REPORTABLE (83)

THABANI NDLOVU
v
(1) CENTRAL AFRICA BUILDING SOCIETY (2) OBEY MAHWEKWE (3) SHERIFF OF HIGH COURT

SUPREME COURT OF ZIMBABWE
HARARE: 4 MAY 2023

S. Siziba, for the applicant
No appearance for the first respondent
Ms. *S. Ngwenya,* for the second respondent
No appearance for the third respondent

IN CHAMBERS

MAVANGIRA JA:

1. This is a chamber application for condonation and extension of time within which to file a notice of appeal against part of the judgment of the High Court of Zimbabwe sitting at Bulawayo, being Judgment No. HB 39/20, handed down on 27 February 2020.

2. The order sought by the applicant reads as follows:

> "1. The application for condonation of non-compliance with rules 37 (10 (a) and (e), 38 (1) (a), 38 (2) and 44 (1) of the Supreme Court Rules, 2018 is hereby granted.
>
> 2. The application for extension of time within which to file and serve a notice of appeal in terms of the rules be and is hereby granted.

3. The notice of appeal shall be deemed to have been filed on the date of this order.
4. The respondents shall pay the costs of suit only if they oppose this application."

FACTUAL BACKGROUND

3. Sometime in 2019 the applicant filed an application in the court *a quo* in terms of rule 359 (8) of the High Court Rules, 1971 wherein he sought the setting aside of the third respondent's confirmation of a sale of his immovable property in execution of a judgment debt that he owed to the first respondent. The application was dismissed. Dissatisfied by the decision of the court *a quo*, the applicant filed a notice of appeal under SCB 29/20. However, the notice of appeal was fatally defective because there was no indication whether or not leave to appeal was necessary; the exact relief sought was not spelt out; the grounds of appeal were not clear and concise and the first respondent who had been a party to the original proceedings in the court *a quo* was not cited as a party in the notice of appeal.

4. Thereafter the applicant approached this Court under SCB 98/20 seeking condonation and extension of time within which to note a fresh appeal. The application was granted by consent on 23 October 2020 and in terms of the consent order, the applicant was to file his notice of appeal within 48 hours of the same. The applicant averred that the order in that case was only issued by the registrar on 26 October 2020, way after the lapse of the 48 hour period. Notably, the applicant's counsel in his supporting affidavit to this application however accepts that the notice of appeal that was filed subsequent to the order by consent was fatally defective anyway. Thus, the delay by the registrar in the issuance of the order, in essence, did not occasion any real prejudice to the applicant.

5. The consent order also provided in para 4 that "(T)he inspected record of trial proceedings shall stand and the first respondent is directed to file heads of argument within 10 days of the settling of security." On this aspect, the applicant pointed out that the said record had been prepared under SCB29/20 and was therefore attached to that record.

6. On 27 October 2020, pursuant to the consent order under SCB98/20, the applicant filed a fresh appeal under SCB 104/20 and the appeal was set down for hearing on 19 November 2020. At the hearing of the appeal, the applicant (then as appellant) sought to base and argue his appeal on the record as prepared and attached to the appeal filed under SCB 29/20. However, the court was not in possession of the said record as it was attached to the appeal record under SCB29/20 and not to the appeal record under SCB104/20. The appeal was thus on 18 November, 2020 struck off the roll by consent, with the registrar of this Court being ordered to set the matter down for hearing at the next earliest possible date. Apparently, there was inaction on the part of both the applicant and the registrar resulting in the matter not being set down in accordance with the consent order.

7. On 21 December 2020, the applicant filed notices of withdrawal for the appeals filed under SCB29/20 and SCB104/20. The applicant's counsel concedes in his supporting affidavit that both notices of appeal did not comply with the peremptory requirements of the rules.

8. Critically, the applicant sought to revive the matter and approached the registrar a year after the order in SCB 104/20 had been made. The applicant avers in his founding affidavit that he was advised that he was out of time. He has thus once again approached

this Court by way of this instant application, seeking condonation and extension of time within which to file and serve a notice of appeal.

APPLICANT'S ORAL SUBMISSIONS BEFORE THE COURT

9. Mr *Siziba*, for the applicant submitted that the application was opposed only by the second respondent who was the purchaser of the property in dispute. In motivating the application, he submitted that the extent of delay was not inordinate as the application had been filed 10 months after the judgment sought to be appealed against had been handed down. He averred that although there were attempts to file notices of appeal by the appellant's erstwhile legal practitioners, the notices were fatally defective. He also submitted that an attempt to rectify the fatally defective notice of appeal in October 2020 by the applicant's erstwhile legal practitioners was of no moment as the defects in the earlier notice remained unattended. Furthermore, that the delay had been occasioned by the procedural irregularities committed by the applicant's erstwhile legal practitioners.

10. In addressing the court on the prospects of success, Mr *Siziba* submitted that there were two issues that stood to be determined. He submitted that the first was the issue of the unpaid outstanding purchase price. He submitted that the receipt issued was for the sum of $300 000 out of the sum of $310 000, hence $10 000 was not paid. He submitted that the court *a quo* did not address the issue of the unpaid balance. Counsel submitted that this pointed to non-compliance with the terms of the sale by the second respondent and hence vitiated the sale in execution.

11. Counsel further submitted that the court *a quo* erred in failing to consider the unsworn evaluation reports presented before it by the applicant. He averred that the valuation

reports were proof that the purchase price was unreasonably low. He also submitted that it was incumbent upon the court *a quo* to have considered the important issue as to whether the purchase price of $310 000 was unreasonably low considering the market forces and economic conditions prevailing at that particular time as well as the description of the property. Counsel argued that the court ought to have exercised its review powers in this instance.

SECOND RESPONDENT'S ORAL SUBMISSIONS BEFORE THE COURT

12. Ms *Ngwenya*, for the second respondent, submitted that the application fell short of the requirements that have to be satisfied for it to be granted and that it ought to be dismissed. In supporting this submission, counsel contended, *inter alia*, that the applicant had not tendered any explanation as to why it took him three months to act on his current legal practitioners' advice since their assumption of agency on 24 September 2020 with this application only being filed on 21 December 2020. She also submitted that, in addition, there had already been an earlier period of delay by the applicant under the watch of his erstwhile legal practitioners. This was for the period spanning from 27 February 2020 to the assumption of agency by the current legal practitioners, for which period no explanation was proffered by the applicant. She argued that the said delay, singly or cumulatively, was inordinate.

13. Counsel further highlighted that the second respondent opposed the application mostly because of the manner in which the applicant has prosecuted this matter and that he lacks seriousness and also because there are no prospects of success in the craved appeal. She pointed out that the order in terms of which the immovable property was sold, was obtained on 30 May, 2017. A public auction was conducted two years later, on 6 May, 2019. An objection to the sale was filed more than two months later, on 25

July, 2019. The Sherrif confirmed the sale. It was only after the confirmation of the sale that the applicant purported to pay the judgement debt, at which point the debt had already been extinguished by the sale of the property and the payment that had already been made to the judgment creditor. She averred that the judgment that is sought to be set aside is dated 27 February, 2020 and reiterated that the application for condonation and extension of time was only filed ten months later on 21 December 2020. In the judgment of 27 February 2020, the court *a quo* dismissed the applicant's application for the setting aside of the sale in execution of his immovable property. The instant application, having been filed almost ten months later on 21 December, 2020, was only being heard in May, 2023, cumulatively some twenty-eight months later. This was subsequent to an order dated 7 July 2021 when the hearing of the matter failed to take place. The order stated:

> "1. The matter be and is hereby removed from the roll with no order as to costs.
> 2. The Registrar is directed to re-set the matter down for hearing during the court's next session for such hearings in Bulawayo."

14. It was also counsel's submission that the explanation that the applicant was waiting on the registrar to set the matter down cannot avail the applicant because any vigilant litigant would have made follow ups with the registrar to ensure that the matter is allocated a hearing date. *In casu*, the applicant was not diligent. She further highlighted that because of the applicant's sluggish approach to the matter, this application was now being heard at a time when the amount of $310 000, being the purchase price involved, has now become a pittance. She argued that this application is more of a plea for charity or mercy and not for justice.

15. Counsel contended that the applicant has been wasting the court's time. This was so because the applicant's initial appeal under SC29/20 was not served on the second

respondent. Despite being alerted to this, the applicant did not respond to the correspondence and did not rectify the defect. Instead of responding to the letter alerting him of that particular defect, the applicant's erstwhile legal practitioners renounced agency two months later. Thereafter, the current legal practitioners assumed agency on 24 September 2020 and proceeded to file heads of argument without rectifying the defect raised by the second respondent.

16. Counsel reiterated that the delay by the applicant in prosecuting this matter was unreasonable and inexplicably long considering that the genesis was a sale in execution.

17. On the prospects of success, counsel submitted that the $310 000 was a value obtained in an open auction bidding process hence the purchase price could not be said to be unreasonably low. Ms *Ngwenya* further submitted that the applicant sought to challenge the purchase price on the basis of unsworn valuation reports which he had produced weeks after the auction. She also submitted that the argument that the purchase price was not paid in full was only raised in the answering affidavit and not the founding affidavit. Counsel stated that it is trite that an applicant's case stands or falls on his or her or its founding affidavit. She also submitted that the purchase price was paid in full and that the sale would not have been confirmed if the purchase price had not been paid in full.

ISSUE FOR DETERMINATION

Whether or not the requirements for granting condonation for late noting of an appeal and extension of time have been satisfied.

APPLICATION OF THE LAW TO THE FACTS

18. The law applicable to applications of this nature is settled. The requirements for this application were aptly captured by ZIYAMBI JA in the case of *Friendship v Cargo Carriers Ltd & Anor* SC 1/13 wherein she stated at p 4 of the judgment that:

> "Condonation is an indulgence which may be granted at the discretion of the court. It is not a right obtainable on demand. The applicant must satisfy the court/judge that there are compelling circumstances which would justify a finding in his favour. To that end, it is imperative that an applicant for condonation be candid and honest with the court.
>
> Certain criteria have been laid down for consideration by a court/judge in order to assist it in the exercise of its discretion. Among these are, the extent of the delay and the reasonableness of the explanation therefor, the prospects of success on appeal, the interest of the court in the finality of judgments and the prejudice to the party who is unable to execute his judgment. The list is not exhaustive."

19. In analyzing the extent of the delay, the judgment of the court which the applicant seeks to appeal against was handed down on 27 February 2020. This application was then filed on 21 December 2020. The applicant however failed or neglected to avail the reasons for the delay. The basic rule pertaining to applications is that a case stands or falls on the averments made in the founding affidavit and not upon subsequent pleadings. The principle was aptly set out in *Austerlands (Pvt) Ltd v Trade & Investment Bank Limited & Ors SC 92-05*. CHIDYAUSIKU CJ remarked at p 8 as follows:

> "The general rule that has been laid down in this regard is that an application stands or falls on the founding affidavit and the facts alleged in it. This is how it should be, because the founding affidavit informs the respondent of the case against the respondent that the respondent must meet. The founding affidavit sets out the facts which the respondent is called upon to affirm or deny."

20. The applicant having failed to outline the reasons for the delay, and after hearing submissions from counsel and perusing the papers filed by both parties, it is evident that the delay by the applicant was occasioned by his lack of vigilance. The registrar of this Court was by order dated 7 July, 2021, directed to set this application down for hearing during the court's next session for such hearings in Bulawayo. This was during

the era of paper files/records when the chamber applications from Bulawayo were specially set down for hearing in Bulawayo by a Judge of this Court, at least once every term.

21. The applicant, conceded that a follow up with, or a reminder to the registrar was necessary, given the period of time that transpired without the matter being set down. Despite such realization, he did not make a follow up with the registrar to have his application set down as directed by the court. With reference to the other notices of appeal filed before this Court, the applicant's counsel submitted that the delay was due to procedural issues occasioned by the applicant's erstwhile legal practitioner and hence the applicant could not be penalized. It is my considered view that this is clearly a case whereby the applicant and his legal practitioners of choice have taken a lackadaisical approach in prosecuting this matter.

22. Counsel for the applicant implored the court to grant the application because not doing so would amount to punishing him for the sins of his erstwhile legal practitioners. However, there is a limit beyond which a litigant cannot be exonerated from lack of compliance with the rules occasioned by the conduct of his legal practitioners of choice. The following remarks by STEYN CJ in *Saloojee & Anor, NNO v Minister of Community Development 1965 (2) SA 135 (A)*, apply herein with equal force:

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of failure to comply with a rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."

23. *In casu*, the applicant chose his legal practitioners. The applicant and his legal practitioners were not vigilant enough to have the appeal prosecuted. Matters ought not

to be continually revisited, neither should the court's time be wasted by litigants who are sluggard in the prosecution of their appeals. The warning sounded in *Ndebele v Ncube* 1992 [1] ZLR 288 (S) at p 290 C-E must be heeded with the seriousness with which it was made. It is not a toothless or hollow warning. McNALLY JA aptly stated:

> "It is the policy of the law that there should be finality in litigation. On the other hand one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute.
> The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt* – roughly translated, the law will help the vigilant but not the sluggard."

This observation and notice to litigants is as pertinent now, if not more so, as it was then.

24. Upon perusal of the papers filed in this matter, I am of the view that the applicant has failed to demonstrate that he has a reasonable explanation for the delay.

25. Moving on to the prospects of success, the applicant approached the court *a quo* with an application to set aside a sale in execution. The applicant was the owner of an immovable property namely stand number 131 Douglasdale Township 3 of Douglasdale ('the property') situate in the district of Bulawayo. The property was sold by the sheriff in execution for a sum of $310 000. The property was bought by the second respondent who paid the full purchase price and the sale in execution was confirmed.

26. The applicant averred that $310 000 was an unjust, inequitable and unreasonable price for the sheriff to have sold the property in question at. The applicant based this

contention on 2 valuation reports which put the open market value of the property at $566 387.50 and $480 578 respectively.

27. The court *a quo* found that the valuation reports had glaring errors as they were not sworn to. This affected their probative value especially after the second respondent had raised a red flag with regard to their propriety and authenticity. The court *a quo* relied on the case of *Zimunhu v Gwasi & Ors* SC 43/02 wherein this Court dismissed an appeal to set aside a sale in execution as the valuation report was not made under oath and did not show the qualifications of the person who had carried out the valuation. The court in that case concluded that the applicant had not made a case for the setting aside of the sale in execution and dismissed the application.

28. In my view, the decision of the court *a quo* cannot be faulted. What was before the court *a quo* was an application to set aside a sale in execution. The applicant produced valuation reports which fell short of the requirements of a valid valuation report. The reports were not sworn to. In coming to the conclusion that it did, the court also took into consideration the case of *Zimunhu (supra)* which clearly stated that an unsworn valuation report is invalid.

29. The sentiments expressed in *Morfopoulos v ZIMBANK* 1996 (1) ZLR 626 (H) at 634D as correctly relied on by the court *a quo* equally apply herein. The following was stated in that case:

> "All too frequently, however, the debtor finds himself in an invidious position relating to the loss of his home precisely because of his own failure to address the problem efficiently at an early stage. Where his own tardiness or evasion has contributed to his problems, a debtor cannot hope to persuade the court that equitable relief is due."

30. In similar vein, the following was stated in *Maparanyanga v Sheriff of the High Court & Ors* SC 132/02:

> "The issue of the sale in execution needs to be managed by the court or otherwise judicial sales will lose credence and when they are held, intending participating buyers may shun such sales on the basis that the sale will remain indefinitely unconcluded because objections take forever to be dealt with and concluded by the objection procedures."

Similarly, in *Walezim Investments (Pvt) Ltd v The Sheriff of the High Court & 4 Ors* SC 44/21 at para 20, this Court stated:

> "It is trite that once a sale in execution has been confirmed, it can only be interfered with in limited circumstances. At common law, any person with an interest in a sale in execution, may apply to Court to have it set aside on good cause shown. However, courts are reluctant to set aside a sale which has been confirmed, more so where transfer of the immovable property has been effected. Authority for this proposition is found in *Morfopoulos v Zimbabwe Banking Corporation Ltd & Ors* 1996 (1) ZLR 626 (H). See also *Mapedzamombe v Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257 (S) at 260C-E."

31. Another important aspect that is also pertinent to this matter and is another pointer to the intended appeal's lack of prospects of success, is that a party who fails to raise objections during a judicial sale, cannot thereafter raise objections in an application to set aside the judicial sale. This has been enunciated in a number of authorities from this Court, including *Nyadindu & Anor v Barclays Bank of Zimbabwe Ltd & Ors* 2016 (1) ZLR 348 at 353F-H.

32. In the final analysis, the applicant has not shown that the court *a quo* grossly erred in coming to the conclusion that it did such as to warrant any interference by this Court. Besides being bedeviled by an inordinate delay for which no valid explanation has been tendered, the applicant has also failed to demonstrate that he has any prospects of success on appeal. The inaction by the registrar that has been referred to above would have availed the applicant, but only if he had been vigilant as well as conscientious in

the preparation and filing of papers before this Court. Unfortunately, for the applicant, the sins of his chosen legal practitioners have, in addition and in the circumstances of this matter, also to be visited on him. The application has no merit.

33. It is accordingly ordered as follows:

"The application be and is hereby dismissed with costs."

Ndlovu Mehluli and Partners, applicant's legal practitioners

Messrs Coghlan and Welsh, 2nd respondent's legal practitioners