RONIA GORA
and
RUMBIDZAI MASAIRE
and
ANESU MAVERA
and
TENDAI CHIWETU
and
KUDZAI KAPITONI
and
JAMES M.Z. PHIRI
and
CLIFF MAVIKO
and
FRANCISCA MASERE
and
FRANCISCA MUGARI
and
MEMORY MUTYENYOKA
and
STEWART NYAMUCHO
and
GRACE MUSHURA
and
FIRIMON MVARUME
and
LAST VENGAYI GOOR
and
WISHMAN MUTOMBA
and
TENDAI KAREN KAPURU
and
CHARITY G. MUROZVI
and
TINASHE MUSHAWA
and
ELLIAH MBOFANA
and
IGNATIOUS MAHACHI
and
MARTHA GWEZUVA
and
GRACIOUS MAZVITA NYAMAROPA
and
GIRLIE TAMBUDZAYI MAPONGA
and
TAWEDZERA MARUMURE
and
PELAGIA MAMBUDZI

and
MARSHAL GWATA
and
SOLOMON S HANYANA
and
MAJORY MUSARA
and
FAITH NYARAI MUTOMBA
and
PETER DUBE
and
LOVENESS MAGWADA
and
ADELLA KUZORA
and
SHUPIKAI MASAMBA
and
TOGARA MARTIN MAKUMBE
and
BATIRAISHE CHRISTINE MAKUMBE
and
KUMBIRAI MARANGE
and
TINASHE NHUNDU
and
DEFINATE GWANDIWA
and
PANASHE MAZANZI
and
OSCAR T. JACOB
and
MELODY KAWANZA
and
MARK MAX KUZORA PASALK
and
NIGEL S. PASALK
and
JEFIAS HAVADI
and
ENNIA RUTURI4
versus
TAFARA INFRASTRUCTURAL DEVELOPMENT CONSORTIUM
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 23 February 2022 & 2 June 2020

Opposed Application

Mr. E. Matika, for the 1st to the 45th applicants.
Mr. P. Mufunda, for the 1st Respondent.
No appearance for the 2nd Respondent.

DEME J: The first to forty-fifth Applicants approached this court seeking the order expressed in the following way:

> "1. The application be and is hereby granted.
> 2. The default order of this Court under Case Number HC 6455/20 granted on 2nd day of December 2020 by HONOURABLE MRS JUSTICE DUBE be and is hereby rescinded.
> 3. The 1st Respondent shall bear costs of suit on a legal practitioner and client scale and; 2nd Respondent to be jointly and severally liable with the 1st Respondent for costs of suit on a legal practitioner and client scale, the one paying and the other being absolved once the 2nd Respondent opposes the application."

The background of the matter is as follows. The Applicants are seeking the relief in terms of Rule 449 of the High Court Rules, 1971 as read with common law, according to the founding affidavit filed. The first Respondent obtained a default judgment, on 2 December 2020, against the second Respondent under case number HC 6455/20. The Applicants averred that the default judgment nullified all allocations of pieces of land made to the Applicants after the deed of settlement signed on 31 May 2018. The parties, to the deed of settlement are the first and the second Respondents. This deed of settlement was reduced into an order of court under case number HC 1345/18. The Applicants also affirmed that they were allocated various pieces of land by the second Respondent, and the majority of the allocations occurred after the deed of settlement was consented to by the first and the second Respondents. In support of their averments, they attached agreements of sale and letters for the allocation of various pieces of land.

It is the Applicants' case that they were not parties to case number HC 6455/20 neither were they aware that there were such proceedings before this court. The Applicants further asserted that their rights were affected by the suit which they were not party to. According to the Applicants, the order under case number HC 6455/20 has the effect of cancelling their agreements of sale and letters of allocation.

The Applicants averred that the order under case number HC 6455/20 was erroneously granted as it sought to nullify agreements of sale of third parties which were not party to that matter. Further, the Applicants alleged that the order was granted in their absence as they were not aware of such proceedings. They also claimed that they have real and substantial interest in the matter despite the fact that they were not cited. They also alleged that they possess valid agreements of sale and letters of allocation for their respective pieces of land. The Applicants also stated that they did pay the purchase price for their respective pieces of land. They also claimed that the judgment has the effect of disentitling them from the land they duly purchased and hold rights. The Applicants further affirmed that the order does not specify the recourse for the affected persons including themselves. It is the Applicants' case that the present application was not inordinately filed as it was filed about five months from the date of their becoming aware of the default judgment. In addition, they averred that the delay was occasioned by the total lockdown coupled with the negotiations which they held with the second Respondent as they persuaded it to file the application for rescission of default judgment. They also claimed that their matter enjoys prospects of success. It is the Applicants' case that their right to equal protection by the law, right to property and the right to be heard are affected by the judgment which they seek to rescind.

The application is opposed by the first Respondent in many respects. The first Respondent averred that the allocation of land by the second Respondent made to the Applicants was only provisional subject to the satisfaction of conditions. According to the first Respondent, the Applicants were supposed to contribute towards the development of the infrastructure including roads, sewer and water reticulation and drainage. The first Respondent claimed that the Applicants refused to make contributions for the development of the stands despite the fact that all the other co-operatives made their contributions. The first Respondent further averred that the Applicants indicated that they were to develop the infrastructure on their own despite the fact that the second Respondent had highlighted that the beneficiaries of the allocation of land were to form a housing consortium for the development of the land. The first Respondent further alleged that the Applicants refused to be members of the co-operatives despite attempts to persuade them.

The first Respondent also alleged that the second Respondent cancelled all allocations of land it had made on 5 July 2016. It is the first Respondent's case that the cancellation was done by the second Respondent as an administrative decision after it had realised that the development of the infrastructure for the land allocated would be difficult. According to the first Respondent, the Applicants were also affected by the cancellation of the allocation of land. The first Respondent also affirmed that the second Respondent indicated that the redistribution of stands was to be redone after the development of the infrastructure of the land in question. After the withdrawal of the allocation, the first Respondent further asserted that the infrastructure development committee was put in place to oversee the development of the land.

The first Respondent also claimed that, by virtue of the deed of settlement under case number HC 1345/18, the second Respondent had no authority to allocate stands to the Applicants. Thus, according to the first Respondent, all the allocations made to the Applicants are *null* and *void*. The first Respondent also affirmed that the order under case number HC 6455/20 was not erroneously sought. Further, the first Respondent alleged that the Applicants were fully aware of the outcome of judgment under case number HC 6455/20. It further claimed that the delay made by the Applicants to file the present application amounts to an inordinate delay.

The first Respondent raised a point *in limine* against the present application. It is the first Respondent's case that the Applicants have no locus standi as they were represented by the first Respondent in the judgment which they seek to rescind. The first Respondent further averred that after the withdrawal of the allocation, the Applicants' rights depended on the first Respondent. The first Respondent further alleged that the second Respondent had no authority to allocate stands after 31 May 2018 as it was prohibited to do so by the deed of settlement consented to by the first and second Respondents under case number HC 1345/18. The first Respondent claimed that since the Applicants did not challenge the deed of settlement under case number HC 1345/18, they cannot challenge the order under case number HC 6455/20 which they seek to rescind.

In reply, to this point *in limine*, the Applicants averred that they do have substantial interest in the matter. They further averred that the 1st Respondent has no

lawful right to represent the interests of the Applicants. The Applicants further claimed that the first Respondent does not have proof that it was authorised to represent their interests. The Applicants further alleged that the deed of settlement never cancelled or nullified their agreements of sale and their letters of allocation. They also claimed that the deed of settlement under case number HC 1345/18 has no bearing on their rights and interests.

The Applicants, through their answering affidavit and heads of argument, raised some points *in limine* against the first Respondent's Notice of Opposition and first Respondent's Opposing Affidavit. According to the Applicants, the opposing papers are fatally defective for want of compliance with the Rules. The Applicants averred that the first Respondent did not serve their legal practitioners with the Notice of Opposition. They also claimed that the first Respondent did not provide for their address of service in its Notice of Opposition. They further asserted that the first Respondent's Notice of Opposition does provide for the address of service of other legal practitioners who are unknown to the Applicants. The Applicants also affirmed that the Notice of Opposition refers to the "application" which the Applicants are not aware of. It is the Applicants' case that the first Respondent's Notice of Opposition does not provide for the second Respondent's address of service. The Applicants also averred that the first Respondent referred, in its Notice of Opposition, to case numbers which are unknown to the Applicants. According to the Applicants, the deponent to the Opposing Affidavit did not make a proper oath.

In response to the points *in limine* raised by the Applicants, the first Respondent, in its heads of argument, insisted that the notice of opposition is valid. It further alleged that the error of addressing the notice of opposition to a wrong address and stating a wrong case number on the notice of opposition are non-prejudicial errors which should not invalidate the notice of opposition filed.

At the hearing, the parties, by consent, agreed to the uplifting of bar operating against the first Respondent for its failure to file heads of argument within the stipulated time frame. Accordingly, I made an order by consent pursuant to the consent by the parties.

The Applicants, at the hearing of this matter, did not insist with their points *in limine* which they raised in their answering affidavit. I will accordingly not deal with such points *in limine* as they were abandoned.

At the hearing, the first Respondent, through its counsel, made a further point *in limine* to the effect that the Applicants ought to have exhausted the available remedies provided for in terms of s 115 of the Co-operative Societies Act, [*Chapter 24:05*] which sets out dispute settlement mechanisms for co-operatives. Mr. Mufunda, on behalf of the first Respondent, submitted that the Applicants were supposed to approach the registrar of co-operatives in terms of s 115 of the Co-operative Societies Act, [*Chapter 24:05*].

In reply, the Applicants, through their counsel, submitted that the present application is for rescission of default judgment and that the current application meets the requirements of Rule 449 of the High Court Rules, 1971. The counsel for the Applicants further submitted that being a member of the co-operative does not take away any member's right to approach the courts in the case of prejudice that would have been suffered by such a member. Mr. Matika further submitted, on behalf of the Applicants, that there is no evidence from the record suggesting the Applicants were members of any particular co-operative. The Applicants' counsel also argued that the cancellation of agreements of sale and letters of allocation does confirm the substantial interest of Applicants under case number HC 6455/20.

I will therefore shift my attention to the points *in limine* raised by the first Respondent. In his submission, Mr. Mufunda, on behalf of the first Respondent, argued that the Applicants have no *locus standi* as they are supposed to have been represented by the first Respondent. In response, the Applicants, through their counsel, Mr. Matika, submitted that the Applicants never elected the first Respondent to be their representative. Mr. Matika further submitted that the Applicants have substantial interest in the matter as the judgment sought to be set aside invalidated the Applicants' agreements of sale and letters of allocation. In my view, any person affected in the manner highlighted by Mr. Matika is entitled to the relief in the form of rescission of default judgment. As correctly submitted by Mr. Matika, there is no evidence suggesting that the Applicants chose the first Respondent to be their representative. No such evidence was placed before the court. I, therefore dismiss the point *in limine* raised in this regard.

The1st Respondent also raised a point *in limine* to the effect that the second Respondent has no authority to allocate residential stands to the Applicants by virtue of the deed of settlement which the first and second Respondent entered by consent under case number HC 1345/18. The first Respondent further argued that since the Applicants did not challenge the deed of settlement, they cannot challenge the judgment under case number HC6455/20. However, upon further inquiry by the court, Mr. Mufunda failed to highlight the appropriate provision of the deed of settlement which prohibits the second Respondent from allocating the stands. Instead, Mr. Matika referred the court to Clause 10 of the deed of settlement which allows the second Respondent to allocate stands. Clause 10 of the deed of settlement provides as follows:

> "No member from any beneficiary co-operative that is part of the Applicant shall lose his / her stand unless the member fails to meet his or her obligations as per this deed and as per the Tafara Pay Scheme regulations. Failing which the Respondent shall be entitled to reallocate the member in default's stand."

In light of Clause 10 of the deed of settlement highlighted above, the point *in limine* raised by the first Respondent challenging the second Respondent's power to allocate stands lacks merits, in my view. I, accordingly, dismiss the point *in limine* concerned.

It is the first Respondent's further point *in limine* that the Applicants ought not to have approached the court at this time. Mr. Mufunda submitted that the Applicants were supposed to have approached the registrar of co-operatives in terms of s 115 of the Co-operative Societies Act [*Chapter 24:05*]. On the other hand, the counsel for the Applicants contended that whether or not the Applicants were supposed to have approached the registrar of co-operatives will be discussed when the court is considering the merits under case number HC 6455/20. He further argued that what the Applicants simply want at this time is the rescission of judgment granted under that case and thereafter the merits may be considered. Section 115 of the Co-operative Societies Act [*Chapter 24:05*], relied upon by the first Respondent's counsel, Mr. Mufunda to challenge the *locus standi* of the Applicants, provides as follows:

> "(1) If any dispute concerning the business of a registered society arises—
> (a) Within the society, whether between the society and any member, past member or representative of a deceased member, or between members of the society or the management or any supervisory committee; or
> (b) Between registered societies;

And no settlement is reached within the society or between the societies, as the case may be, the dispute shall be referred to the registrar for decision.
(2) Without limiting subsection (1), any—
(a) claim by a society for a debt due to it from a member, past member or the nominee or legal representative of a deceased member, whether such debt is admitted or not;
(b) claim by a member, past member or nominee or legal representative of a deceased member for a debt, whether admitted or not; or
(c) dispute concerning the interpretation of a society's by-laws; or
(d) recourse by a member who was surety for the repayment of a loan guaranteed by the society to another member, arising out of a default by the borrower;
Shall be regarded as dispute concerning the business of the society for purpose of subsection (1).
(3) Where a dispute has been referred to him in terms of subsection (1), the registrar may—
(a) settle the dispute himself; or
(b) refer the dispute for settlement to an arbitrator or arbitrators appointed by him; or
(c) refer the dispute to the minister for decision.
(4) For purpose of settling a dispute in terms of paragraph (a) of subsection (3), the registrar may exercise any of the powers conferred on him under section one hundred and fourteen.
(5) The Arbitration Act [*Chapter 7:02*] shall apply in relation to any reference of a dispute to any arbitrator or arbitrators in terms of paragraph (b) of subsection (3).
(6) Any person aggrieved by a decision made by—
(a) the registrar in settling a dispute in terms of paragraph (a) of subsection (3); or
(b) an arbitrator or arbitrators appointed in terms of paragraph (b) of subsection (3);
May appeal to the minister within sixty days after being notified of the decision and the minister may confirm, vary or set aside the decision appealed against or make such other order in the matter as he thinks appropriate."

The first Respondent through its opposing affidavit as amplified by its counsel's submissions argued that the Applicants were not members of any co-operative. In light of this admission by the first Respondent, the provisions of s 115 of the Co-operative Societies Act [*Chapter 24:05*] do not apply to the Applicants. Accordingly, I dismiss the point *in limine* in question for want of merits.

Having exhausted the points *in limine,* raised, I will now focus on the merits of the present application. This application is brought before this court in terms of Rule 449 of the High Court Rules, 1971 which provides as follows:

"(1) The court or 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) 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) That was granted as a result of a mistake common to the parties.
(2) The court or a judge shall not make an order correcting, rescinding or varying a judgment or order unless satisfied that all parties whose interest may be affected have had notice of the order proposed."

The requirements for Rule 449 of the High Court Rules, 1971 were extensively discussed In **Khan v Muchenje**[1], where Makoni J, as she then was, held that:

> "It is now settled in our law that the requirements for the grant of an order for rescission under r 449 are that:
>
> (i) The judgment was erroneously sought or granted;
> (ii) The judgment was granted in the absence of the applicant; and
> (iii) The applicant's rights or interests are affected by the judgment. See *Tiriboyi supra* at 473 B-C.
>
> Once these requirements are met, the applicant is entitled to succeed and the court should not inquire into the merits of the matter to find good cause upon which to set aside the order or judgment. See *Tiriboyi supra* at 473 C".

In casu, the judgment under case number 6455/20 was granted in the absence of the first to the forty-fifth Applicants. The Applicants were not privy to the proceedings under case number HC 6455/20. The Applicants, as submitted by their counsel, stand to be prejudiced by the judgment under case number HC 6455/20 as the judgment nullifies their agreements of sale and allocations of residential stands made to them by the second Respondent. Further, the judgment under case number HC 6455/20 was erroneously sought by the first Respondent on the basis that the first Respondent misled the court into believing that the second Respondent has no power to allocate residential stands to the Applicants in terms of the deed of settlement. At the hearing, Mr. Mufunda failed to highlight the appropriate provision which prohibits the second Respondent from allocating stands.

Further, it is apparent from the case of *Khan* v *Muchenje* (*supra*) that once the Applicants have satisfied the three requirements postulated in that case, there is no need to consider the merits of the matter to find good cause upon which to set aside the order or judgment. Once the three requirements have been established, it is manifestly clear that the right to be heard for the Applicants ought to be protected. The right to be heard is a fundamental right provided for in s 69 of the Constitution of Zimbabwe. Such fundamental right cannot be limited by any law. See the provisions of s 86(3) of the Constitution of Zimbabwe. Thus, I have no obligation to address the points raised by the first Respondent in its opposing affidavit at this time, consequently. The issues raised by the first Respondent in its opposing affidavit will be considered at the appropriate time when the merits of the matter under case number HC

[1] **HH 126-13**

6455/20 are considered. See also the cases of Justice Chengeta *N.O & Ors* v *Tabana*[2], *Mutebwa* v *Mutebwa and Anor*[3], Josephine Matambanadzo v *Natu Lala Goven*[4], *Jonas Mushosho* v *Lloyd Mudimu & Anor*[5] *and Tiriboyi* v *Jani & Anor*[6].

In light of this, I am of the considered view that the circumstances surrounding the present application are a template which satisfies the requirements of the application made in terms of Rule 449 of the High Court Rules, 1971 as augmented by case law. In relation to costs, it is in the interest of justice that costs on an ordinary scale be awarded against the first Respondent for putting the Applicants to unnecessary expense. Consequently, it is ordered as follows:

(a) The application be and is hereby granted.

(b) The default order of this Court under Case Number HC 6455/20 granted on second day of December 2020 by HONOURABLE MRS JUSTICE DUBE be and is hereby rescinded.

(c) The first Respondent shall bear costs of suit.

Matika, Gwisai and Partners, Applicants' Legal Practitioners.
Mufunda and Partners Law Firm, First Respondent's Legal Practitioners.

[2] **HH 23-18**
[3] **2001 (2) SA 193 (TkH)**
[4] **SC 23-04**
[5] **HH443-13**
[6] **HH 117-04**