LLOYD MADYEGASWA
versus
KINGDOM BANK LIMITED
and
RONALD MUGABE
DECLAN PATRICK JOSEPH KELLY
and
SHERIFF OF ZMBABWE
and
REGISTRAR OF DEEDS N.O BULAWAYO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 16 July & 24 September 2021 & 16 March 2022

Opposed Matter

Mr V Majoko, for the applicant
Mr NR Mutasa, for the first respondent
Mr T Danana, for the 2nd respondent
No appearance, for the 3rd respondent
*No appearance,*for the 4th Respondent

1. TSANGA J: What the applicant Lloyd Madyegasva herein seeks, is an order to the effect that a property described as Stand 196 Hillside South, Township 14 of Matsheumhlope, in Bulawayo, which he purchased from one Declan Patrick Joseph Kelly, the third respondent, was done with the full knowledge of Kingdom Bank the first respondent, as it was then known.
2. For ease, I shall refer to the parties by name. The applicant shall be referred to as Mr Madyegasva hereinafter; the first respondent as the Bank; the second respondent, Ronald Mugabe, as Mr Mugabe; the third respondent, Declan Patrick Joseph Kelly as Mr Kelly; and the fourth respondent as the Sheriff or Deputy Sheriff.
3. The Bank was a judgment creditor for a loan owed by Mr Kelly who was the judgment debtor under HC 5275/2010 for the amount of US$ 28 500.00 plus interests and costs. When

he failed to pay, the Bank sought a sale in execution of the above property in question through the Sheriff in order to settle the debt. That sale by the Sheriff was by public auction to Ronald Mugabe who bid on 28 January 2011, where he emerged as the highest bidder. His bid is said to have been for US$55 000.00 though he is said to have then paid $45 000.00 to the Sheriff, a fact which was not disputed.

4. Materially, prior to the Sheriff's sale, Mr Kelly had also listed the same property with an estate agent CB Richard Ellis (CBRE hereinafter) and had advised the Bank of this through a letter dated 7 October 2010. Mr Madyegasva saw the property being advertised and approached the agent. He put in an offer of US$95 000.00 which Mr Kelly accepted. It was double that of Mr Mugabe and would leave him with change. It is not in dispute that the money from the sale to Mr Madyegasva is what was used to settle the debt and the change given to Mr Kelly by the Bank.

5. Mr Madyegasva avers that the sale by Mr Kelly to him was at all times with the full knowledge of the Bank and that it was indeed sanctioned by it. The resultant confusion brought on by the parallel sale emerged when Mr Mugabe who had purchased the property through the Sheriff laid claim to the property in 2012. As a result Mr Kelly had in 2012, brought before the court an application to have the sale to Mr Mugabe set aside under HC 10087/2011. Mr Madyegasva had also filed an application for joinder in that matter under HC 940/12 None of these matters progressed as Mr Kelly left the country for South Africa seemingly abandoning his litigation as confirmed by a letter from his lawyers on record as Annexure F to the applicant's affidavit.

6. It is against this backdrop that Mr Madyegasva seeks an order that the judgment that the Bank had against Mr Kelly for a sale in execution was novated by his purchase on 31 January 2011. As a result, he also seeks an order that the confirmation of the sale in execution in respect of the same property, where in the property was sold to Ronald Mr Mugabe be set aside on the grounds of equity. As for costs, his prayer is that these be lumbered on the Bank.

7 The Bank denies knowledge that Mr Kelly was involved in a parallel process or private sale to that of the Sheriff and takes no responsibility for the resultant confusion that has been borne by the parallel sale. Its position is that when Mr Kelly sought clarification on the way forward subsequent to finding a buyer, he had been referred to the Sheriff to lodge an objection to the confirmation since this was before the sale to Mr Mugabe had been confirmed. Mr Kelly

had apparently not done so. However, it is not in dispute that the money used to settle the debt is that which was paid by Madyegaswa.

Points in limine

8. Mr Mutasa raised a point *in limine*, equally subscribed to by Mr Danana, on behalf of which Mr Mugabe, was that the application was improperly before this court. This was because Mr Madyegasva did not seek to review the Sheriff's action and set aside the sale in execution under r359 of the then High Court Rules 1971, or under the common law. An application for review can only be filed if an objection to the sale was initially filed before the Sheriff. The wrong procedure was also said to have been used in approaching the court through a court application instead of a review. Rule 359 of the High Court Rules 1971 provided as follows:

> ***"359. Confirmation or setting aside sale***
> (1) Subject to this rule, any person who has an interest in a sale in terms of this Order may request the Sheriff to set it aside on the ground that—
> (*a*) the sale was improperly conducted; or
> (*b*) the property was sold for an unreasonably low price;
> or on any other good ground.

In this instance this had not been done. Order 40 rule 359 (7) and (8) provided as follows:

> (7) On receipt of a request in terms of sub rule (1) and any opposing or replying papers filed in terms of this rule, the Sheriff shall advise the parties when he will hear them and, after giving them or their legal representatives, if any, an opportunity to make their submissions, he shall either—
> (*a*) Confirm the sale; or
> (*b*) Cancel the sale and make such order as he considers appropriate in the circumstances;
> and shall without delay notify the parties in writing of his decision.
> (8) Any person who is aggrieved by the Sheriff's decision in terms of subrule (7) may, within one month after he was notified of it, apply to the Court by way of a court application to have the decision set aside."

9. The essence of the objection was that since no complaint had ever been lodged with the Sheriff, there is no basis for review of the Sherriff's actions in terms of s359 (8), which in any event would have had to have been within a month after the Master's decision. This application having been filed in December 2012, some 23 months after that decision, was said to be a nullity. Further, it was argued that the grounds for review under the then r359 are different from those for review under common law and cannot be combined. Mr Mutasa for the Bank placed reliance on the cases of *Chiwadza v Matanda & Ors 2004 (2) ZLR 203 (H) at 206 and Puhwayi Chiutsi Sherriff of the High Court and Elliot Rogers HH 604/2018* for the principle

that if one elects to a come under ordinary review i.e. the 8 week route instead of r 359 (8), one cannot rely on the grounds set out in r 359 for that review, which grounds would include unreasonableness of the price achieved by the sale. One would have to rely on grounds for review set out under s 27 of the High Court Act [*Chapter 7:06*], namely, gross unreasonableness, bias and procedural irregularity or other common law grounds.

10. He had also raised in his heads of argument, the point *in limine* that as the Bank was placed under liquidation, proceedings were automatically stayed. However, at the hearing this point was not pursued and there were not submissions made on it by any party presumably because the liquidation had taken place and in reality from the evidence on record, the Bank's successors in title, through the liquidator, regard Mr Kelly as entitled to his title deeds. On page 110 of the record is a letter from the Mr Chikura of the Deposit Protection Corporation (DPC) to Mr Madyegasva's lawyers. It was written on 1 March 2017. The DPC being the liquidator of AfrAsia Bank, the successors to Kingdom Bank Limited, Mr Chikura its Chief Executive, clearly stated that Mr Kelly's facility was fully paid and that the Bank was amenable to cancellation of the security as well as the caveat and to a return of the title deeds to him. In other words, it is a non issue to the Liquidator. To the extent that Mr Mutasa appeared at this hearing representing the Bank in finalising this matter which was filed in 2012, it can only be with the liquidator's full knowledge and consent.

11. On the point *in limine* which was argued, Mr Majoko submitted on behalf of Mr Madyegasva that he had not approached the court through review because he was not a party to the judgement debt. He also insisted that this application was not under r359 but had been brought under common law on the grounds of equity. Given that his heads of argument do make reference to the application being under r359, Mr Majoko sought to place emphasis on the fact that in applications proceedings a party's case is made in the founding affidavit. In this case, Mr Madyegasva had clearly stated that his approach to the court was on equitable grounds not withstanding that the sale may have been confirmed by the Sheriff. In other words, nowhere in his affidavit did he mention approaching the court in terms of r359 (1). Mr Majoko also drew particular attention to the letter on page 2 of the record written by the estate agent on 7 October 2010. It confirmed to the Bank that Mr Kelly had indeed given a mandate to them to sell the property and that they had already shown it to a number of interested purchasers.

12 I am persuaded to dismiss the point *in limine* that the wrong procedure has been used. Mr Madyegasva was not a party to the sale by public auction. Also, the basis upon which he approaches this court was indeed set out in his founding affidavit as being on the basis of equity. Whether he is correct to do so is a question to be decided on the merits. This is so given the general, though not immutable rule, that equity does not form part of our law. The points *in limine* regarding the applicability of r359 and the wrong procedure was used, are accordingly dismissed.

The merits

13 On the merits, Mr Majoko submitted that a creditor who instructs that property be sold can pull that property out of the fire if he or she so chooses to do so given that sales in execution are forced sales. Even though the property was sold on 28 January 2011 and the applicant signed the agreement with the judgment debtor on 31 January 2011, he argued that at that point nothing stopped the creditor from agreeing to the terms and cancelling the sheriff's sale since a sale by private treaty is valid if the public sale is not yet confirmed. Also, it is within 15 days of a sale that the Sheriff must confirm to the highest bidder.

Drawing on the emails attributed to the Bank after the sale by private treaty, he insisted that the Bank was estopped from saying it did not sanction the sale. He also argued that the Bank had further confirmed that it would be releasing the title deed to Mr Kelly. He also emphasised the point that the balance of the purchase price from the sale, once the debt was settled was to be released to Mr Kelly. He therefore submitted that cumulatively, this conduct was not consistent with a creditor who believed the matter was out of his hands. In addition, not a cent of Mr Mugabe's money had gone to settling the debt owed. He thus argued that this is primarily where equity comes in since the purpose of the sale was to discharge a debt. If the Bank was of the view that its hands were tied then according to Mr Majoko, it should not have accepted the money from the debtor that was coming from a wrongful sale. He also emphasised that Mr Mugabe had not even paid the Sheriff the total amount that he bid for.

14. Mr Mutasa for the Bank argued that the agreement of sale had only been signed by Mr Madyegasva on 14 February 2011, well after the sale to Mr Mugabe had gone through. The process of sale that Mr Kelly and Mr Madyegasva created was said to be a parallel one. A judicial mortgage had already been created which took away certain rights from the debtor in particular the right to sell to a third party. He also argued that the sale had been confirmed and

had become *perfecta* and that as such the purchaser had acquired rights which could only be upset by the court. In this regard he drew attention to the case of *Samson Nanhanga* v *Denzil Chalmers and Ors* HH 545/14 where Dube J remarked that:

> "After confirmation of a sale by the Sheriff, the transaction becomes *perfecta* and the sale is sealed. The purchaser acquires rights which can only be upset by a court of law. The approach of the courts is that judicial sales are not to be readily interfered with after they have been confirmed."

15. Mr Mutasa relied on this case to argue that a debt settled after the sale has been confirmed is of no effect as it is tantamount to closing the stable door after the horse has bolted. He further submitted that principles of equity could not affect a non-legal agreement. His thrust was also that by the time the debtor brought the sale to the attention of the Bank, the sale had been conducted and the property had already been sold. In any event, he submitted, the Bank had advised him to get in touch with the Sheriff before confirmation.

16. Drawing on the case of *Lalla* v *Bhura* 1973 (2) RLR 280 on the merits, Mr Danana on behalf of Mr Mugabe argued that the approach to the court must be by a party who has attended a sale by public auction if a court is to interfere. Furthermore, an applicant should have taken every step necessary to avoid the property being sold in the public auction and the property should have been sold at an unreasonably low price.

17. He also argued that Mr Madyegasva and Mr Kelly had had time to enter into a sale by private treaty before the Sheriff sold it by public auction. Their sale by private treaty had taken place after the sale had already been executed. He thus maintained that the court could not be approached on equitable grounds. He further submitted that the fact that the purchase money was still with the Sheriff showed that the sale was authentic. He also argued that the Sheriff could not be faltered for not releasing the purchase price since the money goes into a Trust account and only upon transfer should the purchase price have gone to the seller. Mr Danana also argued that Mr Madyegasva was well aware that the property was under judicial attachment and that the problem was therefore of his own making. He submitted therefore that this was a case where the court had a duty to maintain the sanctity of sales in execution.

The Legal Considerations

18. Capturing what is equity and its nature in historical jurisprudence, Howard L. Oleck[1] describes it as follows:

> "First, equity is that portion of the law which was developed by the English and American courts of Chancery to remedy defects in the common law. Second, and more important, it is that portion of the law which has been, or may be, enunciated for the purpose of meliorating any harsh or otherwise undesirable effects resulting from the strict application of any particular rule of law." [2]

As for its function he explains this as follows:

> "The function of Equity is the correction of the (civil or common) law where it is deficient **by** reason of its universality *(i.e.:* its tendency to establish rules without exceptions).' In this broad, general sense, Equity is the body of principles which provide and govern exceptions to the law. But that is not all that Equity is."[3]

19. Traditional equity has therefore been limited to extraordinary cases which involve exceptions to a general rule. Concerns with equity as a principle centre on its likelihood of interfering with substantive laws, which by comparison are certain, reliable, predictable and uniform in their dealings with particular situations.

However, its general exclusion is not immutable. As to why its exclusion is not immutable, Oleck sums equity as a historically inescapable necessity arguing that where it does not develop by transplantation or adaptation it must be improvised.

> "Different though its administrative manifestations may be in various places and under varying conditions, the concept of what is right and just is, in essence, always inevitable, if justice is not to become subordinate to form in the law.'[4]

20. Equity has been said to be not part of our law. In *David Phillp Dzirutwe v Grabroc Enterprises (Private) Limited & Others* HH70/2004 the position was explained by Gowora J as she then was as follows:

> "Equity as a system of law distinct from and opposed to the common law is not part of our law. In their book **Wille's Principles of South African Law** 8 ed the learned authors van Heerden Visser and van der Merwe state as follows at page 18:
> The incorporation of these equitable principles in our law has made it well fitted to deal fairly and justly with virtually all cases of hardship that are likely to arise, and there is no need for

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[1] Howard L. Oleck, Historical Nature of Equity Jurisprudence, 20 Fordham L. Rev. 23 (1951).
Available at: https://ir.lawnet.fordham.edu/flr/vol20/iss1/2
[2] Supra at p 24
[3] At page 23
[4] At page 43

> the courts to have recourse to arbitrary rules of 'equity' in order to mete out substantial justice. It is true that Paulus lays down that equity is to be sought in all things, and particularly in law, and also that Voet says that a judge is bound to esteem equity and fairness above strict law, but the actual position in South Africa is that our courts can administer equity only in so far as is consistent with the fixed principles of the Roman-Dutch law. Equitable principles are only of force in so far as they have become authoritatively incorporated and recognized as rules of positive law. It follows that equity cannot, and does not, override a clear provision of our law. 'The court cannot therefore grant equitable relief', said Sir James Rose Innes, 'if by so doing it would be going contrary to a well-defined principle of the Roman-Dutch law, or to some statutory provision. It has been held, for example, that the court has no authority to grant what is known in English law as 'equitable relief against the forfeiture of a lease."

21. However, against the backdrop of a new constitutional order in South Africa ushered in 1994, it has since been held in *Williamson v Schoon* 1997 (3) SA 1053 (T) at 1068 H-I that courts are now enjoined to have regard to principles of equity particularly when exercising their inherent jurisdiction to regulate their own process.

22. Commenting on the principle of equity in this jurisdiction in the more recent Supreme Court case of *Big Valley Masters (Private) Limited v Shi Jinwu SC 24/21,* Guvava JA remarked as follows with reference to the principle of equity:

> "This principle is clearly discretionary and is applied by a court on the basis of the particular circumstances of a case which warrant the use of such a principle. I would however venture to suggest that the principle of equity should be sparingly used as it has the effect of undermining the contract entered into between the parties."

Looking at the facts of the appeal that were before it in that matter, the court concluded that the case was one where equity could be properly applied on the basis that "it would be unjust for the appellant to remain in possession of the US$89 000 which was paid to it by the respondent when the respondent himself did not get anything from the deal".

23. Also important to grasp as a backdrop to factual analysis, are the legal principles governing sales in execution. In a sale in execution, the Sheriff acts on instructions from the creditor. The legal position is clear that once a sale is with the Sheriff, it is no longer for the debtor to deal with that property. In the case of *Turnpike Service Station (1976) (Pvt) Limited* v *Sakunda Properties (Private) Limited & Ors* HH236/20 this right created in favour of the creditor was articulated thus:

> "In the case of a *pignus judiciale*, or judicial mortgage, is a real right over an immovable property that is created by the attachment of the property. **The real right is created in favour of the judgment creditor**: see *Car Rentals Services (Pvt) Ltd v Director of Customs & Excise* 1988 (1) 402 (SC). In *Maphosa & Anor v Cook & Ors* 1997 (2) ZLR 314 (H) MALABA J, as

> he then was, and quoting KOTZE JA in *Liquidators Union & Rhodesia Wholesalers Ltd v Brown & Co* 1922 AD 549, at p 558-9, said[5]:
>
> '[An] arrest effected on property in execution of a judgment creates a *pignus praetorium* or to speak more correctly a *pignus judiciale*, over such property. The effect of such a judicial arrest is that the goods attached are thereby placed in the hands or custody of the officer of the court. They pass out of the estate of the judgment debtor so that in the event of the debtor's insolvency the curator of the latter's estate cannot claim to have the property attached delivered up to him to be dealt with in the distribution of the insolvent's estate."

Factual Analysis

24. The first issue to be decided before delving into the equity argument is whether the Bank was aware of the parallel sale. In this regard, it is important to appreciate fully the sequence of events surrounding the sale by private treaty. The Bank knew from the letter to it dated 7 October 2010 that the debtor's property was with an estate agent. Granted and certainly within its rights, it had proceeded to put the sale in execution in motion. However, following the agreement between Mr Kelly and Mr Madyegasva through the estate agent, it is not in dispute that Mr Kelly wrote to Mr Mike Macheka from the Bank with the following enquiry by email;

> "Please can you let me know what is the intention of the bank re the auction issue. The buyer from CBRE has signed his document and now they want me to sign also, but I cannot do so until I am certain that you are satisfied with the sale terms"….

25. On the way forward, the Bank, through its Mr Macheka, advised Mr Kelly on the morning of 14 February that it was prepared to accept his proposed payment plan of US$30 000.00 by 23 February 2011 and US$10 800 for the next 6 months. Indeed he equally advised that the proposal was being referred to the legal team to "clear implications of events already happening on the ground". On the afternoon of the same day, Mr Macheka, through another email, then advised Mr Kelly to approach the Deputy Sheriff to appraise him of the new tentative arrangements he had made together with the agreements with the buyer. This was in order for the sheriff to determine. Also important to appreciate from Mr Madyegasva's sworn affidavit is that he paid the US$30 000.00 on 22 February 2011 and thereafter the 6 monthly instalments which culminated on 3 September 2011. Therefore of significance is that the US$30 000.00 which the Bank itself stipulated it wanted paid by the 23rd was paid through the estate agent on 22 of February 2011. The Bank would most certainly have known that this

[5] At p 316D – E

amount had been paid. Of importance is that all this was before the sale confirmation which is said to have been done on 25 February 2011. It is also not in dispute that the money used to settle what was being owed was wholly from Mr Madyegasva's payments.

26. Importantly, if the real right is created in favour of the creditor with the Sheriff acting as a conduit for the disposal of the property then the basis for the *pignus judiciale* is that the creditor has not been paid. Where a debt has been extinguished, or firm arrangements agreed as to how it is to be extinguished, it stands to reason that the right of the creditor to the property falls away.

27. In this instance there is no denying on record that the Bank became aware of the parallel process **before** the confirmation of the sale. What is vital to grasp is that it was most certainly within the power of the Bank to have stopped the sale before confirmation as it was the bank that held an interest in that property. Moreover, the Bank indicated to Mr Kelly as highlighted that it needed to be paid US$30 000.00 by 23 February 2011. These were its own terms upon which it would proceed to recognise payment towards the debt and not Mr Kelly's. This was also notably also before the confirmation. Furthermore, the Bank directed that the money from the sale paid to the agent be directed to it. It is the Bank that utilised that money from the sale to Madyegaswa to settle the debt owed to it. Once the Bank agreed to the payment using the sale proceeds from the parallel sale, all processes ought to have been stopped. There could be no basis upon which the Sheriff could have gone on to confirm the sale on behalf of the Bank when the Bank itself now knew that it had been paid using money from the sale to Mr Madyegasva. The *pignus judiciale* could not stand as the underlying *causa* for its existence had been satisfied according to terms as agreed. It is clearly for this reason that the Liquidator rightly holds that Mr Kelly can have his title deeds. It is these factual circumstances that place this case out of the ordinary in that knowing that it had directed payment of the proceeds of the private sale to itself even before the sale was confirmed, the Bank did nothing to stop the confirmation of the sale. The case before me is thus distinguishable from the *Nanhanga* case because here the Bank agreed to the payment and the receipt of a certain amount before the sale was confirmed.

28 I turn now to whether the principle of equity should be used herein. The issue is whether this court is faced factually with an extraordinary case which involves an exception to the general rules dealing with sales in execution. As highlighted, equitable relief has been available

where strict application of a general rule of law would lead to a result that is contrary to what the law intended. In this instance, even before the sale was confirmed, the creditor was aware that it would be accepting money from the sale to Mr Madyegasva. Given that r 359 was intended for sales in execution in order that the money from the sale would settle a debt, it would most certainly be against what was intended where the buyer's money, to the full knowledge of the buyer and the creditor in this instance, did not even go towards the settlement of the debt.

29 The order sought is that it be ordered that the applicant Mr Madyegasva purchased the said property with the knowledge and consent of the Bank. The applicant seeks that the confirmation of the sale in respect of the property wherein the property was sold to Mr Mugabe be set aside on the grounds of equity. In essence, what I have before me are two parties, one who bought through the Sheriff though he did not stick to his bid in terms of what he paid, and, another who bought through the estate agent and whose money was ultimately used to settle debt. Mr Madyegasva whose money was used to settle the debt has been in occupation of that property since 2012. The balance in equity is undoubtedly in his favour.

This is a case where each party must pay their own costs. Much has happened in the succeeding years since 2011. The Bank was succeeded in title and finally liquidated, and, as stated, the liquidator has no objection to giving Mr Kelly his title deeds. Also, Mr Mugabe through his lawyer did not deny that whatever he paid was not what he had successfully bid for. In fact he did nothing to take the court into his confidence by placing the appropriate documentation as to when he made his payments, including as he alleged, for transfer. In the result:

It is ordered that:

1. The Applicant having purchased from the third Respondent, Stand 196 Hillside South Township 14 Matsheumhlope, by private treaty with the first Respondent's knowledge and consent, the confirmation of the sale in execution to the second Respondent in respect of the same property is set aside on the grounds of equity.
2. Each party is to pay their own costs.

Majoko & Majoko, Applicants Legal Practitioners
Costa & Madzonga, first Respondent's Legal Practitioners
Mashayamombe & Co Attorneys, second Respondent's Legal Practitioners
Calderwood, Bryce Hendrie & Partners, Third Respondent's Legal Practitioners