

BINGA RURAL DISTRICT COUNCIL

versus

MOSES MUDIMBA N.O.

(In his capacity as Executor Dative of the Estate of
the Late Shadreck Kilson Mudimba DRB 31/2008)

and

MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS

and

MASTER OF THE HIGH COURT

and

REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE

MUSITHU J

HARARE: 7 & 21 July 2023

Ruling on Preliminary Point

Mr *E Mlalazi*, for the applicant

Ms *N Jakara*, for the 1st respondent

Ms *T Tembo*, for the 2nd & 4th respondent

MUSITHU J:

The applicant seeks the rescission of a default judgment that was granted against it on 11 May 2022, under HC 4637/20. That default judgment was granted following the applicant's failure to file its plea within the period prescribed by the rules of this court. Before the default judgment was granted, the applicant had, on 22 April 2022, filed a chamber application in HC 2676/22 for the removal of the bar operating against it in respect of its failure to file the said plea. The default judgment was therefore granted when the chamber application for the removal of the bar was already pending before the court. The two applications were initially placed before MHURI J who on 28 February 2023, struck them off the roll with costs.

When the parties appeared before me on 7 July 2023, Ms *Jakara* appearing for the first respondent raised a preliminary point at the outset. The point was that the application was not properly before the court after it was struck off for want of a resolution authorising the deponent of the applicant's founding affidavit to represent the applicant in the proceedings. The applicant's legal practitioners had proceeded to re-enroll the matter by way of a letter to the

Registrar. Counsel submitted that such an approach was improper as it offended Practice Direction 3 of 2013. This was because the court had determined that there was no application before it since the defect that afflicted the matter was fatal. For that reason, the matter could only be re-enrolled through a formal written application to the court.

In response, Mr *Mlalazi* for the applicant did not dispute that the application had been struck off the roll for the reasons given by Ms *Jakara*. He also did not deny that the application was re-enrolled by way of a letter to the Registrar. He however submitted that the defect that afflicted the application had been regularised within the 30 days referred to in the Practice Direction. The resolution that had been missing had since been filed of record. That course of action was consistent with s 12 of the Civil Evidence Act¹, which permitted such documents to be tendered in court over the bar. For that reason, there was no need to file a written application in order have the matter re-enrolled.

Ms *Tembo* for the second respondent had no submissions to make and opted to abide by the decision of the court.

Analysis

The preliminary point raised by counsel for the first respondent brings to the fore the issue of the proper interpretation of Practice Direction 3 of 2013. Ms *Jakara* did not cite the specific paragraph of the Practice Direction which she claimed was offended by the applicant's choice or procedure. The specific paragraphs of the Practice Direction that are relevant to this analysis are para(s) 3 to 5, which all fall under the heading '*Struck off the roll*'. It is necessary to reproduce them hereunder.

“Struck off the roll

3. The term shall be used to effectively dispose of matters which are fatally defective and should not have been enrolled in that form in the first place.

4. In accordance with the decision in *Matanhire vs. BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S) and *S vs. Ncube* 1990 (2) ZLR 303 (SC), if a Court issues an order that a matter is struck off the roll, the effect is that such a matter is no longer before the Court.

5. Where a matter has been struck off the roll for failure by a party to abide by the Rules of the Court, the party will have thirty (30) days within which to rectify the defect, failing which the matter will be deemed to have been abandoned.

Provided that a Judge may on application and for good cause shown, reinstate the matter, on such terms as he deems fit.”

Paragraph 3 is self-explanatory. The words '*struck off the roll*' are used when disposing of matters that are fatally defective and ought not to have placed before the court in that form

¹ [Chapter 8:01]

from the very onset. In my view para 4 is intended to cater for those matters that are not covered by para 5. This is because para 5 appears to be confined to those instances where a matter has been struck off the roll because of a failure by a party to abide by the Rules of the Court. In such scenario, a party whose matter has been struck off the roll has thirty (30) days within which to rectify the defect failing which the matter is deemed to have been abandoned. In *Bindura Municipality v Mugogo*², GUVAVA JA made the following pertinent observations concerning para 5.

“It seems to me that a proper interpretation of para 5 of the Practice Direction 3/13 is that the applicant must, within thirty days, rectify the defect by applying for condonation for the late noting of appeal and an extension of time within which he should comply with the rules. He may not do so after the window period which he has been given to rectify the defect as the matter will be deemed to have been abandoned. It seems to me that the restriction on the period within which to rectify the defect was included in the practice directive in order to manage cases which would have been struck off the roll so that the registry would not be cluttered with “dead” files. Thus, a litigant who wished to pursue his matter was granted a limited time within which to apply to cure the defect failing which the matter would be deemed abandoned.”³

The instant matter would not be dealt with under para 5, but para 4. This is because the defect which led to the striking off of the matter had nothing to do with a failure to comply with the rules of court. The matter was struck off the roll for the reason that the deponent to the applicant’s founding affidavit failed to prove that he was duly authorised to represent the applicant by way of a duly signed resolution of the applicant. Paragraph 4 of the Practice Direction is accompanied by a footnote which reads:

“Such a matter can only be re-enrolled following an application for which an appropriate Court order is issued. The Registrar shall not reset the matter without a Court order.”

So, where a matter is struck off the roll for any other reason other a party’s failure to abide by the rules of court then it can only be re-enrolled in terms of para 4 through an application for which a court order is issued. Further, the Registrar is not permitted to reset the matter down without a court order. Under the circumstances, it follows that such a court order can only be issued pursuant to a written application. The instant application was not re-enrolled pursuant to an order of this court. It was re-enrolled pursuant to a written request by the applicant’s counsel. That procedure does not comply with the para 4 of the Practice Direction.

² SC 32/2015

³ At p 4 of the cyclostyled judgment

Section 12 (2) of the Civil Evidence Act which was referred to by the applicant's counsel does not help the applicant's cause. That section provides as follows:

“12 Public and official documents

In this section—

“public document” means a document—

(a) which was made by a public officer pursuant to a duty to ascertain the truth of the matters stated in the document and to make an accurate record thereof for public use; and

(b) to which the public have a right of access;

“public officer” means a person holding or acting in a paid office in the service of the State or a local authority.

(2) A copy of or extract from a public document which is proved to be a true copy or extract or which purports to be signed and certified as a true copy or extract by the official who has custody of the original, shall be admissible in evidence on its production by any person and shall be *prima facie* proof of the facts stated therein.”

While a resolution required for purposes of asserting the deponent's authority would fall within the category of a public document, that alone does not eliminate the need to comply with para 4 of the Practice Direction. Also, the mere fact that the document may be tendered over the bar does not render para 4 nugatory.

The court therefore determines that the preliminary point was properly taken. The application is improperly before the court, and it must suffer the same fate which befell it earlier when it was placed before MHURI J. I also find no reason not to make an award of costs against the applicant. Caution and vigilance were called for especially after the matter was earlier struck off the roll.

Resultantly, it is ordered that:

1. The application is hereby struck off the roll
2. The applicant shall pay the first respondent's costs.

Dube-Banda Nzarayapenga & Partners, legal practitioners for the applicant

Mundia & Mudhara, legal practitioners for the first respondent

Civil Division of the Attorney General's Office, legal practitioners for the second respondent