DAVID CHIWEZA
and
KUMBULA CHIWEZA
versus
MUNYARADZI PAUL MANGWANA
and
PAULINE MANGWANA
and
COMMERCIAL BANK OF ZIMBABWE LIMITED
and
THE SHERIFF OF ZIMBABWE N.O.

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 15 October, 3 November 2020 & 17 February 2021

Opposed Applications –

1) **HC1952/20 - Dismissal of HC 694/20 for want of prosecution**
2) **HC694/20 – Setting aside of the Sheriff's confirmation of a sale in execution**
3) **HC10007/19 – Correction of an order granted in HC3113/17.**
4) **HC1689/20 – Condonation of late filing of application for review in HC694/20**

Mr *T L Mapuranga,* for applicants
Mr *G Madzoka,* for first and second respondent
Mr *T Batasara,* for third respondent

CHAREWA J: For purposes of this judgment, the parties shall be referred to as the applicants and respondents as cited in HC694/20, HC1689/20 and HC10007/19. I have made the decision to write an omnibus judgment in all four matters for the reason that the matters are interconnected and a decision in one affects or disposes of the others. Consequently I will dispose of the matters in the following order for reasons evident in the case summaries:

HC1952/20 - Dismissal of HC 694/20 for want of prosecution

First and second respondents seek dismissal of applicants' application for review for

want of prosecution in HC694/20. On 29 January 2020, applicants filed an application to set aside the sheriff's confirmation of a sale in execution of immovable property in terms of r359 (8) of the High Court Rules. First and second respondents filed a notice of opposition and opposing affidavits on 12 February 2020. Applicants did not, and to date, have not, filed any answering affidavits or heads of argument nor set the matter down for hearing. Consequently, on 17 March 2020, first and second respondents filed an application to dismiss HC694/20 for want of prosecution. Applicants admit that their application in HC 694/20 is not properly before the court having been filed out of time and without seeking condonation. Consequently, it could not possibly be timeously prosecuted.

HC694/20 – Application to set aside the sheriff's confirmation of a sale in execution of immovable property in terms of r359 (8) of the High Court Rules

Applicants having filed an application to set aside the sheriff's confirmation of a sale, and first and second respondents having opposed the same as being improper, the application remains unprosecuted as applicants have neither filed answering affidavits, heads of argument nor sought set the matter down.

HC10097/19 – Correction of an order granted in HC3113/17.

It is important to note that in HC1975/16 (which was another application for condonation by the applicants), they were given the opportunity to seek review of the sheriff's conduct of the sale in execution and to object to the confirmation of the sale within 10 days from 22 March 2017. This they did in HC3113/17, wherein, on 16 October 2019, applicants obtained an order in the following terms:

> "1. The 4th respondent's decision to declare the 1st and 2nd respondents as purchasers and the subsequent confirmation of the sale for stand 2157 Glen Lorne Township 30 of Lot 30 of Glen Lorne is hereby set aside.
>
> 2. The deed of transfer issued by the 5th respondent in favour of 1st and 2nd respondents for stand 2157 Glen Lorne Township 30 of Lot 30 of Glen Lorne held under deed of transfer number 2280/2016 be and is hereby cancelled and set aside.

3. The matter is remitted back to the 4th respondent and applicants are ordered to lodge their objections in terms of the rules from the date of their receipt of this order.

4. The 1st and 2nd respondents to pay costs of suit."

Note must also be made that this order is worded precisely in terms of the draft and as motivated in the founding affidavit. However, applicants seek its correction in terms of r449 on the grounds that the order is ambiguous.

HC1689/20 – Condonation of late filing of application to set aside the sheriff's confirmation of a sale in execution in HC694/20

On 5 March 2020, fully three weeks after having been served with a notice of opposition in HC 694/20, pointing out that that application was improper as it was out of time and no condonation had been sought, applicants filed this application seeking condonation of their late filing of an application to set aside the sheriff's confirmation of a sale in execution of immovable property. The explanation for the delay is that applicants laboured under a mistake of law in calculating the time within which to file the application and where therefore late by two days. No explanation is advanced as to the three week delay in seeking condonation after applicants became aware of their mistake of law on 13 February 2020.

Background

These applications are predicated on a sheriff's sale in execution which was confirmed on 23 November 2015. The third respondent obtained judgment against the applicants on a debt and proceeded to attach the applicant's property which was sold in execution. It is undisputed that the proceeds of the sale did not discharge the applicants' indebtedness. The first and second respondents were declared the successful bidders in the sheriff's sale by private treaty to which all the parties consented. Transfer has already been effected to first and second respondent. The sale remains extant as no application to set aside the sale has been made. By order of this court in HC1975/16 and HC3113/17, applicants have only been accorded to opportunity to file objections to the confirmation of the sale.

Analysis

HC1952/20 and HC694/20.

It is trite that an application stands or falls on its founding papers. Where an application is made without due regard to the procedural requirements as to time limits, and no application for condonation has been made, such an application is improperly before the court and is a non-event. The impropriety cannot be cured by a subsequent application for condonation because, at the time that the improper application is made, it is not valid. A dead horse cannot be brought to life by the introduction into its paddock, of a live horse.

It is precisely for these reasons that the applicants could not properly prosecute their application filed of record under HC694/2020. It was dead in the water. At paragraph 2 of their heads of argument, applicants admit the same when they state:

> "It is common cause that application under HC694/2020 which the applicant seeks to be dismissed for purported want of prosecution is currently not properly before the court as it stands it having been filed out of time. There is therefore nothing currently before the court for 1st and 2nd respondent to prosecute".

In the circumstances, the prudent course would have been for the applicants to withdraw the application and seek condonation. The end result is that the applicants have not prosecuted the application which makes it ripe for dismissal, because even though it is a non-event, it is still pending. As has been noted in the case summary, the notice of opposition was on 13 February 2020. As of to date, no answering affidavit or heads of argument have been filed. Nor has any set down been requested.

It is further trite that in an application for dismissal for want of prosecution, the court must consider three requirements:

1. The conduct of the respondent
2. The explanation for a party's delay in prosecuting its case; and
3. The interests of justice.

I must note that the conduct of the applicants in this matter is so inept as to be deplorable as it does not promote finality in litigation and may in fact amount to an abuse of court. As I

have already stated in the case summaries, applicants, after duly seeking condonation, have already applied for review of the sheriff's confirmation proceedings and obtained an order from this court in their favour in HC3113/17. The matter having been remitted back to fourth respondent, and he, on 27 December 2019, having once again confirmed the sale, the applicants once again seek review of these confirmation proceedings in HC694/20. And also once again, the applicants seek review out of time, and to make it worse, without seeking condonation. And having been notified that their application is out of time and they have not sought condonation, they sat back for three weeks before making such application for condonation. In the meantime, they admit that their application in HC694/20 is a non-event and yet do not seek to withdraw it.

To make matters worse, the only explanation for the delay in prosecuting the matter in HC694/2020 is that it is an improper application which is a non-event, and that they have filed an application for condonation. That begs the question: how does one seek condonation for a non-event? And if it is a non-event, then why are applicants keeping it on the books of the registry?

Clearly, having failed to timeously set a matter down for hearing, the onus is on the applicants to give a reasonable explanation why it should not be dismissed.[1] The explanation by applicants is not reasonable. They should have consented to the dismissal given that they accept that there is "nothing before the court" for them to prosecute.

The purpose behind applications for dismissal for want of prosecution is to aid the interests of justice: that there should be expedient finality to litigation. It seems to me that the multiplicity of applications by the applicants in this matter since the first confirmation of the sale in execution in 2015, and the frequent procedural blunders the applicants commit and subsequently seek condonation for, are aimed at frustrating finality in this matter. It is pertinent to note that out of the eight applications I have identified since third respondent obtained

[1] *Scotfin v Mtetwa* 2001(1) ZLR 249

judgment in HC9274/13, applicants have filed six of them of which three have been applications for condonation. It is time the court puts its foot down and insist on timeous and procedural prosecution in this matter so as to preserve the efficacy of sheriff's sales in execution.

In the circumstances, I cannot but find in favour of the respondents that HC694/2020 having been filed out of time, without condonation having been sought, and consequently leading to non-timeous prosecution, should be dismissed.

HC10007/19

Applicants claim that there is an ambiguity in the order they sought in HC3113/17 after having sought condonation in HC 1975/16. The founding affidavit in HC1975/16 is unequivocal. Paragraph 9 of the founding affidavit n HC 1975/16 states:

> "This is an application for late noting of an application for review of the decision of the 4th Respondent handed down on the 23rd of November 2015, under case number SS96/15 to confirm the sale by private treaty (my emphasis) in respect of the applicants' immovable property being number 2157 Glen Lorne Township, 30 Glen Lorne Estate in the District of Salisbury (hereinafter the property)."

In line with HC1975/16, the notice of application in HC3113/17 is also quite clear that

> "……the Applicants herein intend to seek a review of the 4th respondent to declare and confirm the sale, (my emphasis) be set aside (*sic*) on the following grounds:
>
> 1. Gross irregularity in the proceedings leading to the decision to declare highest purchaser, confirmation and the decision itself (*sic*).
> 2. Irrationality and unreasonableness in that the Sheriff arrived at a decision so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it, when he confirmed and accepted the final price at which property was sold, which price was unreasonably low given the value of the property."

In addition, paragraph 19 and 20 of the founding affidavit in HC3113/17 reveals that applicants' complaint is that they were never notified that first and second respondents were

declared the highest bidder nor given an opportunity to object to the subsequent confirmation of the sale. There was thus no application to set aside the sale in execution before the judge in HC3113/17. The consequent draft order sought and the order obtained has already been reproduced at page 2-3 of this judgment.

It is thus evident that applicants obtained precisely the order they sought. There is thus no ambiguity or error. The relief they now seek in "correcting" that order was therefore never motivated before the court. It is not the function of this court, nor is it the purpose r449, for a party who makes an error in their claim and relief sought, to revisit their case and seek an order different from what is supported by their application. This court having granted applicants what they sought, is now *functus* and cannot reprise their application or relief.

It cannot even remotely be alleged that the order is capable of several interpretations for it to be ambiguous.[2] Further, it cannot, either, be postulated that such ambiguity is attributable to the court.[3] This is because the order, particularly paragraph 1, addressed the applicants' complaint and as prayed for: that the matter should revert to the situation prevailing at the conclusion of the sale to enable the applicants to file objections thereto.

Neither in the application for condonation in HC1975/16, nor in HC3113/17 did applicants seek the setting aside of the sale in execution. What they sought is what they were granted: the setting aside of the declaration of the purchasers and their confirmation as the highest bidders and transfer (which is a consequence of confirmation). *Ergo*, the sale remains extant, hence the relief applicants sought and were granted: that they be accorded the opportunity to object to its confirmation.

It seems to me that this application is evidence of clear ineptness of the applicants and their legal practitioners in protecting their rights, which lack of diligence they now want the

[2] *Ignatius Masamba v Judicial Service Commission & Anor* HH283/17.
[3] See *Herbstein and Van Winsen: the Civil Practice of the High Courts of South Africa, 5th Edition* at p934.

court to whitewash in a clear abuse of court process. Applicants ought to know the proper procedure to follow when they have made an error in their claim and seek redress.

In the premises I find that the order of the court is clearly what applicants wanted: that they be put back into the position they would have been had they received the Sheriff's invitation to object to the declaration of the purchasers as the highest bidders and consequently, the confirmation of the sale.

HC 1689/20

Applicants aver that the late filing of their application to set aside the confirmation of the sheriff's sale in HC694/20 is reasonably explained by the fact that their legal practitioners misinterpreted the provisions of r359 (8) to mean that they had thirty working days to do so. I do not find such an explanation to be reasonably justifiable or rational and is in fact an insult to the intelligence of the court. It does not deserve condonation.[4] Any legal practitioner worth his salt knows that the cardinal rule of interpretation is that words are given their ordinary meaning. A calendar month can never ordinarily mean thirty working days. Applicants' legal practitioners were simply inept. And being applicants' agents, such ineptness is ordinarily arrogated to applicants. [5]

Clearly, two days delay is not inordinate, and in the normal course of events and on reasonable grounds, I would have been inclined to condone it. Unfortunately, I have already found that HC694/20 must be dismissed for want of prosecution, in circumstances where applicants concede that it is not prosecutable and is a non-event. Certainly one cannot approbate and reprobate. If HC694/20 is not prosecutable as a non-event, then what is the purpose of condoning its late filing? Thus, by this admission, applicants no longer have any *causa* for this application for condonation.

[4] *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 @ 211E-F. See also *V Saitis & Co (Pvt) Ltd v Fenlake (Pvt) Ltd* 2002 (1) ZLR 378 @381
[5] *Saloojee & Anor NNO v Minister of Community Development* 1965 (2) SA 135 (A) @ 141

As to prospects of success in HC694/20, it seems to me that applicants are also on the wrong tack. I have found the order in HC3113/20 to be unambiguous, and in consonant with applicants own application and draft order. The proceedings before the sheriff as determined on 27 December 2019 are therefore not a nullity as HC3113/17 never set aside the sale in execution because the court was never prayed to do so. In addition, that order is and remains extant until set aside on review or appeal.[6] I see no prospect of that happening considering that applicants voluntarily sought that order and willingly approached the fourth respondent in fulfilment thereof.

I set no stock on the applicants' submission regarding fourth respondent's reliance on his own valuation to determine the forced sale value or that such act was wrongful. R351 entitles the fourth respondent to obtain a valuation for his guidance. The rules do not oblige him to share that valuation with anyone. In his decision, the sheriff acknowledges that he had two valuation reports from the litigants, the veracity of which he did not and was not obliged to accept. In particular, applicant's valuation report was a theoretical and unsworn document of no probative value. Besides, it is trite that the best indicator for a forced sale value is the price offered at the open competition at the auction of the property being sold in execution.[7]

Neither is the payment of a judgment debt in full after a sale in execution has been confirmed pertinent. In any event, it is not true that the judgment debt has been paid in full. The applicants concede that the judgment debt remains outstanding. Their assertions to the contrary before fourth respondent and in both this application and HC694/20 reveals a heinous lack of probity and honesty which is intended to influence the decision of the court in their favour.

The fourth respondent's sales in execution must be protected in order to preserve their efficacy. It is only where the fourth respondent has misdirected himself in fact and in law, and has otherwise acted irrationally or unreasonably such that there are prospects of success on

[6] *Manning v Manning* 1986 (2) ZLR 1 (SC)@3G-4A
[7] See *Lallla v Bhura* 1973 (2) ZLR 280. See also *Zvirawa v Makoni & Anor* 1988 (2) ZLR 15 @ 18E

review that his decisions must be interfered with.[8] *In casu*, fourth respondent acted in terms of a court order sought by applicants; called for applicants to file their objections to the declaration of first and second respondent as purchasers; considered the objections and confirmed the sale. His conduct cannot be faulted.

In the premises, I cannot find that any application to condone the late filing of an application for review of the confirmation of the sale, either in HC694/20 (which in any case, already stands dismissed) or any other application is merited.

In passing, it appears that applicants have perfected the art of not complying with the rules and making applications for condonation. In HC1975/16, the court had occasion to comment that the applicants' explanation for the delay was unreasonable, but decided to exercise its discretion in their favour so as not to punish them for their legal practitioners' sins. In HC6245/20, the applicants were saved by respondents' consent to upliftment of bar and condonation for late filing of notice of opposition in HC1952/20. Here too, applicants' legal practitioners conveniently misinterpret the time limits within which HC694/20 ought to have been filed and seek condonation. And despite becoming aware of the infraction of the rules on 13 February 2020, they waited until 5 March 2020 to file this application, and no reasonable explanation is proffered for this delay in seeking condonation. Likewise HC10007/19 is basically asking the court to condone applicants and/or their legal practitioners' ineptness in articulating their claim. Interestingly, the applicants have persistently used the same legal practitioners, who routinely commit errors of law and procedure, since 2013.

I also note that applicants filed their answering affidavits after receipt of respondent's heads of argument. That answering affidavit is therefore improperly before the court.[9] And having been served with respondent's heads of argument on 14 May 2020, applicants only filed their heads of argument on 7 July 2020, way out of time. Thus while seeking condonation,

[8] *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (SC) @670
[9] *Magurenje v Maposa* 2005 (2) ZLR 44. See also *Turner & Sons v The Master* HH498/15.

applicants continue to wantonly breach the rules!! Consequently, this is a case where I am not inclined to exercise my discretion not to visit the sins of the legal practitioners on their clients.

Costs

First and second respondent have sought an order for costs on the higher scale on the basis that applicants are abusing court process by engaging in futile litigation exercises aimed at frustrating a sheriff's sale in execution. I have already commented on applicants' lack of probity and honesty. I have also made my views clear on the applicants' wanton disregard for the rules. In the premises, I must agree with first and second respondents that this is a matter where an order for costs on the higher scale is called for.

Disposition

In the premises it be and is hereby ordered that:

1. The first and second respondents' application in HC 1952/20 for dismissal of HC694/20 for want of prosecution is granted.
2. The applicants application in HC694/20 to set aside the confirmation of the sheriff's sale in execution of immovable property in terms of r359 (8) of the High Court Rules is dismissed for want of prosecution.
3. The applicants' application in HC10007/19 for correction of an order of this court granted in HC3113/17 is dismissed.
4. The applicants' application in HC 1689/20 for condonation of late filing of an application to set aside the sheriff's confirmation of a sale in execution in HC694/20 is dismissed.
5. The applicants shall pay first and second respondents' costs of suit on the scale of legal practitioner and client.

Messrs Chambati & Mataka, applicant's legal practitioners
Messrs Mangwana & Partners, first and second respondents' legal practitioners