

MACQUIRE FARMING (PRIVATE) LIMITED
versus
TWAIROB INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 30 MAY AND 14 JULY 2016

Opposed Matter

F Museta for the applicant
A Rubaya for the respondent

MOYO J: This is an application for the confirmation of a provisional order placing the respondent under provisional judicial management. The application was opposed from the outset. The respondent has strenuously opposed the hearing of this matter in that it was previously struck off the roll and the provisions of Practice direction 3/13 were not followed in reinstating it.

On 8 October 2015 the matter was struck off the roll. I had previously declined to set the matter down on the unopposed roll for this reason but applicant's counsel insisted that there is a Supreme court judgment stating otherwise. It would appear though that in fact there is no such judgment except a court order under which circumstances it was given remains unknown. The appellant decided to file its heads of argument in that case instead of a judgment. Of interest is the fact that in the Supreme court case referred to, the matter was not set down on the requisite date, resulting in it falling away, it was not set down and then struck off as is in this case. That case is therefore not relevant to the issues for determination before me.

Practice directive number 3 of 13 provides in relation to the term struck off the roll, that;
“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 days with which to rectify the defect, failing which the matter will be deemed abandoned. Provided that a judge may on application and for good cause shown, reinstate the matter, on such terms as he deems fit.”

It is my considered view that on 8 October 2015, the matter was on the roll there was no appearance by the applicant and this matter was struck off. It was struck off for non-compliance

with the rules requiring that a litigant or his attorney shall attend on the date of hearing where a matter is set down or postponed in terms of rule 223.

Failure to attend, was failure to comply with the rules, causing the court to strike the matter off the roll.

Now the matter having been struck off the roll, the applicant had thirty days within which to seek reinstatement of the matter onto the roll, in terms of clause 5 of the Practice Direction number 3/13.

Applicant did not within the thirty days seek to reinstate its matter onto the roll, neither did applicant consider to seek to do so beyond the thirty days. The matter is thus deemed abandoned as applicant did not seek the appropriate recourse in terms of Practice Direction 3/13. The application is thus deemed abandoned and respondent rightfully submitted that there is no application before the court as matters stand. This was succinctly put by GUVAVA JA in the case of *Bindura Municipality v Mugogo SC 32/15*. The judge therein aptly interpreted practice direction 3/13 as it relates to, matters that have been struck off the roll. In the case of *Matanhire v BP and Shell Marketing Services Pvt Ltd 2004 (2) ZLA 147 (S)* it was held that where a matter is struck off the roll, the effect is that such a matter is no longer before the court and it follows therefore that the matter before me having been struck off the roll and not having been properly reinstated in terms of Practice Direction 3/13, is no longer on the roll it is deemed abandoned. Respondent sought costs at a higher scale and I hold the view that such costs are justified as applicant forged ahead despite warning that the matter is not properly before the court. Instead of following proper procedure, applicant decided to force matters. The costs at an attorney and client scale are justified in these circumstances, by applicant's conduct to persist on a doomed mission, for as long as the matter is not properly reinstated by virtue of applicant adhering to the provisions of Practice Direction 3 of 13, it was clear from the outset that applicant was embarking on a futile mission by seeking to enroll a matter that was struck off without first following the rules. I accordingly find that applicant persisted in full awareness of all the procedural impediments on its way. Costs at a higher scale are thus justified in the circumstances. Refer to the case of *City of Cape Town v Satz 1939 CPD 195*. Also, the case of *James v Jockey Club of SA 1954 (2) SA 44 (W)*.

The applicant can thus not be heard and the only appropriate course of action is the application to be accordingly struck off this roll again with costs.

I accordingly make the following order:

The matter is struck off the roll with applicant bearing the wasted costs at an attorney and client scale.

GN Mlothswa and Company, applicant's legal practitioners

Messrs Rubaya and Chatambudza, respondent's legal practitioners