

NYASHA RWAFU  
versus  
TOKOTI PARADZAI

HIGH COURT OF ZIMBABWE  
TSANGA J & CHIRAWU MUGOMBA JJ  
HARARE, 29 October & 4 November 2020

### **Civil appeal**

Appellant in person  
*R E Nyamayemombe*, for the respondent

TSANGA J: Appellant's application for rescission of judgment was dismissed by the magistrate in a matter involving eviction from stand 656 Zone 6 in Hopley in which the court found that the appellant had no bona fide defence on the merits. Having been given the benefit of the doubt that he was not in wilful default as there was no conclusive evidence of having been served the notice to plead, the appellant averred on merits that the stand from which eviction was sought in fact belonged to his wife and that this stand was known as 658 Zone 5 Hopley and not stand 656 Zone 6 as indicated in the summons. He had also sworn to an affidavit dated 30<sup>th</sup> of November 2018 that although he knew the complainant in the matter having previously worked for him, he did not understand why a case had been made against him as he does not possess a stand in Hopley nor has he ever owned one. In essence he stated he was a wrong party to the action. The court found that he could not therefore represent his wife since a party affected by a judgment can apply for rescission in their own right in terms of Order 30 rule 4(1) and that the wife could proceed in terms of the stated provision.

Appellant filed this appeal on the grounds that

1. The court erred in holding that he could not file for rescission as he was not the owner of the stand but failed to grasp that the Respondent had no *locus standi* to evict him
2. The court erred in failing to recognise that the respondent's stand and the stand from which appellant was evicted are different and so should have granted his prayer.

The prayer sought is that the appeal be allowed with costs and that the judgment of the court a quo be substituted with the following:

- a. Default judgment entered against applicant in case number 36/18 be and is hereby set aside.
- b. Applicant shall file his plea within 14 days of grant of this order.
- c. The applicant be restored to his occupation of the stand from which he was evicted.
- d. The respondent shall pay costs of suit on attorney client scale.

At the appeal hearing appellant appeared in person and confirmed having been evicted in July 2019. He confirmed that his wife was aware of the court's reasoning in not granting him rescission. Indeed, she had sworn an affidavit at the time of the application for rescission stating that she had bought the stand. Even though she had not taken any action to vindicate her claims, appellant maintained his argument that he had reason to appeal in that the court had misdirected itself in ordering an eviction from stand 658 zone 5 when the papers spoke of stand 656 Zone 6. As for the stand numbers which he latches on, the averment on record by Amon Nyika who describes himself as the current Chairman of Simon Mazorodze District shows that these were in a state of flux and had been changed.

In essence the error appears to be not one in the stand itself and who was to be evicted from it but in its simple numerical description or nomenclature. Indeed, that this is the case is borne out by the fact that the parties are known to each other and the appellant was an employee of the respondent before they fell out. Respondent says that the appellant was his tenant. The appellant's own sworn affidavit on p 47 of the record spoke to this relationship and to the fact that he himself has never owned a stand in Hopley.

The respondent's counsel therefore emphasized the point that the appellant never claimed that the property was his. His wife has never applied for rescission and has never taken any action to protect her alleged property. He highlighted that there are clear affidavits on record capturing that the stand in question had been sold to the respondent by one Wilfred Mataka. There was also an affidavit from one Amon Nyika the current chairman of Mazorodze district where the stands are located explaining the sale of the stand by Wildred Mataka and also the issue of stand numbers and the fact that they were yet to be rectified and synchronised.

The first ground of appeal it is in reality linked to the second ground in that the court is said to have erred in failing to recognise that even though he was not the owner the papers referred to a different stand and that therefore the respondent has no basis for evicting him.

There was no error on the part of the magistrate as the magistrate simply indicated that the alleged owner of the stand, who is privy to all details must be the one to take action. Even though the wife was very aware of the facts at the time of the application for rescission of judgment no application was made to be joined as a party having an interest in the matter. She has not sought rescission of the judgment of the court below.

Order 30 rule 4 provides as follows:

**4. Application for rescission by person affected by judgment**

(1) Any judgment of the court may, on the application of any person affected thereby who was not a party to the action or matter, made within seven days after he or she has knowledge thereof, be so rescinded, varied or corrected.”

The fact is having been evicted in July 2019 it was only in March 2020 that the appellant notably, sought to take action by seeking condonation for late noting of the appeal. The wife’s failure or reluctance to take action over property claimed is hers is truly baffling and cannot be explained by hiding behind the fact that she is a self-actor. The magistrate’s decision was clear that:

“In terms of order 30 Rule 4 (1) a party affected by a judgment can apply for rescission. As such the wife of the applicant who purported to be the owner of the stand can apply for a rescission and later to be joined to the proceedings as a party.”

Joinder to the claim if the rescission is granted will be by her application to the court. There is no basis for this court to order a return to the stand by the appellant as he lacks standing, worse still when the person said to be the owner is seemingly not interested in taking any action. It is not for this court to join her *mero motu* when she has not even sought rescission as owner of the property.

As stated in the case of *Sherperd Zengwe & Anor v Maria A Shangu & Anor* HH 180/17

“The doctrine of privity of contract provides that contractual remedies are enforced only by or against parties to a contract, and not third parties, since contracts only create personal rights<sup>1</sup>. Third parties cannot sue even if they would be benefitted by the performance of the contract<sup>2</sup>. The first defendant who acted as an agent of her husband cannot seek to enforce personal

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<sup>1</sup> Innocent Maja *The Law of Contract in Zimbabwe* p 27.

<sup>2</sup> See Innocent Maja *The Law of Contract in Zimbabwe* p 27

rights that emanated from the contract that she was not a party to. Being married to a person who is a party to a contract does not make one privy to that contract. There is no automatic transmission of privity of contract to a spouse by virtue of marriage, be it customary or civil.”

The only person who can speak to the ownership of the stand as being hers is the wife and the magistrate did not err in refusing to grant rescission once the applicant himself told the court that he did not own the stand and neither has he ever owned one in Hopley. It was him who told the court that the stand belongs to his wife. It is she who needed to take action as highlighted by the court below.

The appeal by the appellant lacks merit and is accordingly dismissed with costs.

CHIRAWU MUGOMBA J agrees .....

*Takaindisa Law Chambers*, respondent’s legal practitioners