GEORGE REMENCE MUCHAPONDWA CHIWANZA
vs
HERMAN TENDAI MATANDA
and
THE SHERIFF FOR ZIMBABWE
and
THE REGISTRAR OF DEEDS
and
ZIMBABWE DEVELOPMENT BANK
and
BARCLAYS BANK
and
NATION MADONGORERE

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 23 September 2004 and 13 October 2004

Opposed Application

Mr *E Matinenga,* for applicant
Mr *T H Chitapi,* for 1st respondent
Mr *M Mahlangu,* for 4th respondent.

MAKARAU J: The Zimbabwe Development Bank, the fourth respondent herein obtained judgment against the applicant from this court on 22 November 2000. In terms of that judgement, certain property called stand 6265 Salisbury Township of Salisbury Township Lands, ("the property"), was declared especially executable. In due course, the fourth defendant arranged for the property to be sold by public auction in terms of the rules of this court. The fifth respondent, which also held a judgment against the applicant, indicated to the Sheriff that it intended to participate in the sale.

On 4 May 2001, the Sheriff, through an estate agent, sold the property at a public auction. The highest bid was by the sixth respondent on behalf of the first respondent. On 21 May 2001, the second respondent called for objections to the sale in terms of the rules. Having received no objections, the sale of the property to the sixth respondent was confirmed and instructions given for the conveyance of title in the property to the purchaser.

By 30 September 2001, the purchaser had not paid the purchase price for the property in the sum of the bid and the second respondent purported to cancel the sale. Fresh instructions to re-auction the property were issued but before this could be done, the second defendant re-instated the sale and transfer was effected in favour of the first defendant. Thereafter the fourth and presumably the fifth respondent were paid out the amounts due to them. (The papers before me do not indicate whether the fifth respondent was paid since no papers have been filed on its behalf).

On 30 September 2003, some 28 months after confirmation of the sale in execution, the applicant filed this court application, seeking an order declaring the sale of the property by public auction a nullity and consequently, a reversal of the transfer to the first respondent, and an order giving the applicant leave to settle his indebtedness to the fourth and fifth respondents within 30 days of the granting of the order. The applicant also sought an order evicting from the property the first respondent and all those occupying through him.

At the commencement of the hearing, Mr *Mahlangu* for the fourth respondent applied to be excused from the proceedings as the fourth respondent should not have been cited at all. The application was granted with the consent of the other parties.

Prefacing the court application before me is an application for condonation. Mr *Matinenga* submitted in argument that the application for condonation was made out of an abundance of caution as the application before me was being brought under common law and did not have time limits prescribing when it should be filed.

The issue of whether the applicant is properly before me must detain me.

Mr *Matinenga* was ambivalent in his address as to the nature of the application before me. He submitted that the applicant was approaching this court for a declarator at common law in the main and if that did not find favour with the court, for a review of the decision of the second respondent on the basis of an alleged litany of irregularities, the existence of which has been denied by Mr *Chitapi.*

The issue of how to approach this court to set aside a sale in execution has been before these courts in a number of cases. It would appear to me that three distinct positions obtain.

The first position is specifically provided for in the rules of this court. R359 provides that any person who has an interest in the sale of a property in execution may approach the Sheriff to have the sale set aside on grounds specified in the rule. The approach to the Sheriff must be made before the sale is confirmed. Any person aggrieved by the decision of the Sheriff may within one month, approach this court to have such a decision set aside.

The above procedure has been legislated to replace the old procedure where the first port of call for any one with an interest in the sale would be this court. Thus, in terms of the rules, before a sale in execution is confirmed, any interested party may approach the Sheriff to have set aside a sale in execution on any good ground as provided for in the rules.

The rules do not provide for the procedure to be adopted after the sale in execution has been confirmed. It is my view that any party with an interest in the sale may approach this court by way of ordinary review to have the sale set aside. I do not read the amendment to the rules to be ousting the general jurisdiction of this court to bring under scrutiny the decisions of the Sheriff as quasi- judicial officer. It is my considered view that the effect of the amendment to the rules was to introduce a further procedure of granting the Sheriff power to review his own decisions without necessarily taking away the vested right of interested parties at common law to approach this court for the exercise of its general and inherent review powers. The approach to this court after a sale in execution has been confirmed and in the absence of a prior approach to the Sheriff in terms of the rules is in my view to be based on the general grounds of review as provided for at common law. These would include such considerations as gross unreasonableness, bias and procedural irregularities but cannot include such grounds as an unreasonably low price or that the sale was not properly conducted as provided for under the rules unless such can be subsumed in the recognised grounds of review at common law. It is my further view that this, which presents itself to me as the second approach, only obtains after confirmation of the sale but before transfer is effected to the purchaser.

After a sale has not only been confirmed but transfer of the property has been effected to a third party, interested parties may still approach this court at common law for the sale and transfer to be set aside. It further appears to me that an approach at this stage, after the property has been transferred to a third party, cannot be sustained on alleged violations of the rules of this court nor on the general grounds of review at common law but only on the equitable considerations aptly summarized by Gubbay C.J. (as he then was) in *Mapedzamombe v Commercial Bank of Zimbabwe and Another* 1996 (1) ZLR 257 (S) when at 260D he said:

> " Before a sale is confirmed in terms of r360, it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. See *Lalla v Bhura* supra at 283A-B. Once confirmed by the sheriff in compliance with rule 360, the sale of the property is no longer conditional. That being so, a court would be even more reluctant to set aside the sale pursuant to an application in terms of r359 for it to do so. See *Naran v Midlands Chemical Industries (Private) limited* S 220/91 (not reported) at p6-7. When the sale of the property not only has been properly confirmed by the sheriff but transfer effected by him to the purchaser against payment of the price, any application to set aside the transfer falls outside r359 and must conform strictly with the principles of the common law.
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> This is the insurmountable difficulty which now besets the appellant. The features urged on his behalf such as the unreasonably low price obtained at the public auction and his prospects of being able to settle the judgment debt without there being the necessity to deprive him of his home, even if they could be accepted as cogent, are of no relevance. This is because under the common law, immovable property sold by judicial decree after transfer has been passed cannot be impeached in the absence of an allegation of bad faith, or knowledge of the prior irregularities in the sale in execution, or fraud."

The above then represents the three approaches that present themselves to me. Each approach has its peculiar requisites and in my view, a failure to meet the requisites of the elected approach may be fatal to the application brought.

It is common cause that the applicant in *casu* did not approach the second respondent in the first instance. The application before me cannot therefor be a review of the decision of the second respondent in terms of the rules. It can only be an application brought outside the rules as a general review or for redress at common law.

It is trite that a review application has to be brought in terms of the provisions of order 33 of the High Court Rules. Such an application has to be brought within 8 weeks of the decision to be scrutinised. Where an application is brought outside the time frame provided for in the rules and not in accordance with the provisions of the rules, an application for condonation must be made. In *casu*, although intimation is made that such an application will be made, the application was not persued with any vigour at the hearing. This may have been in realisation of the fact that it in any event, lacks sustenance. No facts have been placed before me as to the cause of the delay in bringing the review proceedings if these proceedings were to be construed as such. A bald averment is made that the applicant had lost all hope of reversing the sale until he received advice from his current legal practitioners. I am not told of when all hope was lost and was had caused such a forlorn feeling to arise. A case for condonation is clearly not made out and I accordingly cannot consider the application before me as one for general review brought under the general powers of this court to review decisions of all inferior tribunals and quasi- judicial bodies.

It remains for me to consider whether the applicant has properly approached this court for redress at common law.

Mr *Matinenga* has ingeniously in my view, sought to argue that the applicant is approaching this court for a declarator at common law, to have the decision of the second respondent set aside on the grounds that he did not abide by the rules of this court. The ingenuity of the submission lies in that on one hand it denies that this is an application that ought to be brought in terms of the rules for alleged violations of the rules yet it relies on those same violations for its sustenance at common law. The only hurdle in Mr *Matinenga* way is the fact that common law does not recognise violations of court rules as a ground upon which a sale in execution may be set aside after transfer of the property has been effected in favour of the purchaser. This is the point made in the *Mapedzamombe* case cited above.

Although the *Mapedzamombe* decision was handed down before the amendments to the rules that I have referred to above, one is able to draw from this decision two main positions. The first one is that the grounds set out in the rules cannot be used to found an

application brought at common law to set aside a sale in execution. Thus the learned judge of appeal held that issues of an unreasonably low price and any other good ground that may have been relevant in an application brought in terms of the rules were of no relevance after the sale had been confirmed and transfer effected. Secondly, it appears to me that the grounds upon which the sale can be set aside at common law aim at protecting the proprietary rights of the purchaser of the property whose title can only be impugned on account of fraud, bad faith and prior knowledge of the irregularities attendant upon the sale. The jurisprudential basis for so holding presents itself clearly to me as the usual protection that our legal system affords the innocent third party in commercial transactions. His acquisition of title to the property is only open to attack on account of bad faith on his part or on account of his prior knowledge of the attendant irregularities or on account of fraud by any one of the other parties in the transaction.

In *casu*, the applicant seeks to rely on the alleged failure by the second respondent to inform him of the highest bid so that he could register his objections to the sale. Although not relevant, the objection he would have raised then is not disclosed in his papers, giving the impression that this has been raised merely as a convenient starting point to attacking the sale of the property. He also alleges that the second respondent had no power to reinstate the sale after having advised the purchaser that he was canceling the sale. Even assuming that the applicant could sustain the allegations he raised, in my view, such grounds are irrelevant for the purposes of bringing and sustaining an application under the common law.

In *casu*, no allegation has been made that the first respondent was aware of the irregularities alleged by the applicant when he took transfer of the property or that he acted in bad faith in any way. Needless to say, no fraud has been alleged. On the basis of the foregoing, it is my view that the applicant was ill advised to bring this application at common law as he has no relevant ground to raise at common law. The grounds that he raises may be relevant in an application under the rules and or under the general review powers of this court, whose requirements I have already dealt with above.

It is therefore my finding that the applicant is improperly before me and cannot find redress.

Mr *Matinenga* has sought to rely on the case *of Bobby Maparanyanga v The Sheriff of the High Court and Others* SC 132/02 as authority for the proposition that one can approach the court at any time under common law to have a sale in execution set aside after transfer on account of non-observance of the rules of this court by the sheriff. With respect, I did not understand that to be the import of the decision by GWAUNZA JA in that case. The sole issue that the Supreme Court defined for itself in that matter was whether the failure by the Sheriff and the purchaser of the property to adhere strictly to the terms of the agreement between them constituted a ground for setting aside the sale in question in terms of r359 of the High Court. (See p6-7 of the cyclostyled judgment). The issue of whether the appellant had been properly before the High Court did not arise and was not adjudicated upon. It appeared common cause that the appellant had been properly before the lower court and that his application in that court had been properly brought in terms of the rules. It was not an application to set aside a sale in execution at common law as is the application before me.

Relying as he did on alleged violations of the rules by the second respondent, it is my view that the applicant ought to have followed the procedures laid down in the rules, culminating with an approach to this court for a review. Alternatively, he ought to have made out a case for condonation for the late institution of general review proceedings. He chose not to do either at his peril.

In the result, the application is dismissed with costs.

Musunga & Associates, applicant's legal practitioners.
T.H. Chitapi & Associates, 1st respondent's legal practitioners.
Gill Godlonton & Gerrans, 4th respondent's legal practitioners.