

LUCKY MUTANGA
versus
SHERIFF OF ZIMBABWE
and
REBECCA TIGERE
and
MAXWELL MATIVENGA TIGERE
and
GETBUCKS FINANCIAL SERVICES LIMITED

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE 2 NOVEMBER 2021 & 12 JANUARY 2022

OPPOSED APPLICATION

W.P. Mandinde, for applicant
T.L. Mapuranga, for second and third respondents
No appearance for first respondent

MAXWELL J: I heard this matter in the company of MANYANGADZE and BHACHI-MUZAVAZI who were on induction.

Applicant seeks an order couched in the following terms:

- “1. The application be and is hereby granted.
2. Applicant shall pay the purchase price of ZW\$155 000 within seven days of this order.
3. First respondent shall sign relevant transfer documents in favour of applicant within 14 (sic) of this order.
4. First respondent shall pay costs of suit.”

BACKGROUND FACTS

Applicant secured a letter from the National Building Society Limited (NBS) confirming that he qualified for a mortgage finance amounting to ZW\$350 000. On 23 November 2018, Stand 57 Guildford Estate Township of Subdivision H of Guildford of Borrowdale Estate (the property)

was sold by public auction to satisfy a debt owed to fourth respondent. The property belonged to second and third respondents. Applicant used the letter from NBS to bid for the property and was declared the highest bidder and purchaser of the property at ZW\$155 000. First and second respondents objected to the confirmation of the sale in execution on the ground that the purchase price was too low. On 24 January 2019, the objection was dismissed and the sale was confirmed, applicant was requested to pay the purchase price into a CBZ account within seven days of the letter of confirmation. On the seventh day, i.e, 4 February 2019, NBS advised the first respondent that applicant's application is going through the normal credit assessment procedures and the final response by the approving committees was expected within the following 14 days. On 25 February 2019, NBS provided the letter of undertaking guaranteeing payment of the full purchase price. The guarantee was valid for three months.

On 5 March 2019, third respondent paid off the judgment debt. Fourth respondent accepted the payment and released the title deeds to the property and cancelled the caveat that had been placed on the property. Applicant's legal practitioners were advised that despite the payment which had been made by second and third respondents, transfer of the property to the applicant would still proceed. On 6 March 2019 first respondent advised fourth respondent's legal practitioners that he was in receipt of original letter of undertaking. The letter also directed the lawyers to proceed with the transfer of the property. Correspondence and litigation followed. On 13 March 2020 applicant deposited the purchase price into the first respondent's account through Mugiya & Muvhami Trust Account. The money was refunded on 20 March 2020 with an indication that it had been paid well after the stipulated time of seven days after the date of confirmation of the sale. A series of correspondence followed and applicant was advised that the letter of guarantee was brought after the expiry of seven days and the first respondent's office had wrongly accepted it. Applicant stated that it was illogical for the first respondent to allege that the date for payment was 6 February 2019 given that the mode of payment was a mortgage bond. He further stated that fourth respondent had accepted the letter of undertaking from NBS guaranteeing payment of the full purchase price on the registration of transfer which is standard practice. He pointed out that no objection had been expressed by first respondent and he cannot belatedly plead a mistake *mero motu* and attempt to set aside or cancel the sale. In his view the first respondent exercised his discretion and extended the seven day period in light of the mortgage bond payment route.

Applicant stated that he was never placed *in mora* by first respondent at any time therefore there was no breach at all. He further states that in terms of the conditions of sale, if he had failed to pay the purchase price by 6 February 2019 as alleged, first respondent ought to have proclaimed the second highest bidder to be the purchaser or alternatively re-advertised. He argues that as these options were not pursued, there was no breach at all. Applicant averred that he holds a clear right to take transfer upon payment of the purchase price in the circumstances. He argues that this is regardless of the method of payment. He prayed that first respondent be ordered to proceed with the transfer and be ordered to pay costs of suit.

Second and third respondents opposed the application. Third respondent deposed to the opposing affidavit. He started by pointing out that the applicant breached the conditions of sale of the property and paid the purchase price outside the stipulated time. As a result, the Sheriff refunded the purchase price and the house was subsequently sold to one Kumbirai Katiyo for US\$90 000 who received the title, rights and interest in the property on 13 August 2020, under title deed number 3324/20. Third respondent stated that there are material disputes of facts which cannot be resolved on the papers. He further stated that the question of whether or not the applicant was in breach of the Sheriff's conditions of sale requires the leading of *viva voce* evidence. He reiterates that in terms of the conditions of sale and the correspondence from first respondent, applicant was given seven days within which to pay the purchase price. Further that the letter of 4 February 2019 from NBS gave applicant away as he participated in the sale in execution and was declared the highest bidder when he had no money.

Third respondent stated that when he discovered that applicant could not pay, he was worried by the galloping interest and paid off the judgment debt on 5 March 2019. He alleges that the payment was accepted by the fourth respondent who thereafter released the title deeds and cancelled the caveat it had placed on the property. According to him this was after the 14 days given by the applicant's bank had lapsed and no payment had been made. In his view, applicant made no valid bid and there was no judicial sale to the extent that such a sale is a cash sale. He also highlighted that NBS had a special condition for the release of the money which was contrary to the Sheriff's conditions. As a result, the special condition had the effect of nullifying the original offer. In terms of the Sheriff's processes, the conveyancers were to be Messrs Danziger and Partners yet NBS stated, in a letter dated 25 February 2019, that their appointed conveyancers were

Messrs Sawyer and Mkushi Legal Practitioners. Third respondent further stated that even when applicant made the payment more than a year and half later, he paid through Mugiya and Muvhami Legal Practitioners, and not in terms of the mortgage bond. For that reason the Sheriff was within his rights to refund the ZW\$155 000 and not to proceed with the sale.

Third respondent pointed out that whilst applicant approached the court seeking an interdict, he should have prayed for a *mandamus*. However the application does not meet the requirements for a *mandamus* which are that one has a clear and definite right, there is an injury actually inflicted or reasonably apprehended, and, there is no other ordinary remedy or similar protection. Third respondent averred that applicant failed to establish a clear and definite right as any entitlement he had to the property was extinguished when he breached the conditions of sale. The breach was in him failing to pay the purchase price on time, failing to apply for an extension of time within which to pay, failing to pay for the property through the agreed mode of a mortgage bond and making a counter-offer by appointing his own conveyancers. According to third respondent, the sale was cancelled by operation of law when applicant failed to meet the conditions of sale. Third respondent concluded by stating that, given the fact that the property has since been sold to another party, applicant has other remedies available to him such as damages.

On 5 November 2020, a report by the first respondent was filed. It confirms that applicant was the highest bidder and that his bid was ZW \$155 000. It confirms that there was an objection on the basis that the sale had been improperly conducted and the property had been sold for an unreasonably low price. The objection was heard, dismissed and the sale was confirmed on 24 January 2019. First respondent pointed out that in Sheriff sales property can be bought by way of mortgage bond or cash. He further pointed out that initially the purchase price was supposed to have been paid by way of a mortgage bond but the full purchase price was paid on 13 March 2020. He also pointed out that the letter of undertaking from NBS was valid for three months, from 25 February 2019 to 25 May 2019. First respondent stated that the payment of the purchase price by applicant was rejected on the grounds that it was made out of time leading to the cancellation of the sale.

In his answering affidavit, applicant stated that the sale to a third party is fraudulent and criminal. He denied that there was a material dispute of fact and that he had no money. He further stated that if the sale conditions were not met, first¹ respondent would not have confirmed the sale

and would have evoked the clause in the conditions of sale on breach. Applicant also stated that the payment which was eventually done through Mugiya and Muvhami Law Chambers was done within the period of the mortgage bond as a cash payment. Applicant submitted that Kumbirayi Katiyo is not an innocent purchaser as he would have known that the property had been under a dispute if he had done due diligence and that as he is not before the court, the court should not get concerned with him.

SUBMISSIONS BY THE PARTIES

Applicant argued that the sale of the house to a third party is null and void as second and third respondents had no right to dispose of the property which had been attached by the Sheriff for sale in execution and which property had not been released. Applicant disputed that there are material disputes of fact which cannot be resolved on the papers. He submitted that the court's approach is to resolve matters on the basis of affidavits where it is practicable to do so. He referred to case authorities including *da Matta v Otto* N.O. 1972 (3) SA 858@ 882 F-H, *Peterson v Cuthbert & Company Limited* 1945 AD 420 @ 428. In *Supa Plant Investments (Pvt) Ltd v Edgar Chidavaenzi* HH 92/09, MAKARAU J (as she then was) state:

“A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

Applicant argued that second and third respondents just made bald allegations without stating in clear terms the alleged material disputes of fact which could not be resolved on paper. On the merits, applicant referred to the case of *Setlogelo v Setlogelo* 1914 AD 221 for the definition of an interdict which is an order prohibiting or restraining someone from doing a particular act or ordering someone to do a positive act to remedy an unlawful state of affairs for which he or she is responsible. He submitted that the application is for an order compelling the first respondent to pass transfer of the property in question. He also submitted that the application before the court satisfied all the requirements for a final interdict to be granted as stated in *Pauline Mutsa Makoni v Julius Tawona Makoni* HH 820/15, *Tribac (Pvt) Ltd v Tobbacco Marketing Board* 1996 (2) ZLR 52 @ 56, *Setlego v Setlego* (supra), *Flame Lily Investment Company (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378, *Boadi v Boadi & Anor* 1992 (2) ZLR 22, and, *Diepsloot Residents' and Landowners' Association & Anor v Administrator Transvaal* 1994 (3) SA 336 @ 344H. The requirements are a clear right, irreparable injury actually suffered or reasonably

apprehended and the absence of a similar protection by any other remedy. Applicant argued that he had a clear right as the property was sold to him by public auction, and after he was declared the highest bidder and purchaser the sale was subsequently confirmed. He further argued that once the Sheriff confirmed the sale he lost the jurisdiction to set it aside therefore the purported cancellation is null and void. Applicant also argued that there is a well-grounded apprehension of irreparable injury in that he has already parted with a considerable amount of money in deposits as well as the purchase price. He pointed out that the purchase price which was refunded continued to lose value each day given the inflationary environment and that the property in question can actually be sold to another person. Applicant submitted that there is no other remedy which will afford him the same relief as that afforded by an interdict which is that title be transferred to him. Second and third respondents argued that the relief sought by the applicant is incompetent given the non-citation of one Kumbirayi Katiyo who is the holder of title, rights and interest in the property. They also alleged that there are material disputes of fact incapable of resolution on the papers. On the merits, they alleged that applicant has failed to satisfy the requirements for an interdict. They referred to the case of *Nanhanga v Chalmers & Ors* HH 545/14 in which it is stated that a judicial sale remains conditional until it is confirmed by the Sheriff and after confirmation the transaction becomes *perfecta* and the sale is sealed. Once the sale is sealed, the purchaser acquires rights which can only be upset by a court of law. Second and third respondents argued that this position does not apply to the present matter. They pointed out that firstly, a judicial sale is a cash sale and applicant made no valid bid as he had no money. They argued that there was nothing for the Sheriff to confirm. They also argued that the special condition imposed by NBS for the release of the money amounted to a counter-offer thereby nullifying the original offer made by the sheriff. They referred to the case of *Orion Investments (Pvt) Ltd v Ujamaa Investments (Pvt) Ltd & Ors* 1987 (1) ZLR 141 in which it was stated that for a contract to be formed, it is necessary that the offeree must, in agreeing, accept the exact terms offered by the offeror. Further it was stated that where the offeree makes a counter-offer or signifies a qualified acceptance of the offer, the offer is taken to have been refused and no contract is formed.

Second and third Respondents also argued that the Sheriff could not extend the period for the payment of the purchase price as no valid bid had been made and the failure to pay constituted repudiation of the agreement. They disputed that there is an apprehension of irreparable injury to

the applicant as he had not parted with any substantial amount and that regard being had to the movements in the economy, the changes in currency, the loss of value of the local dollar, applicant would have received a valuable piece of property for nothing. They submitted that the equities favour their position and there is an alternative remedy which applicant can invoke to protect his purported rights as he can claim damages.

ANALYSIS

The question to be answered in this case is whether or not applicant has made a case for the granting of an interdict and a compelling order. The requirements as stated earlier are:

1. A clear right which must be established on a balance of probabilities
2. Irreparable injury actually committed or reasonably apprehended; and
3. The absence of a similar protection by way of any other remedy.

See *Setlogelo v Setlogelo* (supra) has the applicant established a clear right? In my view the answer is in the negative. To establish a clear right in the circumstances of this case applicant has to show that he fulfilled the conditions of sale by paying the purchase price timeously. Applicant participated in the Sheriff sale with the intention of paying by way of mortgage bond. According to the first respondent that is acceptable and a mortgage bond payment is considered to be payment in cash. By letter dated 24 January 2019 the sale of the property to applicant was confirmed and an invitation made for the payment of the purchase price within seven days from the date of receipt of the confirmation. On the last day of the seven days, no payment was made. Instead, a letter was written by NBS notifying the first respondent that the applicant's application was going through the normal credit assessment and the final response was expected within 14 days. The tone of the letter left one with the impression that the mortgage loan had not been approved yet. The final response was expected from the approving committee. On 25 February 2019, NBS finally issued a letter of guarantee in which Sawyer and Mkushi Legal Practitioners were indicated as the conveyancers. The first respondent's chosen conveyancers were Messrs Danziger & Partners. In *Orion Investments (Pvt) Ltd v Ujamaa Investments (Pvt) Ltd & Ors* (supra) the making of a counter-offer by an offeree was said to signify refusal of the offer and no contract is formed. The letter of guarantee was valid for three months. No payment of the purchase price was made within the period of the validity of the letter of guarantee. The payment was only made on 13 March 2020, not through a mortgage bond, but cash. In my view, applicant could have obtained a

right if he had paid by mortgage bond within the period of the validity of the letter of undertaking. I say so because it seems to me first respondent had extended that indulgence to him. However, resorting to a cash payment was out of the question. The agreement for payment through mortgage bond gave allowance for the payment of the purchase price outside the seven days stipulated in the confirmation letter. Once applicant opted to pay cash, he was bound by the seven-day rule. The payment made more than a year later cannot by any stretch of imagination give rise to the right to receive transfer of the property. To uphold applicant's quest in these circumstances is to negate the very purpose for which Sheriff Sales are done, that is, for the judgment creditors to receive their money promptly. Applicant failed to satisfy the first requirements for an interdict. The second and third requirements are only considered if the first has been satisfied. It follows therefore that it is not necessary to consider them in this case.

Even assuming that Applicant had established a clear right, the question would still be if it is just and equitable for him to pay ZW\$155 000 and receive transfer of the property. In *Zimbabwe Express Services (Pvt) Ltd v Nuanetsi Ranch (Pvt) Ltd* 2009 (1) ZLR 326 it was held that the order which the court makes should not produce an unjust result which would be the case, for example, if, in the particular circumstances, the order would operate unduly harshly on the defendant. This would be the case if the plaintiff were to be unjustly enriched by being able to acquire something that was worth a great deal by paying virtually nothing, the value of the money having been severely eroded by inflation by the time the case was adjudicated. In my view this is true in the circumstances of this case. As submitted for second and third respondents to grant the order prayed for would result in applicant receiving valuable property for a song.

In any event, the title and interest in the property now vest in a third party who is not before the court. The draft order does not deal with how the third party will be divested of title for first respondent to comply. Applicant argued that the sale to the third party is fraudulent and criminal. He has not sought to have it set aside on that basis. He submitted that the third and fourth respondents had no right to dispose of the property which had been attached for sale in execution which property had not been released. The submission ignores the fact that the sale to the third party had the blessing of the judgment creditor, hence the release of the title deeds and the cancellation of the caveat.

For the above reasons, the application fails. I make the following order.

The application be and is hereby dismissed with costs.

Mugiya & Muvhami Law Chambers, applicant's legal practitioners.

Rubaya & Chatambudza, second and third respondents' legal practitioners.

Danziger & Partners, fourth respondent's legal practitioners