PHYLLIS MUTSWIRI
versus
GONYORA INVESTMENTS (PVT) LIMITED
and
THE REGISTRAR OF DEEDS
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 14 October 2015

Opposed matter

T.Mpofu, for the applicant
L.Uriri, for the 1st respondent

MATANDA-MOYO J: This is an application for rescission of judgement entered by this court on 9 October 2014-case number 8368 refers. In that order this court dismissed the application in case number 4149/14 for want of prosecution. In that case the applicant sought to rescind a judgement granted in default on 14 May 2014. In that judgement this court granted an application by the -first respondent in terms of s 3 of the Titles Registration and Derilict Lands Act [*Chapter 20:20*]. The order was granted in default and the Deputy Sheriff was authorised to transfer a certain piece of land situate in the District of Salisbury being remainder of Lot 114 of Greendale measuring 1364m^2 from the applicant herein to first respondent.

The applicant brought two urgent applications for stay of execution but one was withdrawn and the other dismissed. The applicant then proceeded to file an application for the rescission of that order of 14 May 2014. Such application was dismissed on 9 October 2014 for want of prosecution. On 3 December 2014 the applicant noted the present application for rescission of judgement. The applicant explained that the granting of the default judgement was occasioned by her misfiling an answering affidavit together with heads of argument under a wrong case number HC 3897/14. That matter dealt with an

application for an interdict yet the heads of argument clearly dealt with a rescission application. I have perused such papers and found the applicant's averment to be correct.

The applicant submitted that she has prospects of success in the matter as she is the registered owner of the property. The applicant submitted that the respondents would not suffer any prejudice by granting of this order, which prejudice could not be cured by an order of costs.

The brief facts of this case are that the applicant is a cousin sister to the late Muchineripi R Gonyora who was the alter ego of the first respondent at the time of the transactions in question. The late M.R. Gonyora was the original owner of Lot 114 of Greendale. On 3 June 1987 the property was transferred to the applicant, who still holds title to that property under Deed of Transfer number 3625/87. The parties differ on the circumstances surrounding the transfer. The applicant alleges that she bought the property from her late cousin brother as per the title deeds. The first respondent on the other hand alleges that the applicant only held the property in trust for the late M.R. Gonyora, who was the same as the first respondent. The explanation given being that, since the City Council did not allow a single person to hold title to more than one property, the late M.R. Gonyora bought properties and transferred them to relatives. In reality the properties remained his.

The first respondent alleged that the applicant could not afford to purchase such a stand, moreso develop same. The title deeds have always been in the custody of the first respondent. The applicant has never benefited from such property. She collected no rentals from the first respondent. The applicant has attached a power of attorney which she gave to one David Tinago to manage and transact her affairs. Such power of attorney is dated 5 January 1987. She attached no other proof to show that she was benefitting from the property. After the passing on of the late M.R Gonyora in 2002, the first respondent sought to transfer the above property to itself. It then filed an application before this court in terms of s 3 of the Title and Registration and Derelict Lands Act [*Chapter 20:20*]. The application was served by way of substituted service, which was by publication of the application in the Herald. The first respondent had applied for substituted service after telling this court it did not know where the applicant nor where David Tinago resided.

Obviously the first respondent obtained the above orders through lies. The respondent knew the applicant's whereabouts. The applicant is a close relative of the Gonyoras and there is evidence that they met at family gatherings. Whilst I tend to believe the first respondent's version of events, I do not condone the manner in which the first respondent went about

getting title of the property. The first respondent had to be candid with court and place the correct facts before the court. A court cannot condone such actions.

Coming to the merits of the case the applicant being the registered owner of the property, has real rights to the property. The property should be taken away from her upon she being heard.

I am satisfied that the applicant has shown good and sufficient cause why the default order should be granted.

However the manner in which the applicant dealt with this matter is quite deplorable. The applicant has not shown interest in pursuing her matter to finality. She attempted to rescind the default judgement by way of urgent applications. She then noted a proper application for rescission of judgement which application was dismissed. Interestingly this is an application to set aside a default judgement for a judgement granted in default. This obviously makes a circus of the court rules. The applicant continued to commit the same offence of failure to comply with court rules. In *Ndebele* v *Ncube* 1992(1) ZLR 288 (S) Mac Nally JA had this to say;

> "But it must be observed that in recent years applications for rescission for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyers, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for clarity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then reargued until the costs exceed the capital amount in dispute. The time has come to remind the legal profession of the old *vigilantibus non dormientibus jura subveniunt*- roughly translated:the law helps the vigilant but not the sluggard"

See also *Songore* v *Olivine Industries (Pvt) Ltd* 1988(2) ZLR 210

I am satisfied that this is a matter where the applicant even though successful in her application should not recover any costs from the respondents.

On whether the application for rescission is the correct application, I have observed from the court order that the latter was dismissed for want of prosecution. That in itself signifies a default order. It was dismissed due to failure by the applicant to pursue her application. I do not agree with submissions by the first respondent that it is judgement warranting an appeal.

Accordingly I order as follows;

1) The judgement granted against the applicant on 9 October 2014 under case number 8368/14 be and is hereby set aside.

2) The applicant be and is hereby granted leave to set down for hearing case number HC 4194/14 within ten (10) days of granting of this order.
3) That there be no order as to costs.

Rubaya & Chatambudza, applicant's legal practitioners
Sibongile Kampira Attorneys, 1st respondent's legal practitioners