REPORTABLE ZLR (20)

Judgment No. SC 20/05
Civil Appeal No. 28/04

HILDA MUZIKA v (1) PHOEBE KAMHUNGA (2) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, MARCH 21 & JUNE 30, 2005

G Mandizha, for the appellant

P Mukwengi, for the first respondent

No appearance for the second respondent

GWAUNZA JA: This is the second time that this dispute, which is between the same parties, over the same subject matter and concerning the same cause of complaint, has come before this Court. The present appellant was also the appellant in the first appeal, (**SC 112/02**) heard before this Court in November, 2002. In these circumstances, the respondent contends, in part, that the matter is *res judicata*. I will revert to this argument later.

The background to the dispute is as follows:

In July 2001 the appellant and the first respondent concluded an agreement of sale in terms of which the former sold to the latter, certain property in Harare known as Stand No. 851 Mabelreign Township. The purchase price of the property was $2 520 000

of which a deposit of $1 520 000 was paid, leaving a balance of $1 000 000. This amount was to be paid in two equal instalments, the first on or before 31 August 2001 and the last on or before 31 September 2001. When the first respondent failed to pay the first instalment on the due date, the appellant wrote a letter to the first respondent, asking her to consent to the cancellation of the agreement. The first respondent refused to do so, and proceeded to file an application for a provisional order interdicting the appellant from disposing of the property or transferring it to another person. Although the appellant opposed the application, the High Court granted the application with costs. The court found that the appellant had failed to prove her allegation that the first respondent had agreed to cancel the agreement in question. In addition to that, it was found the appellant had not followed the agreed procedure for cancelling the agreement, as outlined in its clause 7.

The appellant appealed against the High Court judgment, to this Court. CHEDA JA, with the concurrence of SANDURA JA and ZIYAMBI JA, found there was no merit in the appeal, and dismissed it. The Court dismissed, in particular, the appellant's alternative ground of appeal, which was to the effect that the contract was not capable of performance because of a supervening "illegality", arising out of Statutory Instrument 255 B of 2000, as amended by Statutory Instrument 261 A of 2001, which provided that in fixing prices of goods and services in Zimbabwe dollars it was unlawful to apply an exchange rate higher than the official exchange rate.

CHEDA JA noted as follows in his judgment:

> "The appellant's attempt to rely on this law is difficult to appreciate because the agreement did not provide for payment of the purchase price in foreign

> currency. She says she and the first respondent agreed to payment in foreign currency. There is no such agreement … The four thousand five hundred and forty-six pounds was inserted (into the agreement) as an alternative in the event that the purchaser chose to pay in pounds. There is nothing to suggest that the balance was to be paid in pounds. Even if part of the balance was paid in pounds by consent of the appellant and the first respondent, there is nothing which binds the purchaser to pay the balance in pounds. The choice is available to her to pay in either currency".

The first respondent thereafter paid the balance of the purchase price in Zimbabwe dollars.

The words cited above in the judgment of the Supreme Court allegedly jogged the memory of the appellant, leading to her recalling that the parties had signed a handwritten agreement which stated that the balance of the purchase price (Z$1 000 000) was to be paid in pound sterling. This agreement had not been produced in the High Court, nor on appeal to the Supreme Court. It was noted by KARWI J, who heard the matter and made the order now being appealed against, that the parties' agreement was initially recorded in long hand but was later typed. The parties had then signed the typed agreement and relied on it in both the first application and the first appeal to this Court.

Even though the full purchase price had now been paid to her, the appellant was convinced that, if produced in the High Court, the handwritten agreement would result in a ruling in her favour. She therefore filed an application in the High Court, seeking an order compelling the appellant to pay her the balance of the purchase price of Z$1 000 000 in foreign currency, being the sum of four thousand five hundred and forty six pounds. She also sought an order stopping the second respondent from transferring the property to the first respondent pending the payment of four thousand five hundred and forty six pounds to her.

By this action, the appellant sought to:

(i) go back on her earlier averment that the agreement of sale could not be enforced due to supervening illegality;

(ii) reverse the order of the Supreme Court, to the effect that she should accept the balance of the purchase price from the first respondent and then sign all documents necessary to pass transfer of the property to her.

The learned judge *a quo* correctly dismissed the application.

The first respondent, in my view properly raised the issue of *res judicata*. According to Herbstein and Van Winsen, "The Civil Practice of the Supreme Court of South Africa" – 4th Ed at p 249, the requisites of *res judicata* are; that the two actions must have been between the same parties, concerning the same subject matter and founded upon the same cause of complaint (*Le Roux v Le Roux* 1967 (1) SA 446 (A).

The matter now before this Court involves the same parties, the same subject matter (the property) and is founded on the same cause of complaint (i.e. the agreement of sale). The appellant in both applications in the High Court, on appeal in respect of the first application and in the present appeal, also, and essentially, seeks the same relief. This is that she be allowed to keep the property in question while at the same time, the first respondent is denied possession and enjoyment of a property for which she paid over half of the purchase price some four years ago, and the balance two years ago, a property which, in addition, the highest Court of the land has ordered must be transferred to her (first respondent). The appellant currently holds

both the purchase price, and the property in question. Her attempt, which is hardly ingenious, to resuscitate the matter which has been finally determined is clearly an abuse of court process and cannot succeed. The principle of finality in litigation must, in this case, be upheld.

Apart from the matter being *res judicata,* Counsel for the first respondent, Mr *Mukwengi,* is correct that this Court is *functus officio*. As a principle of law, this Court, having made a final order on this matter in SC 112/02, has no authority to correct, alter, or supplement it. (*Firestone South Africa* (*Pty*) *Limited v Genticuro A.G.* 1977 (4) SA 298 at 306 F).

Counsel for the first respondent cited a number of other authorities in support of this argument. Given that this Court has already pronounced a final judgment on this matter, this appeal, in effect, is an attempt to persuade the Court to revisit its own earlier judgment. In *Harare Sports Club & Anor v United Bottlers Limited* 2000(1) ZLR 264 at 267 F GILLESPIE J set out the circumstances under which this might be done, as follows:

> "… the common law recognises the power of the court to rescind, vary or correct its judgment. This power has traditionally been stated in extremely circumscribed terms. Hence, a party might claim *restitutio in integrum*, on the grounds of fraud or *iustus* error (*Childerley Estates Stones v Standard Bank of South Africa Limited* 1924 OPD 163, 165-6). In addition, certain other categories were acknowledged where a judgment could be set aside on discovery of new documents after judgment".

As none of the circumstances outlined in this *dictum* have been alleged, the appellant has, accordingly, failed to prove a case for the rescission,

variation or correction of the judgment already passed by this Court, i.e. Judgment No. SC 112/02.

In all the circumstances therefore, there is merit in the respondent's submission that this appeal is devoid of any merit, is misconceived and lacks legal validity. I have already noted that the appeal also amounts to an abuse of the court process. The respondent has urged this Court, in the light of this, to order costs on the higher scale against the appellant, as a mark of its displeasure. I am satisfied this is a proper case for such an order.

It is in the result ordered as follows:

1. The appeal is dismissed.

2. The appellant shall pay the costs on a legal practitioner and client scale.

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

C Mpame & Associates, appellant's legal practitioners

Ziweni & Company, first respondent's legal practitioners