JAMAL AHMED
and
THATCHFREE INVESTMENTS (PRIVATE) LTD
and
SUPER EARTH (PRIVATE) LTD
and
ITCHESTER INVESTMENTS (PRIVATE) LTD
versus
RUSSEL GORERAZA
and
GRACE MUGABE
and
KENNEDY FERO

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 4 April & 25 April 2017 and 28 June 2017

Urgent Chamber Application

Adv *T.R. Mafukidze* with *Mbuyisa,* for the applicants
W.T. Manase and *W.T. Pasipanodya,* for the respondents

CHIWESHE JP: On 21 December 2016 the applicants sought and were granted a provisional order couched in the following terms:

"TERMS OF THE FINAL ORDER SOUGHT

1. That the Respondents, their agents and all those claiming title through them be and are hereby interdicted from interfering with the Applicants' possession and enjoyment of the properties known as NOS 409 HARARE DRIVE, POMONA, HARARE; 18 CAMBRIDGE ROAD, AVONDALE, HARARE and 75 KING GEORGE ROAD, AVONDALE, HARARE.

2. That the Respondents pay the costs of this application on an attorney and own client scale.

TERMS OF INTERIM RELIEF SOUGHT

IT IS ORDERED THAT:

1. The Respondents and all those claiming through them forthwith vacate the premises known as NOS. 409 HARARE DRIVE, POMONA, HARARE; NO. 18 CAMBRIDGE ROAD, AVONDALE, HARARE and NO. 75 KING GEORGE ROAD, AVONDALE, HARARE.

2. In the event that the Respondents and their agents do not vacate the said premises within 24 hours of the service of this order at each one of the premises, that the Sheriff be and is hereby authorised to evict the Respondents, their agents at each one of the premises and all those claiming title through the Respondents and to restore and handover the properties and their keys to the applicants' agents and nominees.

3. The Respondents restore onto the premises all property removed and taken to the workers' alternative homes.

4. Costs to be costs in the cause."

The matter is now before me for purposes of confirmation or discharge of that provisional order.

In their supplementary heads of argument the applicants submit as follows:

"5. The spoliation order granted by Phiri J on 21 December 2016 was a final order. It is not therefore subject to any subsequent confirmation.

6. Any attempt to reconsider the order is unlawful as it would overturn the binding authority of *Blue Ranges Estates (Pvt) Ltd v Muduviri & anor* 2009 (1) ZLR 368 (S) decided by Malaba DCJ.

7. Any person aggrieved by the order of Phiri J of 21 December 2016 should have appealed against it to the Supreme Court.

8. The High Court therefore has no jurisdiction to hear this matter and is now *functus*."

On the other hand the respondents, in their supplementary heads of argument, aver that the order of Phiri J was not final but merely provisional. For that reason, so argue the respondents, that order remains subject to confirmation by this honourable court. It is further submitted that the *Blue Ranges* case *supra* is not applicable as it is clearly distinguishable from the facts of the present matter.

According to the applicants, the facts giving rise to this application are as follows. In April 2015, the first applicant entered into an agreement of sale with the second respondent in terms of which the first applicant sold to the second respondent a diamond ring for the sum of

$1, 350 000.00. The full purchase price was paid into the first applicant's bank account held at Commercial Bank of Zimbabwe (CBZ).

When the ring was tendered to the second respondent, she refused to accept delivery and demanded a full refund of the purchase price, directing that same be paid into her bank account in Dubai. The first applicant states that when this demand was made, he had not breached the terms of the agreement of sale. He therefore refused to comply with the second respondent's demand.

According to the first applicant, it was then that the second respondent started verbally threatening the first applicant in order to induce him to succumb to her demand. When that did not produce the desired result, the respondents turned to the first applicant's immovable properties, where they evicted the first applicant's agents, replacing them with their own. The respondents thus took control and occupation of these properties without following due process and without the applicants' consent.

On 23 November 2016, the applicants wrote to the first respondent and the occupants demanding restoration of their properties. They also sought to negotiate a settlement. When it became clear to the applicants that negotiations had failed to resolve the matter, they decided to approach this court on an urgent basis, and obtained the provisional order cited above.

It is common cause that the provisional order was granted in the absence of the respondents, the Sheriff having failed to serve the notice of set down at the second respondent's residence, a high security property. It is also common cause that the respondents' legal practitioners sought a postponement of the matter to enable them to obtain instructions from the respondents who were at the time on holiday outside the country. The application for postponement was denied, the presiding judge indicating that the respondents would have the opportunity to present their case on the return date. The applicants themselves also anticipated the further ventilation of the issues on the return date, having filed their main heads of argument wherein they submitted that the provisional order be confirmed and that final relief be granted in the terms proposed. In their supplementary heads of argument the applicants have abandoned their earlier stance, maintaining as they now do, that the provisional order is only such in name and that to all intents and purposes, it is a final order, in terms of which the court is now *functus*. It is also pertinent to note that the legal practitioner who originally argued the applicants' case has been replaced by new

counsel who now presents what have been termed "Applicants' Supplementary Heads of Argument." These heads do not supplement the existing heads, rather, they instead constitute an entire departure therefrom.

I however agree with the applicants' newly found wisdom, namely that the provisional order granted by Phiri J is couched in the language of a final order. That is so because it is a spoliation order and, by its very nature, a spoliation order is always a final order. That the "interim relief" granted is final admits of no doubt. Paragraph 1 of that relief directs the respondents to "forthwith vacate the premises" and para 2 of the same authorises the Sheriff to evict the respondents if they do not vacate the premises within 24 hours. Nothing could be more decisive and more final than this order. It determines the cause of action between the parties, thereby finally resolving the dispute between the parties. There cannot be a return date in a matter that has been so concluded.

In *Blue Ranges Estates (Pvt) Ltd v Muduviri and Anor* 2009 (1) ZLR 368 (S) Malaba DCJ, as he then was, had occasion to lay down the distinctive features of a final and definitive order as opposed to an interlocutory or provisional order. He concluded as follows:

> "It is clear from the authorities that Bere J in *Chikafu v Dodhill (Pvt) Ltd* and Makarau JP in *Nyikadzino v Asher supra* used the wrong test of considering the form of the order to determine whether it is final and definitive or interlocutory. Many orders which are final in form are in fact interlocutory whilst some which are interlocutory in form are in fact final and definitive orders. The test is whether the order made is of such a nature that it has the effect of finally determining the issue or cause of action between the parties such that it is not a subject of any subsequent confirmation or discharge."

The distinction is important because once an order is deemed final, the court granting it becomes *functus* and the remedy of any party aggrieved by such order lies in an appeal to the Supreme Court or the appropriate intermediate appeal court. Conversely, if an order is deemed to be interlocutory or provisional, it remains subject to confirmation or discharge by the same court.

In *casu* the order granted by Phiri J is in the form of a provisional order. That in itself does not mean that the order *per se* is necessarily a provisional order. If the order has the effect of finally determining "the issue or cause of action between the parties" it is a final order, regardless of the form in which it is cast, and may not be subject to confirmation or discharge. I have already indicated that I regard the order under consideration to be a final order despite its misleading format. The order that was granted by Phiri J is a spoliation

order. The cause of action or issue in a spoliation order is aptly captured in the following passage at p 1064 of Herbstein & Van Winsen Civil Practice of the Supreme Court of South Africa, 4th edition:

> "A *mandament van spolie* is a final order although it is frequently followed by further proceedings between the parties concerning their rights to the property in question. The only issue in the spoliation application is whether there has been a spoliation. The order that the property be restored finally settles that issue between the parties."

The first applicant's case is that he was in peaceful and undisturbed possession of the properties in question and that he has been forcibly or wrongfully dispossessed of the same without due process of law. The applicants seek an order restoring that possession. Thus the issue or substantial matter or cause of action in the present application is the right of the applicants to possession of the properties. If the applicants can prove such dispossession then that is the end of the matter as far as spoliation proceedings are concerned. The court will order that the property be so returned to the applicants. Such an order once made disposes of the cause of action and the court becomes *functus*. It is irrelevant that the parties may seek to define and enforce their substantive rights in subsequent litigation – the matter at hand, that of spoliation, will have been finally adjudicated upon. That is the import of the "provisional order" granted by Phiri J. It was in effect a final order that disposed of the cause of action in the application before him. Such order is not subject to confirmation.

The respondents argue that the present case be distinguished from the Blue Ranges case supra because in *casu* the application was not served on the respondents. Accordingly the respondents were denied the right to oppose the application before the grant of the order. It is common cause that an application to postpone the matter to enable the respondents to attend or at least give instructions to their legal practitioners was turned down, the judge indicating that the respondents would be able to argue their case on the return date.

The respondents have relied on the dictum by Bristone J in *Burnham v Neumeyer*1917 TPD 630 at p 633 (also quoted with approval in the *Blue Ranges* case *supra*) wherein the learned judge states as follows: "Where the applicant asks for a spoliation order he must make out not only a *prima facie* case but he must prove the facts necessary to justify a final order". In essence the applicant is not only required to establish a *prima facie* case but the facts of the spoliation itself, including the identity of the spoliators, so argue the respondents. The respondents urged the court to accept that the above requirements can only be met where the respondents have also been heard, or, where, having been properly served with process,

they engage in wilful default. In the circumstances, the respondents submit that the applicants have not so established a *prima facie* case nor have they proved the facts required to sustain a final order. Even if the facts of the spoliation were established it would still be incumbent upon the applicant to establish the identity of the perpetrator. That the applicant cannot do without affording the alleged perpetrator the opportunity to be heard. The respondents also point to the Police as having confirmed that it was the Force that was occupying the properties as part of an investigation against first applicant who is accused of money laundering and other offences. A warrant of arrest had been issued against him through Interpol as he was resident outside the country. He did not attend in person at the hearing before Phiri J. It is further alleged that the first applicant is accordingly a fugitive from justice who should not be afforded audience in our courts. The applicants of course deny the status attributed to the first applicant, arguing that at law the cases cited by the respondents do not apply in the instant case and that for that reason, the first applicant's position cannot be that of a fugitive from justice.

The respondents have argued the above and other issues seeking an order discharging the provisional order. In my view the issues they raise are those they should have raised before Phiri J. They were denied that window, and as I have already indicated, a final order is now in place and because it is final, it is not subject to confirmation nor indeed is it proper at this stage to consider arguments to the contrary by either party. The horse has bolted!

A careful consideration of the circumstances of this case leads one to the inevitable conclusion that the order in question was granted in error. The judge and both parties were under the impression that a provisional order and not a final order had been granted. If Phiri J had been advised that the interim relief was framed in terms of a final order, he would not have granted it without hearing the applicants who were on holiday outside the country. He would have either postponed the matter as requested by the respondents to enable them to present their defence or issued such other interlocutory order as he deemed fit. The applicants presented an interim draft order that was in the form of a final order. They proceeded to file papers in anticipation of a return date. They too laboured under the mistaken belief that they had applied for interim rather than final relief. They realised after the event that what they got was in fact a final order, hence the change of argument in their supplementary heads and, perhaps, also the change of counsel. On their part the respondents

believed there would be a return date, a fact communicated to the parties by the judge himself.

I do not agree with the applicants that an order granted under these circumstances is appealable. The matter was not argued on the merits. It would not have been so argued on the merits in the absence of the respondents. On the contrary, both the judge and the parties expected that the merits would be dealt with on the return date. That was not to be. For that reason the resultant order is akin to a judgment granted in default.

And yet this final order is one that was erroneously sought and erroneously granted. It is prejudicial to the rights and interests of the respondents who have been deprived of their constitutional right to be heard. Because it was sought and granted in error it must not be allowed to stand.

In my view the provisions of r 449 (1) (a) of the High Court Rules, 1971 should be invoked. That rule provides as follows:

> "449 **Correction, variation and rescission of judgments and orders**
>
> (1) The court or a judge may, in addition to any power it or he may have, meru moto 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) ……."
>
> (My underlining)

The requirements for such an application or invocation to succeed are clearly spelt out in the wording of the rule; the judgment or order must have been erroneously sought or erroneously granted, being granted in the absence of any party whose rights or interests are affected by the judgment or order. See *Motor Cycle Pvt Ltd v Old Mutual Property Investments Corporation Pvt Ltd* HH 45/07 and *Kaiser Engineering Pvt Ltd v Makeh Enterprises Pvt Ltd* HB 6/12. In *Theron NO v United Democratic Front and others* 1984 (2) SA 532, wherein the South African equivalent of our Rule 449 (1) (a) was under consideration, Vivier J had this to say at p 536 E:

> "Rule 42 (1) entitles any party affected by a judgment or order erroneously sought or granted in his absence, to apply to have it rescinded. It is a procedural step designed to correct an irregularity and to restore the parties to the position they were before the order was granted."

And at p 536 G the learned judge proceeded to explain that the court has a discretion whether or not to grant the application:

> "In my view the court will normally exercise that discretion in favour of any applicant where, as in the present case, he was, through no fault of his own, not afforded an opportunity to oppose the order granted against him, and when, on ascertaining that an order has been granted in his absence, he takes expeditious steps to have the position rectified."

In *Banda v Pitluk* 1993 (2) ZLR 60 (H) at 64 D – F Robinson J distinguished an application for rescission made under Rule 449 (1) (a) and an application for rescission of a default judgment under Rule 63. The latter requires the court, "before it sets aside a judgment under it, to be satisfied that there is good and sufficient cause to do so," whilst the former enjoins the court, once it finds that the judgment was erroneously granted against the defendant, to rescind the judgment without further ado. Similarly in HH 309-15 it was stated at p 5 of the cyclostyled judgment as follows:

> "In the case of *Grantully (Pvt) Ltd and Anor* v *UDC Ltd* Gubbay CJ ably and lucidly outlined the purpose of r 449 when he ruled that once it is established that a relevant fact which ought to have been placed before the court was not placed before it, there is no need for further inquiry for there is no requirement for an applicant seeking relief under r 449 to establish good cause.
>
> In my view r 449 is availed to cater for situations were a judgment erroneously sought or issued in error if allowed to stand would occasion on injustice."

I am satisfied that the order of Phiri J, having been erroneously sought and erroneously issued, must be set aside in terms of r 449 (1) (a) of the High Court Rules 1971. If allowed to stand it would cause an injustice. The rules allow me to so proceed even in the absence of any application from either party. I have the discretion to do so, *meru moto*.

Accordingly it is ordered as follows:

1. The order of this court, given under the hand of Phiri J on 21 December 2016 under case number HC 12497/16, be and is hereby rescinded.

2. The applicants shall pay the costs of suit.

Mtetwa & Nyambirai, applicants' legal practitioners
Manase & Manase, respondents' legal practitioners