HILDA MBIKWAPHI SIBANDA

Versus

THE MESSENGER OF COURT BULAWAYO N.O

And

L NCUBE N.O

And

CBZ BANK LIMITED

And

SHEPCO PROPERTIES (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 2 OCTOBER 2019 AND 4 JUNE 2020

Opposed Application

B Dube, for the applicant
1st respondent, in default
No appearance, for the 2nd respondent
P Mukono, for the 3rd respondent
N. T Mashayamombe, for the 4th respondent

MABHIKWA J: The applicant's property, No. 46 Manningdale, Lot 2 of Lot KN Willsgrove, also known as No. 46 Essexvale, Bulawayo Township was sold in execution of a debt.

The applicant has submitted that the 1st and 2nd respondents, who are the Messenger of Court for Bulawayo and the Provincial Magistrate respectively, do not oppose the application. Further, applicant submits that in fact, 1st respondent has admitted that the sale was not done in terms of the law and has signed a consent order draft to that effect. It appears to me that this matter was at some stage set down on the unopposed roll ostensibly on the allegation that the Messenger of Court for Bulawayo (1st respondent) had signed a

"consent draft" "admitting that the sale had not been conducted properly in terms of the law" and that it (sale) be declared null and void so that there may be a fresh sale. However for obvious reasons as will be shown below the matter was removed from the roll of unopposed matters in respect of the 3rd and the 4th respondents. These are the two parties that would have been affected by the "relief sought". It is not clear whether the applicant went ahead and obtained an order against 1st and 2nd respondents, which in my view would be to obtain relief against a party (s) who themselves are not practically affected by the order, only to use it to the detriment of another party who has the real interest in the relief that would have been granted. In simpler terms, it is improper in my view for a party to obtain an order against a Sheriff or Registrar of Deeds for example, who have no real interest in the properties, well knowing that what the Sheriff or Registrar of Deeds is directed to do by the order practically affects the interests of a judgement debtor or a purchaser of property sold by auction in execution of a debt.

The applicant filed an application for the review of the proceedings and conduct of the 1st respondent and 2nd respondent in respect of the sale in execution of applicant's immovable property being No. 46 Manningdale Township 2 of Lot KN Willsgrove also known as 46 Essexvale, Bulawayo. Applicant set out the grounds for review as follows;

1. That the 1st and 2nd respondents failed to follow the procedure laid out in the Magistrate's Court Rules of conducting a public auction.
2. That the 1st and 2nd respondents grossly erred in failing to inform and, or give the applicant a chance to object to the sale.
3. That 1st and 2nd respondents committed a serious irregularity by doing a Combo public and private sale against the rules of the Magistrates' Court.

Applicant argues therefore that she was thus denied the right fair administration of justice and a fair hearing in terms of the country's Constitution. The applicant then prayed for the following relief; that;

1. The sale of the applicant's immovable property being No. 46 Manningdale Township 2 of Lot KN Willsgrove a.k.a 46 Essexvale Bulawayo Township of Bulawayo be declared null and void and set aside.

2. Pursuant to paragraph 1 (above), the subsequent transfer or purported transfer of the Title in the said property referred to in (1) above into the names of any person, including the 3rd respondent be and is hereby set aside.
3. That applicant be ordered to conduct a fresh auction *de-novo* taking into account a proper Evaluation Report.
4. That there be no order as to costs unless the order is opposed, and the party (s) so opposing be ordered to pay costs on an attorney and client scale.

Needless to say, the 1st and 2nd respondents did not file any papers opposing the application whilst 3rd and 4th respondents did oppose. I propose to start with 1st and 2nd respondents' positions at the same time explaining my use of the phrase "needless to say."

The 1st and 2nd respondents are the Messenger of Court and Provincial Magistrate respectively. These are officers of the court who are generally and by nature impartial in the discharge of their duties. To that extent, they quite often do not file any papers, and rightfully so in my view, otherwise they would then risk the high possibility of being accused of bias if they file papers opposing or supporting the application. Moreover if they oppose, they may, in addition to bias, be accused of simply defending their actions at all costs. As a result, they rarely file papers save for instances where they are called upon to file a report or where the application gravely attacks them in their person. So "needless to say", they did not oppose. It would therefore be unwise and improper as the applicant does, to take their failure to oppose as the "centre peg" or "tholepin" of her application and argument that the sale was not done in terms of the law. I take note also that in her papers and quite often, applicant refers to the following;

> "1st and 2nd respondents have not opposed this application. The 1st respondent has admitted that there were procedural irregularities and has since signed a consent order marked "CP"

This statement and, or other words to that effect, feature prominently in the applicant's founding affidavit and other papers as proof that the sale should be set aside. I have looked at the said document marked "CP". Apparently, it was originally meant to be a "Consent Order" as it is actually so headed. It is still filed as part of the application at pages 49-50. Minus the two signatures, it is literally the same document which is the "amended Draft Order" of this application at pages 51-52. I noted the following from the said document.

Firstly, the document is signed only by counsel for the applicant and counsel for the 1st respondent. None of the five (5) parties personally signed it.

Secondly and most importantly, no where does the document state that 1st respondent has admitted that there were irregularities in the sale of the property, that the sale was not done in terms of the law or words to that effect.

Thirdly, there is no document, even other than Annexture "CP" which contains that alleged admition by the 1st respondent. The alleged admission is therefore not true and it is improper for a party to take advantage of the Messenger's non appearance and put their own conclusions in a misleading manner to the court. The court will not place any importance to those improper claims made as the "tholepin" of her application.

The 2nd and 4th respondents respectively, are the execution judgement creditor and the purchaser of the property in question. These are the parties who are practically, and in effect, affected by the relief sought by the applicant hence again my use of the phrase "needless to say", they opposed the application. They opposed the application on the basis that the applicant had no valid grounds for Review, that the applicant had the opportunity to object to the confirmation of the sale but she did not and that her alleged grounds for review do not fall under the grounds for review that warrant the setting aside of a sale in execution after it has been confirmed.

In her own founding affidavit at paragraph 8:1 applicant says that through a letter written by her Lawyers she enquired from the 1st respondent what had transpired at the Public Auction. In fact the letter (Annexture 'A') shows that she enquired on a number of other procedural issues. She requested clarification and "urgent confirmation in writing" on whether or not the highest price was gotten through a Public Auction or a Private Treaty, as she seemed unsure herself. She also asked for the details of the Magistrate who was present at the sale and the confirmation letter from a Provincial Magistrate declaring the highest bidder in terms of the rules. The enquiry letter (Annexture 'A') is dated 1st August 2018. The Messenger of Court for Bulawayo District, a Mr. T Gumbo (1st respondent) responded by letter dated 9 August 2018. For the avoidance of doubt, I will repeat the body contents of Annexture "B" verbatim herein.

Dear Sir

REF: SALE BY PUBLIC AUCTION OF STAND 461 ESSEXVALE ROAD, MANNINGDALE, BULAWAYO HILDA SIBANDA

We refer to the above matter and to your letter dated 1st August 2018 received by this office on the 8th August 2018.

The debtor's immovable property was sold by public auction to the highest bidder being Shepco Industrial Supplies (Buyer no: 2) for the sum of $ 190 000.00 and present from the Provincial Magistrate's office was His Worship T. Tashaya.

We did write to the Provincial Magistrate's office seeking confirmation of the sale and we are still waiting for that confirmation. We are made to understand he was away on leave and as soon as we get it we will serve you with a copy. (the underlining is mine)

Yours Faithfully

T. Gumbo

Messenger of the Court Bulawayo
Cc: Mugwadi & Associates (CD/bm)

In fact earlier on 26 July 2018 when the applicant was perhaps legally unrepresented at the time, the 1st respondent had sent her the letter marked "C" informing her of the Public Auction of the property that had taken place on 13 July 2018 and that the highest offer therein was $190 000.00. Again, and for good reason I will herein repeat the body part of the letter, again by Mr. T. Gumbo. It reads;

Dear Sir/Madam

RE: SALE BY PUBLIC AUCTION OF STAND 461 ESSEXVALE ROAD, MANNINGDALE, BULAWAYO

We refer to the above matter,

On the 13th of July2018 Messrs Holland Auctineers conducted a public auction on our behalf for the above named property, and the highest offer made was $ 190 000.00.

The offer has been accepted by the instructing lawyers and we have instructed the auctioneers to proceed with the sale.

Please be guided accordingly.

Yours Faithfully

T. Gumbo
Messenger of Court Bulawayo

Firstly, it is clear from Annextures A to C that applicant knew that there had been a Public Auction. However she herself had not attended it. She therefore cannot vouch for what transpired in her absence. She does not claim that her non-attendance was against the law. The rules do not seem to compel any person to secure her attendance at the sale. Outside what she got in writing from the 1st respondent, she cannot vouch for anything that allegedly transpired. For that reason applicant's arguments that sound like hearsay or rumours which she got concerning the sale, will be ignored.

Secondly and very importantly, the three (3) letters (Annextures A, B and C), which include her own, are consistent in their headings regarding the "Public Auction" of No. 461 Essexvale Road, Manningdale, Bulawayo. The two letters from 1st respondent (Annextures B and C) are also consistent that there was indeed a Public Auction. It confirms the name of the highest bidder at $190 000.00. In her papers and heads of argument, applicant attempts to refer to the phrases highest price, highest bid and highest offer as having different meanings. That is erroneous as those terms have often been used and continue to be used interchangeably. She cannot use that erroneous argument to urge the court to find that there was what she calls a "Combo Public and Private Treaty" sale. I notice also that the highest bid was confirmed to her on 26 July 2018 and further to her lawyers "urgent" request on 9 August 2018. It was $190 000.00. Her lawyers were advised also by the same letter of the 9th August that the Provincial Magistrate who was present during the sale was His Worship T. Tashaya. As regards the confirmation Certificate of the sale, they were advised again in the same response of 9 August that confirmation had been sought from the Provincial Magistrate but he was understood to be on leave and that the confirmation would therefore be served on them as soon as obtained which was ultimately done.

It appears to me that despite the "urgency" referred to in Annexture "A", applicant had enough time to act before confirmation of the sale by the Provincial Magistrate but she did not even though by that time she was then legally represented. I also share my sister MATANDA-MOYO J's view in *Rainwide Investments (Pvt) Ltd v Roundebuild Zimbabwe (Pvt) Ltd and 2 Others* – HH- 444-16 that;

> 'The rules allow a Judgement debtor to approach the court and compel compliance with the rules. This is done so as to minimise setting aside of such sales. The applicant herein has been privy to the non-compliances complained of and did nothing."

In Mupedzanhamo v Commercial Bank of Zimbabwe and Another – 1996 (1) ZLR 257 GUBBAY J (as he then was) held that;

> "Before a sale is confirmed in terms of Rule 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 will not readily do so."

In casu, applicant boldly claims that the 1st and 2nd respondents "committed a serious violation of the court rules by carrying out a Combo Public and Private Treaty sale", and that in fact there was no compliance at all with the rules of court 'let alone substantial compliance." She was advised of the sale to 4th respondent on 26 July 2018 and further, her lawyers were advised on 9 August 2018, yet applicant did nothing until 18 October 2018 when she filed this application. By that time, the sale had long been confirmed and the judgement Creditor had been paid. The Capital gains tax to the Zimbabwe Revenue Authority (ZIMRA) had been paid and the transfer process to the name of the purchaser had been confirmed.

It appears to me also from the evidence on record, that it is not disputed that the Auctioneer's Valuation Certificate issued prior to the sale had a forced value pegged at $175 000.00. That valuation report was not challenged by the applicant. The final bid and purchase price of $190 000.00 far exceeded the forced sale value. Applicant now claims that her property is valued at about $300 000.00, challenges the value of $190 000.00 and then insists that the property was sold at an unreasonably low price. Decided authorities are clear on evaluation reports and sale values of properties. Without a contrary and properly made and sworn Evaluation Report produced before the sale or at least at an objection before

confirmation of the sale, applicant's averments on the value of her property cannot be sustained.

I must say that it should be noted that Order 26 of the Magistrate (Civil) Rules, 1980 is the equivalent of Order 40 of the High Court Rules, 1971, not a replica of it. The Magistrate's Court rules are at times more flexible than the High Court rules for instance by allowing more involvement by the "execution creditor." In my view, applicant's counsel tended to conflate the two sets of rules occasionally. For instance, I could not find a proper equivalent, let alone a replica of Order 40, Rule 359, of the High Court rules in the Magistrates Court (Civil) Rules. Rule 359 relates to confirmation by the Sheriff of the highest bid and sale, written objections to the Sheriff and a hearing before the Sheriff, including hearing argument from the parties' legal practitioners after which the Sheriff makes a decision to confirm or cancel the sale or make any such order that he considers appropriate in the circumstances. However, counsel for the applicant occasionally argued as if such a rule exists in the Magistrate's Court rules. It is as if there was an expectation that the Messenger of Court would call the applicant for objections and a hearing.

In casu, I find especially from Annexture A, B, C referred to above and other documents that;

a) The conditions of sale are prepared by the execution creditor who then gives two (2) copies of same to the Messenger of Court at least 28 days before the proposed date of sale. There has been no allegation that this was not done – Rule 7 (a)
b) There is no argument on the nomination of the Auctioneer by the execution Creditor – Rule 10 (a) and (b).
c) The sale was by Public Auction without reserve and the property sold to the highest bidder – Rule 13.
d) The sale was conducted by an Auctioneer operating in the area the Messenger operates and was conducted with the approval, in this case of both the Magistrate and Messenger. The rules actually allow even for approval by any one of them - Rule 14.
e) The sale was held in the presence of a Magistrate, Mr. T Washaya who apparently certified to a Provincial Magistrate, the 2nd respondent, Mr. L Ncube how the sale was conducted - Rule 15.

f) There was a valuation Certificate with a forced value of $175 000.00 for the property, which valuation report does not in fact even appear to me to be an iron cast requirement in sales under the Magistrates Court rules. The highest bidder was declared at $190 000, and this was conveyed to applicant on 26 July 2018.

I am therefore not inclined to agree that there was no compliance at all, even substantial compliance with the rules in this sale as argued by applicant. In fact it appears to me that applicant sought ways to attack the sale and filed her application with no indication what exactly would have been her objection. This was also what MAKARAU J (as she then was) lamented in *Chimwanza v Matanda and Others* – 2004 94) ZLR 203 (HH 170/04) that

> "Although not relevant, the objection he would have raised then is not disclosed in his papers, giving the impression that this has been raised merely as a convenient starting point to attack the sale of the property."

Surely sales in execution are often sold at a price that is forced in nature as the judgement debtor would always want more for her property, hence I am in full agreement with the Judge in *Lalla v Bhura* 1973 (2) RLR – 2 at 283 when he stated that;

> "…..If the courts were ever ready to set aside sales in execution under Rule 359, this might have a profound effect upon the efficacy of this type of sale. Would be purchasers might well be deterred from attending and bidding if they considered their efforts might easily be frustrated by an application under 359 and as a general principle, I think it should be accepted that a court will not readily interfere in these matters."

Right now, two (2) years after filing this application in terms of Order 26 Rule 15 of the Magistrate's Court Rules, the innocent purchaser is still waiting anxiously with bated breath. Similarly and even moreso, and not only from 18 October 2018 but from the time the judgement was granted, the judgement creditor is equally waiting with the same anxiety and bated breath. Applicant does not appear to have done anything to clear the debt even within that "huge grace period" she created for herself.

My brother MATHONSI could not have put it any better than he did in *Raylings Enterprises v Dowood Services* and Others HB 53/2016 when he commented that;

> "Some people simply will not settle a debt. No matter how many times the Creditor runs around the walls of Jericho, the walls remain unshakable and will not fall…. It is just in their nature that they incur a debt which they have no intention whatsoever, of paying back."

In the circumstances, I accordingly find no reason to set aside the sale and the application is dismissed with costs of suit.

Mabundu & Ndlovu Law Chambers, applicant's legal practitioners
Messrs Mugwadi and Associates c/o Danziger and Partners, 3rd respondent's legal practitioners
Mashayamombe & Co. Attorneys, 4th respondent's legal practitioners