NOBERT NJAZI
and
NOBERT NJAZI N.O
(In his capacity as the executor of E/L Margaret Njazi)
versus
TINARWO CHITUZA
and
FRANK RUDOLPH
and
SHERIFF FOR ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 7 November 2019 and 12 February 2020

Opposed Application

T Nzombe, for the applicant
K Gama, for the 1st respondent
E T Moyo, for the 2nd respondent

TAGU J: This is an application for review in terms of Order 33 Rule 256 as read with Order 40 Rule 359 (8) of the High Court Rules 1971, as further read with section 26 and 28 of the High Court Act [*Chapter 7.06*]. The application is made on the basis that the Sheriff erred in confirming and declaring the highest bidder Frank A. Rudolph to be the purchaser of the property which is the applicant's dwelling House which is Lot 1 of Subdivision A of Lots H of Lots A and B called Adylinn of Bluffhill held under deed of transfer number 7199/02 dated 2nd of June 2002 at the sum of $100 000.00. The applicants therefore seek an order to set aside the decision of the Sheriff to confirm the sale of the property to the highest bidder, the second respondent.

The facts giving rise to this application are that in 2013 the first respondent obtained a default judgment against the applicants in case number HC 12845/12. Pursuant to the judgment in the above matter a writ of execution against the applicants' movable property was issued out. Resultantly, the second respondent attached the applicants' movables which among other things included a black leather sofas, deep freezer and a Samsung micro wave. The movable properties failed to fulfill the alleged obligations towards the first respondent. On the 26th of January 2016

the applicants were served with a notice indicating that their dwelling house was due to be sold in execution of the said judgment. On the 14th of May 2018 the applicants' dwelling House which is Lot 1 of Subdivision Ac of Lot H of Lots A and B called Adylinn of Bluffhill was sold in execution by the Sheriff. The property was sold to F.A Rudolph who was declared the highest bidder. On the 17th of May 2018 the first applicant received a letter from the Sheriff advising them of the sale and urging them to make objections of the sale within 10 days. Pursuant to that on the 1st of June 2018 the applicants noted an objection to the confirmation of the sale. On the 15th of August the purchaser of the property made submissions in opposition to the objection raised by the applicants. The applicants submitted their objections with the Sheriff on the 30th of August 2018. The Sheriff however, having gone through the objections confirmed and declared the second respondent as the highest bidder to the purchaser of the properties. The applicants were aggrieved by the Sheriff's decision and decided to make the present application for review of the Sheriff's decision. The applicants allege that the Sheriff's decision to confirm the sale despite their objections is so irrational, outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

The order now being sought is couched in the following terms-

"1. The 3rd Respondent's decision to declare the 2nd Respondent as purchaser and the subsequent confirmation of the sale is hereby set aside.

2. The sale of the property be and is hereby set aside.

3. Respondents to pay the costs of suit."

The basis of the applicants' application for review is three- fold. Firstly, they allege that a person in whose favour the judgment was granted can execute the judgment. In *casu* the order by the Honourable HLATSHWAYO in case HC 12845/12 is in four parts. The applicants were ordered to pay Saltana Enterprises (Pvt) Ltd full developmental levy and outstanding then in respect of Stand 7742 Warren Park Township of Warren Park who was the third respondent in the main matter, secondly, they were ordered to cede their rights to stand 7742 Warren Park aforesaid to the applicant Tinarwo Chituza and the applicant was the third respondent were to record such cession in their records, thirdly, the applicant was to pay cession fees and fourthly, but lastly, the applicants were to pay costs on an attorney and client scale. The applicants in the present case now allege that the first respondent should have executed only in respect of the second order and that

Saltana Enterprise should have executed in respect of the first part of the order. The second basis of the application for review is that the order by HLATSHWAYO J was an order *ad factum praestandum* as opposed to a judgment *ad pecuniam solvendum*. The last basis being that the default judgment was not granted jointly and severally.

They therefore allege that the first respondent should not have executed in respect of the first part of the order but the second part only. They further allege that paragraph (b) of the judgment is clearly an order *ad factum praestandam* as the court ordered them to do something or to perform some act hence this kind of misdirection justifies the making of this application for review on the basis of illegality. Their contention being that the Sheriff erred in failing to realize the fact that the default judgment granted by this honourable court did not warrant execution of that manner. The last contention was that the deceased's estate holds an equal and undivided 50% share in the property hence each defendant is thus liable for half of the debt. For that reason the whole judgment debt cannot be enforced one or the other two of the defendants.

In its Notice of Opposition the first respondent took two points *in limine* that as long as the Sheriff's ruling on the applicants' objection to the confirmation of the sale is extant the present application cannot succeed. The argument being that the confirmation of the sale was a separate and distinct juridical act predicted upon the dismissal of the objection by the Sheriff. Hence the confirmation of the sale and the concomitant declaration of the second respondent as the buyer will stand as long as the ruling dismissing the objection is extant. The second point *in limine* was that the second applicant is not properly before the Court as he or it was not a party to the proceedings that it/he asks the court to review.

It is necessary that I deal with the points *in limine* raised by the first respondent first before I deal with the opposition proffered by the second respondent who did not raise any preliminary points.

The starting point is case Number HC 12845/12 that gave birth to the default judgment. My reading of the papers filed of record is that in case Number HC 12845/12 the first respondent in the present case was the sole applicant in that matter. He was Tinarwo Chituza. He filed an application against one Nobert Njazi as the first respondent. He cited Margaret Mubaiwa as the second respondent lastly he cited Saltana Enterprises (Pvt) Ltd as the third respondent. By virtue

of the default Tinarwo Chituza won the case against the all the respondents. The order of the Honourable Justice HLATSHWAYO read as follows-

"IT IS ORDERED THAT

a. Within ten days of this order being granted, 1st and 2nd respondent shall pay the 3rd respondent the full development levy due and outstanding then in respect of Stand 7742 Warren Park Township of Warren Park.
b. Within ten days of the order being granted, 1st and 2nd respondent shall cede their rights to Stand 7742 Warren Park Township of Warren Park to the applicant and the 3rd respondent shall record such cession in its records.
c. Cession fees shall be paid by the applicant but any amounts in excess of US$200.00 shall be met by the 1st and 2nd respondent.
d. 1st and 2nd respondent shall pay the costs of suit on an attorney and client scale."

What is clear therefore is that the first respondent in the present matter being the sole applicant in HC 12845/12 executed the whole judgment leading to the sale of the said property by public auction. It is also clear that the second applicant in the present matter was not a party in HC 12845/12. On that basis I find nothing untoward in the manner the first respondent executed the judgment because he had won the case. For these reasons I also find nothing wrong in the manner the Sheriff executed his mandate. I also read the grounds of the objection which were turned down by the Sheriff. The Sheriff's decision is therefore still extant. I therefore agree with the first respondent's argument that the confirmation of the sale was a separate and distinct juridical act predicted upon the dismissal of the objection by the Sheriff. The confirmation of the sale, after taking into account the grounds of objections and the concomitant declaration of the second respondent as the buyer will stand as long as the ruling dismissing the objection is extant. Coming to the other point *in limine* it is indeed correct interpretation of the law that since the second applicant was not a party in case HC 12845/12, the second applicant is not properly before the court because the second applicant was never joined in these proceedings. The part that was before the judge was one Margaret Mubaiwa. No effort was ever made to join her Estate. I therefore uphold the preliminary points raised by the first respondent.

Coming to the second respondent, he submitted among other things that the applicants have raised the same argument which was dismissed for lack of merit. The sole issues for determination as regards the second respondent is whether or not the decision of the Sheriff ought to be reviewed

on account of illegality and whether the property is executable against the second respondent who is now deceased.

The Administration of Estate Act [Chapter 6.01] provides at section 44 that-

"44 Suspension of execution against deceased estate

(1) No person who has obtained the judgment of any court against any deceased person in his lifetime, or against his executor in any suit or action commenced against such executor, or which, having been pending against the deceased at the time of his death, has therefore been continued against the executor of such person, may sue out or obtain any process in execution of any such judgment before the expiration of the period notified in the Gazette in manner in this Act provided.

(2) No such person as aforesaid shall sue out and obtain any process in execution of any such judgment as aforesaid within six months from the time when letters of administration have been granted to the executor against whom execution of such judgment is sought without first obtaining an order from the High Court or some judge thereof for the issue of such process."

In the case of *Malawusi* v *Marufu and Others* (49/02) ((49/02)) [2003] ZWSC 1 The Court was faced with a similar argument as the one advanced by the applicants i.e. that the death of a defendant stopped the process of execution, even when a writ had been issued prior to death.

Upon scrutinizing the above statutory provision, the court's interpretation was that it is clear and beyond doubt that what is affected is suing out and obtaining any process in execution of the judgment after the judgment debtor's death. In other words, what is affected is applying for and obtaining the writ of execution after the debtor's death.

In the present circumstances, the writ of execution was obtained in 2014 and the judgment debtor, Margaret Njazi, passed away in 2016. Therefore, the proposition that because the judgment debtor is late, a claim must be brought through her estate is ill-founded because the property in question had already been alienated from second respondent's ownership and subsequent estate by virtue of attachment. Therefore, it is in the interest of justice and fairness that the decision of the third respondent be upheld as no error, irregularity or illegality occurred. Once a property is judicially attached this means that the property is going to be sold to satisfy the judgment debt. In *casu* the applicants to date have not paid anything to service the debt which stood at US$21 767.40 as at 29th July 2016 despite receiving notice of the impending sale in 2014. The applicants are the authors of their own fate and this application ought to be dismissed forthwith with an appropriate order as to costs.

IT IS ORDERED THAT

1. The application is dismissed
2. The applicants to pay costs of suit on a legal practitioner and client scale.

TK Hove, & partners, applicants' legal practitioners
Gama & Partners, 1st respondent's legal practitioner
Scanlen & Holderness, 2nd respondent's legal practitioners