IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE NO: 23/2016**

In the matter between:

BEAUTY PAT SIHLONGONYANE N O	**APPLICANT**
and	
XOLILE SIHLONGONYANE t/a THE PROPERTY SHOP	**FIRST RESPONDENT**
SANDILE SIMELANE	**SECOND RESPONDENT**
MFANAWENKHOSI J. DLAMINI	**THIRD RESPONDENT**
NEDBANK SWAZILAND	**FOURTH RESPONDENT**

Neutral Citation: *Beauty Pat Sihlongonyane N O vs Xolile Sihlongonyane and Two Others (23/2016) [2018] SZSC 52 (29 November 2018)*

Coram: **DR. B.J. ODOKI, JA**
J.P. ANNANDALE JA
J. CURRIE AJA
S.J.K MATSEBULA AJA
M. MANZINI AJA

Date Heard: **4 October 2018**

Date delivered: **29 November 2018**

Summary: *Civil Procedure – Application for review of decision of the Supreme Court setting aside decision of the High Court - Application for review based on grounds* inter alia *that sale and transfer of property to the 3rd Respondent was fraudulently carried out by the 1st and 2nt Respondent contrary to Sections 31 of the Transfer Duty Act 81 of 1962 ad Sections 6 (1) and 43 of the Deeds Registry Act 37 of 1968 – whether Supreme Court erred in not dealing with issues canvassed during the hearing - whether Supreme Court erred in holding that matter was referred to trial and not oral evidence in accordance with Rule 6 (8) of the High Court Rules – whether Supreme Court erred in holding that the High Court ought to have granted an order of absolution from the instance - whether the Supreme Court erred in holding that the 3rd Respondent was a* bona fide *purchaser – Principles and conditions applicable to reviews under Section 148 (2) of the Constitution – No exceptional circumstances which caused gross miscarriage of justice established – Application dismissed with costs.*

JUDGMENT

DR. B.J. ODOKI J.A

[1] This is an Application by the Applicant, Beauty Pat Sihlongonyane, to review and set aside the judgment of the Supreme Court delivered on the

30th June 2016. The Application also seeks an order to confirm the decision of the High Court handed down on the 19th February 2016 in terms of which the sale and transfer of Portion 7 or 8 of Farm Calaisvaile 11 No. 693, situated in the Manzini District, was rescinded, set aside and reversed and the parties *restitutio in integrum* was ordered.

The Background

[2] The background to this Application is as follows. The Applicant is the wife and executrix of the original Applicant Jabulani Elliot Sihlongonyane, who passed on during the trial at the High Court. The Applicant brought an Application in the High Court seeking the following orders:

"1. Declaring the contract of sale between the applicant and the third respondent hereto attached and marked JSI to be void ab initio and of no force or effect;

2. Rescinding, setting aside and /or reversing the transfer of portion 7 of Farm Calaisvaile 11 No. 693 in the Manzini District, from Applicant's name to third respondent's name under Deed of Transfer No. 153/14;

3. Cancelling the Mortgage bond executed by the third respondent in favour of the 6th respondent on the said Portion 7 of Farm Calaisvaile 11 No. 693 in the Manzini District;

4. *Ordering restitution of the parties to the position they were in before the conclusion of the purported contract;*

5. *Awarding costs of this application against first respondent at attorney-client scale."*

[3] The Application was supported by the Founding Affidavit of the original Applicant in which he stated that towards the end of December 2013, he was approached by the 1st Respondent who told him that she was in the business of estate agents and requested the Applicant to engage her agency to sell his farm (a certain portion of 7 of Farm Calaisavaile 11 No 693 in the Manzini District.)

[4] The Applicant took some time to ponder over the matter but eventually agreed to engage the 1st Respondent as his agent. The Applicant claimed that he instructed the 1st Respondent to first subdivide the farm and only sell one portion thereof leaving enough land for the Applicant and his livestock on the other portion.

[5] On 14 January 2014, the Applicant signed an agency agreement between himself and the 1st Respondents business known as the Property Shop, duly represented by the 1st Respondent. This was the "Agreement

Mandate" attached to the Applicant's affidavit and marked Annexture "EJ2."

[6] According to this Mandate Agreement, the 1st Respondent was to first subdivide the farm and sell the first portion thereof at the highest price attainable. The price was estimated at E1,500.000.00 (One Million Five Hundred Thousand Emalangeni). The agent was to be paid 10% of the purchase price as commission.

[7] The Applicant stated that on the same day the First Respondent called him to sign some papers which were part of the transaction he had mandated her to carry out. The Applicant claimed that he was prevailed upon to sign the papers without reading through them and the 1st Respondent did not avail him copies thereof. The Applicant came to know after the transfer of the property that the papers he had signed, which included the deed of sale, had transferred the whole of his farm and not merely a portion, as he had mandated.

[8] The Applicant stated that before the property was transferred he had been called to the offices of C. J. Littler and Company Attorneys to sign a Power of Attorney to pass transfer of certain Portion of Farm Calaisvaile 11 No. 693 which he believed to be a subdivision of his

Portion 8. However, he learnt after the transfer that Portion 7 had been re-designated as Portion 8 by the Surveyor General's Office. The Applicant came to know all this when the Third Respondent acting through his attorneys started threatening him with eviction proceedings.

[9] Prior to the threatened eviction , the Applicant had been paid the sum of E 1,000,000.00 (One Million Emalangeni) which had been deposited into his account, as payment of the purchase price of the property. He waited for the balance of E 500,000.00 (Five Hundred Thousand Emalangeni) but in vain.

[10] The Applicant pleaded that the agents had acted fraudulently in making him hastily and inadvently sign the Deed of Sale for the whole farm when he had mandated them to subdivide it and sell only a portion thereof.

He claimed that the First and Second Respondents had fraudulently tricked him into selling his property for "a song" .

[11] The Applicant's Application was opposed. The First and Third Respondents filed affidavits opposing the order sought, while the Fourth explained in its affidavit that it was neither opposing nor supporting the relief sought by the Applicant. The Fourth Respondent (the Bank) also

filed an affidavit in respect of the bond executed in favour of the Third Respondent to purchase the property in issue.

[12] The First Respondent denied the contents of Annexture "EJ2" and stated that the Mandate Agreement he signed with the Applicant contained in Annexture "F" was to sell the entire farm being Portion 7 of Farm Calaisvaile 11 No. 693, Manzini District, measuring 47 hectares in total, for the price of E1,500,000.00 (One Million Five Hundred Thousand Emalangeni).

[13] It was the assertion of the 1st Respondent that the Applicant was given an opportunity to read through the Deed of Sale before signing it and that the Applicant is not being sincere in his contentions regarding the signing of the Deed of Sale.

[14] The Conveyancer, Mr. Manzini, explained that after receiving instructions from the Applicant and the First and Second Respondents, he conducted a search at the Surveyor General's office. He discovered that there was actually no portion 7 of the said farm but that there was a portion 8. The description of the property had been changed from portion 7 to portion 8.

[15] During the hearing of the Applicant in the High Court, when the learned judge found that the matter could not be resolved on affidavits as it was fraught with disputes of fact, she referred the matter to trial and directed that the conveyancer and the Registrar of Deeds should be called as witnesses, in order to explain the anomaly about the description of the farm.

[16] At the conclusion of the trial, the learned judge made the following orders;

"1. Applicant's application succeeds;

2. The transfer of Portion 7 or 8 as the case may be, of Farm Calaisvaile11 No. 693 situate at Manzini District is hereby rescinded set aside and reversed;

3. The partie's restitutio ad integrum *is hereby ordered, namely;*

3.1 The contract of sale between applicant and third respondent is hereby declared void ab initio*;*

3.2 The mortgage bond executed by Third respondent in favour of sixth respondent on Portion 7 or 8 as the case may be of Farm Calaisvaile ll No. 693 situate at District is hereby declared cancelled.

4. *First and Second respondents are hereby ordered to pay costs of suit at own client – attorney scale."*

[17] Being dissatisfied with the judgment of the High Court, the Respondents appealed to the Supreme Court. The Supreme Court allowed the appeal and set aside the decision of the High Court.

The Grounds For Review

[18] The Applicant has filed the Application to review the above decision on several grounds which are contained in his founding affidavit. The grounds can be summarised as follows:

1. *The Supreme Court committed a gross irregularity in brushing aside legal issues which were fully canvassed in arguments during the hearing of the appeal which issues were:*

   (i) *whether there was a valid sale of property in accordance with Section 31 of the Transfer Duty Act 81 of 1902, and*

   (ii) *whether the renaming to the Applicant's farm by the conveyancer complied with Section 6 (1) (b) and Section 43 of the Deeds Registry Act 37 of 1968.*

2. *The Supreme Court committed a patent error of law in upholding the sale of the property after finding that the Respondents acted fraudulently in facilitating the transfer of the entire property whereas the deceased's intention was to subdivide the property and sell only a portion of it.*

3. *The Supreme Court committed a fundamental and gross irregularity in holding that the matter was referred to trial and not to oral evidence, thus resulting in the inadmissibility of affidavit evidence which affected the merits of the case.*

4. *The Supreme Court erred in upholding the sale of the property despite finding that the evidence of the surviving spouse married in community of property never consented to the sale of the entire property, contrary to Section 16 (3) of the Deeds Registry Act.*

5. *The Supreme Court erred in holding that the High Court should have granted absolution from the instance* mero motu.

6. *The Supreme Court erred in finding that the Third Respondent was an innocent purchaser and therefore, the fraudulent conduct of the First and Second Respondents who were agents of the Applicant, could not affect the interest of the Third Respondent.*

The Principles Applicable to Review

[19] It is now well settled that this Court has review powers over its decisions, as granted to it by Section 148 (2) of the Constitution which provides:

> "(2) *The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rules of court.*
>
> *(3) In the exercise of its review jurisdiction, the Supreme Court shall sit as a full bench."*

[20] It is common knowledge that neither an Act of Parliament nor rules of court have been made to prescribe the grounds and conditions upon which the review jurisdiction may be exercised. Suffice it to point out that several decisions of this Court have attempted to lay down some of the grounds or conditions upon which such review may be made, in the absence of the Act or rules.

[21] Some of the decisions include **COMMISSIONER OF POLICE AND ANOTHER vs. DALLAS BUSANE AND FOUR OTHERS [2015] SZSC 39** (29 July 2015) **VILANE N.O. AND ANOTHER vs. PIPNEY INVESTMENTS (PTY) LTD [2014] SZSC 62** (3 December 2014) **PRESIDENT STREET PROPERTIES (PTY) LTD vs. UCHECHUKIRU**

AND FOUR OTHERS [2015] SZSC 11 (29 July 2015) **SWAZILAND REVENUE AUTHORITY vs. IMPUNZI WHOLESALERS (PTY) LTD** [2015] **SZSC 06** (09 December 2015) **NUR & SAM (PTY) LTD. vs GALP SWAZILAND (PTY) LTD (13/2015) [2015] SZSC 04** (09 December 2015) and **CHRISOPHER VILAKATI vs PRIME MINISTER OF SWAZILAND AND TWO OTHERS (35/2013) [2016] SZSC 15** (30TH June 2016).

[22] In the **PRESIDENT STREET PROPERTIES (PTY) LTD** case (supra) Dlamini AJA stated that:

"[26] In its appellate jurisdiction the role of this Supreme Court is to prevent injustice arising from the normal operation of the adjudicative system; and in its newly endowed review jurisdiction, this court has the purpose of preventing or ameliorating injustice arising from the operation of the rules regulating finality in litigation whether or not attributable to its own adjudication as a Supreme Court. Either way, the ultimate purpose and role of this Court is to avoid in practical situations gross injustice to litigants in exceptional circumstances beyond ordinary adjudicative contemplation. The exceptional jurisdiction must be properly employed, be conducive to and productive of higher sense and degree or quality of justice. Thus, faced with a situation of manifest injustice, irremediable by normal court processes, this court cannot sit back or rest on its

laurels and disclaim all responsibility on the argument that it is functus officio *or the matter is* res judicata, *or that finality in litigation stops it from further intervention. Surely the quest for superior justice among fallible beings is a never ending pursuit of our Courts of justice, in particular, the apex court with the advantage of being the court of last resort"*

[23] After citing authorities from various jurisdictions, Dlamini AJA identified some of the conditions which might justify such reviews as follows:

"[15] From the above authorities some of the situations already identified as calling for judicial intervention are exceptional circumstances, fraud, patent error, bias, presence of some most unusual element, new facts, significant injustice, or absence of effective remedy".

[24] In **SWAZILAND REVENUE AUTHORITY vs. IMPUNZI WHOLESALERS (PTY) LTD** (*supra),* this Court identified a number of important principles that can be distilled from the court judgments cited above. These principles were summarized in paragraph [32] as follows:

"1. In order to maintain certainty in cases already decided, the courts must be cautious against allowing a party to bring a matter back to Court on the same cause of action simply because he is dissatisfied with the outcome.

2. *Section 148 (2) was not promulgated to permit litigants limitless chances to have cases previously adjudicated to finality reheard simply because they are disappointed with the result.*

3. *The Court's review jurisdiction can only be exercised where there is a patent and obvious error of fact or law.*

4. *There is a distinction between an appeal and review so that review jurisdiction is not an appeal "and is not meant to be resorted to as an emotional reaction to an unfavorable judgment."*

5. *Not every decision will be impugned because it is wrong and not every misdirection or error of law will be a ground of review but will rather amount to a ground of appeal.*

6. *Only exceptional circumstances justify the application of Section 148 (2) including fraud, patent error, bias, new facts, significant injustice or the absence of an alternative remedy.*

7. *The jurisdiction of the Supreme Court under Section 148 (2) is exceptional, and is to be invoked not to allow a litigant a second bite at the cherry, in the sense of another opportunity of appeal or hearing at the Court of last resort, but to address only a situation of manifest injustice irremediable by normal court process.*

8. *The Court's review jurisdiction must be narrowly defined and employed with due sensitivity, to avoid opening a flood gate or*

reappraisals of cases otherwise finally disposed of, in accordance with the res judicata doctrine."

Considering of Grounds of Review

[25] The Applicant first submitted on the Courts jurisdiction under Section 148 (2) of the Constitution and cited the decisions and principles I have referred to above.

[26] On the first ground of review the Applicant submitted that a valid sale of the property was not established. It was the contention of the Applicant that the Supreme Court did not address the issue whether the sale of the property was valid in terms of the provisions of Section 31 of the Transfer Duty Act 81 of 1902, and whether the renaming of the deceased's portions of the farm by a conveyancer (Mr. Thulani Masina) complied with Section 6 (1) (b) read together with Section 43 (1) of the Deeds Registry Act 37 of 1965. The Applicant argued that the rectification in the name of the property by renaming it was not done with the consent of the owner, and accompanied by the title deed and the corrected diagram as required by law. Therefore the Applicant submitted, the Third Respondent never acquired a real right in the land as it was never properly registered.

[27] The Applicant argued that the above issues were completely ignored by the Supreme Court, and yet they formed a large part of the discussion during the hearing of the appeal. The transcript of the record of proceedings in the Supreme Court was referred to in this respect. It was the contention of the Applicant that this omission was a gross irregularity which caused injustice to him.

[28] In their Heads of Argument, counsel for the First and Second Respondents stated that they fully associated themselves with the comprehensive Heads of Argument submitted by Senior Counsel for the Fourth Respondent, and prayed that the Application be dismissed with costs.

[29] The Fourth Respondent submitted that the review under Section 148 (2) of the Constitution is confined to reconsideration and correcting manifest injustice caused by an earlier order. It was the Respondent's contention that where the Applicant seeks merely to reargue the case, the Application must be rejected as he cannot be allowed to have "a second bite at the cherry." Reference was made to the authorities already quoted in paragraph [29] of this judgement.

[30] On the first ground of review, the Fourth Respondent submitted that the arguments regarding whether a valid sale of the property was concluded under Section 31 of the Transfer Duty Act, and whether the renaming of the deceased's farm by the conveyancer, Mr. Thulani Masina, complied with Section 6 (1) (b) read with Section 43 of the Deeds Registry Act, were dealt with by the Supreme Court and rejected.

[31] The Fourth Respondent maintained that there was a written contract of sale between the deceased and himself, as required by Section 31 of the Transfer Duty Act which provides that:

> *"No contract of sale of fixed property shall be of force or effect unless reduced to writing and signed by the parties thereto or by their agents duly authorised in writing."*

[32] It was the submission of the Respondent that there was no merit in the argument by the Applicant that because the contract of sale described the property as "Portion 7 of Farm Calaisvaile ll No 693 in the Manzini District" as opposed to "Portion 8 of Farm Calaisvaile ll No 693 in the Manzini District," which in fact it was, there was thus no compliance with Section 31 of the Transfer Duty Act.

[33] The Respondent referred to the case of **Phumzile Patience Simelane v Vulindlela Dlamini N.O. and Others,** High Court case No. 1424/ 2012 (17 September 2013) where the relevant contract of sale described the property as "remainder of portion 8, a portion of 987, Hhohho District" instead of "Portion 8 of Farm 987, Hhohho District, and there was no diagram map showing or *"like depiction"* of the property attached to or incorporated into the contract of sale. The purchaser argued that the property as described in the Deed of Sale was not capable of being identified and did not exist. The Court rejected this argument and found that there had been compliance with Section 31 of the Transfer Duty Act. The Court held further that an error in the description of the property was irrelevant to compliance with Section 31 provided that the property was capable of being clearly identified.

[34] It was the submission of the Fourth Respondent that the description of the property in the original deed of transfer had been altered by hand from "Portion 7" to "Portion 8" and the Registrar of Deeds testified in this regard that there was in fact no Portion 7 but the property was in fact "Portion 8".

[35] The Respondent maintained that the fact that the Supreme Court did not make a specific finding on this issue is no basis on which to review and

set aside the Supreme Court judgment, as there was substantive compliance with Section 31 of the Transfer Duty Act.

[36] The Applicant submitted that the Supreme Court did not address the issue of whether there was a valid sale in terms of Section 31 of the Transfer Duty Act which the Court had spent some considerable time debating with counsel during the hearing of the appeal. This submission has no merit in view of the analysis and conclusion of the Supreme Court on this issue.

[37] The Supreme Court addressed the issue of the two conflicting Agreements of Mandate signed between the deceased Applicant and the First Respondent, namely Annexure "EJ2" and "F" and held that this dispute ought to have been referred to oral evidence to resolve it. This dispute concerned the description of the Portion to be sold in view of the claim by the Applicant that he mandated the agent to sell only a portion of his property. As the matter stood, the evidence was lacking to resolve it.

[38] The Supreme Court stated at paragraph 12 as follows:

"[12] Whilst the respondent maintains that the correct mandate is his annexure "EJ2", the first appellant maintains that the correct mandate given to her is her annexure "F". This is a sharp and very material dispute of fact. It goes to the very root of the dispute which is whether or not the respondent mandated a sale of the whole of his farm or only a portion of it. It is my view that oral evidence was necessary to resolve this dispute."

[39] The next issue the Supreme Court dealt with regarding to the validity of the sale of the property was how the property came to be renamed from "Portion 7" to "Portion 8". The Applicant submitted that the renaming did not comply with the law. The Supreme Court referred to the evidence of the Applicant as follows:

"[4] In his founding affidavit respondent also stated that when he signed the Power of Attorney to transfer Portion 8 of Farm Calaisvaile ll No 693, he was not aware that this was a transfer of the whole of his property. He alleged that since he knew his farm to be Portion 7, he thought Portion 8 was a Portion originating from the subdivision of his portion 7. The first appellant denies this in her opposing affidavit".

[40] The Supreme Court then goes on to explain how the Portion changed from 7 to 8. The Court observed;

"[17] The affidavit of the bank further explains that the Application received by it was to finance a certain Portion 7 of Farm Calaisvaile ll No 693, Manzini District. However, upon receipt of the application by the Respondent it realized that the mortgage bond executed in its favour was for Portion 8 of the same farm. It is then that the bank summoned the conveyancer to explain how this came about. The conveyancer, Mr. Manzini, explained that after receiving instructions from the Respondent, First and Second Appellants, he conducted a search at the Surveyor General's office. He discovered that there was actually no Portion 7 of the said farm but there was Portion 8. The description of the property had been changed from Portion 7 to Portion 8. The confirmatory affidavit of Mr. Manzini is attached to the Fourth Appellant's affidavit filed in the Court a quo".

[41] The Supreme Court stated that evidently the matter could not be resolved on the affidavits before Court in light of the material dispute and that is why the trial judge in the Court *a quo* correctly referred the matter to trial.

[42] The Supreme Court concluded that the contract signed between the Applicant and the Third Respondent was valid. It stated:

> *"[26]* In casu, *if the respondent was let down or even defrauded, it was by his own agent. Such fraud cannot affect the interests of the Appellant whom the judge* a quo *found to be an innocent purchaser. The contract of sale remains valid and there is therefore no justification or basis for an order setting aside the transfer. This would have been the case if the First Appellant had contracted on behalf of the Respondent. However* in casu, *the Third Appellant's case is even strengthened by the fact that it is the Respondent himself who contracted and not his agent. If the Respondent was tricked (and there is no valid evidence to prove this) into contracting, he was tricked by his own agent and he personally entered into the contract. Surely there is no way in which the Third Appellant can be faulted or the validity of the contract challenged".*

[43] I agree entirely with the above conclusion by the Supreme Court regarding the validity of the contract between the Applicant and the Third Respondent. There were no allegations of fraud made against the Third Respondent, and therefore the contract or transfer of the property could not be challenged on that ground.

[44] There were submissions made by the Applicant that the renaming of the property by the conveyancer from Portion 7 to Portion 8 did not comply with the provisions of Section 6 (1) (b) read together with Section 43 (1) of the Deeds Registry Act. The argument was that the Applicant did not consent to the rectification. Section 6 (1) (b) of the Deeds Registry Act gives registrars powers, when in their opinion, it is necessary to rectify any deed or other document registered in the Registry, an error in the name or description of any person or property mentioned therein, or in the conditions affecting any property subject to conditions laid down which include the consent of every person appearing in the deed.

[45] On the other hand Section 43 (1) (b) of the Deeds Registry Act which deals with rectification of tittle by endorsement provides as follows:

" (1) If rectification of title is required in respect of any piece of land in consequence of any survey or re-survey or the correction of any error in the diagram thereof under the Land Survey Act, the registrar may, on written application by the owner of the land accompanied by-

(a) the title deed; and

(b) the new or corrected diagram thereof; and

(c) any bond thereon; and

(d) any registered deed of lease or other registered deed whereby any real right therein is held by any other person; and

(e) the written consent of the holder of such bond, lease or corrected diagram thereof; endorse on the title deed a description of the land according to the new or corrected diagram, which description shall supersede the description already appearing in the title deed."

[46] The evidence adduced at the trial from the conveyancer, and the Registrar General of Survey was that the change in the Registry was effected before the Applicant purchased the property from the previous owner and when the conveyancer went to investigate the title he found that the property had been changed from "Portion 7 to Portion 8." This change appears to have been unknown to the Applicant. Therefore the transfer to the Third Respondent had to bear the current description of the property as Portion 8. There was no subdivision of the property. There was no allegation of fraud committed by the conveyancer or the Surveyor General.

[47] Finally, on the issue of description of the property sold by the Applicant to the Third Respondent, there is no dispute regarding he identity of the property as Farm Calaisvaile ll No 693 in the Manzini District. Whether

the property changed from 'Portion 7 to "Portion 8" did not affect its identity.

[48] Therefore, I find no merit in the first ground of review which should fail. This was the main ground of review based on fraud and illegality as constituting exceptional circumstances which caused gross injustice. The failure of this ground would be sufficient to dispose of this Application but I shall consider the other grounds of review for completeness of my consideration.

[49] Arguing the second ground of review the Applicant submitted that it is obvious from the facts presented that the First Respondent benefitted from a fraud perpetrated on the deceased. It was contended that but for the fraud, the First Respondent would not have been entitled to the higher commission and concomitantly the Third Respondent would not be entitled to transfer the entire property into his name. It was the submission of the Applicant that it is only through the fraudulent intervention of the First Respondent that the Third Respondent acquired the entire property and the Supreme Court committed a grossly unreasonable and manifest error of law in upholding the appeal despite finding that the sale was tainted with fraud.

[50] The Third Respondent submitted that there is no finding by the Supreme Court of any fraud on or by of the parties. It was his contention that the Supreme Court merely found that the Applicant had failed to establish fraud because the witnesses led at the trial gave hearsay evidence which is inadmissible.

[51] The submissions of the Fourth Respondent on the second ground of review were more or less the same as those of the First Respondent and Second Respondent. The Fourth Respondent argued further that the Supreme Court did not find that the First Respondent had defrauded the deceased but on the contrary the Court found that there was no evidence before it to enable it to reach such a conclusion. In any case, there was no evidence that the Third Respondent had defrauded the deceased and the Supreme Court rightly found that the Third Respondent was an innocent purchaser. The Respondent maintained that the Applicant was seeking to appeal against the finding of the Supreme Court under the guise of Section 148 (2) of the Constitution.

[52] It is necessary to correct the impression created by the Applicant that the Supreme Court found that the First Respondent defrauded the deceased. The Supreme Court did not make such a finding. It found instead that there was no evidence to support the claim that the First Respondent

defrauded the deceased. Neither was there any evidence that the Third Respondent had participated in any fraud against the deceased. As I held on the first ground of review, there was no fraud established in this case to warrant a review of the decision of the Supreme Court.

[53] The third ground of review is that the Supreme Court committed a gross irregularity in holding that the matter was referred to trial and not to oral evidence, thus resulting in the inadmissibility of affidavit evidence which affected the merits of the case. The Applicant argued that contrary to the fact that the judgment was crafted in a manner consistent with a referral of a matter to oral evidence, the Supreme Court found that the High Court had referred the matter to trial. The Applicant further argued that the statement made by the High Court in paragraph [5] of its judgment that the matter was "referred to trial" was merely a clerical or an obvious error made by the Court. It was the contention of the Applicant that the Respondents had deliberately left out of the record of appeal, the judge's statement where she listed the issues and witnesses who were to be called in respect of those issues which indicated that the matter was referred to oral evidence not trial.

[54] The Third Respondent and the Fourth Respondent submitted that the record of the High Court is clear that the matter was referred to trial.

They argued that whether the matter was submitted to trial or oral evidence did not matter since the Applicant failed to lead evidence supporting its contention of fraud, save for the inadmissible hearsay evidence. The Respondents maintained that whether the matter was referred to trial or to oral evidence was a question of fact which did not constitute a reviewable irregularity.

[55] Rule *6 (17) and (18) of the High Court Rules provides as follows:*

> *"(17) Where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order to it seems fit with a view to ensuring a just and expeditious decision.*
>
> *(18) Without prejudice to the generality of subrule 17, the court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear personally and be examined and cross examined as a witness or it may refer the matter to trial with appropriate direction as to the pleadings."*

[56] In her judgement the learned judge in the High Court referred to the point *in limine* raised by the Third Respondent that the matter was fraught with disputes of fact which were foreseeable. She then expressly stated that the matter was referred to trial. In paragraph [5] of her judgement she states:

> *"[5] Having considered the pleadings, the matter was referred to trial. I however directed that the conveyancer and the Registrar of Deeds should also be called as witnesses in order to explain about the description of the farm."*

[57] It cannot be claimed that the statement made by the learned judge that the matter was referred to trial was a clerical mistake. There were no issues framed on which oral evidence was to be adduced. The parties were free to call any witnesses they considered relevant in addition to the witnesses the judge listed. In any case whether there was a trial or oral evidence would not have affected the outcome of the case since the material witnesses who were called regarding the mandate given to the First Respondent gave only hearsay evidence which was inadmissible. Moreover, this would not be a reviewable error. Therefore there is no merit in the third ground of review.

[58] In the fourth ground of review the Applicant submits that the Supreme Court erred in upholding the sale of the property despite finding that the evidence of the surviving spouse married in community of property never consented to the sale of the entire property contrary to Section 16 (3) of the Deeds Registry Act. In the first place, the Supreme Court never made such finding or even referred to Section 16 (3) of the Deeds Registry Act. The issue of lack of spousal consent was not pleaded nor addressed in the High Court and the Supreme Court. It is therefore a new issue which cannot be taken on review. This ground must also fail.

[59] The next ground of review was that the Supreme Court erred in holding that the High Court should have granted absolution from the first instance *mero motu.* On the issue of absolution from the instance, the learned judge in the High Court stated in paragraph [23] of her judgement as follows:

> *"While in the witness box First Respondent demonstrated that she could hardly talk and stand. After enquiries, the Court ruled that she be given another date. The matter was postponed to 25th September 2015. On this date counsel for the applicant appeared alone and informed the Court that the first respondent's counsel had advised him that his client was still indisposed and that on the next hearing date, he would apply for absolution from the instance. The Court ordered for dates of filing of heads, and the matter was*

postponed to 16th October 2015. The matter however come back on 19th November 2015 where the First and Second Respondents withdrew their application for absolution and closed their defence case. The other respondents took a similar procedure by closing their case. The matter was therefore postponed for judgment. The Court went on recess thereafter."

[60] It is therefore clear that the application for absolution from the instance was withdrawn by the respondents, and the learned judge therefore was not required to decide the application.

[61] In paragraph [23] of its judgment the Supreme Court stated,

"[23] When the respondent gave the mandate to the first applicant none of the witnesses who testified for him at the trial were present. They testified on what they had heard from the respondent and such evidence is clearly hearsay and inadmissible. The result is therefore that no evidence was adduced to prove the respondent's allegations which had been denied by the first appellant in the pleadings. In the absence of such evidence an order for absolution from the instance should have been entered and the respondent's claim dismissed with costs."

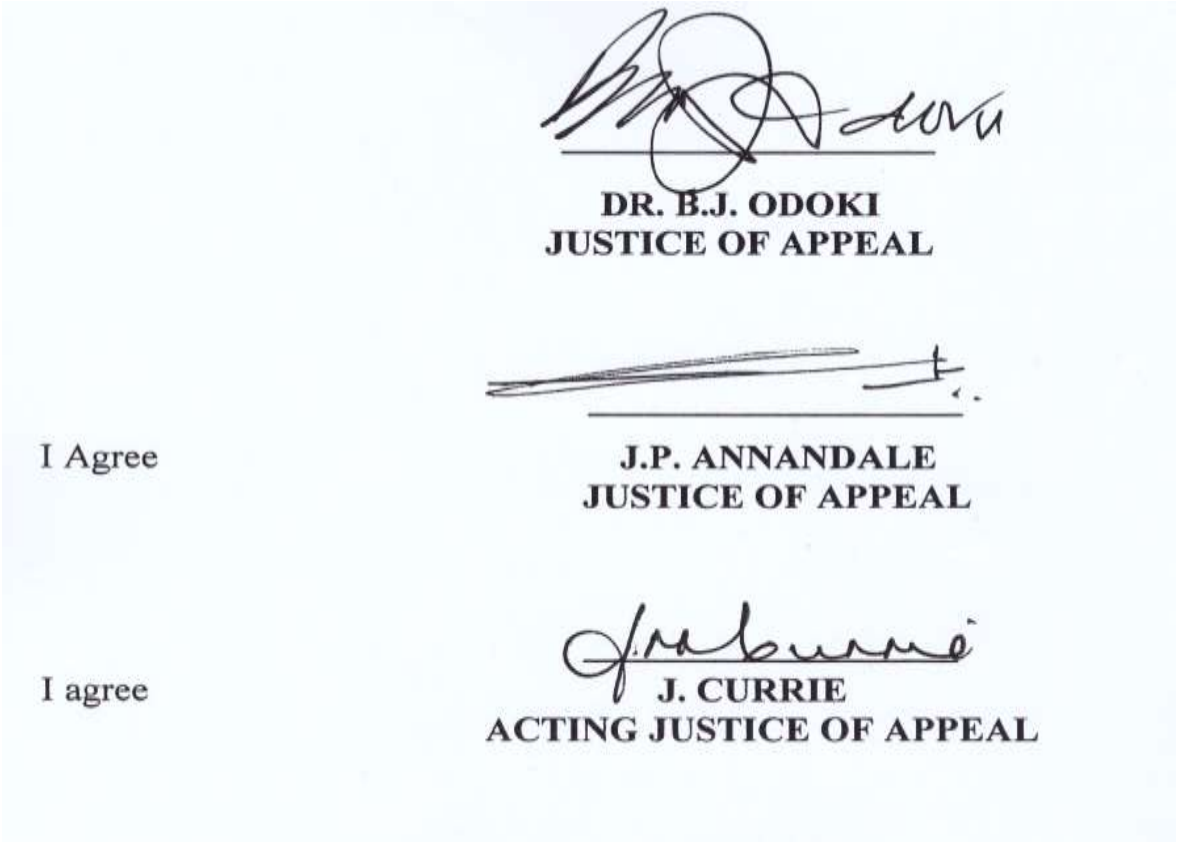
[62] Given the fact that the learned trial judge eventually allowed the Application, she could not have made an order for absolution from the instance at that stage. However, the failure to do so is not a gross irregularity which can be held to be a reviewable error.

[63] The final ground for review is that the Supreme Court erred in finding that the Third Respondent was an innocent purchaser and therefore, the fraudulent conduct of the First and Second Respondent who were agents of the Applicant could not affect the interest of the Third Respondent. In the first place, it should be noted that the Supreme Court did not make any finding that the Applicant was defrauded by the First and Second Respondents. On the contrary, the Supreme Court found that there was no evidence to prove fraud by the Respondents. More importantly, there was no evidence to establish that the Third Respondent participated in any activities of fraud, or other illegal conduct to deprive him of his rights as a *bona fide* purchaser. Therefore this ground also has no merit.

[64] In the result, I find that the applicant has failed to show any exceptional grounds to justify this Court to review the judgement of the Supreme Court.

[65] For the foregoing reasons; I make the following order:

1. The Application for review is dismissed.
2. The Respondents are awarded costs of this Application



DR. B.J. ODOKI
JUSTICE OF APPEAL

I Agree

J.P. ANNANDALE
JUSTICE OF APPEAL

I agree

J. CURRIE
ACTING JUSTICE OF APPEAL

I agree

S. J. K MATSEBULA
ACTING JUSTICE OF APPEAL

I agree

M.J. MANZINI
ACTING JUSTICE APPEAL

For the Applicant	:	Adv. Flynn
For the 1st and 2nd Respondents	:	Mr. M.S. Dlamini
For 3rd Respondent	:	Adv. M. Mabila
For the 4th Respondent	:	Adv. Kennedy SC