

VIRIMAYINYAMWIWA

and

ZEBRA MINING SYNDICATE

versus

GAMESTAR TRADING (PVT) LTD

and

MUSHLY INVESTMENTS

and

DEPUTY SHERIFF N.O

and

MINING COMMISSIONER

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 20 JUNE 2014 AND 17 JULY 2014

Ms P. Mvundla for the applicant
Mr E. Madzivire for the respondent

Opposed Application

MAKONESE J: The Applicants were sued by the 2nd Respondent in this matter for the payment of the sum of US\$ 5924.00 and the equivalent value of 22 grammes of gold. The latter obtained a judgment under case number HC 2856/13 and subsequently issued a Writ of Execution against Immovable property. In pursuance of the Writ of Execution, 2nd Respondent caused the attachment in execution of certain Mining claims known as Zulu 15 located at Pioneer Block, Bulawayo. The aforesaid mining claims were sold by private treaty to the 1st Respondent who duly paid the purchase price in terms of his bid.

On the 18th December 2013, the Applicants lodged an application with this court for an order to set aside the sale. The terms of the order sought are couched as follows:

- “1. The Private Treaty Sale conducted by the 3rd Respondent be and is hereby declared void *ab initio* and set aside.
2. The Applicants be and are hereby ordered to pay 1st Respondent the sum of US\$7100 jointly and severally with the one paying the other to be absolved within 5 days of the granting of this order.
3. In the event that Applicants fail neglect to pay the amount f US\$7100 the Sheriff of Zimbabwe be and is hereby ordered to commence a *de novo* attachment in line with Rule 326 of the High Court Rules.
4. The 4th Respondent be and is hereby ordered to refund the 1st Respondent the sum of US\$5000.00.
5. 1st and 2nd Respondents be and are hereby ordered to pay the costs of this application jointly and severally with one paying the other to be absolved on an attorney and client scale.”

The application is premised on the ground that the mining claims were sold for an unreasonably low price. The Applicant averred that the mining claims raised an annual revenue in excess of US\$ 1 million from gold ore processed and sold from the said mining claims. To support their claims Applicants annexed copies of gold deposits with Fidelity Printers and Refiners (Pvt) Ltd.

The application to set aside the sale has been strenuously resisted by the 1st Respondent. 1st Respondent purchased the mining claims by private treaty and made payments to the 3rd Respondent. In opposing the application the 1st Respondent attacked the application on the grounds that the Applicants had adopted the wrong procedure. In particular the 1st Respondent raised a point *in limine* contending that since the sale in execution had already been confirmed by the 3rd Respondent, the Applicants ought to have approached this court on the general grounds of review. The 1st Respondent averred that the sale has been duly confirmed and 1st Respondent has duly paid the sum of US\$7100 stipulated by 3rd Respondent. Further, the 1st Respondent has paid the Gazetted amount of US\$5016 to 4th Respondent to enable the transfer of the Mining claims. The 3rd Respondent has signed the Certificate of Agent – Transfer to enable the transfer of the claims. 1st Respondent contends that the relief available to the Applicants would have been to seek a review of the sale by 3rd Respondent.

It is not in dispute that the sale was conducted procedurally in terms of Order 40 Rule 358 (2) of the High Court Rules. Applicants were informed of the sale by the 3rd Respondent through

their appointed legal practitioners at the time Messrs *T. Hara and Associates*.

The rules do not provide for the procedure to be adopted after a sale in execution has been confirmed. The procedure to be adopted has been laid down in the case of *George Muchapondwa Chiwanza v Herman Tendai Matanda, The Sheriff for Zimbabwe and others* HB 170/2004..

In this case MAKARAU J states at page 3 of the cyclostyled judgment as follows:-

“The rules do not provide for the procedure to be adopted after the sale in execution has been confirmed. It is my view that any party with an interest in the sale may approach this court by way of ordinary review to have the sale set aside.”

In terms of the common law where a review is brought challenging the validity of the sale the grounds for review would include such considerations as gross unreasonableness, bias and unprocedural irregularities, but cannot include such grounds as unreasonably low price or that the sale was not conducted as provided for under the rules unless such can be subsumed in the recognised grounds for review at common law. See also the case of, *Mapedzamombe v Commercial Bank of Zimbabwe and Another* 1996 (1) ZLR 257 (S).

In *casu*, the Applicants did not approach the 3rd Respondent in the first instance. The application before me cannot be construed as a review of the decision of the 3rd Respondent in terms of the High Court Rules. The Applicants cannot therefore invite the court to exercise its powers of review as this application is premised on the ground that the mining claims were sold for an unreasonably low price. The Applicants evidently adopted the wrong procedure. The procedure for a review application is provided for under Order 33 of the High Court Rules.

I am of the view that the point *in limine* has merit and there is no need for me to deal with the merits of the matter for the reasons given hereinabove.

In, the circumstances, the Application for the setting aside of the sale is hereby dismissed with costs.

Messrs D. W. Mhiribidi and Company, applicants’ legal practitioners
Messrs Joel Pincus, Konson and Wolhunter, respondent’s legal practitioners