

HB 11-18
HC 953/17
XREF 710/16, HC 401/13
XREF HC 1968/13, HC 4010/12

COLLEN DHLAMINI
and
SIPHO SAMUEL SIBANDA
and
EMELDAH DHLAMINI
and
FANITSHO TSHUMA
and
STANLEY NSINGO
and
BEE WALKER
and
PRISCA NGULUBE
and
LEORNARD NCUBE
versus
HERBERT NCUBE
and
HILDA'S KRAAL FARM (PVT) LTD
and
MINISTER OF LANDS AND RURAL RESETTLEMENT
N.O (IN HIS CAPACITY AS MINISTER RESPONSIBLE
FOR THE MINISTRY OF LANDS)
and
REGISTRAR OF DEEDS N.O
(IN HIS OR HER CAPACITY AS REGISTRAR OF DEEDS)

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 19 JANUARY 2018 AND 1 FEBRUARY 2018

Opposed Application

Ms L Mumba for the applicants
Z C Ncube for the 1st and 2nd respondents

MATHONSI J: The eight applicants are the proud beneficiaries of a monumental mistake in terms of which they were settled on Hilda's Kraal Farm located in the district of Nyamandlovu in Matabeleland North Province following the gazetting of that farm by the

government of Zimbabwe during the government's land reform programme. It was a programme in terms of which the government seized farm land owned and occupied by white farmers in pursuit of a deliberate policy to redistribute that land to landless indigenous citizens of this country in an effort to correct historical imbalances in land tenure occasioned by colonialism. In that regard the government policy deliberately excluded the acquisition of farm land already in the hands of black indigenous people, as it was them who were targeted for empowerment by that policy.

Hilda's Kraal Farm was held by a company known as Hilda's Kraal Farm (Pvt) Ltd, the first respondent in this application, by Deed of Transfer Number 2029/87, except that in spite of the name, the company was an investment vehicle through which Herbert Ncube, indigenous and his very indigenous wife Sipiwe Ncube owned the farm. In this application the eight applicants are seeking a rescission of an order issued by this court in their absence on 7 February 2014 in HC 1968/13, a matter in which they were not cited as parties, in terms of rule 449 on the ground that the order was erroneously sought and erroneously granted when, at all times, they were known to have an interest in the matter.

In that matter this court, per KAMOGA J, made the following order:

"IT IS ORDERED THAT:

1. The applicants' application be and is hereby granted.
2. The 1st respondent be and is hereby ordered to send a copy of the offer letter issued to Herbert Ncube to the Registrar of Deeds to strike off the caveat on Hilda's Kraal Farm (Pvt) Ltd with immediate effect.
3. 2nd respondent be and is hereby ordered to strike off the caveat which was placed on Hilda's Kraal Farm (Pvt) Ltd by 1st respondent as soon as possible.
4. No order as to costs."

In that application the first and second respondents herein were the two applicants and they had cited only the Minister of Lands and the Registrar of Deeds as respondents. The first and second respondents failed to cite the present applicants in that matter despite clear knowledge that they had an interest in the matter. I say that because prior to the making of that application the first and second respondents had, in November 2012 issued summons against the said applicants in HC 4010/12 for their eviction from Hilda's Kraal Farm alleging that they were

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in unlawful occupation of the farm. The eviction order had been granted in default on 18 January 2013.

It is significant that when the present applicants sought a rescission of the default judgment granted on 18 January 2013 in HC 407/13, the first and second respondents were very quick to consent to the rescission of that judgment which was rescinded by consent order issued on 10 February 2014. So when they made the application for the upliftment of the caveat in HC 1968/13 which was granted on 7 February 2014 the first and second respondents were aware of the applicants' interest as the eviction claim was being resisted and up to now it is still pending.

I shall return to that but for now let me set out the history of the matter. As I have said, the farm was acquired by the government in 2001 presumably on the assumption that it was not indigenously owned when it was. Thereafter the government settled the present applicants on the farm in 2006 and in good time issued them with offer letters to their respective plots which they promptly accepted. The case would have been open and shut with the applicants having no shouting chance had the first and 2nd respondents resisted what was obviously an error on the part of the acquiring authority.

What appears to have given the applicants a foot hold is the fact that prior to them being issued with offer letters for their respective plots at Hilda's Kraal Farm, the second respondent and his wife, as the two directors of the company, had convened a meeting and resolved to handover the farm to the government for resettlement. In an undated letter to Umguza Rural District Council the two stated;

"RE: HILDA'S KRAAL FARM

In our meeting of 28th May 2001 the directors of the above mentioned farm have decided to hand over the farm to government for resettlement. Please accept it in good faith.

Yours faithfully

Herbert Ncube (Director Operations)
Siphiwe Ncube (Director Administration)."

Subsequent to that the second respondent was issued with and accepted an offer letter dated 9 March 2005 in which he was allocated Subdivision 1 of Khatsense Lot A in the district of Lupane Matabeleland North Province. It is only after that turn of events that the following

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year 2006, the applicants were issued with offer letters for the plots at Hilda's Kraal Farm. They have remained in occupation up to now.

It is common cause that following representations later made by the second respondent the government took measures to withdraw the offer letters issued to the applicants and reinstated the first and second respondents at the farm. It is that withdrawal of the offer letter which the applicants have taken on review in HC 974/17 which application is still pending before this court. So, unlike what the first and second respondents have stated in their opposition, that issue is far from over. I am not sitting to decide the propriety of the review application in HC 974/17 and its outcome is unknown at this stage.

However, where the first and second respondents transgressed was seeking an order for the upliftment of the caveat on the title deeds to the farm citing only the Minister and the Registrar of Deeds. This was despite the fact that they were aware of the applicant's interest in the farm, an interest predicated upon the acquisition of the farm by the government which acquisition at some stage the second respondent accepted by voluntarily surrendering the farm for resettlement. The first and second respondents did that despite having consented to the rescission of the default judgment entered on 18 January 2013 in HC 4010/12, a matter in which the first and second respondents had had the presence of mind to cite the applicants.

It is also important to note that they consented to the rescission of judgment on 10 February 2014 in HC 407/13 and yet three days earlier on 7 February 2014 they had sought and obtained the order for the upliftment of the caveat in HC 1968/13. Their duplicity is there for all to see. More importantly the first and second respondents were subsequently barred from disposing of or encumbering the farm in HC 710/16 on 29 April 2016 by provisional order issued by this court which was later confirmed on 21 July 2016. Therefore uplifting the caveat when all the processes had been reversed and before the definitive determination of the respective rights of the parties was erroneous.

Rule 449 of this court's rules provides;

"449. Correction, Variation and Rescission of Judgments and Orders.

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- (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) ----
- (2) The court or 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.”

Clearly therefore a litigant seeking relief under rule 449 (1) qualifies for such relief where it can be shown that the judgment or order was erroneously granted in his or her absence. The question which arises therefore is whether in approaching the court without citation of the applicants the first and second respondents committed an error. Allied to that is the question whether when it granted the order that it granted the court was aware of all the relevant facts impacting on the grant of that order. It cannot be doubted that an error exists where a judgment or order has been granted when the judge who granted it was unaware of a relevant fact. In deciding an application for rescission of this nature the court is not confined to the record of proceedings. This is because the wording of rule 449 (1) (a) allows a party seeking rescission of a default judgment to place before the court all facts which were not before the court which granted the default judgment. See *Mushosho v Mudimu and Another* 2013 (2) ZLR 642 (H) at 652G.

That is the point also expressed by GUBBAY CJ in *Grantully (Pvt) Ltd and Another v Udc Ltd* 2000 (1) ZLR 361(S) at 364 G-365 A-B that;

“A court is not therefore, so it seems to me, confined to the record of the record of the proceedings in deciding whether a judgment was erroneously granted, as held by ERASMUS J in *Bakoven Ltd v G. J Howes (Pty) Ltd supra* at 471E (1992 (2) SA 466 (E)) and as suggested by the learned judge in this matter. See *Stander and Another v ABSA Bank* 1997 (4) SA 873 E at 882 C-G. Moreover, the specific reference in rule 449 (1) (a) to a judgment or order granted ‘in the absence of any party affected thereby’ envisages such a party being able to place facts before the correcting, rescinding or varying court, which had not been before the court granting the judgment or order. I think the rule goes beyond the ambit of mere formal or technical defects in the judgment or order.”

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When the court granted the order uplifting the caveat placed by the government upon the acquisition of the farm, it was not aware that following such acquisition the government had, with the acquiescence of the second respondent and his wife gone on to apportion the farm and settle the applicants on it. The court was unaware that the applicants had been issued with offer letters thereby clothing them with a legitimate claim over the farm and that the applicants were therefore laying a claim to the farm. The court was unaware that the eviction order granted in favour of the first and second respondents was being successfully repelled at the same time. Had those facts been placed before the court, it would not have granted the default judgment.

If the court holds as I hereby do, that a judgment or order was erroneously sought and erroneously granted in the absence of a party affected by it, then the judgment or order may be corrected, rescinded or varied without further inquiry. See *Grantully (Pvt) Ltd and Another, supra* at p365 G; *Tshabalala and Another v Peer* 1979 (4) SA 27 (T) at 30 D-E; *Topol and Others v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 650 F-G. That therefore resolves the matter. The order is susceptible to rescission.

In the result, it is ordered that

1. The judgment or order granted by this honourable court on 7 February 2014 in case number HC 1968/13 be and is hereby rescinded.
2. The applicants are hereby joined as 3rd to 10th respondents in case number HC 1968/13.
3. The applicants are hereby directed to file their opposition to that application within ten (10) days of the date of this judgment.
4. The costs of this application shall be costs in the main application.

Masiye-Moyo and Associates, applicants' legal practitioners
Ncube and Partners, respondent's legal practitioners