KASEPLAN GRAND INDUSTRIES (PVT) LTD
versus
TEVIOT TRUST (PVT) LTD
and
THE MINISTER OF LANDS, AGRICULTURE,
FISHERIES AND RURAL DEVELOPMENT

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 22 May & 19 October 2023

Rescission of Judgment

G Madzoka, for the applicant
A Kadye, for the respondent

KATIYO J: The applicant approached this court in terms rule 29(1) of the High Court Rules 2021 seeking rescission of a judgment granted by this court. The order sought was as follows:-

IT ORDERED THAT:

1. That the application for rescission of judgment granted by the court be and is hereby granted
2. That the judgment granted by the court under case number HC 3383/20 be and is hereby rescinded.
3. That the respondent be ordered to pay cost on legal practitioner scale

Parties argued their case after which they filed heads of arguments. The order was granted and here are my reasons as requested.

Brief Background

According to the applicant he was allocated Lot 1 A Teviotdale farm in the district of Mazowe measuring 310.6189 hectares and the farm was officially handed over the applicant by the Minister Lands and Rural Resettlement HM Murerwa on the 1st of December 2011 and the offer letter to that effect was in turn granted.

The first respondent sometime in 2020 approached this honourable court under case number HC 3383 / 20 seeking inter alia the following:

a) A declaratory order declaring that the certificate of title number 3973/ 56 held by Teviot Trust (Pvt) Ltd over a certain piece of land situate in the District of Salisbury, being lot1 A Teviotdale measuring 147 1169 Morgen is valid and effectual for all intents and purposes.

b) A declaratory order declaring that the acquisition of Lot 1A of Teviotdale in terms of Gazette No 330 published on 18 June 2004 was outside the provisions of the law, more particularly section 16B (2) (a) and 16A of the Constitution of Zimbabwe was invalid and accordingly set aside.

c) Declaratory order declaring that the consequential endorsement of the first respondent's deed of transfer is set aside and therefore restoring the first respondent's Deed of transfer is set aside and therefore restoring the validity of the first respondent's Title deed.

d) A declaratory order invalidating and setting aside and offer letter issued after the 18th of June 2004.

First Respondent mischievously avoided citing the applicant knowing fully well that applicant had valid rights over the land in question evidenced by a valid offer letter that has been presented in the papers.

A court order was granted in favour of the first respondent.

It was only when first respondent sought the eviction of the applicant that applicant became aware of the application for a declaratur and the respective court order.

Applicant now seeks an application for the rescission of the judgment in terms Rule 29(1) (a) of the High Court Rules 2021 (SI 202 / 21 which was erroneously granted by this court on the 12th of January 2022 as will more fully appear hereunder. Argument by the applicant

IN LIMINE

The point *in limine* should fall as the reason for the discrepancies have been well explained in the answering affidavit filed of record. There is even an affidavit by the legal practitioner who commissioned the founding affidavit confirming the typographical error filed of record on the 6th of September 2022.

In any event, the sequence of events makes it absurd to claim that the applicant had deposed to an affidavit well before it was served with the application for eviction.

This fault cannot be said to be gross. Such an error does not defeat the application. This was put well in the Supreme Court case of *Allen Alesksey Gessen* v *Priscilla Chigariro* SC- 80-21.

The honourable judge had this to say:

> "Mr Zhuwarara for the applicant was down on his knees, so to speak, when he apologised profusely for that typing error. He promptly applied for the deletion of the prayer from the heads of argument. While such clerical oversights should not be done in papers filed by senior counsel for the benefit of a superior court, they cannot form the basis of a dismissal of an application".

Furthermore the court in the case of *Simpama* v *Hove* (45 of 2021) [2021] ZWMSVHC 45 also highlighted how such minor errors should not defeat the claim and said the following:

> "On the return date however the court a quo discharged the above order. It is the discharge of the said order that the appellant is appealing against. The sole ground of appeal is couched as follows: -
> "The court *a quo* erred at law when it discharged the rule nisi on the basis of an admitted typing error when all the requirements for an interdict had been proved on a balance of probabilities".

The appellant in his application before the court *a quo* referred to the respondent as female when he is a male. In the founding affidavit appellant refers to respondent as a female adult. In para(s) 7,8,9,10,12 and 15 respondent is referred to as female.

Respondent asserts that the error goes to the root of the matter and that this therefore must be a case of mistaken identity as respondent has never masqueraded or dressed as a woman appellant however avers that the reference to respondent as female is a mere typographical error emanating from the fact that his legal practitioners may have mistaken respondent's gender on account of respondent's file name being a name that is commonly used by males and females.

I am inclined to agree with the appellant.

Taking into account the above it is clear that the courts do appreciate that that mistakes can be made and where there is a reasonable explanation such mistakes are pardonable. This is a clear case where a mistake should be pardoned given the explanation that has been given. The application is properly before this court and as such, the typo graphical error should be condoned and not be allowed to defeat this application.

Further argued that the applicant has *locus standi*

Rule 29 High court Rules, 2021 provides:

> Correction, variation and rescission of judgments and orders
>
> "The court or a judge may, in addition to any other powers it or he or she may have, on its own initiative or upon the application of any affected party, correct, rescind or vary -
> (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; or
> (b) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;
> Or
> (c) an order or judgment granted as a result of a mistake common to the parties.
> (2) Any party desiring any relief under this rule may make a court application on notice to all parties whose interests may be affected by any variation sought, within one month after becoming aware of the existence of the order or judgment.
> (3) The court or a judge shall not make any order correcting, rescinding or varying an order of judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

The phrase, "any person" ought to be widely interpreted to cover any person who is materially affected by the decision of the court.

The applicant derives authority from the case of Van Niekerk o Van Niekerk & Others 1999 (1) ZLR (S) which is almost of a similar nature wherein JA MUCHECHETERE together with SANDURA JA held that, "the wife had *locus standi* as she was an "aggrieved person" in terms of s 52(9)(1) of the Administration of Estates Act. This phrase should not be interpreted to mean that the only person who could be aggrieved is a person who is a party to a dispute and who has had a decision given against him. The provision must be given a wider and more liberal interpretation, so as to encompass any person who has a genume grievance because an order has been made which prejudicially affects his interests. It does not, however, include a mere busybody who is interfering with in things which do not concern him."

What is instructive from the Van Niekerk case (*supra)* is that when the phrase "any person" is used, there ought to be a wide interpretation of that phrase and the guiding principle is a genuine grievance and material prejudice to interests. Underling is done for emhasis.

The application ought to be heard on the merits. This is so because;

(a) The applicant cannot be described as a busybody because he is a beneficiary of the acquisition which the first respondent challenged and got an order which under normal circumstances ought not to have been granted.

It is submitted that this application is properly before this honourable court. This is so because to make a successful application for rescission of a judgment, the applicant simply has to show that the judgment was made erroneously.

In this case the judgement was indeed entered erroneously. The first respondent mischievously avoided citing or making the applicant part of the proceedings because it was clear that as a holder of an offer letter, the applicant, was an interested party whose rights ought to have been protected. It is this failure by the first respondent to notify the applicant of the proceedings that were before the honourable court that has seen the applicant approach this court to have the order granted on 12 January 2022, rescinded so that it is given an opportunity to defend its rights as evidenced by the offer letter. The court when making its decision was completely oblivious of fact that there could be parties that might be affected by the order given that the farm in question had been acquired in 2004 and that alone was an indication that there was someone at the farm.

The Honourable judge in the Banda case (*supra*) had this to say at p 64 E to F:

> "Let me reiterate immediately that rescission of a judgment under r 449 (1) (a) is entirely different and must be distinguished from an application for rescission under r 63 which requires the court, before it sets aside the judgment under that rule, to be satisfied that 'there is good and sufficient
> cause to do so'. Nor is the court concerned with the issue of whether the defendant had 'a good *prima facie* defence to the action."

The court in the case of *Nyahondo Farm & 3 Others* v *Denise Rosamond Birketoft* [2018] ZWHHC 214 had the following to say about an error that would mislead the court:

> "Given the obvious error occasioned by treating the matter as unopposed on the basis that no heads had been filed, when in actual fact the respondent's heads had been filed the judgment which was issued in error and by mistake ought to be rescinded."

The order is legally flawed. The applicant has an offer letter and its rights have been infringed without is participation in the legal proceedings in the application declaratur.

There is the case of *Collen Dhlamini & 7 Others* v *Herbert Ncube 3 Others* HB-11-18 that fits hand in glove with the case at hand. In this case the first and second respondents sought 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. MATHONSI J had this to say:

> "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.
> 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.
> .....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. .....That therefore resolves the matter. The order is susceptible to rescission."

Respondent's arguments

IN LIMINE

The first respondent argued that the applicant has no *locus standi* to bring the application

The first issue to arise concerns applicant's *locus standi.*

CHINAMORA J in *Zimbabwe Power Company* v *Sebastian Magodo & 3 Others* HH 123/23 had this to say:

> "I say that this is the correct position of the law in this country, the Supreme Court had earlier in *Matambanadzo* v *Goven* 2004 1 ZLR 399 (S) court considered 449(1) (a)" in the context of *locus standi* and held that:
> ". a party affected by a judgment or order that was erroneously sought or granted in his absence may apply for the rescission of the judgment or order. To show *locus standi*, the

> applicant must show that he has an interest in the subject- matter of the order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the order was granted."

As was pointed out by Lord Denning in *Macfoy* v *United Africa Company limited (1961) 3 All ER 1169 (PC) at 1172:*

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

It is submitted that the purported allocation of the land in question to applicant is a legal nullity since the land acquisition itself was declared invalid by a competent Court. Such Court order is extant.

Rule 29 (1) (a) is similar to r 449(1)(a) of the former High Court Rules hence the Court's interpretation of the former rule is adopted.

There is no need to reinvent the wheel in interpreting r 29(1)(a), as it has been discussed in various judgments of this Court. The provision enables the Court to revisit its own decisions on its own or upon application where the order was erroneously sought or erroneously granted in the absence of any party affected thereby. In this context, in *Muvungani* v *Newham Financial Services (Pvt) Ltd HH 57-17* the court held that:

> "The requirements for setting aside a default judgment in terms of r449 are
> settled. The applicant must satisfy
> 1. that the default judgment must have been erroneously sought or erroneously granted.
> 2. such judgment must have been granted in the absence of the applicant and
> 3. applicant must be affected by the judgment"

It is settled law that once an applicant is able to point to an error in the proceedings he is, without further ado, entitled to rescission of the judgment in issue.

See *Tshabalala and Another* v P*ierre* 1979 (4) SA 27 (T) at 30 C-D; *Wector Enterprises (Pvt) Ltd* v *Luxor (Pvt) Ltd* SC 31/15.

The authorities are happily unanimous on this very trite aspect of the law. The law in this regard is set out in *Banda* v *Pitluk* 1993 (2) ZLR 60 (HC). What requires reproduction if not elucidation is the fact that in such proceedings, the Court is only concerned with the existence of an error, it will not inquire into the merits of the matter. At 64 this court noted*:*

> "In my view, when considering the question of rescission of a default judgment under rule 449(1) a) on the ground that it was "erroneously granted in the absence of any party affected thereby", once the court finds, as it has found in this case, that the judgment was erroneously

> granted against the defendant, either because of an error on the part of the judge before whom the application for default judgment was placed in failing to observe the notice of appearance to defend contained in the court file or, as is much more likely, because of the absence of the notice of appearance to defend in the court file through delay on the part of the Registry staff in placing the notice in the court file, then that is an end to the matter and the court should rescind the judgment, as I therefore intend to do in this case"

See also *Matambanadzo* v *Goven* 2004 (1) ZLR 399 (S), *Topol & Ors* v *L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 from pages 648-651, Frenkel, *Wise & Co* (*Africa) (Pty) Ltd* v *Consolidated Press of South Africa (Pty) Ltd* 1947 (4) SA 234 *@ and Holmes Motor Co* v *SW A Mineral and Exploration Co* 1949 (1) SA 155 (C).

In *Nyingwa* v *Moolman 1993 (2) SA 508 (Tk)* the court also concluded that an order is erroneously granted if at the time of the order there existed a fact which a Judge was unaware of and which would have precluded the judge from giving judgment had he been aware of it. See generally *Matambanadzo* v *Goven* 2004.

(1) ZLR 399 (S), *Topol & Ors* v *L S Group Management Services (Pty) Ltd* 1988

(1) SA 639 from pp 648-651, *Frenkel, Wise & Co (Africa) (Pty) Ltd* v *Consolidated Press of South Africa (Pty) Ltd* 1947 (4) SA 234 ©, *Holmes Motor Co* v *SW A Mineral and Exploration Co* 1949 (1) SA 155 ©, *Tshabalala and Anor* v *Peer* 1979 (4) SA 27, *De Wet and Ors* v *Western Bank Ltd* 1977 (4) SA 770 @ 777F-G and *Theron NO* v *United Democratic Front (Western Cape Region) and Ors* 1984 (2) SA 532 ©

It is contended on behalf of the first respondent that, the non-joinder of the application in case number. HC 3383/20 is not an error contemplated by the Rules of this Court. The applicant has taken a position that:

> "The first respondent mischievously avoided citing or making the applicant part of the proceedings because it was clear that as a holder of an offer letter the applicant was an interested party whose rights ought to have been protected.
> It is this failure by the first respondent ton notify the applicant of the proceedings that were before the honourable court that has seen the applicant approach this court to have the order granted on the 12th of January 2022 rescinded so that it is given an opportunity to defend its rights as evidence by the offer letter herein attached".

Application was not erroneously sought or granted.

The applicant's application is premised on the provisions of R 29 (1)a) of the High Court Rules, 2021 more particularly in that the Order was granted in "error" as it was not a party/absent to the proceedings. This is a clear misapprehension of the law by the applicant as the non-citation was not an error. The relief that was sought by the first respondent pertained to the conduct of the second respondent and relief was sought from the second respondent.

The second respondent is constitutionally mandated to drive and administer land acquisition in Zimbabwe. The application by the 1st Respondent was therefore not made in bad faith thus there was no error as envisaged under R 29(1)(a) of the High Court of Zimbabwe Rules, 2021.

It is denied that the first respondent was aware of the particulars of the Offer Letters issued by the second respondent in respect of the property concerned. The second respondent is the issuing authority and it is reposed with the details of the particulars of any Offer Letters issued on the land in question. These details are not public records and not easily attainable even upon request from the offices of the second respondent. The relief sought under HC 3383/20 was to invalidate any subsequent Offer of the land by the second respondent to any other person or entity on the basis that the manner in which the land was acquired was unlawful hence making the acquisition of the land void from the instance.

In answer to the above response the applicant still insisted that the order was erroneously granted. There was nothing illegal about the second respondent's acquisition of the farm as explained in para 4. Further, the applicant is a holder of an offer letter and has been in occupation of the farm since 2011 and it ought to have been clear that it had some substantial interests to protect.

Analysis

As argued by both parties I point out that this is a matter I believe the parties were supposed to have set down and reached a settlement without the need to contest as it turned out to be .The natural principle of justice, *Ald Pattem rule*, was supposed to apply in this case more so where a relief of declaratur was being sought. It has been reiterated as from various authorities both inside and outside our jurisdiction that always thrive to hear both sides in a dispute. The authorities cited above define what a substantial interest is. There is no doubt that in this case as argued above that the applicant had substantial interest in the dispute and omitting him was fatal. Even if the third respondent had other ideas it was still within his powers to so provided he followed the right procedure. The first respondent by leaving out the applicant in the matter it was done deliberately to avoid any contention from the applicant. I hold that had the court *a quo* been provided with enough information would have made its decision also taking into account the interests of the applicant. The applicant was a holder of an offer letter at the said farm and that alone gave him both the *locus standi* and

substantial interests in the matter. The argument that the occupation had been nullified through the principal thereby affecting all those claiming occupation through him does not apply in this case. The first respondent knew that he would get a consent order if he were to approach the court without the other party. If all was well why was the applicant not cited as a party. And if all was well, what was the necessity of approaching the court in the first place. This court has tried to present the arguments as they were put by both parties without much distortion. It has been demonstrated in the arguments that any affected party in a default judgement may approach the court for a remedy. Rule 29 of the new rules provides for such relief provided that all parties whose interests may be affected by any variation sought, within one month after becoming aware of the existence of the order sought or judgement sought are notified.

The phrase "any person" was used and I am sure the purpose was to cover situations as the current one. A close analysis of the argument proffered by the first respondent does not differ materially from that from that of the applicant. All is raised is the issue of *locus standi* and substantial interests on the part of the applicant. Under what else circumstances would substantial interests would not arise under these circumstances.

I also tend to agree with the argument put forward that rescission for an ordinary default is different from the one under r 29 of the new rules as the former seeks a further requirement of prospects of success of the applying party. Many authorities have it that when there is an error when a court reaches judgement it ought to be corrected and rescinding is one of them. What has not yet been clearly established is whether the case should be placed before the same judge who dealt with the matter or any other judge. Currently any other judge can deal with the matter even though I strongly feel the same judge should since is better informed on the obtaining facts. As reiterated above the Minister holds authority over the land and still could still act in the manner he deems fit provided that due process was followed. In this case a withdrawal of the offer letter would have left the applicant without the status as argued now. The applicant has a point when he says he still holds an offer letter whether valid or not it is not an issue for the purpose of these current proceedings. He was officially issued and therefore it cannot be doubted that he has a *locus standi*

I have already made a finding that leaving out the applicant in the application for a declaratur was fatal and the court made that decision without full facts. I do not understand

why the first respondent who seems to have the second respondent on his side would not consent to the variation or even setting aside if this judgment. This is a simple matter. Of interest to note is the submission by the first respondent that he was not aware of the existence of the applicant offer letter because it is not a public record. So what it means, is that had he been aware he would have certainly cited him as an interested party. Specifically one of the reasons why I came to the conclusion that the judgment was erroneously granted for want of more information. Parties were supposed to have sit down and settled.

Conclusion

As discussed above I am more persuaded by the applicant s argument's submitted and I tend to agree with him. In my view it was not even necessary to get thus far with this matter. Having stated as above I will order as follows:

IT ORDERED THAT:

1. Application for rescission of the judgment granted by the court be and is hereby granted
2. The judgment granted by the court under case number HC 3383/20 be and is hereby rescinded
3. No order as to costs.

Chimwamurombe Legal Practitioners, applicant's legal practitioners
Mlothswa Solicitors Titan Law, respondent's legal practitioners