DISTRIBUTABLE (82)

(1) DICKSON KANDAWASVIKA (2) JOYCE GUDZA KANDAWASVIKA
v
(1) THE SHERIFF OF ZIMBABWE (2) NMB BANK LIMITED (3) EVANS MLAMBO (4) TSITSI NHONGO (5) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
GUVAVA JA, BHUNU JA & KUDYA AJA
HARARE: 27 OCTOBER 2020 & 5 SEPTEMBER 2022

E Mubaiwa, for the appellant

H Mutasa, for the second respondent

A Dracos, for the fourth respondent

No appearance for first, third & fifth respondents

KUDYA AJA: The appellants appeal against the whole judgment of the High Court dated 12 March 2020. The court *a quo* dismissed an application wherein the appellants sought a declaration of invalidity against a confirmed sale in execution of Stand No. 230 Vainona Township of Vainona (the immovable property), the consequential vacation of the sale and the resale of the immovable property by private treaty.

THE FACTS

The immovable property was registered in first appellant's name under deed of transfer number 9140/2003. It was declared executable in case number HC 4968/13, on 29 May

2014, in a judgment wherein the appellants were ordered to pay to the 2nd respondent (the bank) US$131 411.42, interest and costs on the higher scale.

The first respondent (the Sheriff) sold the immovable property by public auction to the highest bidder (the 3rd respondent) for US$ 120 000 on 24 July 2015. The third respondent was an agent of the fourth respondent (the purchaser).

The Sheriff duly declared the third respondent the purchaser in terms of r 356 of the High Court Rules, 1971 (the Rules) on 29 July 2015 and notified all the interested parties of his declaration by letter of even date. He further requested the interested parties to lodge their respective objections with him within fifteen (15) days of the declaration date and "immediately" serve any such objections on the other parties. He also directed the interested parties to file their opposition to the objections within ten (10) days of such service.

On 17 August 2015, the appellants' legal practitioners wrote and delivered the appellants' letter of objection to the Sheriff. The letter was copied to the auctioneer and the purchaser but not to the bank. It was, however, later served on the bank's erstwhile legal practitioners on 2 October 2015. Attached to the letter was a valuation report procured from Rawson Properties on 14 August 2015. The immovable property had an open market value of US$ 265 000 and a forced sale value of US$ 175 000. The appellants complained that the "declared" purchase price was unreasonably low and far below the forced sale price and their indebtedness, which had ballooned to US$ 261 754.32.

On 17 August 2015, the Sheriff wrote a letter to the auctioneers (who received it on 27 August 2015) and copied it to the interested parties other than the bank. The letter reads:

> "Kindly sell the immovable property in this matter by way of private treaty since the price realized at the auction was below the forced sale value.
>
> You are mandated to sell their (sic) immovable property for a period of 90 days. Thereafter, should there be no takers it will go back to public auction"

On 25 August 2015, the bank requested the Sheriff to confirm the sale on the basis that he had not received any objections. The Sheriff, however, convened a hearing for the confirmation of the sale in execution on 13 October 2015. The only interested party who was absent from the hearing was the declared purchaser. At the hearing, the appellants' counsel admitted that the letter of objection did not constitute the type of objection contemplated by r 359 (2) and (3) of the Rules. He, consequently conceded that the appellants had not lodged any objection with the Sheriff. Resultantly, by letter dated 16 October 2015, the Sheriff confirmed the sale in execution.

Aggrieved by the confirmation and acting in terms of r 359 (8) of the Rules, the appellants filed an application in case number HC 11139/15 on 17 November 2015 for the setting aside of the confirmation.

The purchaser paid the purchase price through a cash deposit of US$12 000 on 31 July 2015 and a First Banking Corporation mortgage loan of US$112 000 on 23 September 2016.

On 19 November 2018, the appellants withdrew the r 359 (8) application (HC 11139/15), which they had filed some 3 years earlier. Thereafter, acting in terms of s 14 of the High Court Act *[Chapter 7:06]*, they filed the application upon which the present appeal is premised, on 6 December 2018. They sought the relief that I adverted to at the commencement of this judgment.

The fourth respondent had, as at that date, taken transfer of the immovable property and made appreciable renovations and improvements thereon.

THE PROCEEDINGS IN THE COURT *A QUO*

The appellants averred that the sale in execution and subsequent confirmation were improper, irregular and unlawful. They contended that the confirmation was a nullity as it took place after the Sheriff had, in response to the letter of objection, revoked the sale. They argued that the Sheriff became *functus officio* when he cancelled the sale on 17 August 2015, and could not thereafter reverse it on 13 October 2015, in the face of his extant earlier order. The appellants further contended that, as they had established that the purchase price was unreasonably low in the letter of objection, the declaration of the purchaser should have been cancelled. They also argued that the delay by the purchaser in paying the purchase price constituted a valid reason for the court *a quo* to grant the order sought.

Per contra, counsel for the bank and counsel for the purchaser took the preliminary point that the application for a declarator was improperly before the court as it was apparent from the grounds on which it was based and the relief sought that it was in reality a disguised r 359 (8) application for the setting aside of the confirmation. They contended that the appellants ought to have proceeded in terms of r 359 (8) of the Rules. On the merits they argued that the appellants failed to establish "an existing, future or contingent right" that they sought to protect. They contended that the attachment of the immovable property by the Sheriff before the sale in execution and its subsequent transfer to the fourth respondent prior to the lodgement of the application on 6 December 2018, extinguished the real rights held by the first appellant before the onset of these events.

The court *a quo* gave its decision on the turn. It condoned the "tardiness" of the founding affidavit, which was deposed to ostensibly by the second appellant but sworn to by the first appellant. It held that the letter written by the Sheriff on 17 August 2015, in response to the appellants' letter of objection of even date was a nullity. The court *a quo* reasoned that as the letter of objection fell outside the ambit of r 359 (2) and (3), it was not only *void ab initio*, but rendered void and of no force or effect any decision premised upon it. It, therefore, adjudged the revocation to be of no force or effect. It further held that the grounds for the application constituted the classical grounds for reviewing the Sheriff's decision, which are set out in subrule (1) of r 359.

The court *a quo* further found that the application was a disguised quest for review of the Sheriff's conduct and not a declaration of substantive rights. Lastly, it held that any real rights that the first appellant might have had in the immovable property were extinguished by the judicial attachment or *pignus judiciale* and the subsequent transfer of those rights to the purchaser at the time he sought the declarator.

Regarding costs, it held that the application, coming soon after the withdrawal of the r 359 (8) application, was an abuse of process. It punished the appellants for bringing a hopeless application with the perverse purpose of unravelling concluded transactions and frustrating the bank and purchaser.

The court *a quo*, therefore, upheld the preliminary points and dismissed the application with costs on the higher scale without relating to the merits.

THE GROUNDS OF APPEAL

Aggrieved, by the decision of the court *a quo*, the appellants appealed to this Court on 5 grounds of appeal. At the onset of the appeal hearing, Mr *Mubaiwa* for the appellants conceded that the third and fourth grounds of appeal sought to impugn the merits when the matter was disposed of on the preliminary points taken. On the authority of *Mudyavanhu v Saruchera & Ors* SC 75/17 at p 6 and *Bonnyview Estates (Pvt) Ltd v Zimbabwe Platinum Mines (Pvt) Ltd & Anor* SC 58/18 at 4-5, these two grounds of appeal were, therefore, struck out by consent.

The following grounds, therefore, remained in contention:

"1. The Court *a quo* erred and misdirected itself at law and fact by making a finding to the effect that the matter was improperly before it yet it proceeded to hear the merits but did not make any judicial pronouncement on the merits.

2. The court *a quo* erred and grossly misdirected itself by making a finding to the effect that the appellants ought to have proceeded through an application for review yet this is a clear case for a declaratur.

3. ……

4. ……

5. The court *a quo* grossly erred at law and fact by ordering the appellants to pay costs of suit where there was no justification for same.

RELIEF SOUGHT

WHEREFORE, the appellants pray for the following relief: -

a. The instant appeal be upheld with costs and the order of the court *a quo* in case Number HC 11 236/18 be set aside and substituted with the following order:

'i. The application for a declaratory order under case number HC 11 236/18 be and is hereby granted.

ii. The respondents shall jointly and severally the one paying the other to be absolved pay costs of suit on an attorney and client scale.'"

THE ISSUES

The two issues that arise for determination are:

1. Whether or not the application for a declarator to set aside the sale in execution was improper.

2. Whether or not the court *a quo* erred in awarding costs on a higher scale without justification.

THE CONTENTIONS BEFORE THIS COURT

In his oral submissions before the Court, Mr *Mubaiwa* rightly abandoned the first ground of appeal. This ground runs against the pronouncements of this Court that where a preliminary point or points or a contested issue "can put the whole matter to rest" a court is not obliged to proceed to determine the merits or the other contested issues. See *Longman Zimbabwe (Pvt) Ltd v Midzi & Ors* 2008 (1) ZLR 198 (S) at 203D, *Madza & Ors v The Reformed Church in Zimbabwe Daisyfield Trust & Ors* SC 71/14 at pp 8-10 and *Gwaradzimba NO v CJ Petron & Co (Pty) Ltd* 2016 (1) ZLR 28 (S) at 32B.

He, however, related to the second ground of appeal. He made the following contentions. The revocation letter of 17 August 2015, constituted an incontestable and proper exercise by the Sheriff of his powers to set aside a sale in execution conferred upon him by r 359 (7). The hearing on 13 October 2015, was convened and the subsequent confirmation on 16 October 2015, was made in the face of the extant revocation of 17 August 2015. The Sheriff was *functus officio* when he confirmed the sale. The confirmation was therefore void and of no force and effect. He submitted that the court *a quo* should have declared the confirmation invalid and consequently set it aside and ordered a new sale by private treaty. He implored the Court to exercise its review powers in terms of s 25 (2) of the Supreme Court Act [*Chapter 7:13*] and vacate the "improper, irregular and unprocedural" hearing and concomitant confirmation. See *PG Industries Zimbabwe Ltd v Bvekerwa & Ors* SC 53/16 and *Zimasco (Pvt) Ltd v Marikano* SC 6/14.

Per contra, Mr *Mutasa* for the bank and Mr *Dracos* for the purchaser made substantially similar contentions to the following effect. The letter of revocation was a nullity. Firstly, because although the Sheriff date stamped it on 18 August 2015, it was, *ex facie*, written on 7 August 2015 and could not therefore have been in response to the letter of objection. Alternatively, the letter of objection, upon which revocation was purportedly predicated, was an incontrovertible nullity. Such a revocation was, therefore, void *ab initio* and of no force or effect. Further, the grounds upon which the declarator was based and the relief sought revealed that the appellants, in essence, filed a r 359 (8) application disguised as a declarator. The court *a quo,* therefore, correctly dismissed the application on the basis of the preliminary points taken. It also properly exercised its discretion in imposing costs on the higher scale. This was not an appropriate case for the Court to invoke its review powers in terms of s 25 (2) of the Supreme Court Act. To do so would result in the unwarranted resurrection of an invalid letter of objection and intolerably hurt the public policy considerations that belie sales in execution in Zimbabwe.

APPLICATION OF THE LAW TO THE FACTS

The law

It is settled law in this jurisdiction that a nullity not only pervades every other proceeding based on it but does not require an order of a court to set it aside. It is also trite that the conduct of the Sheriff, in breach of his statutory functions, would constitute a nullity. These principles were clearly pronounced by this Court, firstly in *Zimbabwe Mining Company (Pvt) Ltd v Outsource Security (Pvt) Ltd & Ors* SC 50/16 at p 5-6, where UCHENA JA stated that:

> "The Sheriff and all officers acting under his office are not free agents who act as they please. As provided by section 20 of the High Court Act [*Chapter 7:06*], they are officers of the court who should execute orders of the court. Their mandate is to execute orders of the court in terms of the law and the rules. They are not allowed to operate outside the law and the rules.
> ……
> Failure to operate within the strict confines of the Act and rules of court renders their actions a nullity."

And secondly, in *TBIC Investments (Pvt) Ltd & Anor v Mangenje & Others* 2018 (1) ZLR 137 (S) at 147B BHUNU JA remarked that:

> "A perusal of case law shows that there is no need for the court to pronounce or declare something which is a nullity as being null and void as held in the well-known case of *Mcfoy v United Africa Co. Ltd* [1961] 3 ALL ER 1169 (PC) at 1172". In that case Lord DENNING had occasion to remark that:
>
> > 'If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, although it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'" (emphasis provided)

See also *CC Sales Ltd v Sheriff of Zimbabwe & Ors* 2000 (2) ZLR 180 (S) at 182C-E; *Ngani v Mbanje & Anor* 1987 (2) ZLR 111 (S) at 115E-F and *Jensen v Acavalos* 1993(1) ZLR 216 (S) at 220C-D and *Guwa & Anor v Willoughby's Investments (Pvt) Ltd SC* 31/2009 at p 3.

It is also an abiding principle of our law that it is improper for an application for review to be lodged as a declarator. The perverse reason why litigants sometimes disguise reviews as declarators is to avoid seeking condonation and extension of time within which to file the appropriate review. The distinguishing features between a declarator and a review disguised as a declarator were outlined by MALABA JA, as he then was, in *Geddes v Tawonezvi* 2002 (1) ZLR 479 (S) at 484G-485B in these words:

> "In deciding whether an application is for a declaration or review, a court has to look at the grounds of the application and the evidence produced in support of them. The fact that an applicant seeks a declaratory relief is not in itself proof that the application is not for review"

See *City of Mutare v Mudzime & Ors* 1999 (2) ZLR 140 (S) at 142H-143C and *Kwete v Africa Publishing Trust & Ors* HH 216/98 at p 3.

THE STATUTORY PROVISIONS

I proceed to summarize the provisions of r 359 of the High Court Rules, 1971.

The procedure for lodging an objection with the Sheriff, once he has declared a purchaser in terms of r 356, as he did *in casu*, is prescribed in subrule (1), (2) and (3) of r 359. The objector must lodge the request or objection with the Sheriff within 15 days of the declaration date (subrule (2). The objection must be in the format specified in subrule (3). It must state on the face of it the disjunctive grounds of objection, which are illustrated in subrule (1). His cause of action must be stated in his founding affidavit which must be attached to the objection. The lodgement of supporting affidavits is optional. He must without delay (euphemism for within a reasonable time) serve a copy of the lodged request and attachments on all the interested parties.

Subrules (4) (5) and (6) specify the format and the *dies induciae* within which the interested parties may oppose the objection and serve the opposing papers on the objector and the other interested parties. They also specify the format and period within which the objector may lodge and serve his reply on the interested parties contesting his objection.

Subrule (7) specifies the period within which the Sheriff will set down the request for hearing, the procedure at the hearing and the nature of the decisions he may make and the time frame within which he must notify the parties his determination in writing.

An interested party aggrieved by the Sheriff's determination is required by subrule (8) to file a court application with the High Court to vacate the decision on the objection within 1 month from the date on which he becomes aware of the same. In terms of subrule (9), the High Court may confirm, vary or set aside the Sheriff's decision or make any other order it deems fit.

Lastly, subrule (10) empowers the Sheriff, if he does not condone the late lodgment of the objection, to confirm the sale within 15 days from the date on which he declared the purchaser.

In my view, although the procedure specified in r 359 of the Rules mirrors the procedure that pertains to a court application, it is *sui generis*. In other words, it is an elaborate and self-contained procedure which decrees how an interested party who seeks relief from the Sheriff after the Sheriff has declared the highest bidder as the purchaser should proceed. This unique and special procedure in which the legislature substituted "request" for "court application" in the old objection procedure found in the old r 359[1] was enacted following the wholesale amendment of the old rule by SI 80/2000 on the recommendation of SMITH J in *Munyoro v Founders Building Society & Ors* 1999 (1) ZLR 344 (H) at 351B-C[2].

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[1] Reproduced from *CC Sales Ltd v Sheriff of Zimbabwe & Ors* 2000 (2) ZLR 180 (S) at 182A. It stated that:

> "Any person having an interest in the sale may make a court application to have it set aside on the ground that the sale was improperly conducted or the property was sold for an unreasonably low sum or any other good ground. Any such person shall give due notice to the sheriff of the application stating the grounds of his objection to confirmation of the sale. On the hearing of the application, the court may make such order as it deems fit."(My emphasis.)

[2] Smith J recommended that

> "As mentioned above, once a sale has been concluded in terms of r 356 or 358, the Sheriff is obliged to confirm it if no objection is lodged within 7 days. If an objection is lodged, it is dealt with by the High Court. If an objection is not lodged within the 7 days, then the Sheriff must confirm the sale even if there has been a procedural defect or there is other good cause why the sale should not be confirmed. It seems to me that there would be merit in permitting the Sheriff, in the first instance, to deal with any objection. He would be able to handle the matter much more expeditiously and at less cost to the parties. The High Court should only come into the picture if any interested party wishes to appeal from the decision of the Sheriff. I strongly recommend that consideration be given to amending the rules of court so as to confer the necessary powers on the Sheriff to deal with such objections."

I turn to determine the two issues raised in this appeal.

Whether or not the application for a declarator to set aside the sale in execution was improper.

The court *a quo* upheld the preliminary point taken by the bank and the purchaser that the application for a declarator was a disguised r 359 (8) application. The following excerpts from the judgment show that the court *a quo* considered the application to be a disguised review: At p 4:

> "My decision is that the application is not properly before the court for the simple reason that this is clearly and unquestionably and unequivocally an application for review disguised as an application for a declaratory order. It is clearly an application for review because everything that the application seeks and the grounds for seeking that relief are classically and textbook grounds for review."

And at p 5

> "In short, the applicants had no right or, they were wrong to purport to come to court via Section 14 of the High Court Act and avoid Order 40 Rule 359 (8) of the Rules".

And at p 6:

> "Given the decision I have taken that the applicants have come to court via the back door instead of the front door, the front door being Rule 359 (8), the applicants have to be chased out of court. I do not have to decide all the other issues raised in argument because the application is incompetent and it is improperly before the court and I dismiss it."

The power to confirm a sale is reposed in the Sheriff by r 359 (7). An interested party aggrieved by the confirmation may seek the setting aside of the confirmation in terms of r 359 (8. He must do so within one month from the date he has knowledge of the confirmation. The appellants initially filed such an application in terms of the appropriate subrule but inexplicably withdrew it three years later, when it was ripe and ready for hearing. They, soon thereafter filed the application that has given rise to this appeal.

The grounds upon which the application is sought are analogous to the ones enumerated in r 359 (1). They are that the sale was improperly conducted and the price was unreasonably low. The relief sought, although couched as a declarator, is in reality the setting aside of the sale in execution. A declarator is a pronouncement of the existing, future or contingent rights. Mr *Mubaiwa* was unable to articulate the substantive rights the appellant sought to protect. Clearly, he did not seek to protect any ownership rights he may have perceived he still possessed. These had been stripped from him by the attachment and subsequent transfer of the immovable property by the time he filed the application *a quo*. Rather, he sought a declaration of invalidity against the conduct of the Sheriff. The actual relief that he sought was the cancellation of the sale by public auction and its substitution by a sale by private treaty. The grounds and relief sought have an uncanny affinity with subrules (1) and (8), respectively. In terms of the principle set out by this Court in *Geddes v Tawonezvi*, *supra*, the application *a quo* was an application in terms of r 359 (8), that was merely dressed up as a declarator. It is improper and impermissible to seek a declarator in this manner.

The court *a quo* saw through the charade and properly upheld the preliminary point before dismissing the application. In the premises, the second ground of appeal, being unmeritorious, must fail.

Mr *Mubaiwa* however suggested that the Court could exercise its review powers and set aside the decision of the court *a quo* on the basis that the confirmation of the sale was a nullity as it was made in conflict with an extant prior revocation order.

A proper assessment of the evidence led *a quo* and the submissions made in this Court, inevitably leads me to the following conclusions. Firstly, the revocation was based on a letter of objection which was an admitted nullity. The revocation could not therefore stand on

nothing. Secondly, the hearing of 13 October, 2015 was not called by the Sheriff to determine an application by the appellants for the condonation of the late lodgement of a proper objection but to determine whether he could confirm his declaration of the highest bidder as the purchaser. That as the hearing was not called in terms of subrule (7) of rule 359, it was also a nullity. Thirdly, even though the confirmation letter dated 16 October 2015 was written soon after this hearing, it was saved by the provisions of subrule (10) of r 359, which mandated the Sheriff in the absence of a valid objection within 15 days of the declaration of the purchaser, to confirm the sale. The letter was, therefore, in compliance with the latter subrule and remained unaffected by the invalidity of the hearing of 13 October 2015.

In the light of the sentiments espoused by this Court in the *TBIC Investments* case, *supra*, a nullity does not require a court order to set it aside. In any event, I do not find this to be a proper case for the Court to invoke the review powers conferred upon it by s 25 of the Supreme Court Act.

Whether or not the court *a quo* erred in awarding costs on a higher scale without justification

It is trite that costs are always in the discretion of the trial court. An appeal court will only interfere if the costs order is afflicted by the scourge of irrationality, set out in, amongst many other cases of this Court, *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) 62G-63A. Mr *Mubaiwa* did not motivate this ground of appeal in his oral submissions in this Court. In his written heads, the vacation of the costs order of the court *a quo* is predicated upon the success of the second ground of appeal. The court *a quo* correctly labelled the application to be an abuse of court process undertaken for the perverse purpose of unravelling concluded transactions and frustrating the bank and the purchaser. I would uphold the costs order imposed *a quo* as a judicious exercise of the court's discretion and dismiss the fifth ground of appeal.

Regarding costs in this Court, both respondents sought costs on the higher scale. They submitted that the appellants were motivated by a perverse desire to harass and vex respondents. This court does not discourage parties from approaching it for redress of perceived wrongs in merited cases. I agree with counsel for the bank and purchaser that this was a hopeless appeal which was designed to put spanners in the works, frustrate and harass the respondents. I would therefore accede to their request for the imposition of an adverse costs order on the higher scale.

DISPOSITION

This case demonstrates the urgent need for training the Sheriff and his officers on the proper procedures for handling sales in execution so that he executes his onerous task in compliance with the High Court Act and the Rules of Court. The Registrar is, therefore, directed to bring this judgment to the attention of the Judicial Service Commission.

Accordingly, the following order will issue:

1. The appeal be and is hereby dismissed.
2. The appellants shall jointly and severally, the one paying the other to be absolved, pay the second and fourth respondents' costs on the scale of legal practitioner and client.

GUVAVA JA : I agree

BHUNU JA : I agree

Zimudzi & Associates, appellant's legal practitioners

Gill Godlonton & Gerrans, the 2nd respondent's legal practitioners

Honey & Blanckenberg, 4th respondent's legal practitioners.