GLADYS DEKWE
versus
ECOBANK ZIMBABWE LIMITED
and
UNTU CAPITAL LIMITED
and
BERN WIN DEVELOPMENT COMPANY
and
SHERIFF OF ZIMBABWE N.O
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 22 March, 4, 5, 9, 11 May 2022.

K. Siyeba, for the applicant
S. Musapatika, for the 1st respondent
R. Chatezera, for the 2nd respondent

Opposed Application

CHIRAWU-MUGOMBA J: The applicant filed what she termed a court application to set aside confirmation of a sale in execution under common law on the 5th of July 2021. The founding affidavit was deposed to by Walter Bherebende, her then legal practitioner. The background to the application is as follows. Applicant purchased a property commonly known as certain piece of land situate in the district of Salisbury called stand 260 Chadcombe Township of Stand 143 Chadcombe Township 2 measuring 1833 square metres (the property) on the 24th of April 2002. The agreement was between the applicant and the third respondent. The applicant paid the purchase price in full. On the 23rd of April 2014, the third respondent issued summons against the applicant seeking an order cancelling the agreement of sale for the property on the basis that the purchase price had not been paid in full. Default judgment was entered against the applicant under case number HC 311/14. The applicant after obtaining an order condoning late filing of the application for rescission of judgment in HC 4219/15, then filed an application for rescission of judgment under case number HC 12513/16. The applicant and the third respondent by way of a deed of settlement signed a consent to the rescission of judgment on the 11th of September 2017. However, whilst the

applicant was pursuing the application for rescission of judgment, the third respondent obtained a mortgage over the property from the first respondent in April 2017. The third respondent defaulted on the mortgage which led the first respondent to obtain an order against it. The property was subsequently sold to the second respondent through a Sheriff's sale in terms of the laws of Zimbabwe governing such sales. The applicant objected to the sale through the fourth respondent. The applicant undertook to pay the judgment debt on behalf of the third respondent. The fourth respondent gave her a specific time frame within which to make the payment. She however delayed by 5 days but eventually made the payment. By that time however, the sale had been confirmed.

The applicant also pursued to no avail, a court application to have the sale set aside in terms of R359 (8) of the High Court Rules of 1971. The property has now been transferred to a third party, the second respondent.

The applicant thus seeks the following order.

1. That the sale by public auction of a property commonly known as Stand number 2860 Chadcombe, measuring 1837 square metres, Harare to the second respondent and confirmed by the fourth respondent on the 20th of February 2019 be and is hereby set aside.
2. The Deed of Transfer number 3317/2019 made in favour of the second respondent be and is hereby nullified.
3. The applicant be and is hereby declared the lawful owner of a property commonly known as Stand number 2860 Chadcombe, measuring 1837 square metres, Harare.
4. The fourth respondent be and is hereby ordered to sign all the necessary documents on behalf of the third respondent to ensure the transfer of the property commonly known as Stand number 2860 Chadcombe, measuring 1837 square metres, Harare.
5. The third respondent to pay costs of suit on a higher scale.

The first respondent opposed the application as follows. In *limine,* the first respondent contended that the application being one for review was filed out of time with no condonation having been sought. The deponent to the founding affidavit being the applicant's legal practitioner had no authority to depose to the founding affidavit. There was material non-disclosure in that the applicant did not disclose that ownership of the property was disposed of through HC 2495/18. In that matter, which was an interpleader application, the court had dismissed the applicant's claim. That order was still extant. The applicant cannot seek a

declaratory order of an extant court order. The applicant had also made false averments in its application. On the merits, the application cannot be one for setting aside confirmation of a sale in execution but for setting aside a sale in execution. The applicant acquired only personal rights which can only be enforced against the third respondent. The applicant failed to comply with the agreed condition by the Sheriff to pay $15 000 on or before the 20th of February 2019 and it was greed that in the event of a default, the Sheriff would confirm the sale. The allegations of double payment are unfounded because the money paid by the applicant which was insufficient was tendered back by the first respondent's legal practitioners. The applicant has made numerous applications before the court in relation to the sale of the property but to no avail. There is no irregularity, fraud or bad faith on the part of the Sheriff as alleged by the applicant.

The second respondent also opposed the application. It raised *in limine,* the following. The application was filed out of time it being one for review. The sale was confirmed by the Sheriff on the 27th of February 2019 and the applicant had 8 weeks within which to file its application. There is material non-disclosure given that the applicant was unsuccessful in interpleader proceedings which were commenced at her behest. The applicant has failed to explain why she did not seek transfer since 2002.

Whilst the application could have been pleaded in a much more succinct manner, what emerges is that it is one under the common law for the setting aside of a sale in execution and not one in terms of the rules of the High Court. The points *in limine* raised by the first and second respondents therefore fall away except for the issue of authority of the legal practitioner to depose to the affidavit which was abandoned at the hearing.

The three positions that obtain to a sale in execution were eloquently enunciated by MAKARAU J (as she then was) in, *Chiwanza* vs *Matanda and others*, 2004(2) ZLR 200, as follows:-

> "The issue of how to approach this court to set aside a sale in execution has been before these courts in a number of cases. It would appear to me that three distinct positions obtain.
> The first position is specifically provided for in the rules of this court. R359 provides that any person who has an interest in the sale of a property in execution may approach the Sheriff to have the sale set aside on grounds specified in the rule. The approach to the Sheriff must be made before the sale is confirmed. Any person aggrieved by the decision of the Sheriff may within one month, approach this court to have such a decision set aside.
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> The above procedure has been legislated to replace the old procedure where the first port of call for anyone with an interest in the sale would be this court. Thus, in terms of the rules, before a sale in execution is confirmed, any interested party may approach the Sheriff to have set aside a sale in execution on any good ground as provided for in the rules.

> 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. I do not read the amendment to the rules to be ousting the general jurisdiction of this court to bring under scrutiny the decisions of the Sheriff as quasi- judicial officer. It is my considered view that the effect of the amendment to the rules was to introduce a further procedure of granting the Sheriff power to review his own decisions without necessarily taking away the vested right of interested parties at common law to approach this court for the exercise of its general and inherent review powers. The approach to this court after a sale in execution has been confirmed and in the absence of a prior approach to the Sheriff in terms of the rules is in my view to be based on the general grounds of review as provided for at common law. These would include such considerations as gross unreasonableness, bias and procedural irregularities but cannot include such grounds as an unreasonably low price or that the sale was not properly conducted as provided for under the rules unless such can be subsumed in the recognised grounds of review at common law. It is my further view that this, which presents itself to me as the second approach, only obtains after confirmation of the sale but before transfer is affected to the purchaser.
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> After a sale has not only been confirmed but transfer of the property has been affected to a third party, interested parties may still approach this court at common law for the sale and transfer to be set aside. It further appears to me that an approach at this stage, after the property has been transferred to a third party, cannot be sustained on alleged violations of the rules of this court nor on the general grounds of review at common law but only on the equitable considerations aptly summarized by Gubbay C.J. (as he then was) in *Mapedzamombe* v *Commercial Bank of Zimbabwe and Another* 1996 (1) ZLR 257 (S) when at 260D he said:
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> "Before a sale is confirmed in terms of r360, 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 rule 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 r359 for it to do so. See *Naran* v *Midlands Chemical Industries (Private) limited* S 220/91 (not reported) at p6-7. 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.
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> 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."

In casu, it is common cause that the applicant approached the court after the property had been transferred to the second respondent. As in the *Chiwanza* matter above, the application cannot be in terms of the rules including the interpleader proceedings or review as contended by the first and second respondents. The decision of the Sheriff was infact in favour of the applicant as she was given 15 days to pay the amount of $15 000.

From the *Mapedzamombe decision* cited in the *Chiwanza* matter, what can be gleaned is that under common law, one has to invoke the grounds of bad faith, knowledge of prior irregularities in the sale in execution or fraud. What is also apparent is that common law grounds must be narrowly construed lest a dangerous precedent is set. Courts are loath to set aside sales where transfer has already been affected- see *Garati* vs *Mudzingwa and ors,* 2008(2) ZLR 88.

The applicant relies on the following facts that fall outside of the purview of a review or the rules. That whilst applicant was pursuing an application for rescission of judgment, the third respondent fraudulently disposed of the property by registration of a mortgage bond in favour of the first respondent. The third respondent went further and entered into a deed of settlement with the applicant well knowing that there was a mortgage bond registered against the property. Further that the amount of the bond that the third respondent defaulted in paying was almost the same amount that third respondent was claiming. That the third respondent obtained the mortgage bond with the intention to default such that there would be foreclosure proceedings. The applicant further contended that the first and the second respondents were represented by the same legal practitioners and hence there was knowledge of the dispute over the property. The first and second respondents' conduct shows that they acted in bad faith.

Not surprisingly, the third respondent did not oppose the matter. A reading of the first and second respondents' opposing affidavits shows that they did not specifically deny that the property was bonded whilst an application for rescission was pending. There was also no denial that the amount that the third respondent defaulted in paying was the same as that which they had pursued against the applicant. The inescapable conclusion is that the third respondent acted in bad faith. There was also no denial of the fact that the legal practitioners representing the first and the second respondents was one and the same. I note that the grounds raised by the first and second respondents are applicable to the challenging of a sale in execution in terms of the rules which is not applicable if the challenge is under common law grounds. The first and second respondents thus were aware of the irregularities. The only issue that remained after the Sheriff gave the applicant a time frame within which to pay was whether or not the applicant would abide by that time frame.

Whilst courts are reluctant to set aside sales in which transfer has been affected, in my view this case is an exception. The applicant has succeeded under common law grounds to support the setting aside of the sale.

Costs in this matter follow the cause. I however do not perceive of any justification for an award of costs on the higher scale. Accordingly, costs should be in the ordinary scale.

DISPOSITION

1. The application be and is hereby granted.
2. The first and second respondents shall pay the costs jointly and severally one paying the other to be absolved.

Mbidzo Muchadehama, applicant's legal practitioners
Danziger and partners, first and second respondents' legal practitioners