EVA MUZUVA
versus
SHERIFF OF THE HIGH COURT OF ZIMBABWE
and
FBC BANK LTD
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 26 November 2018 & 16 May 2019

Opposed Application

G Nyandoro, for applicant
P Nyeperai, for 2nd respondent
No appearance for the 1st & 3rd respondents

CHITAKUNYE J. This is an application in terms of r 359 (8) of the High Court Rules, 1971.

In this application the applicant seeks an order that:

1. The decision of the first respondent on 19 March, 2018 declaring and confirming the second respondent as the purchaser of the applicant's immovable property (known as Stand 156 Groombridge Township 2 of Lot 39A Mount Pleasant measuring 4032 square metres) be and is hereby set aside.
2. That as a consequence of the order in para 1 above, the transfer of the said property to the second respondent be and is hereby cancelled
3. That the first and second respondents to pay the costs of this application on a legal practitioner and client scale jointly and severally, one paying the other to be absolved.

The circumstances giving rise to this application were that the second respondent obtained judgement against the applicant in respect of a debt owed to it by applicant. Pursuant to that indebtedness a writ of execution was issued and the applicant's immovable property was attached and sold in execution and second respondent was declared the highest bidder.

The applicant acting in terms of r 359 (1) requested first respondent to set aside the sale. Rule 359 (1) provides that:

> "Subject to this rule, any person who has an interest in a sale in terms of this Order may request the Sheriff to set it aside on the ground that—
> (*a*) the sale was improperly conducted; or
> (*b*) the property was sold for an unreasonably low price; or on any other good ground"

In *casu*, the applicant alleged, *inter alia*, that the sale conducted by the Sheriff was illegal as the applicant had, on 28 June 2017, filed a chamber application in terms of rule 348A (5a) for the postponement or suspension of the sale. in terms of rule 348A (5d), the sheriff was enjoined not to take any further steps in regard to the sale of the immovable property pending the determination of the aforesaid chamber application. Applicant argued that the sale was improperly conducted and must be set aside.

The application was opposed by the second respondent in terms of rule 359 (4). In its opposition second respondent contended that no application in terms of rule 348 (5a) had been filed. What applicant had filed in HC 5882/17 was in fact an application for condonation of the late filing of an application in terms of rule 348A (5a).

Upon hearing arguments by the parties the first Respondent dismissed the objection and proceeded to confirm the sale on 19 March 2018.

It is that decision by the sheriff that applicant has brought before this court for review in terms of r 359(8). The applicant alleged that the confirmation was improper as at the time of the confirmation applicant had an application pending in this court in HC 5883/17 (HC5882/17).

In its opposition the second respondent raised a point *in limine* to the effect that there was no proper application in that the grounds upon which applicant wished the sheriff's decision to be reviewed are not stated in the application as is required under r 257.
Another point raised was to the effect that as the sale was confirmed and transfer effected on 10 April 2017 the relief sought by the applicant is incompetent.

As regards the merits the second respondent contended that the first respondent acted properly in confirming the sale as there was no application in terms of rule 348A (5a) that was pending. The application the applicant sought to rely on, HC 5882/17, was an application for condonation of the late noting of an application in terms of r 348A (5a) of the High Court Rules. The second respondent further contended that an application for condonation had no effect of suspending execution proceedings.

Faced with the second respondent's contentions, applicant did not deem it necessary to rebut the assertions in second respondent's opposing affidavit by filing an answering affidavit.

Thus, where second respondent's assertions are unchallenged they are deemed admitted. see *Chihwayi Enterprises (Pvt) Ltd* v *Atish Investments (Pvt) Ltd* 2007 (2) ZLR 89 (S) at 93 E-F

The second respondent's first point *in limine* was that there is no proper application for review as the application does not comply with r 257 of the High Court Rules. These requirements include that the application must state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief.
In *casu*, the application did not state shortly and clearly the grounds upon which this court's intervention is sought.

The applicant's counsel argued that an application under rule 359 (8) is not an application for review. It is a specific application governed exclusively by that rule. Unfortunately counsel did not seem to appreciate that whether the application is titled 'Review' or in terms of rule 359 (8) the net effect is that this court is being asked to review the decision by the sheriff and set it aside on the basis of some irregularity. The grounds for seeking this court's intervention must thus be disclosed. This court cannot just intervene and set aside decisions of inferior tribunals or bodies just at the asking.

I am of the view that the applicant's counsel's response in this regard is misplaced. It is axiomatic that when seeking this court to set aside a decision of an inferior tribunal or body, the grounds to be relied upon must be clearly stated in the application.
Rule 359(8) under which this application is brought states that:

> "(8) Any person who is aggrieved by the Sheriff's decision in terms of subrule (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 rule provides a recourse to an aggrieved party to approach this court by way of court application for the setting aside of the decision. In as far as what is sought is in effect the review of a decision made it follows that this court is being asked to review those proceedings. It is not envisaged that one can just seek the setting aside of a decision without disclosing the basis thereof. I am of the firm view that the procedure provided for in r 359 (8) is a review procedure.

Where a review is sought the rules of this court require that the grounds for seeking review must be stated shortly and clearly in the application itself; that is such grounds must be clear ex facie the application.

The consequences of failure to comply with this requirement were aptly stated by SMITH J in *Chataira* v *Zimbabwe Electricity Supply Authority* 2001 (1) ZLR 30 (H) at 34-5 as follows:-

> "as regards the failure of Chataira to comply with r 257 of the High Court Rules, it seems to me that such non-compliance would constitute good grounds for dismissing this application. Rule 257 requires that an application to bring proceedings under review shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for. In *PEN Transport*, *Mushaishi* and *Marumahoko* cases referred to earlier, the courts clearly stated that failure to comply with r 257 constitutes a fatal flaw. Despite these warnings, legal practitioner still fail to comply with the rule. The time has surely come to say enough is enough and to dismiss the defective application without considering the merits."

In *casu,* the basis for the application was embedded in the founding affidavit as follows:

> "The basis of my application is that the 1st respondent acted illegally in confirming the sale in circumstances where, at the time of his purported decision, there was an application pending in this honourable court in HC 5883/17. HC 5883/17 is still pending."

It would appear that the referenced case number is incorrect but somehow applicant did not deem it necessary to concede to that as well.

The embedment of the ground for the application in the founding affidavit does not cure the effect of the failure to state shortly and clearly the grounds for review in the application itself. The application remains fatally flawed.

The second respondent in its opposing affidavit clearly indicated that it was not aware of any pending case under HC 5883/17. The only application it was aware of is HC 5882/17.

It is this application number HC 5882/17 that applicant sought to rely on before the Sheriff in seeking the setting aside of the sale. According to second respondent HC 5882/17 is an application for condonation of the late filing of an application in terms of r 348A (5a) of the High Court rules.

This assertion by second respondent was not refuted by applicant as no answering affidavit was filed.

In any case a perusal of the documents filed before the sheriff as submitted by applicant shows that the issue of HC 5882/17 being an application for condonation was common cause. It was in that light that the Sheriff concluded that an application for condonation is not the type of application that would entitle him not to confirm the sale in terms of r 348A (5d).

In the applicant's heads of argument the same argument is made to the effect that at the time first respondent declared and confirmed the second respondent as the purchaser of applicant's immovable property HC 5882/17 was pending in the High Court and it is still pending. Applicant argued that until the determination of HC 5882/17, the first respondent is prohibited by rule 348 (5d) from taking any further steps regarding the sale of the property

concerned. I did not, however, hear applicant to deny that HC 5882/17 is in fact an application for condonation. Instead applicant argued that first respondent was not entitled to determine the validity of HC 5882/17 as by doing so first respondent was usurping the jurisdiction of this court.

The applicant's arguments were in my view without merit. It is pertinent to note that it is applicant who approached the Sheriff requesting the Sheriff to set aside the sale in execution of an immovable property in terms of r 359(1). In that application the applicant averred that she had filed a chamber application in terms of rule 348A (5a) which application requires that the Sheriff suspends execution until the application is determined in terms of r 348A (5d). The issue which the Sheriff had to decide on was whether there was such an application in terms of r 348A (5a) as second respondent had contended that there was no such application. The only application it was aware of was for condonation of the late filing of an application in terms of r 348A.

The aforesaid r 348A (5a) provides that:

> "(5a) Without derogation from subrules (3) to (5), where the dwelling that has been attached is occupied by the execution debtor or members of his family, the execution debtor may, within ten days after the service upon him of the notice in terms of rule 347, make a chamber application in accordance with subrule (5b) for the postponement or suspension of—
> (*a*) the sale of the dwelling concerned; or
> (*b*) the eviction of its occupants.
>
> (5b) An application in terms of subrule (5a) shall be made in Form No. 45b and filed with the Registrar."

It is only when a chamber application stipulated by r 348A (5a), in form No 45b has been filed with the registrar and the Sheriff has been notified of the same, that the Sheriff is implored not to take further steps in the execution of the sale. In this regard Rule 348A (5d) provides that:

> "Upon being notified of an application in terms of paragraph (*a*) of subrule (5c), the Sheriff or his deputy shall take no further steps in regard to the sale of the dwelling concerned or the eviction of its occupants, as the case may be, pending the determination of the application."

Clearly, therefore, the chamber application which has the effect of stopping the Sheriff from taking any further steps is an application in terms of (5a), which is a chamber application for the postponement or suspension of the sale of the dwelling concerned or the eviction of occupants thereof. It is certainly not an application for condonation for the late noting of such an application.

It is important to appreciate that an application for condonation and the substantive application for the postponement or suspension of the sale are two distinct applications. That being the case it follows that as at the time the applicant approached the Sheriff there was no application in terms of r 348A (5a) filed with court. The Sheriff was thus correct in proceeding with the execution proceedings.

It is also pertinent to note that the proceedings under rule 348A are intended to be proceeded with expeditiously. In this regard rule 348A (6) provides that:

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> "(6) An application under subrule (4) or (5a), and any proceedings for enrolment and hearing consequent upon the issue of a provisional order under subrule (4), shall be treated as urgent, and rule 244 and the proviso to subrule (2) of rule 247, as the case may be, shall apply accordingly."

In *casu*, the applicant took a lackadaisical approach which was not in tandem with the intention behind the rule. The applicant seemed to be in no hurry to prosecute the application for condonation, let alone file the substantive application in terms of 348A(5a) for postponement or suspension of the sale. The applicant seemed intent on acting at her own lackadaisical pace to the detriment of other parties. Rule 348A was not meant to stall execution ad infinitum.

In this regard it is apposite to note that the application for condonation itself was removed from the roll on 15 September 2017 and the order corrected on 4 December 2017. A letter requesting its re-enrolment was only written on 11 January 2018 and as at the time of this hearing it had not been re-enrolled. The applicant did not demonstrate any steps she had taken to ensure the application for condonation was expeditiously determined.

The applicant's conduct is evident of a litigant intent on delaying the inevitable and in the process frustrating the judgment creditor. The second respondent aptly surmised that due to the lengthy delay in having the application re enrolled and set down, that application has lapsed. In that regard counsel cited para 10 of practice directive 3/2013 which states that:

> "Where directives have not been given in terms of paragraph 8 above, and a matter postponed sine die or removed from the roll is not set down within three (3) months from the date on which it was postponed sine die or removed from the roll, such matter shall be regarded as abandoned and shall be deemed to have lapsed."

In casu, the corrected order of 4 December 2017 had no directives and so at the expiry of three months from that date it was deemed lapsed as it had not been set down. This is an aspect applicant's counsel did not refute.

Another aspect noteworthy is that applicant conceded that as at the time of filing this application on 17 April 2018, the second respondent had in fact obtained transfer. The transfer brought another dimension to the application. It is trite that the transfer altered the requirements for this court's intervention. The legal position in respect of a sale of immovable property confirmed by the sheriff was aptly stated by the Supreme Court in *Mapedzamombe* v *Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257(S) 260 C – F91 in these words:

> "Before a sale is confirmed in terms of r 360, 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 would not readily do so, see *Lalla v Bhura* 1973 (2) ZLR 280 (A) at 283A-B. Once confirmed by the Sheriff in compliance with r360, 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 r 359 for it to do so. See *Naran v Midlands Chemical Industries (Pvt) Ltd* S – 220-91 (not reported) at pp 6-7. 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 r 359 and must conform strictly with the principles of the common law. 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 by execution, or fraud."

See also *Mhlanga* v *Sheriff of the High Court* 1999 (1) ZLR 276 (H).

In *Morfopoulos* v *Zimbabwe Banking Corporation Ltd & Ors* 1996 (1) ZLR 626 (H) 627D-F, GILLESPIE J aptly captured the salient features court must consider in deciding whether to set aside sales in execution in these words:

> "The question of the setting aside of sales in execution of property is one that has received considerable attention in recent times. The administration of justice has not been without criticism, unjustified in my view, of insensitivity to the plight of judgment debtors who face the possible loss of immovable property, including residential accommodation, in satisfaction of a judgment debt. The rules that have evolved concerning the sale of properties in execution are designed to find a balance, on the one hand, between the need to protect a judgment debtor who is unfairly being hounded to insolvency and homelessness and, on the other, the imperative to ensure that the judgment creditor, forced to go to court to obtain satisfaction of his debts, is provided with his just relief. A further factor has been given additional consideration that is the requirement that the reliability and efficacy of sales in execution be upheld."

In instances such as this case where the applicant has taken a lacklustre approach to her case clearly exhibiting that she is in no hurry to put finality to the issue of execution, it would be unfair and unjust to lean in her favour.

I am of the view that even if there had been a proper application such would not have succeeded for the above reasons.

The second respondent asked for costs on a legal practitioner and client scale. I am of the view that such a request is well founded. As already noted the applicant has taken a lackadaisical approach towards prosecuting its application for condonation and has simply been intent on abusing court process. It was evident from inception that no application for postponement or suspension of the sale had been filed with court yet applicant has persisted from the time of the Sheriff's decision to now that the application for condonation for late filing of an application in terms of r 348A should be construed as the application for postponement or suspension of the sale. That was simply untenable. As if that was not enough, the application for condonation was removed from the roll and it has not been reset down for a period well in excess of three months. The applicant has not demonstrated any bona fide intentions to have that application for condonation reset-down and determined. This is clearly a case of applicant simply being intent on harassing the judgement creditor and now owner of the property by ensuring it does not enjoy its rights of ownership. It is appropriate that such conduct be visited by an award of costs on the legal practitioner and client scale.

Accordingly, the application is hereby dismissed with costs

The applicant shall bear the costs of this application on the legal practitioner and client scale.

Hamunakwadi and Nyandoro Law Chambers, applicant's legal practitioners
Costa & Madzonga, 2nd respondent's legal practitioners