NORWICH TRADING PRIVATE LIMITED
versus
NYASHA MUZAVAZI
and
NATHAN MNABA
and
ASTRODOME ENTERPRISES PRIVATE LIMITED
and
STANBIC BANK ZIMBABWE LIMITED
and
CHARMAINE LEES
and
KODJOTSE SABIRI
and
SHADRECK MASASA
and
THE REGISTRAR OF DEEDS N.O
and
GREEN APPLE PROCUREMENT SOLUTIONS PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 19 May 2022 & 18 January 2023

Opposed Application

T W Nyamakura, for the applicant
F Nyangani, for the first respondent
Adv *S Madzoka,* for the second respondent
S M Bwanya, for the third respondent
K T Madzedze with *B M Maunze*, for the fourth respondent

KATIYO J; The applicant approached this court seeking rescission of a judgment in terms of r 449 of the old rules of this court and also in terms of common law for declaratory orders and ancillary relief. The first, second and fourth respondents raised the following points of law;

1. (a) Prescription
   (b) Material dispute of fact
   (c) Application defective and bad at law
   (d) Locus standi

(e) Material nondisclosure of facts

(f) Res judicata among others and

I will now turn to deal with each of the points raised

1. **(a) Prescription**

The first respondent raised the plea of prescription. The first respondent claims that the cause of action with regards to para (s) 2-6 of the Draft Order that the applicant is relying on arose in 2016.The first respondent further claims that the relief that the applicant is seeking was raised in HC 9370/16 and it was dismissed by late brother Judge Phiri. The first respondent acknowledges that a judgment prescribes after 30 years, however the prescriptive period of any other debt is three (3) years. Thus the first respondent claims that the applicant wants to revive ancillary matters which do not have anything to do with the judgment and therefore is of the view that prescription still applies. The applicant is of the view that this point has no merit and claims that neither the remedy of rescission nor the remedy of a declaratory order are debts as referred to by the first respondent. The first respondent bases its claim on section 15 (d) of the Prescription Act [*Chapter 8:11]* (the act) which provides that; "The period of prescription of a debt shall be—

(*d*) except where any enactment provides otherwise, three years, in the case of any other debt."

Section 15 (d) deals with prescription of a debt and the first respondent failed to show this court how para (s) 2-6 of the Draft Orders can be referred to as debt in terms of s 15 of the Act .The point of law raised by the first respondent has no merit and therefore falls away.

(b) Application defective and bad at law

The first respondent raised a point of law that the application is bad at law, fatally defective and should be a declared a nullity. The applicant denied these claims by the first respondent and stated that r 449 applies in this matter because when the application was granted the court had been made to believe that the applicant was before it when in reality the applicant was not before this court. This court is of the opinion that the applicant used the correct rules as she is claiming that she was misrepresented by the respondents when the judgment by MUSHORE J was granted in default. The respondent claimed that this application was bad at

law and could not be cured. The respondent failed to point out the defects of this application. This court failed to see any wrong in the manner in which this application was done therefore this point of law fails

(c) Material nondisclosure

As for this point there is nothing to discuss as nothing has been raised by the applicant to support it

(d) Locus standi

The first respondent raised the point of *locus standi* .The first respondent is of the opinion that the applicant is not an interested party in terms of s 14 of the High Court Act. The applicant has shown that she is an interested party by stating that it has a right and the order granted by MUSHORE J is hindering the applicant from dealing with her property as it pleases and thus the reason for this current application. In the matter of *Allied Bank Ltd* v *Dengu & Another* [2016] ZWSC 52 MALABA DCJ as he was then commented as follows

> "It is quite clear that the question of *locus standi* does not arise in the present case for the following reason. The principle of *locus standi* is concerned with the relationship between the cause of action and the relief sought. Once a party establishes that there is a cause of action and that he/she is entitled to the relief sought, he or she has *locus standi*. The plaintiff or applicant only has to show that he or she has direct and substantial interest in the right which is the subject-matter of the cause of action. "

In the case of *Ndlovu* v *Marufu* HH-480-15, the court had the following to say concerning the concept of *locus standi*:

> "It is trite that *locus standi* exists when there is direct and substantial interest in the right which is the subject matter of the litigation and the outcome thereof. A person who has *locus standi* has a right to sue which is derived from the legal interest recognised by the law. In the case *of Stevenson v Minister of Local Government and National Housing and Ors* SC 38-02, the court in outlining *locus standi in judio* stated that in many cases the requisite interest or special reason entitling a party to bring legal proceedings has been described as "a real and substantial interest" or as a direct and substantial interest."

This court is of the opinion that the applicant has a real and substantial right and therefore has *locus standi* thus this point of law raised has no merit and therefore it fails.

(e) Material dispute of facts

The first respondent raised a point of law that there is material dispute of fact. The issue to do with material dispute of fact was well articulated in the case of *Supa Plant Investment (Pvt) Ltd* v Edgar *Chidavaenzi* HH 92-09 where the learned judge MAKARAU J defines when does a material dispute of fact arise:-A material dispute of fact arises when such material facts put by the applicant are disputed and transverse by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence".

Further held that "For the respondents to allege that there was a material dispute of fact he must establish a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence. He must not make a bare denial or allege a dispute."

This was well stated in the case of *Room Hires Co* v *Jesper Street Mansion* 1949 (3) SA**.**

> "it is necessary to make a robust common approach to a dispute on motion as otherwise the effective functioning of the court can be harm strung and circumvented by the most simple blatant strategy. The court must not hesitate to decide on an issue of facts merely because it might be difficult to do so .Justice can be defeated or seriously impeded and delayed by an over fastidious approach to a dispute raised in an affidavit". See case of *Sofflantini* v *Mould* 1956 (4) SA 150 at 154.

I tend to be persuaded by the argument in the above cases. I don't see any material dispute of facts given that this Court has already established that the first respondent was never a director of the first applicant. Therefore this point of law falls away

(f) RES JUDICATA

The second and fourth respondents raised a special plea of *res judicata*. The respondents are of the opinion that this matter was previously dealt with and therefore they argue that the matter is *res judicata.* In order to succeed a party claiming *res judicata* must show that the previous relief sought is identical to the present in the following aspects as alluded to in *Fidelitas Shipping Co Ltd* v *V/O Exportchleb* [1966] IQB at 640-1.

i) the same matter/question has been decided;
ii) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which *res judicata* is raised;

iii) the judicial decision creating *res judicata* was final.

For *res judicata* plea to be successful it should be clear that the requirements mentioned above have been complied with. In matters HC 1028/21 and HC 9370/16 the cause of action is not the same. In HC 9370/16 the applicant made an application for a Declarator in terms of the following draft order

1. That the appointment and registration of Nathan Mnaba as a shareholder in Norwich Trading (Pvt) Ltd ,effected by way of CR Forms that were signed and filed in the third respondents offices on 29 October 2014 be and is hereby set aside and declared null and void *ab initio.*
2. That the appointment and registration of Nyasha Muzavazi and Jotham Mnaba as the new directors of Norwich Trading (Pvt)Ltd effected by way of CR forms that were signed and filed in the third respondents offices on 29 October 2014 be and is hereby set aside and declared null and void *ab initio*
3. That the registration of mortgage bond number 1193/2015 with second respondent against third applicants property, also known as stand 750 Greystone Township A Harare be and is hereby declared null and void *ab initio.*

In case HC 1028/21 the applicant made an application for rescission of judgment. Thus the relief being sought in this current matter and in that of HC 9370/16 is not the same. Moreso on the issue of the same parties, the parties are not the same. The respondents should really be able to differentiate between same and similar. The requirements for *res judicata* say same and not similar therefore in this instance the parties are not the same but similar with addition of other parties .The other requirement for *res judicata* to be successful is that the judicial decision that created res judicata was final. In this matter the judicial decision cannot be regarded as final , In the matter of *Harare Sports Club and Another* v *United Bottlers Ltd* 2000(1) ZLR 264 (H) 268 C-D where GILLESPIE J made the remarks:

> "--- where the judgment sought to be rescinded was given in default, no question of a final judgment having been given on the merits can arise. Hence, no considerations of *functus officio* or *res judicata* apply to thwart an application for rescission. In such a case, even at common law, it is recognized that the court has a very broad discretion to rescind (on sufficient cause shown) a judgment given by default."

More so MUZOFA J in *Midlands State University* v *Alois Matongo* HH 390/18 dealt with a similar matter where she stated the following;

> "The principle that emanates from these cases is that the judgment relied upon should be considered as to its effect in giving a final and definitive decision. In other words where there is a default judgment *res judicata* does not automatically apply, the default judgment should be analyzed as to its character in the finalization of the matter.
> Even if the Labour Court judgment was not a default judgment, I believe the same principle applies in this case. Can it be said the judgment disposed of the matter? I do not think so. The Court did not deal with the matter on the merits and therefore the substantive issues of the case remained unresolved."

In this case I agree with my sister Judge MUZOFA J in her sentiments, in my own opinion a default judgement cannot be held as final because it is technical in nature. The aim of the judiciary is to bring all matters to finality in a fair and just manner. Therefore for a matter to be *res judicata* it must have been heard in its entirety and on merits .Thus the respondents failed to prove *res judicata* therefore this point of law falls away.

In the conclusion this court makes a finding that the points *in limine* raised have no merits therefore fall away. In the result the court orders as follows;

1. The points *in limine* raised by the first, third and fourth respondent fail.
2. No order as to costs.

Gill, Godlonton& Gerran, applicant's legal practitioners
Nyangani Law Chambers, first respondent's legal practitioners
Munangati& Associates, second respondent's legal practitioners
Mutuso, Taruvinga & Mhiribidi, third respondent's legal practitioners
Mawere and Sibanda, fourth respondent's legal practitioners