

DANISILE SIBANDA

Versus

SHERIFF OF THE HIGH COURT

And

**NATIONAL RAILWAYS OF ZIMBABWE
CONTRIBUTORY PENSION FUND**

And

LOUIS GREMU

And

BULAWAYO REAL ESTATE

And

REGISTRAR OF DEEDS N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 3 NOVEMBER 2021 & 27 JANUARY 2022

Opposed court application

S. Siziba, for the applicant
T.M. Tsvangirai, for the 2nd respondent
H. Moyo, for the 3rd respondent

DUBE-BANDA J: This is an opposed court application. The relief sought by the applicant is that the sale in execution and transfer of stand 12038 Bulawayo Township of Bulawayo Township lands situate in the district of Bulawayo and also known as number 8 Annie Morris Road, Ilanda, Bulawayo (the property) in favour of the 3rd respondent be set aside as *null and void* and title in the property revert to the names of the applicant; that the 5th respondent be ordered and directed to facilitate the registration of the property in the name of the applicant; and respondents pays costs only if the application is opposed. This application is opposed by the second and third respondents. The 1st respondent has placed its version before court and concluded by making the point that it shall abide by the decision of the court. The 5th

respondent was cited in its official capacities because the implementation of the order sought by the applicant, if granted may require its services.

Factual background

This application will be better understood against the background that follows. In case number HC 930/14, 2nd respondent sued applicant in respect of rent arrears and operational costs and obtained a consent judgment in the sum of US\$33 007.25. On the 19th October 2016 the Sheriff was instructed to attach and take into execution the property of the applicant to recover the judgment debt. On the 2nd November 2016, the Sheriff served a notice of attachment of the property, subsequent to the attachment in case number HC 2988/16 applicant filed a court application for condonation for the late filing of an application for the suspension of the sale of a dwelling house. Upon the granting of case number HC 2988/16, an application for the suspension of the sale was filed on the 8 December 2016 under cover of case number 3074/16. Case number HC 3074/16 was dismissed on the 29 December 2016.

The property was sold through public auction on the 24 March 2017. One Tapiwa Ncube was declared the highest bidder. The bid was USD46 000.00. On the 21st April 2017, the applicant filed an objection in terms of Order 40 Rule 359 of the High Court Rules, 1971. On the 14th June 2017, the application was dismissed and Tapiwa Ncube was confirmed the highest bidder. Applicant filed an application for review of the decision of the Sheriff confirming the sale and declaring Tapiwa Ncube the highest bidder. On the 25 September 2017, the 2nd respondent (judgment creditor) instructed the Sheriff to cancel the sale to Tapiwa Ncube. The cancellation of the sale was premised on the withdrawal of the highest bidder, Tapiwa Ncube. The sale to Tapiwa Ncube was cancelled and the property was re-advertised for sale for the 23 March 2018. In the subsequent sale Louise Gwemu was declared the highest bidder. The bid was USD 45 000-00.

On the 6th April 2018, applicant filed an objection to the sale to Louise Gwemu. A hearing was conducted and on the 13th June 2018, Louise Gwemu was declared the bidder. On the 27 June 2018, in case number HC 1801/18 applicant filed a court application for setting aside of the sale to Louise Gwemu. However the property was subsequently transferred to the Louise Gwemu. In HC 2882/18 this court by order dated 10 January 2019 dismissed for want of prosecution the application for the setting aside of the sale in execution, i.e. HC 1801/18. In

case number HC 2391/19 applicant filed an application for rescission of judgment, seeking that the order for the dismissal for want of prosecution in HC 2882/18 be rescinded. On the 11 March 2021, in *Sibanda v The Sheriff of the High Court* HB 25/21 the application for rescission of judgment was dismissed with costs. On the 16 April 2021 applicant filed this application. It is against this background that applicant has launched this application seeking the relief mentioned above.

Preliminary points

Each side made every effort to outdo the other side on the basis of preliminary points. At the commencement of the hearing I informed the parties that I shall adopt a holistic approach. This approach avoids a piece-meal treatment of the matter, and the preliminary points are argued together with the merits, but when the court retires to consider the matter it may dispose of the matter solely on the basis of the preliminary points despite that they were argued together with the merits.

I now turn to consider the preliminary points taken by the parties.

Preliminary points – taken by the applicant

Applicant took the following preliminary points, *viz.*: that there is no competent opposing affidavit by the 2nd respondent; and that the 2nd and 3rd respondents' opposing papers do not comply with the peremptory provisions of Order 32 rule 227(1) (c) as read with rule 227(2) (d) of the High Court Rules, 1971.¹ I now deal with these in turn.

No valid affidavit for the 2nd respondent

Mr *Siziba*, counsel for the applicant contends that there is no competent opposing affidavit by the 2nd respondent. It is contended that the deponent to the 2nd respondent's opposing affidavit has not established that she is authorised to represent the 2nd respondent in this case. It is argued that Knight Frank is not a party to this matter and has neither *locus standi*

¹ This application was filed before the enactment of the High Court Rules, 2021.

nor authority to act for or represent the 2nd respondent unless expressly authorised by a resolution. Further it is contended that the deponent has not attached anything to demonstrate that he is authorised by Knight Frank to represent it and such cannot be assumed but must be proven by a resolution. It is argued that there is no opposing affidavit by the 2nd respondent.

Mr *Tsvangirai*, counsel for the 2nd respondent contends that applicant fully knows and its own record shows that the judicial sale in dispute was a result of her failure to pay rentals to 2nd respondent. In all cases between the parties, i.e. HC 1658/17; HC 1801/18; HC 2882/18 and HC 2391/19 2nd respondent has always been represented by Knight Frank, who are the property managers. The lease agreement between applicant and respondent was prepared by Knight Frank. It is contended that this preliminary objection has no merit and must be dismissed.

In his opposing affidavit Sthembinkosi Mbavhumana declares that he is a partner at Knight Frank, Zimbabwe the managing agents of 2nd respondent's property in question that led to the sale of applicant's property and as such he has authority to represent the 2nd respondent in this matter. Factoring into the equation the history of this matter, that the 2nd respondent has always been represented by its property managers (Knight Frank) in its dispute with applicant, and that the lease agreement between applicant and 2nd respondent was prepared by Knight Frank, and that applicant's papers contain an affidavit deposed to by a former partner at Knight Frank, it would be elevating this requirement of a resolution to unacceptable heights to hold that there is no valid notice of opposition for the 2nd respondent. See: *Tianze Tobacco Company (Pvt) Ltd vs Vusumuzi Mutuyedwa* HH-626-15.

In any event the applicant is not contesting the assertion that the deponent to the opposing affidavit has knowledge of the facts stated in the affidavit. Therefore he is a competent deponent or witness in this matter. As a deponent or witness he can only be disqualified if he does not meet the requirement of Order 32 r 227(4) of the High Court Rules, 1971 which provides that an affidavit filed in written applications "shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein." See: *Bere v JSC and 6 Others* SC 1/2022. I take the view that Sthembinkosi Mbavhumana is a person who can swear positively to the facts of this

matter and no resolution is required for his affidavit to be valid. See: He is a witness. *Willoughby's Investments (Pvt) Ltd v Peruke Investments (Pvt) Ltd & Anor* HH 178/14. All in all, I take the view that this objection is entirely without merit and need not detain this court any further. It is accordingly dismissed.

No compliance with Order 32 rule 227(1) (c) as read with rule 227(2) (d) of the High Court Rules, 1971

Mr *Siziba* contends that 2nd and 3rd respondents have filed fatally defective opposition papers which are not paginated, indexed and numbered in breach of Order 32 rule 227(1) (c) as read with rule 227(2) (d) of the High Court Rules, 1971. It is argued the papers are a nullity and thus rendering the application unopposed by them. It is contended the 2nd and 3rd respondents' papers be struck out as fatally defective and the application be treated as unopposed.

In answer to this preliminary objection, Mr *Tsvangirai* contends that applicant is majoring on side shows. It is argued that there are five respondents, the procedure is that once all opposing papers and answering affidavits have been prepared and filed, it is the duty of applicant to prepare a consolidated index and a consolidated pagination that takes into account all the papers before court and one composite record is created. It is further contended that no prejudice has been suffered by applicant as she managed to answer to the issues raised in the opposing papers. This court was urged to condone this infraction in terms of rule 4C of the High Court rules, 1971. In the main Mr *Moyo* counsel for the 3rd respondent, associated himself with the submissions made by Mr *Tsvangirai*.

The jurisprudence in this jurisdiction is that where there has been a substantial compliance with the rules and no prejudice is likely to be sustained by any party to the proceedings, the court should condone any minor infraction of the rules. See: *Telecel Zimbabwe (Pvt) Ltd v POTRAZ & Ors* HH 446/15. Applicant has suffered no prejudice at all. Accordingly in terms of rule 4C of the High Court Rules, 1971 I condone the omission, if it is an omission at all. This preliminary point has no merit and is dismissed.

Preliminary points – taken by the 2nd and 3rd respondents

Both 2nd and 3rd respondent took the following points *in limine*, viz: that the matter is *res judicata* and that this court is *functus officio* in respect of this matter. 3rd respondent further contended that this application must fail on the basis that it violates the principle of finality to litigation.

Res judicata

In *Anjin Investments (Pvt) Ltd v The Minister of Mines and Mining Development & 3 Ors* CCZ 6 / 2018, the Constitutional Court held that the principle of *res judicata* precludes the court from re-opening a case that has been litigated to finality. The principle was aptly defined in the case of *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472 A-B. The South African Appellate Division had this to say:

If a cause of action has been finally litigated between the parties, then a subsequent attempt by one to proceed against the other on the same cause for the same relief can be met by an *exceptio rei judicatae vel litis finitae*.

Res judicata has been described as follows, that the expression literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in the proceedings between the parties and that it therefore cannot be raised again. See: *Wilke NO & Others v Griekwaland Wes Korporatief Ltd* (1327/2019) [2020] ZASCA 182, *Transalloys v Mineral-loy* [2017] ZASCA 95 para 22 and *Prinsloo NO & others v Goldex 15 (Pty) Ltd and Another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) (para 10).

In *Anjin Investments (Pvt) Ltd v The Minister of Mines and Mining Development & 3 Ors* (*supra*) the court said to be successful, where *res judicata* is raised, all the requisites for the plea must exist. These requisites were didactically stated in the case of *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 45 E-G as follows:

There is nevertheless no room for this exception (of *res judicata*) unless a suit which had been brought to an end is set in motion afresh between the same persons about the same matter and on the same cause for claiming, so that the exception falls away if one of these three things is lacking.

2nd respondent contends that applicant instituted proceedings challenging the sale of her property under HC 1801/18. In HC 2882/18 the application was dismissed for want of prosecution. In HC 2391/19 applicant filed an application for rescission of judgment, which application was dismissed in *Sibanda v The Sheriff of the High Court* HB 25/21. Applicant did not appeal this judgment. It is contended that the judgment in *Sibanda v The Sheriff of the High Court (supra)* is extant and cannot be challenged through the back-door, it is final and definitive judgment on the matter and it was decided on the merits. In respect of *res judicata* 3rd respondent raise substantially the same arguments as 2nd respondent. It is argued that applicant cannot again litigate against the respondents on the same cause of action and seeking the same relief.

Mr *Siziba* contends that the submission that the present application is *res judicata* has not been properly taken. It is argued that the challenge in case number HC 1801/18 was filed under rule 359(8) of the High Court Rules, 1971 and was not dealt with by the court or decided on the merits. It is further contended that this present application is anchored on common law, it cannot be said to be *res judicata* under any circumstances at law.

The immediate question then is whether the first case has been determined on the merits. This issue requires careful scrutiny. It is not in dispute that the dismissal for want of prosecution of case number HC 1801/18 was not on the merits. This however is not the end of the inquiry. An application seeking rescission of judgment of the dismissal order was filed, the application was dismissed. In dismissing the application for rescission (HC 2391/19) this court considered whether applicant has a *bona fide* defence on the merits and found that she had none. I take the view that because this court found that applicant had no defence on the merits, and applicant did not appeal the dismissal of her application for rescission (*Sibanda v The Sheriff of the High Court* HB 25/21), it now means that HC 1801/18 was dismissed on the merits. My thinking therefore is that the issues as raised in HC 1801/18 cannot be raised in any other case between the same parties without breaching the *res judicata* rule.

The applicant first approached the Sheriff in terms of rule 359(1) of the High Court Rules, 1971. The rules provide that in such an application, a litigant may request the Sheriff to set aside a sale on the grounds that it was improperly conducted; or the property was sold for an unreasonably low price; or on any other good ground. To me this entails that such an aggrieved litigant is not confined to the grounds that the sale was improperly conducted; or the property was sold for an unreasonably low price. Such a litigant is entitled to invoke any other ground in motivating the Sheriff to set aside the sale. The any other ground could be common law grounds, i.e. a litigant is within her rights to allege that the sale was done in bad faith and fraudulently.

Subsequent to the hearing of the parties, the sheriff confirmed the sale in execution. Aggrieved by the confirmation of the sale, applicant approached this court (HC 1801/18) to set aside the sale in execution in terms of rule 359(8) of the High Court Rules, 1971, which says 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 application (HC 1801/18) was dismissed for want of prosecution. That application having been dismissed for want of prosecution and an application for rescission (*Sibanda v The Sheriff of the High Court* HB 25/21) having hit a brick wall, she now returns to this court citing the common law as the new cause of action seeking substantially the same relief she sought in HC 1801/18. Is such attainable?

I take the view that it was open to applicant to anchor her application to the Sheriff on the common law grounds on the basis of any other good ground, as sanctioned by the rules. Aggrieved by the decision of the Sheriff it was open to her in her rule 359(8) application to this court to rely on the grounds that the sale was improperly conducted; or that the property was sold for an unreasonably low price; or on any other good ground which could be the common law grounds, she purports to raise in this application.

Now to approach this court and contend that the grounds and the cause of action are different from the dismissed application (HC 1801/18) is in my opinion unattainable. Such grounds were available to her in her application to the Sheriff and to this court in her rule 359(8) application.

In *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 825G, Corbett JA stated that:

‘Cause of action . . . is ordinarily used to describe the factual basis, the set of material facts that begets the plaintiff’s legal right of action’. In deciding whether the same relief is being sought on the same ground, the starting point is ‘to compare the relevant facts of the two cases upon which reliance is placed for the contention that the cause of action (in the extended sense of an essential element) is the same in both.’

I take the view that the material facts upon which applicant relies in this application, is the same factual basis upon which she relied and could have relied in her rule 359(8) application (HC 1801/18).

Applicant abandoned the rule 359(8) application (HC 1801/18) along the way. I say so because she says she was aggrieved by the judgment in *Sibanda v The Sheriff of the High Court* HB 25/21, then her remedy was to appeal such judgment and not to re-start new proceedings, on the same factual basis to achieve the same objective of setting aside the sale in execution of her property. I take the view that the filing of this application is a belated attempt by the applicant to appeal, through the backdoor the judgment in *Sibanda v The Sheriff of the High Court* HB 25/21. The applicant cannot be permitted to circumvent the procedures of this court in this way. She cannot fail to appeal in one application, make a turn and return to this court and start the same application in a different name and contending that it is now based on a different cause of action. Such is impermissible.

It is for these reasons that I reject the argument that the cause of action in case number HC 1801/18 is different from the cause of action in this case. Applicant is committing the very mischief that the doctrine of *res judicata* seeks to stop, by protecting litigants and the courts from never-ending cycles of litigation. In *casu* the parties are the same, the cause of action is the same, the questions raised are the same and the relief sought is the same.

The *res judicata* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. The principle that there must be finality to litigation is part of our law. See: *S v Franco & Ors* 1974 (2) RLR 39 (AD); *Trastar (Pvt) Ltd t/a Takataka Plant Hire v Golden Ribbon Plant Hire (Pvt) Ltd* HB 4/18. While applying this principle, one must be careful not to do injustice to litigants. See: *Ndebele v Ncube* 1992 (1) ZLR 288 (S). It

is not in the interests of justice that the court be taken back and forth in essentially the same matter. See: *Sibanda v The Sheriff of the High Court* HB 25/21.

There must be an end to litigation and it would be intolerable and could lead to great uncertainty if courts would permit the same issues to continue being re-cycled *ad infinitum*. Applicant has enjoyed her day in court, she cannot be permitted to approach this court again armed with the same application now differently labelled. In *Mafurirano v Total Zimbabwe (Pvt) Ltd* HB 239/21 KABASA J remarked that litigation is not about using ingenuity to bring as many applications as such ingenuity allows in order to get the same relief. There must be finality to litigation. I agree with these remarks.

In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28 the Constitutional Court of South Africa noted that there must be an end to litigation and it would be intolerable and could lead to great uncertainty if courts could be approached to reconsider final orders made. Applicant's conduct in bringing this application violates the principle of finality to litigation. It is for the above reasons that this application must fail.

Disposition

In the premises I find that the point *in limine* that this matter is *res judicata* has merit and must succeed.

In the result, it is ordered that:

1. The point *in limine* of *res judicata* is upheld.
2. This application is dismissed with costs of suit.

Mweli Ndlovu & Associates, applicant's legal practitioners
Dube-Tachiona & Tsvangirai, 2nd respondent's legal practitioners
Joel Pincus, Konson & Wolhurter, 3rd respondent's legal practitioners