

BRAMWELL BUSHU
versus
GRAIN MARKETING BOARD
And
GODFREY MADZIWANYIKA
and
SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 24 November 2015 and 24 May 2017

Opposed Application

N Bukwa, for the applicant
G H Muzondo, for the respondent
No appearance for the 2nd & 3rd respondents

CHITAPI J: In this application the applicant has set out in his draft order the relief which he seeks as follows:

IT IS ORDERED THAT:

- (a) Confirmation of the sale of the applicants property under Sheriff's sale No. 66/14 be and is hereby set aside.
- (b) The applicant is hereby given ten (10 days) within which to take any action which he deems fit.
- (c) Any party who opposes the application shall pay costs of this application at the level of legal practitioner and client

I heard arguments in this matter in the opposed motion court on 24 November, 2015 and reserved judgment to afford myself time to consider and weigh the parties' contentions.

Regrettably, judgment has delayed owing to my deployment to the Criminal Division soon after I had heard this matter and others. Unfortunately, the Criminal Division itself had its

own pressures as virtually almost all cases set down for hearing commenced as scheduled hence leaving me with little time to devote to judgments I had reserved during my stint in the Civil Division.

I have noted and acknowledge follow up letters from the first respondent's counsel enquiring as to when judgement would be ready. The length of the delay did justify the follow up enquiries. The delay is regretted.

In recent times, it is not often that the court or judge is called upon to chide a senior legal practitioner for shoddy work. The legal profession is accepted and considered as one of honour. To practice law is a privilege that is enjoyed by a select few. Legal practitioners are admitted officers of this court and their paramount duty is to the court and the administration of justice. Legal practitioners admittedly have a client, legal practitioner relationship to protect and they should strive to advance their clients cases to the best of their abilities. However, because legal practitioners are officers of this court, duly sworn and admitted as such, they have a duty to conduct themselves with integrity. It is not possible in this judgment to comprehensibly interrogate and exhaust the topic of legal practitioners' duties. A lot of literature abounds on the topic. For the purposes of my judgment, I will confine myself to the need for a legal practitioner to conduct himself with integrity in providing competent assistance to the court. It is totally unacceptable for a legal practitioner to discharge his or her function perfunctorily.

It was very unfortunate that I had to deal with this application only 2 months after my appointment to the bench from private practice. I asked myself whether the lack of competence by a legal practitioner shown by the applicants' legal practitioner in the preparation of the applicants' papers was a general standard which the judges were facing in their courts. Happily and thanks to the inadvertent delay in handing down of this judgment, I have since experienced admirable levels of competency by legal practitioners both senior and junior in several other cases which have come before me. The incompetence level shown in this application by the applicants' legal practitioner will therefore pass off as an exception to the minimum levels of competence expected of legal practitioners who consider themselves sufficiently experienced to prepare pleadings and present argument before this court which is a superior court with original jurisdiction over all criminal and civil matters in Zimbabwe including other powers set out in s

171 of the Constitution of Zimbabwe. Practising law in the High Court is and should not be considered a walk in the path.

The application filed by the applicants' legal practitioner is hopelessly inadequate in form and substance. I deal with the inadequacies in the application hereunder. Firstly the application does not indicate the provisions of the law under which it is made. I will accept that form 29 of the High Court rules does not specifically provide that the applicant relying on a provision of the law should cite the rule under which the application is made. However, in practice, any astute legal practitioner making an application in terms of a statutory provision including a rule of court is expected to indicate the rule or provision concerned. The need to cite the relevant provision of the law under which the application is made, where applicable of course, cannot be overemphasized. The citation of the correct and relevant provision attunes the court to its jurisdiction and the judge or court as the case may be immediately opens up to the provision and if need be researches on the provision if it is not one that immediately comes to mind.

Notwithstanding that form 29 does not provide for the rule or statutory provision citation, it should be accepted as a basic rule and pre-requisite in any application grounded on a statutory provision or rule of court that the provision or rule be cited. If not cited in the heading "court application....." then the founding affidavit should at least contain a statement by the applicant that he or she is making an application in terms of the specific provision or rule. It should not be left to the judge to have to go through all the papers filed in the application in order to determine the nature of the application. I have indeed dealt with countless applications where the provision or rule if applicable has been cited. This is as it should be. It is a matter of common sense and logic. It is to me no different from the need for a party to provide a citation for a legal case authority intended to be relied upon in heads of argument. The case citation is indicated as a matter of common sense practice and logic because the party citing the case wants the judge to read the case. A statutory or rule specific application should using the same logic specify the statute or rule. I would extend my reasoning to non statutory or and non rule specific application. If the application is grounded in the common law, it should state so. After all Order 1 r 4 (2) is clear that the forms in the first schedule to the rules should not be used with slavish adherence, but be altered to suit the circumstances of the matter at hand.

When I initially perused the applicants' draft order, my first impression was that the application was the usual High Court Rules Order 40 r 359 (8) application in terms of which a party aggrieved by the decision of the third respondent to confirm a sale of immovable property in terms of r 359 (7) (a) after conducting a hearing in terms thereof where there has been lodged an objection in terms of r 359 (1). A rule 359 (8) application is supposed to be made or filed within one month of the decision of the third respondent. This is one of the requirements which the judge reading the application will first have regard to. The timeous making of the application confers power on the court to proceed to consider the merits of the application.

The applicants' affidavit did not indicate the date that the third respondent confirmed the impugned sale. It is again such elementary omission which opens up the applicant's legal practitioner to criticisms of incompetence. When I considered the annexures to the applicants' affidavit, I did not find any letter of confirmation of the alleged sale. Annexure D to the founding affidavit which is the only correspondence by the third respondent which the applicant attached to his papers was an instruction by the third respondent to the first respondent's legal practitioners to transfer the property in question to the second respondent who had emerged the highest bidder and declared and confirmed as purchaser, there having been no objections received by any interested party.

The applicant admits in the founding affidavit that the first respondent obtained judgment against him. He states that the first respondent caused the attachment of the property in issue where after the third respondent did not communicate with him. The applicant deposed in para 6 of his founding affidavit that he "only got a letter of acceptance." He does not indicate as to when he received the letter of acceptance. I assume that the letter of acceptance referred to would be the declaration which the third respondent would have made in terms of r 356. It is this declaration or acceptance that an interested party may challenge within 15 days of its being made in term of r 359 (2). The rules are procedure specific on how the acceptance or declaration should be challenged.

In para 7 and 8 of the founding affidavit, the applicant states that his legal practitioners engaged the third respondent to stay confirmation of the sale so that another matter in which the property was a subject matter could be finalised. Annexure A to the founding affidavit is a letter dated 7 July, 2014 addressed to the third respondent and copied to the first respondent's legal

practitioners upon whom it was delivered a week later on 15 July, 2014. The contents of the letter read as follows:

“GRAIN MARKETING BOARD v HILLSTAR INVESTMENTS AND ANOTHER

We refer to the above matter.

This property is a matrimonial property.

An application is pending before the High Court to salvage it as a matrimonial property. We request that proceedings be stayed in this matter.

We do not think it is of any benefit for us to duplicate these proceedings. The matter is pending under HC 5083/13.

Yours faithfully

BVEKWA LEGAL PRACTICE”

Herein lies another criticism of incompetence on the part of the legal practitioner. One should perhaps go back to the basics. An attachment and sale in execution of attached property is a judicial process. It is sanctioned by the court. The third respondent acts under direction of the court. A writ of execution reads in part that the Sheriff (third respondent) is “required and directed” to effect the attachment under authority of the court. It is important to understand therefore that the third respondent is only an agent or officer of the court directed and required to carry out the directives given in the writ of execution. It follows that the third respondent has no authority or jurisdiction to act outside of the directive given to him in the writ of execution. The powers which the third respondent exercises are set out in the rules. They are set out in the relevant rules of order 40. The first respondent is not empowered to act outside the parameters of the rules. The Sheriff is a functionary whose powers are limited to the relevant provisions of the rules.

The third respondent inter-alia is as already pointed out empowered to determine objections from interested parties prior to confirmation of the sale in execution. The manner of lodging objections is provided for in r 359. Annexure “A” undoubtedly falls far short of complying with the rules on how a request to set aside a sale in execution should be made. The objection to a sale is time specific as to its filing, it should also be served on all interested parties giving them the set number of days in the rules to file any objections. The person making the

objection or request may reply. A hearing is convened by the third respondent. By failing to comply with the rules, the applicant's legal practitioner stands justly criticized for incompetence.

To make matters worse, the matter HC 5083/13 referred to in annexure A to the founding affidavit has nothing to do with the property in issue. Upon a perusal of court record HC 5083/13, the parties to it are *Profert Zimbabwe P/L v Wade McRoberto*. The matter was dealt with by ZHOU J as an unopposed court application for provisional sentence in a sum of US\$55 862-15 by the plaintiff against the defendant which was granted. The wrong citation of the case thus showed a perfunctory approach to work by the applicant's legal practitioner. The wrong citation was repeated in the answering affidavit showing lack of attention to detail. A legal practitioner must always pay attention to detail and this includes case ad records citations because the court or judge's time is not wasted looking up wrong cases or records.

The applicant also attached as annexure B to his founding affidavit, a letter dated 16 July 2014 from the first respondent's legal practitioners. The letter was addressed to the third respondent, copied to the applicant's legal practitioner and delivered on the same date under urgent cover. The letter was in response to annexure A. The contents of the letter are as follows:

“GRAIN MARKETING BOARD V HILLSTAR INVESTMENTS AND ANOTHER

We refer to the above matter in particular the letter to yourselves by Bvekwa Legal Practice dated 7 July, 2014 and copied to us.

Our reading of the aforesaid letter gives the impression that the author seeks to invoke Rule 359 (1) of the High Court Rules. If our inference is correct, it is our intention to advise your good office that the letter does not satisfy the requirements set out in that rule. In our view, the purported intention of case No HC 5083/13 (sic) to salvage the auctioned property as a matrimonial property does not constitute a ground for interfering with the confirmation of the sale.

In view of the above, we kindly request you to proceed in terms of the rules of the court.

Yours

G. H Muzondo.”

The applicant's legal practitioner was therefore advised by the first respondent's legal practitioner of the need to file a proper objection if that was what the applicant intended to do. There was no proper objection filed. The third respondent in the circumstances was entitled to consider the sale perfecta and proceed to direct the property that be transferred to the purchaser.

The applicant attached copy of his legal practitioners letter dated 23 July 2014 addressed to the first respondent's legal practitioners as annexure C. it reads as follows:

“GRAIN MARKETING BOARD V HILLSTAR INVESTMENTS AND ANOTHER

We refer to the above matter and to our telephone conversation we had on 26 July, 2014. Find herewith the copies of the application attached.

Yours faithfully

BVEKWA LEGAL PRACTICE”

Again the application which was being referred to in the letter was not attached to this application. In other words, annexure C to the founding affidavit is incomplete as it refers to an application attached to the letter but omitted in this application. Annexure C is therefore of no probative value. The applicant does not speak to the content of the application in his founding affidavit. I have in some of my judgments stated that the law of evidence is a mine field that will explode in the face of the inexperienced or uninitiated pleader. I repeat the expression herein. An incomplete document affords no probative value. The court or judge must not be left to speculate on a litigant's case. The litigant must place full facts of his or her case before or to the court or judge. The applicant has no one to blame but himself for failing to plead his case clearly and fully.

It is trite that an application stands or falls on the founding affidavit. The following is stated in Herbstein Van Winsen: *The Civil Practice of the High Courts and the Supreme Courts of Appeal South Africa* 5th Edition at p 440-441:

“The general rule which has been laid down repeatedly is that an applicant must stand or fall by the founding affidavit and the facts alleged in it; and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated there, because these are the facts that the respondent is called up either to affirm or to deny. The Appellate Division has held that it is not permissible to make out new grounds for an application in a replying affidavit. *Directors of Hospital Services v Misty* 1979 (1) SA 626 (A) at 635 H-636 B DIEMONT JA held that:

‘When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is
.....’”

See also: *Misheck Tizirai v Chenjerai Hamandishe & 3 Ors* HH 793/15, *Alfred Muchini v Elizabeth Mary Adams & 4 Ors* SC 47/13, *Madisa v Maswabi* 2007 (2) BLR 313.

Expressed in another way it should therefore be borne in mind by parties bringing proceedings by way of court application that the affidavits of the parties take the place of pleadings and evidence and as such, issues and averments supportive of a party's case should clearly and be adequately canvassed therein.

In para 8 and 9 of the founding affidavit, the applicant deposed as follows:

“8. After receiving the letter from G.H. Muzondo and Partners I am told and verily believe that my legal practitioners discussed on the phone, the matter with Mr Muzondo wherein they explained the purport of the letter. Mr Muzondo asked for the application which was provided under cover of Annexure “C”. The Sheriff Mr Madega also telephoned my legal practitioners asking for the application. It was provided. The response to the provision of these documents was the letter of confirmation. Had the receipt of these documents, especially the Sheriff indicating that he was proceeding, I would no doubt have duplicated the application. He went quite misleading me into not acting. I attach hereto copy of the Sheriff's letter of confirmation which I mark “D”.

9. For the reason of the deceit, I ask that the confirmation be set aside to enable me to take action to protect my interest.”

I have already indicated that the parallel and prior application is still a mystery to me as a wrong case number was quoted and a copy of the application not attached.

The first respondent in opposing the application stated as follows in paragraphs 3.1-3.4 of the opposing affidavit deposed to by the Corporate Secretary:

“16 3.11. This is denied. The applicant was duly informed through annexure ‘B’ to the applicant's founding affidavit that the purported intention of case No HC 5083/13 to salvage the auctioned immovable property did not constitute a valid ground for interfering with the confirmation of the sale. In any event, the stand in question in that application was stand number 140472 Salisbury Township of Salisbury Township Lands. Whereas the sale that the applicant seeks to challenge is in respect of Stand 14472 Salisbury Township of Salisbury Township Lands.

3.2 Further the applicant failed or neglected to file any other competent basis in terms of Rule 359 of the High Court rule to bar the Sheriff from proceedings with the confirmation of the sale.

3.3. The applicant was therefore well aware that the Sheriff was proceeding with the confirmation of the sale.

3.4. The applicant cannot therefore seek through this application, to set aside the sale on the unfounded basis of deceit, which in my view falls short of meeting the requirements of setting aside a sale in execution.”

The answering affidavit is baffling in content. In response to para 3.1 – 3.4 above, the applicant stated as follows:

“4. Ad paragraph 3

I did not say I was objecting. I only indicated that it would help if the 3rd respondent had waited for the outcome of the matter in HC 5083/13. This was explained to the 1st respondent’s legal practitioner by my legal practitioners. The issue of the Stand Number is clearly a typographical error. I indicated why I thought the third respondent should wait. All that I have said is quite clear in that it can have the effect of setting aside the sale and I pray accordingly.”

With respect to the applicants’ legal practitioner, the response is meaningless. The rules of court do not provide for the third respondent to stay or postpone a sale on the basis of a pending case. He carried out a directive from the court and he had no powers to postpone a court’s directive. If a party wants the Sheriff to stay a sale, this is done through utilizing the provisions of r 348 A or by seeking an interdict in the normal way. The third respondent would be breaching his duties if he were to suspend court directives and the rule book merely upon a letter requesting him to do so penned by the judgment debtor.

The applicant should through his legal practitioner have known that there was nothing to stop the third respondent from proceedings to execute the writ of execution to the end. The applicant did not file any rule permissive objection. He even admits so in the answering affidavit that he was not objecting. He was instead asking for a stay of confirmation in an informal manner by letter. The third respondent is an officer of the Court and not a judge or court. He therefore cannot suspend the operation of the rules of court with particular reference to stopping execution save to the limited extent as provided for by operation of law in terms of rules 348 A and 358 (2) and 359 (7).

The applicant alleges deceit in seeking the setting aside of the sale after confirmation. Who deceived who if one may ask? There was no hoodwinking or fraud committed by the third respondent. The applicant decided to create and adopt his own procedure of impugning a properly executed sale in execution. It should have been clear to the applicants’ legal practitioner that he was supposed to note a proper objection to confirmation of the sale. It is arguable whether he would have succeeded. It is not necessary to delve into that.

The determination of this application is simple. It has no sound basis. The applicants’ legal practitioner decided to tear apart the rule book and adopted an informal procedure of writing a letter to the Sheriff to stay the process of confirmation on grounds not provided for in the rules. The court cannot allow a situation where its process, as herein, a writ of execution to

be defied or stayed by its officer, the third respondent outside the authority of the court or as provided for in the rules. For the avoidance of doubt, I should note that the judgment creditor can withdraw or suspend execution subject to applicable rules as to payment of costs incurred and related matters see *David Tendayi Matipano v Gold Arwen Investments (Private) Limited* 2014 (1) ZLR 344 (S).

Disposition

In all the circumstances this application is devoid of merit. It is dismissed with costs.

Bvekwa Legal Practice, applicant's legal practitioners
Gift Muzondo & Partners, respondent's legal practitioners