HB 21-16
HC 1026-15
XREF HC 497-15

REGIONAL MANAGER BEITBRIDGE
and
ZIMBABWE REVENUE AUTHORITY
versus
MODRECK MARAMBA
and
ASSISTANT SHERIFF BULAWAYO

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 4 AND 11 FEBRUARY 2016

Opposed Application

Ms C. Bhebhe for the applicants
1st respondent in default

MATHONSI J: After reserving judgment in this matter, my attention was drawn to the fact that the first respondent, who was not in attendance at the hearing, had in fact been sitting in motion court when the matter was called in another court room. He had therefore not ignored the notice of set down but had strayed to the wrong court. What then exercised my mind was whether to re-set the matter down in order to afford the respondent an opportunity to be heard. Considering that all the necessary papers had been filed and that the opposition to the application was not meritable at all coupled with the fact that the respondent had defaulted (he ignored the notice put up by the registrar informing parties of the court room where opposed matters were being heard), I decided to exercise my discretion against the respondent.

This was also informed by the fact that *Ms Bhebhe* for the applicant was entitled to the order that she sought in default. I had deferred the grant of the order and told *Ms Bhebhe* that I was concerned with the conduct of the Sheriff's office in Bulawayo and found it necessary to give reasons for the order that I was going to make in order to highlight my concerns over the operations of that office.

This is an application for rescission of judgment which should not have been opposed at all especially in light of the fact that the assistant sheriff who purportedly served the first

respondent's application has not bothered to dispute the claim that he did not serve the application even after being openly challenged on his return of service used as a locomotive for the delivery of a default judgment granted against the applicants, a default judgment granted even against the first applicant despite the apparent lack of service upon him.

The office of the sheriff, which only recently was clothed with wider responsibility to serve virtually all processes of this court including those which previously could be served by legal practitioners or their employees, should be reformed pretty fast before the administration of justice in this part of the country grinds to a halt. It should be reminded to take that task seriously. Accusations of false service, fake returns of service and no service at all until the date of hearing are becoming louder by the day in this part of the country where, perhaps owing to lack of supervision, representatives of the sheriff think they are holiday making. It must be said now and in an effort to nip the rot in the bud that this court transacts very serious business whose outcome affects the lives of members of the public as well as public institutions.

In doing so, this court relies heavily on the goodwill, diligence and indeed trustworthiness of the assistants of the sheriff tasked with the responsibility of serving court process and submitting returns of service which the court uses to determine matters. After all the sheriff is an officer of the court and his return of service is *prima facie* evidence of service: *Croco Properties (Pvt) Ltd* v *Swift Debt Collectors (Pvt) Ltd t/a Ruby Auctions* HH 220/13.

In that regard the submission of a false return of service is not only a travesty of justice but an affront to the dignity of this court. It must, where proved, be severely punished in order to discourage those among the assistants of the sheriff who are lazy to deliver process and think they can "serve" process by Bluetooth while sitting in their offices only to hoodwink the court by submitting fake returns. What is even worse is that such a rogue officer would still levy a fee for lying which litigants have to cough up their hard earned money to settle.

On the night of 13 January 2015, the first respondent was misbehaving at the Beitbridge border post in his Toyota Noah motor vehicle registration number ABH 1651 when his motor vehicle was seized and he was promptly issued with Notice of Seizure number 043793I. It is said that he used an undesignated entrance point to enter the customs area in contravention of s22 of the Customs and Excise Act [Chapter 23:02]. Although his vehicle had been lawfully

impounded, the first respondent is said to have used the cover of the night to "steal" his motor vehicle, driving it out of the border post under circumstances which suggested that he used it to facilitate the smuggling of goods which were in it.

In so doing, the first respondent committed even more infractions against the law. The vehicle was only recovered later after it had been abandoned on the Zimbabwean side.

The first respondent petitioned the first applicant regarding the penalty that had been assessed for him as he pleaded for mercy. Although the penalty was reduced from $5000-00 to $2000-00 he did not pay. He opted instead to approach this court by court application filed in HC 497/15 on 25 February 2015. He sought in that application an order directing the first and second applicants to release his motor vehicle, never mind the due process in terms of the Customs and Excise Act [Chapter 23:02] being enforced by the applicants and that he had not paid the assessed penalty.

It was always going to be very difficult for the first respondent to obtain the relief that he sought in the circumstances of this matter as I have outlined them. His best bet was to proceed with his application unopposed. That way his conduct at the border on the fateful day would remain unknown to the court. It is after having regard to that background that the significance of the sheriff's assistant by the name P. Moyo's intervention may be properly understood. According to that assistant sheriff's return, on 25 February 2015, he served the process at Zimra, 5th Floor Mhlahlandlela Government Complex in Bulawayo. He further remarked:

> "Chamber application served on M. Gwatidzo an employee for the defendant who accepted service on behalf of the defendant."

It is that return of service which was relied upon in obtaining default judgment against the applicants on 2 April 2015 in HC 497/15.

But then that return has its inherent frailties. The process which should have been served is a court application and not a chamber application. As to where Moyo obtained a chamber application to serve when HC 497/15 is a court application, we do not know. The process is said to have been served upon an employee of the second applicant by the name of M Gwatidzo. We are told that the second applicant employs no such person. The only employee with the name closest to that is one Kokerai Gwatidzo who is not based at 5th Floor but says he is at the ground

floor. He says he had dealt with Moyo on a previous occasion and suspects that he may have conjured his name from that previous engagement and owing to the fallibility of human memory, probably got the initials gravely wrong, thereby betraying the falsity of the return.

That is not all. The assistant sheriff completely forgot that there was need to serve the process on the first applicant who was the first respondent in that matter. This is so because, not only was he cited in the application, an order was also sought and granted against him. In the heat of fabrication the first applicant was left out. As I have said, the assistant sheriff in question was challenged on that return of service, not only through this application wherein he is cited as a party but was also confronted by Gwatidzo and T. Mazuru on 13 April 2015 to explain his return. He did not give a satisfactory answer. He has not seen the wisdom to favouring the court with an explanation either. It is trite that whatever is not disputed in affidavits is taken as admitted.

The applicants now seek the rescission of the order made on 2 April 2015 on the basis that they were not served with the application and that they have a *bona fide* defence to the application. Self-acting, the first respondent filed opposition to the application. He says whether or not the application was properly served is not his business. He gave the application to the sheriff for service and got a return of service. That is enough. The applicants have no defence at all. He also says something about the order he sought not having been against the first applicant.

I have said that the application should not have been opposed. It is a rule 63 application and in terms of rule 63(2) the court may set aside a judgment given in default where there is "good and sufficient cause" to do so. The factors which the court will take into account in determining good and sufficient cause have been discussed in a line of cases which include *Roland and Another* v *McDonell* 1986 (2) ZLR 216 (S); *Sangore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210; *Stockhill* v *Griffiths* 1992 (1) ZLR 172 (S).

They are the reasonableness of the applicant's explanation for the default; the *bona fides* of the application for rescission of judgment; the *bona fides* of the defence on the merits; and the prospects of success of that defence. In the course of this judgment I have shown why the applicants were denied the opportunity to defend the application by what appears to have been a fake return of service. To the extent that the first applicant was concerned judgment was granted

when there was no proof of service at all upon him. I have also shown how the first respondent transgressed the law at the Beitbridge border post thereby entitling the applicant's to seize his motor vehicle. I am therefore satisfied that the applicants have discharged the onus of establishing "good and sufficient cause" for the rescission of the impugned order.

In the result, it is ordered that:

1. The order of this court granted in favour of the first respondent on 2 April 2015 in HC 497/15 be and is hereby rescinded.
2. The applicants shall file their opposition to the application within 10 days of the date of this order.
3. The costs of this application shall be costs in the main application.

Coghlan & Welsh, applicants' legal practitioners