

NAOME THAKATAKA

And

AUCTION INTERMARKET FLOORS LTD

And

JOSEPH THAKATAKA

Versus

THE SHERIFF OF ZIMBABWE N.O

And

SOLUSI UNIVERSITY

And

MOHAMMED Z PATEL

And

THE REGISTRAR OF DEEDS N.O

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 5 JULY & 29 NOVEMBER 2018

Urgent Chamber Application

S. Nkomo for the applicant
S. Collier for 2nd respondent
G. Nyoni for 3rd respondent

TAKUVA J: In this chamber application the applicants seek a provisional order in the following terms:

“Pending the finalisation of this matter the applicant be and is hereby granted the following relief:

HB 312/18
HC 2000/18
X REF HC 1664/18

1. The intended transfer of the immovable property known as subdivision 2 of Lot 63A Hillside, Bulawayo, be and is hereby temporarily stayed pending the return date.
2. In the event that the said transfer has already taken place, the 4th respondent be and is hereby directed to set aside or to reverse that transfer.”

Background facts are that on or about the 10th day of April 2013, 2nd respondent orally instructed the 2nd applicant to sell for it certain goods by public auction. The 2nd applicant proceeded to sell these goods but, through the instance of the 1st and 2nd applicant elected to misappropriate the proceeds of the sale and converted the said proceeds to its own use. Angered by this the 2nd respondent proceeded to institute proceedings for payment of damages equivalent to the value of the said goods under cover of case number HC 988/14. A default judgment was obtained in that matter, however, when the Sheriff proceeded with the attachment they were unable to find any goods to cover the value of the debt. Consequently, the 2nd respondent instituted proceedings for the 1st and 3rd applicants to be found personally liable for the debt in terms of section 218 of the Companies Act. That application was successful and an order was made binding the 1st and 3rd applicants to the 2nd applicant's debt. Consequently, the 1st applicant's house was attached and sold in execution. It is that sale which forms the subject of the current proceedings.

The 1st applicant filed an objection on the basis that the property was disposed of at an unreasonably low price. There was no allegation that the 1st respondent had not complied with the provisions of rule 348 of the High Court Rules 1971. This was only raised at the hearing of the matter against strong objection by 2nd respondent. The 1st respondent dismissed the objection prompting the applicant to file a court application under HC 1664/18 challenging the confirmation of the sale by 1st respondent. Applicants also want 1st respondent to be directed to comply with the provisions of Rule 348 A of the High Court Rules.

The 2nd respondent opposed that application on 28 June 2018. It is still pending. Despite that, the 1st, 2nd and 3rd respondents are now proceeding to transfer the property to the 3rd respondent. Applicants fear that if this property is transferred before case number HC 1664/18 is finalised, the outcome would be a *brutum fulmen*. Further, applicants contend that they use the

property as a warehouse to store 2nd applicant's property and would suffer great prejudice if it is sold for such a "lesser value". Finally they argued that they have no other satisfactory remedy and their application has great prospects of success.

The application was opposed by the 2nd and 3rd respondents on the following grounds:

1. The only ground raised by the applicants in their objection is that the property had been sold for an unreasonably low price.
2. Rule 348A of the Rules of this court is inapplicable in casu.
3. The application under HC 1664/18 has no prospects of success and in terms of Rule 360 of the rules of this court, the 1st respondent has a legal obligation to proceed with the transfer.
4. The averment that the property was sold for an unreasonably low price has not been substantiated by a valuation report by an independent valuer.

The Law

Interdicts are granted if the following requisites are met by an applicant;

- (a) That the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or if not clear is *prima facie* established though open to some doubt.
- (b) That if the right is only *prima facie* established, there is a well grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- (c) That the balance of convenience favours the granting of interim relief; and
- (d) That the applicant has no other satisfactory remedy. See *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511.

Application of the law to the facts

In casu, the applicants namely 1st and 3rd are the owners of the immovable property in issue. True, the house has been attached and sold by public auction but this sale is being challenged by the applicants. The challenge has been formalized in a court application under HC 1664/18. The 2nd respondent's argument is that this matter has no prospects of success on grounds it has listed which impinge on applicants' clear right. However, in my view, the applicants' *prima facie* right though open to some doubt remains established. I take the view that this is not an application that can be dismissed solely on the grounds that the applicants' prospects of success are bleak or nonexistent.

In respect of the second requirement if the application is not granted, the transfer will be effected and applicants evicted from the property. Further, the decision under HC 1664/18 will be of academic interest. Applicants are likely to suffer irreparable harm financially, moreso if they ultimately succeed in establishing their right.

As regards the balance of convenience I find that this is a case where both parties are likely to suffer inconvenience and prejudice. However, I am of the view that the balance of convenience favours the granting of the interim relief in that if the interdict is not granted applicants will suffer more harm than the respondents. Respondents can still proceed with the transfer if they succeed because the house will still be there. In any event, the bulk of the pleadings have been filed in HC 1664/18. What is left is for the parties to file their heads of argument and it will be set down for hearing. It is therefore undesirable for the court to grant piece-meal orders which have the potential to pre-empt the decision in the main matter i.e. HC 1664/18. I am aware that 3rd respondent is an innocent third party who is interested in the sale being confirmed and transfer effected so that he obtains the property. Unfortunately, these are the risks that buyers at public auctions should keep in mind.

The only remedy available to the applicants is to stop transfer in the interim. They can only do so by way of an interdict.

HB 312/18
HC 2000/18
X REF HC 1664/18

In the circumstances, I conclude that the applicants have established the requirements for the granting of an interdict.

Accordingly, it is ordered that:

Pending the finalisation of this matter, the applicants be and are hereby granted the following relief:

1. The intended transfer of the immovable property known as subdivision 2 of Lot 63A Hillside, Bulawayo, be and is hereby temporarily stayed pending the return date.
2. In the event that the said transfer has already taken place, the 4th respondent be and is hereby directed to set aside or to reverse that transfer

Mathonsi Ncube Law Chambers, applicants' legal practitioner
Webb, Low & Barry, 2nd respondent's legal practitioners
Messrs Moyo & Nyoni, 3rd respondent's legal practitioners