KINGSTONE RINGISAI MAKARICHI
versus
AGNES MABVUNZA

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 18 & 19 March, & 28 April 2021

Opposed Application – to compel discovery, filing of summary of evidence, PTC issues, bundle of documents and attend round table conference

Mr *Muringani*, for the applicant
Mr *B Mutiro,* for the respondent

CHAREWA J: This is an application to compel discovery and the filing of pre-trial documents in HC 13081/12. The respondent has raised the preliminary point that the application is fatally defective for want of the correct form. Further, she submits that the application is improperly before the court, the main matter having been struck off the roll and no application for reinstatement having been made.

Background

The applicant issued summons in HC 13081/12, against the respondent in 2012 and the matter was set down for pre-trial on 10 September 2014. Both parties defaulted and the matter was struck off the roll. The applicant waited until September 2019 to set the matter down for pre-trial, whereupon respondent drew his attention to Practice Direction 3/2013 regarding the procedure to follow where matters have been struck off. However, applicant proceeded to seek set down for pre-trial and to file this application, arguing that since his matter had been struck off when it was not fatally defective, it was not necessary to seek its reinstatement as his matter does not fall within the purview of Practice Direction 3/2013.

At the commencement of the hearing, respondent sought condonation of late filing of heads of argument which I granted with the consent of the applicant.

Parties' submissions *in limine*

Respondent submits that she should not be compelled to file pre-trial conference papers as, firstly, the application is fatally defective as it does not conform to r230 as it is not in form

29B. For this submission, she relies on *Zimbabwe Open University* v *Mazombwe*[1] and *Jambo* v *Church of the Province of Central Africa*[2]. The defect was drawn to the applicant's attention but no remedial action was taken, hence the application is a nullity.[3]

Secondly, applicant submits that, there is, in any case no action before the court, HC 13081/2012 having been struck off the roll on 10 September 2014, and no congruent application having been made to reinstate it. The matter was struck off the roll when practice direction 3/2013 was already in use and the difference between the terms had been clarified. In fact, applicant did apply for reinstatement on 12 July 2019, but withdrew that application on 9 October 2019.

Given the persistence of the applicant to insist on a defective application predicated on non-existent action, respondent prays for an order of costs on the scale of legal practitioner and client.

For his part, applicant submits that Practice Direction 3/2013 seeks to ensure uniform use of the terms "struck off the roll", "postponed *sine die"*, and "removed from the roll". He argues that paragraphs 3, 4 and 5 of the Practice direction only apply to matters which are fatally defective. Therefore, the order of the court that the matter was struck off the roll does not fall within the purview of the practice direction as it was predicated on default of appearance. Condonation for non-conformation with the rules and reinstatement are thus not necessary as "struck off the roll" in this case was in effect "removal from the roll". He relies on *Bobby Maparanyanga* v *Brian Pernell Van Schalkwik*[4] and distinguishes *Matanhire* v *BP & Shell Marketing Services Pvt Ltd*[5].

With regard to the first point *in limine* that the application is fatally defective for want of the proper form, the applicant makes no meaningful submissions, either in his heads of argument or orally save to baldly state that the application is properly before the court as it complies with r241.

Analysis

The application is purportedly a chamber application to compel respondent to file documents in HC 13081/2012. Therefore, it requires to be served on the respondent. Such a

[1] 2009 (1) ZLR 100 @103
[2] HH329-13
[3] See *Tamanikwa v Board President & Ors* HH676-15
[4] SC64/2002
[5] 2004 (2) ZLR 147 (SC)

chamber application must be made in terms of the proviso to r241, in which case it must be in Form 29 with appropriate modifications. Form 29 requires that a party's attention must be drawn to the procedural rights available to it, including that he must be given notice as to when he must file opposing papers. The notice of application by the applicant does not conform to Form 29. Rather, applicant appears to have used form 29B, which though inappropriate does not render the proceedings fatal according to the principles in *Zimbabwe Open University v Mazombwe* (supra). While the form used does not set out the procedural rights to which respondent's attention must be drawn, it does set out the grounds of the application. The court has discretion, in terms of r4C, to condone the use of the wrong form where no prejudice has been suffered by the respondent therefrom. Respondent has not shown that she suffered any prejudice from the use of the wrong form, has suffered no prejudice. The first point *in limine* must thus fail.

With respect to the second point *in limine,* paragraphs 2-5 of Practice Direction 3/2013 which was published on 29 November 2013 provides as follows:

"**General Note**

1…..

2. With a view to ensuring the uniform use and application of the terms 'struck off the roll'; 'postponed *sine die'* and 'removed from the roll', the following changes to the current practice takes effect from 1 January 2014. (my emphasis)

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* v *BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S) and *S* v *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[6].
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."

The import of these provisions, in my view, is that:

1. With effect from 1 January 2014, a judge should not strike a matter off the roll unless the matter is so fatally defective as to be a nullity.

[6] Such a matter can only be re- enrolled following an application for which an appropriate Court is issued. The Registrar shall not re-set the matter without a Court order.

2. Once an order striking a matter off the roll has been made, rightly or wrongly, the matter is no longer before the court. Only where the matter has been struck off by reason of non-conformity with the rules shall the matter be set down after an order for its re-enrolment has been obtained.

Such an interpretation is in line with the decisions in *Matanhire* (*supra*) and S v *Ncube*. However, *in casu*, the fly in the ointment is that the matter was not struck off the roll because it was fatally defective or was not in conformity with the rules. It was struck off the roll for non-appearance of both parties on the date of hearing. Regardless, the order striking the matter off the roll remains extant. It cannot be ignored merely because it flies against the rationale in the practice direction.

It is trite that an order of court remains valid and enforceable, whether or not it is erroneous, until it is varied or set aside. I cannot, therefore, agree with the applicant that I should ignore the order or interpret it to mean "removed from the roll". This order was made on 10 September 2015, more than eight months after the practise direction clarifying how the terms are to be applied was made. I cannot pretend or assume that the order was meant to read "removed from the roll" rather than exactly what it is. In any event, even if I accept that the order was erroneously made then the recourse is not to ignore it or to pretend that it is not what it is. The proper recourse for the applicant, once this challenge was drawn to his attention, was to seek correction or variation of the order.

In the circumstances, I do not consider the *Bobby Maparanyanga* (*supra*) case to be apposite. The decision therein was before the promulgation of Practice Direction 3/2013. At that time, the terms "struck off the roll" and "removed from the roll" where used interchangeably as if they had the same effect and consequences. This was the very reason why the practice direction was made, to remove the confusion created by using the terms as if they meant the same thing. Any order of "striking off" made after 1 January 2014 had to relate to matters no longer before the court for being fatally defective for failure to comply with the rules. An order of striking off in any other case consequently was an order granted in error.

In the ordinary course of events, I would have *mero motu* rescinded the order as it is patently not in conformity with the practice direction. However, the conduct of the applicant requires that he make an application to explain his apparent lack of diligence:

a. He sat back from 2014 until 2019 instead of pursuing his matter and offers no explanation for his inaction.
b. He offers no explanation why he withdrew the application for re-instatement he made in 2019.
c. His attention having been drawn to the status of his matter in HC 13081/2012 pursuant to it having been struck off the roll, he made no attempt to seek appropriate rectification but ill advisably insisted on proceeding with this application.

As matters stand therefore, the order striking his matter off the roll has not been corrected or varied. The matter remains struck off the roll. There is thus no matter before the court. In the circumstances I cannot grant an order compelling the filing of pre-trial papers in a matter which remains struck off the roll and is not before the court.

I must agree with respondent that the persistence of the applicant in this matter was clearly unreasonable and showed a wanton disregard of the rules or at worst, an unforgiveable lack of diligence. Applicant caused respondent to incur unwarranted costs by proceeding on the wrong premise in circumstances where due notice had been given of the difficulties endemic to its chosen course of action. It is thus only fair that respondent be awarded her costs on the legal practitioner and client scale.

Disposition

Consequently, the application is dismissed with costs on the scale of legal practitioner and client.

Messrs L.T. Muringani Law Practice, applicant's legal practitioners
Messrs Rubaya & Chatambudza, respondent's legal practitioners