

Judgment No. HB 57/07

Case No. HC 3912/04

X Ref HC 935/03

**ZIMBABWE NATIONAL NETWORK  
FOR PEOPLE LIVING WITH HIV/AIDS**

**Versus**

**DUMISANI NKOMO N.O.**

**And**

**NKOSANA SIBANDA**

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 21 AND 31 MAY 2007

*G Nyoni* for applicant

*Ms N Moyo* for respondents

Judgment

**KAMOCHA J:** On 30 May 2003 this court granted a provisional order interdicting Dumisani Nkomo and the Registrar of Deeds from transferring stand number 7102 Gwabalanda to any person except Robson Nkomo and Hermia Sibanda. The applicant in that case was Nkosana Sibanda who was then allowed to pay \$600 000,00 due to Dumisani Nkomo, Registrar of Deeds and Zimbabwe National Network for People Living with HIV/AIDS to the Guardian Fund if they would not have accepted it by 30 May 2003.

The provisional order was confirmed in default on 19 March, 2004. The final order that was granted compelled the then respondents to transfer the said stand into the names of Robson Nkomo and Hermia Sibanda failing which the Deputy Sheriff was authorised to sign the transfer papers on Dumisani Nkomo's behalf. Respondents were to pay costs on an attorney and client scale.

The applicants filed this application 8 months after the final order had been granted in default. They relied on Order 49 Rule 449(1)(a) which provides that:-

“449(1) The court or judge may, in addition to any other power it or he may have, *mero muto* or upon the application of any party affected, correct, rescind or vary any judgment or order-

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

The applicants set out in their founding affidavit a number of irregularities in the case in which default judgment was granted. They submitted that if the irregularities had been brought to the attention of the court the default judgment would not have been granted. This court was referred to the case of *Banda v Pitluk* 1993 (2) ZLR 60 where the court held that in deciding an application of this nature, the court is only obliged to decide if the judgment was entered in error or not. If it was erroneously entered, then applicant is entitled to rescission. ROBSON J had this to say at page 64E to F:-

"Let me reiterate immediately that rescission of judgment under Rule 449(1)(a) is entirely different and must be distinguished from an application for rescission under Rule 63 which requires the court, before it sets aside the judgment under that rule, to be satisfied that "there is good and sufficient cause to do so." Nor is the court concerned with the issue of whether the defendant had "a good *prima facie* defence to the action"."

In case number HC 935/03 Nkosana Sibanda who instituted the proceedings purported to rely on a general power of attorney which was not signed and witnessed. The power of attorney also did not indicate where it was executed or drawn. That aspect was important as those executed outside Zimbabwe need authentication by a certificate from a notary public. It was therefore submitted that the power of attorney was invalid.

Nkosana Sibanda's principals were Robson Nkomo and Hermia Sibanda. These were known principals yet Nkosana Sibanda instituted the proceedings in that

case in his own name when it was not his action but that of his principals. He should have sued in the names of his principals as he himself had no *locus standi*. The action he brought was incompetent.

Dumisani Nkomo who is the Bulawayo provincial co-ordinator for the Zimbabwe National Network for the People Living with HIV/AIDS was cited in his personal capacity. He was wrongly sued.

Judgment No. HB 57/07

Case No. HC 3912/04

X Ref HC 935/03

I do agree with the applicants that the court would not have granted the default judgment if it had been aware of these irregularities. Granting a judgment to a party who has no *locus standi* is a gross error and such judgment would have been erroneously entered. It ought to be rescinded.

In the result I would issue the following order:-

It is ordered that:

1. the judgment granted on 19 March, 2004 in favour of the respondent and against the applicants together with the Registrar of Deeds under case number HC 935/03 be and is hereby rescinded; and
2. costs shall be costs in the main action.

*Messrs Majoko and Majoko* applicant's legal practitioners  
*Moyo & Company*, respondents' legal practitioners