

SAMUEL NCUBE
versus
SHERIFF OF ZIMBABWE
and
PEOPLE'S OWN SAVINGS BANK
and
EMILIAH TENDAI SIGAUKE
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 27 JUNE 2018 AND 26 JULY 2018

Opposed Application

Applicant in person
Mrs J Mugova for the 2nd respondent
S Tsumele for the 3rd respondent

MOYO J: This is an application wherein the applicant seeks the following order:

- 1) That the sale by private treaty concluded between the 1st and 3rd respondents on 4 August 2014 and in respect of stand No. 14475 Selborne Park Bulawayo be and is hereby set aside.
- 2) The deed of transfer No. 655/15 registered in favour of 3rd respondent on 23 April 2015 be and is hereby cancelled.
3. The deed of transfer No. 883/04 registered on 16 March 2004 be and is hereby renewed.
- 4) The 4th respondent be and is hereby directed, in respect of the relevant documents, to make the endorsements and entries necessary to give effect to paragraph 3 of this order.

- 5) In the event that applicant had been evicted from stand No. 14475 Selborne Park, Bulawayo, it is ordered that he be reinstated immediately by giving vacant possession of the said property.
- 6) Costs at an attorney and client scale if this matter is opposed.

The second respondent raised several points *in limine* but one that has the effect of disposing of the matter is the one on *res judicata*. I say so for the one on an additional affidavit having been filed without the leave of the court does not have the effect of disposing of the matter as that additional affidavit can still be expunged from the court record with the effect that the proceedings are dealt with on the merits but without that additional affidavit.

The rest of the points *in limine* that is, that the application is an abuse of court process and that the application is predicated on dishonesty, are not points that would dispose of the matter at this stage, and they in fact are issues on the merits in my view as they are relevant to the issue of costs.

The only other point *in limine* that has been raised which has the effect of perhaps disposing of the matter at this stage, if upheld, is that of dirty hands on the part of applicant as he has failed to honour an order for costs against him before this court on a previous matter. In answer to that, the applicant stated that his house was sold in execution by first respondent and he was not made aware that the amount due did not cover costs that were due to the second respondent. I would thus not deal with this point due to the potential factual dispute that goes with it.

I will only deal with the aspect of *res judicata*.

The facts of this matter are that applicant's house was sold by the first respondent in execution of an order granted by this court in favour of the second respondent. In fact applicant had his house mortgaged by second respondent as security for a loan. When the loan account was not serviced in accordance with the agreement between the parties, the mortgage bond on applicant's property was foreclosed through an order of this court, resulting in the sale in execution.

It would appear that in HC 1720/16, the applicant instituted a similar application seeking to set aside the sale in execution on common law grounds that he is still advancing herein. The

application in HC 1720/16 was dismissed for want of prosecution on 7 October 2016 in HC 2345/16. The applicant has reinstated the same application in HC 2165/17 which is the matter before me. Applicant does not dispute this factual point which in fact is a clear fact that can be discerned from the court records in HC 1720/16 and HC 2345/16.

In his answering affidavit, paragraphs 4 and 5 therein, applicant states as follows with regard to HC 1720/16.

“Ad paragraph 11

4. The matter referred to herein has been withdrawn and 2nd respondent has duly been notified of the withdrawal.”

“Ad paragraph 14-18

HC 1720/16 is an application that I made at the High Court which I subsequently withdrew and gave notification to all parties. Unbeknown to me, 3rd respondent had already made an application for and been granted an order for want of prosecution (*sic*). I only became aware of the order for want of prosecution when it was attached as an annexure in the present proceedings. I then went on to peruse the records at the High Court and found that indeed such an application had been granted and the application had been served on the lawyers Lunga Gonese.”

He then submits that he was not aware of the order dismissing HC 1720/16 for want of prosecution and that he is in the process of making an application for rescission of that judgment. Be that as it may, whether he was aware of the dismissal of the order, whether, Lunga Gonese did not act in his interests, whether he is in the process of launching an application for rescission of judgment, all that is irrelevant for the purposes of the point *in limine* relating to *res judicata* because this same matter was presented to this court in HC 1720/16 and was subsequently dismissed. Thus is as per applicant’s own admission as well as the contents of the pleadings in HC 1720/16 which confirm the situation as presented by second respondent.

The requirements for *res judicata* are as follows:

- 1) The previous matter must have been between the same parties.
- 2) The previous matter must be based on the same cause of action.
- 3) With respect to the same subject matter.

This is per the judgment of FRIEDMAN JP in *Bafokeing tube v Impala Platinum Ltd* 1999 (3) SA 517 (B).

Herbstein and Van Winsen Vol (1) 5th Edition stipulates that:

“A court must have regard to the object of the exception *res judicata* that it was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the concomitant deleterious effect of conflicting and contradictory decisions.”

The requirements for a plea of *res judicata* to be successfully made were also reiterated in the case of *Farai Nigel Chitsinde v Stanny Musa and others* HH 274/10. It is accordingly held herein that the point *in limine* relating to *res judicata* succeeds as the matter was clearly brought before this court in HC 1720/16 and was finalized through a court order. Whatever efforts applicant is making to rescind that order are neither here nor there as the order remains extant.

Applicant thus could not bring a determined matter to this court, without first rescinding the judgment therein which remains extant. Even if applicant had managed to rescind the judgment therein (which is near impossible to achieve), he would still have to either finalise the matter in that suit or withdrew it after rescission, for him to successfully launch a fresh application. It is noted however, that applicant has sued respondent in almost all for a being the Magistrates Court, the High Court, the Administrative Court and Constitutional Court. He just does not want to accept his fate and he keeps on dragging the respondents to court on matters, that are clearly either procedurally wrong or bad at law. Respondents have sought costs at a higher scale for this reason, that applicant does not want to count his losses and move on with his life, but he wants to keep the respondents in court by all means necessary. Mounting litigation similar to the previous case and having that challenged by the respondents in their opposing papers, but instead of doing the noble thing to withdraw and seeking instead to turn a blind eye to the obvious fatalities in his case, warrants that the applicant be ordered to pay punitive costs. The court is empowered to exercise its discretion and award punitive costs where: a litigant's behaviour amounts to stubbornness bordering on vexatiousness, where an application has been brought to court yet it is unnecessary, where an applicant is in abuse of court process, where there exists a grave defect in the pleadings and where proceedings were brought on ill-advised grounds. This is as per Herbstein and Van Winsen *The Civil Practice of High Courts of South Africa* 5th edition vol 2 at pages 972-973.

It is for these reasons that I will award costs at a higher scale, as I believe that applicant's situation can be classified as being the same as the many situations that I have alluded to herein that is sheer stubbornness, mounting proceedings on ill-advised grounds, and bringing unnecessary litigation. I thus find that punitive costs are warranted.

I accordingly uphold the point *in limine* on *res judicata*, the application is thus dismissed with applicant paying the costs on the legal practitioners and client scale.

Lunga Gonese Attorney's, applicant's legal practitioners

Mawere and Sibanda 1st respondent's legal practitioners

Dube-Banda Nzarayapenga and Partners, 3rd respondent's legal practitioners