LAWRENCE MUTESWA
versus
SHERIFF OF ZIMBABWE
and
CASPER MASVIKENI FAMILY TRUST
and
ELIZABETH TETE
and
DELTA ZIMBABWE T/A DELTA BEVERAGES (PVT) LTD
and
THE REGISTRAR OF DEEDS (N.O.)

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 11 June 2021 & 6 June 2022

Opposed Application

Mr N. Kambarami, for the applicant
Mr G. Madzoka, for the second and third respondents

MUSITHU J:

INTRODUCTION

Four matters were consolidated into one. These are HC8510/19; HC 5439/20; HC 7657/20 and HC 7659/20. The matters predominantly involve the same parties and the same subject matter. Central to the dispute is an immovable property known as stand number 709 Greystone Township 8 of Greystone Township 8 of Greystone A, a certain piece of land situated in the district of Salisbury measuring 4337 square metre also known as 13 Coventry Road, Greystone Park, Harare (hereinafter called the property). The property was sold in execution by the first respondent at the instance of the fourth respondent in satisfaction of a debt that the applicant owed the fourth respondent. HC 8510/19 is the present application in which the applicant seeks the setting aside of the first respondent's sale under the common law. He also seeks the eviction of the second respondent from the property. I will give a brief outline

of the other three matters before I revert to HC 8510/19, which happens to be the main matter herein.

***The Trustees for the Time Being of Casper Masvikeni Family Trust* v *Lawrence Muteswa and Another* HC 5439/20**

In that matter, the applicant *(The Trustees for the Time Being of Casper Masvikeni Family Trust)* applied for the cancellation of Deed of Transfer number 10703/02 dated 24 September 2002 made in favour of the first defendant, Lawrence Muteswa. The applicant sought the revival of Deed of Transfer 1537/18 of 17 April 2018 in its name.

The brief facts were that the applicant purchased the property at an auction sale conducted by the Sheriff. The property was transferred to the applicant on 17 April 2018. The applicant evicted the first respondent and took occupation of the property. The first respondent approached this court under HC 8510/19 and obtained a default judgment that reversed the sale and transfer of the property into the applicant's name. The court, per TAGU J, reinstated the original Deed of Transfer number 10703/02 dated 24 September 2002 in favour of the first respondent. The applicant claimed that it had not been served with the application and only got to know about the matter when it was served with an order of eviction. It asserts that the default judgment was obtained fraudulently under the circumstances.

The applicant reacted to the default judgments by making two applications. HC 942/20 was an application for rescission of judgment. HC 949/20 was an urgent chamber application for stay of execution pending the determination of the application for rescission of judgment under HC 942/20. The provisional order was granted by ZHOU J on 12 February 2020. It was confirmed by consent by CHINAMORA J on 20 May 2020. The default judgment was set aside by consent by ZHOU J under HC 942/20 on 18 March 2020. In the same order ZHOU J ordered the applicant *(Casper Masvikeni Family Trust)* to file its notice of opposition in HC 8510/19 within five working days from the date of the order.

Counsel were in agreement that a determination of HC 8510/19 on the merits would decide the fate of HC 5439/20.

Casper Masvikeni Family Trust* v *Lawrence Muteswa HC 7657/20

It was a r 449 application. The applicant *(Masvikeni Family Trust)* sought the rescission of a judgment granted by this court per MUSHORE J under HC 5542/20. After rescinding the default judgment obtained by Muteswa (the respondent) in HC 8510/19, the applicant had not filed its opposing affidavit within five working days as directed by ZHOU J. The order was granted on 18 March 2020, and five working days expired on 25 March 2020. The applicant's opposing papers were ready for filing on 24 March 2020. When the applicant's legal practitioners attempted to have the opposing papers issued and filed, the registrar's office declined to receive the documents owing to the new Covid 19 restrictions that suspended the issuing and filing ordinary matters save for urgent matters.

The legal practitioners proceeded to serve unissued opposing papers at the offices of the respondent's legal practitioners under cover of a letter dated 24 March 2020. The letter explained the reasons behind the failure to issue and file opposing papers with the registry. When the registrar's office resumed business for all matters, the applicant had its affidavit properly issued and filed with the registry on 11 May 2020. In the meantime, the respondent had under HC 5542/20, applied for default judgment before MUSHORE J alleging that the applicant had failed to file its opposing papers timeously under HC 8510/19. The applicant averred that the learned judge ought not to have granted default judgment under the circumstances. In any case, the applicant had not been served with a copy of the application under HC 5542/20.

After strenuously opposing the relief sought by the applicant, Mr *Kambarami* for the respondent eventually conceded that the r 449 application was unassailable considering that the circumstances under which the default judgment was obtained, clearly pointed to a deceitful by the respondent. The relief sought under HC 7657/20 was granted in terms of the draft order.

Casper Masvikeni Family Trust* v *Lawrence Muteswa & Another HC 7659/20

This was an urgent chamber application for the stay of execution of the order granted by MUSHORE J under HC 5542/20, pending the determination of the application under HC 7657/20. At the hearing before me, counsel agreed to have the provisional order granted

by CHIRAWU-MUGOMBA J confirmed by consent. This was because once the court determined in HC 7657/20 that the order by MUSHORE J was erroneously granted and set it aside, there was no basis upon which the confirmation of the order could be opposed.

THE APPLICANT'S CASE: HC 8510/19

In the present application, the applicant (Muteswa) seeks the following relief:

"**IT IS ORDERED THAT**

1. The Sale in Execution, the transfer of the immovable property commonly described as stand number 709 Greystone Township 8 of Greystone A, a certain piece of land situated in the district of Salisbury measuring 4337 square metre also known as 13 Coventry Road, Greystone Park, Harare into second Respondents name and registration of title deed of Transfer number 1537/2018 be and is hereby.
2. The 5th Respondent be and is hereby ordered to register the property commonly described as stand number 709 Greystone Township 8 of Greystone A, a certain piece of land situated in the district of Salisbury measuring 4337 square metre also known as 13 Coventry Road, Greystone Park, Harare and held under Deed of Transfer Number 1537/2018 into the applicants name;
3. The second and respondent and anyone acting through it be and herby ordered to vacate the property commonly described as 13 Coventry Road, Greystone Park, Harare within 48hours of this order, failing which the first respondent be and is hereby ordered to effect the eviction and render vacant possession to the applicant regardless of any application being filed.
4. The second, third and fourth respondent to pay cost of suit on an attorney and client scale."

The application was opposed by the first, second and fourth respondents. Although it filed an opposing affidavit, the fourth respondent did not file heads of argument, and neither was it represented at the hearing.

The applicant claimed that it was embroiled in a legal dispute with the fourth respondent arising from some contractual relationship between the applicant, Muteswa Wholesalers (Private) Limited (Muteswa Wholesalers) and the fourth respondent. The fourth respondent obtained an order of this court under HC 4426/16 directing the applicant and Muteswa Wholesalers to pay a debt they owed the fourth respondent. The court order was not complied with resulting in the property being placed under judicial attachment at the instance of the fourth respondent.

The applicant further claimed that upon learning that the first respondent was about to auction the property, which was his sole dwelling house, he approached this court on an urgent

basis under HC 9961/17 seeking a stay of execution. In that matter, the applicant herein was the first applicant, while Muteswa Wholesalers was the second applicant. The fourth respondent herein was the first respondent, while the first respondent herein was the second respondent. On 2 November 2017, NDEWERE J granted the following order by consent:

> **"IT IS ORDERED BY CONSENT THAT**
> 1. The sale in execution No. SS106/17 set for the third of November 2017 in respect of Stand 709 Greystone Township 8 of Greystone A situate in the District of Salisbury measuring 4337 square metres shall proceed as scheduled.
> 2. The Sheriff's sale of the third of November 2017 referred to above shall not be confirmed if first applicant brings a bank undertaking or confirmation for the due payment of the applicants' indebtedness including costs to the first respondent on or before the 16 November 2017.
> 3. First and second applicant pay the first respondent's costs for this Urgent Chamber Application in the sum of US$1 400.00 on or before the 15 of December 2017".

The applicant averred that pursuant to clause 2 of the order by NDEWERE J, he managed to secure a bank undertaking from CBZ Bank Limited (CBZ) on 14 November 2017. The letter from CBZ reads as follows:

> **"REF: APPROVAL OF LOAN**
> We refer to the above matter.
> We are very glad to inform you that in response to your request for a bank loan in order to meet your tight financial problems. You wanted to meet your expenses, hence the bank has decided to approve your application of loan for US$300 000.00.
>
> We have thoroughly read and analysed your business proposal. Our bank has concluded that your plan is perfect for you in order to run a business successfully. The business can be very profitable for you if you follow the terms and conditions. It can be beneficial for us in turn.
> ……
> Please come to the bank and review the terms and conditions of the loan agreement with the bank. The terms and conditions have been completely outlined in the promissory note. You are requested to come and sign it.
>
> We have attached several stated documents with this letter that are favourable for you. Please review the forms thoroughly and return us so that the processing of loan can be done. If you have a query to this matter, you can contact the undersigned.
>
> Yours Sincerely
>
> **P. Machokoto**
> **(SME FACILITIES)"**

The applicant claimed to have filed the letter of record as well as serving a copy on the first respondent. The Registrar of the High Court confirmed receipt of the letter through her response of 24 November 2017, which informed the applicant that his letter had been placed before the Judge presiding over the matter. The applicant also claimed to have approached FBC Building Society (FBC), which responded to his loan application through a letter of 13 November 2017. The letter reads as follows:

> **"RE: APPLICATION FOR MORTGAGE LOAN**
> We refer to the above matter
> We acknowledge receiving your application for a mortgage loan which is dated 13 November 2017.
>
> Kindly note that we are considering your application. We however need a period of 3 months to assess your account considering that your salaries were not received through us. Your salary will therefore be effectively received through our bank starting end of November or December.
>
> Kind regards
>
> Mortgage Department"

The applicant claimed to have served the letter on the first respondent on 13 November 2017. The applicant averred that by submitting the undertaking from CBZ to the first respondent, he complied with para 2 of the aforementioned order which required him to bring a bank undertaking on or before 16 November 2017. For that reason, the applicant contended that the first respondent did not have any power to entertain objections to the sale of the property. The first respondent was obliged to set aside the conditional sale in view of the applicant's compliance with the order by NDEWERE J.

The applicant advanced three bases for the relief sought herein. These are: bad faith; fraud and the existence of prior irregularities.

On the allegation of bad faith, the applicant asserted that the first, second and fourth respondents conveniently ignored the order by consent by proceeding with the sale despite the clear wording of paragraph 2 of the order by consent. The first respondent set 13 December 2017 as the date for hearing objections to the sale. The applicant claimed to have filed an objection to the sale in order to serve the property. In spite of the objection and the submission of the bank guarantee, the sale was confirmed on 4 January 2018. Title to the property was

transferred to the second respondent on 17 April 2018. The applicant averred that what was suspicious about the whole process was that the conveyancing was done by Mundia and Mudhara Legal Practitioners who were conflicted, having represented the fourth respondent in the litigation proceedings. In the applicant's eyes, that was the first hint of collusion and bad faith by the first and second respondents. They were hell bent on divesting the applicant of his rights in the property.

The applicant averred that the first respondent should not have violated an extant court order merely because the second respondent persisted in having the sale confirmed. Before transfer of title was made, first and second respondents were aware that the court order had been complied with. There was no basis for confirming the sale in the absence of a complaint by the fourth respondent that the consent order had not been complied with. The sale had to be set aside on this basis alone. The second respondent was not a *bona fide* purchaser who required the protection of the law.

Concerning the allegations of fraud, the applicant made reference to two letters from the first respondent written in connection with the property. One was to the Zimbabwe Republic Police and another to Mundia & Mudhara legal practitioners. The letter to Mundia & Mudhara dated 4 January 2018 advised that no objections had been received in connection with the sale of the property. For that reason, the second respondent being the highest bidder was confirmed as the purchaser for a sum of $410,000.00.[1] The letter stated that the confirmation of the purchaser followed the dismissal of an objection made on behalf of the applicant by Mtethwa Law Chambers. The letter further required that the full purchase price be deposited into the Sheriff's CBZ Account within seven days from the date of receipt of *'this letter of confirmation"*. The letter further directed the lawyers to pass transfer to the purchaser against *"payment of the full purchase, all costs and our charges."*

The second letter to the Zimbabwe Republic Police appears to have been in response to a request for information by the police. The letter dated 18 March 2019 reads in part as follows:

> "RE: APPLICATION FOR INFORMATION IN RESPECT OF MATTER BETWEEN LAWRENCE MUTESWA AND MUTESWA WHOLESALERS V DELTA ZIMBABWE LIMITED: HC8164/17

[1] Letter on page 20 of the record

…….

BACKGROUND

We received instructions from Messrs Mundia & Mudhara Legal Practitioners to proceed with the sale of the immovable property in the above matter on the 21st of June 2017, see attached letter of instruction, writ and court order.

The property was scheduled for sale on 15 of September 2017 by GMP Real Estate. On the 4 of September 2017 the judgment debtor's lawyers Messrs Chinawa law Chamber filed an Urgent Chamber application for stay of execution pending court application for rescission of judgment under HC8164/17. The case was removed from the roll and we proceeded with the sale. However on 14 of September 2017 interpleader summons were filed Sheriff by Judith F Muteswa.

On 21 of September 2017 we received a letter from Messrs Dube Banda Nzarayapenga informing the Sheriff that they had not accepted the interpleaders filed by Judith Muteswa for the reason that there was no proof that the immovable property belonged to her, hence the Sheriff proceeded with the sale on 3 of November 2017, see attached letter. Casper Masvikeni Family Trust was declared the highest bidder in the sum of $410 000-00. The Sheriff proceeded to accept the offer.

On 13 of November 2017 Messrs Mthetwa law chambers representing Muteswa Wholesalers filed an objection to the confirmation of the sale which was set down for hearing before the Sheriff on 13 of December 2017 and the objection was dismissed. The Sheriff proceeded to confirm the sale on 4 of January 2018.

The purchase price was deposited in the Sheriff's account on 8 of January 2018. Messrs Mundia & Mudhara Legal Practitioners submitted the transfer documents for the Sheriff's signature on 17 of January 2018 and these were signed on 18 of January 2018. On 23 January 2018 Messrs Mthetwa Law Chambers filed a court application for setting aside sale by the Sheriff. However the application was filed when the Sheriff had already signed transfer documents hence there was no reason for the Sheriff to stay execution pending the outcome of the court application.

On 17 of April 2018 transfer was registered in the name of Casper MasvikeniFamily trust, and on 30 April 2018, Messrs Mundia & Mundara Legal Practitioners wrote to the sheriff demanding the release of the purchase price.
……."

The applicant averred that the urgent chamber application for stay of execution was not removed from the roll as alleged by the first respondent. Instead it resulted in the order by consent of 2 November 2017. The applicant contended that it was surprising that the letter made no mention of the order by consent and the fact that it had been complied with despite the first respondent being aware of that position. The letter to Mundia & Mudhara alleged that no objections to the sale had been received, yet in the letter to the police the first respondent advised that an objection had been filed on behalf of Muteswa Wholesalers. The applicant

asserted that at the time the objection was determined on 13 December 2017, the first respondent was aware that the applicant had obtained the bank guarantee. The issue had been discussed during the hearing of objections on 13 December 2017.

The applicant averred that the above anomalies pointed to collusion between the first and second respondents. The applicant further alleged that the second respondent was no stranger to the first respondent having acquired several properties through forced sales involving the first respondent. Such sales were replete with serious irregularities just as was the case with the present sale.

As regards past irregularities, the applicant averred that although the first respondent was expected to proceed with the sale, he was not supposed to confirm it in the face of the bank guarantee that his office was aware of. The objections should not have been determined on 13 December 2017. Proceeding with the objection process was highly irregular and capricious. On its part, the second respondent was aware of the order by consent which suspended the sale. It was also aware of the bank guarantee obtained by the applicant. That knowledge ought to have prompted it to withdraw its interest in the property. Somehow it proceeded to pay the purchase price regardless of its prior knowledge of these developments.

The applicant averred that he had a real and direct interest in the matter having lost his property under circumstances which were manifestly irregular, unfair, marked by connivance, dishonesty and bad faith. The applicant also claimed that the first respondent prepared his valuation report through Stohill Properties, who also happened to be the auctioneers of the property. There was no way the same entity could claim to be an independent auctioneer and valuator at the same time.

APPLICANT'S SUPPLEMENTARY AFFIDAVIT

The supplementary affidavit was filed on 11 May 2020, the same day the notice of opposition on behalf of the first and second respondents was issued and filed. At the hearing, Mr *Madzoka* for the first and second respondents objected to the tendering of the affidavit on the basis that it was not filed with the leave of court. Mr *Kambarami* for the applicant countered arguing that at the time the affidavit was issued and filed, the respondents had been barred as their notices of opposition were filed out of time. Counsels agreed to abandon their preliminary

points, but instead focus on the merits of the dispute. The supplementary affidavit was consequently admitted by consent.

The supplementary affidavit partly touched on the same averments of fraud and connivance directed against the first and second respondents in the founding affidavit. It went on to allege that the property was transferred before the full purchase price, expenses, disbursements, charges and sundries levied by the first respondent had been fully paid within the prescribed timelines. The first respondent was accused of proceeding with the transfer of the property four months after an application challenging the confirmation of the sale was made. He thus pre-empted a pending application and effectively usurped the functions of the court. The first respondent was also accused of depriving the applicant the constitutional safeguards of the protection of the law as set out in the Constitution of Zimbabwe.

The applicant further asserted the sale was a sham, which militated against the integrity of sales in execution. Connivance was alleged between the first, second and fourth respondents. They had connived and conspired to sabotage the rules of sales in execution. The source of the applicant's ire was the respondents' decision to ignore the letter of undertaking from CBZ Bank Limited. That flied in the face of the consent order granted by NDEWERE J. For that reason, the applicant contended that sale was patently unlawful and a nullity at law. Second respondent acquired defective title. It received title from a seller who was not the owner of the property. That seller had no mandate to sell the property. No valid title could be founded on an illegality. The confirmation process was irregular, thus rendering the registration of title void.

As regards the non-payment of the full purchase price, it was alleged that the second respondent was supposed to pay US$471,500.00, being the purchase price of US$410,000.00, and US$61,500.00 Value Added Tax (VAT). The second respondent received the first respondent's letter on 4 January 2018, but purportedly made payment on 8 January 2018. The applicant averred that the payment was not received by the first respondent within seven days, as stated in the first respondent's letter. The remaining balance of US$61,500.00 was also not paid timeously. It was only paid on 24 January 2018. The first respondent was expected to cancel the sale instead of proceeding with registration. The applicant contended that the first

respondent proceeded to have the property transferred before the full purchase price was paid. That was fraudulent.

The applicant further asserted that in his letter of 18 March 2019, the first respondent stated that the transfer papers were signed on 18 January 2018. The amount of US$61,500.00 was only paid on 24 January 2018. That amount was only paid after the first respondent had already transferred the property to the second respondent. The property was transferred into the second respondent's name on 17 April 2018. That, according to the applicant, showed that the whole process was farcical, and ought to be set aside.

THE SECOND AND THIRD RESPONDENT'S CASE

The third respondent deposed to hers and the second respondent's opposing affidavit in her capacity as one of the trustees. She raised the defence of *lis pendens* at the outset. She alleged that the present application was similar to another application pending before this court under HC 560/18. That preliminary point was however abandoned at the commencement of oral submissions and therefore warrants no further attention.

On the merits, the second respondent denied conniving with anyone in the purchase of the property. The proceeds of the sale were used to extinguish the applicant's indebtedness to the fourth respondent. The second respondent was familiar with the consent order. It denied that the applicant duly complied with para 2 of the consent order as alleged. It asserted so for the following reasons. The hearing on the objection to the sale was held after the consent order was granted. The applicant did not tell the meeting that he had submitted the letter of undertaking to the first respondent. The first respondent found that the applicant had in fact tendered loan application forms and not a letter of undertaking.[2] According to the second respondent, the only issue raised by the applicant was that the first respondent ought to stop the hearing pending the determination of the applicant's loan application to FBC. If indeed a letter of undertaking from CBZ existed at that stage, then it would have been the easiest of tasks to place it before the first respondent. It was not produced because it did not exist.

[2] Paragraph 3 of the first respondent's ruling on page 47 of the record

According to the second respondent, the fourth respondent in its founding affidavit in HC 1293/20[3] denied being served with a letter of undertaking from CBZ.[4] Further, in an email of 12 February 2020 attached to the fourth respondent's affidavit in HC 1293/20, the fourth respondent's lawyers requested the author of the CBZ letter of undertaking to confirm the authenticity of that letter. In his response of the same date, the official from CBZ identified as Piason Matsokoto responded as follows:

> "Am sorry I don't know anything of this sort, the undersigned is not my name and in 2017 I was in another section, I joined SMEs late last year."[5]

The second respondent averred that the disclaimer by Piason Matsokoto all but confirmed that the purported letter of undertaking from CBZ was a forged document. There was no such person answering to the appellation "P. Machokoto", and for that reason there was no letter of undertaking to talk about. According to the second respondent, the applicant's legal practitioners wrote to the first respondent advising of a pending loan application at FBC. The letter from Mthetwa Law Chambers dated 11 December 2017 reads in part as follows:

> **"RE: <u>LAWRENCE MUTESWA AND MUTESWA WHOLESALERS VS DELTA ZIMBABWE LIMITED T/A DELTA BEVERAGES AND THE SHRIFF OF THE HIGH COURT. HC 8164/17/SS106/</u>**
>
> We act for and on behalf of LAWRENCE MUTESWA, kindly note our interest.
> We write to advise that pursuant to the Order by Consent granted by Justice Mwayera in the above matter, we have tendered a letter of undertaking from FBC Building Society showing that the bank is considering the loan application.
>
> We therefore pray that the sale be not confirmed.
> ……."[6]

The letter did not mention of an undertaking from CBZ, which confirmed that no such undertaking existed. In its opposing affidavit to the applicant's application for the setting aside of the Sheriff's sale in HC 560/18, the fourth respondent denied the existence of a letter of undertaking.[7] According to the second respondent, that affidavit was deposed to on 5 February

[3] HC 1293/20 was an application for rescission of a default judgment obtained by the applicant herein against the first to fourth respondents in HC8510/19.
[4] Paragraphs 9.6 and 9.7 of the fourth respondent's opposing affidavit in HC 1293/20 on p53-54 of the record.
[5] See the email thread on page 58 of the record.
[6] See page 66 of the record
[7] See paragraph 8 of the fourth respondent's opposing affidavit in HC 560/18 on p 67 of the record. It reads as follows:

2018, well after the alleged letter of undertaking was written. In his response to those averments, the applicant did not assert that he had submitted a letter of undertaking.[8] His affidavit was deposed to on 11 April 2018, well after the letter of undertaking by CBZ was allegedly written. The affidavit did not make reference to the CBZ letter of undertaking. That, according to the second respondent, confirmed that the letter was simply not in existence.

The second respondent further contended that even assuming it was accepted that the CBZ letter of undertaking was genuinely issued by the bank, still it did not show that it was intended to extinguish the debt owed by the applicant to the fourth respondent. The wording of the letter showed that it was some form of business proposal, which made it fall short of clause 2 of the consent order.

The second respondent averred that the sale was confirmed because of the applicant's failure to abide by the terms of the consent order. Had the applicant complied with terms of the order, he would have objected along those lines in the hearing before the first respondent. His lawyers would not have asked the first respondent to stop the confirmation of the sale on the basis of a pending loan application at FBC. It was further averred that the reasons given by the first respondent for dismissing the applicant's objections did not at all show bias or bad faith against the applicant. The second respondent further contended that there was nothing irregular in having the conveyancing done by Mundia & Mudhara legal practitioners. The fifth respondent would not have authorised transfer to sail through had there been any reported anomalies.

On the allegations of fraud, the second respondent averred that these were without foundation. The transfer documents were signed on 17 January 2018, while the application to set aside the sale was issued and filed on 23 January 2018. In any case, the filing of an

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"Applicants, like in this case, limply tried to rely on the court order granted in case number HC 9961/17. The way Applicants interpret clause 1 and 2 of that court order brings to serious doubt if they understand what a bank undertaking or confirmation is. A bank undertaking cannot in anyway be filled in loan application form. On the contrary, it is a legally binding document by the bank where the bank undertakes to pay the ascertained sum. It is not a letter acknowledging receipt of an application for a loan. Applicants failed to produce any such document except a filled in loan application form."

[8] Paragraph 9 of the applicant's answering affidavit in HC 560/18 on p 76 of the record reads:

"….. I submit that the letter which I submitted to the Court was proof enough to confirm that I had engaged the bank and the bank was considering the said application. It is my humble submission that the bank as an entity has its requirements and procedures which they follow hence the letter of undertaking could not be obtained over the period which was given…"

application did not suspend anything. It could not stop the transfer of the property. The application referred to (HC560/18) had not even been set down for hearing at the time the second respondent's opposing affidavit was deposed to.[9]

In conclusion, the second respondent urged the court to dismiss the application with costs on the attorney and client scale as it was clearly an abuse of court process. The applicant had failed to prove the alleged bad faith or connivance between the first and second respondents.

THE ANSWERING AFFIDAVIT

The applicant persisted with his averments that his property was transferred illegally and unprocedurally. He asserted so in light of the fraudulent manner in which the fourth respondent allegedly obtained default judgment against him in HC 4426/16; the fraudulent transfer of the property to the second respondent in spite of the application challenging the confirmation of the sale in execution under HC 560/18. That application was now moot since property had been transferred. His only recourse was to mount an application under the common law as he had done.

The applicant insisted that the letter of undertaking from CBZ was served on the first respondent but he ignored it. The applicant also dismissed the claims that the CBZ letter of undertaking was forged, insisting that the averment was based on hearsay evidence from the fourth respondent. The email allegedly emanating from an official of CBZ was suspicious as it did not bear a CBZ Bank logo. It could have been generated from any computer. The emails were also not certified just to confirm their authenticity.

The applicant insisted that the first respondent had no business transferring the property to the second respondent before the full purchase price was paid. The applicant also claimed that the parties used a fraudulently issued Capital Gains Tax Clearance certificate to facilitate transfer. Capital Gains Tax was allegedly not paid in full at the time conveyancing papers were lodged with the fifth respondent. The applicant further contended that he never lost his ownership rights in the property in light of the manner in which the property was transferred. The mere fact that the property was transferred before the full purchase price was paid made

[9] The affidavit was deposed to on 24 March 2020

the whole process irregular. The applicant also asserted that by not filing opposing papers to HC560/18, as well as to the present application, the first respondent had essentially admitted to committing a procedural irregularity which vitiated the sale and transfer of the property.

The applicant also claimed that the purchase price of the property was way below its forced sale value and accordingly unreasonable. That defeated the notion of an auction sale. The conduct of the first respondent was impeachable, and the court would have found as such in HC 560/18. Rules governing the conduct of judicial sales were conveniently flouted to benefit the second respondent.

THE SUBMISSIONS

Mr *Kambarami* argued that the payment of the purchase price did not comply with the instruction in the first respondent's letter to Mundia & Mudhara of 4 January 2018. That letter required the full purchase price to be deposited into the Sheriff's CBZ Account within seven days from the date of receipt of the letter of confirmation by the first respondent. He claimed that a payment of US$20,540.00 was made on 2 March 2018, while another of US$316,880.00 was made on 14 May 2018. Counsel submitted that transfer papers were nevertheless signed when the second respondent was in breach of the first respondent's terms. That was irregular and the sale had to be set aside on that basis under the common law. Counsel cited the case of *Mashave* v *Standard Bank of South Africa Ltd*[10], to support of that contention.

Counsel admitted that it was clear from paragraph 2 of the consent order by NDEWERE J that what would only stop the confirmation of the sale was the production of a bank undertaking for the payment of the fourth respondent's debt. Mr *Kambarami* conceded that there was no evidence that the alleged letter of undertaking by CBZ was served on the first respondent. He accordingly abandoned the line of argument based on the alleged letter of undertaking from CBZ.

In his opening remarks, Mr *Madzoka* cited the case of *Muchini* v *Adams & Others*[11], where the court reiterated the position of the law that an application stands or falls on the

[10] 1998 (1) ZLR 436 (S) at 438 C where the court held:
"The Roman-Dutch law protects the right of an owner to vindicate his property, and as a matter of policy favours him against an innocent purchaser. See for instance *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20 A-C. The innocent purchaser's only defence is estoppel."

[11] SC 47/17 at p 4

founding affidavit and the averments made therein. He submitted that the question that had to be answered was, on what grounds was the court approached by the applicant? That answer was found in the founding affidavit. Despite the filing of the supplementary affidavit, the court still had to go back to the foundation of the case, which was the founding affidavit. Counsel further submitted that the applicant completely abandoned his founding affidavit whose cause of action was founded on an undertaking. Now the applicant had adopted an entirely new case not established in the founding affidavit. Mr *Madzoka* argued that on the authority of the *Muchini* case, such an approach was not legally tenable. The application had to fall on that basis.

Mr *Madzoka* further submitted that the applicant also made allegations of bad faith and fraud against the first and second respondents. These allegations were also tied to the letter of undertaking which the applicant alluded to in his founding affidavit. To the extent that the argument based on the undertaking was abandoned, then these averments were bereft of any legal foundation. Counsel also submitted that the first respondent's decision dismissing the applicant's objection remained extant. Assuming the applicant was successful herein, where would that take him in the face of the first respondent's decision to confirm the sale? It would leave the applicant staring at a dead end. The application had to fall on that score alone.

As regards the allegation that the first respondent signed transfer documents before payment of the full purchase price, Mr *Madzoka* submitted that the Judicial Service Commission receipt attached to the applicant's answering affidavit, bearing a date stamp from the first respondent's Accounts Office revenue, confirmed an online payment of US$410,000.00 on behalf of the second respondent.[12] There was also an online funds transfer notification generated by Ecobank confirming a payment of US$410,000.00. The fact that the first respondent had not generated a receipt there and then did not make the sale invalid. The point was that the purchase price was paid to the first respondent as an officer of the court and agent of the judgment creditor. It was for these two to allege that no payment had been received, justifying the cancellation of the agreement of sale. They never said that. Counsel further

[12] Judicial Service Commission receipt on p 118 of the record and an online funds transfer notification from Ecobank dated 8 January 2018 on p 119 of the record.

submitted that the recital in the Deed of Transfer in favour of the second respondent acknowledged that a payment of US$410,000.00 was made towards the purchase price of the property.

In his brief response, Mr *Kambarami* submitted that the supplementary affidavit was properly before the court having been integrated into the founding affidavit when counsel agreed to abandon their preliminary points. He insisted that the transfer of the property was done before the full purchase price was paid. The first respondent had failed to comply with his own directive.

THE ANALYSIS

The applicant approached the court for the setting aside of the Sheriff's sale in terms of the common law. The approach followed by courts in an application of this nature was set out by GUBBAY CJ in *Mapedzamombe* v *Commercial Bank of Zimbabwe and Another*,[13] where he said:

> "Before a sale is confirmed in terms of r 360, 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 *Lalla v Bhura* supra at 283A-B. Once confirmed by the sheriff in compliance with r 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 r 359 for it to do so. See *Naran v Midlands Chemical Industries (Private) limited* S 220/91 (not reported) at pp 6-7. When the sale of the property not only has been properly confirmed by the sheriff but transfer effected by him to the purchaser against payment of the price, any application to set aside the transfer falls outside r359 and must conform strictly with the principles of the common law.
>
> This is the insurmountable difficulty which now besets the appellant. The features urged on his behalf such as the unreasonably low price obtained at the public auction and his prospects of being able to settle the judgment debt without there being the necessity to deprive him of his home, even if they could be accepted as cogent, are of no relevance. This is because under the common law, immovable property sold by judicial decree after transfer has been passed cannot be impeached in the absence of an allegation of bad faith, or knowledge of the prior irregularities in the sale in execution, or fraud." (underlining for emphasis)

An applicant who wishes to set aside a judicial sale that has been confirmed, with the property having passed to the purchaser faces a Herculean task so to speak. He must allege and

[13] 1996 (1) ZLR 257 (S) at 260D.

prove that the sale was beset by bad faith, fraud or knowledge of the prior irregularities in the sale in execution. Accordingly, allegations of impropriety based on the submission that the property was sold at an unreasonably low price are of no relevance at this stage. These were made in the applicant's answering affidavit.[14] At any rate these were new averments that had not been pleaded in the founding affidavit.

In his founding affidavit, the applicant sought to impeach the sale on the grounds of bad faith, fraud and prior irregularities. I will turn to consider these individually as they were pleaded in the founding affidavit.

The allegation of bad faith was anchored on two bases. First was the allegation that the Deed of Transfer in favour of the second respondent was prepared by Mundia & Mudhara, the same law firm that was representing the fourth respondent herein. It was alleged that the law firm had an interest in the matter. This allegation was not pursued in arguments before me and I considered it abandoned. Suffice it to point out that the founding affidavit does not set out the nature of interest the law firm had in the entire process, which would justify imputations of bad faith against that law firm.

The second basis was that the first respondent proceeded to confirm the sale as well as pass transfer to the second respondent in the face of the bank guarantee from CBZ. His conduct violated paragraph 2 of the consent order by NDEWERE J, which stated that the sale would not be confirmed if the applicant produced a bank undertaking. As I have already noted, Mr *Kambarami* abandoned this argument on the basis that there was no proof that the alleged letter of undertaking was served on the first respondent.

The allegations of fraud were based on perceived inconsistencies in the first respondent's letters to Mundia & Mudhara of 4 January 2018, and the one to the Police of 18 March 2019. The alleged inconsistencies in my view boil down to lack of attention to detail on the part of the first respondent in his communication with the said parties. For instance, it was alleged that in the letter to the Police, the applicant filed an urgent chamber application for stay of execution, which was then removed from the roll, when in actual fact it gave birth to an

[14] See paragraphs 10.5 to 10.11 of the answering affidavit on pages 113-115 of the record.

order by consent. That anomaly is of no consequence because it is common cause that HC 9961/17 resulted in the order by consent granted by NDEWERE J.

The next allegation was that the letter was silent on the aspect of the order by consent and the fact that the applicant had complied with it. Again nothing turns on this submission since the alleged compliance with the order by consent was anchored on the letter of undertaking from CBZ. Any argument based on that letter was abandoned for reasons already stated. Lastly, it was alleged that in his letter to Mundia & Mudhara, the first respondent alleged that no objections were received, yet in the letter to the Police there was an acknowledgment that the applicant had made an objection. Again it is common cause, and it was not disputed by any party that the applicant indeed lodged an objection which was dismissed by the first respondent. The submission clearly lacked merit.

The last objection was based on alleged prior irregularities. The argument was that the first respondent was not supposed to confirm the sale in the face of the bank guarantee from CBZ. As already noted, the argument based on the alleged bank guarantee was abandoned. Consequently, the alleged prior irregularities attributed to the side lining of the bank guarantee are inconsequential. The other accusation based on prior irregularities was that the first respondent employed Stohill Properties to prepare the valuation report, yet the same entity was also the auctioneer. The same entity could not be an independent auctioneer as well as being an independent valuator. The submission was not pursued in oral submissions. Suffice it to note though that no wrongful conduct was imputed to Stohill Properties. That marked the end of the applicant's case as pleaded in the founding affidavit.

Then came the supplementary affidavit. It was admitted by consent, and for that reason, Mr *Kambarami* argued that it became part of the founding affidavit. Mr *Madzoka* on the other hand submitted that the supplementary affidavit offended the dictum in *Muchini v Adams*[15]. In that case the court held as follows:

> "It is trite that an application stands or falls on the averments made in the founding affidavit. See *Herbstein* & *van Winsen* the Civil Practice of the Superior Courts in South Africa 3rd ed p 80 where the authors state:
>
> > "The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that

[15] Supra

> although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out"[16] (Underlying for emphasis).

A supplementary affidavit is simply intended to augment the applicant's case. It can only be filed with the leave of the court, and it permits the applicant to bring in additional facts which did not find their way into the founding affidavit. The supplementary affidavit was in four parts. The first part gave a factual conspectus to the application. The second part dealt with the issue of non-compliance with the order by NDEWERE J. The third part dealt with the alleged non-payment of the full purchase price. The fourth part was concerned with the existence of an application to set aside the sale. The last part dealt with the alleged breaches of constitutional safeguards. The question of the non-compliance with the order by NDEWERE J is, as already noted, a non-issue. It was abandoned.

Can the sale be upset on the basis of the alleged non-payment of the full purchase price within the seven days stipulated by the first respondent? The applicant argued that the sum of US$410,000.00 was purportedly paid on 8 January 2018, but was not received by the first respondent within the said seven days. He also claimed that the remaining US$61,500.00 meant for VAT was paid on 24 January 2018, after the seven days had lapsed. If the sum of US$410,000.00 representing the purchase price was paid on 8 January 2018, then it fell within the seven day period as directed in the first respondent's letter of 4 January 2018. A receipt issued by the first respondent's "Accounts Office Revenue" confirmed a payment of US$410,000.00 to that office on 8 January 2018.[17] Nothing was placed before the court to suggest that the amount was not received by the first respondent within seven days as alleged by the applicant.

Further, nothing was placed before the court to suggest that the amount representing VAT ought to have been paid at the same time as the full purchase price. Instead, the first respondent's letter of 4 January 2018 directed the conveyancers to pass transfer to the purchaser

[16] Page 4 of the judgment
[17] Receipt on page 121 of the record.

"against payment of the full purchase price, all costs and our charges". The recital clause in the Deed of Transfer recorded that: *"ACKNOWLEDGING that the whole purchase price amounting to FOUR HUNDRED AND TEN THOUSAND UNITED STATES DOLLARS (US$410 000) to have been paid…."*. The fifth respondent would not have passed transfer without being satisfied that the purchase price was indeed paid or at least secured.

At any rate, this is the kind of complaint that the applicant ought to have made under r 359 before the sale was confirmed. Alternatively, he would have made that complaint when challenging the first respondent's decision to confirm the sale following the dismissal of his objection. That complaint cannot be made at this late stage after the property was transferred upon payment of the purchase price.

The applicant's complaint that the first, second and third respondents pre-empted the outcome of the court application to set aside the sale, that is HC 560/18, is devoid of merit. According to the first respondent's letter to the Police, the application to set aside the sale was only issued and filed on 23 January 2018. The transfer documents had been signed on 18 January 2018. The applicant was represented at all material times. There is no indication that the applicant sought an injunction to suspend the looming transfer pending the determination of the application to set aside the sale. The circumstances would perhaps have been different, if for instance the first respondent had signed the transfer papers after being served with the application to set aside the sale. That was not the case herein.

The alleged violations of constitutional safeguards are similarly without merit. It was contended that the applicant had a right to be heard before the sale was confirmed. He was allegedly denied that right because transfer was then effected before he was heard. It was also alleged that the right to fair administrative justice, as well as the right to be heard and protection of the law were violated because of the first respondent's conduct. The court finds the accusations rather baseless and unwarranted. The applicant only has himself to blame for not pursuing the legal remedies at his disposal to pre-empt any processes that would have frustrated his bid to have the sale set aside before it was confirmed or before title was passed to the second respondent. He cannot blame his inaction, or his legal practitioners' inertia on the first respondent.

For the foregoing reasons, the court finds that this application is devoid of merit and it must be dismissed.

THE FATE OF HC 5439/20

As highlighted under my introduction, the fate of HC 5439/20 was dependent on the outcome of HC 8510/19. In HC 8510/19, the applicant prayed that the sale and transfer of the property into the second respondent's name be set aside, with his title being restored. The applicant had already achieved that through the default judgment granted by TAGU J on 22 January 2020. His title had been reinstated as a result of that default judgment. That default judgment, as already noted, was set aside through the consent order granted by ZHOU J on 18 March 2020.

The second respondent's title was however not reinstated following the setting aside of that default judgment which had paved the way for the restoration of the applicant's title. In order to restore the parties to their respective positions prior to the default judgment granted by TAGU J, it is only proper that the order sought by the applicant in HC 5439/20 be granted as prayed for.

COSTS

The second and third respondents prayed for the dismissal of the application with costs on the attorney and client scale. In the case of *In re Alluvial Creek Ltd*, GARDNER JP had this to say about costs on the attorney and client scale:

> "An order is asked for that he pays the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious although the intent may not have been that they should be vexatious".[18]

The level at which costs must be awarded is a matter in the discretion of this court. I am not persuaded to make an award of costs on the attorney and client scale as requested by the second and third respondents in view of some concessions made by the applicant's counsel in this matter as well as other matters referred to herein.

[18] 1929 CPD 532 at page 535

DISPOSITION

The court will accordingly make the following orders in respect of all the matters that were consolidated herein.

It is ordered as follows:

1. **In respect of HC 8510/19;**
   The application be and it is hereby dismissed with costs.

2. **In respect of HC 5439/20;**
   a) The second respondent shall cancel Deed of Transfer number 10703/02 dated 24 September 2002 made in favour of the 1st Respondent holding the property called certain piece of land situate in the district of Salisbury, stand number 709, Greystone Township 8 of Greystone A, measuring 4337 square metres.
   b) The second respondent be and is hereby ordered to revive Deed of Transfer number 1537/18 dated 17 April 2017 in favour of the applicant.
   c) Each party shall bear its own costs of suit.

3. **In respect of HC 7657/20**
   a) The application is granted
   b) The order of this court under HC 5542/20 granted on 8 October 2020, be and is hereby set aside in terms of rule 449 of the High Court Rules, 1971.
   c) The respondent shall pay the costs of the application on the attorney and client scale.

4. **In respect of HC 7659/20**
   a) The provisional order is hereby confirmed.
   b) The first respondent shall pay the applicant's costs of suit.

Manyurureni & Company, legal practitioners for the applicant
Mahuni and Mutatu Attorneys At Law, legal practitioners for the second and third respondents