DAVID CHIWEZA
and
KHUMBULA CHIWEZA
versus
MUNYARADZI PAUL MANGWANA
and
PAULINE MANGWANA
and
CBZ BANK LIMITED
and
THE SHERIFF FOR ZIMBABWE
and
THE REGISTRAR OF DEEDS, HARARE N.O.

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 28 February 2017 & 22 March 2017

Opposed Application

M Mhlongwa, for the applicants
R Chingwena, for the1st and 2nd respondents
N R Mutasa, for the 3rd respondent

DUBE J: This is an application for condonation of late noting of an application for review sought to be brought in terms of Order 40 r 359.

The brief background to this application is as follows. The applicants are owners of an immovable property known as number 2157 Glen Lorne Township, 30 Glen Lorne Estate in in the District of Salisbury, a property sold by the fourth respondent, hereinafter referred to as the Sheriff, through a private treaty sale. The first and second respondents are the purchasers of the said property. The third respondent is the judgment creditor. The applicants' property was attached in execution of a judgment obtained against them by the judgment creditor. The fourth respondent agreed with the applicants that the property be sold by private treaty. On 29 October 2018 the Sheriff sold the property by private treaty and declared the first and second

respondents the highest bidders at a bid price of $226 500-00. He invited objections to the sale. The judgment creditor objected to the sale resulting in the purchasers increasing the price to $260 000-00.The Sheriff accepted the increased price. The Sheriff purported to copy the letter inviting objections to the applicants but the letter was sent to a non-existent address being 13 Bargrobe Close, Glen Lorne. Consequently, the applicants were never notified of the highest bidders and were not invited to object to the declaration of the highest bidder. The Sheriff proceeded to declare and confirm the first and second respondents the highest bidders at $260 000-00 on 29 October 2015 and 23 November 2015 respectively. The fourth respondent then again purported to notify the applicants of the confirmation of the sale and sent a letter to 13 Bargade Close, Glen Lorne, another non-existent address. The applicants' address is 12 Bargrove Close, Glen Lorne. The applicants remained in the dark about these developments and only became aware of the sale when the first and second respondents sought to occupy the property on 12 December 2015.

The applicants submitted that the sale of that property cannot be allowed to stand as the sale was improperly conducted. They were not afforded an opportunity to object to the sale before the Sheriff made his final decision. They contended that they have a right to administrative conduct which is both substantially and procedurally fair in terms of s 68 (1) of the Constitution. They further submitted that they had a legitimate expectation to be heard before the decision to confirm the sale was made. They maintained that the Sheriff did not act fairly. They contend further that the property was sold at an unreasonably low price regard being had to the actual market value of the property. They were unable to raise this objection due to failure to advise them of developments.

The first and second defendant's position is that the property was not sold at a reasonable price. Although the property went for $260 000-00 there are other costs attendant to the transfer of the property, such as the auctioneers, Sheriffs, conveyancing, estate agents and clearance fees totaling $60 000-00 which brings the total to $320 000-00. The respondents contended that the applicants were always aware of the sale and deliberately refrained from bringing this application or challenging the sale. They contend that the explanation proffered by the applicants for the deadly in bringing this application is unreasonable.

The third respondent submitted that the applicants have not met the requirements for the grant of an application for condonation of late noting of an application for review. It submitted that the price fetched is reasonable and that the application for review has no prospects of success. The applicants have not proffered a reasonable explanation for the failure to file the application for review within the prescribed time.

The requirements for an application for condonation have been laid down in a number of cases. They include a consideration of the following factors;

a) the degree of non - compliance

b) the explanation for it

c) the prospects of success in the main claim

d) the importance of the case

e) possibility of prejudice to the other party should the application be granted

The list is not exhaustive. The approach to be taken in an application for condonation was discussed in *United Plant Hire* v *Hills & OR's* 1976 (1) SA 717 (A) @ 720 F – A as follows;

> "It is well settled that in considering applications for condonation the court has a discretion to be exercised judicially upon considering all the facts and that in essence it is a question of fairness to both sides. In this enquiry relevant considerations may include the degree of non-compliance with the rules, the explanation thereof, prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other."

See also *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 (H) @ 242 E – 243 C. *Forestry Commission* v *Map* 1997 (1) ZLR 254 (S), *Kombayi* v *Berkhout* 1988 (1) ZLR 53 (S), *Kodzwa* v *Secretary for Health and Anor*, 1999(1) ZLR, 313(S).

In *Grootboom* v *National Prosecuting Authority and Ano*r (2013)34 ILJ 282 (LAC) the court dealt with the approach to be adopted where some factors are not satisfied and remarked as follows,

> "….where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

A party who has failed to comply with the requirements of the rules is required to apply for condonation as soon as he becomes aware of the non-compliance and without further delay. He has the onus to convince the court that he has a good excuse for the delay. Condonation is not there simply for the asking. The interests of justice are paramount in an application for condonation. Condonation will only be granted where it is in the interests of justice to do so, regard being had to all the pertinent factors. The applicant is required to give a full, detailed and reasonable explanation for the delay in bringing the application. The full period of the delay and the date when action was eventually taken should be spelt out in the application to assist the court in determining the degree of non – compliance. The court is required to consider the requirements for an application for condonation cumulatively and weigh them against each other. The application for condonation is not decided on one exclusive factor. The existence of strong prospects of success may compensate for any inadequate explanation given for the delay. Where the applicant proffers a good explanation for the delay this may serve to compensate for weak prospects of success in the main matter. Good prospects of success and a short delay, albeit with an unsatisfactory explanation, may lead to granting of the application. The court dealing with the application has a wide discretion which it must exercise judicially after considering all the circumstances of the case. The factors are not to be individually considered, but cumulatively considered with the strong making up for the weak. The court should endeavor to be fair to all the parties involved.

Rule 359(8) allows any person, who is aggrieved by a decision of the Sheriff confirming a sale to apply to court for the setting aside of the decision. The application for review was required to be filed within one month of the confirmation of the sale. The Sheriff's decision to confirm the sale was handed down on 25 November 2015. The applicants filed the present application on 26 February 2015, a delay of 3 months ensued from the date of the decision. The applicants however became aware of the sale around 12 December 2015 when the purchasers occupied the property. The period of delay is calculated from the time they became aware of the sale. The applicants themselves do not seem to be aware of the exact date. The applicants were expected to file the application by about 12 January 2016. The period of delay is about one and a half months. The delay is fairly short. Our courts have accepted longer periods of delay. Each

case depends on its own circumstances. All requirements of the application have to be considered cumulatively.

The delay in applying for condonation requires an acceptable and reasonable explanation. After the purchasers moved onto the property, the applicants immediately engaged the judgment creditor and the Sheriff querying the manner in which the sale was conducted. They took steps to discover what had happened and tried to address the situation. The applicants actually wrote to the Sheriff on 21 December 2015 querying the sale and a response was given on 18 January 2016. The Sheriff acknowledged that he acted unprocedurally and that the applicants were not afforded an opportunity to object to the sale. He was unable to do anything about the situation as he was *functus officio*. The matter could only be resolved by the court. The reason for the failure to file the application for review on time is not entirely that of the applicants. They were simply not aware of the developments until December 2015. The applicants are not entirely to blame. The steps taken by the applicants are relevant and acceptable. The applicants were unrepresented at this stage. When their enquiries and negotiations did not yield fruitful results, they sought legal advice on 12 February 2016. They indicate that after this, their legal practitioners required time in order to do research over the matter. The legal practitioners took about 13 days in this exercise, only to file this application on 26 February 2016. The applicants' legal practitioners must have become aware through their research of the prescribed time limits but failed to immediately take corrective action. The applicants' legal practitioners were tardy. The explanation for the delay is unreasonable.

The applicant bringing an application for condonation for a failure to bring a review on time is required to show that prospects of success exist in the main matter. In Herbstein and Van Winsen, *The Civil Practice of the Supreme Courts of South Africa 4th Ed* @ 933 the authors set out the purposes of review proceedings as follows;

> "The essential question in review proceedings is not the correctness of the decision under review but its validity."

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 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.

Courts do not readily set aside judicial sales as this has the effect of bringing the efficacy of judicial sales into disrepute. The challenger must show the existence of an irregularity that renders the sale invalid. In other words, the irregularity must be material and must result in actual prejudice to the person complaining. Inadequacy of a sale price on its own constitutes a good reason for setting aside a judicial sale. The applicant must show that the price fetched is so unreasonable and inadequate that it shocks the conscience of the court.

A private treaty sale is a judicial sale where the Sheriff sells a property to a third party without public bidding. The sale is conducted by the Sheriff through an estate agent appointed by him. The price of the property is determined by the pre-valuation report done by the auctioneer. The objective of such a sale is to try and fetch the best possible price. The guiding factor at a sale by private treaty is the market value of the property conducted on a willing buyer willing seller basis. A forced sale value is the price at which a property is sold under forced sale conditions and the price at which it can reasonably be sold. Where a property is sold by private treaty sale, the forced sale value of the property is the minimum it ought to fetch. A property that is sold by private treaty and fetches a price that is below the forced value is sold at an unreasonably low price.

The rules of this court require a litigant who is aggrieved by a decision of the Sheriff to set aside the decision within one month in terms of r 359 (8). The applicants were required to lodge an application for review within one month from the date they became aware of the sale. Being unaware of the sale, the applicants were unable to exercise that right. The Sheriff

conceded a procedural irregularity in the conduct of the sale. All parties accept that the applicants failed to exercise their right to object to the sale due to the Sheriffs conduct of sending the letters inviting objections to wrong addresses. A genuine error occurred on the part of the Sheriff. The Sheriff erroneously believed that he had notified the applicants of their right to object and that they had no desire to exercise that right. The applicants should not shoulder the burden of what happened. They are entitled to apply to set aside the sale. This irregularity on its own is sufficient to vitiate the sale and cannot be ignored by a court dealing with the review.

The open market value of the property was pegged at $450 000-00 for both the applicants and respondents. The judgment creditor's value was placed at $470 000-00 and the forced sale value at $307 000-00. The respondents tried to challenge the applicant's valuation reports on the basis that it was not sworn to until it was drawn to their attention that their own valuation reports were also not sworn to. The property was expected to fetch a price much more than the forced sale value of the property .A price much less than that was fetched. The respondents' argument that because the purchasers incurred an extra $60 000-00 in fees and other charges after the sale, bringing the total to$320 000-00, the fees constitute part of the purchase price does not find favour with this court. The purchase price or bid price obtained at a judicial sale is the actual price at which the purchaser is prepared to buy the property. Additional costs including those charged by the Sheriff and auctioneers in lieu of a judicial sale do not form and constitute part of the bid price or purchase price. The purchase price fetched when one considers the market values given for the property is too low. The price obtained is far below both the forced sale values. The property was expected to fetch a price close to the actual market value of the property. The price obtained is way below the forced sale value and is undoubtedly unreasonable. The main reason why the property was to be sold by private treaty was so that the applicants would be able to raise a reasonable amount so that they would be able to pay the judgment creditor. For as long as the price is below the forced market value it appears to me to be unreasonable. The notion of a private treaty sale is defeated if the price fetched turns out to be below the forced sale value of the property. The respondents have discharged the onus on then to show that the property was sold at an unreasonably low price.

It is mind-boggling that the Sheriff would accept a price so much less than the forced sale value after a sale by private treaty. The Sheriff's conduct is questionable. The conduct of the

Sheriff violated the applicants' constitutional right to administrative conduct that is both substantially and procedurally fair. The applicants were not heard before an adverse decision was made over their property. The Sheriff is vested with discharge of public functions. He is required to discharge his duties with fairness, due diligence and care and in adherence to laid out procedures and rules of court. The Sheriff was remiss when he dealt with this sale. Judicial sales negatively impact on debtors and their property and hence the need for the Sheriff to pay attention to detail in conducting these sales. The rules governing the conduct of judicial sales were flouted. To condone such conduct would result in the courts sending the wrong messages to the public and bring the administration of justice into disrepute. It is the duty of this court to help in building trust in the processes of judicial sales.

The mishaps complained of are material. The applicants stand to be prejudiced if this application is not granted and the sale is not upset. The applicants will have lost the right to object to the sale or correct the anomalies that occurred .The buyers have acquired a mortgage bond and have already acquired title over the property. Perhaps what they should be doing is negotiating a top up instead of opposing this application. Both the applicants and the purchasers will suffer prejudice either way. The respondents are unlikely to suffer irreparable harm as they have an alternative in the form of damages from the Sheriff. The judgment creditor just seems to be annoyed by the applicants' quest to get the matter reviewed. They will suffer no prejudice as the debt will still be paid and with interest. The balance of convenience seems to tip in favour of the applicants. The decision impugned cannot be valid. What is fair is to have the sale proceedings reviewed.

The court is alive to the fact that the applicants' explanation for the delay was unreasonable. The court has in its discretion decided not to punish the applicants for the sins of their legal practitioners because of the importance of the case. Despite the shortcoming in the explanation for the delay, the prospects of success in the application for review are excellent and far outweigh the other requirements of this application. The court has also considered that the delay complained of is short. To deny the applicants to have the sale reviewed would amount to the court doing an injustice with its eyes open. It is my considered view that the applicants have an arguable case in the application for review. The scale tilts in favour of granting the application. The interests of justice demand that condonation be granted.

Accordingly, it is ordered as follows;

1. The application is granted.
2. The applicants be and are hereby granted leave to file the application for review.
3. The application for review is to be filed within 10 days of this order.
4. The 1st, 2nd and 3rd respondents are to pay the costs of this application.

Chambati, Mataka & Makonese, applicants' legal practitioners
Munyaradzi Paul Mangwana & Pauline Mangwana, 1st and 2nd respondents' legal practitioners
Costa & Madzonga, 3rd respondents' legal practitioners