BELLA ZIBOWA

And

BLESSING ZIBOWA

Versus

ISAIAH SHONHIWA

And

WILLING SHOKO

And

TERRENCE KENNY

And

SHERIFF OF THE HIGH COURT N.O.

And

REGISTRAR OF DEEDS N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 21 DECEMBER 2022 & 23 FEBRUARY 2023

Opposed court application

W. Ncube, for the applicants
Adv. P. Dube for the 2nd respondent
Ms. S. Lusinga, for the 6th respondent

Introduction

1. This is a court application for review wherein the applicants seeks an order couched as follows:

    i. That the purported sale of Lot 21A Burnside, situate in the district of Bulawayo measuring 5635 square metres (the property) to second respondent be and is hereby declared illegal, unlawful and null and void and of no force or effect.

ii. The decision of the 4th respondent to sign the transfer documents to transfer the property be and is hereby declared unlawful, null and void and of no force and effect.

iii. The transfer of the property to 2nd respondent be and is hereby declared null and void.

iv. Deed of Transfer No. 1497/2018 issued in favour of 2nd respondent dated 26th September 2018 be and is hereby declared null and void and accordingly cancelled.

v. The 5th respondent be and is hereby ordered to reinstate applicants' Deed of Transfer No. 2731/05 dated 22 September 2005.

vi. 1st and 2nd respondents to pay the costs of suit on an attorney and client scale.

vii. 3rd and 4th respondents to pay costs of suit, only if they oppose this application.

2. For the sake of convenience, I shall refer to the parties either by their names or by their respective designations in this court. The application is opposed by the second (Shoko) and sixth respondents (Bank). The first respondent (Shonhiwa) filed a notice of opposition and opposing affidavit, however did not file heads of argument and did not prosecute his opposition further. The fourth respondent (Sheriff) filed reports in this matter and other cross reference matters, in essence all the reports deal with the facts of this case. The third respondent (Kenny) did not participate in this application. The fifth respondent (Registrar of Deeds) neither filed any opposing papers nor participated at the hearing of this matter. I take it that it has taken a position that it shall abide by the decision of this court.

The background

3. This application will be better understood against the background that follows. On the 16 July 2014 in case number HC 1043/14 Shonhiwa obtained an order in the sum of US$51 000.00 against the second applicant (Blessing Zibowa). Paragraph two of the order declared that Stand number 50 Southway Road, Burnside, Bulawayo (property) be specially executable by private treaty as it was pledged as security. On the 14th June 2017 Kenny obtained an order in the amount of US$14 500.00 against both the first and second applicants, for completeness the two are husband and wife. On the 30th August

2017 Kenny sued out a writ of execution against the immovable property of the applicants. On 16 March 2018 the Sheriff placed under judicial attachment the immovable property of the applicants.

4. In the meantime on the 18th September 2017 Messrs Mashayamombe and Co. Attorneys at Law (Messrs Mashayamombe) in pursuance of the order in HC 1043/14 and on the instructions of the judgment creditor Shonhiwa appointed Ken Estate Agents "as sole agent to forthwith negotiate the sale and disposal of the above property subject to the purchase price being equivalent to or above the estimated market value indicated in your evaluation report." On the 22nd September 2017 Shoko signed a written offer to purchase the property for $80 000.00. On the 25 October 2017 Shonhiwa sued out an *ex parte* application in case number HC 2818/17 and obtained an order couched as follows:

   i. That leave is granted to join the Deputy Sheriff, Bulawayo as 2nd respondent in proceedings under cover of case number HC 1043/14.
   ii. The 2nd respondent (Deputy Sheriff) be and is hereby authorised to take all steps and sign all documents as may be necessary to cause the transfer of rights, title and interest in Stand No. 50 Southway Road, Burnside, Bulawayo to any third party to whom the property is sold by private treaty in pursuance of court judgment in case HC 1043/14.
   iii. There shall be no order as to costs.

5. On 16 March 2018, and at the instance of the writ sued out by Kenny the Sheriff attached the property, and set out the 11 May 2018 as the date the property would be sold by public auction. On 8 May 2018 the applicants filed case number HC 1325/18 seeking the suspension of the sale set down for the 11 May 2018. According to the Sheriff in his Report date stamped 20 November 2018 the sale was cancelled because of the application filed by the applicants and a letter received from Messrs Mashayamombe in which the lawyers attached a court order declaring the property especially executable and that it was to be sold to Shoko by private treaty for US$80 000.00.

6. On the 30 April 2018 Shonhiwa through his lawyers Messrs Mashayamombe wrote to the Sheriff requesting that he signs all necessary papers to cause the property to be transferred to Shoko. Messrs Mashayamombe attached to their letter necessary papers for the transfer and copies of court order in HC 1043/14 and HC 2818/17. The execution of Kenny's writ was abandoned and the Sheriff sought Kenny's consent to sell the property by private treaty and such consent was granted.

7. On 11 June 2018 Belia Zibowa as co-owner of the property filed case number HC 1649/18 and obtained the following order:

   i. That the application for correction of a judgment be and is hereby granted.
   ii. The judgment of this court dated 16th of July 2014 under HC 1043/14 be and is hereby corrected on paragraph 2 only to read:
   "An order declaring half share of stand No. 50 Southway Road, Burnside, Bulawayo specialty (*sic*) executable by private treaty as it was pledged as security."
   iii. The judgment of this court dated 8th day of November 2017 be corrected to read:
   "The 2nd respondent be and is hereby authorised to take all steps and sign all documents as may be necessary to course (*sic*) the transfer of rights, title and interests in half share of stand No. 50 Southway Road, Burnside, Bulawayo to any third party to whom the half share of the property is sold by private treaty in pursuance to court judgment in case No. 1043/14. "
   iv. No order as to costs.

8. On the 26th September 2018 the property was transferred to Shoko. The Bank passed mortgage bond over the property. It is against this background that applicants have launched this review application seeking the relief mentioned above.

Preliminary objections

9. Adv. *Dube* counsel for Shoko argued that the non-joiner of Messrs Mashayamombe is fatal to this application. On the other hand Ms. *Lusinga* counsel for the Bank argued that this application is fatally defective for want of compliance with r 260 (1) of the

High Court Rules, 1971. These were the rules applicable at the time of the filing of this application. These points, therefore, need to be considered *in limine*.

Non-joinder

10. Adv. *Dube* argued that the non-joinder of Messrs Mashayamombe in this matter is fatal to this application. It was submitted that Shoko was not involved with the litany of illegalities and wrongs allegedly committed by Messrs Mashayamombe and he has no answer to proffer in respect of such illegalities. Counsel submitted further that Messrs Mashayamombe consented to the order in HC 1649/18, but did not avail to the Sheriff a copy of such order, such that when the Sheriff signed the transfer documents he was not aware of the existence of such an order. Messrs Mashayamombe were the conveyancers of the property. Counsel argued further that Messrs Mashayamombe should have been joined so that they explain their conduct that has a bearing to this matter. Counsel submitted further that the non-joinder of Messrs Mashayamombe is prejudicial to Shoko in that the conduct of the lawyers is sought to be used to affect his purchase of the property.

11. Prof. *Ncube* counsel for the applicants submitted that in terms of r 87 of the High Court Rules, 1971 no cause may be defeated by the non-joinder of a party. Counsel argued further that this court may determine the issues in disute so far as they affect the rights and intersts of the parties to this matter. Counsel submitted further that Messrs Mashayamombe remain the legal practitioners of record for Shohniwa in this matter. They were served with all the processes including a notice of set down. The lawyers had notice of whatever is alleged they had done. Counsel argued that this preliminary point has no merit and must be dismissed.

12. On the facts of this case I agree with Prof. *Ncube* that this court may determine the issues in dispute in so far as they affect the rights and interests of the parties to this

matter. The argument that the non-joinder of the Messrs Mashayamombe is prejudicial to Shoko in that the conduct of the lawyers is sought to be used to affect his purchase of the property has no merit. Even if this is so, this cannot be a basis of complaining about a non-joinder. I say so because a party is joined in proceedings not to protect the interests of another party, but itself. A complaint about a non-joider must be anchored on the prejudice of the party that has not be joined. A complaint that the non-joinder of Messrs Mashayamombe is prejudicial to Shoko is of no moment. It is of no consequence. It does not require Messrs Mashayamombe to be litigants to protect the interests of Shoko. He is before court and it is incumbent upon him to protect his own interest.

13. Again regarding Messrs Mashayamombe the lawyers had notice of all the allegations and *innuendos* raised against them. I say so because on the 20 November 2020 Messrs Mashayamombe filed a notice of opposition for Shoko, and on the 1st December 2020 Messrs Mashayamombe filed a notice of opposition for Shonhiwa. Shoko's notice of opposition to this application was drawn and filed by Messrs Mashayamombe. They were his legal practitioners then. The lawyers were served with a detailed answering affidavit and heads of argument. The lawyers are still on record as legal practitioners for Shohniwa.

14. Notwithstanding that Messrs Mashayamombe have not been joined as a party to this matter, they are clear about the allegations and the contentions of the applicants. They read and understood the application, and filed the two notices of opposition. It is not like the applicants are raising serious allegations behind the backs of the law firm. Not at all. On the facts of this case I take the view that Messrs Mashayamombe is a law firm, it had notice of the application and all proccesss filed thereafter, surely if the applicants peddled untrue statements about or of them they could have taken steps to protect their position. Such was not done.

15. In the circumstances this preliminary point relating to the non-joinder of Messrs Mashayamombe has no merit and is dismissed.

Rule 260 (1) of the High Court Rules, 1971

16. Ms. *Lusinga* argued that this application is fatally defective for want of compliance with r 260 (1) of the High Court Rules, 1971. The rule says:

> ***260. Preparation and lodging of record and fees***
>
> (1) The clerk of the inferior court whose proceedings are being brought on review, or the tribunal, board or officer whose proceedings are being brought on review, shall, within twelve days of the date of service of the application for review, lodge with the registrar the original record, together with two typed copies, which copies shall be certified as true and correct copies. The parties to the review requiring copies of the record for their own use shall obtain them from the official who prepared the record.

17. The decision sought to be reviewed is that of the Sheriff. The Sheriff submitted a report regarding this matter. The report qualifies as a record for the purposes of r 260 (1). In the circumstances this preliminary point has no merit and is refused.

18. I now turn to consider the merits of this matter.

The merits

19. The applicant's grounds of review are set out in the application. In summary, the grounds of review raised are these:

i. The decision of the Sheriff to sign transfer documents and to transfer the applicants' property known as Lot 21 A Burnside, situate in the district of Bulawayo measuring 5 635 square metres (the property) was unlawful and illegal and beset with procedural irregularities. In summary the grounds for review are elaborated as follows:

   a. That the property was transferred without any judicial sale of it having been made or conducted as required by the law and the rules of court.
   b. That the purported private treaty agreement of the sale of the property is a legal nullity in that it was done by or under the authority of the

judgment creditor or by agents of the judgment creditor in violation of the law and the rules of court.

c. That the first applicant's half share of the property was sold by private treaty without her consent, without a court order, without a prior public auction at which the property failed to attract a reasonable bid price.
d. That in making the purported private sale and securing the transfer of the property the respondents ignored and / or violated an order of court excluding the first applicant's half of the property from any sale of it by private treaty.

20. Voluminous papers were filed of record, the court was also referred to a number of cross-reference applications and court orders granted in respect of the cross reference applications. Some of the cross-reference matters are these; HC 1043/14; HC 2818/17; HC 1649/18; HC 1325/18; and HC 836/22. In determining this matter I took note of the pleadings and documents filed in the cross-applications. I did so on the basis of the authority in *Mhungu v Mtindi* 1986 (2) ZLR 171 (SC), where it was held that in general a court is always entitled to make reference to its own records and proceedings and to take note of their contents. The applicants' further filed supplementary heads of argument. When the matter was argued before this court the parties abided by their heads of argument, and made oral submissions to emphasise certain points.

Whether there is a decision or adminsitraive action by the Sheriff that is sought to be reviewed

21. Adv. *Dube* counsel for the second respondent argued that the applicants have failed to establish the very first requirement for judicial review; *viz* a decision by the Sheriff. Counsel submitted that the departure point in an application for review is that there must be a decision that is sought to be reviewed. Counsel argued that without a decision there can be no review, and that in this case the Sheriff made no decision that is reviewable by this court. It is contended that the Sheriff made no decision, he signed the transfer papers of the property on the basis of court orders. Counsel argued that it is this court that in HC 1043/14 ordered that the property be sold by private treaty, and in

HC 2818/17 this court ordered that the Sheriff take all steps and sign all documents as may be necessary to cause the transfer of rights, title and interest in Stand No. 50 Southway Road, Burnside, Bulawayo to any third party to whom the property is sold by private treaty in pursuance of court judgment in case HC 1043/14. Counsel submitted that the Sheriff did not made a decision to sign the transfer papers, it is this court that authorised him to do so. In essence counsel argued that what is sought in this application is a review of the orders of this court, and this court cannot review itself, therefore there was nothing for this court to review.

22. When counsel's attention was drawn to the order in HC 1649/18 which confined the transfer to the half share of the second applicant, counsel argued that her argument remains the same that the review jurisdiction of this court has not been engaged. It was contended that the Sheriff did not make a decision to sign the papers, he was authorised by the court to do so. Counsel argued further that the Sheriff was joined in HC 1043/14 by the order of this court in HC 2818/17, and therefore he was no longer acting in his capacity as the Sheriff but as a litigant. There was no need for a writ of execution because the Sheriff was now a litigant and he had to act as *per* the order of the court. It was argued that the court orders made the issuance of a writ of execution not necessary.

23. Prof. *Ncube* argued that what is sought to be reviewed is the decision of the Sheriff to transfer the property to the second respondent without a valid sale. Counsel argued further that what is not sought to be reviewed is the court order that clothed the Sheriff with the authority to transfer the property to Shoko. But the court order did not permit the transfer of the property without a valid and lawful sale.

24. This court has neither jurisdiction nor competenace "to review itself" as it were, i.e. to review the decisions of the High Court. This court cannot review the orders obtained in HC 1043/14 and HC 2818/17 as amended in HC 1649/18. These orders are extant. The question that arises is whether the Sheriff made a decision that is susceptible for review. Without such a decision susceptible for review there will be nothing for this court to review in this application. Put differently, for the review jurisdiction of this court to be engaged there must be a decision made by the Sheriff.

25. A decision is the gateway to the review jurisdiction of this court. In *Bhugwan v JSE Ltb* 2010 3 SA 335 (GSJ) the court placed under a strong lens the issue of what, for the purposes of review constitutes a reviewable decision as distinct from an inchoate decision that is not susceptible to review. The existence of a decision is the very first question to be asked and answered in any review proceeding: what is the decision which is sought to be reviewed and set aside? Absent such a decision, the application for a review is still-born.

26. The first inquiry is whether the Sheriff made any decision that is reviwable? The Sheriff made a decision to sign the transfer papers into the name of Shoko. It is clear that in signing the transfer papers the Sheriff did not act on the strength of a writ sued out by Shonhiwa. In fact Shonhiwa did not sue out a writ of execution answering to the order in case number HC 1043/14. Again the transfer of the property to Shoko was not in pursuance of a writ of execution sued out at the instance of Kenny. The sale at the instance of the writ sued out by Kenny was scheduled for the 11 May 2018 and the sale was cancelled. The Kenny writ was suspended, and he consented to participate in Shonhiwa private sale. He filed his writ to participate in the proceeds of the sale. The Sheriff in his report says the sale was directed by the court to be a private treaty sale. The instructions issued to his office were with regards to the transfer of the property. He contends that he signed the transfer documents as ordered by the court. The Sheriff made a decision that is clearly located outside the court orders. He made a decision to sign the transfer documents in the absence of a writ of execution and without a valid sale in execution. The court did not order him to sign the transfer papers in the absence of a writ of execution and without a valid sale in execution. What is sought to be reviewed is the decision to transfer without a valid sale, not the court order authorising the signing of the transfer of the property. A clear distinction has to be drawn in this regard, i.e. the decision to transfer the property without a valid and lawful sale and the court order authorising the Sheriff the transfer the property. It is the former decision that is sought to be reviewed. The answer to the question whether the Sheriff made a decision that is susceptible for review, is that he did.

Whether the property was transferred without any judicial sale

27. The applicants contend that the property was transferred without any judicial sale of it having been made or conducted as required by the law and the rules of court. That there was no judicial sale of the property in that there was no writ of execution, and that the transfer of the property to Shoko was thus unlawful and in contravention of the law and the rules of court.

28. Rule 322 of the High Court Rules, 1971 provides thus:

> The process for the execution of any judgment for the payment of money, for the delivery up of goods or premises, or for ejectment, shall be by writ of execution signed by the registrar and addressed to the sheriff or his deputy, in accordance with one or other of Forms Nos. 34 to 41.

29. Rule 322 provides in peremptory language that the process for the execution of any judgment for the payment of money shall be by writ of execution signed by the registrar and addressed to the sheriff or his deputy. The Sheriff does not act on the basis of a court order, there must be a writ of execution answering to the court order. The procedure in terms of which any judgment or order of the court is enforced is execution, and the Sheriff is the executioner. It is the writ that directs the Sheriff to execute on the property of the judgment debtor. The writ must contain a full and complete description of the nature, situation and address of the property to enable it to be traced and identified by the Sheriff, and must be accompanied by sufficient information to enable the Sheriff to give proper notice of the attachment to all interested parties.

30. In this case there was no writ of execution signed by the registrar and addressed to the sheriff for the sale in execution of the property. The Sheriff says he acted on the basis of the court orders and his role was limited to the transferring of the property to Shoko. In a letter dated 11 October 2018 the Sheriff says the sale was done outside his office, he was only involved in the signing of the transfer documents as *per* the court orders.

31. The court orders prescribe that the property had to be sold by private treaty, but did not sanction the by-passing f the peremptory and mandatory requirement of the issuance of a writ and sale of the property in terms of the law. No sale arising from judicial proceedings may be done outside the office of the Sheriff. The order that the property

be sold by private treaty, can only be executed by the Sheriff armed with a writ of execution. No other way. A writ of execution requires and directs the Sheriff to attach and take into execution the immovable property of the judgment debtor. Armed with a writ in terms of r 50A the Sheriff had to nominate an auctioneer to conduct the sale of the immovable property. The fact that the Sheriff is a party in HC 1043/14 is of no moment. Whether the Sheriff is a party or no party no to litigation, his duties are prescribed by the rules of court and the law. There is a reason why sale of property pursuant to a court order must be predicated on a writ of execution. A writ of execution ensures that there is administrative oversight throughout the process, right from the process of attachment to the transfer of the property to the purchaser. The transfer of the property to Shoko was invalid as it was predicated on a sale conducted without a writ of execution in violation of the rules of court.

Whether the property was sold by the judgment creditor or his agents

32. The applicants contend that the purported private treaty agreement of the sale of the property is a legal nullity in that it was done by or under the authority of the judgment creditor or by the agents of the judgment creditor in violation of the law and the rules of court. Was the property sold by the agents of the judgment creditor? On 18 September 2017 Messrs Mashayamombe wrote a letter to Ken Estate Egents, the letter says:

> In pursuance of the High Court order HC 1043/14 attached hereto and the subsequent evaluation of the aforementioned property by yourselves we hereby on the instruction of the judgment creditor Isaiah Shonhiwa appoint you sole agent to forthwith negotiate the sale and disposal of the above property subject to the purchase being equivalent to or above the estimated market value indicated in your evaluation report.

33. In case No. HC 2818/17 there is a copy of a written offer to purchase the property addressed to Ken Estates Agents. The offer was made on 22 September 2017. The offer was made by Shoko. He made an offer to pucharse for the sum of $80 000.00.

34. On the 5th October 2018 the applicants erstwhile legal practitioners wrote to the Sheriff enquiring about the following issues: when the sale was conducted; when the advert

was placed in a newspaper; when the notice to auction was done to the judgment debtor and who received the notice; when the highest bidder was confirmed in terms of rule 356, whether the judgment debtor was notified of the highest bidder in terms of rule 359, if so when such notification was done; if the sale was done in terms of rule 358 whether the judgment debtor was notified, if so when and upon who? The Sheriff's reply is telling, he says:

> We however cannot provide the documents you require as this was a sale done outside the Sheriff's office. The Sheriff was only involved in the signing of the necessary documents as orders by the High Court, HC 2818/17, Xref 1043/14. (My emphasis).

35. It is clear that the property was not sold in execution by the Sheriff. In fact he could not have sold the property because Shonhiwa had not caused the issuance of a writ of execution which could have directed the Sheriff to sell the property. The fact the the order in HC 1043/14 decreed that the property is "specially executable by private treaty as it was pledged as securirty" did not sanction the sale by the judgmemt creditor or his agents. The judgment creditor had no business in selling a property arising from a court order. The sale remained subject to a judicial sale to be conducted by the Sheriff in terms of the law.

36. In *Maparanyanga v the Sheriff of the High Court and Four Ors* SC 132/02 the court said:

> It hardly needs emphasising that in negotiating a sale of immovable property by private treaty in circumstances such as those obtaining *in casu* the Sheriff must always be conscious of the vested interest and rights that other people have in the property that he sells in execution, including that sold in a private treaty.

37. A sale in execution cannot be done outside the office of the Sheriff. The property ordered to be sold by private treaty must simply be sold by the Sheriff, and no one else. It is the Sheriff who must negotiate the sale. It is the Sheriff who must enter into an agreement with the purchaser. It is the Sheriff who must be at the centre of the sale. A property sold in execution by private treaty cannot be sold by the judgment creditor or

his appointed agents. It can't. I gree that the purported private treaty agreement of the sale of the property was irregular. It was invalid. It was unlawful.

Whether the sale of the 1st applicant's half share was sold in terms of the law

38. The applicants contend that Belia Zibiwa's half share of the property was sold by private treaty without her consent, without a court order, without a prior public auction at which the property failed to attract a reasonable bid price.The applicants contend further that in making the purported private sale and securing the transfer of the property the respondents ignored and / or violated an order of court excluding the first applicant's half of the property from any sale of it by private treaty.

39. In case no. HC 1649/18 Belia Zibowa sought an order excluding her half share from the sale and transfer of the property. The application was filed on the 11 June 2018 and on the 28 June Messrs Mashayamombe & Co. (the legal practitioners for Shonhiwa) addressed a letter to Belia Zibowa's legal practitioners and made the point that Shonhiwa was not opposed to the relief sought by the Belia Zibowa. On 5 July 2018 a Mr B Masamvu for Belia Zibowa and J Ndubiwa (Messrs Mashayamombe & Co.) appeared in court and the court granted the flowing order:

> That the application for correction of a judgment be and is hereby granted.
>
> The judgment of this court dated 16th of July 2014 under HC 1043/14 be and is hereby corrected on paragraph 2 only to read:
> "An order declaring half share of stand No. 50 Southway Road, Burnside, Bulawayo specialty (*sic*) executable by private treaty as it was pledged as security."
>
> The judgment of this court dated 8th day of November 2017 be corrected to read:
>
> "The 2nd respondent be and is hereby authorised to take all steps and sign all documents as may be necessary to course (*sic*) the transfer of rights, title and interests in half share of stand No. 50 Southway Road, Burnside, Bulawayo to any third party to whom the half share of the property is sold by private treaty in pursuance to court judgment in case No. 1043/14.
>
> No order as to costs.

40. On 21 August 2018 the Sheriff signed a Power of Attorney to make Transfer, and on 26 September 2018 the property was transferred to Shoko. At the time the Sheriff signed the transfer papers of the property, and at the time the property was transferred there was in existence an extant order of this court which in clear terms prohibited the transfer of Belia Zibowa's half share. The Sheriff transfered the whole property, including Belia Zibowa's half share, in clear contravention of an extant order of this court. In the circumsatnces Belia Zibowa's half share was sold and trasnfered in violation of an extant order of court. Such a decision violates the principle of legality and is reviewable and falls to be set aside.

The position of the 2nd respondent

41. Adv. *Dube* submitted that Shoko is a *bona fide* purchaser. This contention was contested by Prof. *Ncube*, who submitted that he is not a *bona fide* purchaser, even if he is such a purchaser such is irrelevant in this inquiry. The sale cannot stand because it is premised on a sale executed in contravention of the law, in that there was no writ of execution.

42. In his opposing affidavit the second respondent avers that he is a *bona fide* purchaser and that the property has been transferred into his name. He avers further that he purchased the property from the Sheriff, and he had no knowledge of any procedural irregularitie during the entire process of the sale. He disputes that the property was sold to him by Shonhiwa. He belived the Sheriff was acting in good faith and in terms of the law.

43. In the power of attorney to make transfer signed by Macduff Medega the Sheriff, he says he sold the property to Shoko for the sum of USD$80 000.00. It is not correct that it is the Sheriff who sold the property to Shoko, I say so because on 18 September 2017 Messrs Mashayamombe wrote a letter to Ken Estate Egents, appointing the estates agents on the instructions of Shonhiwa to forthwith negotiate the sale and disposal of

the property. As *per* the Sheriff's letter dated 18 May 2018 addressed to Messrs Mashayamombe the former advised that the proceedes of the sale be deposited with his office for the purposes of distributing such proceeds amongst other creditors and the relevant stakeholders i.e. ZIMRA. And the Sheriff in his letter dated 11 October 2018 says clearly that "this was a sale done outside the Sheriff's office." It is clear that Shoko did not purchase the property from the Sheriff, but from Shonhiwa and his agents. The Sheriff only effected the transfer of the property to Shoko.

44. Is the second respondent a *bona fide* purchaser? On the 21st September 2017 the second respondent affixed his signature to a supposed agreement of sale between himself as purchaser and the applicants as sellers. The supposed agreement is signed by him and the estate agent. It is not signed by the applicants. On the 22nd September 2017 the second respondent signed a written offer to purchase the property for $80 000.00. Prof. Ncube argued that the inference that this offer was made *post facto* to create a document to use in case HC 2818/17 is compelling. I agree. Otherwise is it impossible to explain how and why an offer was being made after the second respondent had already a day before affixed his signature to the agreement. The second respondent's offer was attached to the application in case HC 2818/17.

45. The applicants contend that the second respondent is not a *bona fide* purchaser. The contention is anchored on that the second respondent was fully aware that the Sheriff did not sell the property to him, and was also aware that the first applicant's half share could not be sold by private treaty as this contravened the terms of the amended order in HC 1043/14. The second respondent's contention that he purchased the property from the Sheriff is incorrect. He purchased it from Shonhiwa, the first respondent. In the opposing affidavit he goes at length trying to show that he bought the property from the Sheriff, but the facts of this case just show the opposite, that he puruchased the property from Shonhiwa.

46. On the 11th June 2018 the first applicant as co-owner of the property filed case number HC 1649/18 seeking the correction of the order in HC 1043/14 as read with the order in HC 2818/17 seeking the exclusion of her undivided share in the property from the operation of the orders in HC 1043/14 and HC 2818/17. On 7 July 2018 the application was granted by consent. Messrs Mashayamombe although representing Shonhiwa in

the application did not disclose that the property had already been sold to Shoko, neither did they alert the Sheriff of the order. The second respondent is entangled in all these issues. He cannot extricate himself from the conduct of Messrs Mashayamombe. On the facts of this case the second respondent cannot be said to be a *bona fide* purchaser.

47. The sale of the property was beset with irregularities. It was sold outside the framework of the law in that it was sold without a writ having been issued and that it was sold in clear violation of the order in HC HC 1649/18.

48. The second respondent contend that this court must take into account that the reliability and efficacy of sales in execution must be upheld. And that a judgment creditor forced to go to court to obtain satisfaction of his debts must be provided with just relief.

49. In *Maparanyanga v the Sheriff of the High Court and Four Ors* SC 132/02 the court said:

> It is contented for him that for public policy reasons a result allowing the sale *in casu* to be set aside would bring the entire system of judicial sales in execution into disrepute. It is submitted further in this regard that the public at large would lose entirely the confidence which it has had up to now in this well established device which or decades facilitated the recouping of debts owed to banks and the like. I am not persuaded, given the facts and circumstances of this case, that setting aside this sale would have the undesirable outcome described in the second respondents heads of argument.
>
> The Court is concerned with interpreting the law and dispensing justice. That being the case, and in relation to the subject of this case, a situation resulting in the system of judicial sales being brought into disrepute would clearly not be desirable. The purpose of sales in execution is, in law, quite also trite. The rules of the court and certain administrative measures, like the standard contract of sale *in casu*, are formulated with the object of ensuring that the purpose of such sales is achieved. The common law duties of officers involved in sales are where the common law, the rules of the Court and the administrative requirements of an office responsible for enforcing judgments are flouted, the Court would be failing in its duty if it condoned such disregard of the law and rules. It would be doing exactly that were it to allow the sale in question to stand.

> It is crucial, for the proper performance of their work, that officers of the law comply with, rather than pay lip service to, the procedures designed to guide them in the performance of their duties. Needless to say, strict adherence to such rules and procedures would enhance public confidence in the system of judicial sales.
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> When all is said and done, I am satisfied that the appellant proved his case and was entitled to judgment in his favour.

50. In *Kanoyangwa v Messenger of Court & Ors* SC 68/06 the court said:

> Although it is my finding that the equities do not favour a finding in favour of the appellant, I find it necessary to stress the point that the Court does not condone the blatant disregard of rules governing judicial sales, by the officers whose mandate it is to uphold the rules. Such disregard does have the undesirable effect, as correctly noted by the appellant, of bringing judicial sales into disrepute, and should be discouraged in the strongest terms.

51. In *casu* there was clear blatant disregard of the rules governing judicial sales. The first respondent or his agents had no right at law to sell the property to the second respondent. The Sheriff had no right to transfer the property sold in contravention of the requirements of the law. In the circumstances of this case the second respondent was either part of the shenanigans or was aware of such shenanigans. Either way he is caught up in this melee.

52. It is trite that the requirements for transfer are twofold: delivery effected by registration of transfer in the deed's office; and the existence of a real or lawful agreement, the essential elements of which are an intention on the part of the transferor to transfer the property and an intention on the part of the transferee to acquire ownership of the property. No lawful agreement exist in this case. In the absence of a lawful agreement, then ownership will not pass despite registration. In *CBZ Bank Limited v David Moyo & Another* SC 17/18 the court held thus:

> I must state that a deed of transfer or registration of cession is not conclusive proof of ownership or the rights of a cessionary. See the cases of *Young v Van Rensburg* 1991 (2) ZLR 149 (S) at 156 D-G and *Kassim v Kassim* 1989 (3) ZLR 234 (H) at 237 B-D. It simply raises a presumption in favour of the holder of the title deed or the rights of a cessionary until the claimant proves on a balance of probabilities that he innocently bought the property or cessionary rights from the owner of the property or cedent. See the case of *Cunning v Cunning* 1984 (4) SA 585 (T). In any event, the registration of transfer in the Deeds Registry or registration of cession at the offices of a local authority or Deeds Registry does not always reflect the true state of affairs. A title deed or registered cession is therefore *prima facie* proof of ownership or cessionary rights which can be successfully challenged. When the validity of title or registered cession is challenged, it is the duty of the court to determine its validity in order to make a ruling which is just and equitable.

53. In the circumstances, I take the view that if the *causa* is invalid, e. g. no lawful sale, the transfer of ownership will also be invalid. Therefore the registration of transfer No. 147/2018 is invalid and susceptible to be set aside.

The position of the 6th respondent

54. The Bank contends that the property is now held by the second respondent under Deed of Transfer No. 1497/2018, and it is the holder of a Mortgage Bond over the property. It was argued that it is trite law that the registarion of a mortgage bond creates a real right in favour of the mortgagee, and that once registered it can only be cancelled with the consent of the bond holder or in terms of an order of court. The sixth respondent would only consent to the cancellation of the mortgage bond after the loan it advanced to the second respondent has been paid in full.

55. The application is criticised on the basis that it does not disclose any cause of action against the sixth respondent, nor has an order been sought for the cancellation of the mortgage bond registered in favour of the sixth respondent. It was argued that the applicants made an error of law in contending that the mortgage bond would fall away once the deed of transfer in favour of the second respondent has been cancelled. The

sixth respondent argued that this application must be dismissed with costs on an attorney and client scale.

56. The applicants argued that they seek no relief against the Bank whom they have cited only as an interested party with a mortgage bond registered against a title deed which is a nullity. The applicants further contend that once it is found that the deed of transfer against which the mortgage bond was registered is a nullity, it then follows that the mortgage bond itself is a nullity and of no consequence. It was argued that the sixth respondent cannot expect to put a mortgage bond on nothing and expect it to stand. It was argued further that if the deed of transfer in favour of the second respondent is a nullity so is the mortgage bond registered against that null deed of transfer. It was contended that the innocence of the sixth respondent to the wrongs committed by the first and the second respondents is wholly irrelevant to the issue for determination.

57. In this case the Sheriff derived his duty and authority to transfer ownership in the order in HC 1649/18. If the sale was unlawful because it violates the principle of legality, as in the present case, then the sheriff can have no authority to transfer ownership of the property in question to the purchaser who will thus not acquire ownership despite registration of the property in his or her name.

58. As correctly pointed out by Prof. *Ncube*, the transfer of the property from the applicants was based on an unlawful sale and the resultant registration of ownership in the name of Shoko falls to be set aside. The transfer of the property into the name of the second respondent, as well as the registration of the bond over the property, stand to be set aside on the grounds that they were underpinned by a sale that was not lawful. And it matters not that the Bank was completely innocent and not implicated at all in the unlawful sale.

The relief sought by the applicants

59. The applicants' seek inter *inter alia* declaratory orders; cancellation of the deed of transfer issued in favour of Shoko; and the re-instatement of their deed of transfer. This is an application for review. In this jurisdiction in an application for review the powers

of this court are prescribed by legislation and jurisprudence. The primary remedies associated with review are setting aside or correcting. These remedies are mentioned in the much cited *dictum* of Innes CJ in *Johannesburg Consolidated Investments Co v Johannesburg Town Council* 1903 TS 111

> Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute , or is guilty of gross ireegularity or clear illegality in the performace of the duty, this court may be asked to review the proceedings complained of and set aside or correct them.

60. According to the learned author Hoexter C. in the book *Administrative Law in South Africa* (Juta 2nd ed.) 518:

> Setting aside means quashing the administrator's decision, while correcting – a more extreme measure – involves substituting the court's decision for that of the administrator. Because these are built-in remedies, as it were, administrative law review has been termed 'review to set aside or correct.'

61. In *Police Service Commission and Another v Manyoni* SC 7 / 21 the court set out the powers of the court on review. It said:

> Section 28 of the High Court Act provides for the powers that the court is imbued. It reads:
>
> > "on a review of any proceedings or decision other than criminal proceedings, the High Court may, subject to any other law set aside or correct the proceedings or decision."
>
> It is trite and this appears clearly from the above cited provisions that in an application for review the court must confine itself to establishing whether or not the proceedings were afflicted with irregularities. Once it found, as it did in this case, that there were irregularities in the process in which the appellants discharged the respondent then its power should have been exercised in terms of s 27 of the High Court Act.
>
> > This was clearly stated in Standard Chartered Bank of Zimbabwe Ltd v J. Chikomwe and 211 Ors s 77 –2000.
> >
> > "This is because reinstating the respondents in the circumstances implies a finding that the respondents were innocent of the charges of misconduct against them by the hearing officer. It should be

> borne in mind that the respondent in their appeal to the Appeals Board were mainly challenging the procedural irregularities in the hearings before the disciplinary Committee. The merits of the case were not really challenged....."

See also Air Zimbabwe Ltd v Mensah SC 89/04.

So too, in this case, the respondent was not happy with the manner in which his matter was handled. It was his case that there was no Suitability Board which was convened neither was he called to answer to any charges.

The court a quo agreed with him but then ordered his reinstatement. Clearly this was ultra vires the powers of the court where it finds an irregularity. Its powers are limited to setting aside, or correcting the decision of the Tribunal.

As the matter is not an appeal on the merits the court aquo would not have had the power to set aside the decision of the Police Service Commission and substitute it with its own decision.

62. In *casu* the applicants are aggrieved by the fact that their property was sold contrary to the requirements of the law. This court has power to set aside the sale, and to set aside the transfer on the basis that it was predicated on an invalid sale that was contrary to the requirements of the law. On the facts of this case it is outside the ambit of this review application for this court to start making declaratory orders. In a review application this court cannot set aside and substitute, it can set aside and correct. Therefore, all this court can do is to set aside the decision of the Sheriff to transfer the property without a valid and lawful sale, and the consequent transfer of the property.

63. What has given me more trouble is what to do with the mortgage bond in favour of the Bank. I say so because in the draft order the applicant did not specifically seek an order that it be set aside. However Prof. *Ncube* argued that once the transfer falls the mortgage bond must also fall. I agree. I take the view that as the transfer of the property from the applicants was predicated on an invalid and unlawful sale and the resulting registration of ownership in the name of second respondent falls to be set aside. The transfer of the property into the name of the second respondent, as well as the registration of the bond over the property, stand to be set aside on the grounds that they are underpinned by an invalid sale that was not lawful.

64. As pointed out above in a review application this court may set aside or correct the decision subject to review. Therefore the draft order is varied so that it speaks to the relief that this court may grant in a review application. The court cannot start to grant declaratory orders; and the re-instating the applicants' deed of transfer.

Costs

65. The awarding of costs is based on fundamental principles relating to the law of costs. There are two principles in awarding costs. The first is the basic rule that the court within its discretion determines costs. The second rule is costs are generally awarded to a successful litigant who is indemnified for the costs incurred as a consequence of litigating. And this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. I intend awarding costs in favour of the applicants. However the applicants have sought costs on a legal practitioner and client scale against the first and second respondents. To mulct litigants with punitive costs requires a proper explanation grounded in our law. None exists in this case. I therefore intend awarding costs on a party and party scale against the first and the second respondent.

In the result, it is ordered as follows:

i. The sale of the applicants' property being of Lot 21A Burnside, situate in the district of Bulawayo measuring 5635 square metres to the second respondent be and is hereby reviewed and set aside.

ii. The transfer of the property being of Lot 21A Burnside, situate in the district of Bulawayo measuring 5635 square metres to the second respondent be and is hereby set aside.

iii. The registration of mortgage bond passed over the property being of Lot 21A Burnside, situate in the district of Bulawayo measuring 5635 square metres in favour of the sixth respondent be and is hereby set aside.

iv. The first and the second respondent jointly and severally, each paying the other to be absolved by the costs of suit.

It is so ordered.

Mathonsi Ncube Law Chambers, applicants' legal practitioners
Mashayamombe & Company, 1st respondent's legal practitioners
V. Chikomo Law Chambers, 2nd respondents' legal practitioners
Danziger & Partners, 6th respondent's legal practitioners