is dismissed.

Mr Mazuru had resigned even though the Ministry did not stamp his letter. Resignation does not need to be accepted by the Ministry in order to be valid. The applicant cannot be held liable simply because the Ministry did not update its records *vis-à-vis* Mr Mazuru's status. Once communication was made to the first respondent that Mr Mazuru had resigned, he ought to have served the summons afresh on another committee member which he did not, so there was no service on the applicant.

First respondent is not a member of the applicant since his agreement of sale with Mr Mahowa was cancelled.

First respondent cannot claim compensation for the improvements he made from the applicant because the applicant was not a party to the agreement of sale. Such can be claimed from the person who entered into the agreement with him.

Default judgment granted against the first respondent of 2017 had nothing to do with the applicant as it was a matter between the first respondent and the third respondent.

For an application for rescission to succeed the application must show that there is good and sufficient cause for seeking rescission. See r 63 (2) of the High Court Rules, 1971. The applicant should thus show that he was not in wilful default and that he has a *bona fide* defence on the merits which, *prima facie*, carries some prospects of success. See *Stockil* v *Griffiths* 1992 (1) ZLR 172 (S), *Roland & Anor* v *Mc Donnell* 1986 (2) ZLR 216 (S) at 226E-H, *Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 10 (S). These factors are considered conjunctively. However, whilst the test is that the factors are considered conjunctively one factor may very well sway the court. Where the applicant gives an unsatisfactory explanation for his default but has a convincing *bona fide* defence on the merits, the court will be inclined to grant the application for rescission.

Whether the applicant was in wilful default

For a party to be held to have been in wilful default, it ought to have been aware of the proceedings and made a decision not to appear. There should be an element of intention or gross negligence in not attending. In *casu* it cannot be said that the applicant was in wilful default. Evidence shows that it was not properly served with the summons. It was served on a person who had resigned as the secretary of the applicant and this was brought to the attention of the first respondent by way of a letter written by Mr Mazuru's lawyers on 13 January 2014. Resignation takes effect upon being communicated and the letter of resignation to the Registrar of Cooperative by Mr Mazuru was sufficient proof that he resigned. *See Jakazi & Anor* v *The Anglican Church of the Province of Central Africa* SC 10-13 wherein the Supreme Court said,

> "The law is clear. Resignation is a unilateral act which takes effect upon being communicated."

Whether the applicant has a bona fide defence on the merits

The first respondent's claim in HC 10482/13 in which he obtained the default judgment against the applicant is premised on agreement of sale he entered into with Clever Mahowa. However, cancellation thereof was confirmed with the consent of the first respondent in HC 4076/10. The entitlements the first respondent sought to enforce in HC 10482/13 emanated from a cancelled agreement of sale. At law a party cannot claim rights emanating from a cancelled agreement.

Besides, the agreement itself was illegal because it was entered into in contravention of s 80 of the Cooperative Societies Act [*Chapter 24:05*] in that it was entered into without the prior approval of the Registrar of Cooperatives. The first respondent was the first to raise this issue of illegality in his opposing affidavit. Consequently, the first respondent cannot derive any rights from the illegal agreement. See *Dube* v *Khumalo* 1986 (2) ZLR 103 (SC) wherein GUBBAY J said;

> "There are the rules which are of general application: The first is that an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced. This rule is absolute and admits no exception. --- it is expressed in the *maxim exturpi causa non oritur* action."

The first respondent cannot therefore be entitled to holding over damages based on an agreement which is prohibited in terms of an Act of Parliament.

Even if it were to be accepted that the agreement which the first respondent and Clever Mahowa entered was valid, stillthe applicant has a *bona fide* defence to the first respondent's

claim in that it was not a party to that agreement and as such it cannot be bound by a contract to which it was not a party to. See R H Christie *Business Law in Zimbabwe*, 2 ed Juta & Co Ltd at p 7 wherein he said,

> "A person who is not a party to a contract cannot be held liable or claim on it because as it is usually expressed, he is not privy to the contract."

The significance of the doctrine is that persons may not reap the benefits or suffer the consequences of a contract to which they were not a party to. In the present matter the applicant cannot therefore bear liability for obligations under a contract it was never a party to. The applicant thus demonstrated that it had a *bona fide* defence which, *prima facie*, carried some prospects of success. It thus ought to be afforded an opportunity to defend the first respondent's claim on the merits.

In the result, I gave the following order:

1. The application for rescission of the default judgment granted in HC 10482/13 on 18 July 2018 is granted.
2. The applicant is hereby directed to file a notice of appearance to defend and its plea within 5 days of receiving this order.

Wintertons, applicant's legal practitioners