MATHEW WHEELER
versus
MESSENGER OF COURT HARARE N.O.
and
RESIDENT MAGISTRATE HARARE N.O.
and
CARTWORTH MACHINGAUTA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 19 June 2020 & 7 May 2021

Opposed application – Declaratory Order

Mr S.T. Mutema, for the applicant
Mr E.T. Moyo, for the respondent

MUSITHU J:

INTRODUCTION

Applicant seeks a declaratory order against the respondents. The relief sought is aptly set out in the draft and reads as follows:

> "IT IS ORDERED THAT:-
> 1. Application for a Declaratory order be and is hereby granted.
> 2. The disqualification of Applicant's bid by the second Respondent be and is hereby declared erroneous and is set aside.
> 3. The Applicant be and is hereby declared the Highest Bidder and the rightful purchaser of the property commonly known as stand number 10138 White Cliff South Harare.
> 4. The 3rd Respondent be and is hereby directed to sign all transfer documents of rights, title and interest in property mentioned in paragraph {3} of this order in favour of the Applicant within 7 days of service of the order.
> 5. Should the 3rd Respondent fail to comply with paragraph {4} of this order the Sheriff be and is hereby authorised to sign all necessary documents and cause transfer of the same property to pass to the Applicant.
> 6. There shall be no order as to costs"

The first respondent opposed the application.

FACTUAL BACKGROUND

The background facts as set out in the applicant's founding affidavit are as follows. Applicant advanced third respondent some funds for the construction of a dwelling house. The third respondent acknowledged the debt in writing. He failed to pay back the money, prompting the applicant to approach the Harare Magistrates Civil Court for appropriate relief. An order

by consent was granted on 8 July 2016. It ordered 3rd respondent to pay the applicant US$19 347.00, plus interest at the prescribed rate from the date of initial default to the date of full and final payment. He was also ordered to pay costs of suit at the attorney and client scale. The debt still remained unpaid.

A writ of execution against movables hit a brick wall. The Messenger of Court returned with a *nulla bona* return of service. The applicant proceeded against third respondent's immovable property, known as stand number 10138 White Cliff South Harare (the property). A public auction was conducted by first respondent. The amount realised was ridiculously low and the applicant objected to the confirmation of the sale. The highest bid was US$3 500.00 against a debt of US$19 347.00. Applicant moved for a sale by private treaty. The proposal was accepted and he also participated in the sale. He communicated his bid through a letter of 28 February 2019, addressed to the first respondent. The letter reads:

> **"REF: Sale of Immovable Property in the matter between Matthew Wheeler vs Cartworth Machingauta.**
>
> Reference is made to your return on 2 March 2018 in which you advised us that the highest bidder in the above execution against No. 10138 White Cliff South Harare was Nelson Kuutsi, being $3500.00 as shown on the attached confirmation of bid. The Plaintiff in the matter rejected the offer resulting in us requesting a sale by private treaty.
>
> Please note that after further consideration the Plaintiff is offering $19 000.00 for the property. Please advise us on the consideration of this offer.
>
> Yours faithfully
>
> **STANSILOUS AND ASSOCIATES"**[1]

Applicant's legal practitioners received a call from first respondent advising that his bid had been disqualified because he was an interested party in the sale. The applicant's legal practitioners took exception with the first respondent's communication through a letter of 4 April 2021. The relevant part of the letter reads as follows:

> "REF: SALE IN EXECUTION MC19320/16
> …….
> For the avoidance of doubt, we wish to advise that there is no law which excludes a judgment creditor to participate in sale in execution either by private treaty or public auction. The very reason why our client took the Respondent to court is that he was an interested party, the judgement is in his favour. The amount to be realised should a sale be concluded will be paid to him. For all intents and purposes it always has been and will always be in his interest to participate. If there shall be found another bid with favourable conditions than our client's then that means such a tender will be regarded as the highest and the property will be awarded to such purchaser. If a lower bid than his will be accepted it still remains prejudicial to him as will

[1] See page 13 of record

be realised, in which case we seek to be formally advised of the alleged disqualification in order to correctly advise our client and take further instructions on the matter….."[2]

1st respondent responded through a letter of 5 April 2019. The relevant part of the letter reads:

"……..
We sincerely apologise for not communicating in writing refers your Paragraph 3 of your letter. We telephoned your office and mentioned that the plaintiff (Judgment Creditor) cannot participate in the sale since he is an interested party as per the Resident Magistrate's guidance.

We thought it would work out fast for you to make necessary adjustments.

We suggest you write direct to the Resident Magistrate, ***PLEASE NOTE*** that out office stands ***guided*** by the office of the Resident Magistrate.

Be guided accordingly
……."[3]

The letter was copied to second and third respondents. On 9 April 2019, first respondent wrote to the second respondent. The letter reads in part:

"…….
Your good office directed us to sell the immovable property by private treaty in your letter dated 27th March 2018.
In response to the advert(s) placed on the notice boards and the Herald please find attached here are the offers:-

Shelton Mashingaidze	***RTGS $13 500.00***
Truetwell Chinyandura	***RTGS $12 050.00***
Albert Muremo	***RTGS $12 000.00***

May we please have your ***directive*** **in** respect of these offers.

……."[4]

The letter was served on the applicant's legal practitioners, who on their part wrote to the second respondent on 11 April 2019[5]. In their letter the legal practitioners confirmed receiving first respondent's letter to second respondent communicating the bids received, which were not only lower than the applicant's, but also excluded his own bid. They complained that the bids received were too low and would be prejudicial to both their client and the third respondent. The money to be recovered from the auction was meant for their client, and if those lower bids were to be accepted, it meant the debt would still remain unsatisfied as third respondent had no other executable property. It was for this reason that the

[2] See page 15 of record
[3] Pages 16-17 of the record.
[4] Page 18 of record.
[5] Pages 19-20 of record.

applicant had made a bid which was equivalent to the debt. Applicant's legal practitioners also sought clarification on the legal basis upon which the applicant's bid was disqualified. The second respondent responded to the letter from the applicant's legal practitioners on 17 May 2019. His letter reads:

> "……
> The contents of your letter dated 11th April 2019 were noted. You advised that your client who is the Judgment Creditor participated at the Sale by private treaty and offered $19 000.00 to purchase Stand number 10138 White cliff South Harare.
>
> In as much the rules civil are silent on whether or not the Judgment Creditor can buy or not the property of the Judgment Debtor, it is my considered view that ethically and morally it is improper for a judgment creditor to purchase a house of a judgment debtor when the parties are both involved in a legal battle.
>
> Allowing the judgment creditor to purchase the property of the judgment debtor does not augur well with the tenents of justice……."[6]

Applicant's Case

The applicant contended that the second respondent's reason for disqualifying his bid was fundamentally flawed. The reasons given had no legal basis, and therefore unsupportable at law. Applicant further contended that the Magistrates Court as a creature of statute could not formulate its own legal principles outside the purview of the law that created it. If indeed the reasons were actuated by moral considerations, then second respondent should also have considered the morality of rejecting a bid that would have totally wiped out the third respondent's indebtedness. It was unconscionable for the second respondent to disqualify applicant's bid when the applicant had complied with the bidding requirements, and his bid remained the highest. This was all the more so considering that the debt was acknowledged by the same party whose property was being sold in execution. The position would be different had it been bids higher than that of the applicant were received.

Applicant also averred that since the sale was conducted by private treaty, first respondent was not entitled to a commission from that sale. Applicant further asserted that first respondent was reposed with the mandate to execute judgments of the Magistrates Court as well as conduct public auctions. It was the first respondent who communicated the disqualification of the applicant's bid. The fact that first respondent sought guidance from the second respondent on the fate of the applicant's bid did not exculpate him from his

[6] Page 21 of record.

responsibilities. It was for these reasons that costs were sought against first respondent on the scale of attorney and client.

In conclusion applicant averred that he was an interested party for purposes of obtaining the relief of a *declaratur* primarily for two reasons. Firstly, as the judgment creditor, he had a lawful basis to sell the third respondent's property in execution. He remained the sole beneficiary of the sale. Secondly, he participated in the sale by private treaty. No legal basis had been given to disqualify his bid which remained the highest. It was in his interest that the decision to disqualify his bid be set aside by this court, and have him confirmed as the highest bidder and the purchaser of the property.

First Respondent's Case

The thrust of first respondent's opposition was as follows. The application was essentially one for review disguised as one for a *declaratur*. In substance applicant was seeking a review of the decision of the second respondent. He had not exhausted the domestic remedies provided for under the magistrates' court rules. The first respondent denied that the applicant's bid was the highest since the sale was still ongoing and bids higher than that of the applicant were coming in. The first respondent maintained that the decision to disqualify applicant's bid was that of the second defendant and not his. He was merely guided by the second respondent as he ought to do in terms of procedure. Further, it was the second respondent who guided and directed sales of immovable properties in execution of judgment debts. The second respondent's role included attending the public auction, and confirming the highest bid and the sale.

According to the first respondent, the lower bids referred to by applicant were not accepted. The first respondent referred to a letter it received from the second respondent dated 17 May 2019. The letter reads in part as follows:

> "…….
> The offers that you submitted to my office following a sale by Private Treaty have been noted. However, I have noted that the prices offered are not commensurate with the market value.
>
> You are therefore directed to re-advertise and sell the house by Public Auction or Private Treaty.
> ……"[7]

The first respondent contended that the second respondent's letter all but confirmed that the three bids applicant sought to impeach were not accepted and the sale remained open. The

[7] Page 30 of record

first respondent dismissed the applicant's contention that first respondent was not entitled to a commission from the sale. Applicant was merely seeking a convenient route to avoid costs associated with the sale of the property.

In conclusion first respondent averred that applicant's claim was ill-conceived in terms of the relief sought and the party from whom it was claimed. Equally ill-conceived was the claim for costs on the attorney and client scale, which was premised on the wrong assumption that it was the first respondent who disqualified the applicant's bid. He urged the court to dismiss the application with costs on the attorney and client scale.

Reply

In reply, applicant insisted that the application was regular. The object of the *declaratur* was the setting aside of the second respondent's decision to disqualify the applicant from participating in a sale in execution as a judgment creditor. Applicant contended that where the position of the law was settled, a party's rights were asserted through a *declaratur*. The question as to whether a judgment creditor could participate in a sale in execution was settled by the law. In the instant case, what applicant only needed to be established was whether or not he was the judgment creditor. The question as to whether he could participate in a sale in execution did not arise. For that reason he was not obliged to proceed by way of review. The issue of exhausting internal remedies also fell away. Applicant also averred that there was no provision in the rules of the Magistrates Court, obliging a party to seek relief in that court alone.

Applicant denied that there were bids higher than his. He had only authorised one sale by private treaty which yielded the three bids he alluded to. The bidding process was scheduled to start on 5 March 2019, and ending on 8 April 2019, as per the advertisement published by the second respondent. Applicant claimed that he was only informed of the disqualification of his bid a day after the closure of the bidding process. That communication also informed him of the three bids that had been received by first respondent. Those bids were way lower than his. If any bids higher than his had been received as at that date, then they ought to have been communicated to the second respondent. The fact that such higher bids were not communicated meant that they did not exist, and his bid remained the highest. Applicant further averred that no bids could have come after the closure of the bidding process on 8 April 2019. The sale itself was reopened without him being informed notwithstanding his interest in the matter. That made the process more irregular. Applicant claimed that the communication by first respondent of 20 May 2019, supposedly notifying him of the rejection of the earlier bids by

second respondent was never served on him or his legal practitioners. The letter which was addressed to the applicant's legal practitioners reads as follows:

> "…….
> We had submitted the offers to the Resident Magistrate on 09th April 2019 to direct us, for sale of immovable property by private treaty/public auction. We have been directed to re-advertise and sell the immovable property by private treaty/public auction.
> See copy of the letter attached hereto which is self explanatory
> We are placing the adverts on the following Notice Boards:-
> - Civil Court – Harare
> - Rotten Row Court – Harare
> - High Court – Harare
> - Harare Central Police Station
> - Master of High Court
> - Supreme Court
>
> We are also proceeding to advertise the immovable property in the Herald.
> ……."[8]

On 20 May 2019, first respondent instructed the Herald newspaper to advertise the schedule for the sale of the property on 29 May 2019, 5 June 2019 and 12 June 2019. Applicant claimed that all this communication was an afterthought on the part of the first respondent. It was meant to justify his collusion with second respondent in the purported rejection of the bids. Applicant maintained that this could be the only logical conclusion because the second respondent's letter of 17 May 2019, advising first respondent of the rejection of the three bids was never served on the applicant or his legal practitioners. Applicant claimed to have learnt of all these letters through the first respondent's notice of opposition. In any case, applicant averred that he was concerned with the disqualification of his bid, and not the fact that the other bids were not a true reflection of the market price of the property.

The applicant claimed that first and second respondent colluded with each other to subvert a lawful process. This was borne out by the fact that: in a letter dated 20 March 2018 to the applicant's legal practitioners, first respondent referred to an earlier dispute concerning the same property that had been postponed to 25 March 2018, and that it was awaiting the outcome of a court application for a *declaratur.* The sale in execution had been challenged by a third party through an application for a *declaratur,* resulting in the suspension of the confirmation process pending the determination of that *declaratur*. On 25 June 2019, applicant's legal practitioners wrote to first respondent directing him to suspend the sale of the property pending the determination of the present application[9]. first respondent responded to

[8] See page 32 of record
[9] See page 48 of record

the said letter through a letter of the same date undertaking to suspend the sale of the property pending the finalisation of the current proceedings.[10] Applicant contended that the subsequent reopening of bids was therefore irregular in view of this communication.

Applicant averred that had his bid been accepted, there would have been no need to reopen the bids. To show second respondent's *malafides*, applicant claimed that the letter rejecting the three bids was only written on the same day that second respondent wrote to his legal practitioners admitting that there was no law in terms of which his bid could be disqualified. The rejection of the three bids did not affect his own bid which remained the highest. His bid was not rejected for being lower than the market value of the property since it was never considered. At any rate, the second respondent did not even give details of what constituted the market value of the property.

On the issue of commission, applicant averred that first respondent was misinformed regarding his entitlement to commission. When a sale was conducted through a private treaty, an auctioneer was not entitled to commission, so he argued. He claimed that first respondent did not introduce him to the 3rd respondent because he was already part of the sale by virtue of him being a judgment creditor. He was also the one who requested the sale by private treaty. For that reason, first respondent was not entitled to any commission.

Applicant claimed to have written to second respondent having realised that he was the only one opposing this application. The letter proposed an abandonment of costs against the second respondent on condition second respondent did not oppose the application. second respondent allegedly turned down the proposal and advised applicant to file his answering affidavit. The alleged letter to second respondent, and second respondent's response were not attached to the answering affidavit. From the papers filed of record, it is only the first respondent that opposed the application. I do not understand how second respondent would have asked the applicant to file his answering affidavit when he did not oppose the application in the first place. That just betrays a serious lack of attention to detail by applicant's counsel or whoever prepared the answering affidavit.

In conclusion applicant maintained that the decision sought to be set aside was that of the first respondent and not the second respondent. The applicant persisted with his claim.

[10] See pages 48-49 of record

THE ISSUES

Four issues stand out for determination. These are:

- ***Who disqualified the applicant's bid?***
- ***Whether the decision to disqualify the applicant's bid was lawful.***
- ***Whether applicant ought to have proceeded by way of a declaratur or review.***
- ***Whether this court can declare applicant as the highest bidder and purchaser of the property.***

THE SUBMISSIONS

In his oral submissions, Mr *Mutema* persisted with applicant's submission that the disqualification of his bid was irregular. That decision ought to be set aside. His submissions in the main were essentially a reiteration of the applicant's position as set out in the affidavits. As regards the appropriateness of the application, Mr *Mutema* submitted that what was being challenged was the disqualification of the applicant's bid, and a *declaratur* was the apposite relief in the circumstances. In his heads of argument, the applicant submitted that the question that ought to be answered was whether there was a need to first establish the right sought to be relied upon or that right was already established such that a committal of the act complained of constituted a breach of that right. If that right already existed, then a *declaratur* was the competent remedy. If the existence of the right was yet to be established, then a decision as to its existence required to be established through a review.

Applicant further contended that the right of a judgment creditor to participate in the bidding process as a prospective purchaser was settled in *Crusader Real Estate Consultancy v CABS*[11]. Applicant further submitted that once it was established that a judgement creditor can participate in a sale in execution then the purported disqualification of the applicant's bid became unlawful. For that reason, there was nothing for the court to review. The court was also referred to the *Mugwebe* v *Seed Co Ltd* & *Anor*[12] judgment. Applicant further submitted that in this case, the court was not being called upon to determine the correctness of the

[11] 1999 (2) ZLR 259

[12] 2000 (1) ZLR 93 (S). In that case the court referred to the case of *McFoy v United Africa Co. Ltd* [1961] 3 All ER 1169 [PC] at 1172. The court said "Where the determination of a court is that the action of the tribunal which is complained of, has rendered the proceedings null *ab initio*, then there is nothing to review because the proceedings become obsolete. By being rendered obsolete then the court may proceed to make a declaration of rights. However, where the relief sought is to determine whether or not those proceedings complained about by virtue of being unprocedural or unfair, then a review of those proceedings is necessary to be done to determine the correctness of such determination"

disqualification of the applicant's bid. It was merely being called upon to declare that action illegal by reason of the position of the law on that issue.[13]

In response, Mr *Moyo* for the first respondent submitted that the decision that the applicant sought to impeach was that of the second respondent, an administrative authority in its own right. Counsel submitted that the question as to whether or not a *declaratur* was the appropriate remedy was a matter for which the court could ultimately exercise discretion in determining it. He further submitted that the application was ill-conceived for reasons that: it was essentially a review application disguised as one for a *declaratur*; applicant had not yet exhausted domestic remedies provided for under the Magistrates Court Rules; the relief sought as against first applicant was improper. In its heads of argument, first respondent cited several authorities in support of the position that a court will not be deceived by the form of an application brought before it.[14] A court will rend aside the veil of deception and look at the substance of the application.

Mr *Moyo* submitted that in *casu* the applicant's contention was that there was an illegality or error of law in the decision by the party who disqualified the applicant's bid. Also, the contention that the sale was improperly conducted spoke to the process of judicial sales, an issue of procedure. As an alternative, counsel submitted that section 26 of the High Court Act[15] applied to the perceived irregularity. The method of challenging an alleged irregularity was by way of a review. Mr *Moyo* further submitted that order 26 rule 8(18) of the Magistrates Court rules also provided a procedure for challenging alleged irregularities in a judicial sale involving second respondent. Such a challenge was made through an application to that court within seven days of the declaration of the highest bidder by a Magistrate.

Mr *Moyo* argued that if an impropriety was alleged with regards to the manner in which a sale was conducted, then the applicant ought to have approached the Magistrates Court instead of the High Court. Even assuming that applicant was entitled to approach the High Court, then that approach ought to have been done in terms of order 33 for a review of the second respondent's decision. The court was exhorted to strike the application off the roll with costs.

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[13] See also *Musara v Zimbabwe National Traditional Healers Association* 1992 (1) ZLR (H) 9
[14] *Makuvaza v Messenger of Court – Chivhu & 2 Ors* HH 121/19; *Chiwundo v Zimbabwe National Family Planning Council* HH 212/13
[15] [*Chapter 7:06*]

The first respondent further averred that an adverse finding by the court did not necessarily confirm the applicant as the highest bidder. The decision making process was a preserve of the second respondent. The second respondent must be left to consider the applicant's bid just like any other bids. The court could not declare the applicant as the highest bidder, for doing so would be a usurpation of the second respondent's functions. The decision to disallow the offer was one within the second respondent's purview in terms of order 26 rule 8 (17)(b) of the Magistrates Court rules. The first respondent argued that the second respondent was not compelled to accept any offer made in a judicial sale by private treaty. The relief sought against the first respondent was therefore ill-conceived.

On the question of fees, first respondent submitted that it was obliged under order 32 rule 4 (1) to charge fees prescribed under Table B of the second schedule to the Magistrates Court rules. Those fees included a commission on the sale of a property. The first respondent argued that the case of *Crusader Real Estate Consultancy* v *CABS* was distinguishable from the present case in that that case dealt with a claim for commission in a judicial sale where an agent had not facilitated a sale. It did not deal with the sheriff's entitlement to a commission in a judicial sale. The sheriff's entitlement to a commission arose once he attached property.

THE ANALYSIS

Who disqualified the applicant's bid?

The parties held contrasting views concerning the authority that disqualified the applicant's bid. The first respondent insisted it was the second respondent. Applicant on the other hand equivocated. Initially it said it was second respondent. Later, it passed on the buck to the first respondent. A determination of this issue will also inform the propriety of the relief sought by the applicant and concomitantly the question of costs. In paragraph 2 of the draft order, applicant sought to have second respondent's decision to disqualify his bid declared erroneous and set aside. In the answering affidavit, the applicant made a flip flop. He stated *"It is apparent that the decision sought to be set aside is of the first Respondent not the second. It is also apparent that the decision was based on a wrong position that the second Respondent wrongly disqualified my bid."*[16] This he said, in reaction to the first respondent's averment that the applicant had misfired with regards to the remedy sought and the party he sought it from.

[16] Last paragraph of the answering affidavit on page 40 of the record.

One cannot readily fathom what instigated this sudden turnaround. Probably it was the applicant's sudden appetite for costs on the higher scale that he pursued with so much vigour and conviction against first respondent in his founding affidavit. Yet the draft order proposed that each party bears its own costs. If that *volte face* was triggered by a craving for costs against first respondent, then it clouded applicant's judgment. For in doing so, the answering affidavit forgot the draft order and the founding affidavit upon which the relief sought was premised.

Be that as it may, it is clear from the papers that it was the second respondent that made the decision to disqualify the applicant's bid. The first respondent only communicated that decision. The communication was initially verbal, but was later put in writing. The second respondent later confirmed that position through his own letter of 17 May 2019, to the applicant's legal practitioners. Although he struggled to justify the decision to disqualify applicant's bid, the point was made. The decision was his. It is as clear as daylight. How second respondent's decision metamorphosed to become that of the first respondent is bewildering. Applicant appeared utterly confused. I find no other way to explain this ambivalence on his part.

Order 26 rule (8) provides the procedure for the execution of an immovable property; the sale of the property; and the accounting for the proceeds of the sale. The second respondent plays an oversight role in all that. In fact, order 28 rule 8 sub rule 15 provides that: *"The sale shall be held in the presence of a magistrate who shall certify to a provincial magistrate, if that is the case, that the sale was duly and properly conducted and, in his or her certificate, the magistrate shall state the name of the execution debtor, the amount of the purchase price and the name of the purchaser"*. Indeed Mr *Mutema* did not deny that it is the second respondent that confirms the bids and the sales.

The court therefore finds the contention that it is first respondent's decision that ought to be set aside preposterous. It is the second respondent that disqualified the applicant's bid. It is his decision that this court should be concerned about.

Whether the decision to disqualify the applicant's bid was lawful.

I have already remarked that the second respondent was at pains to justify his decision to disqualify the applicant's bid. He conceded that the rules of court were not prescriptive. They were equally not instructive. His decision was at best informed by moral and ethical considerations. It just did not sound morally and ethically right for a judgment creditor to purchase the house of a judgment debtor when both were still engaged in legal combat, so he

reasoned. He further opined that *"allowing the judgment creditor to purchase the property of the judgment debtor does not augur well with the tenents of justice".* I can only assume that he meant to relate his opinion to principles of natural justice as they are often called in this jurisdiction.

Whatever it is he meant, the second respondent did not properly apply his mind to the issue before him. He did not elaborate on the tenets of justice that he was alluding to. His conduct fell far short of what was expected of him in terms of section 3 of the Administrative Justice Act[17]. The right to administrative justice is one of the inviolable rights secured under Chapter 4 of the Constitution.[18] His decision was supposed to be anchored on sound legal foundation. His office is created by statute. He superintends over a process that is itself defined in the rules of his court. The law that he administers does not proscribe the participation of a judgment creditor in a sale in which he has an interest.

In the *Crusader Real Estate Consultancy (Pvt) Ltd* v *CABS*[19] case, the court dealt with a sale in which the defendant (CABS) was sued for commission by the plaintiff (Crusader Real Estate Consultancy). The defendant was the only bidder at the auction. It was also the judgment creditor. The sheriff refused to accept the first bid as too low. The defendant increased its bid. It was accepted by the Sheriff. The sole issue before the court in that case was not so much about the lawfulness of a bid by the judgment creditor. It was about the propriety of the claim for commission by the estate agent. Had the judgment creditor been precluded from bidding for the property of a judgment debtor, then I do not think the dispute would have gone that far.

In his submissions on the issue, Mr *Moyo* stated that he would abide by the decision of the court on the issue, although he attempted to dissuade the court from relying on the *Crusader Real Estate Consultancy* judgment arguing that it was distinguishable from the present case. He did not explain how it was distinguishable. I did not find his submission persuasive, more

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[17] [*Chapter 10:28*] Section 3 reads as follows:
"3 Duty of administrative authority
(1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—
(a) act lawfully, reasonably and in a fair manner; and
(b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
(c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned"

[18] See section 68 of the Constitution.
[19] 1999 (2) ZLR 257 (SC)

so considering it was just made in passing. In the absence of compelling legal arguments, I do not see how allowing a judgment creditor to participate in an auction sale would offend tenets of natural justice, or be deemed to be ethically or morally wrong. After all it is not the judgment creditor that conducts the sale. A judgment creditor is just like another participant at an auction or sale by private treaty. He can only be disqualified from participating in the sale if he violates the rules and conditions of the sale which apply universally to potential bidders. The right of a creditor to participate in a sale is established in the absence of a law or rule that proscribes such participation. The decision to disqualify the applicant's bid, unsupportable as it was at law, constituted a nullity. The second respondent's conduct in disqualifying the applicant's bid was tantamount to an invalid act.

Whether applicant ought to have proceeded by way of a declaratur or review.

Mr *Mutema* argued that the disqualification of the applicant's bid was illegal and as such, it did not warrant that an approach be made to this by way of a review in order to pronounce on that illegality. On the strength of the case of *Musara* v *Zimbabwe National Traditional Healers Association*[20], he further argued that an interested party can seek to nullify an invalid act by way of a *declaratur* instead of review. Mr *Moyo* on the other hand argued that the applicant's complaint was about irregularities in the manner the property was sold. He submitted that the correct method for challenging such an irregularity was a review of the proceedings that gave rise to that complaint. He referred to the case of *Constable Sibanda K* v *The Trial Officer (Chief Supt. Masuku C) & 2 Others*[21]. The approach to follow in resolving this issue was set out by MALABA JA (as he then was) in *Geddes Limited* v *Tawonezvi*[22]. He said:

> "I accept that there are terms used by the respondent in the application which could suggest that the application was for review. The notice of the court application stated that it was a "review court application". In para 20 of the founding affidavit, he said he did not pursue the appeal before the Labour Relations Tribunal because he believed that it did "not have power to deal with irregularities of a reviewable nature". ……. The draft order prayed for the setting aside of his suspension and the disciplinary proceedings.
>
> Setting aside of a decision or proceeding is a relief normally sought in an application for review. When one looks at the grounds on which the application was based and the evidence produced in support of them, there is, however, just enough information to support the learned judge's decision that the application was for a declaration of rights. In *Musara* v *Zinatha* 1992 (1) ZLR 9 (H) ROBINSON J at 14 C-D said:

[20] 1992 (1) ZLR 9 (HH)
[21] HB 128/18
[22] SC 34/02 at pages 9-10

> "At the outset I would observe that the bulk of the petitioner's petition raises matters, such as malice, gross irrationality, the application of the *audi alteram partem* principle and bias, which relate to the subject of review and which would only render the act in question voidable and not void. Consequently, those issues are not properly before this court in the present application which seeks a declaratory order specifically and exclusively on the ground that the petitioner's purported suspension is null and void. Fortunately for the petitioner, there is just sufficient information on the papers to enable the court to consider the petition as one seeking a declaratory order in regard to the petitioner's suspension …".

> The next question is whether the learned judge was correct in holding that this was a case in which a declaratory order ought to be granted. The learned judge was entitled on the evidence before him to exercise the broadest judicial discretion in deciding whether a declaratory order should be granted. It cannot be said he did not exercise his discretion properly." (Underlining for emphasis).

In the *Musara* v *Zinatha*[23] matter, ROBINSON J cited with approval, the views expressed in the criminal case of *S* v *Prinsloo*[24], and went on to state:

> "Although, admittedly, *Prinsloo's* case is a criminal case, I consider that the same approach should be adopted by the court in a civil case where, on the papers before it - the more so where those papers seek a declaratory order – an act of glaring invalidity is, as in this matter, staring the court straight in the face. For the court to refuse, save in exceptional circumstances justifying such refusal, to declare the act in question null and void *ab initio* on some technical ground would, I agree, be to ignore the court's fundamental duty to see that justice is done which, after all, is the duty which the layman experts the courts to discharge"

I find this approach quite persuasive. Where an administrative authority makes a decision that at law it is not empowered to render, then that decision is a nullity, and consequently void *ab initio.* In the present case, second respondent made a decision to disqualify the applicant's bid. He failed give a legal basis for such decision. In my view that made his decision null and void and susceptible to be declared so by this court, notwithstanding that the consequential relief of setting aside such decision is ordinarily available under review proceedings.

The illegality complained of occurred the moment second respondent made a decision to consider other bids, to the exclusion of the one by the applicant. Unfortunately second respondent did not oppose or comment on the application. The first respondent could not comment on the second respondent's behalf. The issue was concerned with the exercise of administrative powers vested in the second respondent, as an administrative authority. The

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[23] Supra

[24] 1970 (3) SA 550 (O) at 553F-G, where the court said:

> "Invalid proceedings are inevitably null and void *ab initio* and a court of appeal should not hesitate to intervene *mero motu* and to set such proceedings aside. It would in fact be inexcusable to ignore the proven fact of invalidity merely because it has not been raised in the notice, since by doing so the court would ensure that justice is not duly done and would therefore be ignoring its fundamental duty."

argument that the applicant ought to have approached the court with an application for review instead of a *declaratur* is not tenable for the foregoing reasons. There is just sufficient information on the papers for the court to exercise its judicial discretion and deal with this application as one which seeks a *declaratur*.

Mr *Moyo* argued that applicant did not exhaust the procedure for challenging alleged irregularities in a judicial sale as provided for under Order 26 Rule 8 (18). Rule 8 (18) states:

> "(18) Any person having an interest in a sale may apply to court to have it set aside on the ground that the sale was improperly conducted or that the property was sold for an unreasonably low sum or on any other reasonable ground:
> Provided that, any person making such application shall give due notice of the application to the messenger stating the grounds of his or her objection to the confirmation of the sale." (Underlining for emphasis).

This provision would not apply to the circumstances of this case for the simple reason that no sale had been concluded when this application was launched. I hold this view because the grounds for impugning such a sale are that the *"sale was improperly conducted or that the property was sold for an unreasonably low sum or on any other reasonable ground"*. I am fortified in holding this view by subrule (16) which states that: *"If the provincial magistrate is satisfied that the highest price offered is reasonable, having regard to the circumstances of time and place and to the state of the property market, he or she shall within seven days from the date of the sale declare the highest bidder to be the purchaser, subject to confirmation under subrule 19."*

The challenge envisaged under subrule (18), is made pursuant to a declaration of the highest bidder as purchaser by the provincial Magistrate. In *casu*, the second respondent declined to accept the bids forwarded by the first respondent on the basis that they were not commensurate with the market value of the property. Mr *Moyo* sought to argue that applicant's bid was not the highest, as other higher bids had been received, and some were still coming in. No evidence of such higher bids was placed before the court. Instead, first respondent was directed to re-advertise and sell the property by public auction or private treaty.[25] That process was stalled by this application. I find Mr *Moyo's* argument to be devoid of merit in that regard.

For the foregoing reasons I find that the application for a *declaratur* is properly before this court.

Whether the court can declare applicant as the highest bidder and purchaser of the property.

Mr *Mutema* submitted that had the applicant's bid not been disqualified, he would have been declared the highest bidder. His bid was way higher than those that were rejected by

[25] See the 2nd respondent's letter of 17 May 2019 on page 30 of record.

second respondent. For that reason, Mr *Mutema* urged this court to declare the applicant as the highest bidder and the rightful purchaser of the property. Mr *Moyo* on the other hand beseeched the court to be wary of usurping the powers of an administrative functionary such as the second respondent. He further submitted that by declaring the applicant as the highest bidder, this court would be arrogating to itself power reposed in first and second respondents to conduct judicial sales. He referred to the case of *Mugugu v Police Service Commission & Another*.[26]

I agree with Mr *Moyo's* submission. If this court were to declare applicant as the highest bidder and purchaser of the property, it would have effectively assumed the roles of the first and second respondent. first respondent is responsible for conducting auction sales, under the supervision of second respondent who ultimately declares the highest bidder and purchaser. The declaration of the highest bidder as the purchaser remains the preserve of the second respondent. If a party is not content with such declaration then he has to avail himself of the remedies available under the Magistrates Court rules. What this court can only do is to remit the matter back to the second respondent so that he considers applicant's bid collectively with other competing bids that were made or may be made in respect of the same property. This court cannot direct the second respondent on which bid to accept or whether the bids already submitted, including the one by the applicant, are commensurate with the open market value of the property. That is the prerogative of the second respondent.

There is an isolated issue that counsel made reference to in their submissions. I wish to advert to it in passing. It is whether the first respondent is entitled to a commission in a sale by private treaty. It is needless for this court to deal with this issue since it was never part of the substantive relief sought by the applicant. In fact, it was somewhat bizarre for the applicant to even raise it in these proceedings considering that it is ordinarily a claim made by the first respondent for services rendered.

COSTS

The general rule is that the successful party is entitled to costs on a scale which must be determined depending on the nature of the case and the manner in which litigation was conducted. In his draft order applicant did not seek costs against any of the respondents. In paragraph 26 of the founding affidavit, he sought costs against first respondent on the attorney and client scale. That decision was based on the rather misguided view that it was the first

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respondent who disqualified the applicant's bid. I have already alluded to the bewildering disconnect between the answering affidavit and the relief sought by the applicant, which can only be attributed to a lack of attention to detail by applicant's counsel. It is just as well that the question of who disqualified the applicant's bid as between first and second respondents was never a real issue. It was rather an upshot of the casual manner in which applicant's counsel approached this case. This court will not reward mediocrity.

DISPOSITION

Resultantly it is ordered that:

1. The application for a *declaratur* succeeds.
2. The decision by 2nd respondent to disqualify the applicant's bid is hereby declared null and void, and is consequently set aside.
3. The matter is remitted to the 2nd respondent for him to reconsider as required by the applicable rules, the bids that were submitted in respect of the property known as stand number 10138 White cliff South, Harare, in order to determine the highest bidder and purchaser of the property.
4. In reconsidering the bids as directed in paragraph 3 above, the 2nd respondent shall also take into account the applicant's bid that had been disqualified.
5. Each party shall bear its own costs.

Stansilous & Associates, legal practitioners for the applicant
Scanlen & Holderness, legal practitioners for the 1st respondent