MELODY MAKUNURA
versus
AMOS ZVAREVASHE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 10 May 2023

Chamber Application

CHITAPI J: The applicant Melody Kuziwakwashe Makunura (Melody) has three related matters pending in this court the last of which is HC 931/23 that was placed before me for determination. The other related records are case numbers HC 6395/19 and HC 5728/20. The cases are related as follows:

Case Number HC 6395/19

The first respondent herein as plaintiff therein filed an application for rescission of a default judgement granted by UCHENA J (as he then was) in case number HC 9080/12 against one Rodger Nyasha Makunura and Chitungwiza Municipality as first and second defendants. In terms of that default judgement granted on 12 December 2012, the first defendant was ordered to transfer over by a cession – a property called Stand Number 26530 Unit L, Seke, Chitungwiza to the applicant herein failing which the Sheriff was ordered to sign cession documents with second defendant therein to effect cession of the property aforesaid.

Case Number HC 6395/19

The applicant Melody on 16 November 2022 filed this application for rescission of the default judgement granted in case number HC 9080/12 as aforesaid. The basis for seeking rescission is stated as that the judgement was granted in error. The application was made in terms of r 449 of the High Court Rules, 1971 (now repealed). The respondents are the first, second and third respondents herein. This application was then the first of these applications filed by Melody.

For purposes of context, the applicant, Melody who was not a party to case number HC 9080/12 claims that Rodgers Makunura is deceased and died on 28 September 2005. Melody claims to have been appointed the Executor Dative of the Estate Late Rodgers Makunura by virtue of letters of Administration issued to her on 22 July 2019 and issued on 25 July 2019.

The applicant Melody seeks rescission of the default judgement in case number HC 9080/12 on the basis that the same was granted in error as it was based upon a fraud. The basis of alleging fraud was that the first respondent as plaintiff in case number HC 9080/12 based his claim for cession of the property in question on a purported sale agreement of the property allegedly entered into between him and Rodgers Makunura on 13 April 2007 yet by that date Rodgers had died in 2005 as already noted. The rescission application is still to be heard once procedural hurdles which case numbers HC 5728/90 and HC 931/23 are concerned with are cleared.

Case Number HC 5728/20

The applicant Melody filed a chamber application for substituted service of the notice of set down of case number HC 6395/19 by publication of the notice of set down in the Herald Newspaper. Case number HC 6395/19 was set down for hearing on 28 July 2020 before MANZUNZU J. The same was removed from the roll on the basis that service of the notice of set down was defective. The notice of set down had been served on the first respondent's legal practitioners yet they had renounced agency prior to its service. The legal practitioners gave out in the notice to renounce agency that the first respondent's address for service was 27737 Unit C, Chitungwiza.

Melody then attempted service of another notice of set down of case number HC 6395/19. This time Melody engaged the services of the Sheriff to effect service. The Sheriff tried to locate the address 27737 Unit C, Chitungwiza in vain. The Sheriff then sought directions to the address from the second respondent, Chitungwiza Municipality. In the return of attempted service 23 November 2020, the Sheriff endorsed the return of service as follows:

> "Attempted Service: Failed to locate the given address of service. Went to Council Offices and Mr D. Moyo of Chitungwiza Council said that there is no 27737 in Unit C."

When the chamber application was placed before MANZUNZU J, the learned judge raised a query on 20 October 2020 and stated:-

> "This is a matter in which the applicant should attempt to serve notice of set down through the Sheriff at the first respondent's last known address as provided for by the respondent's ..... legal practitioners. Service can also be attempted at 26530 Unit L, Seke, it being the address of the property awarded to him in case number HC 9080/12."

The applicant filed an affidavit in answer to the learned judge's query and indicated that House Number 26530 Unit L was still in the possession of and occupation by the applicant and her mother, the surviving spouse of Rodgers Makunura and that the first respondent did not reside at that address.

In the meantime, the Registrar had on 13 April 2021 dismissed this application on the basis that the applicant Melody had failed to timeously rectify the judge's query. The Registrar indicated that in terms of practice directive 2/16, para 3.2, the application HC 5728/20 had accordingly been dismissed. Although the applicant's legal practitioners persisted that the query had been addressed within the 30 days of raising the query, the Registrar was steadfast on his position.

Case Number HC 931/23

It is the current application. The applicant Melody decided to abide the Sheriff's advice to dismiss the application HC 5728/20. The applicant then filed this chamber application for reinstatement of case number HC 5728/20 following the dismissal by the Registrar.

The applicant gave a rundown of the paper trial in the matter. The applicant explained that after the rescission application was removed from the roll, there was compliance with the directive of MANZUNZU J to also attempt service on the first respondent at the address of the property in dispute. The applicant averred that following the directive aforesaid, she served the notice of set down. However by the time service at Number 26530 was effected, the 30 day notice given by the Registrar to rectify the first query on service had lapsed.

What exercises my mind is whether or not the applicant can seek reinstatement of the application which the Registrar dismissed in terms of Directive 2/2016. The directive reads as follows:

> "**PRACTICE DIRECTION 02/2016**
> DEALING WITH QUERIES IN CHAMBER APPLICATIONS
> 1. **Application**
> This Practice Direction applies to the Supreme Court and High Court of Zimbabwe.
> 2. **General Note**
> In order to ensure that litigants prosecute their matters to finality, the following changes to the current practice takes effect from the 1st of September, 2016.
> 3. **Queries in Chamber Matters**
> 3.1 In determining the fate of a chamber application a judge may raise such queries as he or she may consider pertinent to the disposal of the application.
> 3.2 Any query raised in terms of subparagraph (3.1) shall be attended to promptly, and in any event, not later than 30 days from the date on which the query was raised.
> 3.3 Where a query so raised by a judge has not been attended to within the period stipulated in subparagraph (3.2) the chamber application shall be dismissed by the Registrar.
>
> Hon Mr Justice G.G. Chidyausiku
> **Chief Justice**."

It is common cause that in dismissing the chamber application HC 5728/20, the Registrar acted in terms of the provisions of para 3.3 of the quoted Directive. The applicant had failed to attend to the query by MANZUNZU J within 30 days as required by the provisions of para 3.2 of the Directive. Directive 2/2016 does not provide for the recourse of reinstatement following upon the dismissal envisaged in para 3.3. The applicant does not in case number HC 5728/20 allege irregularity by the Registrar in invoking the provisions of Directive 2/2016 upon dismissing application HC 5728/20. Were such the case, the decision of the Registrar would be subject to review. The question then is, can a matter dismissed in terms of para 3.3 of the Directive be reinstated.

It must be noted that Practice Directive 2/2016 has been incorporated in the current High Court Rules S.I. 202/2021 which were promulgated on 23 July 2021. Paragraph 3.1, 3.2 and 3.3 are incorporated respectively as r 60 subrules (15); (16) and (17) in that order. Application HC 5728/20 was filed before the new rules S.I 202/2021 came into force. As with directive 2/2016, the current rules do not provide for a recourse of reinstatement after dismissal of a chamber application by the Registrar in terms of r 60(17).

From a practical point of view, by issuing a query the judge would have dealt with the chamber application in part and become seized with it. The failure to answer a query as provided for in the Directive 2/2016 in para 3.2 and 3.3 renders the chamber application liable to a dismissal comparable to a dismissal for want of prosecution. By not providing for reinstatement of the dismissal application, the rule maker who must be taken as having been perspicacious of the omission to provide for the relief of reinstatement of the dismissal application must be taken as not having intended that the dismissed application be reinstated by application made for the purpose.

The dismissal for want of prosecution in this sense does not necessarily end the case because it is not a judgement on the merits. The applicant gets its case dismissed for non-activity or default in addressing a query raised by the judge in order to give a final determination to the chamber application. The applicant can refile the suit but cannot reinstate the dismissed one. The dismissal envisaged by the Practice Direction is not done at the instance of the respondent. It is done as part of the managing or regulating the process of court and the justice administration.

In considering whether or not reinstatement may be applied for and granted or refused, I considered the provisions of Practice Direction 3/2013 which applies to the interpretation, application and effects of the terms “struck off the roll, postponed *sine die* and removed from the roll.” That Practice Direction states that where a mater is struck off the roll, a judge may on application and for good cause, reinstate the matter, on such terms as he deems fit. In relation to matters postponed *sine die* or removed from the roll, the reinstatement or set down on the roll can only be done upon application made to the court and granted. The point I therefore make is

that the intention behind the Directive is that where a matter is to be managed in a particular manner, the Directive should provide for that. Where the Directive is silent as with the case of Practice Direction 2/2016 in relation to a dismissed matter, then reinstatement is not contemplated.

The Practice Direction 2/2016 was introduced in order to manage the handling of chamber applications to ensure that they are disposed of timeously in an orderly manner. The time lines given for responding to a query by the judge must be strictly observed. Where the time cannot be met, then an extension of time should be sought before the lapse of the 30 days to avoid the automatic dismissal envisaged in para 3.3 because once the dismissal has been made by the Registrar, that marks the closure of that chamber application and the defaulting party would have to make a fresh application if advised. The Directive therefore places litigants and legal practitioners on the alert that where a judge has given directives or queries to be addressed by the applicant in a chamber application, a failure to do so within the period provided for in the Directive results in an automatic dismissal of the chamber application by hand of the Registrar. The remedy of reinstatement is not provided for and is not available in such cases.

In consequence, I dispose of this application as follows:

IT IS ORDERED THAT:

(i) The application HC 931/23 is incompetent and is hereby dismissed.

(ii) For the avoidance of doubt, the dismissal of the application HC 5728/20 by the Registrar for applicant's failure to address the judges query raised therein within 30 days provided for in Practice Direction 2/2016 remains extant.

Thondhlanga and Associates, applicant's legal practitioners