RAMWIDE INVESTMENTS (PRIVATE) LIMITED
versus
RONDEBUILD ZIMBABWE (PRIVATE) LIMITED
and
MESSENGER OF COURT FOR MATEBELAND
NORTH PROVINCE
and
WILLIAM MAKUSHA

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 10 May 2016 & 27 July 2016

Opposed Matter

T Zhuwarara, for the applicant
T Moyo, for the 1st respondent
R.C. Muchenje, for the 2nd respondent
Ms *S. Nyasura* with *T. Marume*, for the 3rd respondent

MATANDA-MOYO J: At the onset of the proceedings Mr Moyo for the first respondent raised a point *in limine* that this application was on 23 September 2015 struck off the roll with costs and the court ruled that the matter was not urgent. In terms of Practice Direction 3/2013 issued by the Chief Justice "struck off the roll" is defined as:

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

Counsel argued that the term "struck off the roll" meant the matter was no longer before the court and the Registrar was not entitled to set the matter down without an order of court. Counsel argued that the present application fell foul of Practice Direction 3/13 and no judgment can be issued in respect of this matter. He submitted that the applicant was enjoined to apply for the enrolment of the matter and obtain such an order before the matter could be heard. For such proposition he referred me to the cases of *Matanhire* v *BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (5) and *S* v *Ncube* 1990 (2) ZLR 303 (S).

Mr *Zhuwarara* for the applicant opposed the point *in limine* taken by counsel for the first respondent. His argument was that this application commenced as an urgent application.

The judge who heard the matter struck the matter off the roll of urgent matters. Her ruling was to the effect that the matter was not urgent, meaning the matter was to be enrolled on the normal roll. He further argued that this court should consider what prompted the Chief Justice to issue Practice Directive 3/2013. He submitted that the Practice Direction was introduced as a result of appeals which were defective and removed from the roll. Such appeals required a Court Order to the effect of compliance with the rules before re-enrolment. He urged this court to distinguish the two processes of striking off the roll of urgent matters and that of striking off defective appeals. He urged this court to find that the application was properly before the court.

I have perused the initial urgent application filed by the applicant case HC 7927/15 refers and the judgment thereon. It is clear from a reading of the said judgment that the judge ruled the matter not to be urgent. Such matter was struck off the roll of urgent matters. The issue falling for determination is "what is the meaning of strike off the roll". Is such striking off' the roll in terms of practice direction 3/13? My view is that when a matter is struck off the roll of urgent matters it simply means that the matter was enrolled on the wrong roll. The matter was not 'urgent' in terms of the rules and such matter should proceed by way of ordinary application as opposed to urgent application. Simply put it means the matter failed to qualify to jump the que and be heard ahead of other matters on the ordinary roll. It failed to qualify as warranting to be treated as critical or high priority and deserving of immediate attention.

The application was not defective but was only ruled not to be urgent. There is nothing that prevents the same application to be enrolled on the correct roll and be determined.

The arguments advanced by counsel for the first respondent are the same arguments which were advanced in the case of *Bindura Municipality* v *Mugogo* SC 32/15. The above matter related to an appeal which had previously been struck off the roll for failure to comply with r 4 (2) and r 7 (b) of the Supreme Court (Miscellaneous Appeals and References) Rules 1975. The applicant applied for reinstatement of such appeal. The court found that the applicant had filed a wrong application. The court held that once an appeal has been struck off the roll for failure to comply with the rules, it means such an appeal is a nullity. It follows that there can be no reinstatement of that which is a nullity. Such appeal would be fatally defective and invalid. The Supreme Court in that case quoted with approval the case of

Jensen v *Acavalos* 1993 (1) ZLR 216 @ 220 B. Once an appeal is found to be defective, such appeal cannot be reinstated. The matter can only be re-enrolled upon rectification of such defects. Such a matter is distinguishable from the present case. The present case does not relate to reinstatement of a matter on the same roll. The present matter involves transferring matter from a wrong roll to the correct roll.

The urgent application was disposed of on 23 September 2015. The applicant proceeded to file an answering affidavit on 21 January 2015. The applicant did not reserve the application on the respondents but simply proceeded to file an answering affidavit. On 21 January the applicant also filed heads of argument in the matter. The second respondent filed its heads on 4 February 2016. The first respondent filed its heads of argument on 18 May 2016.

The other issue which falls for determination is "what is the procedure of enrolling a matter ruled not to be urgent on the ordinary roll; Does the process entail reissuing process or it simply entails transfer of the same matter to the ordinary roll." It is common cause that the High Court Rules are silent on the matter. Practice Direction 3/13 does not deal with this aspect either. There is a vacuum on the procedure to be employed. The first respondent is of the view that after being struck off the roll, this matter was no longer before the court. He argued that a court order was supposed to be obtained by the applicant for the enrolment of the matter on the ordinary roll. The Registrar could not have lawfully set the matter down without the order of court. The problem with this submission is that the first respondent had failed to show that the urgent application "was fatally defective and should not have been enrolled in the form in the first place" as per para 3 of Practice Direction 3/2013. Paragraph 4 provides:

> "……..
> 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."

"Re" as appearing above means 'again'. It is the process of bringing back the same matter on the same roll. Such process as I have said above differs from the present scenario involving moving a matter from one roll to another.

The applicant herein simply proceeded with the matter on a different roll. The same application was proceeded with albeit on a different roll. As I said above the rules do not provide for a procedure of moving a matter from the urgent roll to the ordinary roll. I must therefore look at the procedure adopted by the applicant to find whether it occasioned any

prejudice on the other parties. None of the respondents in their papers allege that any prejudice was occasioned to them. None of the respondents indicated they wished to supplement their opposing papers before the matter could proceed. Without such averments on prejudice I am unable to find that the procedure adopted by the applicant is wrong. The application remained pending before this court but on the ordinary roll. Nothing could prevent the applicant from continuing with the same application on the ordinary roll. My view is that the decision to "strike off" the roll of urgent matters has effect of automatically transferring the matter to the ordinary roll, in the same form.

The major difference between an urgent application and an ordinary application is that in an ordinary application the respondent is given ten days within which to file his/her notice of opposition. The other requirements are the same. Had respondents desired filing of further papers, such an indulgence would have been granted them as with urgent application the time limits within which to file opposing papers are shorter. I am not persuaded by arguments advanced in favour of the point *in limine* by the first respondent and such point *in limine* fails.

The facts of this case are aptly set out in the judgment of the 23 September 2015 and I do not intend to restate same. This is an application to aside the Sheriff's sale on the basis of the following irregularities;

1) That the first respondent wrongfully pointed out to the second respondents certain properties belonging to the applicant it wanted to be levied in execution in contravention of the law.
2) That the first respondent never communicated to the second respondent the correct amount to be levied, which commission resulted in wrongful execution.
3) The writ of execution was not properly served on the applicant's place of business and the Sheriff did not allow the applicant to point out the property it preferred auctioned.
4) That the second respondent failed to do a valuation on the attached property which resulted in sale of such properties at abnormally low bids.
5) That the second respondent failed to properly advertise the applicants property and falsified costs he claims to have incurred and
6) That the third respondent wrongfully participated in the auction. The third respondent is an executive officer in the first respondent and he had precipitated motivated and organised the sale in execution of applicant's property.

The applicant submitted that the first respondent wrongfully pointed out to the Messenger of Court the property to be levied for attachment in violation of Order 26 r 5 (1) (a) of the Magistrates' Court Rules 1980, which provides;

> "The Messenger shall upon receiving a warrant directing him to levy execution on the movable property-
>
> (d) if the judgment debt and costs are not paid full, make an inventory and valuation of the property pointed out to him, or if the debtor does not point out the property, make an inventory….. of the property….. he thinks sufficient to satisfy the warrant."

It is clear that it is either the judgment debtor who points out the property to be attached or the messenger who does so should the judgment debtor fail out so point out the property.

The applicant alleges it is the first respondent who pointed out such property. The second respondent said representatives of the applicant namely Zacks Nyoni and Danisa Sibanda pointed to such property. The applicant relied on Annexure K on p 107 of the record which is a letter from the first respondent to its lawyers. In that letter they identified property belonging to the applicant to be attached. In such letter the first respondent identified the following property:

> "1 x Motor Grader – RB 418
> 1 x 1 Water Bowser (Truck)
> 1 x D 85 Bulldozer
> 2 x Powerplus Tipper Trucks"

The messenger of court on 14 July 2015 attached the following property:

> "Motor Grader – RB 418 serial P00702
> Motor Grader – RB 418 serial P00885
> Water Bowser Truck ACL 3520
> 2 x Powerplus Tipper Trucks ACL 3512"

The coincidence between the letter of the first respondent to its lawyers and the attached property points to the fact that it was in fact the first respondent who pointed to the property to be attached in violation of the rules. In that letter the applicant indicated that its technical manager, the third respondent would assist to move the property. The applicant alleges that it was the third respondent who pointed out the goods to be attached. The third respondent went on to participate in the sale and to purchase certain equipment. The applicant argues that, that removed him from the purview of the meaning of *bona fide* third party purchaser. The third respondent maintained he is a third party purchaser who is protected by

the law. Counsel for the third respondent referred me to the case of *Chiwadza* v *Matanda and Others* 2004 (2) 203 (H) where the court held that where transfer has already taken place the sale cannot be impeached in the absence of bad faith or knowledge of prior irregularities in the sale or fraud. This is so because of the protection our legal system affords third parties in commercial transactions. See also *Mapedzamombe* v *CBZ and Another* 1996 (1) 257 (S). A legal definition of *bona fide* purchaser:

> "One who acts without covin, fraud or collusion; one who, in the commission of or connivance at no fraud, pays full price for the property and in good faith, honesty, and in fair dealing buys and goes into possession. … is one who buys property of another without notice that some third party has a right to, or interest in, such property, and pays a full and fair price for the same…"

Is the third respondent an innocent third party? From a reading of the papers the sale was conducted on 19 August 2015 and on 22 August 2015 the third respondent became aware that the applicant was laying a claim to the property he bought alleging he bought such machinery at a low price. The third respondent was also being fingered in having pointed to the machinery for attachment. In *Vossal Investments (Pty) Ltd* v *City of Johannesburg* 2010 (1) SA 595 (ASJ) the court found that the owner of some property is entitled to recovery of same where the sale has been perfected by delivery in the case of movables where the purchaser had knowledge of the judgment debtor's application for rescission of the judgment prior to such delivery. Even where delivery finally takes place the owner is entitled to recover the property.

In our law it is trite that movable property sold in execution at judicial sales, cannot as a general rule after delivery be vindicated from a *bona fide* purchaser. In the present case the third respondent cannot be said to be a *bona fide* purchaser after he participated in the identification of the property to be attached, and such property having been initially bought from the first respondent, who is the third respondent's employer. The third respondent before taking delivery of the machinery became aware that the applicant was claiming a right to such property. I am of the view that the third respondent is not protected by the laws protecting third parties. I am of the view that the applicant discharged the onus of showing that the third respondent was not a *bona fide* purchaser for value without notice. The third respondent has failed to discharge the onus on him of showing that he was a *bona fide* purchaser.

The applicant also seeks the setting aside of the warrant on the basis that the amount reflected thereon was not the correct amount. I did not hear the applicant saying the amount on the writ of execution differed from the amount on the judgment of the court. The clerk of court has no right to alter amounts as appearing on the order when issuing a writ of execution. The applicant failed to even attach he said judgment. The law is settled in this regard. A warrant can only be set aside where it is no longer justified by the debt or *causa.* If the debt is paid in full then the *causa* of a warrant falls away. In this matter the *causa* of the warrant still remains. The applicant has not claimed to have extinguished the debt and therefore the warrant cannot be set aside: see *Watchman* v *Standard Bank Africa BPK en Andere* (2002) ALL JA 558 T.

See also *Hoban* v *Absa Bank* 1999 CLR 403 (W) at 411 -12 where TUCHTEN AJ stated as follows:

> "Proceedings in execution are, it is true, inroads upon the rights and property of the individual. On the one hand, proceedings in execution are designed to enable a person who has sought and obtained a judgment of court to recover what is lawfully due to but unlawfully withheld from him by a judgment debtor. As MacCall AJ pointed out in *Joosub* v *JL* case *SA (Pty) Ltd* 1992 (2) SA 665 (N) at 672 E, "a non-compliance with a slight informality which does not go to the root of the matter" will not entitle a judgment debtor to have a sale in execution set aside. Balancing these considerations, it seems to me that where a judgment debtor seeks to attack a sale in execution prior to delivery or transfer of his property sold at such sale on the grounds of non- compliance with post attachment formalities he must show at the very least a reasonable possibility that such non-compliance will cause him prejudice…"

On the issue of machinery being bought at unreasonably low prices, there is no concrete evidence placed before the court by the applicant on the values of such property. There is no concrete evidence showing the machinery was bought at unreasonably low price. The applicant simply speculated on the valuables of the machinery and failed to place before this court any evidence upon which this court can find in its favour. It is unfortunate that this court cannot engage in prophecy and place values on the properties. In so far as innocent third parties bought the property there is no evidence warranting the setting aside of sale on that basis.

The applicant also challenged failure by the second respondent to value the goods at the time of attachment. This, applicant argued resulted in undervaluation and abnormally low bids. The applicant argued that this requirement "to make valuation" of the property attached is mandatory in terms of r 5 (1) (d) of the Magistrates Court Rules. It argued that the effect of failure to value the goods is to void the attachment and the subsequent sale. In the absence of

a valuation the bid is uninformed and results in anomalous bids and sales. The respondents on the other hand refused that no valuation was done. The second respondent argued that he attached goods which to his opinion were sufficient to satisfy the warrant. Its valuation at this stage is only an estimation of the market value. Otherwise the accurate market value would be determined at the auction.

In *Zvirawa* v *Makoni* 1988 (2) ZLR 15 (SC) the court held that it was the applicant who had the onus to establish that the market price of the property is higher than that realised by the sale and that the sale was sold for an unreasonably low price. See also *Lalla* v *Bhura* 1973 (2) RLR 280 (G.D).

I am of the view that the applicant has failed to establish that the failure to value goods resulted in low bids. In any case there is no law which requires that the valuations be set out in writing. The messenger can do the valuations without putting them in writing.

The applicant also complained that the property was not properly advertised. That resulted in failure to create interest within the body- public to come to the auction. I was referred to *Chikwavira* v *The Sheriff and Another* HH 375-15 where the court found that an advertisement which inadequately describes the property is no advertisement at all. The applicant submitted that the advert in the present matter was deficient and meaningless. In its form the advert failed to adequately inform the public and generate interest for the sale resulting in low bids being offered. The advert complained of appears on p 141 of the record. The advert stated the machinery to be sold and the serial or registration numbers. There was no other description for example whether the equipment was running or non-running. The question falling for determination is whether such description was adequate. Did the advert sufficiently and properly inform the public of the property to be sold? The answer is no. The advert as placed by the messenger of court failed to properly describe the equipment. The year of manufacture or first use was not put, the hours covered by the machinery was not put. It was not clear whether such equipment was functional or not. It is clear that members of the public were only informed that 2 x Motor Graders serial numbers…, Water Bowser Truck reg …, Bulldozer serial number … and 2 x Powerplus Tipper Trucks reg number were being actioned at Songa Road Harare. Nothing else was stated about the condition of the equipment.

In *Chizikani and Anor* v *Central African Building Society* 1998 (1) ZLR 371 the court had this to say:

> "An advertisement which inadequately describes the property is no advertisement at all. It will fail to comply with the Sheriff's mandatory obligation. The purpose of describing the property is not merely to identify it. It is also to inform the public of that which is being sold, with the aim of attracting the interest of potential purchasers to the auction … for it is in the interests of the judgment debtor and probably in the interests of creditors, that property to be sold obtain as high a price as possible."

I am of the view that the advert herein was inadequate but there is no proof that such in adequacy led to low bids. In any case bidders have an opportunity to inspect the property before the auction. I have no evidence before me that such advert caused any prejudice to the applicant.

Lastly what is the remedy available to the applicant? I have been referred to Order 33 of the Magistrates Court Rules which provide:

> "(i) Effect of failure to comply with rules
>
> (1) … failure to comply with these rules or with any request made in pursuance thereof shall not be a ground for judgment against the party in default.
> (2) Where any order made in terms of subrule (2) is not fully complied with within the time stated, the court may on application order compliance therewith within a stated time. …"

Order 26 (b) r 4 A (2) provides:

> "An advertent failure by Messenger of court to deliver or leave a notice in terms of subrule (1) shall not invalidate any attachment, sale in execution or ejectment effected in terms of a warrant."

The above rules show that failure to comply with the rules does not automatically lead to setting aside of the sale in execution. This is so because courts must promote public confidence in such sales. Setting aside of public sales even on trivialities would lead to loss of public participation in such sales as that would create uncertainty.

The courts are also not keen on setting aside public sales where delivery or transfer has been effected except when non-compliance with the rules go to the root of the matter. In the present case the rules allow a judgment debtor to approach the court and compel compliance with the rules. This is done so as to minimize setting aside of such sales. The applicant herein has been privy to the non-compliances complained of especially that of non-valuation and did nothing. It can be argued that the applicant waived its rights to complain.

Where the applicant had a genuine complain of failure to properly advertise, again the applicant did not come up with valuations for such machinery so that this court could determine the prejudice suffered. Without that evidence there is no proof before me that, such improper advert negatively affected the sale.

In the result I agree with the applicant's submission in its heads that the proper remedy would be to apply for damages rather than setting aside the sale.

Since the application cannot be said to be totally without merit, I am of the view that each party should meet its own costs.

In the result the application fails and is dismissed without an order as to costs.

Gill Godlonton & Gerrans, applicant's legal practitioners
Tamuka Moyo Attorneys, 1st respondent's legal practitioners
Nenjy Nyamapfeni Law Practice, 2nd respondent's legal practitioners
Matsikidze & Mucheche 3rd respondent's legal practitioners