EULA CHIMANIKIRE
Versus
DOVES FUNERAL ASSURANCE (PVT) LTD
And
SHERIFF OF THE HIGH COURT
And
DELTA BEVERAGES (PVT) LTD

HIGH COURT OF ZIMBABWE
HARARE 10 & 12 OCTOBER 2022
CHILIMBE J

V.*Masaiti* -for applicant
L.T. *Musekiwa*-for first respondent
No appearance for second and third respondent.

Opposed application

CHILIMBE J

BACKGROUND

[1] At the base of a multi-layered series of interloculocutory applications lies the quest by applicant to set aside a confirmed judicial sale in execution. The subject of that sale is her former matrimonial home, a property in which she claims (and seeks to rescue) a 50% undivided share. The property was attached and sold in 2015, and eventually transferred to first respondent in 2019. In that regard, applicant approached this court seeking leave to file out of time, an objection to the confirmation of that sale by second respondent. That application was opposed by first respondent who later moved the court to dismiss it for want of prosecution.

[2] This application for dismissal was granted in default of appearance by applicant. Applicant made an attempt to get this judgment rescinded but that effort floundered. The application was deemed fatally defective and had to be withdrawn. The present application is a second attempt which has been opposed on the basis that (a) it was filed after an unjustifiably inordinate delay, (b) enjoys no prospect of success in the underlying matter. (c) amounts to an abuse of process and (d) is adverse to the administration of justice and need for finality to litigation. Applicant argued to the contrary.

EXPLANATION FOR THE DELAY

[3] Those heads raised by Mr. *Musekiwa* for first respondent encapsulate the key considerations which a party seeking the rescission of a court`s judgment must fulfil[1]. I must however, take a short diversion to comment briefly on a matter relating to the papers before the court. Recently[2] , I again felt compelled to remind and encourage litigants and legal practitioners to apply the basics of report writing when drawing up court papers. It should be the simplest of tasks for a party to identify, gather, process and then synthesise essential facts and evidence relevant to a dispute before packaging them as court applications in terms of the rules. This, especially so, in condonation applications (such as the present one) characterised by duplicity of matters, a contentious history and relevance of both to the resolution of such applications. It will not suffice for parties and counsel to present inconclusive accounts impaired by unexplained gaps and unanswered questions, then refer to the court`s right of recourse to its own records, citing among other authorities, *Mhungu v Mtindi* 1986 (2) ZLR 171.

[4] Even less desirable is the temptation by counsel to circumvent the inadequacy of fact or incoherence of a party`s tale, by including evidence in heads of argument or giving evidence from the bar. This being done under the guise of referring to "matters already before the courts whose contents are adopted as if specifically pleaded herein".

[5] In the present application and with respect, both sets of affidavit are bereft of the requisite detail and flow necessary to project the full historical picture. Despite such deficiency, the following account was eventually pieced together; -the matter commences with case number HC 7383/15 being the original suit by the judgment debtor which resulted in judicial attachment of the property in question. The case reference itself gives an indication of the age or origin of this dispute. Applicant filed the chamber application as HC 2249/19 referred to in [2] seeking condonation for failure to file an objection to confirmation of the stated sale.

[6] This chamber application was dismissed for want of prosecution on 30 September 2019 per DUBE J (as she then was). The founding affidavit in the present application has not set out grounds for failure to progress the chamber application. In *Guardforce Investments (Pvt) Ltd v Sibongile Ndlovu & 2 Ors* SC 24-16, CHIDYAUSIKU CJ held that a party served

[1] Both counsel cited Chiweza & Another v Mangwana & Ors (supra) which dealt with the requirements of condonation.

[2] *Humble Enterprises (Pvt) Ltd v The Trustees For The Time of Peter Manjengwa Family Trust & Anor HH 681-22*

with application for dismissal for non-prosecution ought to take such application as a trigger to galvanise into action.

[7] Moving away from the main application, applicant stated in her answering (not founding) affidavit that she became aware of the (30 September 2019 DUBE J) judgment in January 2020.The circumstances of how she gained knowledge of the judgment were not disclosed. What transpired though, is that she filed an application to rescind this judgment under HC 1954/20 in March 2020. To account for the delay between 30 September 2019 (or applying her reckoning-January 2020), and March 2020, applicant explained as follows in her founding affidavit; -

> "15. The judgment was handed down on 30th September 2019.I then filed the application for rescission on 17th March 2020.The application was supposed to have been filed 30 days after I became aware of the judgment. My application for rescission was therefore late by about one month in terms in HC 1954/20."

[8] But HC 1954 was ill-fated. It was withdrawn before ZHOU J on 10 November 2020 given the defects earlier referred to. The applicant then filed the present application on 20 May 2021.Her explanation for the non-activity between 10 November 2020 and May 2021 was the COVID 19 pandemic`s impact on normal court operations. First respondent disputed that these explanations from applicant amounted to a plausible account for the delay afflicting the matter.

THE PROSPECTS OF SUCCESS

[9] Mr. *Masaiti* for applicant, argued strenuously that applicant enjoyed significant prospects of success in the underlying application for leave to challenge the sale confirmation. His position was premised on second respondent`s claim that she was neither informed nor invited to file her objections to confirmation of the sale. In particular, her objection was based on the fact that the sale yielded an unreasonably low price.[3]Counsel cited the court`s remarks in *Chiweza & Anor v Mangwana* & 4 Ors HH 186-17.

> "The crucial question in an application to set aside a judicial sale is whether the sale was conducted in accordance with procedures and whether the sale is valid. The reviewing court will be required to determine if the sale challenged is invalid for the reason that the

[3] The alleged sale price realised, against the alleged market value of the property are figures that were not specified in the applicant`s papers but found their improper way into the record via counsel`s heads of argument.

> applicants were not invited to object to the sale and if the price fetched is unreasonable. If the answer is in the affirmative, the sale will be set aside on review. The law is that where the Sheriff has declared the highest bidder, he is required to invite objections to that declaration. He must also invite objections before he confirms the sale. Where the Sheriff fails to invite objections, such failure is fatal and renders the sale invalid. The rationale behind the requirement is that interested parties must be heard before the Sheriff decides to accept a bid and confirm a sale. A judgment debtor whose property is put up for sale by judicial hand is required to be advised of all stages of the sale. This empowers him to be able object to the sale proceedings. Where a judgment debtor is not advised of the sale proceedings, is unaware of the fact of a declaration of the highest bid and confirmation of a judicial sale, and in addition is not afforded an opportunity to object to a judicial sale, the resulting sale is irregular."

[10] When quizzed as to whether the passage of time did not favour applicant approaching the court for a review of second respondent`s handling of the sale, Mr. *Masaiti* argued that applicant was precluded from doing so before she raised the challenge to confirmation as set out in rule 359 (1) of the High Court Rules 1971.This presumably because r 359 (8) permits a party aggrieved by the sheriff`s decision following representations may approach a court for relief.

[11] Mr. *Musekiwa* on behalf of first respondent, argued to the contrary. He submitted that applicant did not enjoy any prospects of success in her endeavour to challenge a sale long confirmed and followed by transfer of title. The judgment creditor and debtor had long vacated the picture. A third party was now in ownership of the property. Whether applicant proceeded by way of review, or through her current attempts in terms of the rules governing execution, the inordinate delay in prosecuting her claim would operate against her. It was further submitted that this very aspect of delay illustrated the handicap faced by applicant at every stage of the analysis of the grounds for condonation.

DISPOSITION

[12] This last point by first respondent`s counsel is significant. Applicant has battled to justify the delay in (a) mounting the original challenge in terms of r 359 to challenge confirmation of the sale. She also- (b), could not justify why her application to court for leave to file a r 359 application was not diligently prosecuted. Further, as (c), when that application itself was attacked for non-prosecution, again no persuasive reason has been tendered as to why such was

not defended resulting in a default judgment. Thereafter (d) she launched a defective application which she herself admits had to withdraw. After these setbacks, applicant (e), took a further two months to act, even going by her own account. All this (f) on the back of a matter going seven (7) years back involving a property that was sold, confirmed and transferred. Mr. *Musekiwa* argued that first respondent had to continuously bear the cost of meeting applicant`s repeated attempts at court through the interlocutory applications.

[13] There has to be finality to litigation. This is a matter where breach of the rules has been repetitive and applicant must be urged to reflect and face the reality of her situation. A solution may lie to her problems but not necessarily through the process she seeks to pursue in the courts. (See *Terera v Lock & 3 Ors* SC 93-21; *Nelson Mangena v Edgars Stores Limited & Anor* HB 108-16; *Chiweza & Anor v Mangwana & 3 Ors* HH 55-21). This dispute has to be put to bed and as such, the application for condonation will be refused.

It is accordingly ordered that; -

The application be and is hereby refused with costs on the ordinary scale.

Saidi Law Firm-applicant`s legal practitioners
Musekiwa & Associates-first respondent`s legal practitioners.

CHILIMBE J _____12/10/22

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