BRIDGET KORONI
and
PAMELA ZVIDZAI
versus
DESMOND RUSERE
and
CALLISTA NYASHA MUNENGWA
and
CITY OF HARARE
and
THERESA CHINODAKUFA

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 6 May 2010 and 7 December 2011

Opposed Application

T I Gumbo, for the applicants
J Mambara, for the respondents

MAKONI J: The applicants approached this court seeking the rescission of the judgment granted by this court on 30 April 2008 in HC 7208/07 and that the first, second and fourth respondents pay costs of the application. The basis for seeking the order is that the judgment in HC 7208 was obtained through fraud.

The background to the matter is that the applicants are the grand daughters of the late Zvidzai Moses Koroni who during his life time had right, title and interest in stand number 34 Chigutsa Road New Mabvuku ("the property"). The fourth respondent purports to be or is a sister to the late Koroni. It appears the late Koroni is survived by a wife who lives in Chiundura communal lands. It is not clear from the papers whether the estate of the late Koroni was registered but the property was somehow ceded to the applicants.

In HC 6/06 Bridget purportedly approached this court and obtained an order in default to the effect that the property be sold and the proceeds be shared equally between the applicants Sibonile Koroni and Febby Koroni.

In HC 7208/07 Bridget, again, purportedly approached this court and obtained an order in default, that Pamela signs documents to facilitate cession of the property to the first and second respondent in this matter.

On 11 December 2009 Bridget filed the present application alleging fraud on the part of the fourth respondent in obtaining the order in HC 7208/07.

The first and second respondents oppose the application on the basis that they were innocent purchasers. If the applicants have any issues they should approach the fourth respondent. They purchased the property after being shown the order in HC 6/06. That order is not being attacked. They got transfer of the property and obtained an order to evict the applicants.

The fourth respondent challenges the application on the basis that she assisted Bridget to approach the court and obtain the order in HC 6/06 and in HC 7208/07. She avers that she used to stay with Bridget and would have no reason to forge her signature. She supports the first and second respondents in their averments that they are innocent purchasers. She avers that the real issue is the distribution of the proceeds of the sale of the property which were paid in local currency and was eroded by inflation.

After hearing the matter I reserved judgment. As I was preparing to write the judgment, I noted some anomalies on the supplementary affidavits filed in HC 7208/07. The anomaly was that the deponent to the affidavit was Bridget but the signature was that of the fourth respondent. As this issue had not been addressed during submissions, I invited the parties counsel to come and address me.

Whilst both counsel were agreed that the documents filed as supplementary affidavits were not affidavits, they differed on their effect of thereon.

Mr *Mambara* submitted that the case rests on the founding affidavit which incorporate, the proceedings in HC 6/06. The queries that were being addressed by the documents were not material. Mr *Gumbo* submitted that the issues addressed in the documents were material as the draft order as amended could not have been granted had those issues not been addressed.

The first document dated 27 March 2008 addressed the queries that the draft order was general and did not specify the names of the purchasers.

The second document addressed the issues in whose name the property was registered, whether the estate of the late Moses Koroni has been registered and why Pamela, the first respondent then, should be made to sign the cession papers.

I agree with Mr *Gumbo* that the issues addressed in the documents were material to the granting of the order. The order had to be specific as to who the property was being ceded to. One had to be clear that you are not dealing with deceased's estate property. If it was now registered in Bridget's name, one had to be clear how the property came to be ceded to her. These issues are not canvassed in the founding affidavit in HC 6/06. If I were to borrow the expression by Mr *Gumbo*, "if one pulls the carpet from underneath the 'supplementary affidavit', the order would not stand". In view of the above, I will set aside the proceedings in terms of r 449.

Assuming I am wrong, I will proceed to address the matter as argued before me.

The respondents, in their opposing papers raised the point that the application was filed well out of time as is stipulated in the rules. The applicant, in her answering affidavit averred that the application was not filed in terms of the rules but in terms of common law.

It was submitted on behalf of the applicant that a judgment obtained through fraud can be set aside or rescinded such a judgment can be rescinded in terms of common law.

It was further submitted that the respondents did not in any way challenge the report by the forensic report which confirms that the founding affidavit and the Power of Attorney (in HC 7208/07) were forged.

Mr *Mambara* for the respondents submitted that the applicants made a false mistake by seeking rescission instead of setting aside of the order. In any event, the first applicant has not distinguished the heavy onus resting on her as she relies on the ground of fraud. The fourth respondent has not been brought before the courts to answer criminal charges.

In my view, the question of whether the judgment should be rescinded or set aside is a question of semantics. In Herbstein and Van Winsen – *The Civil Practice of the Supreme Court of South Africa* 4th ed p 692 where they discuss the requirements for setting aside a judgment procured by fraud, the authors use the words rescission and setting aside interchangeably. Mr *Gumbo* clarified in his submissions that what the applicants were seeking was the setting aside of the judgment on the basis of fraud.

The applicant, in her papers filed a forensic report where the founding affidavit of Bridget Koroni and the general Power of Attorney, allegedly signed by Bridget were examined. The conclusion was that the questioned signatures were forged. None of the respondents put in issue the forensic report. It is to be taken that they cannot mount a challenge to the forensic report. The applicant has therefore established fraud on the part of the fourth respondent. Those documents and as a consequence the order granted using those

documents cannot stand. The sale to the first and second respondent also cannot stand for nothing legal can flow from a fraud. It is a nullity. I can do no better by concluding the matter with a quote from LORD DENNING in *McLoy* v *United African Company Limited* (1961) 3 ALL ER 1169 (PC) at 1172 where he said:

> "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 the court to set it aside. It is automatically null and void without more ado, though it is 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."

In the result I will make the following order:

1) The judgment granted by this honourable court on 30 April 2008 in case number HC 7208/07 be and is hereby set aside.
2) The first, second and fourth respondents to pay costs of this application.

Atherstone & Cook, applicants' legal practitioners
J Mambara & Partners, respondents' legal practitioners