ROBERT LAWRENCE ROY v CHITAKATA RANCHING COMPANY LIMITED
(1980) Z.R. 198 (H.C.)

HIGH COURT
DARE, COMMISSIONER,
18TH JANUARY,1980
1979/HN/790

Flynote

Headnote

This was an application under O. 19, r. 1, of the High Court Rules by the defendants requesting the judge to review his own judgment. The grounds were that the judge could take into account fresh evidence which was not produced at the hearing of events which had happened but which were not known to the defendants advocate at the date of hearing or up to the end including the date judgment; was delivered.

Held:

(i) Events which occur for the first time after delivery of judgment could not be taken into account as grounds for review of judgment.

(ii) Setting aside a judgment on fresh evidence will lie on the ground of the discovery of material evidence which would have had material effect upon the decision of the court and has been discovered since the decision but could not with reasonable diligence have been discovered before.

Cases referred to:

(1) Crossfeld & Sons Ltd. v Tanian [1900] 2 QB 629.
(2) Re Scott and Alvarez Contract [1895] 1 Ch. 596.
(3) Falcke v Scottish Imperial Insurances Co. [1886-90] All E.R. 768.

Legislation referred to:

High Court Rules, Cap. 50, O. 39, r. 1.

For the plaintiff: Mr Peter Cave.
For the defendants: Mr S.S Phiri and Mr Hassan Coovadia.

1980 ZR p199
DARE,COMMISSIONER.

Judgment

DARE,COMMISSIONER : On 11th and 12th December, 1979, I heard an application by the plaintiff for an interlocutory injunction herein.

I delivered judgment on that in open Court on 18th December, 1979. In that judgment I reminded counsel for the rights of appeal which their respective clients had if any of them be aggrieved by my decision. Neither party has as yet exercised that right of appeal. Instead the three defendants have applied for review of my judgment under O. 39 r. 1 of the High Court Rules. Leave to apply out of time was granted. Counsel for the plaintiff did not object to the extension of time. The grounds upon which the application is based are contained in an affidavit by the 3rd defendant dated 8th February, 1980. I wish to stress at this early stage and to constantly remind myself that I am dealing with an application to review my own judgment. I am not dealing with an application to vacate the interlocutory injunction on the basis that circumstances have changed to such an extent that the orders which I made on 18th December last year are no longer justified by the events since then.

Nor am I dealing with an application to vary the orders which I made in December on the basis of something relevant to the matters in dispute which has occurred since 18th December, 1979. I am being asked to review my judgment under the specific provisions of O. 39, r. 1, of our High Court Rules.

The terms of that rule are very wide. The relevant portions read as follows:

> "ORDER XXXIX.
> REVIEW
>
> 1. Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision.

I am urged by Mr Phiri for the defendant to say that under that rule I am entitled to take into account two kinds of fresh evidence. Firstly, evidence which was not produced at the hearings on 11th and 12th December of events which had happened but which, he says, were not known to the defendant's advocates at the date of the hearing or indeed up to and including the date I delivered judgment on 18th December, 1979, and: Secondly, evidence of events which have occurred since the hearing and since the judgment was delivered.

At this stage I think it is important to remember that although possession, occupation and use of 'the three Farms' (Farm Numbers 2597,

2598 and 3095 Kabwe) was really the subject of the arguments in the application for interlocutory injunction, that application was contested on both sides on an agreed basis namely that Roy, the plaintiff, was the registered proprietor of the three farms, subject of course to certain mortgages or other similar incumbencies which were mentioned in the evidence of Roy's agent, D. F. Burton. This is supported by the following:

(a) Paragraph 1 of the Statement of Claim annexed to the writ herein dated the 8th November, 1979, which reads:

"The Plaintiff is the owner of Farms 2597, 2598 and 3095 situate in Kabwe"

(b) Paragraph 4 of the affidavit of D. F. Burton dated the 8th November, 1979.

"That the Plaintiff is the Registered Proprietor of Farms 2597, 2598 and 3095 Kabwe"

(c) The affidavit of the third defendant dated the 4th December, 1979, where in para. 4 (c) (i) he deposed:

"A Mr R. L. Roy . . . is the registered owner of the above Farms which are adjacent to . . . Chitakata Ranching Company

(d) the sworn evidence of D. F. Burton and the third defendant in this court on 11th and 12th December, 1979. I have re-read the lengthy cross examinations of these witnesses. There was not a single question put to either of them to suggest that Roy was not as at that time, 11th and 12th December, 1979, the registered owner of the three farms, subject of course as I have said to certain mortgages and charges which Mr Burton mentioned in his evidence when telling me of his estimate of Mr Roy's net assets in this country.

(e) the very first sentence of my judgment of 18th December, 1979, when I said:

"The Plaintiff, Roy, is the Registered Proprietor of . . . the three Farms"

Now it is time to look at the affidavit evidence in support of this application for review to see what events fall under the two kinds of fresh evidence I have mentioned. As I see it they are as follows: Under the first type of fresh evidence I mentioned:

(a) That against each of the three titles of the three farms. The Commissioner of Lands had on 7th December, 1979 purported to register something called on the Certificate of Search "Certificate of Re-entry" No one has told me what this document is or what its contents are and no one has told me how it was registered when on the face of the Certificate of Search there was a subsisting Caveat Registered to prevent any registration against any of the titles of the three farms.

(b) That the Commissioner of Lands had written to the first defendant on 7th December, 1979, and that the first defendant had

written to the Commissioner of Lands on 8th December, 1979. This is disclosed in para. 1 of Exhibit MNZ1 to the affidavit of the third defendant dated 8th February, 1980. I have not been allowed to see copies of those letters.

I also have evidence that at some time the first defendant had paid to the Commissioner of Lands the sum of K80,565.92 which was (inter alia) purchase consideration for the three farms. I cannot tell from the evidence whether this was paid before or after I delivered judgment on 18th

December, 1979.

Since these letters were obviously directed towards some negotiations or purported agreement for the first defendant to acquire some sort of alleged 'title' to the three farms I cannot understand why the defendants did not disclose these facts to this court. Certainly Mr Phiri tells me they did not tell their own advocates about them. It is lack of full disclosure by a witness who has sworn to "tell the truth, the *whole* truth and nothing but the truth", as did the third defendant, perturbs me.

Under the second type of fresh evidence which I mentioned namely events which have occurred after the hearing and delivery of judgment I now have evidence:

(a) About the payment of the money to the Commissioner of Lands. I have given the defendants the benefit of the doubt and presumed this was paid after the judgment.

(b) A letter from the first defendant to the Commissioner of Lands dated 26th December, 1979, of which no copy has been shown to me.

(c) A letter from the Commissioner of Lands to the general manager of the first defendant dated 27th December, 1979, referring to the previous exchange of correspondence I have mentioned, acknowledging receipt of the K80,565.92 and informing the first defendant that as soon as diagrams have been obtained from the Survey Department, direct leases will be issued to the first defendant for the three farms. I find this reference to obtaining survey diagrams somewhat bewildering. The Certificate of Search produced to me clearly disclose that the three certificates of title in the name of Roy for the three farms, to each of which would be attached the original survey diagram of the farm the subject of the Certificate of Title, were in existence and would be either in the hands of Roy or his agent or in one case possibly the mortgagee. Why the Registrar of Deeds did not exercise his very wide powers under the Lands and Deeds Registry Act to compel production of any relevant document at the Deeds Registry as not been explained to me.

(d) A copy of an alleged lease dated the 4th January, 1980, from His Excellency the President as lessor to the first defendant. The copy shown to me and indeed the copy annexed to the original of the new Certificate of Title I will mention later shows no sign of it having been executed by the first defendant, and what makes me even more suspicious of the validity of this document is that it

purports to create a term ninety-nine years from the 1st October, 1979. I cannot see from any evidence before me that His Excellency could possibly create any legal estate in the three farms in favour of the first defendant or in favour of anyone else other than Roy from the 1st October,1979. Perhaps that situation will be clearer when someone explains what this "Certificate of re-entry" is and what it is supposed to evidence and under what lawful authority it came into existence.

(e) A copy of a new Certificate of Title issued on the strength of the said "Lease", also dated 4th January, 1980, No. 47769. The original of that was shown to me at the hearing and returned to the defendant's advocate. That too appears to have been registered in apparent defiance of the caveat.

However, I am not here to decide the complexities of the conflicting claimes for title. That will be fought out either at the trial of this action, or the other action which the defendants or some of them have commenced in Lusaka for specific performance of an alleged contract for sale of the three farms but which writ has not yet been served on the defendant in that Action (the plaintiff in this action) or in some other litigation which Mr Cave tells me he is about to commence. On that subject. I merely wish to observe that if there is a mortgage, it might be wise to include him or it as a party to the relevant action in which the title conflict will be fought out.

I specifically asked counsel on both sides to try to find some legal authority to either support or rebut Mr Phiri's argument that I can take into account facts which have only come into existence since the date I delivered judgment. I myself have done a lot of research within the limits of the library facilities available to me in Ndola and in the time at my disposal. I have found nothing.

Mr Phiri has quoted to me *Grossfeld & Sons Ltd v Tanian* at p. 629. That was a Workmen's Compensation case which decided that if there has been no change of circumstances since the award of compensation, then there can be no grounds for reviewing the amount of the periodical payments.

Mr Phiri argues that the converse is true, i.e. if there has been a change in the circumstances since the award, then there are grounds for review. I regret to say I think this is a fallacious argument. It is like saying, 'A Policeman is a man who wears black boots and a peaked cap' and following it up with, 'therefore, a man who wears black boots and a peaked cap must be a Policeman'. As a matter of basic principle I have come to the conclusion that one can never take into account events which occur for the first time after delivery of judgment as grounds for review of a judgment. If it were otherwise there would never be an end to any litigation. The losing party would in most cases find something happening after he had lost which would enable him to ask for a second bite of the cherry. To some extent my conclusion is strengthened by the lack of

success which both I and counsel have encountered in trying to find a direct authority to show of any case, anywhere, anytime where a judgment has been reviewed on the strength of subsequent events.

Therefore I find that I cannot take into account events which happened after 18th December, 1979. If I am wrong on this basic principle, then the Supreme Court will put me right on appeal.

I now turn to examine the circumstances in which I may take into account evidence which was in existence before judgment, but which was not brought before the court. Here there is much more authority available. It is old law from the days when in the "received law" of Zambia, there was a process called a "Bill of Review". There is no directly comparable provision to 0.39' r. 1, in the present Rules of the Supreme Court.
I suspect there was one in the old Rules of the Supreme Court but regrettably, the High Court at Ndola is no longer equipped with a set of the old Rules of the Supreme Court. *Halsbury's Laws of*

England, 3rd edn., Vol. 22, p. 791, para. 1670, reads as follows:

> "1670 SETTING ASIDE A JUDGMENT ON FRESH EVIDENCE. An action will lie to rescind a judgment on the ground of the discovery of new evidence which would have had a material effect upon the decision of the court. It must be shown that such evidence is a discovery of something material in the sense that it would be a reason for setting aside the judgment if it were established by proof; that the discovery is new, and that it could not with reasonable diligence have been discovered before. A mere suspicion of fresh evidence is not sufficient."

In the case of In *re Scott and Alvarez Contract* (2), Kekewich, J, said at p. 622:

> "Therefore, if the Defendant can now successfully resist the Plaintiff's action for specific performance, it must be on the ground that he is entitled to review the order of the Court of Appeal"

and at p. 623:

> "The strength of the Defendant's case lies in the discovery that *Mary Ann King*, the original underlesses of the premises, made a will, of which her daughter Sarah Ann Banks was executor and trustee. That this discovery was actually made after the order of the Court of Appeal is beyond doubt; but the Plaintiff contends that it might with reasonable diligence have been made before. The title was one suggestive of difficulty from first to last."

and at p. 627:

> "I propose to pronounce a judgment to the following effect:
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> The Court being satisfied that the further evidence now adduced was not known to the Defendant at the date of the Order of the Court of Appeal. and that he could not have then acquired a knowledge thereof by the use of reasonable diligence, declare that the Order of the Court of Appeal is not

> binding on the Defendant, and that the Defendant is not bound to accept the title to the leasehold premises in the pleadings mentioned"

I am aware that there were some variations to that case in [1895], 2 CH 603. I do not think they affect the basic issues upon which I have relied.

The next case of interest is *Falcke v Scottish Imperial Insurance Co.* (3) at p. 768. I appreciate that this case was before the previous one I have mentioned. It was considered in the Scott and Alvarez case. Kay, J said at p. 769:

> "In this case leave to bring an action in the nature of a bill of review is sought because since the decision of the Court of Appeal material evidence is alleged to have been found; but such leave is not given unless, first, the evidence is material; secondly, that it has been discovered since the decision; and, thirdly, could not with reasonable diligence have been discovered before."

The learned judge repeats these principles at the foot of the same page, but based his eventual decision on the construction of a document, and dismissed the application.

Now applying those principles to this case: I have no doubt that the correspondence between the Commissioner of Lands and the first defendant which occurred before the hearing was known to the first defendant or could have been known with reasonable diligence. If it did not inform its own advocates (and Mr Phiri says his firm knew nothing of it). it cannot ask me for relief. The other item is the alleged 'Certificate of Re-entry'. I cannot say whether it would have been material until I have seen it and had some explanation of the legal authority upon which it is founded. But even if it is material, it did not need much "reasonable diligence" to ascertain it existed. It was on the register in Lusaka on 7th December, 1979. The defendant's advocates practise in Lusaka. It was their fundamental duty to search the register before coming to Ndola to argue the case on 11th and 12th December, 1979. They cannot be heard to say that they could not with reasonable diligence have discovered the contents of a public register which is always open to search by anyone at a very modest fee in normal working hours five days a week.

Consequently, I hold that there are no good grounds for reviewing my judgment of 18th December, 1979.

I again remind the parties of their respective rights of Appeal to the Supreme Court.

I again urge the lawyers on both sides to bring this action to final trial with all possible expedition to reduce the inevitable damage which one side or the other must suffer whichever way the ultimate decision goes.

The Defendants have, I am told, complied with that part of my order on the interlocutory injunction which required them to remove their cattle from the three farms to their own adjoining eight farms by 31st

January, 1980. If by the middle of this year this action (or another relevant action) has not come to trial, then depending on how many other cattle the defendants still have on the eight farms, it may be necessary to consider again the grazing situation, particularly if the court is satisfied that the delay in bringing the final action to court is to be laid at the door of the plaintiff or his advocates.

The defendants' application for review is dismissed.

The defendants will pay the plaintiff's costs of and incidental to this application other than costs of the plaintiff's unsuccessful application for an adjournment which he must pay.
Application dismissed