

WELLINGTON MURAMBA  
versus  
HAZEL TENDAI HANYANI  
(In her capacity as Executrix of the estate  
of the late Vincent Matongo DR No. 1954/18)  
and  
THE MASTER OF THE HIGH COURT N.O  
and  
THE SHERIFF OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE  
**MAXWELL J**  
HARARE, 7 June and 3 November 2022

**Opposed Matter**

Applicant in person  
1<sup>st</sup> respondent in person  
No appearance for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents

**MAXWELL J:**

Applicant indicated that he was approaching the court in terms of s 25 of the Administration of Estates Act and High Court Rule 449(a). Section 25 of the Administration of Estates Act deals with the appointment of an executor. Applicant is not seeking the appointment of an executor. Rule 449(a) dealt with the correction, variation and rescission of a judgment obtained erroneously, in the absence of the affected party. The application was filed on 3 January 2022. Applicant ought to have referred to section 29 of the 2021 rules, Statutory Instrument 202 of 2021. Considering that both parties were not legally represented and that the technicalities are benefitting Applicant to the prejudice of first Respondent and her family, I condoned the error made by the applicant and dealt with the merits of the application.

In HH 288/16, Vincent Matongo (Vincent) approached this court after breaching an agreement of sale of a house with Applicant. Applicant cancelled the agreement of sale in or about January 2013. Vincent was claiming a refund of the sum of \$92 000-00 that he had paid towards the purchase price of the house. The parties had agreed that Vincent could effect certain improvements to the property purchased namely construction of a perimeter wall around the

boundary of the property purchased and sinking a borehole on the property. Vincent also claimed the cost of these improvements in the sum of US\$24 450-00 from the Applicant on cancellation of the agreement of sale. Vincent further claimed the \$1 000-00 being a rental paid to the Applicant but which Vincent did not utilise. Vincent further claimed costs of suit on a legal practitioner and client scale.

Applicant defended the claims contending that the \$92 000-00 that Vincent paid him towards the purchase price should be forfeited on account of both breach and the fact that Vincent had authorised the disbursement of the instalments paid at the time such instalments were paid. Whilst accepting that the cost of improvements were refundable, Applicant claimed that he was entitled to set off the same against damages claims that he had against Vincent. Applicant counter claimed some damages arising from unlawful cutting down of certain indigenous and exotic trees and fruit trees which Applicant claimed Vincent cut from the yard of the premises and stumped out without Applicant's authority. Applicant alleged that Vincent had damaged some structures at the premises and claimed damages from Vincent for digging up the driveway into the premises which Vincent relocated to a different road. After a trial, the following order was given:

"It is therefore ordered that the defendant pay the plaintiff,

- (1) The sum of \$92 000-00 being refund of the purchase price paid
- (2) \$20 800-00 being the cost of improvements less the cost of vandalising the borehole.
- (3) \$1 000-00 being refund of rent paid
- (4) interest on the above amounts at the legally prescribed rate with effect from the date of service of summons
- (5) Costs of suit.
- (6) Defendant's claim in reconvention is dismissed with costs."

The order was handed down on 18 May 2016. Applicant appealed to the Supreme Court. Vincent died in 2018 and his estate was registered as DR 1954/18. First Respondent is the Executrix of the estate. The Supreme Court heard the appeal by the Applicant and gave the following order on 24 October 2019:

".....IT IS ORDERED THAT:

1. The appeal succeeds in part with no order as to costs.
2. The order of the court *a quo* be and is hereby amended to read:

"It is therefore ordered that the defendant shall pay the plaintiff

  - (a) The sum of \$92 000.00 being a refund of the deposit paid.
  - (b) \$20 800.00 being the cost of improvements.
  - (c) The court returns a verdict of absolution from the instance in respect of the respondent's claim for a refund of \$1000.00 for rent paid.

- (d) The court returns a verdict of absolution from the instance in respect of the appellant's claim in reconvention for damage to the borehole.
- (e) The rest of the appellant's claim in reconvention be and is hereby dismissed.
- (f) The respondent be and is hereby ordered to pay three quarters of the respondent's costs and
- (g) The respondent shall pay interest at the prescribed rate from the date of service of summons."

On 21 January, 2020, a writ of execution against property was issued citing the late Vincent as the Plaintiff. Applicant challenged the validity of the writ. Messrs Mudimu Law Chambers, the first Respondent's erstwhile legal practitioners withdrew the said writ on 14 February, 2020. Applicant offered to settle the matter by paying money into a bank account. He alleged that there was no response to his offer. On 27 September 2021 another writ of execution was issued citing the same parties. It is this writ that Applicant is seeking to have set aside on the basis that it is fatally defective. Apart from citing a deceased person, it erroneously cited Applicant as the Plaintiff but refers to him as the above-mentioned respondent yet the respondent in the title is Vincent Matongo. The bond of indemnity was also given in the name of the deceased.

Rule 32 (9) of the High Court Rules, 2021 supports the Applicant's contention. It provides as follows:

"(9) Where a party to any proceedings dies or ceases to be capable of acting as such, his or her executor, curator, trustee or other legal representative may, by notice filed with the registrar and served on all other parties to the proceedings, state that he wishes to be substituted for that party, and thereupon, subject to subrule (10), he or she shall be deemed to have been so substituted in his or her capacity as curator, trustee, or legal representative, as the case may be."

First Respondent therefore should have sought to be substituted for the late Vincent Matongo. The writ of execution would then subsequently be issued reflecting her (in her capacity as the executrix) as the Plaintiff.

For that reason, the application succeeds.

#### ORDER SOUGHT

Applicant sought the following order:

- “1. The writ of execution issued by this Honourable Court on the 27 September 2021 be and is hereby set aside.
2. The 1<sup>st</sup> Respondent to provide the Applicant with the late Vincent Matongo's Estate RTGS banking details.
3. There be no order as to costs if the 1<sup>st</sup> Respondent does not oppose this application.”

Whilst the first paragraph is in order, I am not persuaded that Applicant is entitled to the order sought in the second and third paragraphs.

In respect of the second paragraph, it is common cause that Applicant received the deposit in United States Dollars. The Supreme Court order does not say applicant should pay the equivalent of the deposit paid. For that reason, no order is made for the provision of the RTGS banking details of the estate of the deceased Vincent Matongo.

On the issue of costs, I find it unacceptable that even after the Supreme Court has confirmed Applicant's indebtedness to the family of the deceased Vincent Matongo, he is clutching at technicalities instead of honouring his obligation. In my view, each party must bear its own costs in the circumstances.

#### DISPOSITION

The application partially succeeds. The following order is made:

1. The writ of execution issued on 27 September, 2021 be and is hereby set aside.
2. Each party bears its own costs.

Applicant in person