

NDABEZINHLE LORENZO MASEKO

Versus

THE SHERIFF OF THE HIGH COURT

And

STANBIC BANK LIMITED

And

NQOBILE NGWENYA

And

REGISTRAR OF DEEDS N.O

IN THE HIGH COURT OF ZIMBABWE

MOYO J

BULAWAYO 29 OCTOBER AND 11 NOVEMBER 2021

Opposed Application

M. Ndlovu, for the applicant

S. Chamunorwa, for the 2nd respondent

Ms J. Mugova, for the 3rd respondent

MOYO J: This is an application for condonation of the late noting of an application for review. The applicant seeks condonation to file an application for the review of the Sheriff's decision in a judicial sale in execution of the applicant's properties. The respondents have raised preliminary points to the effect that the application is totally defective and that the claim sought to be reviewed has since prescribed.

The preliminary point on the application being fatally defective

The respondents have challenged the format of the application in that it does not comply with Rule 242. They also submitted that paragraphs 26, 27 and 28 of the founding affidavit show that applicant is challenging the propriety of

the judicial sale. Respondents further argued that the intended application is a challenge in terms of Rule 359.

The gravamen of the intended application is that the sale was improperly conducted, and that the property was sold at an unreasonably low price. Respondents argue that these are grounds for setting aside a sale in execution in terms of Rule 359 of the High Court Rules 1971. Respondents argue that the purchaser in this case has since taken transfer and for the applicant to have prospects of success the sale cannot be impeached in the absence of allegations of bad faith, or knowledge of prior irregularities in the sale, or fraud, all which are common law grounds for review. The respondents cited the case of *Chiwanza vs Matanda & Ors* 2004 (2) ZLR (S) 203 (H).

In this case it is common cause that title has been passed onto the purchaser. The challenge that can be mounted in such a scenario can then only be in terms of the common law. It cannot be in terms of the grounds stated in Rule 359 of the former High Court rules. In the case of *Chiwanza v Matanda & Ors (supra)* the court quoted from the case of *Mapedzamombe v CBZ & Or* 1996 (1) ZLR 257 (S)

“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 Rule 359 and must conform strictly with the principles of the common law.”

In replying to the points *in limine* the applicant’s counsel submitted that there was no prejudice to the respondents for failure to conform to the applicable rules. Applicant’s counsel then sought to apply for condonation for such failure but did not give any reasonable explanation for the failure to comply with the rules of this court. Whilst the court would not want to be bent on minding technicalities as opposed to substance, this court takes note of the fact that legal practitioners have a lax attitude towards adherence to the rules of court. The rules should be

adhered to. They must be followed, they are not merely in existence to be followed at one's convenience. They direct the legal procedures of this court and they must be respected and honoured. Even where rules have not been complied with, a proper case for condonation of the failure to observe them must be made. In other words there must be a good reason for non compliance with the rules of court. Litigants must always strive to respect the rules and only fail to do so in justifiable and pardonable circumstances. To simply, ignore the rules and then come to court and ask for condonation without making a case for such condonation will not suffice. In fact it would mean that a litigant has failed to make a case for the condonation and since condonation cannot just be granted for the mere asking, such condonation must be refused. A case must be made for condonation for the court to be able to exercise its discretion in favour of the applicant Failure to lay to proper ground for the granting of condonation means that the applicant has failed to make a case for the relief of condonation. There is ample case law on this point. Refer to the case of *Marick Trading Pvt Ltd v Old Mutual & Anor* HH 667-15. Applicant in this case having failed to make a case for condonation, none can be granted.

On the aspect of the intended application being brought on the wrong grounds, applicant's counsel sought to argue that the intended application is based on the common law. However, it is clear from paragraphs 26-28 of the founding affidavit what the intended application is about. It is clearly about the impropriety of the sale and the price having been too low. That is the crux of the application and it cannot be divorced from those facts. The argument by applicant's counsel that the application is in terms of the common law therefore lacks merit and cannot be accepted. The application is therefore both fatally defective and irregular and should be struck off the roll with costs. The respondents also raised the issue of prescription as a preliminary point but I have not dealt with it as it is

my considered view that the issue of prescription would be relevant to determine if there was a valid application before me, which I have found not to be so.

The respondents asked for costs at a higher scale for the reasons that applicant persisted with a clearly defective and incompetent application and that applicant is abusing court process. I hold the view that indeed this application borders on an abuse of court process, it is ill-fated and creates an unnecessary burden on the respondents to defend it. Applicant should have withdrawn this application and sought to launch a properly drafted and well grounded application.

It is for these reasons that the application is struck off the roll with costs at an attorney and client scale.

Ndlovu Mehluli & Partners, applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners, 2nd respondent's legal practitioners
Mlotshwa & Maguwudze Titan Law, 3rd respondent's legal practitioners