JOYCE MADZORERA

versus

DAVID SHAVA

HIGH COURT OF ZIMBABWE

CHATUKUTA J

HARARE, 4 March 2010 & 12 January 2011

Opposed Matter

I E G Musimbe, for the applicant

T Mpofu, for the respondent

CHATUKUTA J: The applicant seeks an order for the ejectment of the respondent and any other person in occupation through him, from Stand 1741 Unit A, Seke, Chitungwiza (the property) and costs on a higher scale.

The background to the application is that on 6 November 2001 the respondent purchased the property from one Gloria Madzorera. The respondent instituted proceedings in case No. HC 2793/02 for an order to compel Gloria to cede her interests and rights in the property into his name. The application was granted in default on 19 June 2002. The rights and interests of the late Tafirenyika Madzorera in the property were duly ceded into his name.

On 9 August 2002 and in case No. HC 6518/02, Gloria Madzorera filed an application for the rescission of the order granted under case No HC 2793/02. The application was opposed. Although Gloria Madzorera filed an answering affidavit and heads of argument, the matter was never set down for hearing at the instance of either party.

However, the property belonged to and was registered in the name of Tafirenyika Madzorera. Tafirenyika had died on 13 August 2000 before the sale of the property to the respondent. Tafirenyika's estate was registered with the Master of the High Court

and on 31 July 2003. The applicant was appointed executrix dative of Tafirenyika's estate.

On 6 January 2005, the applicant filed an application in case No. HC 59/05 seeking an order for the rescission of the judgment in case No. HC 6518/02 in terms of *r*449 of the High Court Rules, 1971. The basis of the application was that the property belonged to the estate of the Late Tafirenyika and that Gloria did not have the authority of the Master to dispose of that property. It was contended that the court had erroneously granted the order for cession because it was not aware at the time that the property belonged to a deceased estate. The application was granted on 9 March 2005 in default of the respondent.

On 4 May 2005, the respondent filed an urgent chamber application and was on 10 May 2005 granted an interim interdict restraining the applicant from registering the property back into the name of the estate or into the name of any third party or advertising the sale of rights and interests in the property. The respondent was ordered to file an application for rescission within seven days of the interim order.

The respondent filed the application for rescission on 15 August 2005 in case No. HC 3953/05. The basis for the application was that the order granted in case No. HC 59/05 did not set aside the order granted in his favour in case No. HC 2793/02. The applicant could not therefore reverse the cession because the order was extant. The respondent further contended that the applicant did not have the *locus standi* to have sought the rescission of case No. HC 2793/02 because she had not been a party to that case.

It appears the application was argued by both parties and was dismissed. Following the dismissal of the application, the respondent refused to vacate the property. He insisted in a letter from his legal practitioners of instant and dated 30 November 2007, that case No. HC 2793/02 which granted him the right to have the property ceded into his name had not been set aside by the order in case No. HC 59/05. He stated that there were two conflicting orders and that the order in case No. 2793/02 took precedent. The applicant then filed the present application because of the respondent's resistance to vacate the property.

The order in case No. HC 59/05 reads as follows:

"IT IS ORDERED THAT:

1. That application succeeds with costs.
2. That the court order under case No. 6518/02 be and is hereby set aside.
3. That third Respondent is directed to set aside the said cession and re-register the rights and interests in Stand 1741 Unit "A", Seke, Chitungwiza to the Estate Late Charles Tafirenyika Madzorera.

Arising from the above background, it is the applicant's contention that the order clearly reversed any gains that the respondent had obtained in case No. HC 2793/02. It was also clear that there was an error in case No. HC 59/05. It was contended that the error does not detract from the fact the court ordered the reversal of the cession of rights and interests in the property back into the name of the estate of the Late Tafirenyika Madzorera. The respondent's application for rescission of judgment (case No. HC 3953/05) was dismissed and therefore the applicant had the right, on behalf of the estate to seek for the respondent's ejectment from the property.

The applicant further submitted that reference referred to a non existent order of court was an apparent error. She applied for an order in terms of *r* 449 correcting the order so that it reflected the correct case number for the order that was set aside.

The respondent raised the same arguments it raised in the application for rescission in case No. HC 3953/05 which was dismissed. He contended that the order in HC 2793/02 was not rescinded and therefore was extant. He further argued that the court had erroneously granted an order to the applicant who had not been a party to case No. HC 2793/02. The respondent opposed the application to correct the order in case No. HC 59/05 arguing that the court could not correct the order in the absence of the reasons for the dismissal of the application in case No HC 3953/05.

It appears to me to that there are basically two issues. The first issue is the effect of the dismissal of the respondent's application for rescission in case No. HC 3953/05. The second issue is whether or not I should grant the application to correct the order granted in case No HC 59/05.

The effect of the dismissal of the application in case No. HC 3953/05 is in my view, that the order in case No. HC 59/05 reversing the cession into the respondent's

name remained extant. I am of the view that the reasons for judgment are necessary only in so far as a court is required to determine the correctness of an order arrived at. I am not being asked to consider the correctness of the order in case No HC 3953/05. It is not competent for me to even consider that case given that it is an order of this court. Such consideration would amount to a review of this court's own decision. I therefore do not believe it is competent for me to consider the submissions raised by the respondent which were raised in his application for rescission in case no HC 3935/05.

It is not in issue that the order set aside a non-existent order. However, it further provides for the reversal of the cession from the respondent's name back into that of the estate of the late Tafirenyika Madzorera. It is the effect of this latter part of the order that the respondent unsuccessfully sought to reverse in his application for rescission. It appears to me that the application for rescission was itself an acknowledgment of the fact that the order in case No. HC 59/05 deprived the respondent of his rights granted in the order in case No. HC 2793/02. Had there been no such realisation and acknowledgment of the effect of the order, the respondent would not have deemed it necessary to apply for the rescission of the order. It is my view that the order in case no HC 59/05 for the reversal of the cession from the respondent's name into the name of the estate therefore still stands and the applicant is entitled to the order that she seeks.

I now turn to the application to correct the order in case No. HC 59/05. I am of the view that it is competent for me to consider the correction of the order in terms of *r* 449. *R* 449 (1)(b) allows the court to *mero motu* or upon the application of any party affected to correct any judgment or order in which there is an ambiguity or a patent error or omission, "but only to the extent of such ambiguity, error or omission". The exercise of this discretion is only permitted to the extent that after the correction, the order should reflect the intention of the judge. Such an intention is derived from the pleadings before the court which made the decision. (See *First National Bank of Southern Africa Ltd v van Rensburg No and Others: in re First National Bank of Southern Africa Ltd v Jurgens and Ors* 1994 (1) SA 677 (T) 681 A-C, *First Consolidated Leasing Corporation Ltd v McMullin* 1975 (3) SA 606 (T) at 608E - F; *Seatle v Protea Assurance Co Ltd* 1984 (2) SA 537 (C) at 541C; *Everson v Allianz Insurance Ltd* 1989 (2) SA 173 (C) at 179H - 180D; *First National Bank of South Africa Ltd v Jurgens and Others* 1993 (1) SA 245

(W) at 246E - G; *Laduma Financial Services v De la Bat NO en Andere* 1999 (4) SA 1283 (O) at 1286F - 1287E and *Adonis v Additional Magistrate, Bellville, and Ors* 2007 (2) SA 147 (C) 153 paragraph 17.)

The fact that the reasons for the dismissal of the application in case No HC 3953/05 for the rescission of case No. HC 59/05 are not available is in my view, for the reasons stated above, irrelevant. The respondent was given the opportunity to address the court and failed to advance any meaningful submission.

As rightly submitted by *Mr. Musimbe,* the reference to case no HC 6518/02 seems to have been an error. In paragraph 7 of the applicant's founding affidavit in case No. HC 59/05, the applicant stated as follows:

> "First Respondent obtained an order compelling Second and Third Respondent's (*sic*) to have cession of the above-mentioned property effected to him, which order was granted under Case No. 6518/02 (*sic)* in default."

As already indicated, it is common cause that case No. HC 6518/02 was not prosecuted to its conclusion and no order was issued by the court in that case. It is also common cause that the applicant however, intended to have the order that had empowered the respondent to cede the property into his name rescinded. The respondent obtained that order in case No. HC 2793/02. The fact that the court was setting aside a non existent order was therefore clearly a patent error. I do not believe that was the intention of the court. The error arose from the applicant's pleadings, but was none the less an error that the court would not have intended to perpetuate. In the result, the applicant must succeed in having the order corrected to reflect the intention of the court.

The applicant claimed costs on a legal practitioner and client scale on the basis that the respondent sought to delay the finality of litigation. I am in agreement with the applicant. The respondent was aware of the dismissal of his application for rescission in case no HC 3953/05. The applicant had the courtesy of giving him notice to vacate the property. The respondent chose not to vacate the property but responded by letter dated 30 November 2007. The respondent could not wish away the judgment in case No HC 3953/05 with a letter restating the same position he had advanced in the case that he lost.

The conduct of the respondent was a clear disregard of the order dismissing the application for the rescission of case No. HC 59/05. That order remained extant with its defect and the only course of action for the respondent would have been to further challenge the order of dismissal. It did not. By resisting eviction, the respondent caused the applicant to incur unnecessary expenses in initiating and prosecuting the present application. The court must therefore express its displeasure at the respondent's conduct by making an appropriate order of costs on a higher scale.

In the result, it is ordered that:

1. The order in case No HC. 59/05 be and is hereby corrected by the deletion of "case No. 6518/02" and substitution with "case No. HC 2793/02" such that paragraph 2 of the order reads as follows:
   "2. The Court Order under case No. HC 2793/02 be and is hereby set aside."
2. The respondent, and any person claiming occupation through him, be and is hereby ordered to vacate Stand 1741 Unit A, Seke, Chitungwiza within 14 days of the date of service of this order, failing which the Deputy Sheriff be and is hereby authorised to eject him and any person claiming occupation through him from the property.
3. The respondent be and is hereby ordered to pay costs of this application on a legal practitioner and client scale.

IEG Musimbe, applicant's legal practitioners
Messrs Uriri, respondent's legal practitioners