

RABCO INVESTMENTS (PVT) LTD
versus
BULAWAYO CITY COUNCIL
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 30 MAY 2018 AND 21 JUNE 2018

Civil Trial

T Ndlovu for the plaintiff
R Moyo-Majwabu for the 1st defendant

MOYO J: Plaintiff instituted these proceedings seeking an order against the defendants as follows:

- (a) An order for the claim that judgment under HC 3088/13 is hereby declared fully paid by plaintiff to 1st defendant.
- (b) An order that the 1st defendant be and is hereby stopped from execution the court order under HC 3088/13.
- (c) An order that the 2nd defendant is interdicted from transferring property known as stand number 1116 Bulawayo Township situate in the district of Bulawayo to anyone and/or if such transfer has occurred it be declared *void ab initio*.
- (d) An order that the defendants pay the costs of suit.

The facts of this matter are that plaintiff is a corporate entity within the municipal jurisdiction of the first defendant. It therefore pays rates and other ancillary charges to the first defendant as the local authority in the area within which plaintiff operates. Plaintiff neglected and or failed to pay the rates due to first defendant over some period of time. First defendant ended up litigating against plaintiff in HC 3088/13.

First defendant later obtained judgment against plaintiff in HC 3088/13. Pursuant to that judgment, first defendant then sought to execute against plaintiff's immovable property namely stand 1116 Bulawayo Township situate in the district of Bulawayo. The property was put on auction by the sheriff on 6 November 2015.

In the meantime first defendant had been running an incentive policy where one would get a discount for offering to pay 50% of their arrears. The plaintiff owed the first defendant about \$38 000-00 Mr George Ratisayi, plaintiff's manager gave viva voce evidence on behalf of plaintiff to the effect that on 9 November 2015 he collected \$38000-00 from his boss and went to clear plaintiff's arrears. He was attended to by a Mr Hikwa who offered him the 50% discount as per the first defendant's discount incentive applicable at the material time to all those people who cleared 50% of their rate arrears. He paid and was given a receipt and he left. Their account had already been handed over to legal practitioners for collection but they decided to go to pay at first defendant's premises as first defendant's employees said that they could pay there and then go and show the lawyers the receipt. Plaintiff later realized that first defendant had reversed the discount leading to the matter before this court. Asked if, when he paid, Mr Hikwa knew that the plaintiff had a judgment entered against them, Mr Ratisayi said he need not tell Mr Hikwa that as Mr Hikwa knew that fact because he occasionally would visit plaintiff's premises so he was privy to the plaintiff's circumstances in relation to the debt owed to first defendant. He said they had seen the incentive through the newspapers and they had applied through the first defendant's lawyers but to no avail.

I note that there are material discrepancies in the plaintiff's case and I will set them out here under.

- 1) Mr George Ratisayi says in his evidence in chief, that he went to first defendant's premises with the whole amount that was due to first defendant that is \$38000-0 and that he never asked for the discount at that material time but that the first defendant's employees, particularly a Mr Hikwa, offered him the discount.

However, in plaintiff's declaration paragraph 7 thereof plaintiff pleads thus:

"On or about 15 November the plaintiff approached 1st defendant. The plaintiff told 1st defendant that there is a judgment against the plaintiff, however, the plaintiff would like to take advantage of their discount policy so that it could clear its debt against 1st defendant."

There is a material discrepancy here in that Mr Ratisayi is the one who went to pay at the first defendant's offices, he avers that first defendant offered them a discount that they were not even seeking on the day in question as they wanted to clear their arrears, yet in the declaration,

the very basis for plaintiff's claim it is intimated that they set upon a mission to apply for that discount on the day in question.

- 2) Mr Ratisayi says there was no need for him to tell the first defendant's employees that the plaintiff had a judgment against it for the amount in question as Mr Hikwa offered them the discount with full knowledge of the judgment debt and attachment as he would occasionally come to their offices and was therefore privy to the circumstances of their case. However, in paragraph 7 of the declaration as quoted above, it is specifically averred that plaintiff told the first defendant that they had a judgment against them when they applied for the discount. Even under cross examination Mr Ratisayi also said the first defendant's employees said he need not worry about the attachment by the sheriff since the sheriff had already attached plaintiff's immovable property for the same debt.

Mr Ernest Ngwenya gave evidence for the first defendant and he told the court that those with accounts that had been handed over for collection by the lawyers and those with judgment against them were not eligible for the scheme and that therefore plaintiff was not eligible which is why the error with their account was corrected as they should not have been offered the scheme discount in the first place.

I hold the view that plaintiff has not made a case for the relief sought because of the following reasons:

- 1) Plaintiff's case is fraught with discrepancies on material points as I have already shown herein, so plaintiff is not being sincere, they sneaked and wove themselves into a scheme they knew they were not entitled to because, they had applied to the lawyers and had not gotten any response.
They also knew that their property had been attached and was due for auction on 6 November 2015 and on 9 November 2015, when Mr Ratisayi went to pay at first defendant's offices, he must have known about the sale in execution had taken place on 6 November 2015. In fact the sale in execution that having taken place on 6 November 2015, and them going to pay on 9 November 2015, it shows that they were propelled into action by the sale in execution.
- 2) The scheme itself was crafted by the first defendant. It is the first defendant's scheme. It is the first defendant which determined the criteria of eligibility or otherwise into the

scheme. The terms and conditions of the scheme were crafted and are known by the first defendant. Even Mr Ratisayi when he was asked if he disputed that per the terms and conditions of the scheme by first defendant, plaintiff did not qualify, he honestly said that he could not dispute that. It is the first defendant which crafted the scheme, it is the first defendant which determines who enters the scheme and who does not.

It is not in dispute that those accounts already handed over to lawyer or litigated against did not qualify for the scheme. Plaintiff bulldozed and forced itself into a scheme it did not qualify for. Plaintiff now seeks this court to uphold a situation that has no basis to exist. For plaintiff to be eligible to the scheme, it must meet the full criteria as crafted by the creators and owners of the scheme. This court cannot impose on a scheme, a person or an entity that does not qualify. For a right to exist on plaintiff's side, the plaintiff must plead that it fully met the criteria of the scheme and that it is and discriminated against by being excluded from the scheme.

Plaintiff however, accepts that it did not qualify but it wants this court to force the first defendant to avail to it a privilege it did not qualify for. This court does not interfere with the terms and conditions of a scheme crafted by an entity which has the prerogative to create and enforce its own schemes. This court only interprets rights that clearly exist in any given situation. I hold the view that plaintiff, not having met the criteria for the scheme, first defendant was indeed within its rights to correct the anomaly of awarding plaintiff a discount it obtained when it was in fact not entitled to it.

Plaintiff seeks an order that I declare, the judgment debt in HC 1088/13 paid in full, I cannot do so as plaintiff's own evidence is that it did not pay the amount owing in full on the pretext that it is eligible to the discount scheme when in fact it was not.

I also cannot stop the attachment, by the sheriff of stand 1116 Bulawayo as that attachment is in pursuit of a lawful execution of a judgment of this court. I absolutely have no reason to interfere with that process.

It is for these reasons that I find that plaintiff has not made a case for the relief sought.

Plaintiff's claims are accordingly dismissed with costs.

James, Moyo-Majwabu and Nyoni, 1st defendant's legal practitioners
Sansole and Senda, plaintiff's legal practitioners