REPORTABLE (13)

Judgment No. SC 19/08
Civil Appeal No. 237/03

GIVEMORE GARATI v (1) STALIN MAU MAU (2) BEVERLEY BUILDING SOCIETY
(3) SHERIFF FOR ZIMBABWE (4) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & GARWE JA
HARARE, FEBRUARY 26 & AUGUST 15, 2008

O C Gutu, for the appellant

Z M Kamusasa, for the first respondent

No appearance for the second, third & fourth respondents

MALABA JA: This is an appeal from a judgment of the High Court dated 30 July 2003 dismissing with costs an application in case HC 2596/03 for condonation of an alleged late filing of the court application in case HC 1488/03.

The court application under HC 1488/03 was made on 18 February 2003. It was for an order to set aside the sale by public auction of stand no. 2580 Highfield ("the property") belonging to the appellant. The sale was in execution of a judgment in favour of the second respondent. At the public auction held on 30 November 2001, the first respondent was the highest bidder. He was declared the purchaser of the property by the third respondent on 12 December for a price of $2 050 000.00.

On 14 January 2002 the appellant lodged a written request with the third respondent in terms of r 359(1) of the High Court Rules ("the Rules") to set aside the sale on the ground that the property was sold for an unreasonably low price. After hearing submissions by the parties on the request, the third respondent confirmed the sale on 15 April 2002.

Rule 361 of the Rules provides that immediately after the sale has been confirmed and the conditions of sale complied with, the Sheriff shall proceed to give transfer of the property to the purchaser against payment of the purchase money. The first respondent was under an obligation to pay the purchase price for the property immediately after he was notified of the decision to confirm the sale. He did not do so. On 22 October 2002, the second respondent wrote a letter to the third respondent through its legal practitioners expressing concern at the delay by the first respondent in the payment of the purchase money. On 23 October, the third respondent wrote to the first respondent demanding payment of the money. On 27 November, the second respondent wrote again to the third respondent expressing its concern at the continued failure by the first respondent to pay the money. On 3 January 2003, the appellant, who believed that the second respondent had power to cancel the sale, wrote to it complaining of the delay by the first respondent in paying the purchase money and asking that the sale be cancelled. He copied the letter to the third respondent.

On 20 January 2003, the second respondent's legal practitioner wrote to the third respondent a letter in the following terms:

> "We have now received a letter from the judgment debtor requesting that we cancel the sale. It is not up to us to cancel the sale. The sale was confirmed and it is within your discretion to cancel the same in the event that there are delays in the payment of the purchase price by the purchaser. The purchaser has delayed in making payment and from the look of things it does not appear he still wants to proceed with the sale."

On 3 February the appellant wrote to the third respondent saying:

> "It would appear … that Mr Mau Mau bidded for the property at the auction knowing fully (*sic*) well that he did not have the money with which to purchase the property but had seen an opportunity to make money for himself since he is now looking for a buyer to the tune of $15 million without himself having wasted a cent towards the property. I view all this to be unfair and I am now seeking for a redress with your office. I would regard it as fair if you could cancel his sale and re-auction the house or allow me to look for a buyer."

The first respondent had in fact paid the purchase money on 31 January 2003. The payment was made fourteen months after the sale and nine months after confirmation.

On 18 February, the appellant made the application in case no. HC 1488/03 for an order setting aside the sale on the ground that there had been an inordinate delay in the payment of the purchase money by the first respondent. In paragraph 9 of the founding affidavit he said:

> "The main reason (for the application) is basically the fact that it has taken the first respondent an unreasonably and unduly long time to raise the purchase price in the sum of $2 050 000.00 (two million and fifty thousand dollars). … By reason of delay in raising and paying the purchase price, the first respondent had caused me and other interested parties considerable financial prejudice. On my part, I did everything within my power and means to ensure that the transfer was properly executed in favour of the first respondent soon after my objection was dismissed by the third respondent. Throughout this transaction the first respondent was adopting a very casual attitude which can only be interpreted to mean that he was not in a hurry to pay the purchase price and thus, he was

> effectively in breach of the contract of sale executed at the public auction on November 30, 2001."

The appellant also made the allegation that by failing to take steps to cancel the sale on the ground that the first respondent had failed to pay the purchase price within a reasonable time, the third respondent aided and abetted the first respondent in delaying the payment. In para 10 of the founding affidavit he said:

> "What I find very curious is the fact that the third respondent was literally going out of his way to assist and also to protect the interests of the first respondent at the expense of everyone else. He seemed not to have done anything to expedite the payment of the purchase price by the first respondent. This is clearly proved by the fact that it took the first respondent almost fourteen (14) months to raise and pay the purchase price from the date of the sale. Even if one had to consider the time that the first respondent took to consider and to subsequently reject my objection to the sale, it is still apparent that the first respondent took an unreasonably long time to raise and to pay the purchase price. It is a notorious fact that because of the hyper-inflationary conditions presently obtaining in the country, I am going to considerably lose out if the sale in favour of the fist respondent is allowed to go through. …
>
> The fact of the matter is that the first respondent did not play ball and he therefore cannot and should not be allowed by this Honourable Court to literally have his cake and eat it. I humbly submit that there are very good grounds for this Honourable Court to exercise its discretion by setting aside the public sale that was conducted on November 30, 2001."

He made it clear that what caused him to make the court application was the fact of the inordinate delay by the first respondent in paying the purchase money. In paragraph 11 of the founding affidavit he said:

> "Had the first respondent promptly paid the purchase price to the third respondent, then I would not have even contemplated filing the present court application."

The first respondent did not deny in the opposing affidavit the allegation that the purchase money was paid after an unreasonably long period of time calculated

from the date of the sale or its confirmation. He averred that the application was in terms of r 359(8) which provides that:

> "Any person who is aggrieved by the Sheriff's decision in terms of subr (7) may, within one month after he was notified of it, apply to the Court by way of a court application to have the decision set aside."

The appellant made arrangements with the second respondent in terms of which he paid the judgment debt. The second respondent released the title deed to the property into his custody. The third respondent filed a report dated 4 March 2003. He did not deny the allegation that the first respondent took an unreasonably long time to raise and pay the purchase money. He said he would abide by the decision of the Court in the application.

The decision made by the third respondent in terms of subr (7) of r 359 is the decision confirming the sale. The first respondent averred in the opposing affidavit that the court application was in term of r 359(8) and as such had to have been made within one month after the appellant was notified of the decision of the Sheriff. He contended that the application was not properly before the Court as it was made outside the time limit. No condonation of non-compliance with r 359(8) had been applied for and granted.

The appellant denied in the answering affidavit that the court application was subject to any time limit. He later changed his mind and accepted that the application had to comply with the time limit prescribed under r 359(8). It is then that he

made the application for condonation in case no. HC 2596/03. In dismissing the application the learned Judge said:

> "In terms of the provisions of r 359(8) of the High Court Rules, the applicant was supposed to lodge a court application to have the sale in execution of the immovable property set aside within one month of the notification by the Sheriff of the rejection of his objection. The applicant became aware of the Sheriff's decision before 14 May 2002. Despite that knowledge the applicant applied to this Court only on 18 February 2003 to have the Sheriff's decision set aside. He was more than 9 months out of time and did not first seek condonation …. Regarding condonation, the applicant had been advised albeit wrongly, by his legal practitioner that there was no need to seek condonation first. The first respondent specifically raised the issue of condonation in his opposing affidavit. However, the applicant in his answering affidavit roundly rejected the advice on condonation as being false, maintaining there was no time limit for bringing the application and proceeded to file his heads of argument and to request a set down date. Only after being served with the first respondent's heads of argument did the applicant file the present application, now seeking condonation.
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> The above series of delays and reckless disregard of the rules of this Court constitute enough grounds to move the Court to express its displeasure by declining condonation even though committed by the applicant's chosen legal practitioners and not directly by the applicant himself. (See *Saloojee & Anor NNO v Minister of Community Development* 1965(2) SA 135A, *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313(S). However, the matter is put beyond any pale of doubt when the applicant's prospects of success are examined. On the merits the applicant states that the delay by the first respondent in effecting payment constitutes good ground for the setting aside of the sale. This is the one and only basis upon which the applicant seeks to have the sale in execution set aside. However, in my considered view, failure to pay the purchase price timeously or at all is a matter pertaining to the performance of the contract of sale and not its conclusion or terms, and thus falls outside the ambit of r 359(1). Where the purchaser fails to carry out obligations in a sale in execution, the Sheriff may be moved to cause the sale to be cancelled in terms of r 357. In this case the payment has already been made. Therefore the applicant's remedy lies in establishing and pursuing a cause of action relating to the late payment of the purchase price."

An application for condonation is made to a Court when there has been failure to comply properly or timeously with a rule under which a party is bound to act in seeking the relief from the Court. The learned Judge proceeded on the basis that a

question of condonation of non-compliance by the appellant with r 359(8) at the time he made the main application to have the sale set aside had arisen for his determination. The assumption was that in seeking the particular relief from the Court the appellant was bound to act in terms of that rule.

The appellant did not apply to Court to have the decision of the third respondent confirming the sale in terms of subr (7) of r 359 set aside. The main application was for an order setting aside the sale on the ground that the purchase money was paid by the first respondent after an unreasonably long period of time. The ground on which the relief was sought arose after the decision of the third respondent in terms of subr (7) and was a consequence of the conduct of the first respondent. The appellant could not make the application for the relief he sought from the Court in terms of r 359(8) which is directed at any person who is aggrieved by the Sheriff's decision in terms of subr (7). There was therefore no question of non-compliance for the purposes of founding an application for condonation with a rule the appellant was not bound to comply with in seeking the relief from the Court.

At common law any person interested in a sale in execution may apply to Court to have it set aside on good cause shown although Courts are reluctant to set aside a sale which has been confirmed and even more reluctant where transfer of the immovable property has been effected. The law was restated by GILLESPIE J in *Mortpoulos v Zimbabwe Banking Corporation Ltd & Ors* 1996(1) ZLR 626(H) where at 628G-H the learned Judge in the course of a review of the authorities said:

> "By the common law an owner of property which has been sold in execution but not yet transferred may seek an order of *restitutio in integrum* setting aside the sale on good cause shown."

See also *Mapedzamombe v Commercial Bank of Zimbabwe & Anor* 1996(1) ZLR 257(S) at 260 D-E.

The right a person interested has under r 359(8) to apply to the Court to have the decision of the Sheriff in terms of subr (7) set aside is in addition to the common law right to apply to the Court to have the sale set aside before transfer of the property on good cause shown.

It appears to me that the appellant was exercising the common law right when he applied to the Court to have the sale in execution of his property set aside on the ground that the purchase money had been raised and paid by the first respondent after an unreasonably long time.

The Court hearing the application has to decide in the exercise of its discretion whether or not the ground on which the application was made is a good cause for setting aside the sale. In arriving at that decision the Court would take into account all the relevant circumstances of the case including the failure by the third respondent to act in terms of r 357; the attitudes of the second and third respondents to the application; and the fact that transfer of the property has not been effected.

It was a misdirection on the part of the court *a quo* to consider the prospects of success of the main application when no question of condonation of non-compliance with r 359(8) had in fact arisen notwithstanding the application made to it. The learned Judge should have heard and determined the main application. He should now do so.

In the result, the appeal succeeds with costs. The judgment of the court *a quo* is set aside and substituted with the following order -

"The matter is struck off the roll with costs."

SANDURA JA: I agree.

GARWE JA: I agree.

Gutu & Associates, appellant's legal practitioners

Kamusasa & Company, first respondent's legal practitioners