

DEVINE HOMES (PVT) LTD
versus
THE SHERIFF AND 2 OTHERS

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 2ND and 17 April, 2004 and 2ND June, 2004

Mr *Chikumbirike*, for the applicant
Mr *Dube*, for the respondents

BHUNU J: Following my dismissal of the applicant's interlocutory application seeking my recusal in judgment number HH 92-2004 this is yet another application by the applicant seeking default judgment against the 1st respondent on the grounds that he is barred.

The 1st respondent is the Sheriff who initially sold in execution Lot 399 Highlands Estate of Welmoed in the district of Harare measuring 18.1743 hectares to the applicant. He later cancelled the sale and resold the disputed property to the 2nd respondent. At all material times the 1st respondent was acting in his official capacity and in the course of duty.

Dissatisfied with the cancellation of the sale the applicant sued both the 1st respondent and the 2nd respondent alleging that in cancelling the sale in execution the person of the Sheriff was acting corruptly. It now challenges the confirmation of the Sheriff's sale to the 2nd respondent.

Both respondents sought to defend the suite. Initially the 1st respondent was being represented by Mr *Mudenda* of the Civil Division of the Attorney-General's Office whereas the 2nd respondent was being represented by Advocate *DeBourbon*.

At a later stage upon realising that both respondents had a common defence it was decided that they be represented by the same lawyer. It appears this was meant to save costs. When Mr *DeBourbon* relocated to South Africa Advocate *Matinenga* took over.

Mr *Chikumbirike* now complains that the 1st respondent is supposed to be a neutral State official. Teaming up with the 2nd respondent and being represented by the same lawyer does not auger well with his official position of

neutrality. That might very well be so but I am not aware of any rule of law that bars the two from being represented by the same lawyer and indeed Mr *Chikumbirike* has not pointed out to any such rule.

I take the view that while it is undesirable for the two respondents to be represented by the same lawyer that does not affect their respective rights to be defended by a lawyer of their own choice. The choice to be represented by one lawyer in my view merely affects credibility and weight to be given to their respective defences and not the right to representation by a lawyer of their own choice.

I therefore find as a fact proved that 1st respondent was not in default. He was in fact represented by Advocate *Debourbon*, Advocate *Matinenga* and Mr *Dube* at all material times. The mere fact that the 3 lawyers also happened to represent the 2nd respondent in the same proceedings does not amount to default on the part of the 1st respondent.

It is common cause that when sued the 1st respondent did not file notice of opposition and opposing affidavits inform 29A as is required by Rule 232 of the High Court Rules.

Rule 233 provides that where the respondent fails to file notice of opposition and opposing affidavit within the prescribed time limit then he is barred.

Mr *Chikumbirike* now claims that the 1st respondent did not comply with the said rules within the prescribed time limit. He is now barred and his client is entitled to default judgment against the 1st respondent. That may very well have been so had the 1st respondent been an ordinary litigant.

In keeping with the traditions and practices of this court the 1st respondent filed a Sheriff's report. It is accepted that in the normal run of things when cited the Sheriff does not file opposing papers. He prepares a report for the benefit of the court detailing the steps he took in executing his duties. This is consistent with his position of neutrality to file opposing papers would amount to leaning in favour of the other contesting party.

While accepting that normally when cited the Sheriff files a report and not opposing papers Mr *Chikumbirike* nevertheless argues that this case ought to be distinguished from ordinary cases because the Sheriff is not being cited in his nominal capacity but in his substantive capacity.

With all due respect, I am not aware of any tradition, rule of law or practice stipulating that where the Sheriff is cited in his substantive capacity as

opposed to nominal capacity he is obliged to file notice of opposition and opposing affidavit in terms of Rule 232 of the High Court Rules.

That being the case the application cannot succeed. It is accordingly ordered that the application for default judgment against the 2nd defendant be and is hereby dismissed with costs.

Chikumbirike & Associates, the plaintiff's legal practitioners
Dube, Manikai and Hwacha, the respondent's legal practitioners