Judgment No. HB 73/06
Case No. HC 3248/04
X-Ref HC 2848/02 &
1490/02

MUNUNURI MAISWA

Versus

AUSTIN KUREBA N O (in his capacity as Executor in estate of the late Lazarus Nyashanu)

And

S SIMBANEGAVI

And

CHARLES KANOGOIWA

And

GRACE KANOGOIWA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 24 APRIL AND 13 JULY 2006

Advocate P Dube, for applicant
J Tshuma, for third and fourth respondents

Opposed Application

NDOU J: This is an application for rescission of a default judgment granted by this court on 22 July 2004. The salient facts of the case are the following. Applicant initiated legal proceedings of summons at this court under case number HC 2848/02 to compel the deceased estate to honour certain rights of pre-emption, and to obtain an order cancelling an agreement of sale the executor has since entered into with 3rd and 4th respondents. This application was occasioned by a default judgment which was granted in chambers

by my bother Judge. From the file, it is

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common cause the order was granted when the applicant and his legal practitioner failed to appear at 0900 hours.

1. **Explanation for default**

In the papers was a "Notice To Attend Pre-Trial Conference" filed on 25 June 2004 and served on the applicant's and 1st and 2nd respondents' legal practitioners on the same date. The operative part of this notice reads "take notice that the pre-trial conference before a Judge of this honourable court will take place at 9:00 am on 22nd day of July 2004" (emphasis added)

What was not in the Judge's file however, was another "Notice to Attend Pre-Trial Conference" filed with the Registrar of this court a day before the one above i.e. on 24 June 2004. It was also served upon both applicant's and 1st and 2nd respondents' legal practitioners. The operative part of this one states – "Take notice that the pre-trial conference before a Judge of this honourable court will take place at 12:30pm on 22nd July, 1998" (emphasis added)

It is clear that the former notice was correcting the latter. I do not understand how the applicant and his legal practitioner got confused here. If both notices gave the year 2004 i.e the same date, one would understand the confusion. Here, in 2004, the notice is calling the applicant, 1st and 2nd respondents to appear

before the court in 1998. This apparent error taken cumulatively with the notice filed and served around 21 hours later should tell a vigilant litigant, especially one with the benefit of legal representation, that the latter notice is correcting the former. 1st and 2nd

respondents' legal practitioner was not confused because he was vigilant. He appeared at 0900 hours on 22 July 2004. He was present when the judgment complained of here was granted. In the circumstances the applicant's failure to appear at 0900 am constituted a default crying out for an explanation. The applicant's legal practitioner did not attempt to clear the alleged confusion with the 3rd and 4th respondents' legal practitioner or the Registrar of this court. Even at this late hour the applicant and his legal practitioner do not seem to have realised that the year on the notice they allege to have relied upon is 1998. There is not a reasonable explanation for the default- *Songare* v *Olivine Industries (Pty) Ltd* 1988(2) ZLR 210 (S); *HPP Studio (Pvt) Ltd* 2000(1) ZLR 318 (HC); *Khumalo* v *Mafurirano* HB-11-04 and *Bishi* v *Secretary for Education* 1989(2) ZLR 240 (HC). The courts generally assist the vigilant and not the sluggish – *Lee* v *Ncube & Ors* HB-26-06.

2. **Prospects of success on the merits**

The 3rd and 4th respondents' case is primarily based on this ground. In short they aver that the applicant's claim, in the main

action, is not sustainable at law at all. The applicant's (plaintiff) in the main action, is clearly spelt out in paragraphs 7, 8, 10 and 11 of his declaration. In paragraph 8 thereon, applicant states:

> "Upon learning of 1st defendant's (1st respondent's) authority over the deceased estate plaintiff requested that he be granted first option to purchase stand number 3 Donovan Street, Northend in Bulawayo, once it became available for sale. 1st and 2nd defendant agreed to this and further undertook to advise plaintiff once the property came on to the market at which time there would be advising the price of the property as well.
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In paragraph 11 of the declaration thereon applicant states:

> "Plaintiff communicated his intention acceptance of the offer at the said price and enquired whether 1st defendant has since obtained the requisite authority in terms of Administration of Estates Act as this was a deceased estate which plaintiff would require to have to enable him to raise mortgage finance from a building society."

Quite clearly from his own admission in his founding claim, applicant seeks to hold 1st defendant to a promise, that he made before he was appointed an executor. Contrary to what applicant now submits in his heads of argument, the agreement relied upon which applicant seeks to enforce was made between himself and the 1st defendant. It is clear that according to the applicant's case he made his request to make first purchase not before, but after the death of the deceased the late Lazarus Nyashanu. Nowhere in his detailed pleadings does applicant say the late Lazarus Nyashanu made the offer for first option. Even in his very long founding affidavit (14 pages) under HC 1490/02 he never mentioned that the right of pre-emption was previously given by the late Nyashanu

during his lifetime. This new cause of action is alluded to for the very first time by the applicant in the founding affidavit in this application for rescission i.e. on 20 August 2004. In paragraph 11 thereof the applicant states:

> "11. …As second respondent would probably confirm, a right of pre-emption was previously given by deceased during lifetime for an indefinite period at a time the house was in serious arrears for rates with the City of Bulawayo which deceased asked me to pay. He specifically undertook to offer the house to me first once he made the decision to sell in consultation with his family. We agreed that the property would be valued by an estate agent to determine the price. This was in the presence of 2nd respondent who was the caretaker at this time."

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By accident or by design this new cause of action was only introduced after the second respondent had been barred so we are unable to have his views on the matter. More importantly at the time of argument the applicant's pleadings had not been amended to reflect this new cause of action. In the circumstances it is strange that the heads of argument devote a substantial amount of submissions around this new cause of action. Advocate *Dube* is correct in saying pleadings can be amended at any stage before judgment and that such amendment may include the substitution of the cause of action. But this can only be done with the leave of the court. Four years after the institution of these proceedings such indulgence has not yet been sought. So to date, applicant's cause of action is limited to enforcement of the agreement between

applicant and 1st respondent which was allegedly entered into in March/April 2001 after the death of the late Nyashanu. This agreement has serious legal flaws and is not binding in law on the following grounds. At the time the offer to sell was made to applicant and at the time applicant accepted the offer, 1st defendant had not been appointed an executor to the estate of the late Lazarus Nyashanu. No letters of administration had been issued as is required by law in terms of the Administration of Estates Act [Chapter 6:01], more particularly as provided for in section 23 which reads:

> "…the estate of all persons dying either testate or intestate shall be administered and distributed according to law under letters of administration to be granted in the Form B in the second schedule by the Master of the testamentary executors duly appointed by such deceased person or to such person as shall in default of testamentary executors, be appointed executor dative to such deceased person in manner hereunder mentioned."

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By his own admission applicant, when the offer was made, first respondent did not have such letters of administration issued in his favour by the Master of the High Court.

Further, in terms of section 41 of the said Act, any person who deals in the assets of a deceased estate will have himself personally liable for any debts arising from such dealing. The Act is quite clear therefore that without letters of administration the estate cannot be encumbered by the would be executor or any other third party.

The matter is put beyond any reasonable doubt by the

provisions of section 120 of the said Act which provides that before any sale of any property in an estate can be effectual, there has to be an enquiry by the Master and after such an enquiry having been carried out then authority may be granted by the Master. *In casu*, no enquiry was carried out by the Master, no authority was granted as letters of administration had not even been applied for. At best, if ever applicant was to have any rights arising from the purported agreement, it can only be a personal claim against the 1st respondent in his personal capacity and not against the estate. Applicant's claim in the main action is defective, in that he failed to cite the Assistant Master who is administering the estate of the deceased. In the premises, applicant's claim in the main action is unsustainable. On the merits, therefore, there are not prospects of success – *Chetty* v *Law Society, Transavaal* 1985(2) SA 756 (A); *Mukotakwa* v *Zimbabwe Transport Co-operative Society Ltd* HH-245-92; *ZIMBANK* v *Masendeke* 1995 (2) ZLR 400

(S); *Marowoza* v *Mukumba & Anor* SC 84-96 and *V Saitis and C* v *Fenlake* [2002] 4 ALL SA 50.

This is an important case to the parties as it involves residential property. The 3rd and 4th respondents are prejudiced by the delay in bringing the matter to finality. They paid the purchase price in 2002 and were supposed to have taken occupation as of

June 2002. They claim to be *bona fide* third party purchasers. Applicant has not paid the purchase price but enjoys occupation on account of provisional order of this court. He is seemingly not in a hurry to prosecute the matter. The status *quo* is in favour of applicant. There is a need to avoid unnecessary delays in the administration of justice especially in cases such as this one where rights over residential property are in issue.

Taking all the above factors individually or cumulatively the applicant failed to make a case for rescission.

Accordingly, I dismiss the application with costs.

Joel Pincus, Konson & Wolhuter, applicant's legal practitioners
Webb, Law & Barry, 3rd and 4th respondents legal practitioners