MUHAMMAD AKRAM
versus
THE SHERIFF OF ZIMBABWE
and
OLGA MUKWINDIDZA
and
THE BELVEDERE TRUST

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 24 July and 10 October, 2019

Opposed Application

Adv. Magwaliba with *R Mahuni* for the applicant
J Mafume, for 2nd Respondent

CHITAKUNYE J. In this application the applicant seeks an order couched as follows:

(1) That the application authorising the sale of an immovable property known as 3 Kenilworth Road Belvedere Harare held under deed of transfer 5285/2011 be and is hereby granted.
(2) The 1st respondent be and is hereby ordered and directed to conduct another sale in execution in terms of the rules of this court in relation of 2nd respondent's property which is currently under judicial attachment.
(3) The 2nd respondent to pay the costs of this application on an Attorney- Client scale.

The pertinent facts leading to this application may be summed up as follows:

On the 12th February 2018 the applicant obtained a default judgement against the 2nd respondent in the sum of US$175,720-00 plus interest under case number HC 206/18. Upon obtaining the judgement the applicant instructed 1st respondent to attach in execution movable property of 2nd respondent. The 1st respondent made a *nulla bona* return as the movable property located was insufficient to satisfy the debt. The 1st respondent proceeded to attach immovable properties belonging to the 2nd respondent including the property in question, that is, Stand number 7287 number 3 Kenilworth Avenue, Belvedere Harare. Number 3 Kenilworth Avenue was subsequently sold by 1st respondent at a public auction to the highest bidder at a sum of US$175000-00.

On the 23rd April 2018 the 1st respondent wrote a letter to all interested parties advising them of the highest offer made for the property and that if no objections were received within 15 days he would confirm the sale.

On the 3rd May 2018, the 2nd respondent lodged her objection to the sale of the property in terms of rule 359(1) (b) through her erstwhile legal practitioners Madotsa & Partners. Two points were raised as a basis for the objection and these were:

1. That the sale fetched an amount which is unreasonably low; and
2. That the property did not belong to 2nd respondent but to a 3rd party who had not consented to the sale.

Before the objection could be heard after set down, the 2nd respondent lodged an application with the Sheriff purportedly in terms of rule 359 seeking the setting aside of the sale in execution through another law firm, Mafume Law Chambers, in SS 27B/18.

The applicant opposed that application. Besides the grounds already raised in the initial objection the 2nd respondent added other grounds for seeking the setting aside of the sale.

After hearing submissions from the parties on the above objections the 1st respondent made a determination in favour of the 2nd respondent. In his determination the 1st respondent alluded to the provisions of Rule 345 of the High Court Rules,1971 to the effect that where property subject to real rights of any third party is sold in execution such sale shall be subject to the rights of such third person unless he otherwise agrees.

In *casu,* the immovable property was registered in the name of Belvedere Trust, which had not been notified of the attachment in execution and therefore had not given its consent.

On that basis the 1st respondent set aside that sale and referred the parties to court for a determination of the issue of ownership of the property.

As a result of the 1st respondent's decision the applicant set upon establishing the position of Belvedere Trust on this property. In this regard applicant's legal practitioner wrote a letter of inquiry to 3rd respondent legal practitioners, Ahmed and Ziyambi, inquiring on 3rd respondent's position *vis- a- vis* the property in question. In that effort applicant established that 2nd respondent had in fact paid the entire purchase price but was just dilly dallying in obtaining transfer. This finding was contrary to 2nd respondent's contention that she had not paid the full purchase price. They established that for all intents and purposes the property now belonged to 2nd respondent what remained was payment of transfer fees and the signing of declaration by purchaser document.

The applicant's legal practitioners wrote another letter to 3rd respondent's legal practitioners on 6 August 2018 indicating that applicant was prepared to pay the transfer fees so that the property is transferred to 2nd respondent as soon as the sheriff's sale is confirmed. They also asked for a letter confirming that the 3rd respondent was not opposed to the sale in execution as the purchase price was paid in full.

On the 20th August 2018 applicant's legal practitioners wrote to the 1st respondent advising him that Ahmed & Ziyambi, as legal practitioners for 3rd respondent, had confirmed that the purchase price had been paid in full all that remained was for 2nd respondent to attend at their offices to sign a declaration by purchaser document. They also reconfirmed that 3rd respondent was not opposed to the sale in execution. The legal practitioners concluded by stating that:

> "In light of the above we hereby instruct you to proceed to sell the property without further delay as the legal impediments have been overcome."

On the same date applicant's legal practitioners advised 3rd respondent's legal practitioners of the payment of the transfer fees and that in the circumstances can they proceed to transfer the property into 2nd respondents name.

On 24 August 3rd respondent's legal practitioners advised applicant's legal practitioners that they were now only awaiting 2nd respondent to attend at their offices to sign the declaration by purchaser. Subsequent to this applicant's legal practitioners wrote two letters on 19 September and 5 November 2018 essentially advising 2nd respondent's legal practitioners that the legal impediments to the sale in execution had been overcome and that if 2nd respondent was able to she can find a buyer of the property by private treaty to maximise the purchase price. This did not yield the desired results as 2nd respondent maintained that the impediments had not been overcome.

On 9 November 2018 applicant's legal practitioners wrote yet another letter to the 1st respondent advising him that the legal impediment had been overcome and so can he proceed to sell the property. The first respondent's response, in a letter dated 14 November 2018, was to the effect that the impediment had not been overcome as the property was still registered in the name of Belvedere Trust and not the judgement debtor. This letter prompted applicant's legal practitioners to write a letter to 3rd respondents legal practitioners advising them to write directly to the sheriff informing him of the 3rd respondent's position. This the 3rd respondent's legal practitioners did on 22 November 2018. In their letter Ahmed & Ziyambi indicated that 3rd respondent no longer had interest in the property in these words:

> "We confirm that the only remaining process in the transfer of the property is that the Purchaser has not attended to sign the Declaration by Purchaser, despite our several calls to the purchaser. Our client has no interest in the property, save for it to be transferred to the new owner."

On 26 November applicant's legal practitioners wrote to the first Respondent instructing him to proceed with the sale in view of 3rd respondents indications above. This did not yield positive results as the first Respondent still insisted on being furnished with an original title deed in the name of the 2nd respondent.

On 20 February 2019 applicant's legal practitioners made another attempt at instructing the first Respondent to proceed with the sale but the Sheriff would have none of it.

It is this stance by the first respondent whereby even upon being informed by 3rd respondent's legal practitioners that 3rd respondent was not objecting to the sale in execution as it no longer had any interest save to effect transfer to 2nd respondent the sheriff insisted that the impediment in terms of rule 345 had not been overcome, that led to the applicant approaching this court for the above stated relief.

The second respondent opposed the application. In her opposing affidavit, whilst not seriously disputing the sequence of events outlined above, the 2nd respondent contended that she had not met the full conditions of the agreement of sale as she had not paid the full purchase price. She also contended that the letters relied upon by applicant, written by 3rd respondent's legal practitioners, were not the requisite consent to sale but mere acknowledgment of the status of the property. She further contended that applicant should pursue her other properties that are registered in her name and not number 3 Kenilworth Avenue.

It is apparent that the 2nd respondent's opposition was basically to hide behind the sheriff's contention that the legal impediments had not been overcome and so the property cannot be sold.

In his submissions Counsel for 2nd respondent raised a point *in limine* to the effect that:

i) The application is fatally flawed in that it does not state the rule or enactment by which it is brought before this court in terms of rule 226(1) and that

ii) the application appears to be a hybrid of a review in terms of rule 359(8) and an appeal against 1st respondent's decision in SSB 27/18 and a *declaratur* without meeting the requirements of each of the above.

He contended that there is no legal basis for the applicant to bring such an application before this court.

In his response to the point *in limine* Counsel for applicant argued that there is no rule under Order 32 that states that a party must state the rule under which an application is brought. These courts have alluded to the desirability of citing the rule under which an application is being brought. Non-compliance with what court has deemed as desirable is therefore not fatal to the application. As regards the assertion that the application appears to be a hybrid of a review and appeal and a *declaratur*, Counsel argued that that is not so. In this regard counsel referred to paragraphs 21 to 27 of the founding affidavit and the draft order which he said showed clearly that this is an application for *mandamu*s. In this regard applicant was not seeking the setting aside of 1st respondent's decision or a *declaratu*r. Instead applicant is seeking that 1st respondent be ordered to do that which the law says he must do. It is thus an application to compel the sheriff to comply with the law that mandates him to conduct a sale in execution now that the issue of the legal impediment had been overcome.

Upon considering the submissions on the point *in limine* I was of the view that whilst indeed the application may not have been elegantly couched, there is no doubt that whilst applicant was not happy with the sheriff's actions in the first sale, the basis for this application was the Sheriff's continued refusal to conduct another sale despite the fact that 3rd respondent had clearly stated that it had no interest in the property save to effect transfer into 2nd respondent's names.

Rule 226 which 2nd respondent referred to does not state that an application to be valid must refer to the rule under which it is brought. Counsel for 2nd respondent also referred to *Munyaradzi Hove* v *ZIMPHOS Limited and others* SC 8/18 for the proposition that failure to cite the rule is fatal. This was clearly not correct. In that case at page 4 ZIYAMBI AJA opined that:

> "In my view legal practitioners ought to cite the relevant Rule in terms of which an application is placed before the courts. Merely to assume that the court is aware of its Rules is insufficient. The Rules are to be cited for the purpose of drawing the attention of the Registrar as well as the opposing party to the legality of the course taken by the applicant."

In stating the above the honourable judge did not indicate that failure to cite the rule is fatal on its own. In that case the judge in fact proceeded to deal with the application and determined it on other grounds and not on the basis of failure to cite the Rules.

In *casu,* I did not hear 2nd respondent to allude to prejudice she suffered which cannot be addressed in any other way from the failure to cite the Rule applicable. I am of the view that failure to cite the rule under which the application is brought is not fatal in the circumstances.

It is also clear from the relief sought that applicant was not seeking the reversal of any earlier decision by the sheriff on the earlier sale but was seeking to compel the Sheriff to conduct another sale. The points *in limine* were thus without merit.

As regards the merits of the application, I am inclined to agree with applicant's Counsel that the issue pertains to the first respondent's refusal to sell the property on the pretext that the property must first be registered in 2nd respondent's name. In his letter to applicant's legal practitioners on 14th November 2018, the first respondent made his refusal clear when he stated, *inter alia*, that:

> "As you confirmed in your letter dated 9 November 2018 that the property you are instructing the sheriff to execute on is not registered in the judgement debtor's name, the sheriff is still not in a position to execute these instructions."

The sheriff did not however explain how he came to the decision that unless the property is in the name of a judgment debtor's name he cannot sell such property. Rule 345 which he purported to rely on does not state so. That rule states that:

> "Where property subject to a real right of any third person is sold in execution such sale shall be subject to the rights of such third person unless he otherwise agrees."

Evidently, therefore, the rule does not prohibit the sale of a property registered in a third party's name but makes such sale subject to the real rights of the third party unless he or she agrees. This is intended to protect the real rights and interests of that third party.

What is required is for the third party to be notified of the sale and to give consent to the sale. In *casu,* the first sale was conducted without notifying Belvedere Trust and this was an anomaly. However when Belvedere Trust was now notified and had indicated in no uncertain terms that it had no interest in the property save to effect transfer to 2nd respondent, this ought to have been adequate for the sheriff to proceed with the second sale as instructed by applicant's legal practitioners. In interpreting rule 345 one must not lose sight of its purpose which is to protect the rights and interest of a third party who has registered real rights in the property. Where such third party unequivocally states that they no longer have any interest in the property as they received full purchase price that in my view should be adequate for the sheriff to proceed with the sale.

The sheriff as a public officer charged with execution of orders in terms of the law cannot give excuses that are not provided for by law for failure to carry out his duties. See *Sabeta* v *Commissioner General ZIMRA* 2012(1) ZLR 258(H) and *Chavunduka & Another* v *Commissioner of Police & another* 2000(1) ZLR 418(S)

In *casu*, the first respondent's excuses for failure to comply with instructions to execute for the second time was without good cause at all. It was a dereliction of duty. It is hard to fathom how the Sheriff interpreted rule 345 to mean that the property must be in the name of the judgment debtor for him to be able to sell it in execution. The rule merely provides that the sale is subject to the real rights of that third party. It is this interpretation that 2nd respondent clung on to the bitter end. I however did not hear 2nd respondent's legal practitioner to explain how rule 345 can be interpreted to mean that the sheriff cannot sale in execution an immovable property in a third party's name unless such property is first transferred to or registered in the judgement debtor's name. Counsel instead argued that the applicant must seek the sale of other properties of the 2nd respondent which are in her name. But surely the sheriff can only sell the property he has attached.as long as that attachment has not been challenged.

The question as to whether the applicant has established the requirements for an order compelling the sheriff to sale in execution is not a difficulty one at all. It is common cause that the judgment applicant obtained is extant. The debt has not been liquidated and the sheriff is in possession of a valid writ of execution. Further the attachment has not been challenged. The only challenge had been on the appropriateness of the first sale without the consent of the third party in whose name the property is registered. The Sheriff as a public officer is enjoined to execute court orders and in *casu*, to sell the attached property. Any failure to carry out his mandate will result in applicant suffering prejudice which prejudice cannot be remedied in any other way that would ensure that the debt is liquidated.

The applicant asked for costs on a legal practitioner and client scale. Counsel argued that an examination of 2nd respondent's opposing affidavit shows clearly that she had no basis to oppose the application. The opposing affidavit does not contain any meaningful denials of the events as narrated by applicant. The 2nd respondent did not deny that the reason for the setting aside of the first sale was due to failure to notify and obtain consent of 3rd respondent. She did not deny that 3rd respondent has now been notified and has indicated that it has no interest in the property save to pass transfer to 2nd respondent. In the light of the above 2nd respondent's opposition was not bona fide but simply intended to delay the execution to the prejudice of the applicant.

Another aspect that made 2nd respondent's opposition unmeritable is the fact that the 3rd respondent, in whose name the property is registered, was cited as party and opted not to oppose the application. The 3rd respondent no longer had any interest in the property hence was not opposed to the first respondent being ordered to sell the property.

The 2nd respondent's counsel had no clear response to the issue of costs save to insist that the application be dismissed on technical grounds. In my view counsel missed the point. This was a clear case of seeking to compel the Sheriff to do that which the law says it is his duty to do and not to hide behind an untenable interpretation of rule 345. The legal impediments the Sheriff had acceded to earlier have been overcome and the third party had been cited as party. This all served to show that there was no longer any impediment to the Sheriff proceeding with the sale in execution.

In my view, the second respondent had no basis to oppose the application. She simply intended to harass and harangue the applicant for her own selfish reasons. In the circumstances costs on a legal practitioner and client scale are justified.

Accordingly the application is hereby granted as follows:

It is hereby ordered that:

1. The first respondent is hereby ordered to sell in execution Stand 7287 Salisbury Township, also known as number 3 Kenilworth Avenue, Belvedere, Harare, held under Deed of Transfer 5285/2011.
2. The first respondent is hereby directed to conduct another sale in execution in terms of the rules of this court in relation to the above cited property which is under judicial attachment.
3. The 2nd respondent shall pay costs of this application on the legal practitioner and client scale.

Mahuni Gidiri Law Chambers, applicant's legal practitioners
Mafume Law Chambers, 2nd respondent's legal practitioners