PHILDAH MOLLY CHIKEREMA
versus
PLAXEDES CHIKEREMA (In her capacity as Executrix Dative of Estate Late Charles Kufahakurotwe Chikerema DR No. 1507/98)
and
DORCAS MAKAZA (In her capacity as Executrix Dative of Estate Late James Robert Dambaza Chikerema DR No. 1201/06)
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 17 January & 20 February 2019

Opposed Application

P Kawonde, for the Applicant
Ms L Mwaurayeni for the respondent

MUREMBA J: This is an application for rescission of a default judgment which was granted in favour of the first respondent against the second and third respondents under HC 6115/18 on 22 August 2018. The application is being made in terms of rule 449 (1) (a) of the High Court Rules, 1971.

The background of the matter is as follows:

In 1999 Cecil Madondo the then executor to the estate of the late Charles K Chikerema successfully sued James Chikerema for the livestock that he had taken from Charles Chikerema. He obtained judgment on 23 January 2001. James Chikerema appealed against the judgment but lost the appeal in 2003. All efforts to enforce the judgment by the executor were futile until James died in 2006. Even after his death it was difficult to enforce the judgment. The judgment was superannuated.

On the third of July 2018 the first respondent who was the wife to the late Charles Chikerema who took over executorship of her late husband's estate from Cecil Madondo filed an application for the revival of the superannuated judgment which remained wholly outstanding. The

second respondent who is the executor to the estate of the late James Chikerema did not oppose the application resulting in the application being granted in default. The third respondent is the Master of the High Court. The initial judgment of 2001 was in the sum of $762 600. Upon being revived the amount was converted to US$22 317.23 because of the dollarisation of the economy.

The applicant who is the surviving spouse of the late James Chikerema wants this revived judgment rescinded in terms of rule 449 (1) (a) on the grounds that:

Firstly, the judgment was erroneously granted in her absence and that the said judgment has affected her rights as the surviving spouse and beneficiary to the estate notwithstanding that she was not a party to the revival proceedings. She averred that the second respondent (the executor to her late husband's estate) chose not to defend the application without consulting her and the deceased's family in a matter involving the estate yet they are the beneficiaries to the estate. The applicant averred that the executor should have consulted the deceased's family and beneficiaries. The decision not to oppose the application was made in bad faith.

Secondly, the judgment was fraudulently obtained as certain facts were not placed before the court. If those facts had been placed before the court, the court would not have granted the judgment. The hidden facts are that in 2015 the first respondent had sued the applicant in the present matter in her then capacity as the executrix dative of the estate of the late James Chikerema, before the second respondent had assumed that role. The applicant was sued under HC 11699/15 and that matter progressed beyond pre-trial conference stage and it is still pending. Four of the issues to be determined at trial relate to the superannuated judgment of 23 January 2001. Issue 7 relates to whether or not the sum of US$22 317.23 is equivalent to the net value of the 23 January 2001 judgment.

The applicant averred that since this matter HC 11699/15 is still pending it should proceed to trial for full and proper ventilation of the issues. She averred that all that is needed is for the executor to be substituted since she is no longer the executor. She averred that the second respondent should therefore not have connived with the first respondent and allowed a judgment to be granted in default. She averred that these facts should have been brought to the attention of the court and if it had been done, the court would not have granted the default judgment since a similar matter was already pending before it. She contended that on the basis of *lis pendens* HC 6115/18 would have been held in abeyance pending finalization of HC 11699/15.

The applicant averred that she holds a reasonable suspicion that the non-opposition of the matter by the second respondent in HC 6115/18 was calculated and was as a result of connivance between the first and second respondents. The applicant averred that on the basis that the court was not aware of the existence of such facts, the judgment was erroneously granted.

In response the first respondent averred the following. The judgment was not granted in error and all relevant parties were properly cited. The applicant did not prove her allegations of fraud and connivance between the second respondent and herself which prompted the second respondent not to respond to the application. It was within the first respondent's rights as the executor to apply for the revival of the superannuated judgment of her late husband. The applicant cannot say that the application was granted in her absence when she was not supposed to be cited in the first place as she was and is not the executor of her late husband's estate. The second respondent who is the executor was duly cited and served but for reasons best known to herself she chose not to respond to the application. That the applicant and the other beneficiaries of the estate were not consulted by the second respondent, the executor of her late husband's estate in making the decision not to respond to the application cannot be a ground for rescinding the judgment. The non-disclosure of a pending matter in HC 11699/15 in the application for revival of the superannuated judgment in HC 6115/18 was immaterial because the two matters were based on separate causes of action. The matter in HC 11699/15 had nothing to do with the revival of the superannuated judgment of 2001.

Rule 449 (1) (a) provides that the court or a judge may, in addition to any other power it or he may have, *mero motu* or upon application of any party affected, correct, rescind or vary any judgment or order that was erroneously sought or erroneously granted in the absence of any party affected thereby. The rule is designed to correct errors made by the court itself and is not a vehicle through which new issues and new parties are brought before the court for trial. For rescission to be granted in terms of this rule the judgment must have been erroneously sought or granted; such judgment must have been granted in the absence of the applicant; and the applicant's rights or interests must be affected by the judgment. See *Motor Cycle Pvt Ltd* v *Old Mutual Property Investments corporations (Pvt) Ltd* HH – 44-07; *Tiriboyi* v *Jani & Anor* 2004 (1) ZLR 470 (H) and *Gary Robert Brown and Anor* v *Michael Author Strydom and Anor* HB 164-15.

In *casu* I am not inclined to grant the application for the following reasons.

Judgment not granted in error

What constitutes an error for the purposes of rule 449 is a situation where at the time of issue of the judgment there existed a fact which the judge was unaware of, which fact would have precluded the judge from granting the judgment if he or she had been aware of. See Herbstein and Van Winsein *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th ed Vol 1 page 931. In *casu* it is the applicant's averment that in HC 6115/18 if the court had been appraised of the existence of the pending matter in HC 11699/15 it would not have granted the default judgment. The cause of action in HC 11699/15 is that the applicant's late husband James Chikerema took livestock belonging to the first respondent's late husband. It is the same matter which was adjudicated upon in this court in HC 4876/99 between *Cecil Madondo N.O* v *James Chikerema*. The claim in HC 11699/15 is for the return of the livestock, compensation for losses incurred as a result of the delay in the fulfilment of the 2001 judgment, an order compelling the executor to amend the final distribution account of the estate of the late James Chikerema among other reliefs. Clearly, when the claim for the return of the livestock was made in 2015 in HC 11699/15 that claim was already *res judicata* having been determined in 2001. The applicant even raised the special plea of *res judicata* in response to the claim in HC 11699/15. A matter which was *res judicata* could not disentitle the first respondent from obtaining judgment in HC 6115/18. Even if the court had been made aware of the existence of the pending matter in HC 11699/15 it would not have been precluded from granting the default judgment for the revival of a superannuated judgment of 2001. The first respondent's omission to mention the existence of HC 11699/15 in HC 6115/18 was thus of no consequence. No fraud was thus committed by the first respondent in not disclosing the existence of a pending matter in HC 11699/15. Moreover, the relief the first respondent was seeking in HC 6115/18 was different from the one she was seeking in HC 11699/15. HC 6115/18 was for the revival of a superannuated judgment whilst in HC 11699/15 the applicant was suing for the return of the livestock, compensation for losses incurred as a result of the delay in the fulfilment of the 2001 judgment, and for an order compelling the executor to amend the final distribution account of the estate of the late James Chikerema among other reliefs. Issues in the HC 11699/15 matter were not relevant to the determination of the application for the revival of the superannuated judgment in HC 6115/18. As was correctly argued

by Ms. *Mwaurayeni*, the *lis pendens* doctrine which Mr. *Kawonde* sought to advance was misplaced.

Judgment granted in the absence of the applicant

The claim that was made in HC 6115/18 was against the estate of the late James Chikerema for the revival of a judgment that was granted against James Chikerema himself in 2001 when he was still alive. In 2018 James Chikerema having passed on and his estate (the deceased estate) not being a separate *persona* it follows therefore that it had to be represented by its executor in litigation. It is the executor who is the agent or representative of the estate. The executor occupies the legal representative of the deceased, with all rights and obligations attaching to that position. See *Liquidators of Union Bank* v *Watsons Executors* 8 SC 200 at 306, by DEVILLERS CJ. The executrix dative having been served with the application chose not to respond to it and the first respondent obtained a default judgment. The executrix dative being the representative of the estate, her actions and or decisions are binding on the estate. Consequently, the second respondent's decision not to oppose the application after being served with the application is binding on the estate. The applicant not being the representative of the estate cannot therefore say that the default judgment was granted in her absence. The proceedings in HC 6115/18 did not require her to be joined as a party as they did not require the joinder of the beneficiaries.

Applicant's rights and interests not affected by the default judgment as contemplated by law.

In an application for rescission of a default judgment the applicant must have *locus standi* to bring the application. To establish *locus standi* he or she must show that he or she has an interest in the subject matter of the judgment or order sufficiently direct and substantial to have entitled intervention in the original application upon which the judgment was given or order granted. See Herbstein and Van Winsein *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th ed Vol 1 page 931 & 944. In a matter involving an estate, a beneficiary who is not the executor is obliged to show direct and substantial interest. Direct and substantial interest is defined as an interest in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation. See *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 92) SA 151 9(O); *Shumbairerwa* v *Chiraramiro & Ors* HH 731-15; and *Kadengu & 2 Ors* v *Kadengu and 2 Ors* HH 113/06.

In *Kadengu & 2 Ors* v *Kadengu and 2 Ors* HH 113/06 KUDYA J had this to say.

> "In Zimbabwe, as far as I am aware, the question of a beneficiary's direct and substantial interest in a will was considered by MORTON J in *Clark v Barnacle N.O. and two others* 1958 R & N 348 (SR). In that case two executors sued a third executor in the estate of one Henry Douglas Clark to recover assets of the estate. The third executor's functions as such had been suspended by a court order pending the determination of the suit. The applicant was one of four residuary heirs who sought to be joined in as a co-plaintiff with the other two executors in order to protect his interests. He held that while an executor was the only person who had *locus standi* to bring a vindicatory action relative to property alleged to form part of the estate, the residuary heir could seek the intervention of the court for the proper performance of the executor's duty or to seek his removal. (My underlining) The application for joinder was dismissed both in terms of Common law and Rule 7 Order 12 of the Rules of Court in existence at the time."

In *casu* the applicant as a beneficiary of the estate managed to show that the default judgment will reduce the free residue of the estate from which she stands to benefit but this is a financial interest which is only an indirect interest as explained in the cases cited *supra.* She failed to establish direct and substantial interest in the subject matter of the judgment which is the revival of a superannuated judgment which was granted against her late husband long back in 2001 and remained unfulfilled. The applicant having failed to establish direct and substantial interest in the matter, she therefore has no *locus standi* to apply for rescission of the default judgment. If the applicant is unsatisfied with the way the second respondent is administering her late husband's estate her recourse is not to seek rescission of judgment or to meddle in litigation in which the executor is involved in but to seek intervention of the court for the proper performance of the executor's duty or to seek his removal. See *Clarke* v *Bernacle N.O & 2 Ors* 1958 R & N 348 (SR). The applicant's averments that there was connivance between the first and the second respondents resulting in the second respondent not opposing the application are the sort of averments that she can make when seeking the intervention of the court for the proper performance of the executor's duty or his removal. Moreover, these averments must be well substantiated. They should not be bold and baseless allegations as they are in the present matter.

Costs

I will award costs on a higher scale as prayed for by the first respondent because the application is frivolous and vexatious. It is meant to delay the day of reckoning. The applicant wants to delay the first respondent in enforcing her judgment in respect of a debt which has been owing since 2001. At the same time she wants the first respondent to be made to pursue a 2015

matter which she fully knows that the first respondent will not win because she (applicant) raised a special plea of *res judicata* which will definitely succeed. The applicant wants the first respondent to continue going round and round in circles to avoid or delay the enforcement and fulfilment of a long outstanding debt. Besides, the applicant being a beneficiary who has been an executrix for the same estate before knew fully well that she had no *locus standi* to bring the present application.

In the result, the application is dismissed with costs on a higher scale.

Kawonde Legal Services, applicant's legal practitioners
S Makonyere, 1st respondent's legal practitioners