SIBHEKILE SIBANDA

Versus

MPILO MSIPHA

And

MASTER OF THE HIGH COURT

And

SURPRISE NDLOVU N.O

And

BULAWAYO CITY COUNCIL

And

SHERIFF OF THE HIGH COURT N.O

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 17 NOVEMBER 2020 AND 11 MARCH 2021

Opposed Application

Ms K Mpofu, for the applicant
H Shenje, for the 1st respondent
No appearance for the 2nd, 4th and 5th respondents
3rd respondent in person (barred)

MABHIKWA J: The applicant made this application in terms of Order 49 Rule 449 of the High Court Rules 1971 purportedly to seek the rescission of a judgement granted under case No. HC 803/19 on the ground that an error had been made in granting the judgement. She also sought an order for the removal of the 3rd respondent as Executrix Dative in the estate of the late Laiza Khumalo.

The relevant brief background facts of this matter are that the late Laiza died intestate on 5 May 2014. She was survived by only two (2) children, both female, being the applicant and the now late Bekezela Mpofu. Bekezela died recently on 29 January 2019 after she and

the applicant had been disagreeing on certain issues concerning the house. Curiously, the application is being made well after the death of Bekezela but moreso long after judgement was granted on 30 May 2019. The application was filed more than a year later.

The property in issue, house No. 70681 Lobengula West Township, Bulawayo was apparently the only property left, forming the estate of the late Laiza Khumalo. I note therefore that in her papers, the applicant makes reference to the 3rd respondent having made decisions contrary to or that were against the interests of the "beneficiaries" when in fact she would be referring to her interests. From the papers, Bekezela Mpofu never quarreled or took the Executrix to court during her lifetime. If anything, indications are that she disagreed with applicant initially on how to dispose of the property as she was living in the house with nowhere to go but the applicant had accommodation and wanted her share of the house. At some stage, Bekezela even offered to buy out the applicant but on 2 occasions failed to do so. It was eventually resolved that the house be sold and the proceeds be shared between the two sisters. In her application, applicant appears to mix-up issues. Instead of showing the error that occurred when judgement was granted, she complains of the following;

a) She complains that the property was sold without her knowledge and consent.

b) That the Executrix of the estate (3rd respondent) did not follow the law and thus the house was sold outside the law.

c) That this led to an application by the purchaser (1st respondent) to compel transfer of the house which she did not oppose and a default order was granted. This seems to imply that she did not oppose the application even if she felt certain things were not being done in terms of the law.

d) That the judgement was granted in error as the sale was null and void *ab initio* and that the Judge had not even seen the Section 120 Certificate of Authority to sell the house. She claims that the Judge would not have granted the order sought had he known that there was no Section 120 Authority.

e) She also seeks an order for the removal of the Executrix claiming the executrix has not acted in the interests of the estate and its beneficiaries.

Ultimately therefore, the applicant complains absolutely of the conduct of the Assistant Master and that of the Executrix. There is no complaint at all against the conduct of the 1st respondent who innocently purchased the house in question.

I am tempted therefore to agree with *Mr Shenje* for the 1st respondent that the applicant wants to have her cake and eat it. It is clear from the Master's Report at pages 21 and 22 of the record and from her own founding affidavit that the applicant herself was the beneficiary that was pushing for the sale. It is the now deceased sibling (Bekezela) who was refusing to have the house sold. The Master gave her 30 days to buy out the applicant. She failed and this triggered the sale of the house. Therefore the resolution to sell the house was done by the Master at the insistence of the applicant herself. At the second page of his report, the Master states that it was eventually agreed that the house be sold. All that remained was the issuance of the Section 120 Certificate itself. He contends that this is simply an administrative issue in the winding up and finalization of the estate. When all that was happening, the 1st respondent was not in the picture and was not even aware of the wrangles between the applicant, her late sister and the Executrix. She only comes in much later as an innocent purchaser when they had eventually agreed to sell the house.

Infact at paragraph 17, applicant herself in her founding affidavit admits receiving her half share of US$7 706.00 out of the deposit of US$16 000.00 paid by the 1st respondent. So, she cannot claim that she was unaware of the sale process or that the sale was unlawful when she is the one who insisted on it and even received her half share of the sale. Perhaps one would listen to such a complaint if it came from the Executor of her late sister's estate, not the applicant. I notice also that the applicant was not a party to the proceedings intended to be rescinded in terms of rule 449 of the High Court rules. The parties in that matter were Mpilo Msipha, the now 1st respondent who purchased the house, Surprise Ndlovu (now 3rd respondent in her capacity as the Executrix Dative in the estate late Laiza Khumalo, the Assistant Master of the High Court and the City of Bulawayo.

To that extent, applicant has a heavy burden resting on her if she is to succeed and that is if she alleges fraud and misrepresentation. Unfortunately she is not even so alleging. Further, the house was apparently sold in 2018 and ownership has long been transferred to the 1st respondent. 1st respondent says that this was after she had paid the whole purchase

price of US$26 100.00. After all, apart from the Master and the Executrix, there were legal practitioners involved, Maseko Law Chambers being some of them.

The Law

In *Kassim v Kassim* – 1989 (3) ZLR 234 (HC) which was a matter involving division of property following a divorce, it was held that the general principle is that once a court has dully pronounced a final judgement or order, it has no authority to correct, alter or suspend it, because it becomes *functus officio*. However, the principal judgement or order may be supplemented in respect of accessory or consequential matters, such as costs, or the interest on a judgement debt which the court had overlooked or inadvertently omitted. Rule 449 would come in. This power is exercisable by a Judge of the court, irrespective of whether he or she made the original order.

Also in *Bopoto v Chikumba and Others* – 1997 (1) ZLR 1 (H) where a buyer of a house had obtained a court order compelling the seller to effect transfer of same. The seller had not opposed the buyer's application for this order and the judgement had been granted in default. The applicant, who had not been a party to those proceedings, applied for rescission of judgement. She alleged that the seller had acted fraudulently in entering into the agreement of sale in order to defeat the applicant's claim. It was held that generally only a party against whom a judgement has been given in default may apply to have that judgement set aside. The applicant was not such a party and therefore had no *locus standi* to apply for rescission of the judgement.

In my view an applicant who fails to prove application in terms of rule 449 (1) (a) by showing fraud and misrepresentation also takes away the *locus standi* to apply for rescission. In any event, it is trite that an applicant who seeks rescission of a judgment on the basis of alleged fraud and misrepresentation bears a heavy onus resting on him if he or she has to succeed. See *Bopoto v Chikumba and Others* (supra).

Requirement of correction of error or rescission of judgement under Order 49 rule 449 of the High Court Rules, 1971

Rule 449 of the Court rule reads as follows;

"449 Correction, variation and rescission of judgements and orders .

(1) The court or a Judge may, in addition to any other power it or he may have, *mero metu*, or upon the application of any party affected correct, rescind, or vary any judgement or order –

a) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or,

b) in which there is an ambiguity or a patent error or omission but only to the extent of such ambiguity, error or omission; or

c) that was granted as the result of a mistake common to both parties.

2. The court or a Judge shall not make any order correcting, rescinding or varying a judgement or order unless satisfied that all parties whose interests maybe affected have had notice of the order proposed."

So, by interpretation there are about four (4) scenarios in which the court or a Judge may correct, vary or rescind a judgement or order.

The first scenario simply is where the court or Judge realises an error in the judgement or order and *mero motu* varies or corrects it. In my view, this kind of correction or variation is best suited for minor grammatical, typographical or some wording mistakes that would obviously portray a different meaning from the one intended if not corrected. It is my view also that it would generally be undesirable for a Judge to rescind or vary a whole judgement in the absence of the parties in this way. The applicant is obviously not asking that there was such an error to be corrected *mero-motu*, hence her application anyway.

The second is where there is an ambiguity or patent error or omission in the judgement or order. It is important that the correction, variation or rescission is only to the extent of that particular ambiguity, error or omission. To that extent, it is similar to the situation referred to above. Such an error, omission or ambiguity may be brought to the attention of the Judge by concurrence of both parties. It is improper, as is becoming prevalent now, for a party or his lawyer to unilaterally write to a Judge and claim that in his opinion there is an error, omission or ambiguity and then ask the Judge to "correct" the judgement or order. Applicant again is not referring to this kind of error, ambiguity or omission.

The third situation is where a judgement or order is granted as a result of a mistake common to both parties and the said parties want it to be rectified. Again this applicant does

not seem to claim this kind of mistake and as already stated, she was not even a party to the proceedings and order sought to be corrected.

The fourth instance, which the applicant appears to have based her application on, is where an order was erroneously sought or erroneously granted in the absence of any party affected by that judgement or order. It is common cause that the applicant was affected by the order and was absent when it was granted. But the matter does not end there. It does not necessarily follow that because applicant was absent and is affected by the judgement or order, then it was erroneously sought or was granted in error. Each case depends on its facts and circumstances. *In casu,* I have already alluded to the circumstances under which the house was sold in 2018 at the insistence of the applicant and well before the death of her sister, the only other beneficiary in the estate. *Mr Shenje* also submitted and explained the circumstances under which the order now sought to be rescinded, was in fact granted. He explained, as appears clearly on the papers that the application by 1st respondent to force the Master and City of Bulawayo to transfer the property was not opposed and thus set down on the unopposed roll. *Mr Shenje* says on the date of hearing, the court was satisfied that the matter was properly set down on the unopposed roll. He was even asked by the Judge to make certain clarifications which he made including the fact that the property had been bought by his client (now 1st respondent) after the two beneficiaries had agreed that the house be sold and they get their respective shares. Also, the 1st respondent had long paid the full purchase price. At the time, the applicant having insisted that the house be sold, obviously did not advise the Executrix to oppose the application.

It is grossly wrong and unfair for applicant to now use legal niceties and allege irregularities in order to have a judgement properly entered to be rescinded. This brings me to the issue of the Section 120 Authority to sell.

Section 120 Certificate of Authority

Long after she insisted to the Master and the Executrix that the house be sold and also now after the death of the only other beneficiary of the estate, applicant now claims that the house was sold unlawfully because a Certificate of Authority to sell had not been issued in terms of Section 120 of the Administration of Deceased Estates Act, Chapter 6:01. She also takes advantage of the Master's admission in his report that the matter may be referred back to him for completion because indeed the Certificate had not yet been issued although it was

common cause that it had been agreed amongst all concerned including the two beneficiaries that the house be sold so that they share the proceeds equally.

A distinction should be made between the case *in casu* and a case such as *Katsande v Katsande and Others* 2010 (2) ZLR 82 (H) which was an administration of an estate involving mostly minors. The testator's will specifically directed in clause 3 (a) stated that the immovable property being house No. 18806 Unit L Seke, Chitungwiza shall revolve upon his son Kudzanayi Frank Katsande who in turn was directed in terms of the same clause to exercise the responsibility and execute such parental duties as the testator himself would have done over his minor daughter Milenda Tinashe Katsande. She resided at the said property. The executor was duty bound to comply with that unambiguous provision of the Will. Clause 3 (c)'s intention was also clear that the said property was only to be sold if, and only if the estate failed to meet claims and demands from creditors of the estate. However, there being no such failure to pay creditors and some of the beneficiaries being minors, Razmond Katsande, the dully appointed Executor Testamentary therein, failed to execute his duties properly in selling the house on 11 October 2007, and then fraudulently obtaining the Master's consent in terms of section 120 of the Administration of Estates Act (Chapter 6:01) which was granted only three (3) months after the actual sale had taken place. Further, both parties and the Master had failed to comply with the strict provisions of section 122 of the same Act since the estate involved minors. Regrettably and quite often, these strict provisions are often taken mistakenly as being contained in Section 120. Traces of such mistaken belief seems to appear in respect of the applicant in the current case. In *Katsande v Katsande* (supra), the court correctly held that the selling of the house had been unlawful and that the issuance of the Section 120 was not only fraudulently sought and issued but also unnecessary as the Will specifically provided that the property should not be sold.

For the avoidance of doubt the famous Section 120 of the Administration of Estates Act reads:

> "If, after due inquiry, the Master is of the opinion that it would be to the advantage of persons interested in the estate to sell any property belonging to such estate otherwise by Public Auction, he may, if the Will of the deceased contains no provision to the contrary, grant the necessary authority to the executor so to act."(the underlining is mine).

It is clear therefore from the above that there is no law that there should always be a Section 120 Certificate issued if estate property is to be sold. The section is clear that it is only when the Master is of the opinion that it may be to the beneficiaries' advantage together with all other interested persons to sell the property, which does not always have to be a house by the way, that the Master may, (not must or shall) grant the authority. Impliedly therefore, the Master may even *mero-motu* grant the authority to sell the property with no one having asked for it, let alone consent to it, for as long as he genuinely is of the opinion that it is advantageous to the interested parties in the administration of that particular estate. That is the import of the section. Further, it is clear that the legislature in crafting section 120 intended that the Master be guided first and foremost by the Will of the deceased person if any. Where it was silent, or where the will did not prohibit the sale or where there was no Will at all then the Master may grant authority to sell. Clearly therefore there is no law that there should always be sought and issued, a Certificate in terms of section 120 as often misinterpreted and which the applicant *in casu* has used as her "peg hole."

It is clear in these papers and I am inclined to agree with *Mr Shenje*, when he argues that this application has been motivated only by the fact that applicant complains that she did not get all her share of the proceeds of the sale. After the payment of the US$26 000-00 purchase price, it appears according to her that she had only received the half-share of the deposit which was US$7 706-00. She claims that the rest has not been accounted for. She believes that her late sister may also not have received her share. But that is not for the 1st respondent to correct. The 1st respondent paid her full purchase price, and subsequently after a court order, took transfer of the property. The applicant does not allege in her application, any fraud against the 1st respondent or any connivance or ill doing. There were also legal practitioners involved in the sale and transfer. Messrs Maseko Law Chambers are some of them. Her only recourse is the Executrix and anybody else who could not account for her money if that is true.

Secondly it is clear to me from a reading of the papers that the applicant also sees a window of opportunity to repossess the house for her full benefit. Bekezela Mpofu, the only other beneficiary of the estate with whom she argued for some time, died on 29 January 2019. A year and half years later, she filed this application. In my view, this was to simply re-possess the house for her full benefit, albeit at the expense of the buyer (1st respondent)

I am convinced that there was no error at all in the granting of the judgement in case No. HC 803/19.

Accordingly, the application is dismissed with costs of suit.

Webb Low & Barry Inc. Ben Baron & Partners, applicant's legal practitioners
Shenje and Company, 1st respondent's legal practitioners