CLAUDIOUS MAPEDZAMOMBE
versus
EMILY MHINI

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 28 February and 07 March 2013

Opposed

Applicant - in person
L Uriri, for the respondent

MAKONI J: The applicant, at one point was the registered owner of Stand 606 Northwood Township 4 of Sumben. The property was sold in execution at a public auction and the respondent was confirmed as the highest bidder. The property was transferred into her name on 24 November 1992. The applicant was not happy with the developments resulting in him instituting a plethora of cases against the respondent and other parties. This culminated in the High Court in *Mhini* v *Mapedzamombe* 1999(1) ZLR 561 (H) making an order of perpetual silence and that the applicant had to apply for leave of this court to institute proceedings relating "directly or indirectly to the purchase by the applicant (respondent) of the property". It is this order that he seeks to set aside.

His draft order reads as follows:

"1. The applicant be and is hereby granted leave to institute proceedings against the respondent and her employees or agents in proceedings which relate directly or indirectly to the purchase of the respondent of certain immovable property known as Stand 606 Northwood Township of Sumben.

2. The applicant be and is hereby granted leave by the honourable court to set down any matter already filed or commenced with this honourable court in connection with eh immovable property described in para (1).

3. There shall be no order as to costs unless the respondent opposes this application".

The respondent took *in limine* the point the applicant cannot be heard by reason of the fact that he is in contempt of the order that he seeks to set aside. He had to first of all seek leave of this court to file the present application.

When the applicant filed the present application he was represented by legal practitioners. They filed Heads of Argument and applied for set down of the matter. They then renounced agency. At the hearing the applicant appeared in person. I will address these factors later on in my judgment.

Mr *Uriri* contended that it is not clear what the applicant seeks in the present application. In his founding affidavit he seeks the rescission of the judgment handed down on 30 June 1999 by GARWE J (as he then was). See para 5, 6 and 13 of the founding affidavit The order in *Mhini*'s *supra* judgment stops the applicant to approach this court without leave. He therefore contended that these proceedings are not properly before the court.

The applicant contended that in para 4 and 14 he in effect was seeking leave of this court. He also mentioned para 7 and 11.

A reading of the applicant's founding affidavit leaves one without doubt in one's mind, that what the applicant seeks is the rescission of the judgment by GARWE J. It is only when one gets to the draft order that one is confronted with the issue of seeking leave of this court. Paragraphs 5 and 6 of the founding affidavit are clear that the applicant seeks rescission of judgment. In the penultimate paragraph which is para 13, he states:-

> "It is within my view (*sic*) in the interests of justice to pursue (*sic*) the rescission of order, *sic*) HC 4395/99 as it was delivered unwillingly (*sic*) by the High Court through the misrepresentation and the omission of facts by the first respondent. It is trite law that the High Court can set aside any judgment procured by perjury, forgery or fraud or that new facts of (*sic*) of a material nature have arisen…."

He concludes the affidavit by saying that the upliftment of bar against him will allow him to finally seek justice. He had earlier on made reference to the bar in para 4 where he says he filed the application to lift the bar of perpetual silence. There are no averments set out in support of the relief that he seeks in the draft order.

In his Heads of Argument filed by his erstwhile legal practitioners the applicant persists with the issue of rescission of judgment. The issues to be determined as formulated in the Heads of Argument were:-

> "1.1 Whether or not the plaintiff still has recourse to rescind the judgment under HC 4395/99.
>
> 1.2 Whether or not the judgment granted under HC 439500 was granted out of fraud, error or mistake (*sic*)".

There is no mention, whatsoever, of the issue of leave to institute proceedings in the Heads of Argument.

It appears the applicant's erstwhile legal practitioners contributed to the confusion in the manner they drafted the papers. There are no averments in support of an application for leave. Instead they address the requirements of rescission of judgment and then drop in averments of upliftment of the bar. One wonders what was being made reference to 'as upliftment of bar.

The the draft order is very clear that what the applicant seeks is leave of the court to institute proceedings. The fact that his founding papers do not support the relief that he seeks is a different issue altogether. It can be addressed when dealing with the merits of the matter. In view of the above the respondent cannot succeed. I therefore dismissed the point *in limine*

After the point *in limine* was argued, I postponed the matter to the 7 March 2013 for continuation after my determination. On that date the respondent did not attend court. An application for dismissal of the application was made and was granted.

In the result I will make the following order.

1. The application is dismissed.
2. The applicant to pay the respondent costs on a legal practitioner client scale.

Uriri Attorneys-At-Law respondent's legal practitioners