HB 254/16
HC 1229/15

MOONLIGHT PROVIDENT (PVT) LTD

Versus

NOBERT SEBASTIAN

And

BULAWAYO FUNERAL SERVICES (PVT) LTD

And

FAMILY FUNERAL SERVICES (PVT) LTD

And

AVRIL HAMER-NEL (in her capacity as the Executrix Dative of Estate Late William Hamer-Nel)

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 6 JUNE & 9 SEPTEMBER & 13 OCTOBER 2016

Opposed Application

A Masango for the applicant
Miss T. Sibanda for the respondent

MAKONESE J: This is an application for rescission of judgment pursuant to the provisions of Order 49 Rule 449 of the High Court Rules, 1971. The application relates to a default judgment granted by this court a decade ago under case number HC 790/06. The application is opposed. The 1st respondent argues that the application is not properly before the court for a variety of reasons which I shall deal with later in this judgment.

Factual background

The applicant avers that it purchased shares in a company known as Bulawayo Funeral Services (Pvt) Ltd, together with stand 1030, Bulawayo owned by the company. The applicant paid as the purchase price an amount of Z$600 000 000 to a company known as Discount

Company of Zimbabwe. In terms of the agreement of sale the late Charles Hamer-Nel who represented the seller, handed all the original documents to the applicant. At the time the property was acquired by applicants, Bulawayo Funeral Service (Pvt) Ltd, (2nd respondent) was operating from the premises at stand 1030, Bulawayo. Applicant avers that attempts to evict the 2nd respondent from the premises failed. The papers relating to the attempted eviction cannot be located as the lawyer who dealt with those matters is now deceased. Nothing seems to have been done by the applicants to secure occupation of the premises. In the meantime, as years went by, 1st respondent entered an agreement with the late Hamer-Nel and purchased the property and took ownership of Bulawayo Funeral Services (Pvt) Ltd. It would appear common cause that from the year 2003 the 1st respondent had assumed ownership of stand 1030, Bulawayo. It is not in dispute that on 2nd November 2006 and under case number HC 790/06, 1st respondent obtained default judgment against Charles Hamer-Nel and the Registrar of Deeds. In terms of that order Charles Hamer-Nel was directed to deliver or cause the delivery of the whole of the issued share capital of Family Funeral Services (Pvt) Ltd to 1st respondent. Further, Charles Hamer-Nel was ordered to transfer the rights, title and interest in stand 1030, Bulawayo. The applicant avers that it only became aware of the default judgment sometime in October 2014. It is applicant's contention that the judgment was granted in error and that the court should rescind the judgment in terms of Rule 449 of the High Court Rules. It is clear from the application before this court that applicant seeks rescission of judgment entered against a third party and further seeks cancellation of transfer of an immovable property into 3rd respondent's name.

Issues for determination

The issues for determination before this court are as follows:

(a) whether the relief sought by the applicant is competent
(b) whether the applicant has approached the court with dirty hands
(c) whether the application is properly before the court
(d) whether the applicant has satisfied the requirements for the granting of an for rescission of judgment

I shall deal with each of the issues as set out above in turn

Whether the relief sought by applicant is competent

It has to be noted from the outset that *ex facie*, the applicant's application is for rescission of judgment under case number HC 790/06. The 1st respondent contends that the relief sought by the applicant in its draft order has the effect of seeking substantive relief and interfering and substituting the standing order made under case number HC 790/06. Such relief cannot be granted in terms of Rule 449 of the rules. It is my view that the facts of this matter indicate the existence of double sale. It is settled law that in cases of double sales, the first in time is stronger in law, a position held by McNALLY (JA) (as he then was) in the case of *Guga* v *Moyo & Others* 2000 (2) ZLR 458 (S) at page 459 E where he stated as follows:

> "The basic rule in double sales where transfer has not been passed to either party is that the first purchaser should succeed. The first in time is the stronger in law. The second purchaser is left with a claim for damages from the seller, which is usually small comfort. But the rule applies only in the absence of special circumstance affecting the balance of equities."

In the case of *Dube* v *Mpala & Others* HB-116-05, the court applied the same principle and in addition to that, assessed the balance of equities in reaching its determination. The court noted that:

> "The balance of convenience must weigh heavily in favour of the second purchaser before the court can favour her over the first purchaser."

An assessment of equities is not an exhaustive exercise but interrogates issues of fairness, which includes whether or not the second purchaser was an innocent purchaser, whether transfer has been effected, how much has been spent by the second purchaser on the property concerned, and what has been done by the second purchaser towards the improvement and development of the property.

In this matter the balance of equities seem to favour the 1st respondent as the first purchaser of the 2nd respondent (2003) and transfer having been effected in 2006 by virtue of a

court order, which applicant now seeks to rescind. First respondent avers that considerable sums of money have been spent in the development of the immovable property. This fact is not denied by the applicant. The applicant has slept on the matter for a period close to 10 years. He has not moved to take occupation of the property and has not spent a single cent on the development of the property. In such a scenario any recourse should be sought against fourth respondent.

In the case of *Ndidzano* v *Gondora & Others* HH-65-11, PATEL J (as he then was), stated as follows:

> "The second purchaser is bound by the rights of the first purchase in the property, and it is a species of fraud on his part if he attempts to defeat those rights."

In applying this principle to the instant case, it would be tantamount to fraud on the part of the applicant, in seeking to elevate its rights over first, second and third respondents' rights by seeking a substantive order against the respondents. It is my view that the relief sought in the draft order is incompetent to the extent that it seeks not only to rescind the default judgment, but to obtain substantive relief against the respondents.

Whether the applicant has approached the court with dirty hands

The 1st respondent contends that applicant has approached the court with dirty hands as there is a pending criminal case against it in respect of a matter for fraud. It is common cause that the applicant used title deeds in respect of the immovable property belonging to third respondent as security for a loan facility without the authority to do so. Counsel for the 1st respondent, whilst not abandoning this point, did not pursue this aspect as it became clear that the "dirty hands principle" was not really applicable in this matter. The criminal case in question had not been finalised at the time this matter was argued.

Whether the application is properly before the court

1st respondent contends that this application is not properly before the court, and in fact, defective owing to applicant's failure to lodge the application for rescission of judgment

timeously. Applicant gives the excuse that it took long to secure the relevant information and the files which had been handled by a legal practitioner who is now deceased. It seems to me that the applicant is not being candid wit this court. It is most peculiar that one would supposedly purchase shares in a company which owns an immovable property and would for a period of 10 years not bother to know where the property is located. The applicant never derived any benefit from the property and never paid any utility bills in respect of the property. It is equally baffling that applicant was not interested in taking occupation of a property for which it had paid a substantial amount of money. The applicant is run by sophisticated persons who at all material times had access to legal representation. It is incredulous for the applicant to aver that they purportedly secured title over the immovable property by mere possession of the original title deed. The applicant may not have been in a hurry to take occupation but their failure to assert their rights timeously raises the suspicion that they were aware that 1st respondent had purchased the same property and chose to wait and do nothing.

In the case of *Khan* v *Muchenje* HH-126-13, the court dismissed an application for rescission of judgment brought in terms of Rule 449 on the basis that such supplication was not made expeditiously, in that the applicant had taken six months to file its application to have a judgment set aside on the grounds that the judgment had been entered in error.

See also the case of *Grantully (Pvt) Ltd & Anor* v *UDC Ltd* 2000 (1) ZLR 361

It is trite that there has to be finality in litigation. It is for this reason that Rule 63 has a stringent time frame within which applications for rescission of judgment have to be filed. In the present case, I am not convinced that the judgment entered under case number HC 790/06 was entered in error. The applicant is not a party to that matter. It has not sought joinder in that action. It is my strongly held view that this application ought to have been made as soon the applicant became aware of the default judgment. In that event, the applicant would still have been required to seek joinder in terms of the rules. The application is undoubtedly not properly before the court.

Whether applicant has satisfied the requirements for granting an order for rescission in terms of Rule 449

The following factors constitute the requirements for granting an order for rescission of judgment in terms of Rule 449:-

(a) The judgment was erroneously sought or granted
(b) The judgment was granted in the absence of the applicant
(c) The applicant's rights or interests are affected by the judgment

It is my view that the applicant failed to satisfy the requirements for these reasons:

(a) applicant has failed to show how and what factual or legal error was made by the court in granting judgment under case number HC 790/06, as the judgment was granted after proper service had been effected on Charles Hamer-Nel. The court in *Munyimi Tauro* SC-41-13 described what constituted an "error" to be a case in which a judge was unaware of facts which he had been made aware of, he would not have made the judgment he had made. The court further remarked that:

> "In any event Rule 449 involves the exercise of a discretion. It has not been shown that the exercise of such discretion was in any way irrational …"

(b) whilst the judgment was granted in the absence of the applicant, the judgment cannot be deemed to have been granted erroneously as the applicant was unknown to the applicant at the time. The judgment entered in case number HC 790/06 was entered against the correct defendant, Charles Hamer-Nel.
(c) Applicant has a self-created interest in the judgment under case number HC 790/06, one that emerged retrospectively and not at the time judgment was entered. In that regard, a retrospective interest and alleged right cannot be said to have been affected at the time judgment was entered.

The purpose of Rule 449 was enunciated by SANDURA JA (as he then was) in the case in case of *Matambanadzo* v *Gosven* 2004 (1) ZLR 399 (S) at page 404 by reference to Rule 42 (1), the South African equivalent of our courts. Rule 449 described in *Thereon NO* v *United Democratic Front and Ors* 1984 (2) SA 532 (C) as follows:

> "Rule 42 (1) entitles any party affected by a judgment or order erroneously sought or granted in his absence, to apply to have it rescinded. It is a procedural step designed to correct an irregularity and to restore the parties to the position they were before the order was granted."

In *Tiriboyi* v *Jani & Anor* 2004 (1) ZLR 470, MAKARAU JP (as she then was) emphasised that Rule 449 is an exception to the general rule, and must be resorted to only for purposes of correcting an injustice that cannot be corrected in any other way.

The applicant herein has failed to show that the judgment made under case number HC 790/06 was patently wrong on the facts or at law. This application does not fall squarely within the provisions of Rule 449. The application is clearly ill-conceived and is not properly before the court as the draft order seeks substantive relief against a third party. The application was not timeously made. There is need for finality in litigation.

On the basis of the foregoing the applicant cannot succeed. In the result, I make the following order:

1. The application is dismissed.
2. The applicant shall pay the costs of suit.

Messrs Lazarus & Sarif, applicant's legal practitioners
Messrs Majoko & Majoko, respondents' legal practitioners