HH-83-2002

HC 10309/01

SLADEN MARUFU
vs
WINTERTONS
and
MARGARET MALAWUSI
and
THE SHERIFF FOR ZIMBABWE
and
THE REGISTRAR OF DEEDS N.O.
and
EAGLE ESTATE AGENT (PRIVATE) LIMITED)
and
BEVERLY BUILDING SOCIETY

HIGH COURT OF ZIMBABWE
NDOU J
HARARE 7 March and 5 June 2002

Mr *E. T. Matinenga,* for the applicant
Mr *Chikuni,* for the 2nd respondent

NDOU J: The applicant seeks an order in the following terms:

"THAT:

1. 1st respondent attend to registering transfer in favour of the applicant of Stand 13655 Salisbury Township of Salisbury Township Lands also known as No. 90 Palmer Road, Milton Park, Harare within seven (7) days of the date of the granting of this order;

2. the 4th respondent be and is hereby directed to register the transfer in accordance with paragraph 1 above.

3. the 1st respondent bears the costs of this application."

The first respondent, Wintertons, do not oppose the relief sought. They properly concede that the letter of 9 April 2001, which apparently emanate from their office and purported to instruct the Sheriff to stop the sale of second respondent's property scheduled for 4 May 2001, was contrary to the instructions of the judgment creditor. The judgment debtor was still in arrears and the instructions should never have been given. The third respondent, the sheriff, does not oppose the chief sought. The second respondent, opposes the relief sought on the basis that: "Even though the judgment authorizing the sale of the property in question may have been properly obtained, execution must have been stayed by reason of the 2nd Respondent's death."

The salient facts of this matter are that on 4 May 2001 the fifth respondent (Eagle Estate Agent) conducted a public auction sale of immovable properties in Harare. The fifth respondent was duly instructed to conduct this sale on behalf of the third respondent (The Sheriff of Zimbabwe). At the aforementioned public auction sale, the applicant purchased Stand No. 13656 (as defined in paragraph 1 of the relief sought) for a purchase price of $3 000 000 (three million dollars). Accordingly the third respondent duly declared the applicant to be the highest bidder and also to be the purchaser for a purchase price of $3 000 000. The third respondent confirmed this fact in writing by a letter dated 8 June 2001. The first respondent, and in particular one Ms Y. Mahlunge, was the legal practitioner who attended to the foreclosure of a mortgage bond registered in favour of the sixth respondent by the second respondent.

On 6 July 2001 the third respondent again wrote to the first respondent advising that no objections had been raised to the sale by public auction and that the applicant had been duly confirmed to the purchaser. The first respondent was also duly instructed to pass transfer in favour of the applicant.

The first respondent thereafter sent the applicant a proforma account on 25 July 2001. The applicant duly paid the purchase price in the sum of $3 000 000 to the third respondent and he also paid all the transfer costs in the sum of $222 622.50. The applicant, complied with all his obligations as the purchaser and it was now incumbent upon the first respondent to proceed to register transfer in favour of the applicant. Instead the first respondent purported to cancel the sale through a letter dated 24

August 2001. This letter of cancellation was sent to the third respondent but not to the applicant. On 6 September 2001 first respondent wrote a letter to the applicant enclosing a cheque in the sum of $222 622.50. This cheque was accepted by the applicant on a "without prejudice" basis. In later correspondence the first respondent seems to say that the sale was cancelled on 9 April 2001. This seems strange in light of the fact that the first respondent sent the applicant a proforma account on 25 July 2001, and also accepted payment of the transfer costs on 31 July 2001.

The second respondent's opposition is based on the interpretation of section 44 of the Administration of Estates Act *[Chapter 6:1]*. The section reads:

> "44 (1) No person who has obtained judgment of any court against any deceased person in his lifetime or against his executor in any suit or action commenced against such executor, or which, having been pending against the deceased at the time of his death, has thereafter been continued against the executor of such person, may sue out or obtain any process in execution of any such judgment before the expiration of the period notified in the *Gazette* in manner in this Act provided.
>
> (2) No such person as aforesaid shall sue out and obtain any process in execution of any such judgment as aforesaid within six months from the time when letters of administration have been granted to the executor against whom execution of such judgment is sought without first obtaining an order from the court or some judge thereof for the issue of such process.

Matinenga, for the applicant, contends that this provision applies to the execution issued after the death of the judgment debtor and not before. He relies on the case of *Falconer's Executor v Drewitt (*1899) 16 SC 512 as authority. He quotes the headnote from this case which states:

> "Where property has been attached in execution of a writ before the death of the debtor, the sheriff may proceed with the sale after the death of the debtor before the expiration of six months from the time when letters of administration were granted to his executor."

He also referred to the case of *Du Toit and De Wall v Heydenrych and Others (*1984) 11 SC 197 as authority. In these cases it was held that section 31 of Ordinance 104, equivalent to section 44 *(supra),* only bars the issuing out and not the subsequent progress of a writ of execution. In *casu,* it is common cause that the writ of execution was issued out on 15 July 1999. The judgement debtor passed away on 20 February

2000. The judgment debtor's property was sold at a judicial sale on 4 May 2001. The letters of administration were granted on 12 June 2001.

The central issue for determination is whether the judicial sale should have been stayed after the death of the second respondent. In other words, whether the sale was barred by the provisions of section 44 (*supra).*

The position in South Africa law changed in 1965 when legislation specifically prevented the sale in execution of any property of a debtor whether attached in terms of a writ issued out before or after his death – see *The Civil Practice of the Supreme Court of South Africa* 4th edition by Van Winsen, Gilliers, Loots at pages 792-793. Mr *Matinenga* submits that Zimbabwe Law is as what obtained in South Africa before 1965 (i.e. before the enactment of section 30 of Act 66 of 1965) and that, indeed, our section 44, is virtually reproduced in the *Du Toit and De Wall v Heydenrych and Other* case (*supra).*

In this case it is beyond dispute that the applicant participated at a public auction sale which was properly conducted. The applicant was declared the highest bidder and was confirmed as such by the Sheriff. Once confirmed by the Sheriff in the compliance with Rule 360, the sale is no longer conditional.

That being so, a court would be even more reluctant to set aside the sale pursuant to application in terms of Rule 359 for it to do so – se *Mapedzamombe v Commercial Bank of Zimbabwe Anor* 1996 (1) ZLR 257 (S) at 260D – E and *Naran v Midlands Chemicals Industries (Pvt) Ltd* SC 220-91 at pp 6-7. Under 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 by execution, or fraud – see *Maponga v Jabangwe* 1983 (2) ZLR 395 (S) at 396D – E, *Gibson N. O. v Iscar Housing Utility Co. Ltd and Ors* 1963 (3) SA 783 T at 787A – B; *Sookdeyi & Ors v Shadeo & Ors* 1952 (4) SA 568 A at 571H – 572A; *van den Berg v Transkei Development Corporation* 1991 (4) SA 78 (TkG) at 80G – J and *Eramus v Michael James (Pty) Ltd* 1994 (2) SA 528 (C) at 552F. As aluded to earlier on, the determination of this matter, lies on the interpretation of section 44 of the Administration of Estates Act, [*Chapter 6:01].*

I hold the view that section 44 only bars the issuing out and not the subsequent progress of a writ of execution, and therefore, the sale in execution under such circumstances is legal – see *Van Reenen v Pearson (1 Roscoe 236); Du Toit and De Waal v Heydenrych and Ors (supra); Falconer's Executor v Drewitt,* 16 SC 512; S.A. *Association v Knocker;* 1931 OPD 135. Section 44, in my view, bars the suing out or the obtaining of any process: "may sue out or obtain any process in execution of any such judgment…" This section does not the applicant in the circumstances of this case. Whatever may be said of the spirit and intention of section 44, in terms it does not apply to the circumstances of this case. Our position is similar to that pertaining in South African prior the enactment of section 30 of their Administration of Estates Act, 66 of 1965. In this case the writ of execution was issued more than seven months prior the death of the judgment debtor.

It is accordingly ordered that:

1. the first respondent attend to the registering transfer in favour of the applicant of Stand 13655 Salisbury Township of Salisbury Township Lands also know as Number 90 Plamer Road, Milton Park, Harare within seven (7) days of the date of the granting of this order.

2. the fourth respondent be and is hereby directed to register the transfer in accordance with paragraph 1 above;

3. the first respondent bears the costs of this application.

Guti & Chikowore, applicant's legal practitioners.
Scanlen & Holderness, 2nd respondent's legal practitioners.