

PHILLIP MUDZIVIRI
In his capacity as Executor Dative of the Estate
of the Late Lovemore Ngwende
and
OLIVER MASOMERA

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 28 September, 2011

Opposed Application

Applicant in person
S. *Simango*, for the respondent

MUTEMA J: At the hearing of the application I dismissed it with costs. The applicant has requested for written reasons for the dismissal.

These are the reasons:-

Respondent was appointed executor of the estate of the late Phineas Ngwende. Phineas Ngwende was the father of the late Lovemore Ngwende.

This application was for condonation of late filing of an application for rescission of a default judgment granted by this court on 23 August, 2010. The bare bones of the matter are that prior to his demise, the late Lovemore Ngwende had instituted a court application under case number HC 1308/10 challenging validity of the second will said to have been executed by his late father Phineas Ngwende. Apparently a default judgment was granted against Lovemore Ngwende in that case after which he lodged an application for its rescission which he failed to prosecute timeously, prompting the respondent to make a chamber application under case number HC 5285/10 to have the application dismissed for want of prosecution. On 23 August, 2010 MUSAKWA J granted the chamber application by way of this order:

“Court application for Rescission of Default Judgment (*sic*) Case No. HC 1308/10 be and is hereby dismissed for want of prosecution. First respondent pays costs of suit”.

In the present application filed on 14 April, 2011 the applicant was seeking condonation for late noting of an application for the rescission of MUSAKWA J’s order of 23 August, 2010.

The law in an application of this nature is now trite. In *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998(2) ZLR 249(SC) A it was held that in terms of r 63(1) a defendant against whom a default judgment has been granted has a period of one month from the date he became aware of the judgment to apply for rescission of that judgment. If he does not make the application within that period, but wants to make it after the period has expired, he must first make an application for condonation of the late filing of the application. If he does not seek condonation as soon as possible, he should give an acceptable explanation, not only for the delay in making the application for rescission but also for the delay in seeking condonation. There are thus two hurdles to overcome. See also *Saloojee & Anor NNOV Minister of Community Development* 1965(2) SA 135 at 138H.

In the instant case the default order sought to be rescinded was granted on 23 August, 2010. The late Lovemore Ngwende died in December 2010. The application for condonation was only filed on 14 April, 2011. The applicant is non-committal as to when exactly he became aware of the default order save to say in the Founding Affidavit,

“We only became aware of the existence of the application (*sic*) when the respondent wrote a letter threatening to sell the house in Highfield which the widow (*sic*) of late Lovemore Ngwende is residing We could not challenge the application (*sic*) during the relevant time before the appointment of executor hence this delay. The delay was not wilful”.

The papers filed of record ventilate that at least by 3 January, 2011 the widow of the late Lovemore Ngwende had become aware of the default order of 23 August, 2010 for on that date she wrote to the Master of this Court complaining about the respondent’s threat to dispose of the Highfield house to offset the liabilities of the estate. Even if the court were to be benevolent and accept that both the application for the rescission of the order as well as for condonation could not be filed before appointment of the executor, I would still be minded to find the explanation for the delay unacceptable. The applicant was appointed executor *dativo* of the late Lovemore Ngwende’s estate on 1 March, 2011. By then Lovemore Ngwende’s widow had long been aware of the existence of the default order. The application for condonation of late filing of the application for rescission of the default order was only filed on 14 April, 2011 – one month 14 days after the appointment of the executor. The peroration in the applicant’s founding affidavit that the delay was occasioned by the wait to have the executor appointed amounts to digging in the ashes. No explanation as to why the

condonation was not sought as soon as possible after 1 March, 2011 or why the application for rescission was also not filed soon after that date or at most within one month post 1 March, 2011 has been proffered. In the event the two hurdles applicant had the onus of scaling remained insurmountable to him.

Even if one were to look at the prospects of success regarding the default order sought to be impugned, the complaint is that a matter should not be dismissed for want of prosecution due to a delay of only four months, I would still find the applicant non-suited if account is had to Order 32 r 236(3)(b). It provides that where the respondent has filed a notice of opposition and an opposing affidavit and, within one month thereafter, the applicant has neither filed an answering affidavit nor set the matter down for hearing, the respondent may on notice to the applicant make a chamber application to dismiss the matter for want of prosecution. This is exactly what the respondent did and I have no reason to doubt that my brother MUSAKWA J in granting the chamber application was satisfied on the papers before him that the requirements of the relevant rule had been complied with. It is not sufficient for the applicant *in casu* to merely baldly allege that he was not served with the notice for the chamber application or that the matter had been set down for hearing. If that was so then the proper procedure was for the applicant to invoke r 449(1)(a) for it would have been clear that the order was granted in error.

The applicant also attempted to go further on prospects of success regarding the main matter of challenging the will. While that aspect does not fall within the realm of the present application it behoves me to utter some strictures concerning it vis-à-vis the principle of finality to litigation. The first and final distribution account of the late Phineas Ngwende was approved by the Master and the plot in contention which the first will had bequeathed to the late Lovemore Ngwende but was later bequeathed to Lovemore's stepmother and two stepbrothers in equal shares by the second will has long been sold by private treaty for value and transferred to an innocent third party and the proceeds shared amongst the beneficiaries and dissipated. The prospects of success even in the main matter seem to be only a pie in the sky.

The foregoing were the reasons why the application for condonation for late filing of the application for rescission was dismissed with costs.

Nyikadzino, Kworera & Associates, respondent's legal practitioners