TETRAD HOLDINGS LIMITED & 10 OTHERS
versus
NATIONAL SOCIAL SECURITY AUTHORITY
and
SHERIFF OF ZIMBABWE
and
TETRAD INVESTMENT BANK LIMITED

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 13 & 25 November 2015

Opposed application

R H Goba, for the applicants
A Demo, for the 1st respondent

MAKONI J: This is an application made in terms of Order 40 r 359 (8) of the High Court Rules 1979 whereby the applicants seek the setting aside of the decision of the second respondent (The Sheriff) to confirm the sale of 10 immovable properties, in execution. The applicants also seek costs on an attorney and client scale against the Sheriff.

The backgrounds to the matter is that, during the course and scope of the Sheriff's function and in terms of r 359 (7) the Sheriff made a ruling in respect of an objection to the confirmation of a sale in execution that had been filed by the applicants in terms of r 359 (1). The applicants then filed the present application. The applicants, in their challenge rely on the following grounds namely

(i) That the sale values achieved on auction of all the properties were unreasonably low.

(ii) That, the auction has resulted in a gross travesty.

(iii) That a single valuation was used which was inaccurate and incomplete and conducted by an individual who is not a registered valuer, thereby prejudicing applicant's rights.

The application was opposed by the sheriff and the judgement creditor, (NSSA).

NSSA took, *in limine*, two points i.e. that the applicants failed to cite or join all interested parties and that they attached evidence to their Answering Affidavit. I will deal with the points in seriatim.

Non-Joinder

Mr *Demo*, for NSSA, submitted that the applicants did not cite the purchasers who bought the properties. These purchasers parted with their money after successfully bidding for the properties at the public auction. These purchasers were present when the matter was heard before the Sheriff. The applicants are aware of the names of the purchasers. They will be affected and or prejudiced if the court were to grant the relief being sought by the applicants. He further contended that such non-joinder is fatal to the application before the court.

Mr *Goba*, for the applicants, submitted that what is being challenged is the decision of the Sheriff and that he is the embodiment of those affected. The purchasers are aware that the sale has been challenged. It was not necessary that they be joined. He further contended that NASA could have applied to join the purchasers to the proceedings.

He further contended that in terms of r 359 (8) the court may make such other order that it considers necessary. What was being impugned was the Sheriff's decision. It was advisable but not necessary for the purchasers to be joined.

A joinder of parties takes place where two or more parties join together to bring an action or application or two or more defendants or respondents are joined in the same matter. Parties are joined either as a matter of convenience or as a matter of necessity. Joinder for convenience is to avoid *inter alia* a multiplicity of actions.

On joinder of necessity the authors Herbstein and Van Winsen: The *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th ed p 215 had this to say:

> "A third party who has, or may have, a direct and substantial interest in any order the court might make in proceedings or is such an order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings, unless the court is satisfied that such person has waived the right to to be joined. Such a person is entitled to demand joinder as a party as of right and cannot be required to establish in addition that joinder is equitable for convenient. In fact, when such person is a necessary party in this sense the court will not deal with the issues without a joinder being effected, and no question of discretion or convenience arises."

In terms of our rules non-joinder is provided for in terms of r 87 (1) which provides as follows:

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they effect the rights and interest of the person who are the parties to the cause or matter."

In interpreting r 87 (1) Patel J (as he then was) had this to say in *John Simon Rodger & Ors* v *Frik Muller & Ors* HH 2/20 on p 4 of the cyclostyled judgment:

> "While I accept that non-joinder of a party is not necessarily and invariably fatal to the continuance or determination of any matter, it is trite that r 87 (1) do not absolve a litigant of the obligation to cite all relevant parties. The discretion of this court in this regard must be exercised so as to ensure that all persons who might be affected by the determination of the issues in dispute be afforded the opportunity to be heard before that determination is actually made."

In *Burdock Investments (Pvt) Ltd* v *Time Bank of Zimbabwe Ltd & Ors* 2003 (2) ZLR 437 H at 442 D-E Makarau J (as she then was) examined a number of authorities dealing with the issue of when a court may order joinder. She concluded by saying:

> "It is my respectful opinion that the above represents the law and practice of this court in matters of joinder and intervention by parties in proceedings before this court. Before a party may be joined or may be allowed to intervene in proceedings before the court, he or she must establish a direct and substantial interest in the subject matter of the judgement. The interest must be such that the judgement cannot be carried into effect without adversely affecting the legal position of the party mis-joined and in circumstances where the defence of *res judicata* will not be raised against that party in future proceedings to protect that interest."

See also Rose v *Arnold & Ors* 1995 (2) ZLR 17 H at 19 G-H.

In *casu*, the issue for determination is whether the purchasers have a direct and substantial interest in the order that this court may make or if such an order cannot be sustained or carried into effect without prejudicing them. It is my view that the relief that the applicants seek to impugn in this matter, impinge on the rights of the purchasers. If this court were to make a decision to grant the relief that the applicants seeks, the court will interfere with rights that the purchasers acquired when they were declared the highest bidder at the auction. The court would have done so against the trite principle of our law that interested parties should be afforded an opportunity to be heard in matters in which they have a direct and substantial interest. Put differently, the court is being asked to make a determination which is prejudicial to the purchaser's rights without their side of the story being put before the court.

It is my view that it was essential that the purchasers be joined in these proceedings as they have a direct interest in the outcome and determination of this matter. Their sales had

been confirmed by the Sheriff. The applicants were aware of the identities of the purchasers. They were party to the objection proceedings before the Sheriff. The applicants have not made out a case for why they should now be left out in these proceedings. For the above reason, I consider the non-joinder of the purchasers as fatal to the present proceedings.

I may add that there in an increase in the number of matters where parties seek to impugn the decision of Harare Sheriff in terms of r 358. In most of these cases the highest bidders at the auctions are not being cited. The message should be sent out that highest bidders, whose sales would have been confirmed, would have acquired rights in the property in issue. If the court were to set aside the sale, such an order cannot be carried into effect without prejudicing them. Such a person would be a necessary party to the proceedings and should be joined.

In the result I will uphold the point *in limine*. It will not be necessary for me to deal with the other point *in limine* or proceed with the matter on the merits.

I will therefore make the following order.

1) The application is dismissed
2) The applicants to pay the first respondents costs.

Venturas & Samukange, applicants' legal practitioners
Chihambakwe, Mutizwa & Partners, 1st respondent's legal practitioners