

ALLEN KUDHENGEYA
versus
FARAYIMHIZHA

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 21 May 2015

Civil Review

MAFUSIRE J: This was a civil matter. It was dealt with in the magistrate's court. The trial magistrate then referred the record to this court for review. Regrettably, the referral was incompetent because it was unprocedural.

The facts were these. The trial magistrate had granted judgment in favour of the plaintiff for the payment of a certain sum of money by the defendant. The plaintiff had proceeded to execute. An immovable property in which the defendant allegedly had some rights and interest was attached and sold in execution. It appears that the intention had not been to sell it as one whole. It had been intended to attach and sell only an undivided one half share. That was said to be the extent of the defendant's interest in that property. Nonetheless, the provincial magistrate had proceeded to confirm the sale in terms of the powers vested in him by Order 26 r 7 of the Magistrates Court (Civil) Rules, 1980.

The provincial magistrate subsequently realised he had made a mistake. Almost two weeks after he had confirmed the sale, the legal practitioners acting for the judgment debtor had written to him in protest. Among other things, they pointed out that the warrant of execution in terms of which the property had been sold had clearly stated that what was to be sold was an undivided one half share. Three days after the legal practitioners' letter to him, the provincial magistrate dispatched the record of the case to this court under cover of a letter addressed to "**The Review Judge**". In the letter he admitted his mistake but explained that he was now "*functus [officio]*". He also blamed the lawyers for having failed to act timeously "**...in terms of O 26 r 7 [15c] of the rules despite having very good grounds to have the sale set aside.**"

This court has previously pointed out that, unlike in criminal matters, there is no provision for an automatic review in civil matters or a reference for review by judicial

officers: see *Pardon Gosa v Lydia Mujeni*¹ and *Moyo v Ndhlovu*². BHUNU J, in *Gosa*, quoted³ the following passage in *Moyo*⁴:

“The High Court’s general powers of review are contained in ss. 31 and 32 of Act 22 of 1964, but neither section deals with the question who may initiate review proceedings. Order 25 of the Rules of Court, however, deals with the procedure for initiating a review. Rule 6 provides that a party to proceedings in an inferior court shall do so **by application by way of notice of motion**, and that this must be done within eight weeks subject to the proviso that the High Court may for good cause extend the time.” (my emphasis)

In *Gosa*, BHUNU J noted that the provisions of the rules on review have not changed materially since *Moyo*.

Reviews are governed by Order 33 r 256 of the Rules of this court. They are by way of a court application instituted by the party seeking review. Thus, as BHUNU J observed in *Gosa*, civil reviews are party driven.

In casu, it was incompetent for the legal practitioners for the judgment debtor to write directly to the provincial magistrate as they did. In their protest letter, they first pointed out that the immovable property should not have been sold as an undivided one whole, but as an undivided half share. They then concluded their letter by the following threat and demand:

“As a result, we hereby object to the confirmation because it confirmed the sale of No. 6 First Avenue, Mbare in its entirety, notwithstanding that the other half share belongs to Estate Late Eunice Makonese. In the circumstances, we demand that the confirmation be set aside within seven (7) days from the date of this letter, failing which, we shall take legal action against you.”

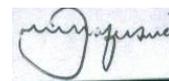
Yet Order 26 r 7(15c) of the Magistrates Court (Civil) Rules clearly states:

“(15c) **Any person** having an interest in a sale **may apply to court** to have it set aside **on the ground that the sale was improperly conducted** or that the property was sold for an unreasonably low sum **or on any other reasonable ground**:

Provided that any person **making such application** shall give due notice of the application to the messenger stating the grounds of his objection to the confirmation of the sale.” (emphasis added)

Thus, until such time that this matter is properly brought on review by way of a court application this court is not seized of it. The record of the matter is accordingly remitted back to the provincial magistrate.

21 May 2015

A handwritten signature in black ink, appearing to read "M. J. G. S. S.", written on a light-colored background.