MABEL TASTHI NDLOVU

Versus

LINDELWE LAURETTA MLOTSHWA

And

THE SHERIFF N.O.

And

BULAWAYO REAL ESTATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 17 OCTOBER 2011 & 22 MARCH 2012

M. Ndlovu for the applicant
J Sibanda for the respondent

Judgment

NDOU J: The applicant divorced her erstwhile husband, Patrick Ndlovu. Their marriage was dissolved by this court on 20 October 2005. The court ordered, *inter alia*, that the matrimonial house stand number 632 Nketa be evaluated by a reputable estate agent and the net proceeds be shared as follows: applicant 40% and Patrick Ndlovu 60%. Two years later the applicant filed an application under case number 614/07 and was granted a judgment by default entitling her legal practitioners to be the only ones vested with the authority and powers to sell the house. This order was brought to the attention of Patrick Ndlovu by the applicant's legal practitioners by letter dated 21 May 2007. The applicant alleged that Patrick Ndlovu received the letter and court order. Patrick Ndlovu even suggested that he was in a position to send to the applicant's legal practitioners buyers offering more money. Instead on 4 September 2007, Patrick Ndlovu entered into an agreement of sale of the said house for two billion Zimbabwe dollars with the 1st respondent in this case. The latter agreement was successfully assailed by the applicant under case number HC 50/08 (HB-28-10). In that case this court made an order in the following terms:

"It is ordered that:

1) The agreement of sale of stand number 632 Nketa Township of Lot 400 A Umganin Bulawayo entered into by and between Patrick Abednigo Ndlovu and Lindelwe Laurete Mlotshwa on 4 September 2007 be and is hereby declared invalid.
2) If the 2nd respondent [1st respondent *in casu*] has taken occupation it is hereby ordered that she and all those occupying through her vacate stand number 632 Nketa, Bulawayo within 15 days of this order; and
3) If 1st and 2nd respondents shall bear the costs of suit on an attorney-client scale jointly and severally one paying the other to be absolved."

The 1st respondent was owed $16 000 by Patrick Ndlovu and the property in dispute has been attached and is due to be sold in execution of judgment debt. The 1st respondent obtained the order against Patrick Ndlovu for $16 000,00 under case number HC 2559/10. The 1st respondent caused the judicial attachment of the only asset that Patrick Ndlovu owned i.e. the house in dispute. The 1st respondent instructed the Sheriff to sell the said property according to law. The 1st respondent admits that she is aware from the previous case HC 50/08 between the applicant, herself and Patrick Ndlovu that the applicant was awarded 40% net value of the house by this court on the divorce of applicant and the 1st respondent. 1st respondent states that she is also aware that Messrs Cheda and Partners Legal Practitioners were to conduct the sale of the house in terms of the court order granted under HC 614/07. 1st respondent's position is that she understood that that order only applies to applicant and Patrick Ndlovu. The 1st respondent avers that following his obtaining an order against Patrick Ndlovu he became a creditor of the latter. Further that, his claim being that of a creditor is preferent to that of the applicant. This is the main issue for determination. But the 1st respondent raised a point *in limine* which I propose to deal with first. The issue is whether the applicant adopted a wrong procedure by approaching this court directly to set aside the judicial sale. It is trite that Order 40 of the High Court Rules, 1971 provides for domestic remedies for setting aside a judicial sale. The applicant did not utilize or exhaust these internal remedies. The applicant should have approached the Sheriff to set aside the sale moreso given that the warrant of execution giving rise to the sale was not impugned. Rule 332 should have been used to attack the attachment. The warrant of execution makes the Sheriff's actions lawful and as such the sale should have been challenged in terms of Order 40 of the Rules.

After the determination, the applicant should have approached the Sheriff in terms of Rule 348 and 348A to assert her claim to the property in dispute. Failing the above, the applicant should have relied upon the provisions of Rule 359. The applicant approached the

court prematurely without exhausting all these internal remedies. There is no reason proffered as to why she did not approach the Sheriff to assert her domestic remedies.

Accordingly, on this point alone the application must fail. It is ordered that the application is dismissed with costs.

Cheda & Partners, applicant's legal practitioners
Job Sibanda & Associates, respondent's legal practitioners