REPORTABLE: (41)

WALEZIM INVESTMENTS (PRIVATE) LIMITED
v
(1) THE SHERIFF OF THE HIGH COURT (2) CROMBIL INVESTMENTS (PRIVATE) LIMITED (3) TEMBA HWATI AND FIVE OTHERS (4) MUVINGI & MUGADZA LEGAL PRACTITIONERS (5) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, BHUNU JA AND CHATUKUTA AJA
HARARE NOVEMBER 19, 2020 AND MAY 13, 2021

L. Uriri with *T. Zhuwarara,* for the appellant

F. Chinwawadzimba, for the second respondent

B. Mahuni with *N. Phiri,* for the fourth respondent

MAVANGIRA JA:

INTRODUCTION

1. This is an appeal against the whole judgment of the High Court in a matter in which three court applications mentioned hereunder were consolidated by consent and consequently heard at the same time.

2. An application under HC 11481/17 was made by the appellant in terms of r 358 (9) of the Rules of the High Court, 1971 (the rules), for the setting aside of the first respondent's decision confirming the second respondent as the highest bidder in a sale in execution. The parties in that matter were the appellant, as the applicant, with the respondents being the first, second and third respondents.

3. The second respondent having obtained title in the immovable property that was the subject of the sale in execution, filed an application under HC 6238/18 for the eviction of the appellant therefrom. The parties in that matter were the second respondent, as the applicant with the appellant as the only respondent.

4. Thereafter, the appellant filed another application under HC 6849/18 for the cancellation of the title deed for the said immovable property that had been registered in the name of the second respondent. The parties in that matter were the appellant, as the applicant, the respondents being the first, second, fourth and fifth respondents.

FACTUAL BACKGROUND

Re: HC 11481/17

5. Pursuant to a writ issued in favour of the third respondents under HC 10959/13, the appellant's immovable property, namely, Lot 34 Subdivision A and B of Lochinvar commonly known as 34 James Martin Drive, Lochinvar, Harare, was put up for sale by public auction. The highest bid at the auction was US$240 000. The bid was rejected. The first respondent then directed the estate agents to sell the property by private treaty. The second respondent bought the property by private treaty.

6. The appellant made an application before the first respondent for the sale to be set aside. It raised an objection to the sale on the basis that it was improperly conducted and that the property was sold for an unreasonably low price. The application was opposed by the second and third respondents.

7. In his determination dated 10 November 2017, the first respondent dismissed the application and confirmed the sale to the second respondent.

8. After the confirmation and in a letter dated 13 November 2017 addressed to the fourth respondents, the first respondent appointed the fourth respondents as conveyancers of the property in terms of the agreement of sale. In the said letter the first respondent instructed the fourth respondent to pass transfer to the purchaser against payment of the full purchase price. Notably, this appointment of the fourth respondents as conveyancers was a distinct assignment from their earlier position or status as the third respondent's legal practitioners.

9. On 17 November 2017, before the agreement of sale was signed, the second respondent's legal practitioners wrote to the first respondent requesting for extension of time to pay, with a deposit of $50 000 being paid immediately and the balance of $230 000 on 29 November 2017. The first respondent accepted the payment terms and formally responded through a letter dated 21 November 2017. The second respondent subsequently made payment of the full purchase price in compliance with the agreed terms. The second respondent signed the agreement of sale on 22 November 2017 with the first respondent signing on 8 December 2017.

10. On 27 November 2017 the appellant wrote a letter advising the fourth respondent that it had paid its debt. On 29 November 2017 the fourth respondents advised the first respondent of this notification.

11. There is an indication that the appellant filed an objection with the first respondent on 27 November 2017, this being the same date on which it wrote the aforesaid letter to the fourth respondents. This is so because on 8 December 2017 the first respondent wrote to the appellant's legal practitioners advising that the objection that had been filed on 27 November 2017 was out of time and that the first respondent had "already confirmed the sale after dismissing your first objection dated 29 August 2019." The first respondent's letter further stated "(W)e are proceeding with the signing of documents and with the transfer of the property since the Sheriff is now *functus officio*."

12. On 11 December 2017, the appellant filed an application in terms of r 359 (8) of the High Court Rules under HC 11481/17. The application was set down for 24 May 2018 but was on that date struck off the roll due to technical defects. The matter was not reinstated within the prescribed time limits. In the interim the second respondent demanded transfer and the fourth respondents who had been appointed as conveyancers were instructed by the first respondent to proceed with the transfer. Consequently, on 22 June 2018 the property was successfully transferred by the first respondent into the second respondent's name.

Re: HC 6238/18

13. Having obtained title as outlined above, the second respondent sought to evict the appellant. The appellant resisted eviction resulting in the institution of the

application under HC 6238/18 on 5 July 2018 in which the second respondent sought the eviction of the appellant.

Re: HC 6849/18

14. On 23 July 2018, the appellant filed another application under HC 6849/18 seeking cancellation of the title deed issued in favour of the second respondent and on the strength of which the second respondent was in the process of seeking its eviction.

15. These three matters were, as indicated earlier, eventually consolidated. The two applications filed by the appellant were both dismissed by the court *a quo*. The application by the second respondent for the eviction of the appellant was successful.

16. The appellant was aggrieved by the court *a quo*'s determination of all three applications leading to the filing of this appeal on the following grounds of appeal:

> "1. The Court *a quo* erred in determining that there was no cognisable basis upon which it could interfere with the sale in execution and attendant transfer of the Appellant's immovable property. At law once the Appellant had extinguished the debt before the conclusion of the execution process the associated judicial sale ought to have been set aside.
> 2. The Court *a quo* grossly misdirected itself in holding that the Sheriff's decision to confirm the sale was administrative and could not usurped. (*sic*) Such finding was anomalous in that it ignores a Court's wide powers under r 359 (8) of the High Court Rules as well as the fact that the said Sheriff had irregularly confirmed a sale and actuated a transfer of property whose basis had been extinguished by the Appellant's payment of the judgment debt.
> 3. The Court *a quo* grossly misdirected itself in finding that the appellant's payment of the judgment debt was surreptitious and

somehow illicit. At law nothing precludes a judgment debtor from extinguishing a judgment debt before the conclusion of the execution process: *more so* where such tender is accepted by the judgment creditor and the Sheriff is duly informed of the cessation of execution.

4. Further, the Court *a quo* erred in holding that the Appellant was not entitled to the impugnation of the second respondent's title in the Appellant's immovable property transferred in execution. In *casu* the second respondent received title after it was made aware of the fact that the judgment debt begetting execution had been extinguished and that the Sheriff had been instructed by the judgment creditor to terminate execution.
5. The Court *a quo* grossly misdirected itself in failing (to) impeach the conduct of the fourth respondent. Having duly informed the Sheriff that the judgment debt had been paid off; it was woefully irregular, if not reprehensible, for the same legal practitioners to then proceed to transfer title in a property in execution of a debt they are aware has been paid and settled.
6. The court *a quo* grossly erred in finding that the second respondent had the right to evict the Appellant from Lot 34 of subdivision A & B of Lochinvar situate in the District of Salisbury knows (*sic*) 34 James Martin Drive Lochnivar (*sic*) Harare and claim holding over damages when it was apparent that its title was defective."

17. The relief sought by the appellant is in the following terms:

"1. THAT the instant Appeal Succeeds with Costs,

2. THAT the order of the Court *a quo* be Set Aside and substituted with the following:

    1. The decision by the 1st Respondent under cause HC 11481/17 declaring the 2nd Respondent therein the highest bidder for Lot 34 of Subdivision A & B of Lochinvar situate in the district of Salisbury measuring 8 070*sq* meters also known as 34 James Martin Drive Lochinvar Harare be and is hereby set aside.

    2. The respondents under HC 11481/17 to pay costs of the application on a Legal Practitioner Client Scale.

    Additionally

    3. The fifth respondent who was the fourth respondent in Cause HC 6849/18, be and is hereby directed to cancel the Deed of Transfer 3409/18 registered in favour of the second respondent therein; such Deed being in respect of Lot 34 of Subdivision A & B of Lochinvar situate in the district of Salisbury measuring 8 070 sq meters also known as 34 James Martin Drive Lochnivar (*sic*) Harare.

4. The 5th respondent, who was the fourth respondent in cause HC 6849/18 is hereby directed to reinstate the Deed of Transfer 2021/05 dated 3 March 2005 as the requisite Deed in respect of Lot 34 of Subdivision A & B of Lochinvar situate in the district of Salisbury measuring 8 070 sq meters also known as 34 James Martin Drive Lochinvar Harare.

5. The Application for Eviction under Cause HC 6238/18 is dismissed with the attendant costs."

18. The six grounds of appeal raise the following issues:

(a) Whether or not payment of the debt by the appellant after the confirmation of the sale, vitiated the sale in execution and any consequent actions which emanated from the said sale.

(b) Whether or not the second respondent had the right to evict the appellant from the property and claim holding over damages.

(c) Whether or not the court *a quo* erred in holding that the first respondent's decision to confirm the sale was administrative and could not be usurped.

THE LAW AND ITS APPLICATION TO THE FACTS

Whether or not the payment of debt by the appellant after confirmation of the sale vitiated the sale in execution and any consequent actions which arose from the said sale.

19. This issue relates to grounds of appeal numbers 1, 3, 4 and 5.

20. It is trite that once a sale in execution has been confirmed, it can only be interfered with in limited circumstances. At common law, any person with an interest in a sale in execution, may apply to Court to have it set aside on good cause shown. However, courts are reluctant to set aside a sale which has been confirmed, more so where transfer of the immovable property has been effected.

Authority for this proposition is found in *Morfopoulos v Zimbabwe Banking Corporation Ltd & Ors* 1996 (1) ZLR 626 (H).

21 Rule 359 (1) of the Rules, allows for any person having an interest in a sale conducted in terms of Order 40 to request the Sheriff to set it aside on the ground that the sale was improperly conducted or that the property was sold for an unreasonably low price or on any other good ground. In such an application, in terms of subrule (7), the Sheriff may confirm the sale or cancel the sale or make such order as he deems appropriate in the circumstances. In terms of subrule (8), any person aggrieved by the Sheriff's decision 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.

22. In *C C Sales Limited v The Sheriff of Zimbabwe & 3 Others* SC 80/2000, SANDURA JA stated at p 8:

> *"*The significance of the confirmation of a sale is that it is much more difficult to have the sale set aside after it has been confirmed than before it has been confirmed. This point was stressed a few years ago by GUBBAY CJ in *Mapedzamombe v Commercial Bank of Zimbabwe and Another* 1996 (1) ZLR 257 (S), apropos judicial sales in execution, this Court remarked at 260D-E:
>
> 'Before a sale is confirmed in terms of r360, it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. See *Llala v Bhura supra* at 283A-B. Once confirmed by the Sheriff in compliance with rule 360, the sale of the property is no longer conditional. That being so, a court would be even more reluctant to set aside the sale pursuant to an application in terms of r359 for it to do so. See *Naran v Midlands Chemical Industries (Private) Limited* S 220/91 (not reported) at p6-7.'
>
> See also *Barclays Bank of Zimbabwe Ltd v The Sheriff of Zimbabwe & Anor* S-68-2000 in this regard."

In this regard, see also *Barclays Bank v The Sheriff of Zimbabwe & SEDCO* SC 68/2000 at p 5 wherein GUBBAY CJ also referred to *Morfopoulos v Zimbabwe Banking Corporation Ltd (supra) at 631G-H.*

23 *In casu,* the sale in execution was confirmed on 13 November 2017. The second respondent proceeded to comply with the requirements set out by the first respondent and paid the full purchase price on agreed terms. Confirmation by first respondent and payment of full purchase price made the sale perfect. When the second respondent paid the initial deposit as per the agreement with the first respondent, the appellant had not paid off the judgment debt that had occasioned the attachment and judicial sale of its immovable property. In addition, the first respondent was advised of the payment of the judgment debt on 29 November 2017, the same day that the second respondent paid the full purchase price.

24 The appellant sought to rely on the letter by the fourth respondents dated 29 November 2017 confirming payment of the debt without addressing the significant fact that this was way after the confirmation of the sale on 13 November 2017.

25 In *Lalla v Bhura* 1973 (2) RLR 280 (GD) the court stated as follows:

> "Courts should not be over ready to set aside sales in execution under Order 40, r 359 of the High Court Rules, 1971, as this might have a profound effect upon the efficacy of this type of sale as would-be purchasers might be deterred from attending and bidding if they considered that their efforts might easily be frustrated by an application under r359 and, as a general rule, it should be accepted that a court will not readily interfere in these matters."

26 The contention by the appellant that it had extinguished the judgment debt before the conclusion of the execution process and that the judicial sale ought therefore to have been set aside is misleading both factually and legally. Payment by the appellant was made way after the confirmation of the sale and when a third party, to wit, the second respondent, had already acquired interests. Such payment cannot, on facts of this case, be regarded as a good cause for setting aside the sale.

27 The fact that the signing of the agreement was done after payment by the appellant does not strengthen the appellant's case or weaken the second respondent's. This is so because when the first respondent confirmed it, it ceased to be a conditional sale.

28 The contention that was belatedly made that the contract of sale only came into being after the parties had signed the agreement ought not detain this Court as this contention was not raised in the court *a quo*. Neither was it addressed or ventilated by the parties as it was not one of the grounds for objecting to the sale. It is thus an issue on which the court *a quo* did not make a finding or decision as it was not an issue that was before it. Consequently, it cannot properly be raised on appeal. In this regard see *Nzara v Kashumba* 2018 (1) ZLR 194 (s); *Flowerdale Investments (Pvt) Ltd & Anor v Bernard Construction (Pvt) Ltd & Ors* 2009 (1) ZLR 110 (s).

29 Payment by the second respondent was made before the contract was signed because the parties had upon confirmation reached agreement and it was incumbent upon the second respondent to make payment. Without an agreement, the first respondent would have no basis for demanding and accepting payment of the full purchase price. The subsequent signing formalised an agreement that had already come into being.

30 The appellant's contention that the second respondent did not comply with the terms of the confirmation letter was not raised by the appellant in the court *a quo*, neither was it dealt with by the second respondent. It is an issue on which there is no determination by the court *a quo* and this Court cannot therefore make a determination on the basis of that issue.

31 By paying the judgment debt at the stage that it did, the legally represented appellant must be taken to have consciously taken the risk and did so at its own peril as it must have been fully cognisant of the consequences of the confirmation of the sale. Payment that was made when the sale had been concluded and was effectively *perfecta* cannot be the basis for the setting aside of the sale.

32 It is significant that when the objection to the sale in execution was raised, the judgment debt was still outstanding. When the objection was dismissed and the sale confirmed the judgment debt remained unsatisfied.

33 It is also significant that a party can apply to court and seek the setting aside of the Sheriff's decision dismissing its objection. The court's consideration in such

application, which is made in terms of r 359 (8) is limited to the consideration of the grounds that were before the Sheriff at the time that the objection was taken. In this regard see *Nyadindu & Anor v Barclays Bank of Zimbabwe & Ors* 2016 (1) ZLR 348 (H) where the following was stated at 353H:

> "The court is required to look at the objections raised and test the decision of the Sheriff. Rule 358 (8) limits the grounds upon which this application may be brought to those grounds raised in terms of r 359 (1) as objections. The High Court sitting as a review court, cannot inquire into questions that were not raised initially as objections and deliberated on by the Sheriff. A party who has failed to raise an objection at the time he challenges the decision to accept a bid price with the Sheriff, cannot raise the objection for the first time in an application to set aside the Sheriff's decision to confirm a sale."

34 In *Chiutsi v The Sheriff & Ors* HH 604/18 it was held that:

> "It means that those grounds not raised before the Sheriff and therefore not considered by him in his decision to confirm the sale which is sought to be set aside cannot be raised for the first time before the court."

In casu, payment by the appellant was done after confirmation of the sale. The objections raised by the appellant before the Sheriff related to the price being unreasonably low and the sale being improperly conducted. The issue of the payment of the judgment debt by the appellant, was not raised, and could not have been raised as no payment had been made at that stage. In the circumstances, the allegation that the first respondent irregularly confirmed a sale when the debt had been paid must not be allowed to mislead the court.

The issue of the payment of the debt was raised for the first time in an application in terms of r 359 (8). The court *a quo* found that the confirmation of the sale was not irregular. The contention that the sale and transfer were irregular because the

debt had been paid is unsustainable on the facts of this case. In the circumstances, the findings of the court *a quo* cannot be faulted.

35 The payment of the debt by the appellant, done after the confirmation of the sale, could not have barred the first respondent from effecting transfer to the second respondent. The reason is that once the sale was confirmed it was for the second respondent to pay the full purchase price. This, the second respondent did in accordance with the agreed terms of payment. Once the purchase price was paid in full, the first respondent had an obligation to effect transfer. The transfer of the property to the second respondent cannot in the circumstances be said to be irregular.

36 It is also opportune to indicate at this stage that the appellant failed to establish before the court *a quo* that the price for which the property was sold to the second respondent was unreasonably low in the particular circumstance of the case.

37 The payment of the judgment debt was made after the confirmation of the sale as well as after the payment of the purchase price. There was no explanation as to why the payment was not made earlier and only made at the late stage. Against such a background, the court *a quo*'s summation or conclusion that the appellant went behind every one's back to make payment and that such payment, even if proved to have been made, was irrelevant, cannot be faulted. The sale in execution was done above board and in accordance with the law.

38 For sales in execution there is a balance that must be struck between the need to protect a judgment debtor who may be unfairly hounded to insolvency and

homelessness on the one hand and the need to ensure that the judgment creditor who has been forced to go to court to obtain satisfaction of his debt secures just relief. It is, at the same time, also crucial to ensure that the reliability and efficacy of sales in execution are upheld. In this regard see the *Morfopoulos* case *(supra).* Once the sale was confirmed, the appellant, as judgment debtor, could not just decide to settle the debt and expect that the sale would be cancelled without just cause. It has been emphasised by this court and it is appropriate to take note that it is important that public confidence in judicial sales be upheld.

Whether or not the second respondent had the right to evict the appellant from the property and claim holding over damages.

39 This issue covers the sixth ground. Once it is accepted that the sale of the property was properly confirmed and the attendant transfer valid, it follows that the second respondent, being the registered owner of the property, has a right at law to seek the eviction of whoever is in occupation of its property. Ownership of land is proved by way of registration of title. *In casu* the title deed of the property the subject matter of the sale in execution, is in the name of the second respondent. See *Ishemunyoro v Ishemunyoro & Ors* SC 14/19, *Takafuma v Takafuma* 1994 (2) ZLR 103 (S).

40 The second respondent paid for and acquired the property in good faith. There has been no allegation that he did not act innocently. In *Nzara v Kashumba* (*supra*) the court stated as follows:

> "This case therefore sanctions ruthless vindication of the owner's rights. Ownership is a well-guarded title in property law. For this reason, after

finding the second, third and fourth appellants to be the true owners, the court *a quo* was bound by law to vindicate their title to the land".

41 The basis upon which the appellant sought to impeach the second respondent's ownership of the property was invalid. The court *a quo* did not therefore err in upholding the second respondent's ownership of the property and consequently, its right to evict the appellant. There was no basis upon which the claim for eviction ought to have been denied. Furthermore, as the second respondent had been denied occupation of his property, he was entitled to claim holding over damages. The second respondent established the justification for the quantum of damages that it claimed. The market rentals for the property was established to the satisfaction of the court *a quo*.

42 Having dealt with the two main issues identified earlier herein, I intend to now examine another aspect raised in the appellant's second ground of appeal. The question that arises is whether or not the court *a quo* erred in holding that the first respondent's decision to confirm the sale was administrative and could not be usurped.

Where or not the court *a quo* erred in holding that the first respondent's decision to confirm the sale was administrative and could not be usurped

43 Despite raising this issue in the second ground of appeal, the appellant did not specifically address it in its heads of argument or in oral submissions. It is my view that for this reason this issue should not detain the court.

44 However, in *Chiwanza v Matanda & Ors* HH 170/2004 the court noted that in performing his functions, the Sheriff acts as a quasi-judicial officer and that the administrative functions that he performs are reviewable by the court. In its judgment the court *a quo* made reference to case law that establishes that the High Court has supervisory powers but is not entitled to usurp the responsibilities of an administrative functionary. See *Tenesi v Public Service Commission* 1996 (1) ZLR 196 (HC).

45 Rule 359 (8) allows a person who is aggrieved by the decision of the Sheriff to take the decision to the High Court on review. It does not grant the High Court the power to take away the functions of the Sheriff but to review the decision of the Sheriff. Support for this proposition may be found in the case of *Nyadindu & Anor v Barclays Bank of Zimbabwe & Ors (supra)* where the following was stated at 353 G:

> "The procedure envisaged by r 359 is that of a review of the decision of the Sheriff by this court."

It follows therefore that the contention that r 359 (8) empowers the High Court to usurp the powers of the Sheriff misleading and is not sustainable at law.

46 There is another aspect that requires comment. This relates to the appellant's complaint that the court *a quo* grossly misdirected itself in failing to impeach the conduct of the fourth respondent.

47 The fourth respondent acted on the instructions of the first respondent after having been appointed as the conveyancer in accordance with the terms of the agreement of sale. The mandate to act as the conveyancer ought to be viewed separately from the fourth respondent's earlier mandate as the third respondents' legal practitioners, which mandate had already lapsed after the fourth respondent had performed their role to completion. The said instructions to the fourth respondent were given by the first respondent after the sale had been confirmed. The fourth respondents acted as conveyancers on behalf of the first respondent. The first respondent's instructions to the fourth respondent were not withdrawn or reversed at any stage. In such a situation, and once the first respondent is found to have acted in accordance with the law, it would be illogical as well as irrational for the fourth respondent to be taken to task for fulfilling the mandate lawfully given to it by the first respondent.

48 The appeal does not have any merit. Costs will follow the cause.

49 Before I conclude, I need to express the court's displeasure and disappointment in the conduct of the fourth respondents' legal practitioners in the following regard. In para 19 of the fourth respondents' heads of argument they cited the South African case of *Brummer v Gorfil Brothers (Pty) Ltd En Andere* 1999 (3) SA 389 and quoted from it a passage that they ascribed to SPOELSTRA J. During the

preparation of this judgment I failed to locate the quoted passage at the stated pages or at any other pages in the report. I noted that the judgment is generally in Afrikaans with several English quotations at various pages. I also noted that amongst the five judges who sat in that matter "SPOELSTRA J" was not one of them. I thus requested the Registrar to contact the fourth respondents' legal practitioners and obtain from them a copy of the judgment that they copied the passage from. The requested copy was availed as requested but my perusal of it did not solve anything. I then requested that the legal practitioners mark on the availed copy the exact location of the quoted passage.

50 The judgment was duly returned to me and I noted that it had been highlighted on three different pages at five different portions. These highlights were at pp 392E, 392G-H, 393D-F, 393G and 405B-C. Pages 392 and 393 capture parts of the long headnote for the case, while p 405 covers part of the judgment by SCREINER AR.

51 It became very clear that the passage that is in the heads of argument does not exist in the judgment from which it is purported to have been quoted. The highlighted portions of the judgment do not correspond to the quote that is in the heads of argument. The quote is ascribed to a judge who did not sit in that matter. In addition the purported quote has some clearly ungrammatical portions making part of it meaningless. There is no explanation proffered as to how this situation came to be. It is not proper for a legal practitioner to behave in this unbecoming manner. Valuable time was spent trying to verify the cited authority, which citation was patently not done with any due diligence as would be expected of a

legal practitioner. In the same vein, when counsel indicated before this Court that he abided by the heads of argument filed of record, this must be taken to be a submission that was obviously very casually made. This is improper. Note should be taken by legal practitioners of the need to be meticulous and professional in the preparation of heads of argument *inter alia*.

52 It is accordingly ordered as follows:

"The appeal be and is hereby dismissed with costs.

BHUNU JA: I agree

CHATUKUTA AJA: I agree

Nyamayaro Makanza & Bakasa, appellant's legal practitioners.

Dhlakama B Attorneys, 2nd respondent's legal practitioners

Muvingi & Mugadza, 3rd and 4th respondent's legal practitioners