FARAI BWATIKONA ZIZHOU
versus
THE SHERIFF OF ZIMBABWE N.O.
and
RITA MARQUE MBATHA
and
REALTY WORLD (PVT) LTD

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 16, 20 & 21 March 2023

Opposed Application

Mr *M H Chitsanga*, for the applicant
First respondent in default
Second respondent in person
Third respondent in default

MUNANGATI-MANONGWA J: The applicant and the second respondent have a long history of litigation between themselves. The second respondent has in her favour a judgment against the applicant under Case No HH 675/21 wherein she was awarded damages for sexual harassment to the tune of USD 180 000. The amount remains unpaid. In the quest of getting what is due to her the second respondent instructed the first respondent the Sheriff of Zimbabwe to attach the applicant's property. The property was duly attached being a half share in an immovable property called Lot 2 of Lot 41 of Hatfield measuring 4047 metres held under Deed No.6602/07. An auction sale of the property on 3 May 2021 did not yield any meaningful results as the highest

bidder failed to comply with the conditions of the sale when called upon to do so. The first respondent then directed the third respondent to sell the property by private treaty. The third respondent proceeded to sell the property by private treaty and the second respondent (the judgment creditor) emerged as the highest bidder. The applicant objected to the sale in terms of r 71 (40) alleging that:

a. The property was not adequately advertised
b. Rita Marque Mbatha, the highest bidder did not comply with the conditions of the sale.
c. The property was sold at an unreasonably low price
d. It is against public policy that a judgment creditor participates in a sale in execution and offers to buy the property using the judgment debt.

The second respondent opposed the objection. The objection was duly dismissed by the first respondent after an oral hearing and the sale was confirmed. Aggrieved by the decision of the Sheriff the applicant has approached this court in terms of r 71(45) to have the decision set aside. The second respondent opposed the application maintaining that there is no reason why the sale should be set aside.

The second respondent raised a point i*n limine* that the applicant failed to comply with r 15(8) hence the application should be dismissed with costs. The said rule reads as follows:

> "(8) At any time of filing an appeal, application or pre-trial conference request, as the case may be, a party shall deposit with the sheriff an amount as determined by the sheriff for costs of service of all notices of set down."

The second respondent submitted that the applicant failed to pay for costs of service of all notices of set down as required at the time that the applicant filed the application. She submitted that given that scenario the application had to be dismissed for want of compliance with the rules.

She further highlighted that it was her who then had to pay for the notices of set down to be served. The applicant's counsel did not dispute that the rule was not complied with. He submitted that when a court application is issued the registrar demands payment for the application. It is practice that the fees for the service of the notice of set down are paid when the set down is issued. He stated in argument that the practice is that one pays for service when one reaches the stage where service of notice has been reached. He submitted that the applicant applied for a set down date on 23 February 2023 and paid the costs of service. At that time the applicant was not aware that the second respondent had already paid for the service of set down.

In response the second respondent submitted that practice cannot override provisions of the rules which are peremptory. She added that the applicant has been aware of her effort to set the matter down. The applicant had not been willing to set the matter down hence had not paid the requisite fee on time. She submitted that by the time the applicant paid for the service of notice on 23 February 2023 the matter had already been allocated to a judge and it cannot be said there was compliance.

Rule 15(8) is couched in a manner that makes payment for costs of service of all notices of set down compulsory upon the filling of an application in this instance. It states that " a party ***shall*** deposit with the Sheriff…" The rule places a duty on the litigant to approach the sheriff for the determination of the amount to be deposited by the party for costs of service of all notices of set down. This is stated in clear terms. Thus the obligation is not with the registrar. Further the office concerned is that of the Sheriff. Thus to say the practice by the registrar is to allow the parties to pay when they reach the stage of set down is not sufficient as a defence. It is not registry or the Registrar who has to determine payment, it is the sheriff. There is no allegation that the Sheriff refused to determine the amount payable. As correctly argued by the second respondent, the

applicant cannot rely on practice as same cannot overide the rules. In any case that practice has not been confirmed, even if it were, still the matter does not lie with the Registrar but it is an issue for the litigant and the Sheriff as the official responsible for service of documents.

The importance of rule 15(8) can never be over emphasized. The introduction of this rule in the new rules is in my view meant to expedite the hearing and finalization of matters once a set down date has been provided. It is meant to eradicate the technical hitches previously faced by the courts where a date for hearing is provided and nothing happens on the hearing date because parties have not been notified due to the fact that the Sheriff has not been placed in funds. It is meant to ensure that there is no delay in notifying the parties once matters have been set down for hearing. It is not uncommon for the registrar to provide a date and delay ensues because there are no funds in the account of the sheriff to serve process. It is therefore pertinent that from the onset the litigant in the stated instances approaches the Sheriff for the determination of the cost for service of notices and pays the determined amount. The importance can further be deciphered from the repercussions of failing to comply with the rule. Rule 15(9) provides:

> "(9) A copy of the receipt of such deposit shall be furnished to the registrar by the party within five (5) days of filing the appeal, application or pre-trial conference request, failing which the appeal, application or pre-trial conference request, shall be regarded as abandoned and, in the event of an appeal or application, shall be deemed to have been dismissed."

The rule is clear that after complying with r 15(8) the receipt of the deposit has to be furnished to the registrar within 5 days of filing of the application, failure of which the application shall be regarded as abandoned and shall be deemed dismissed. Thus far reaching consequences follow the failure to comply with the rule. Sub rule 9 also supports the view I expressed earlier that the applicant cannot rely on practice by the registrar because the issue has more to do with liaising with the Sheriff than the registrar. The Sheriff determines what has to be paid and the

registrar only gets notified of payment by being served with a receipt. In that regard the applicant has no defence as regards failure to comply. It is also not in dispute that the belated payment for the service of the notice of set down cannot qualify as compliance. In any case it was not only made late but after the matter had already been allocated to a judge which was done on 3 February 2023. The second respondent had by then paid the requisite fee for service of the notice of set down on 1 February 2023 in order to expedite the hearing of the case seeing that the applicant had not complied.

The sanction for failure to comply in this instance is that the matter is regarded as abandoned and is "deemed dismissed." This is by operation of the law hence nothing can be done at this stage to salvage the case.(See ***Watermount Estates v The Registrar of the Supreme Court & Ors SC135/21***). The applicant did not apply for condonation for failure to comply with the rule. The applicant remains non-compliant hence the case is considered abandoned and deemed dismissed. As a consequence there is no matter before me. That being so, there is nothing to determine. In the result, the matter is struck off with costs.

Mutandiro, Chitsanga & Chitima, applicant's legal practitioners