SHUMAI MARIMO

Versus

RAPHAEL NKALA

And

REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 23 MARCH 2006 AND 14 JUNE 2007

L Mcijo, for applicant
Ms C Nleya, for 1st respondent

Opposed Application

NDOU J: The applicant in the current case filed an application for rescission of judgment granted by this court in HC 45/03. The applicant also seeks the confirmation of the provisional order that she obtained against the 1st respondent in HC 2245/03 i.e the stay of execution. The background facts are the following. On 13 September 2001 the applicant and the 1st respondent approached Messrs Sansole and Senda Legal Practitioners to have an agreement of sale drafted for them wherein the applicant was selling house number 2620 New Magwegwe, Bulawayo to 1st respondent in the sum of $950 000,00. The applicant was paid $400 000,00 upon signature of the agreement of sale on 13 September 2001 and the balance of $550 000,00 was to be paid by 31 December 2001. The applicant was in the company of a young female relative at the time of the conclusion of the said agreement. Sometime in May 2002 the applicant took 1st respondent to her own legal practitioners and there on 23 May 2002 executed another agreement of sale for the same disputed property

for $2 500 000,00. From the papers it seems to me that the parties novated the original agreement because in the latter agreement the parties agreed to "cancel" the agreement of sale of 13 September 2001. The applicant's erstwhile legal practitioner deposed to an affidavit in this application that at the time the latter agreement of sale was executed the applicant did not seem to suffer from lack of capacity to contract. Pursuant to the agreement of 23 May 2002 1st respondent discharged his obligations in full by paying the applicant the full purchase price by instalments as agreed upon by the parties. Thereafter the applicant did not transfer the property in terms of the contract. She dilly-dallied. In frustration the 1st respondent instituted a court application under HC 45/03 and served it upon the applicant.

The applicant consulted Messrs Webb, Low and Barry Legal Practitioners. The applicant thereafter proposed some form of settlement of the matter. The proposal was rejected by the 1st respondent who sought to hold the applicant to the agreement of sale of 23 May 2002. The applicant did not oppose the application despite the good service on her. She was also legally represented at the time. The 1st respondent then obtained an order unopposed compelling the applicant to transfer the disputed property into 1st respondent's names [i.e. the order in HC 45/03].

Thereafter, in case number HC 2245/03 the applicant obtained a provisional order which effectively stayed execution of the order in HC 45/03. From the papers, it is clear that there are three issues for determination *viz*:

a) application for condonation for filing the application for rescission out of time;

b) the application for rescission; and

c) confirmation or discharge of the provisional order granted in HC 2245/03 on 21 October 2003.

During the hearing, Mr *Mcijo*, for the applicant submitted that it would be in the interests of finality for the court to indulge the applicant for the delay in applying for rescission and deal with actual application for rescission. Ms *Nleya*, for the 1st respondent did not oppose this approach so, I will condone the applicant's late filing of her application for rescission. The parties are in agreement that the outcome of the application for rescission will necessarily determine the fate of the provisional order. There is, however, a point *in limine* raised by the 1st respondent i.e. whether the deponent, Violin Dlodlo, had the authority to do so. I propose to first deal with the point *in limine*.

Violin Dlodlo's authority to depose to the founding affidavit

Violin Dlodlo is the daughter of the applicant. She averred that she was acting on behalf of the applicant because the latter cannot do so herself on account of her age and deteriorating health. In support of her averment that the applicant lacks capacity she filed a medical report compiled by Dr F A Onyanga Omara, specialist Physician. This is what Dr Omara said about the applicant's condition on 23 April 2003.

> "Mrs Marimo has been under medical treatment for many years since 1994 when she was treated for Neuro-Syphilis in Mpilo Hospital with various antibiotics. She continued to complain of various ailments including recurrent headaches, general aches and pains, poor memory and concentration and in 1997 was further investigated, had lumbar puncture which again tested positive for cerebral syphilis. Over the years she has been treated extensively

by various doctors including Dr A P Baker, a Psychiatrist for her mental problems. I have been treating her since June 1998 for most of the above symptoms.

Apparently, Mrs Marimo sold the family house in 2001 without the consent of other family members and after discovering the sale and terms of sale the family has been trying to cancel the sale and recover the property as they believe because of her mental state Mrs Marimo was not competent to make such a decision. A letter was apparently written to the courts about her illness by Dr Baker and up to now the case has still not been resolved.

I my view, due to complications of cerebral syphilis and the long history of mental and physical ill health Mrs Marimo was and is not capable of making informed major decisions and writing this medical report at the request of the family to clarify her medical history.

Yours faithfully …"

For obvious reasons, the deponent was not authorised by the applicant by virtue of a Power of Attorney. The parties did not accord this important issue the treatment it deserves. 1st respondent rejected the above medical evidence out of hand. The applicant stated that the point *in limine* was devoid of any merit. There was no reference to the relevant authorities or Rules on this issue by either party in the heads of argument. It is trite that a litigant must have the mental capacity to understand and appreciate the proceedings at a sufficient level to enable him or her to play a useful and constructive role by giving proper instructions to his/her legal practitioners. In order for a party to play such a role, the mental ability to make rationally motivated decisions is required. *The Civil Practice of the Supreme Court of South Africa*, Herbstein and Van Winsen (4th Edition) at 151 and *Jonathan* v G*eneral Accident Insurance Co of SA Ltd* 1992(4) SA 618(c) . Every person is, however, presumed to

be sane, and the onus is on the person alleging the contrary to prove it. From the applicant's papers what is discernible is that Violin Dlodlo deposed to the founding affidavit in a representative capacity. Her authority to do so was challenged and she has not bothered to do something about the challenge. If on the one hand, she is representing the applicant on account of the latter's mental or/and physical disability then the provisions of Order 32 Rule 249 of the High Court Rules, 1971 are applicable. She has not been properly appointed the applicant's curator *ad litem*. If,

on the other hand, she is not representing applicant pursuant to the provisions of Rule 249, then she has to show that she has been duly authorised by a Power of Attorney despite the challenge to her authority. So whichever way one looks at it Violin Dlodlo was not properly authorised to represent the applicant. Because of the challenge, Violin Dlodlo had to prove her authority to represent the applicant. Although such authority could have been conferred by ratification when the challenge was made, the said Violin Dlodlo did no seek such ratification – *Afglow Land and Cattle Co (Pvt) Ltd* v *Napier* 1971(1) RLR 3 and *Unlawful Occupiers of the School Site* v *City of JHB* [2005] 2 ALL SA 108 (SCA).

Was Violin Dlodlo properly authorised to institute these proceedings? Or, was she doing as part of the "family members" alluded to in Dr Omara's medical report, *supra*, who felt they should have been consulted by the applicant first? If she is relying on mental disability of the applicant was she properly appointed curator *ad litem* in terms of Rule 249? This is a case where the issue of authorisation is crucial bearing in mind that the applicant received the full purchase price from the 1st

respondent. She was legally represented when the agreement of sale was executed.

Accordingly, I hold the view that there is merit in the point *in limine*. There is no need to go to the issue of rescission.

Accordingly, the application is dismissed with costs.

Lazarus & Sarif, applicant's legal practitioners
Sansole & Senda, 1st respondent's legal practitioners