MARTIN C GROBBLER
and
PROTEA VALLEY (PVT) LTD
versus
IVY RUPANDE
and
THE MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 30 May 2019 & 27 November 2019

Opposed Matter

N Mugiya, for the applicant
1st Respondent in person
D Jaricha, for the 2nd respondent

MUNANGATI-MANONGWA J: The applicants herein seek rescission of a default judgment granted in favour of first respondent on 8 November 2018. They further seek that the hearing of the main matter be stayed pending the finalisation of the appeal in SC 87/18 and ultimately costs against the first respondent on a client attorney scale. The application is opposed by both first and second respondents.

At the hearing Mr *Mugiya* raised two points *in limine* which had been raised in the answering affidavit and are as follows: Firstly, that the first respondent's affidavit is not properly commissioned as it does not disclose the designation of the purported Commissioner of Oaths although his name is indicated. In that regard there is no opposition before the court. He cited *Firstel Cellular (Pvt) Ltd* v *Net-One Cellular (Pvt) Ltd* 2015 (1) ZLR 94 (S) as the case in point. The respondents maintained that there is nothing irregular about the commissioning of the affidavit as the person who signed is indeed a commissioner of oaths and an identified legal practitioner hence the opposition before the court is valid.

Apparently the first respondent's affidavit is commissioned by an identified legal practitioner one Francis Winston Chingara in the Ministry of Foreign Affairs as the stamp below his signature would show. It is not denied that he is a legal practitioner or that he is a

Commissioner of Oaths. This is unlike in the *S* v *Deyi* [2013] ZAGPPHC75 case cited in the *Firstel Cellular* case (cited *supra)* where a police constable used the stamp of a magistrate when commissioning an affidavit. In *casu*, there is no misrepresentation as regards the status of the person commissioning the affidavit. Further, the regulations applicable specifically required a commissioner of oaths to state his or her designation and the area he holds his appointment of office. There are no such regulations in operation in Zimbabwe and as PATEL J stated in the *Firstel Cellular* case the matter is governed by practice. In that case the court held that, despite the use of the stamp for certifying copies as being "true and correct" having been used, "… it is not disputed that Raymond Moyo is a legal practitioner and a notary public and, as such, a recognised commissioner of oath." The affidavit was thus held to be properly before the court.

The court finds that the first respondent's affidavit having been commissioned by an identified legal practitioner and thus a commissioner of oaths is properly before the court. The first point *in limine* is thus dismissed.

The second point raised by the applicants is that the second respondent's affidavit was commissioned by the second respondent's legal practitioner. Mr *Mugiya* indicated that Margaret Gezera is a legal practitioner from the Civil Division hence could not have commissioned the affidavit for the second respondent. This was therefore grossly irregular and rendered the affidavit fatally defective. It being alleged that the legal practitioner had interests in the case. In that regard there was no opposition by second respondent before the court. In response the respondents argued that in terms of the Justice of Peace and Commissioners of Oath (General Regulations of 1998) affidavits attested to by members of the public service are valid. So, Mrs Gezera could still do the commissioning as long as it was in the interests of the State.

The court finds nothing irregular about the commissioning of the second respondent's affidavit by Margret Gezera given the cited regulations hence the affidavit is properly commissioned and hence properly before this court.

The applicant's legal practitioner sought to say the deponent to the second respondent's affidavit being the acting permanent secretary had no authority to depose to the affidavit. He could not derive authority from the office. Suffice that this issue had not been raised before.

It is noted that the applicants had not raised this issue when they filed their answering affidavit. It is thus taken they had no issue with the deponent's authority. In any event, the acting permanent secretary is the administrator on point in a ministry giving him power to

answer to the issues raised. Further, a deponent can depose to any information that is within his knowledge.Thus this point, coming belatedly and not being properly pleaded coupled with lack of merit is dismissed.

The facts of this matter are that: the first respondent holds an offer letter to a piece of land known as subdivision 4 of lot 1 of Buena Vista located in Goromonzi. On 14 November 2017 plaintiff issued summons in this court for the eviction of the first and the second applicants from subdivision 4 of Lot 1 of Buena Vista farm measuring 161.11 hectares. The applicants duly contested the claim and the matter was set down for trial on 8 October 2019. In their pleadings the applicants had raised an exception but same had not been set down before the trial hence the exception was heard at trial. The court reserved its ruling and finally a judgment was issued by CHIKOWERO J on 17 October 2018 dismissing the preliminary points and effectively paving way for the trial to be heard. The parties were then advised to attend court for continuation on 8 November 2018.

It is common cause that the first respondent and the second respondent attended. The applicants were not in attendance save for their legal representative Mr *Mugiya.* A default judgment was thus granted and it is this judgment which the applicants seek to be set aside.

It is the applicant's contention that they were not advised of the new trial date the 8th November 2018. They allege the registrar phoned their lawyers' offices on 7 November 2018 to advise of the new trial date. Mr *Mugiya* was then in Mutare and became aware during early hours of the 8th November 2018. Meanwhile the first applicant was in the Zambezi area and only got to know of the date when the hearing date had since passed, that is on 14 November 2018.The applicants argue that the default was thus not wilful.

The applicants presented several factors which they considered as "defences" and these are summarised as follows:

- that there is an appeal pending in the Supreme Court viz the dismissal of the points *in limine* at trial hence the matter could not proceed.
- that the respondents had obtained another order in the Magistrates Court in 2013 which could have been registered and executed upon rather than seek a fresh order. The applicants attached a court record book extract from the Magistrate Criminal Court stamped 25 October 2013 which recorded the applicant's conviction viz occupying gazetted land and ordering them to give vacant possession to the first respondent by 6 November 2013.

- that the matter was res judicata as first and second respondents had sought eviction at the Magistrates Court but the matter was dismissed.
- that the applicants had filed an application for a declaratur at Bulawayo High Court under HC 3126/17 whose net effect is to dislodge the first respondent's claim
- that the first applicant is a holder of an offer letter which was lost when his farm was attacked by thugs sent by the first respondent but he had confirmation of the said offer letter and reference was made to annexure F1 –F2.

It is pertinent to describe Annexures F1 and F2 presented by the applicants. F1 is headed:

"Mashonaland East Province Printed Offer Letters Report as at Thursday, 7 November 2013."

It has first applicant's name.

At the bottom the following appears:

- Checked by ……. Date Checked …….
- Collected By …… Date Collected ……

The document has no stamp neither is it signed as shown above.

Annexure F 2 is headed:

"MASHONALAND EAST ALLOCATION SCHEDULE 55 – JUNE 2013"

The first applicant's name appears as number 50 on the schedule. His identity document number is listed together with the farm description, hectrage, address and nature of farming. There is a column written "remarks" and the following is endorsed:

"**white farmer recommended to stay**."

Of note is the fact that some of the factors raised as defences are not defences against the claim but are points which should have been raised as points *in limine.*

In her opposition the first respondent insists the respondents had a defaulting habit. On 8 October 2018 the first day of trial both applicants did not attend despite receiving the notice to attend. Their failure to attend was condoned and a new date set. On 7 November all parties were advised to appear. The respondent insists the applicants were in wilful default and in any case, nothing was produced to prove that first applicant was in the Zambezi area hunting nor the air ticket as he claims to have flown back.

The first respondent also pointed out that the applicants had at trial on 8 October 2018 raised the issue pertaining to the order by the magistrate criminal court, and the application to the civil court for eviction and both points were dismissed in HH 654/18. Hence, the continued raising of same issues was mischievous. These issues being raised to delay finalization of the matter.

On the issue of the pending appeal, the first respondent insisted that no appeal was ever noted against the dismissal of the preliminary points raised on 8 November 2018. On the issue of *res judicata* the first respondent maintained that, that issue had been comprehensively dealt with in the judgment of CHIKOWERO J wherein he found that the matter was not *res judicata* reference is made to HH 654/18. This judgment clearly stated that, the fact that the state successfully prosecuted and obtained an eviction order in the Magistrate Criminal Court did not take away the first respondent's right to seek eviction in this court.

As regards the actual defence, the first respondent denied that the first applicant ever had an offer letter. If they had been issued with an offer letter to start with, a replacement could have been requested. The so-called confirmations being Annexures F1 and F2 were a nullity at law. Further, first respondent referred to the confirmation by second respondent that she is the lawful owner. The first respondent sought costs *de bonis propriis* on an attorney- client scale.

The second respondent opposed the application insisting that the parties were notified of the set down two weeks before the trial commenced and the call of 7 November 2018 to the parties was a further reminder. It also referred to a propensity by the applicants not to attend court citing the applicant's failure to attend court on 8 October 2018.

The second respondent clearly averred that there is no record in the Ministry of Lands showing that an offer letter for land was ever given to the first applicant.

It is a requirement of r 263 of the High Court Rules 1971 that an applicant for rescission of judgment establishes "good and sufficient cause" as the basis for the rescission sought. In considering whether there is good and sufficient cause the court *inter alia* looks at the reasonableness of the explanation for the default, the bona fides of the application and whether there are prima facie prospects of success in the main matter. It is upon weighing these factors in conjunction with each other that the court in exercising its discretion will decide whether to grant the application. The courts have indicated time and again that rescission of judgment will not been granted upon mere asking. It is a discretion of the court judiciously exercised. See *Zimbabwe Banking Corporation Ltd* v *Masendeke* 1995 (2) ZLR 400, *Deweras Farm (Private) Limited & Ors* v *Zimbabwe Banking Corporation* 1998 (1) ZLR 368 (S).

In *casu*, it is common cause that all the parties were telephoned by the registrar on 7 November 2018 and advised of the hearing date. The applicants do not deny that their legal practitioners' office received the call, in fact Mr *Mugiya* attended the hearing on the date without clients. The other litigants confirm that they had been advised of the date two weeks earlier and the call of 7 November 2018 was a reminder. Although the applicants deny this, the fact remains, ultimately their legal practitioners were aware of the date. The first respondent claims he was in the Zambezi valley hunting and only flew back around the 14th November 2019. This averment is not supported by any evidence not even an air ticket to show that he had travelled. Whilst this is not determinant on its own, one cannot overlook that the applicants were not in attendance on 8 October 2018 when both respondents attended and the court condoned their absence and went on to deal with the points raised through an exception.
This also saves to inform whether the applicant has a genuine desire to have the case re-opened.

The court also needs to consider whether the applicants have a *bona fide* defence to the claim which if established at trial would result in success. It is not necessary to fully deal with the merits of the case and produce evidence that the probabilities are in his favour. However, in the words of MCNALLY JA in the *Deweras Farm* case cited *supra*, the defence must be good enough to establish good and sufficient cause.

The first applicant's defence is that he is entitled to remain on the land. He states on p 19 that "I can't remember where the offer letter went and how I misplaced it because at one time my place was forcibly entered into by beneficiaries who claim that they had been offered the same piece of land and I lost a number of things". This cannot be true because the second respondent, the responsible authority, denies issuing an offer letter. Ever since 2013, when first applicant was taken to the magistrate criminal court, no letter was ever produced. It is because it is non-existent, there is no record of it.

What the applicants placed before the court as Annexures F1 and F2 being a schedule and an Annexure are but useless documents which do not bear any official stamp and would never suffice to stand as an offer letter, permit or lease. Suffice that BERE J (as he then was) sitting as criminal appeals court with HUNGWE J (as he then was) in a matter involving applicants re-emphasised that lawful authority as defined by the Supreme court in various matters means an offer letter, permit or lease agreement nothing more, nothing less. In essence the applicants have no defence to the claim for eviction. Why then should the court re-open the case, to achieve what purpose.

It is common cause that the first applicant was convicted at the Magistrates Court for occupying gazetted land without lawful authority in October 2013. First respondent was a complainant therein. The conviction stands as an appeal was dismissed in HH 462/16. The applicants do not possess any offer letter, a permit nor a lease, the only documents considered as lawful authority entitling a settler to occupy acquired or gazetted land. See *Commercial Farmers Union and 10 Ors* v *The Minister of Lands and Rural Resettlement and 6 Ors* SC31/10. In that regard there is no basis for the applicants' continued occupation of the land in issue. There is thus no plausible defence by the wildest imagination that the applicants can offer.

It turned out during the hearing that the purported appeal against CHIKOWERO J's judgment throwing out the points *in limine* initially raised at trial, lapsed and a letter from the Supreme Court addressed to the applicant' legal practitioners dated 25 March 2019 bears testimony. Although the letter communicating the lapse was addressed to Mr *Mugiya* as appellants' legal practitioners, he professed not to be aware, however conceding upon its production in court. The applicants did not pursue the *res judicata* argument as it had no merit and same had also been adequately venerated by CHIKOWERO J.

The reference to the case in the High Court of Bulawayo where the applicants seek a declaratur was meant to sway the court in a wrong direction. The first respondent is not party to those proceedings and whilst one should not speculate on outcomes of another court's judgment it stands to be seen how a claimant who has no necessary documents stands to succeed.

The applicants will clutch at straws to frustrate the first respondent's occupation of land. Applicants continue to illegally occupy the land in issue (their appeal against conviction having been dismissed in August 2016) and fail to attend court much to their benefit. It does not escape the court's eye that the applicants had on the 20 November 2018 lodged an appeal in the Supreme Court under case No SC882/18 against the same judgment that they seek rescission. Thus, having filed this court application for rescission of judgment on the 14 November 2018 the applicants proceeded to file an appeal against the same default judgment. That court's records show that the appeal was deemed to have lapsed or abandoned on the 31 May 2019. There could be no worse abuse of court process than this. There is need for finality and re-opening of the case is not proper given that good and sufficient cause has not been established mostly for want of a defence that carries prospects of success.

This is a case which requires that the legal practitioner advising the applicants be censured. Whilst it is a litigant's constitutional right to access courts and seek relief, it is not acceptable to abuse court process. The applicants clearly embarked on a perceivably doomed mission. It is inconceivable how a court would re-open its doors to a litigant who has no defence to offer. The applicants having failed to establish good and sufficient cause the application must fail.

Accordingly, the application is dismissed with costs on an attorney-client scale with Mr Mugiya paying costs *de boniis a propriis*. The Registrar is directed to place a copy of this judgment before the Council of the Law Society of Zimbabwe.

Mugiya & Macharaga Law Chambers, applicants' legal practitioners
Civil Division of the Attorney General's Office, 2nd respondent's legal practitioners