VADEE ABDUL
and
VIMBAI CHIBIYA
versus
ASSETFIN (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 25 February 2025 & 2 May 2025

Opposed Application-Rescission of Default Judgment

Mr *M Chipetiwa*, for the applicants
Mr *B Maunze*, for the respondent

MUSITHU J: This is an application for the rescission of a default judgment granted by this court on 22 November 2023, under HCH 6544/23. In that matter, the respondent herein was the plaintiff, while the second applicant was the defendant. The court ordered that the defendant and all those claiming occupation through him must vacate a property known as Stand 41 Hessel Road Carrick Creagh Harare (the property) within ten (10) days of service of the order. The court further ordered that in the event that the respondent and all those claiming through him failed to comply with the directive to vacate the property within ten (10) days of the order, then the sheriff of the High Court was to evict them forthwith as well as demolish any structures erected at the property.

The present application was made in terms of r 29 of the High Court Rules, 2021 (the rules). Additionally, the applicant also invoked r 27 of the rules. The application was made on the premise that the applicant was an affected party against whom a judgment granted against the second applicant also impacted on him. The application for rescission was conjoined with an application for the first applicant's joinder to the proceedings in HC 6544/23.

Factual background to the application

The first applicant averred that on 6 May 2024, he received a call from the second applicant advising that the Sheriff had come to the property and delivered a notice of removal, a writ of ejectment and a court order notifying the second applicant to vacate the premises or be evicted from the property on 9 May 2023. The first applicant claimed to be based in Bulawayo where he works. On viewing the documents, the first applicant discovered that the

court order relied upon for the eviction was obtained against the second applicant, who happened to be his caretaker who looked after the property when he was in Bulawayo.

A perusal of the documents revealed that the respondent filed summons for eviction and demolition of the property sometime in 2023. The summons was served on an unnamed female tenant at the property. No appearance to defend the summons was filed and a default judgment was granted on 22 November 2023.

The first applicant claimed to be the holder of all rights and interests in the property. He further claimed to have purchased the property on 14 May 2005, from a trust called Paradza Trust which at the time of the sale was represented by one Bernard Mahara Mutanga. The first applicant claimed to have stayed at the property from 14 May 2005 until sometime in 2022 when he received a letter addressed to the occupants of the property by the respondent's legal practitioners. The letter required them to vacate the property as it belonged to the respondent. He instructed his erstwhile legal practitioners to inquire on what basis the respondent was seeking his eviction. The respondent had simply alleged that it was the owner of the property without furnishing any evidence to that effect. The first applicant resisted the eviction.

The first applicant averred that even though the respondent's legal practitioners were informed of his agreement of sale with Paradza Trust, they proceeded to issue summons against the second applicant, a mere caretaker. The first applicant averred that the second applicant was the wrong defendant. He further averred that the respondent's legal practitioners should have inquired from the first applicant's legal practitioners if they had the mandate to receive summons on his behalf instead of serving them at the property.

The first applicant denied having tenants at the property, save for the caretaker. He claimed that the summons could have been served on a wrong address, and this explained why the unknown female tenant would not have known the second applicant. If the summons had been served on the second applicant, then he would have brought them to the first applicant's attention. The order which was granted against the second applicant directly affected his rights and interests yet he was not joined as a defendant.

It was further submitted that even though the respondent claimed to be the owner of the property based on a certificate of registered title obtained in 2022, the first applicant had purchased the same property from Paradza Trust which also claimed to be the owner of the property. The first applicant claimed that there was a scheme of fraud perpetrated against him by the respondent and its associates who were bent on fleecing him of his investment.

The first applicant argued that he could not be evicted on the basis of a court order obtained against his caretaker. He claimed to have a lien on the property based on the improvements he made to the property. The investment made to the property was in excess of US$100,000.00, and the property was currently valued at about US$250,000.00. The applicant averred that he had good prospects of success in the main matter and deserved a chance to be heard.

The second applicant also deposed to his own founding affidavit. The averments made in his affidavit were not materially different from those made in the first applicant's founding affidavit. He denied that the summons was served at the property, as they would have been served on him as the caretaker.

The Respondent's Case

The opposing affidavit was deposed to by Elisha Tsikaki in his capacity as a director of the respondent. He urged the court to dismiss the application for joinder on the basis that the application for rescission could not at this point include parties who were not included in the main action. The reason for the joinder was unjustified because the first applicant was aware of the letters of demand which were written and served at the property. The respondent denied that the applicants were not aware of its interest in the property. The first applicant never disclosed that the second applicant was his caretaker when all letters of demand were served at the property.

The respondent averred that it was the registered owner of the property by virtue of a certificate of registered title No. 3889/22. The respondent never leased or sold the property to any third party. The respondent was unaware of the occupation of the property by the applicants, and only became aware of their existence in 2022, when it carried out an audit of its immovable properties across Zimbabwe. It was also averred that the applicants' representatives did not explicitly indicate which parties they were representing. The letter of 10 November 2022 from Chigwanda Legal Practitioners to the respondent's legal practitioners only referred to their client who was the occupant of the property. The respondent's legal practitioners therefore assumed that the said legal practitioners were also acting on behalf of the second applicant since he was also in occupation of the property.

The respondent also denied the averment that the second applicant was not properly served with the summons. It was averred that the fact that the applicants did not dispute the description of the place as explained in the sheriff's return of service meant that they were aware of the details provided by the sheriff. The applicants were therefore aware of the eviction

proceedings as evidenced by the letter from the respondent's legal practitioners attached to their own founding affidavit. The letter clearly stated that the respondent was going to institute proceedings for the eviction of the applicants from the property.

The respondent dismissed the first applicant's assertion that he could not be evicted because he made improvements to the property. There was no evidence of those improvements. There was also no evidence showing that Paradza Trust, from whom the first applicant claimed to have purchased the property was ever the owner of the property. The first applicant himself had failed to provide proof of his ownership of the property after allegedly purchasing it from the Paradza Trust.

In any event, the respondent had offered to pay the first applicant for its improvements but he rejected the offer. It was therefore not the respondent's fault that the applicants were going to lose the illegal structures which they had unlawfully built on the respondent's property.

The Submissions

In his submissions, Mr *Maunze* for the respondent, raised three preliminary points. The first was that the second applicant had no *locus standi* to institute proceedings; the second was that the application was defective for lack of specificity and particularity of the provisions of the rules in terms of which it was made; the third concerned the propriety of combining an application for rescission and one for joinder. I will proceed to deal with these separately hereunder.

Second Applicant's *Locus Standi*

Mr *Maunze* submitted that the order that the applicants wanted rescinded provided for three things. It provided for the eviction of the second applicant; the eviction of all those claiming occupation of the property through the second applicant and the demolition of structures. *Mr Maunze* further submitted that in para 10 of his founding affidavit, the second applicant had disqualified himself from seeking rescission by alleging that his joinder was improper. Further, he did not allege that he contributed anything to the improvements at the property. He therefore lacked the requisite l*ocus standi* to file a r 27 application.

In response, Mr *Chipetiwa* for the applicants argued that the preliminary point was devoid of merit. This was because the default order required the second applicant to vacate the premises. The place was his home and he needed his day in court. He could not be evicted on the basis of a default judgement. The second applicant had a constitutional right to

accommodation. Mr *Chipetiwa* further submitted that the second applicant was entitled to vindicate his right of occupation because he was occupying the property as an employee.

The principle of *locus standi* has been the subject of legal discourse in this jurisdiction on countless occasions and is a well beaten path. In their book *The Civil Practice of the High Courts of South Africa,* authors *Herbstein & Van Winsen*[1] make the following pertinent observations on the question of *locus standi:*

> "This question involves consideration of whether the party is enforcing a legal right and has sufficient interest in the relief claimed. It is important to note that a person who has an interest in the relief claimed may, nevertheless, not be able to claim that relief if the claim is not based upon a legally enforceable right……"

A party must establish a direct and substantial interest in the right which is the subject-matter of the suit. A person's interest in the cause must be predicated upon a legally enforceable right. The mere existence of an interest in the subject matter of litigation or relief claimed may not be sufficient to clothe a litigant with the requisite *locus standi,* if such an interest does not translate into a legally enforceable right.[2]

In para 10 of his founding affidavit, the second applicant averred as follows:

> "I further submit that I have good prospects of success in the main matter. I intend to show the Court in the main matter that my joinder is improper because I do not occupy the property in question in my name. I stay there as an employee of Mr Abdul."

The second applicant effectively disclaimed his involvement in the dispute by alleging that he had been improperly cited. In short, his argument was that he was improperly sued in these proceedings because he had no rights in the property save as an employee of the first applicant. The second applicant's reaction to the claim against him is sensible. As a mere employee, he could not claim to have any rights more than those of the first applicant as his employer. In fact, had the respondent been aware of the proper identities of the party that claimed some rights in the property, then I have no doubt that it would not have cited the second applicant in his capacity as a mere caretaker. The person who ought to have been properly cited was the first applicant.

Mr *Chipetiwa's* submission that the second applicant had a constitutional right to accommodation and that he was entitled to vindicate his right to the property as an employee of the first applicant, is without merit. The second applicant may have had an interest in the

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[1] Fifth Edition Vol 1 at p 185
[2] See also *Allied Bank* v *Dengu & Anor SC 52/16* at p 6 of the judgment

property by virtue of his being an employee of the first applicant. That interest did not translate into a legally enforceable right which he could vindicate against a third-party claiming ownership of the property. The second applicant did not allege that he made any improvements to the property or that he was involved in its purchase. He was not going to be affected by the demolition of the property because he did not claim to have made any improvements. In para 16 of his founding affidavit, the first applicant also observed that *"in fact the joinder of VIMBAI CHIBIYA in HC 6544/23 is wrong and improper."*

I am therefore persuaded to make a finding that the second applicant has no *locus standi* to seek the rescission of the default judgment. He was correct to aver that he was improperly cited. That being the case, he should not be saddled with an adverse order of costs because he was improperly cited as a party to the proceedings. The second applicant's application is accordingly dismissed with no order as to costs.

Whether the application if defective for lack of particularity

Mr *Maunze* submitted that the application was defective in that it did not clearly particularize the requirements of the provisions of the rules under which it was made.

In response, Mr *Chipetiwa* submitted that the facts of the matter showed that what was before the court was a r 29 application. This was also clear from the background of the matter as set out in para 6 of the first applicant's opposing affidavit.

The face of the application described it as a "COURT APPLICATION FOR RESCISSION OF DEFAULT JUDGMENT AND FOR JOINDER OF 1ST APPLICANT TO THE MAIN ACTION AS THE DEFENDANT: Rules 29 & 27 of the High Court Rules, 2021". In paragraphs 3-4 of the first applicant's founding affidavit under the heading "NATURE OF APPLICATION", the first applicant averred that the present application was for rescission of a default judgment in terms of r 29 of the rules.

What the first applicant sought to do was to delineate his own r 29(1) application in terms of which he wanted the judgment set aside, from that of the second applicant. The second applicant's application was filed in terms of r 27, and it sought the rescission of the judgment on the basis that it was granted in default. In a r 27 application, rescission will be granted if the court is satisfied that there is good and sufficient cause to set aside the judgment granted in default.

What is of concern to the court now that the second applicant is no longer part of the proceedings, is the r 29 application in terms of which the first applicant sought his own relief. Under r 29(1), the court may at the instance 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) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or (c) an order or judgment granted as a result of a mistake common to the parties. Rule 29(1) therefore provides three instances in which the court would on its own initiative or upon application by an affected party correct, rescind or vary an order or judgment.

Mr *Maunze's* argument as I understood it was that from a perusal of the first applicant's founding affidavit, it was not clear, under which of those three categories the r 29 application was launched. I agree with that submission. After setting out the basis of his application to be r 29, the first applicant did not specify under which category of r 29(1) was the application placed before the court. As already noted, r 29(1) is broad. It was not clear whether the application was made on the basis that the order or judgment: was erroneously sought or granted; or that there was some ambiguity or patent error or omission; or that there was a mistake common to the parties.

In *Bushu* v *Grain Marketing Board & 2 Ors*[3], CHITAPI J made the following instructive remarks:

> "However, in practice, any astute legal practitioner making an application in terms of a statutory provision including a rule of court is expected to indicate the rule or provision concerned. The need to cite the relevant provision of the law under which the application is made, where applicable of course, cannot be overemphasized. The citation of the correct and relevant provision attunes the court to its jurisdiction and the judge or court as the case may be immediately opens up to the provision and if need be researches on the provision if it is not one that immediately comes to mind."

Where a provision of the rules in terms of which the cause of action is founded is broad, then the applicant must zero in on the specific provision that is relevant to their application. The court must not be left guessing about the applicable provision. As observed by the respondent's counsel, the first applicant adopted a kitchen sink approach whereby everything was just thrown at the court for the court to make its own determination about the basis of the application. Nowhere in the first applicant's affidavit was an attempt made to clarify under which part of r 29(1) was the application placed before the court. The exact nature of the complaint was not set out.

In para 27 of the founding affidavit, the applicant concluded by stating: *"In the circumstances, I humbly submit that it is in the interest of justice that the default judgment be*

[3] HH 326/17 at p 3

set aside". Again, no attempt was made to explain the nature of the first applicant's complaint relative to the provisions of r 29(1).

The same goes for the application for joinder which was supposedly made in terms of r 32. It was in para 5 of the first applicant's founding affidavit that the first applicant made it clear that the same application was intended to motivate his joinder to the main proceedings. The need to set out the requirements of a joinder was overlooked. Rule 32 was cited in passing. It was only in para 28 that the applicant stated *"I hereby apply for leave to be joined as a party and be allowed to file my Appearance to Defend in Case Number HC 6544/23."*

The first applicant conflated three potentially standalone applications into one but forgot to properly plead the essential requirements of each application founded as they were, on different provisions of the same rules of the court. The applicant was required to plead his cause of action under the different heads mindful of the provisions of the rules under which the different claims were being motivated. The different causes of action were presented in convoluted and jumbled up manner that was not easy to follow and relate to the legal provisions under which the application was supposedly launched.

The court would have overlooked the shortcomings where they confined to the form or face of the application. The fact that the defects manifested themselves in the founding affidavit made the affidavit incurably defective. The general rule which has been laid down repeatedly by superior courts is that an application must stand or fall by the founding affidavit and the facts alleged therein.[4] It is not the duty of the court to go through the painstaking process of attempting to decode the nature and basis of a litigant's complaint from the voluminous papers that are placed before it. Rather, it is the duty of the litigant in motion proceedings to set out his cause of action with sufficient clarity bearing in mind that the affidavits take the form of pleadings in such proceedings.

The application must therefore fall on that score. Having made that decision, it becomes unnecessary to canvass the merits of the matter.

COSTS

The court was urged to dismiss the application with costs on the attorney and client scale in the event of it finding in favour of the respondent. The court was not persuaded to make an award of costs on the punitive scale.

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[4] See Herbstein & Van Winsen: *The Civil Practice of the High Courts and the Supreme Courts of Appeal South Africa* 5th Edition at p 440-441: See also *Muchini v Adams* SC 47/13

Resultantly it is ordered that:

1. The second applicant's application is hereby dismissed with no order as to costs.
2. The first applicant's application is struck off the roll for being defective.
3. The first applicant shall bear the respondent's costs of suit.

Ingwani Chipetiwa Group, legal practitioners for the applicants
Jiti Law Chambers, legal practitioners for the respondent