PADLEY INVESTMENTS (PRIVATE) LIMITED
and
PINNACLE PROPERTY HOLDINGS (PRIVATE) LIMITED
and
PATRICIA TAMIREPI
versus
GLADMORE CHIFAMBA
and
MHIRA MUSANHI

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 21 March and 21 April, 2017

Opposed Matter

D Ochieng, for the applicant
P Kwenda, for the respondent

MANGOTA J: This application was heard on 21 March, 2017. After I had read documents filed of record and heard counsel, I delivered an *ex tempore* judgment in which I dismissed the application with costs.

On 19 March, 2017 the applicants wrote to the registrar of this court. They requested reasons for my decision. These are they:

On 4 March 2010, the first applicant, a subsidiary of the second applicant, sold stand number 637 Chisora Village, The Grange, Harare ["the property"] to the second respondent. The property is 2 400 square metres in extent.

Whilst the price of the property was pegged at $40 000-00, the first and the second applicants agreed with the second respondent that the latter would not pay the sum which constituted the purchase price. They agreed, as parties, that the transportation services of bricks which the second respondent rendered to the first applicant would be offset against the value of the property. They, in short, agreed that payment would be in kind as opposed to being in cash.

Subsequent to the conclusion of the sale of the property to the second respondent, the latter approached the first respondent and offered to sell the same to him. The offer was made after the respondents had inquired from the second applicant if the second respondent had title in the property. The second applicant confirmed that the second respondent had title in the property which he could sell to the first respondent.

On the strength of the second applicant's assertion, the second respondent ceded his rights in the property to the first respondent to whom he had sold the same.

On the allegation that the second respondent had not paid full purchase price for the property, the first and second applicants cancelled the agreement of sale of the property to the second respondent. They repossessed the property and sold it to the third applicant.

On 17 September, 2013 the respondents sued the first and second applicants. They filed their action under case number HC 7590/13. They, *inter alia,* sought to have the cancelled agreement of sale and the sale of the property by the second, to the first, respondent declared lawful and binding. They excluded the third applicant from the suit.

The first and second applicants received the respondents' summons and declaration on 26 September, 2013. They did not enter appearance to defend within the prescribed *dies induciae.* The respondents filed a chamber application for default judgment. They did so on 21 October, 2013.

ZHOU J dealt with the respondents' application. He, on reading the papers, commented as follows:

> "According to the letter dated 7 March, 2013 the same property was sold to one Patricia Tamirepi. She is, therefore, an interested party who must be cited in these proceedings" (emphasis added)

Pursuant to ZHOU J's directive of 5 November, 2013 the respondents filed a notice of amendment of their summons and declaration. They did so on 4 December, 2013. The notice sought to join Patricia Tamirepi, the third applicant, to the proceedings and to have the sale of the property to her by the first and second applicants set aside.

The respondents served upon the third applicant the summons and declaration which they served on the first and second applicants on 26 September, 2013. They also served upon her the amended summons and declaration. They then filed a second chamber application for default judgment. They filed it on 18 March, 2014.

Zhou J dealt with the respondents' second chamber application. He, on 2 May 2014, entered default judgment against all the three applicants.

ZHOU J'S judgment forms the basis of the present application. The first and second applicants contended that it was erroneously sought and granted. They contested the manner in which the third applicant was joined to the suit which the respondents instituted under case number HC 7590/13. They submitted that the joinder of the third applicant was defective and, therefore, the judgment which flowed from it was a nullity. They applied for its rescission. They relied on r 449 (1) (a) of the High Court Rules, 1971 in the mentioned regard. The respondents, according to them, should either have withdrawn their action and reinstituted it with all the three applicants cited together or, alternatively, they should have applied for a joinder of the third applicant to the proceedings which had already commenced.

The respondents' position was that the amendment which they effected on the summons and declaration was not defective. They insisted that the third applicant was properly joined to the first and the second applicants. They stated that they relied upon ZHOU J's directive as read with r 87 (2) (b) of the rules of this court when they joined the third applicant to the proceedings. They submitted that there was no need for them to apply for a joinder in a situation where ZHOU J had made an order in terms of the cited rule.

The position which the respondents took is, in the court's view, correct. They complied in every material respect with the directive which Zhou J issued to them in the exercise of his discretion under r 87 (2) (b) of the High Court Rules, 1971. They, therefore, did not have to apply for a joinder of the third applicant to the action which they instituted under case number HC 7590/13. Their conduct in the mentioned regard cannot be faulted at all.

That ZHOU J had the requisite power to direct as he did is evident from a reading of r 87 (2) (b) of this court's rules. The rule reads, in part, as follows:

> "87. **Misjoinder or non-joinder of parties**
> (1) …….
> (2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either or its own motion or on application –
> (a) …….
> (b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party;
> (3) ……." [emphasis added]

ZHOU J realised, from the papers which had been placed before him, that the property which the respondents were laying claim to had also been sold to Patricia Tamirepi. He remained alive to the fact that Patricia Tamirepi had a direct and substantial interest in the

property which pertained to the respondents' chamber application for default judgment. He, in the exercise of his discretionary powers, ordered or directed that she be joined to the proceedings. He did so with a view to ensuring that the issue of ownership of the property between the respondents and Patricia Tamirepi would be effectually and completely determined as well as adjudicated upon. His conduct in the mentioned regard finds support from a reading of *Anabas Services (Pvt) Ltd* v *Ministry of Health & Ors,* 2003 (1) ZLR 247 (H).

The amended summons was not defective at all as the first and second applicants claimed. It complied with the rules of court in every material respect of them.

The respondents took the trouble to remain as transparent as they reasonably could. They explained, to the learned judge's satisfaction, the manner in which they joined Patricia Tamirepi to the proceedings. A reading of the affidavit which they filed in support of their second application for default judgment is relevant in the mentioned regard.

The respondents attached to their opposing papers Annexures Q and R. The annexures were the Sheriff's returns of service of process which was served upon the third applicant on 6 February, 2014.

The first annexure, Q, shows that the respondents served upon the third applicant the summons and declaration which had been served upon the first and second applicants on 26 September, 2013. The second annexure, R, constitutes the respondents' proof of service of the amended summons and declaration upon the third applicant who, at about the time of service, was legally represented by Sachikonye-Ushe Legal Practitioners.

Like the first and second applicants who were served with court process and did not enter appearance to defend, the third applicant did not enter appearance to defend within the prescribed *dies induciae*. She did not do so from 6 February, to 18 March, 2014 which is the day that the respondents filed a second chamber application for default judgment. They applied for judgment against all the three applicants.

Simple mathematical calculation shows that Patricia Tamirepi was accorded nineteen clear working days within which she could have entered appearance to defend, if such was her intention. She, for reasons known to herself, refrained from contesting the respondents' action against the first two applicants and herself.

The respondents' conduct cannot be faulted when they proceeded to obtain default judgment against all the three applicants as they did. They, in the mentioned regard, complied with r 88 (3) and (4) of the High Court Rules, 1971.

The foregoing matters show that the application of the first and the second applicants was misplaced. They premised it on r 449 (1) (a) of the rules of this court. A reading of the rule does not support the views which the first and second applicants hold of the matter.

Rule 449 makes reference to correction, variation and rescission of judgments and orders. It reads, in part, as follows:

> "(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 granted in the absence of any party affected thereby; or
> (b) ……; or
> (c) ……." (emphasis added)

As the respondents correctly submitted, the third applicant is the party who would have been adversely affected by ZHOU J's order of 2 May, 2014. She is, therefore, the person who should have applied for rescission of judgment under r 63 or r 449 of the rules of this court. Her application under r 449 (1) (a) would not have been sustainable at all. It would not have been so as the order which the court made against her was not granted in her absence. She was made aware of the respondents' action and she did nothing about it. She, therefore, does not qualify to apply for rescission under para (a) of sub-rule (1) of r 449.

The first and second applicants could not, by any stretch of imagination, apply for rescission of judgment at all. They could not do so under r 63 or under r 449 of the rules of court. They were served with court process on 26 September, 2013. They did not enter appearance to defend within the prescribed *dies induciae.* They did nothing about the respondents' claim from the time that they received court process to the time that they filed the present application. They allowed the matter to lie dormant for more than two years running. They advanced no reason at all for their inaction. They, at any rate, were not adversely affected by ZHOU J's order of 2 May, 2014. If they were, they would, in all probability, have contested the respondents' action when summons was served upon them on 26 September, 2013. The fact that they did nothing about the respondents' action is ample evidence for the conclusion that they were not contesting the suit.

The first and second applicants made every effort to, as it were, speak for and on behalf of, the third applicant. In applying as they did, they fell into the commonly referred to adage which stresses the point that they were crying more than the bereaved. They could not, at law, apply for and on behalf of, the third applicant. They merely cited her name as one of

them when she was not. She was never part of their application. She was not, and is not, before the court.

Patricia Tamirepi fought her own lone legal battle. She did so on 22 July, 2014 when she applied for rescission of judgment. She, for her own reasons, withdrew her application on 13 February, 2015. She, in the mentioned regard, allowed the matter which related to the property which she purchased from the first two applicants to be put to eternal rest.

The first and second applicants' submission as to the validity or otherwise of the contract which they concluded with the respondents should not detain the court at all. That matter has nothing to do with the application which they placed before me under r 449 (1) (a) of the High Court Rules, 1971. They should have pleaded as to the validity or otherwise of the contract in the action which the respondents instituted against them under case number HC 7590/13. In order for them to plead as such, they should have entered appearance to defend. They cannot move the court to revisit the matter which they allowed to lie dormant for more than two years. They did not advance any reason at all for their inaction. They, in short, cannot be allowed to bring a matter which relates to the main action through the back door. They, in fact, cited no rule of court, statute law or case authority which allowed them to insert clauses 29.1-29.4 of their founding affidavit in the present application.

On the strength of the foregoing matters, therefore, I remained satisfied that the application was totally devoid of merit. It was a complete waste of time, energy and effort of the court and the respondents in favour of whom default judgment was properly entered. I, in the premise, dismissed the application with costs.

Mutamangira & Associates, applicants' legal practitioners
Musendekwa & Mtisi, 3rd applicant's legal practitioners
Kwenda And Chagwiza, respondents' legal practitioners