BELLIA ZIBOWA

And

BLESSING ZIBOWA

Versus

ISAIAH SHONHIWA

And

TERRENCE KENNY

And

DEPUTY SHERIFF OF HIGH COURT BULAWAYO N.O

And

WELLINGTON SHOKO

And

DEEDS REGISTRY N.O

And

FBC BUILDING SOCIETY

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 7 FEBRUARY AND 28 MAY 2020

Opposed Application

Professor W Ncube , for the applicant
J Ndubiwa, for the 1st and 4th respondents
Ms P Vangiranai, for the 6th respondent
2nd, 3rd and 5th respondents, in default

MABHIKWA J: At the conclusion of Submissions in argument in this matter, I granted the relief sought and indicated that my reasons thereof would follow. Below are the reasons for my decision.

The applicants filed this application seeking condonation for the late filing of an application for review of a decision made by the 3rd respondent as Sheriff of Zimbabwe together with the 4th, 5th and 6th respondents. In terms of that decision, the applicants' property known as No. 50 Southway, Burnside, Bulawayo was sold to the 1st respondent and transferred into his name.

The salient facrs of this matter are that the applicants filed an application for the review of a decision made by 3rd respondent as Sheriff of Zimbabwe together with the 4th, 5th and 6th respondents to have the applicants' property sold. They contend that the sale of their property was done completely irregularly and outside the court rules. Further, applicants complain that whilst they had themselves instructed their erstwhile legal practitioners timeously, the lawyers did a messy job and failed to comply with basic rules of court.

At the hearing of the application, the respondents raised a point *in limine* that applicants' application failed to comply with Order 33 Rule 257 of the High Court Rules, 1971. The rule provides thus;

> "The court application 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."(the underlining is mine)

Confronted by the same point *in limine* which the Judge correctly noted that 6th respondent had in fact raised in its opposing papers as early as 10 October 2018, the erstwhile legal practitioners, Messrs Dube-Tachiona and Tsvangirai Legal Practitioners, then sought to make a brief oral application for condonation of the non compliance. *Mr Masamvu* for the applicant submitted that if the court were so inclined to accept that the non-compliance with Rule 375 was fatal to the application, then the applicant would seek the indulgence of the court to exercise its discretion in terms of Rule 4C of the court rules and condone the non-compliance. The application had failed to state even on the draft, the exact nature of the relief sought.

At the end of the hearing, the learned Judge, my sister MOYO J, was not amused by the lackadaisical approach taken by the lawyers in making a shoddy application by oral submissions from the bar notwithstanding the fact that the rules state that such application for condonation for failure to comply with the rules of court should be in written form. The

learned Judge thus simply upheld the point *in limine* and dismissed the application for Review with costs.

In bringing this current application the applicants, had dumped their erstwhile legal practitioners and sought the services of new lawyers. They implored the court not to visit the ineptitude and sluggish approach of their erstwhile legal practitioners on them. They implored the court to consider most importantly, that they as lay persons had instructed their legal practitioners timeously. When they confronted the erstwhile legal practitioners they were told that nothing further could be done. It was only the current legal practitioners who, after perusing the court record noted and advised that the application had not been heard and dismissed on the merits. They contended the failure to comply with a court rule to put a prayer on the application for Review was a purely technical issue which the lawyers should have taken care of and should not be rigidly imputed upon them as innocent lay persons. They thus submitted that they had a good cause for both the condonation application and the merits in case No. HC 2784/18, the main case.

It is trite that judicial sales, which are either sales by public auction or private treaty in appropriate circumstances must be done within the four (4) corners of the court rules. Anything done outside the court rules is a legal nullity and of no legal force. The applicants contend that after obtaining orders in their favour, one being judgement in the sum of USD14 500 plus costs on an attorney and client scale and the other being a judgement declaring applicants' property, No. 50 Southway road, Burnside, Bulwayo executable, the respondents conducted their own private sale which did not involve the Sheriff as is required by law. For that submission, the applicants attached Annexture "E" to the application.

Annexture "E" is a letter written by the Additional Sheriff in Charge of the Southern Region. It was a reply to the applicants' erstwhile legal practitioners who had requested for certain information and documents relating to a purported sale of the applicants' property. The Sheriff's office could not provide answers, information and documents that were very pertinently requested. In short, the Additional Sheriff explained that they had initially received instructions to sell the property in question from Messrs Webb, Low and Barry legal practitioners on 30 April 2018. The sale was scheduled for 11 May 2018. However, they cancelled the sale after a Chamber application for the suspension of the sale in terms of Rule

348A (5a) filed by Messrs Dube-Tachiona and Tsvangirai Legal Practitioners. Importantly however, at the very bottom of the letter, the Sheriff's office states as follows:

> "We however cannot provide the documents you require as this was a sale done outside the Sheriff's office. The Sheriff was only involved in the signing of the necessary documents as ordered by the High Court in HC 2818/17; Xref 1043/14."

In other words, the Sheriff's office admitted that the sale was not done in accordance with the due process of the law as provided for in the Court Rules. It is clear from that admission that the Sheriff's office neither authorized nor conducted the sale in question.

The Law

A dismissal of a claim or application due to failure to non compliance with Court Rules is not a judgement on the merits of a case. That is trite.

In *Belinsky v Chipere* 2012 (1) ZLR 253 (H) (HH 74/12) the excipient had been sued by the respondent for damages arising out of a motor vehicle accident. A Pre-Trial Conference had been set down. The respondent did not appear. The excipient applied for an order dismissing the respondent's claim with costs. He was granted the order. The claim was duly dismissed with costs. The court held that "such an order obtained without hearing evidence is not a judgement on the merits. It is not at law a judgement for the other party but it merely amounts to a default judgement." The court held further that the defaulting party was entitled to issue fresh summons.

Also in *Mambo-National Raiways of Zimbabwe & Another* 2003 ZLR 347 in a case almost similar to the case *in casu*, Mambo applied for condonation of the late filing of an application. Rule 259 of the High Court Rules required that an application for Review must be filed within 8 weeks. SMITH J, (as he then was) held that:

> "In my view, where a delay in filing a Review application exceeds six months, the court should refuse to condone the late filing unless there are very compelling reasons."

In the Mambo case, not only was there an inordinate delay in filing the application for Review but also a failure to comply with Rule 257 of the High Court Rules. That rule requires that an application for Review must state shortly and clearly the grounds on which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed

for. Unlike *in casu,* in the Mambo case, there was no initial and timeously failed application. So the court had to look at both the inordinate delay as well as the prospects of success. Because of the non-compliance with Rule 257, the court decided not to even consider it necessary to look into the issue of *prospects of success, and dismissed the application. Importantly however, for the case in* casu, the learned SMITH J in Mambo (supra) had this to say.

> "When an application is dismissed on the basis of non compliance with Rule 257, it would be appropriate, in my view, to order that the costs be paid by the legal practitioner concerned. The failure to comply with Rule 257 would clearly be due to the incompetence or negligence of the legal practitioner."

The order for costs *de bonis propris* was a clear indication that the court regarded the non compliance as a gross incompetence, negligence or ineptitude of a lawyer which the applicants *in casu* complain of. It (non compliance) clearly cannot be held against them. From the foregoing legal position, it is noted that Messrs Dube-Tachiona and Tsvangirai apparently failed to comply with court rules, even when advised by defendants' lawyer (outside their client's knowledge) that the application was defective. At the hearing my sister MOYO J dismissed the application after upholding the point *in-limine* that it was fatally defective for non-compliance with the Court Rules. She did not delve into the merits. To that extent, the merits were not determined.

Mr Ndubiwa for the 1st and 4th respondents has argued that the applicants have now brought the same application, seeking the same relief, on the same cause which MOYO J dismissed on 11 April 2019. In my view, whilst it may indeed appear as though the applicants are making literally the same application, this is in fact not so. At the time the applicants filed for review of the sale irregularities in HC 2748/18 they were within time and therefore they have not made this application before.

It appears to me that *Mr Ndubiwa* conflates two (2) different applications, both incidentally with the term "condonation" but with different outcomes and effects. In that first application, there was no "application for condonation of the late filing of an application for Review." It was just a straight timeously filed application. But belatedly as it were at the beginning of the hearing, Messrs Dube-Tachiona and Tsvangirai realised the folly of their argument on the non compliance with the rules in stating the exact nature of the relief sought

(Rule 257). They then attempted to apply for "condonation" orally, to amend their papers at the same time imploring the court to use its discretion in terms of Rule 4C of the High Court Rules. MOYO J outrightly rejected the application as there was no provision for such application which in any according to MOYO J, was very shoddily done orally. She dismissed the "condonation request." So, this was a completely different application for "condonation" even though the term "condonation" is also used. It is important to note that the rejection of that "condonation request" led to the dismissal of a timeously filed application for Review.

Owing to the lawyers' gross ineptitude on a legal and procedural point that a litigant as a layman cannot be expected to have input or control over, the applicants found themselves having to file a fresh process just as in *Belinsky v C*hipare (supra) They promptly ditched the inept counsel to pursue what they believed is an arguable case on the merits in their favour. However, unlike in a Summons case, this was an application and they were now out of time. They were now forced to make an application for condonation to file that application for Review. They had shown, timeously, their willingness and intention to assert their rights regarding the unprocedural sale of their property.

It is this court's view that indeed once found that a matter was dismissed, not on the merits but on a technicality like a preliminary point especially such as the one *in casu*, that matter cannot be said to have been determined. *Res-judicata* would not apply in such a case.

Mr Ndubiwa has also argued that generally, the court would not be quick to set aside a Sheriff's decision to sell property in execution of a court order to satisfy a debt. This submission is very true, and there is a pleathora of decided cases to that effect. What should be noted through is that the argument is correct only to the extent that the sale in question can properly be described as a judicial sale. The irregularities that may be condoned by the court in Ndubiwa's argument are irregularities committed or omitted by the Sheriff in conducting the sale and can, when good cause is shown, and in the interests of justice, be condoned. Where the Sheriff confirms that a sale was not authorized or conducted by him and refuses or decides not to defend it, that sale cannot be described as a Judicial Sale.

Order 40 Rule 358 (1) is clear, it states as follows:

"358. Sale otherwise by Public Auction.

(1) Where all, persons interested including the judgement debtor consent thereto, or otherwise with the consent of a Judge, the Sheriff may sell immovable property attached in execution otherwise than by Public Auction, if he is satisfied that the price offered is fair and reasonable and that the property is unlikely to realise a larger sum by a sale at Public Auction.
(2) If, after a sale by Public Auction has taken place the Sheriff is not satisfied that the highest price offered is reasonable as provided for by Rule 356, the Sheriff may sell the property by private treaty subject to the conditions of sale for such price being greater than the highest offer made at the Public Auction, as he deems fair and reasonable. If the Sheriff is unable to sell the property by private treaty at such price, it may again be offered for sale by Public Auction."

It is clear from the above that even a sale by private treaty is done and authorized by the Sheriff. The rules clearly do not allow estate agents to conclude "judicial sales" not instructed and done by the Sheriff. No law authorizes a judgement creditor and his lawyers to instruct an estate agent to conduct a "judicial sale" outside the rules of court. Parties and or their lawyers cannot engage in a sale outside the Sheriff's office and then simply call the Sheriff "to sign documents" after the fact. The Sheriff cannot simply "sign" papers of a sale that he did not conduct and then it becomes a judicial sale. Unfortunately also and contrary to Mr Ndubiwa's submissions, the reports that he referred to in case No. 2748/20, which I have read, do not show that it was the Sheriff's office that sold the property at least even if irregularly. As a result, the Sheriff's position in Annexture "E" distancing themselves from the sale by private treaty stands. There is a pleathora of cases and the reasons are well known that while on the one hand there is s desire by the courts to have finality in litigation and that a success full party in the form of a creditor get their just dues, there is, on the other hand the need to guard against improper and corrupt sales of people's properties where those with the "judgement debtor" tag may just be ripped off as their properties are sold unlawfully. That is why Rule 359 gives them the right to apply that a Sheriff's sale be set aside on the grounds that it was improperly conducted.

It is true also as submitted that the courts may, in appropriate cases, consider innocent purchasers of property in irregularly conducted judicial sales. However, for the reasons given above, I am not persuaded that this is case wherein I could properly consider exercising my discretion in that direction.

I am not persuaded either, that this is a case wherein I am being called upon to review my sister Judge's work, which is impermissible. I am convinced that before me is a

completely different application with a different cause. I am thus satisfied that the point *in limine* (*res-judicata*) cannot succeed in this matter. In my view, this matter finally boils down to interests of justice. Firstly, I must say that the clear indignation of my sister, MOYO J on the non-compliance with Rule 357 by the applicants' lawyers as well as the outrage by SMITH J in a similar non compliance with the same Rule 357 in Mambo's case, and secondly the Sheriff's revelation that the sale was done outside their mandate and office, and that they were only called to sign documents well after the sale, saves the day for the applicants. They deserve their day in court.

In the circumstances, and in the interests of justice, I will take the view of GREENLAND J (as he then was) in *Mtetwa v Moyo & Another* HH 222-89 when he declared that,

> "In determining whether or not "good cause" has been shown, the first factor the court will consider is the reason for the delay. If the reason, or part of the reason, is due to a fault on the part of the applicant, then that cannot be accepted as "good cause". The second factor which the court will consider is the applicants' success on the merits."

I am satisfied that "good cause" has been shown, and that it is in the interest of justice that this application succeeds in the following order.

1. The late filing of an application for review by the applicants (against the respondents) relating to and concerning the sale and transfer of Lot 21A Burnside situate in the district of Bulawayo commonly known as 50 Southway Burnside Bulawayo be and is hereby condoned.
2. The applicants be and are hereby directed or granted leave to file a substantive application for review within 10 days of granting of this order.
3. Costs on an ordinary scale.

Mathonsi Ncube Law Chambers, applicants' legal practitioners
Mashayamombe and Company, 1st and 4th respondents' legal practitioners
Danziger and Partners, 6th respondent's legal practitioners