DANBRO HOLDINGS (PVT) LTD
and
ARLINGTON JOINT VENTURE
versus
INNOCENT MANYANGE
and
SAKUTUKWA & PARTNERS
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 15 March 2016 & 15 June 2016

Opposed application

F Girach, for the applicants
T Mpofu, for the 1st respondent
No appearance for 2nd Respondent
No appearance for 3rd Respondent

TSANGA J: This is an application for rescission of a default judgment granted on 14 December 2011,[1] in which the court order compelled applicants to transfer two stands, described as stands No. 2367 and 2368 of Arlington Estate held under Deed of transfer 4592/96, to the first respondent, Innocent Manyange. Rescission of the judgment is sought on the basis that applicants never sold the stands in question, and equally, that they never at any time received the court application in question or notice of the matter from which the default judgment emanated. They state that they have never operated from 49 Greendale Ave and that this was never at any time their address of service. They highlight that they only became aware that a default judgment had been granted against them on 4 October 2012.

[1] This matter first appeared before me on the 23rd of October 2013 for hearing of the application for rescission. The applicants having not filed proof on a board resolution, and given the nature of the dispute where identity of the applicants was at stake, I had upheld this preliminary point raised by the respondents regarding the need for a resolution to have been filed. See *Danbro Holdings (Pvt) Ltd and Anor v Innocent Manyange & Ors* HH 376 - 13. Applicants appealed and the Supreme Court ordered that the application for rescission be heard on the merits. It is therefore the merits of the application for rescission that is now the subject matter of this judgment.

The first respondent, Innocent Manyange purportedly bought the stands through one Jealousy Marimudza who presented himself as the Director of applicants. He resists this application for rescission on the basis that there was service of the application on the applicants. In effecting the sale, he said Jealousy Marimudza is averred to have acted through the second respondent, Sakutukwa and Partners, a firm of lawyers. He further resists the application on the grounds that after the court order was passed in December 2011, he had on 16 April 2012 in particular, personally served the court order on several persons connected with the applicants. He therefore argues that it is false that applicants became aware of the default judgment in October 2012 and that for all intents and purposes, any application for rescission should have been made within 30 days of becoming aware of the order in accordance with r 63 of the High Court Rules.

Mr *Girach* who argued on behalf of the applicants at the hearing, emphasised that the application was in terms of r 449 of the High Court rules in that it sought to reverse a judgment that had been made without notification to the other side. In particular, he said there was no compliance with r 39 (2) (d) (1) of the High Court Rules, 1971 which requires service at a Corporate's place of business. He argued that there was no contention in the certificate of service that the applicants were served at their place of business with the application that led to the default judgement. The certificate of service simply states that the court application for an interdict was handed personally to Jealous Marimudza on the 6th of December 2007.

He pointed out that the official records of the company reflect clearly that its place of business is 7 Normandy Road Alexandra Park not 49 Greendale Avenue as alleged by first respondent. He also highlighted that there was no indication that the said Jealousy Marimudza to whom the said application is said to have been handed, was a Director, secretary or public officer of the applicants. As such, the sum total of his argument in this regard was that the service of the application was bad in law and applicants were unaware of the pending proceedings. The default judgment, he said, should therefore never have been entered. To the extent that it had, this had been done in error and as such it could be rescinded in terms of r449 which grants the court the right to rescind a judgment granted in the absence of the other party. (See *Banda* v *Pitluk*[2]). He argued that the first respondent believed he was serving the right person when he was in fact not.

[2] 1993 (2) ZL:R 60 (H)

Relying on the case of *Chihwayi* v *Attish Enterprises Private Limited*,[3] he also argued that a proper case had been made out for setting aside the default judgment on the basis of fraud. He asserted that the applicants are registered owners of the property and that the said Jealousy Marimudza purported to be a director of the first applicant when he was clearly not. It was his view that a simple search in the Deeds Office would have revealed that he was not. He had never been authorised and had never been a director. Furthermore, he pointed that the said agreement which had been produced by Jealousy Marimudza to Sakutukwa & Partners, the second respondents, which he said showed that he had purchased shares in the applicant's company could not be produced by Mr Sakutukwa. His assertion was that the first respondent's remedy was against the lawyers who led him to believe that Jealousy Marimudza was authorised to represent applicants.

The applicants also emphasised in their heads of argument that r 63 cannot apply to such circumstances where there has been fraud and that instead, such applications are considered in terms of the common law, under which a key element for rescission is the showing of a good and sufficient cause. This is deemed to constitute reasonableness of the explanation, the bona fides of the application and the bona fides of the defence on merits and the applicant's prospects of success. Using these parameters, on the *bona fides* of the defence, the core argument was that they did not enter into the agreement of sale with the first respondent, neither did they instruct the second respondent to do the same. As such they argued that they cannot be compelled to transfer the stands as per the default order.

Mr *Mpofu* who appeared on behalf of the first respondent argued that whether the application is under r 63 which he deemed applicable, or r 449 which he disputed, it was in both cases woefully out of time as no condonation had been sought for the late filing of the application. He drew strength for his argument that even an application under r 449 is time bound from the case of *Grantully (Pvt) Ltd and Anor* v *UDC Ltd*.[4] It was held in that case that it would be a proper exercise of a court's discretion to hold that an applicant could not be heard after the lapse of a reasonable time even where such applicant proved that the rule applied.

He also argued that if the judgment is rescinded under common law because of fraud, then the order granted in rescinding would be final and the parties could not thereafter come

[3] 2007 (2) ZLR 89 (S)
[4] 2000 (1) ZLR 361 (S)

back to the issue. The court, he said, would have dealt with a final and definitive issue thereby closing all avenues of litigation. Reliance for this argument was placed on the Supreme Court case of *Nyamuswa* v *Mukanya.*[5]

Thus, central to his argument was the question of whose fraud is said to form the basis of the issue. His position in this regard was that it was certainly not fraud on the part of the first respondent who in fact relied on an advert, paid the purchase price for the stands, and, waited for transfer. When that was not forthcoming, he had served all parties concerned. His core argument therefore was that this being the case, the order cannot not be set aside on account of fraud that could not be imputed to the first respondent. He further argued that the second respondent, Sakutukwa and Partners was equally also not fraudulent.

The thrust of his argument was also that there were insufficient facts before the court for it to make a finding that the judgment should be set aside on account of fraud. He argued that in fact there were serious dispute of facts. In this regard he pointed to the fact that evidence had been placed before the court showing that Jealousy Marimudza had acquired shareholding and that the submission of Form No. CR6 from 2012 was of no consequence as this was after the fact. In his view, what should have been put forward was the relevant form for 2011. He further put forward the argument that the applicants should have brought Jealousy Marimudza to court since for a rescission at common law all the parties need to be present.

Mr *Girach*'s argument in response was that the applicants do not know Jealousy Marimudza and could not have brought him to court as there was no contention on their part that he was a director. His position was that if the respondents truly believed that Jealousy Marimudza was a Director then they should have filed the relevant company form to prove so. He also argued that the shareholders agreement was a fallacy made up by the second respondent Mr Sakutukwa. He emphasised that the essence of the matter is that the service was defective. Furthermore, he stressed that an import of r 449 is to set aside a judgment which was made in the absence of the other party and that this was the quest in this instance. He also argued that it is incorrect to say the case will be brought to finality under common law since in setting aside a judgment on the basis of fraud, all that the court needs to be satisfied on is that it was obtained as a consequence of fraud. As such he emphasised that it

[5] 1987 (2) ZLR 186 (SC)

will be at the hearing of the main matter that the issue of fraud will be canvassed fully because once this judgement is set aside, the necessary papers will accordingly be filed.

The legal position

Rule 39(2) (d) which deals with the manner of service on corporates provides that:

> "(*d*) In the case of process to be served on a body corporate—
> (I) by delivery to a responsible person **at the body corporate's place of business or registered office**;
> or
> (ii) if it is not possible to serve the process in terms of subparagraph (i), by delivery to a director
> or to the secretary or public officer of the body corporate;"

Service in this case was purportedly effected at 49 Greendale Avenue which is not the applicants' place of business according to corporate records. Furthermore, service was equally effected on a person who applicants deny has anything to do with its business. On this score, it follows from the outset that the default judgment was void because service of process was defective. The averred facts in this matter point to a defect in the service of the process and therefore the application falls to be considered in terms of r 449. Indeed if the judge who granted the judgment had known that there had been defective service, he clearly would not have granted the order. Once this court accepts that the default judgment was defective for reasons of improper service of process, then the issue of the applicant having to show a meritorious defence falls away as the judgment will have been granted in error. See *Mushoto* v *Mudimu & Anor*,[6] *Munyimi* v *Tauro Nyamhuka*,[7] and *Hove & Anor*[8]

Order 49 r 449 does not lay down any time frame for setting aside an irregular judgment. The relevant part is couched as follows:

> ***"449. Correction, variation and rescission of judgments and orders***
>
> (1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order—
>
> (*a*) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or
>
> (*b*)…….
>
> (*c*)……..

[6] 2013 (2) ZLR 642 (H)
[7] 2013 (2) ZLR 291 (S)
[8] HH-425-14.

(2) The court or a judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed."

Indeed the case of *Grantully* (supra) referred to by the first respondent's counsel does emphasise the need for such applications, being procedural in nature, to be brought expeditiously. This is because it is in the interests of justice to have finality and certainty to matters as soon as possible. However, what emerges from a reading of that case is that what constitutes a reasonable time for bringing such an application under this rule is a factual consideration. Notably in that case, the length of time that the applicants had waited before bringing their application in terms of r 449 was five years. It was in this context that their application was deemed to be woefully out of time and an abuse of court process.

What is of significance in setting aside a judgment deemed to be void on account of a procedural irregularity is that the irregular judgment that is sought to be set aside must be challenged within a reasonable period from the time that the applicants got to know of the judgment. Where such a judgment is challenged within a reasonable time, the courts inevitably set it aside. What constitutes a reasonable time depends on the facts of the case. Whether a delay is reasonable depends on its length bearing in mind the background of the case and the issues at stake. See for example, *Changuion* v *Tram (Pty) Ltd* 2007 (2) BLR 495 (HC) in which the High Court of Botswana dealt with a like worded provision relating to a judgment granted in error. The judgment sought to be rescinded had been granted on 21 March 2006 and the applicant became aware of it on 17 July 2006 but did not launch an application for rescission till 14 December 2006, nearly five months later. Applying the above criteria to the facts to assess the reasonableness of the time frame within which the application had been brought and explanation for delay in bringing the application, the reasons were deemed not to be such as to render the five months delay unreasonable or the application untenable.

In casu the applicants averred that they got to know of the judgment in October 2012. The first respondent said that whilst it had been granted in December 2011, he had brought it to the attention of the applicants sometime in April 2012. The first respondent himself waited for over 4 months before actively pursuing the applicants. He must have known that something was amiss hence his endeavours to consciously seek out the applicants and to bring the judgment to their attention.

The applicants, on the other hand, who are said to have waited from April to December before taking action, must have needed to ascertain the position on the ground before they could bring their application for rescission. In my view, under the circumstances averred where they knew nothing at all about the sale or the court order, a period of eight months before applying to set aside a judgment granted in error is not unreasonable. Consultations, investigations and verifications of what actually transpired would evidently have needed to be undertaken.

The issue of whether there was fraud or not is not for this court's decision at this juncture. The bona fides of the matter are not in issue. Of significance is that there was no proper service and it is important that the judgment be set aside so that the applicants can have the opportunity to put their story before the courts.

Costs have been sought on a higher scale. However, it seems to me that justice will more appropriately be done if costs are in the cause.

Accordingly, it is ordered that:

1. Judgement entered in default against the 1st and 2nd applicants in case no. HC 6876/07 be and is hereby set aside.
2. The 1st and 2nd applicants shall file their opposing papers in Case No. HC 6876/ 07 within 10 days of the granting of this order.
3. Costs of this application will be in the cause.

Mhishi Legal Practice, applicant's legal practitioner
J Mambara & Partners, 1st respondent's legal practitioners