HOME OF ANGELS HOUSING CO-OPERATIVE
SOCIETY LIMITED AND 5 OTHERS
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 14 June & 8 November, 2022

Opposed

L Madhuku, for the applicant
R Nemaranda -Dodzo, for the respondent

MANGOTA J: I heard this application on 14 June, 2022. I delivered an *ex tempore* judgment in which I struck the case off the roll with costs.

On 1 August, 2022 the registrar of this court wrote advising me that the applicant appealed my decision. He requested reasons for the same for purposes of the appeal. My reasons are these:

The applicant, which are six housing co-operatives, were sued by the respondent, the City of Harare, seeking to evict their respective members and them from its Lot 2 of Parkridge Estate which is commonly known a Paddock 27, Crowborough Farm, Harare. In February, 2019 the six housing co-operatives entered into consent papers with the respondent. They, as parties, translated their respective consent papers into court orders on 6 February, 2019.

On 12 April, 2021 the housing co-operatives filed a joint application for rescission of judgment which the court entered for the parties in 2019. They applied under r 449 (1) (c) of the repealed rules of court.

On being served with the application, the respondent raised three preliminary points after which it dealt with the substance of the application. Its *in limine* matters were/are that:

a) the applicant adopted a wrong procedure;
b) the application suffers from the defence of *lis pendens* – and
c) the deponent to the founding affidavits of each applicant did not have the *locus* to apply as he did.

The applicant, on its part, also raised a preliminary point. The point was to the effect that one Phakamile Mabhena Moyo, the acting town clerk, did not have the authority of the respondent to depose to the latter's opposing affidavit.

Because the *in limine* matter which the applicant raised was contained in the latter's answering affidavit, the stated fact closed the door against the respondent which could not, unless with leave of the court granted upon an application filed by it, file any further affidavit after the answering affidavit had been filed. The respondent, however, insisted, in its Heads, that there was no need on its part to prove that the deponent to its opposing affidavit had its authority to so depose to the affidavit. It, in the mentioned regard, placed reliance on *Dube* v *PSMAS & Anor*, SC 73/19 in which the court stated that:

> "A person who represents a legal entity, when challenged, must show that he is duly authorised to represent the entity."

That the respondent is a legal entity requires little, if any, debate. That it can only act through natural persons who fall under its purview is taken as given. Mr Moyo, the acting town clerk, stated in clear and unambiguous terms that he:

i) was/is the acting town clerk of the respondent – and

ii) was/is authorised to depose to the affidavit for, and on behalf of, the respondent.

When he stated as he did, I remained satisfied that he was not on a frolic of his own. I was further satisfied that he had the authority of the respondent to defend the latter in an as best a manner as he could.

As the acting town clerk of the respondent, he, judicial notice is taken, occupies the highest seat in the respondent. He, if a comparison may be favoured, occupies the position of chief executive officer in the respondent. He could not have been on a frolic of his own as the applicant alleges. This is a *fortiori* the case given that the application was served on the respondent. He had no choice but to take the only logical step to defend the suit which had been mounted against the respondent. As the person who is overally in charge of the day-to-day administration of all personnel who work within, and for, the respondent, no one but him was/is better qualified to defend the suit of the applicant. The applicant's cause could, in all probability, have held if some officer who falls under the respondent other than the deponent had taken it upon himself to defend the suit.

The preliminary point which the applicant raised is misplaced. It is devoid of merit and it is, accordingly, dismissed for want of substance.

Equally without merit is the respondent's third preliminary point. None of the applicant's deponent can be said to have had no *locus* when it is through each deponent that the respondent entered into a consent paper which the parties translated into an order of court in February, 2019. Each applicant, it is common cause, is a legal entity which cannot talk, see, smell or touch. It can only act through such natural persons as those who deposed to the founding affidavit of each applicant. These, as gleaned from the papers file of record, occupy the highest seat in their respective housing co-operatives. It is, therefore, inconceivable that any persons other than them would have signed the consent paper for, and on behalf of, each applicant.

The *in limine* matter which the respondent raised in respect of the issue of the deponents' *locus* lacks merit. It is, accordingly, dismissed.

In respect of the preliminary matter which is to the effect that the applicant adopted a wrong procedure, the old rules of court under which the application was filed, it is noted, provided three ways in terms of which a court order could be rescinded. In the repealed rules of court, the procedure fell under rr 63, 449 or 56. The first two of the mentioned rules are replicated in the new rules of court under rr 27 and 29 respectively.

Rule 56 of the repealed rules of court does not appear to have its equivalent in the High Court Rules, 2021. It made specific reference to the manner in which a judgment or order of court which has been entered by consent of the parties could be set aside by the court. Such an order could only be set aside upon the applicant showing good and sufficient cause for the rescission. It was not set aside on the basis of r 63 or r 449 which the applicant employed in the instant application. Different considerations applied to each of the three rules of court.

The respondent's *in limine* matter which is to the effect that the applicant employed the wrong procedure is, therefore, not out of place. The judgment which the applicant seeks to rescind is in the form of a consent order. It can only be rescinded under r 56, and not under r 449, of the repealed rules of court. The respondent's preliminary point is not without merit. It, accordingly, succeeds.

The second preliminary matter which the respondent raised is that of *lis pendens*. *Lis pendens* is a defence which is open to the defendant or respondent who is being sued by the plaintiff

or the applicant. The principles which relate to the defendant's plea of *lis pendens* were enunciated in *Diocesan Trustees, Diocese of Harare* v *Church of the Province of Central Africa*, 2009 (2) ZLR 57. These are that:

a) the litigation is pending;
b) the other proceedings are between the same parties or their privies;
c) the pending proceedings are based on the same cause of action- and
d) the pending proceedings are in respect of the same subject-matter.

Hebstein and van Winsen discuss the same defence in their *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5th edition, at 605 wherein they state that:

> "*Lis pendens* is a special plea which is open to a defendant who contents that a suit between the same parties concerning a like thing and founded upon the same cause of action is pending in some other court."

The defence of *lis pendens alibi*, it has been established, shares features which are in common with the defence of *res judicata* because they have a common underlying principle which is that there should be finality to litigation. Once a suit has been commenced before a tribunal which is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated. By the same token, the suit will not be permitted to be revived once it has been brought to its proper conclusion *(res judicata*). The same suit between the same parties should be brought only once and finally. There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of these elements, there is no potential for a duplication of actions: *Nestle South Africa (Pty) Ltd* v *Mars Incorporated* (2001) 4 All SA 315 SCA).

The above-cited case authority sums up the principle which relates to the plea of *lis pendens* in a clear and succinct manner. Although the case is not from this jurisdiction, its persuasive value cannot be glossed over. This is so notwithstanding that it is not binding on me. Its value remains of great importance because of the clarity of thought which went into it. It is, therefore, in the context of the principle which is laid down in that case that the respondent's defence shall be considered. In doing so, however, I shall not lose sight of the assertions of the respondent and the ability on my part to refer to previous or current records of the court. There is a dearth of case

authority which allows me to refer to the court's own records and/or proceedings in my consideration of the present application. *This is a fortiori* the position of the law where the case which I am dealing with is, in substance, related to cases which the court dealt with in the past or which it is dealing with at the time the court is called upon to deal with, as well as decide, the case. Section 176 of the Constitution of Zimbabwe provides to an equal effect. It asserts, in part, that the Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process. The constitutional provision is also re - stated in *Mhungu* v *Mfindi* 1986 (2) 171(SC) as well as in *Netone* v *Econet*, SC 47/18

The respondent states, in his plea of *lis pendens*, that:

> "4.1 The first applicant applied for rescission of judgment under HC 8927/19 on 31st October, 2019. The respondent filed its notice of opposition and opposing affidavit on 14 November, 2019 and since November, 2019 the first applicant has not bothered to pursue his matter any further.
>
> 4.2 On 9 March, 2020 the first applicant once again together with fourth and fifth applicant filed another application for rescission of judgment under HC 1387/20. This matter is still pending and the applicants have not taken any action to pursue this matter any further since March, 2020.
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> 4.3 Once again and for the third time, first, fourth and fifth applicant (sic), all the applicants herein, filed a court application for rescission of judgment under HC 6886/20 on 23 November, 2020. This matter is still pending and the applicants have not done anything to pursue this matter any further."

The above-quoted statements are specific allegations which the respondent raised *in limine* in its opposing affidavit. They appear at p 38 of the record and under the heading which reads: *Matter is pending*. In its answering affidavit, the applicant refrained from addressing the issue which the respondent raised against it. All it did was to deny that the preliminary matter had merit. It stated that counsel for it would address the same in its Heads.

What the applicant fails to appreciate is that, whilst the issue of the plea of *lis pendens* is a matter of law which counsel for it has the capacity to argue, the respondent raised matters of fact which counsel for it would not be able to address effectively without its factual response to the same unless counsel ventures to give evidence from the bar which he cannot do.

It is evident, from a reading of the above-stated set of circumstances, that the applicant failed to controvert specific allegations which the respondent raised against it. The allegations fall into the realms of evidence which the applicant should have challenged. By not challenging that piece of evidence which is clear and unambiguous in nature, the applicant placed itself into a very

invidious position. It allowed itself to fall into a deep hole out of which it will find it difficult, if not impossible, to come.

It is a trite position of the law that what is not denied in affidavits is taken as having been admitted: *Fawcett Security Organisation* v *Director of Customs & Excise*, 1993 (2) ZLR 121 (SC); *DD Transport (PVT) Ltd* v *Abbo*t, 1988 (2) ZLR 92.

On a correct interpretation of this aspect of the case, the applicant should not have allowed itself to take refuge under the mistaken belief that counsel for it would address the factual issues which had been raised against it. Counsel cannot give evidence from the bar. The law of practice and procedure does not allow a legal practitioner who represents a litigant to play the role of the latter. It allows each party to any proceedings to play his own role. The litigant's role is to give evidence and the role of his legal practitioner is to apply the law to the evidence of the litigant and, in the process, argue the case for the litigant.

The above-stated matter aside, I took the liberty to read the cases to which the respondent made reference. I observed that, on 31 October, 2019 the first applicant applied under HC 8927/19 to rescind the consent order which it concluded with the respondent in February, 2019. It filed HC 8927/19 under Rule 56 of the repealed rules of court. I observed further that the first applicant did not pursue its application when the respondent filed its notice of opposition to the same. The net effect is that HC 8927/19 remains pending at court from the date that the notice of opposition was filed to-date. My further observations were that, on 23 November, 2020 the applicants plus three others which are Bantu Heritage Housing Co-operative, Ideal Homes Housing Co-operative and Tatakura Housing Co-operative, applied under r 56 of the repealed rules of court to rescind consent orders which they each concluded with the respondent in February, 2019. The application was filed under case number HC 6886/20. The record shows that the applicant did not pursue HC 6886/20 to its final conclusion.

It is when such matters as are observed in the foregoing paragraphs are taken consideration of that it cannot be suggested that the respondent's plea of *lis pendens* is without merit. It is definitely with merit. Litigants cannot file cases with the court and park them at court without bringing them to finality. Litigants who file court process should make every effort to bring them to their logical conclusion. What they cannot do is to file and park process at court as the applicant did *in casu*. What they cannot also do is to make an effort to resurrect the same matter for the

consideration of the court when previous process which they filed on the same subject-matter, between the same parties and the same cause of action remains unterminated.

The applicant, it is my view, did not abandon HC 8927/19 and HC 6886/20 for no reason. It left them at court and uncompleted for a specific reason. It realized that, in its application for rescission of the consent orders which it concluded with the respondent, it employed r 56 of the repealed rules of court. It must have become aware that, if it proceeded with HC8927/19 and/or HC 6886/20, it had to find justification for rescission of the consent orders which it entered into. The stuck reality which it faced was that it had no such justification which it could advance to the court for it to successfully rescind the consent orders. It, in all probability, realized that an application under r 56 of the old rules of court required it to show good and sufficient cause for the rescission which it sought to move the court to grant to it. Because it remained alive to the fact that it did not have the requisite justification for rescission, it looked for an alternative escape route, so to speak. Its escape route was to abandon HC 8927/19 and HC 6886/20 in preference to r 449 (1) (c) which required no justification for rescission. Its disposition in the observed regard displays the highest degree of dishonesty which the court will not condone let alone accept.

The preliminary matter which the respondent raised is with merit. It destroys the case of the applicant to a point of no return. It makes the application fatally defective. Because of defects which are inherent in the first and second *in limine* matters of the respondent, the application cannot stand. It stands on no leg. It is, accordingly, struck off the roll with costs.

Lovemore Madhuku Lawyers, applicant's legal practitioners
Chihambakwe Mutizwa and Partners, respondent's legal practitioners