PROJECT MANAGEMENT TURKEY
PROJECTS ZIMBABAWE (PVT) LTD

Versus

PHEPHELAPHI DUBE N.O.
(Representing Musa Ndlovu, a minor)

And

LISESO MUSTAKE

And

EXCEED CONSTRUCTION (PVT) LTD

And

ELIOT MHARADZE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 12 June 2023 & 29 June 2023

Opposed court application

B.Z. Mlilo, for the applicant
N. *Mlala,* for the 1st and 2nd respondents

DUBE-BANDA J:

[1] This is an application for recession of judgment in terms of r 29 of the High Court Rules, 2021. The applicant seeks an order that the judgment granted in HC 2039/20 be rescinded. The application is opposed by the first and second respondents.

[2] The background to this matter as gleaned from the papers filed of record is that on 25 August 2017 the City of Bulawayo (Council) allocated the applicant 198 stands in Pumula South Phase iii, and that stand number 15520 is one of the 198 stands. On 9 November 2021 the applicant sold stand 15520 to one Milidza Moyo (Moyo). On the other hand, on 25 March 2021 first respondent (Dube) obtained a court order in HC 2039/20, in the main compelling the third and fourth respondent (Exceed Construction and Mharadze) to construct a two roomed house at

stand number 15520 Pumula South, Bulawayo for the benefit of the first and the second respondents (Dube and Mustake). The applicant was not cited in HC 2039/20. And it is aggrieved by the order in HC 2039/20, and now seeks that it be rescinded. It is against this background that applicant has launched this application seeking the relief mentioned above.

Points *in limine*

[3] The first and second respondents (respondents) raised two points *in limine*. At the commencement of the hearing, I informed Counsel for the parties that I shall adopt a holistic approach to avoid a piece-meal treatment of the matter. Wherein the points *in limine* are argued together with the merits, but when the court retires to consider the matter, it may dispose of the matter solely on the points *in limine* despite that they were argued together with the merits. I now turn to the points *in limine*, *viz* that this application is not properly before the court in that no condonation was sought; and that the applicant has no *locus standi* to institute these proceedings.

[4] The respondents contend that this application is not properly before court in that it was filed out of time allowed by the rules and no condonation was sought and granted. Reliance for this submission is anchored on Rule 29(2) of the High Court Rules, 2021 which says:

> Any party desiring any relief under this rule may make a court application on notice to all parties whose interests may be affected by any variation sought, within one month after becoming aware of the existence of the order or judgment. (My emphasis).

[5] The respondents contend that the applicant became aware of the order in HC 2039/20 on 25 March 2022. It is contended further that its legal practitioners received a letter from Council informing it of the order on 24 or 25 March 2022. And this application was filed on 29 April 2022, a period exceeding one month calculated from the date the applicant became aware of the order sought to be rescinded. On the other hand, the applicant contends that it became aware of the order on 6 April 2022 after its legal practitioners had inspected the record at the High Court Registrar's office and uplifted a copy of the order.

[6] On the facts of this case I accept that the applicant became aware of the order in HC 2039/20 on 6 April 2022. I say so because it is not controverted that it was on 6 April 2022 that the applicant's legal practitioners uplifted a copy of the court order at the offices of the Registrar of the High Court. The empowering rule is clear that such an application must be made within one month after becoming aware of the existence of the court order sought to be rescinded. In this case the applicant became aware of the court order on 6 April 2022, and this application was filed on 29 April 2022, a period less than a month from the date it became aware of the court order. The applicant has satisfactorily proved that it became aware of the court order within one month of the date of the filing of the application, in my view in such a case there is no requirement for an application for condonation.

[8] Therefore, the point *in limine* that this application is not properly before court for want of an application for condonation has no merit and is refused.

[9] The respondents have placed the applicant's *locus standi* in dispute. *Locus standi* relates to whether a particular applicant is entitled to seek redress from the courts in respect of a particular issue. In terms of the common law to establish *locus standi* an applicant must show a "direct and substantial interest" in the subject matter and the outcome of the litigation. See: *Matambanadzo v Goven* SC-23-04; *Sibanda & Ors v The Apostolic Faith Mission of Portland Oregon (Southern African Headquarters) Inc* SC 49/18. In *Makarudze & Anor v Bungu & Ors* 2015 (1) ZLR 15 (H) the court pointed out that *locus standi in judicio* refers to ones right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a direct and substantial interest in the outcome of the litigation. Such interest is a legal interest in the subject matter of the action which would be prejudicially affected by the judgment of the court. See: *Zimbabwe Stock Exchange v Zimbabwe Revenue Authority* SC 56/07.

[10] The facts of this case show that on 25 August 2017 Council allocated the applicant stand number 15520 Pumula South, Bulawayo. The applicant sold the stand to one Moyo and it failed to transfer the stand to the purchaser because of the extant order in HC 2039/20. I take the view that the applicant has a direct and substantial interest which would have entitled it to seek a

joinder HC 2039/20. Again, the order in HC 2039/20 compelled Exceed Construction and Mharadze to construct a two roomed house at stand number 15520 for the benefit of Dube and Mustake, the same stand Council allocated to the applicant. The applicant has *locus standi* in this matter. In my view the applicant had a direct and substantial interest in the subject-matter of the order which would have entitled it to intervene in the original application in which the order was granted. See: *Matambanadzo v Goven* SC 23/04. Therefore, the point *in limine* that the applicant has no *locus standi* in this matter has no merit and is refused.

[11] I now turn to the merits of this application.

Merits

[12] This matter turns on whether the order in HC 2039/20 was erroneously sought or erroneously granted in the absence of the applicant. Rule 29(1)(a) of the High Court Rules, 2021 provides thus:

> Correction, variation and rescission of judgments and orders
>
> (1) The court or a judge may, in addition to any other powers it or he or she may have, on its own initiative or upon the application of any affected party, correct, rescind or vary—
> (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; or
> (b) -----
> (c) -----

[13] In *Mashingaidze v Chipunza* 2015 (2) ZLR 361 (H), the court *per* CHITAKUNYE J (as he then was) said:

> "Under r 449 (1) (a) one does not need to have been a party to the application for default judgment for one to be able to apply for the setting aside of the judgment. The applicant is only required to show that it is affected by the judgment or order and that such order was erroneously sought or granted."
>
> (Rule 449(1) High Court Rules, 1971 the repealed rules is identical to r 29(1)(a) of the High Court Rules, 2021).

See: *Sibanda v Gwasira* SC 14/21; *Museredza &Ors v Minister of Agriculture, Lands, Water and Rural Resettlement* CCZ 1/22.

[14] In application proceedings a court may grant a final order based on common cause facts; facts not seriously disputed and facts not disputed at all. See: *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) 623 (AD) at 634H to 635C; *Palmer v Kanyenze* HH 16/20. In *casu* it is common cause or not seriously disputed that on 17 August 2017 Council allocated the applicant 198 stands including stand number 15520 Pumula South, Bulawayo. On 23 June 2020 the applicant was issued with a Final Certificate of Completion: i.e., of servicing of 198 Stands in Pumula South; and that on 9 November 2021 the applicant entered into an agreement of sale with Moyo in respect of stand number 15520 Pumula South. Sometime in January 2022 the applicant submitted the agreement with Moyo to Council for signing and to commence the process of transferring the stand to the name of the latter. Sometime on 24 or 25 March 2022 the applicant received a letter from Council informing it that the stand could not be transferred to Moyo because of the order in HC 2039/20. It is common cause that the applicant was not a cited in case number HC 2039/20.

[15] It is clear that HC 2039/20 was granted on 25 March 2021, well after Council had allocated the stand to the applicant. The applicant was affected by the order in HC 2039/20, in that its rights, title and interest in the property was taken away without its participation in the process, as such it is entitled to seek the rescission of the order.

[16] In *Mashingaidze v Chipunza* (*supra*) the court said in seeking the setting aside of the order a party must show that not only was it affected but also that the order was erroneously sought or erroneously granted. On this aspect the applicant submitted that sometime on or about 5 November 2020, it advised the first and second respondents that the property belonged to it and not to Exceed Construction and Mharadze. And that Exceed Construction and Mharadze had no authority to sell the stand. Notwithstanding this awareness the first and second respondents proceeded on 25 March 2021 to obtain a default order without citing the applicant to the suit. There can be no doubt in this case that the applicant's interests were affected by the order granted in default. There is no doubt that it was not cited as a party in the suit.

This is a case where the applicant ought to have been cited and allowed to participate in the application as the relief sought meant the obliteration of its rights, title and interest in stand number 15520 Pumula South, Bulawayo. It is for these reasons that this application must succeed. See: *Sibanda v Gwasira* SC 14/21.

[17] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule. Accordingly, the first and second respondent must pay the applicant's costs.

In the result, I grant the following order:

1. The application for recission of judgment be and is hereby granted.
2. The order granted in HC 2039/20 be and is hereby rescinded.
3. The first and second respondents to pay the cost of suit, jointly and severally each paying the other to be absolved.

Webb, Low & Barry Inc. Ben Baron & Partners, applicant's legal practitioners
Sansole & Senda, 1st and 2nd respondents', legal practitioners