MFEMA GARANEWAKO
and
MSEVA ALFORD
and
MAGO JEREMIAH
and
CHIKOMBA KENNEDY
and
DADIDA EDWIN
and
DANA PLACKIE
(Represented by FIDELIS DANA)
and
KADZERE SABINA
and
KAKARAHWA RONNIE
and
KARIMANZIRA VINCENTIA
and
MBENDERA EZEKIEL
and
MAENZANISE DZIDZISAYI
and
BADZA FRANCIS
and
MAKOTSA G.T
and
MASAWI TAFIREYI TENDEKAYI & ANNA
and
MSIKOCHI ANGELA
and
MATARE RUDO
and
MATSEKEZA ANDREW
and
MAKURA WELLINGTON DINGA
and
MUCHINOTA GLADMORE
and
MUDYANADO JACKSON

and
MUDZAIMBASEKWA PAUL
and
MUDZINGANYANA JOYCE
and
MUNODAWAFA ROSEMARY
and
MUPAME CASIAN
and
MUPFUNYA DANIEL
and
MUPUFUWA ELIZABETH
and
MUSAVENGANA KINOS
and
MUTUMBI COSMAS
and
MUKAMBA ETHIEL
(Represented by TAKUDZWA MUKAMBA)
and
LONGWE ENAY
and
ONYIMO STANFORD
and
RABVUKWA ROSE
and
SHANGWA IREEN
and
SHAYA TAWANDA
and
WILIAM SHAME
and
HARARE MUNICIPAL WORKERS UNIONS
versus
CITY OF HARARE
and
KENNIAS CHIVUZHE
and
HOWARD MAZANI
and

STEVEN KISI
and
TENDAI MURENJE
and
CLEMENT HODERA
and
TARUSENGA HODHERA
and
EDMORE MUDUKUTI
and
COSMAS MACHEKWA
and
WATSON MASAITI
and
STEVEN GUSHAKUSHA
and
TAKADHI G CHOTO
and
SHAKESPEAR NYAMBI
and
PRIDE BESA
and
FRANCIS CHINYERE
and
DOWART KUFUMANI
and
N MAKUMBE
and
JACKSON MARWISA
and
DAVISON CHIGUMBU
and
CHOSINA CHARE
and
WONGAI CHATIZA
and
SUSAN NYAMUKAPA
and
PAUL S. CHABATA
and

TENDAI MUTAMBANESHIRI
and
FUNGISAI MANOMANO
and
RESCA DZUMBIRA
and
TENDAI MASARURE
and
ANDREW CHAVENGWA
and
NOSMA TIMIRE
and
THOMAS MUGADZA
and
LINAH MUTAMISWA
and
NEVERITY MANYANGADZE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 29 June 2021 & 8 September, 2021

Opposed Application

Ms *J Majome*, for the 1st - 35th applicants
M Mubvumbi, for the 36th applicant
C Kwaramba, for the 1st respondent
E Dunzvambeva, for the 2nd - 32nd respondents

MANGOTA J: On 11 September 2018, the first respondent, a local authority established in terms of the Urban Councils Act, entered into a consent order with the second to thirty-second respondents ("the respondents") who are its employees. The consent order appears at p 114 of the record. It was issued under HC 6908/13. It allocated to the respondents stand numbers 3515 to 3553 excluding stand numbers 3536 and 3552 of Valley Lane Plan TPX 1290, Crowborough, Harare.

The consent order constitutes the applicants' cause of action. They claim that the first respondent allocated the stands which are mentioned in the court order to them. They allege that the consent order which was issued in their absence adversely affects their interests in the stands. They move that the order be rescinded to pave way for them to be joined to HC 6908/13 so that the same is decided taking into account their interest. The application succeeds.

The applicants did not state the rule under which they filed their application for rescission of judgment. However, a reading of their founding papers shows that they filed it under r 449(1)(a) of the rules of court. They, for instance, state in para 6 of their founding affidavit that the parties to whom the consent order was issued refrained from joining them to the case notwithstanding their knowledge of the applicants' interest in the same. Paragraph 25 of their affidavit brings out their point more clearly than they bring it under para 6. It reads:

> "25. The order of this Honourable Court by Honourable Justice Zhou on 11 September 2018 is a clear example of an order that was erroneously sought in the absence of another party which in this case are the applicant (sic) (emphasis added).

The applicants did not mince their words when they responded to the respondents' *in limine* matters. They stated that they filed their application under r 449, and not under r 63, of the rules of court. Paragraph 1 of their answering affidavit is relevant in the mentioned regard. It reads, in part, as follows:

> "…This application is made in terms of r 449 of this Honourable Court (sic) for rescission of default judgment entered by ZHOU J after it was erroneously sought by the respondents in this matter".

The above statement of the applicants renders the preliminary matters which the respondents raised nugatory. They cease to have any legal force or effect. The statement, in short, disposes of the respondents' preliminary points. It makes them unworthy of any attention.

Rule 449 under which the application was filed offers a discretion to me. It allows me to correct, vary or rescind a judgment or order of court. It allows me to do so on my own accord or on an application which the applicant files. I can correct, vary or rescind where it is evident to me that the judgment or order:

(a) was erroneously sought or granted in the absence of the applicant who must show, on balance of probabilities, that the judgment or order adversely affects his interests; or

(b) suffers an ambiguity or a patent error or omission in which case the variation or correction will remain limited to the extent of such ambiguity; or

(c) was granted as a result of a mistake which is common to both parties.

That the applicants have an interest in the stands which form the subject-matter of their dispute with the respondents requires no debate. They allege, and their allegations have not been challenged in any meaningful manner, that the first respondent allocated the stand to them. They state in para 3 of their founding affidavit that they are the current occupants, allotees and contributors towards the development and servicing of stand numbers 3515 to 3553 excluding stand numbers 3536, 3541 and 3552 of the Valley Lane Housing Scheme Plan TPX 1290, Crowborough North, Harare.

The statement of the applicants is *in sync* with that of the first respondent who states in para 9.3 of his supplementary opposing affidavit that, as the allocating authority, he has taken steps to resolve the dispute which exists between the applicant, on the one hand, and the respondents, on the other. He states at pp 525 to 530 of the record that he will allocate land to the applicants whom he admits lost out as a result of the consent order. He attached to his affidavit Annexures A1 – A40 which he describes as allocation letters which, according to him, are aimed at resolving the matter.

That the applicants should have been joined to HC 6906/13 is evident from what the first respondent states in the foregoing paragraphs of this judgment. He admits that the consent order which the court issued to the respondents and him prejudiced the applicants. They were left out when they should not have been. They lost out in the process. This therefore accounts for the effort which he has embarked upon to try and resolve the dispute which he created for the applicants and the respondents.

It follows, as a matter of logic, that, if the applicants had been made part of the equation which led to the consent order, the dispute would have been conclusively and definitively resolved. It remains a live issue because of the first respondent's piecemeal approach to it. It must be tackled head on.

Paragraph 26 of the founding affidavit contains the reason for the rescission application. It states that the consent order was entered in error. It was, goes the submission, entered when the

judge who issued the consent order had not been made aware of the existence of the first respondent's resolution of 13 January, 2013 and the fact that the applicants are already developing the stands with some of them having already taken occupation of the same. The respondents, the applicants assert, misrepresented the correct position of the matter to the judge who issued the consent order.

The question which begs the answer is would the judge who issued HC 6908/13 have issued the consent order if the parties who appeared before him had been candid enough to make him aware of the existence of the applicants and their interest in the stands. The answer remains in the negative. The respondents, it is evident, deprived the judge of vital information. They withheld the same from him.

It is this withholding of information from the court by litigants who are before it which leads to the conclusion that the judgement was erroneously sought or granted. The moment it is accepted that the court entered judgement in circumstances where it would not have done so if full disclosure had been made to it, the error which the court makes cannot be debated. It is taken as given.

A strict construction of r 449(1)(a) of the rules of court would give the district impression that the applicants cannot rescind an order to which they were/are not a party. The misconstruction of the rule would lead to rescission of judgments only on the ground of a mistaken belief on the part of the court that the defendant knew of the hearing when, in fact, he did not or where counsel for the applicant in an *ex-parte* application leads the court mistakenly to believe that the respondent deliberately decided not to consult his attorney or to appear at the hearing; or where the capital claimed has already been paid by the defendant.

Rule 449, as constructed, would appear to deprive such litigants as the applicants of the requisite *locus* to sue. The misconstruction arises from the fact that the rule does not define the word *party* when it states, as it does under para (a), that:

> "(1) The court or a judge may…upon the application of <u>any party affected</u>……
> (a) That was erroneously granted in the absence <u>of any party affected</u> thereby….." (emphasis added).

The word *party* would appear to restrict itself to the plaintiff and the defendant or

The applicant and the respondent in an action or in motion proceedings respectively. This kind of interpretation, therefore, shuts the door for anyone who is outside the defined classes of litigants. He cannot, as *Bakoven Ltd* v *G.T Howes (Pty) Ltd* 1992 (2) SA 466 (E) 471 F enunciated, enter into the equation. He has no *locus*, so to speak. ERASMUS J who had the occasion to consider, and make pronouncements on, the *Bakovan* case likened the meaning and import of r 42(1)(a) of the South African Uniform Rules which is on all fours with r 449(1)(a) of the High Court Rules 1971, to a court of appeal which deals with nothing else but the record of proceedings.

Grantully (Pvt) Ltd v *UDC Ltd* 2000(1) ZLR 361(S) at 364 H- 365 A-B clarifies the law in respect of such litigants as the applicants. It confers *locus* upon them to rescind the order to which they are not a party. The wise words of GUBBAY C.J. are apposite. They read:

> "A court is not….confined to the record of proceedings in deciding whether a judgment was erroneously granted.... moreover, the specific reference in r 449(1)(a) to a judgement or order granted in the absence of any party affected thereby envisages such a party being able to place facts before the correcting, rescinding or varying court, which had not been before the court granting the judgment or order…"

The case of *Grantully* settles the law in a manner which requires no debate. The applicants have the *locus* to rescind HC 6908/15. The case affects their interests in the stands adversely. It was issued in their absence. They were able to place before me facts which the respondents did not place before ZHOU J who entered judgment in their favour in the absence of the applicants.

It is pertinent that the dispute which relates to the applicants and the respondents be resolved in a holistically manner. It should not be allowed to take a piece meal approach which leads to no meaningful end. There should be finality in the dispute.

The applicants proved their case on a balance of probabilities. The application is, in the result, granted as prayed.

J Majome and Company, applicants' legal practitioners
Mbidzo, Muchadehama & Makoni, 1st respondent's legal practitioners
Makwanya Legal Practice, 2nd – 32 respondents' legal practitioners
Chakanyuka & Associates, 36th applicant's legal practitioners