

TOMU NYANDORO
and
ESTATE LATE PAULINO OLIVERIA MARTINS
DR.1308/07 represented by Mr Israel Gumunyu, the Executor.
and
THE MASTER OF THE HIGH COURT
and
CHRISTOPHER MARTINS

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 13 November 2009 and 3 February 2010

Opposed Matter

S Mushonga, for applicant
O Takaindisa (SC), for first and third respondents

CHITAKUNYE J: The applicant is a farmer. He claims to have been friends with Mr Paulino Oliveria Martins who died on the 2 September 2007 at Harare. The applicant claimed that in the course of their friendship he lent the late P O Martins some money which he had reserved to buy an international truck horse with. In exchange for the loan Mr P O Martins was to import a similar truck for the applicant. As fate would have it Mr P O Martins died before he had delivered the truck to the applicant. The applicant said that when he made a claim for the truck which had been imported in his name but not yet delivered to him the executor rejected his claim. He therefore approached this court for an order that:

1. The first and second respondents be directed not to include the applicant's Nissan Diesel UD290 WF Horse into the estate of the late Paulino Oliveria Martins DR1308/07 estate.
2. The first and third respondents be directed to release the truck and all the relevant papers to the applicant to enable the applicant to forthwith register this truck into his name within seven days of the granting of this order.
3. Upon the first and third respondents' failure the deputy sheriff be authorized to take the truck and to sign all relevant papers to enable the applicant to register the truck into his name and the extra costs incurred shall be on the first and third respondents' account and handover the truck to the applicant
4. That the first and third respondents bear the costs of suit on an attorney and client scale and not those of the estate.

The applicant's case was that he was a friend to the late P O Martins who died on 2 September 2007. Prior to his death P O Martins had borrowed a sum of \$5 billion dollars (Zimbabwean currency) from the applicant. In turn P O Martins was to import an International Truck horse for the applicant as repayment for the loan.

When Martins died he had not yet delivered the horse. When the applicant saw a notice of death duly published in the press he filed a claim with the executor for the truck. The applicant asserted that at the time of his death Martins had began the process of importing the truck for him. To confirm this he attached a pro-forma invoice. The pro-forma invoice is in the applicant's name and address. He argued that that pro-forma invoice was the one used to purchase the truck he is claiming from the first respondent.

In response to the claim the executor requested the Master of the High Court to convene a special meeting for purposes of discussing and validating the claims. That meeting was indeed held on 19 December 2007 at the Master's office with the applicant and the executor in attendance.

On 8 January 2008 a Mr Matore of the Master's office, wrote a letter to the applicant's legal practitioners copied to the executor, indicating that he had accepted the applicant's claim hence the 15 ton truck be declared a non-estate property and be restored to the applicant since it was purchased for him by the late P O Martins during his lifetime. On 23 January 2008 the Master of the High Court, Mr C Nyatanga, wrote a letter to the applicant's legal practitioners nullifying Mr Matore's letter of 8 January 2008 as being unprocedural.

Further correspondence between the applicant's legal practitioners and Mr. Nyatanga did not yield favorable results.

The applicant duly filed a solemn declaration purportedly in terms of s 47(1) of the Administration of Deceased Estates Act [*Cap 6:01*].

In that declaration he out lined the basis for his claim. He also attached a copy of the pro-forma invoice from Nissan Diesel South Africa (Pvt) Ltd in his name and a supporting affidavit from Edmore Musandiriri.

On 25 April 2008 the executor wrote to applicant advising that he was declining his claim for the 15 tonne truck on the basis of insufficient evidence. He asked the applicant to furnish sufficient information and proof of the claim within twenty one days.

On 23 July 2008 the executor wrote to the applicant's then legal practitioners Chingeya-Mandizira indicating that the applicant's claim had not been accepted as the claim was vague and unsubstantiated.

It was after this rejection of his claims that the applicant filed the present application. The first and third respondents opposed the application. The applicant duly filed answering affidavit in response to the opposing papers on 9 April 2009.

The applicant's heads of argument were filed on 3 June 2009 and served on the respondents' legal practitioners on that same date. In terms of r 238 of the High Court Rules the respondents were required to file their heads of arguments not more than ten days after being served with the applicant's heads of arguments. The respondents did not file their heads of arguments within the ten day period. The respondents were thus barred. For the respondents to be heard on the merits they had to apply for the upliftment of the bar. This the respondents did not do. On 13 October 2009 when the matter was set down for hearing Mr Uriri appeared for the respondents. As the bar was still operating against the respondents and no application for its upliftment had been made Mr Uriri applied for a postponement of the hearing so that he could attend to the issue of the upliftment of the bar. Leave was granted for the respondents to file an application for the upliftment of the bar within five days from that date.

On 13 November 2009 the case was again set down for hearing. On this occasion Mr *Takaindisa* appeared for the respondents. As had been the case with Mr Uriri he indicated that he had just been briefed. As no application for the upliftment of the bar had been made he found himself gagged. The most he could say was that the instructing legal practitioners had not been forthcoming with the reasons for the delay in filing heads of arguments hence no application for the upliftment of the bar could be made.

It was in these circumstances that Mr *Mushonga* applied for judgment as the respondents were in default. He however urged court to consider the application on the merits.

In as far as the respondents were barred and thus could not be heard on the merits, it is my view that any judgment will be in the same vein as a judgment granted in the absence of the other party.

In *Christopher Zvinavashe v Nobuhle Ndlovu* SC 40/06 at p 4 of the cyclostyled judgment GWAUNZA JA opined that:

“The defining feature or essence of a judgment granted after a party fails to appear is the ‘default’ of the absent party, that is his failure to do what he ought to have done.”

In *casu* the respondents failed to file their heads of arguments within ten days after they had been served with applicant's heads of arguments. The respondents further failed to apply for the upliftment of the bar and so effectively the respondents could not be heard.

I am of the view that no case has been made to consider the application on the merits. I will thus grant a default judgment as follows:

It is hereby ordered that:

1. The first and second respondents be and are hereby directed not to include the Nissan Diesel UD 290 WF Horse into the estate of the late Paulino Oliveria Martins DR 1308/07.
2. The first and third respondents be and are hereby directed to release the Nissan Diesel UD WF 290 Horse and all the relevant papers to the applicant to enable the applicant to forthwith register the vehicle into his name within seven (7) days of the granting of this court order.
3. Upon the first and third respondents failure the Deputy Sheriff be and is hereby authorized to take the said vehicle and to sign all relevant papers to enable the applicant to register the vehicle and handover the vehicle to the applicant.
4. The first and third respondents shall bear the costs of suit.

Mushonga Mutsvairo & Associates, applicant's legal practitioners.
Chivhinge & Company, 1st & 3rd respondents' legal practitioners.