

ESTATE LATE ROSE DZIRUNI

APPLICANT

AND

ENOCK DHLIWAYO

RESPONDENT

INT HE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 14 OCTOBER 2010 AND 21 OCTOBER 2010

Mr V. Ruombwa for applicant
Respondent in default

Opposed Application

MATHONSI J: The late Rose Dziruni filed an application in this matter under case number HC 4028/04 against the Respondent seeking an order compelling transfer of stand number 2703 Bulawayo Township also known as number 16, 18th Avenue, Famona, Bulawayo in pursuance of a sale agreement entered into between the parties on 4 June 2001.

The application was opposed by the Respondent and was not set down for argument until the late Rose Dziruni died on 6 July 2008. Her son, Obvious Dziruni was appointed executor of the estate of the late Rose Dziruni on 30 September 2008.

Prior to that, on 17 January 2007, the Respondent had made a chamber application in this Court under case number HC 66/07 seeking an order for the dismissal of the late Rose Dziruni's application in case number HC 4028/04 for want of prosecution. Rose Dziruni, who was then alive, had strongly opposed that application arguing inter alia that she had failed to effectively prosecute her application because the Respondent had failed to provide an address

for service after *Messrs Lazarus and Sarif* who represented him renounced agency on 5 January 2006.

That application was not set down for argument but Respondent, who did not know of the death of Rose Dziruni aforesaid, made another chamber application under case number HC 29/09 seeking an order granting him leave to set down case number HC66/07 on the unopposed roll owing to Rose Dziruni's failure to file heads of argument in breach of Rule 238(2a) as read with subrule (2b) of the High Court of Zimbabwe Rules, 1971. The order was granted on 16 January 2009.

In pursuance of that order Respondent set down matter number HC 66/07 unopposed and obtained an order dismissing case number HC 4028/04 for want of prosecution on 25 June 2009. Effectively therefore the Respondent obtained two court orders against a dead person.

An application for the rescission of the order made in case number HC 66/07 was made under HC 1225/09 and it was opposed by the Respondent who argued extraneously that the executor was negligent in not informing his late mother's legal practitioners of the death of Rose Dziruni.

The rescission of judgment application was set down for hearing on the 12th October 2010 but both parties did not appear in Court. On further inquiry it was discovered that the Applicant had filed a notice of withdrawal of the application on the 7th October 2010 which had not found its way to the court record.

Having gone through the papers filed of record, I was of the view that the two court orders made after the death of Rose Dziruni against her and without substitution of the executor had been made in error. I therefore desired to hear counsel on that point.

Mr Mlala representing the Respondent was notified that the matter had been moved to 14 October 2010 at 10am but chose not to appear in court. *Mr Ruombwa* confirmed having withdrawn the application but did not give any reason for doing so. The withdrawal of the application was ill advised and probably informed by the perception that the application was out of time.

There was no merit whatsoever in the opposition to the application. The moment Rose Dziruni died on 6 July 2008 proceedings in case number HC 4028/04 could not continue until an executor had been appointed and even after appointment of the executor, the proceedings could only continue after the substitution of the executor as Applicant in that matter. This was not done.

It follows that judgment could not be taken against the deceased. Accordingly the two orders of this Court made on the 16th January 2009 and the 25th June 2009 were made in error. This Court is empowered to, mero motu correct, vary or rescind an order made in error. In terms of Rule 449 of the High Court of Zimbabwe Rules 1971;

- “(1) The court or a judge may, in addition to any other power it or he may have, mero motu 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; or
 - (b) ---
 - (c) That was granted as the result of a mistake common to the party.”

Having discovered the error made in granting the orders I have referred to, I am entitled mero motu to rescind those orders. The orders in question cannot stand at all because they were sought and granted as a result of a mistake common to both the Respondent and the court. The assumption was that Rose Dziruni was still alive when she was deceased at the time and an executor had not been substituted.

Although the Applicant withdrew the rescission of judgment application, Rule 449 empowers me to rescind an order made in error and that is exactly what I intend to do. It is amazing that the Respondent saw it fit to oppose the rescission of judgment application when it was pretty obvious he had erroneously sought an order against a dead person and the court had also wallowed in the same error. If the application had not been withdrawn the Respondent would have been visited with punitive costs.

In order to expedite the matter, although no application has been made for the substitution of the executor as Applicant in case number HC 4028/04, I consider it necessary to substitute the executor as Applicant. The supervening death of Rose Dziruni means that the Application for dismissal for want of prosecution cannot be pursued.

In the result I make the following order; that

1. The orders of this Court made in Case No. HC 66/07 on 25 June 2009 and in Case No. HC 29/09 on 16 January 2009 be and are hereby rescinded.

Judgment No. HB 124/10
Case No. HC 1225/09
Xref No. HC 1076/09, 29/09
Xref No. HC 66/07, 4028/04

2. The executor of the estate late Rose Dziruni AKA Rose Tshandavu Dziruni, namely Obvious Dziruni be and is hereby substituted as Applicant in Case No. HC 4028/04 to prosecute that application to finality.
3. Each party shall bear its own costs.

Bulawayo Legal Projects Centre, applicant's legal practitioners
Cheda and Partners, respondent's legal practitioners