HARARE MOTORWAYS (PRIVATE) LIMITED
and
AFRICAN BANKING CORPORATION OF ZIMBABWE LIMITED
t/a BANC ABC
versus
THE SHERIFF FOR ZIMBABWE N.O
and
DOVES FUNERAL ASSUARANCE COMPANY LIMITED
and
BLUESTAR LOGISTICS (PRIVATE) LIMITED
and
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 21 October 2019 & 27 November 2019

OPPOSED MATTER

T Mpofu, for the 1st applicant,
R Muchandiona, for the 2nd applicant
R Goba, for the 2nd respondent
T Chinyoka, for the 3rd respondent
No appearance for the 1st respondent

DUBE J: This application is somewhat of an unusual nature. The applicants have brought an application for a declaratory order to set aside a sale in execution. They also seek an order to uplift a caveat.

The applicants are up in arms against the Sheriff. This dispute arises from a sale in execution of property belonging to the first applicant that was sold to the second respondent by the Sheriff at a public auction. The applicants are aggrieved by the manner in which the Sheriff conducted himself and seek an order declaring the first respondent's confirmation of the second respondent as the purchaser of stand number 173 Willowvale Township of Willowvale Situate in the District of Salisbury declared unlawful and set aside. In addition, they seek an order compelling the Sheriff to uplift a caveat placed upon the first applicant's property to enable transfer of the property from first applicant to the third respondent.

The background to this challenge is as follows. The second applicant, the judgment creditor, obtained judgment against the first applicant, Kukura Kurerwa Bus Service (Pvt) Ltd, [KK] and other judgment debtors under HC 4137/16. Stand 173 Willowvale Township of Willowvale, "the property," which belongs to the first applicant was attached together with other properties belonging to the other judgment debtors. On 25 June 2018, a public auction was conducted in respect of various properties owned by the judgment debtors. The property was sold and the second respondent was declared the highest bidder. On 31 October 2018, KK was placed under final liquidation. The Sheriff directed that the sales of all properties belonging to KK, first applicant and other judgment debtors including those already sold but not yet confirmed be stayed. The Sheriff directed that all the highest bidders be refunded all monies paid, including the highest bidder of the property, being the second respondent. The Sheriff did this, despite the fact that the properties affected by the provisional liquidation were only those belonging to KK and not the property which belongs to the first applicant. The Sheriff insisted that the sales could not proceed as his office was now *functus officio*. The first and second applicants agreed between themselves to find purchasers for the property to facilitate immediate settlement of the debt. An agreement of sale of the property was entered into between the third respondent and the first applicant. The second applicant requested the Sheriff to uplift the caveat to enable transfer of the property into the third respondent's name and the Sheriff indicated that he had already confirmed the sale of the property to the second respondent.

The applicants are aggrieved by the conduct of the Sheriff and assert that the Sheriff failed to conduct the sale in a transparent and honorable manner or perform his duties as is required in terms of his mandate. They alleged that the Sheriff refused to cooperate with the applicants and did not act lawfully when he refused to uplift the caveat on the property and when he confirmed the second respondent as the purchaser of the property when the property had already been sold to the third respondent. Having told the parties that he was *functus officio,* he proceeded to confirm the sale. They contended that the third respondent is an innocent party and cannot be prejudiced because of the shoddy manner in which the Sheriff conducted himself. The applicants seek an order for the removal of the caveat on the property, an order declaring that the Sheriff's confirmation of the second respondent as the purchaser of the property is unlawful and is set aside.

The first respondent did not oppose the application. Instead he filed a report. The second respondent is opposed to this application. It raised a number of preliminary issues. In brief, it

submitted as follows. The application is improperly before the court. Instead of seeking a declaratory order, the applicants ought to have employed r 359 (8) to challenge the sale, in which case they were required to apply for condonation of late noting of the application. It maintained that the applicants have fallen foul of the rules and seek to set aside the sale through the back door. The third respondent maintained that the Sheriff could not later purport to confirm the sale as he did. The decision of the Sheriff to confirm the sale is unlawful, unreasonable and unfair.

Applicants maintained that the proper application to make in this case is for a declaratory order as the Sheriff exceeded his powers and hence acted *ultra vires* the rules. The applicants maintained that they did not make a r 359 (8) application and that therefore they were not required to apply for condonation of late noting of this application.

According to the second respondent, the order sought by the applicants is not proper as the property was sold to the second respondent through execution of a court judgment and the sale has been confirmed. The applicants adopted a procedure which is outside the rules of court. Whilst the applicants have not applied to set aside the sale in terms of the r 359 (8), the issue of setting aside the confirmation of sale is evident from the draft order. It argued that the applicants seek a review of the Sheriff's decision through the back door. Additionally, it contended that the first applicant sold the property well knowing that the property was still under attachment by the Sheriff after having been sold to the second respondent and thereby creating a double sale. The second respondent refuted that it was refunded the purchase price as the money remained under the authority of the Sheriff. Being aware of the second respondent's interest in the sale, the first applicant went on to sell the property for the second time to the third respondent who had been the second highest bidder. The second sale was conducted without the knowledge of the Sheriff or the second respondent. It took issue with the fact that the first applicant sold the property under private treaty to third respondent being well aware that the Sheriff had not uplifted the caveat and that the property was still under judicial attachment and when the first sale in execution was still in existence. Uplifting the caveat is going to create an injustice and leave the second respondent exposed. The alliance of the first and second applicants is not holy and was meant to compromise the sale to the second respondent.

At the hearing of the application, the first applicant asked the court to strike out of the record the report filed by the Sheriff. The second respondent urged the court to accept the report as the applicants and third respondent suffer no real prejudice should the court accept the report.

The issue that arises from the preliminary points is whether a party who is aggrieved by the conduct of an auction sale can challenge a confirmation of the sale by way of a declaratur. With regard to the merits, the issue that arises is whether or not the conduct of the Sheriff in confirming the sale of the property to the second respondent warrants setting aside the sale in execution.

The court will deal first with the correctness of this application. The issue I am being called upon to address is not new turf. It was raised and ably tackled in the case of *Chiwanza* v *Matanda* HH 170/04 by MAKARAU J. In that case, the Sheriff had confirmed a sale in execution and the aggrieved party approached the court seeking among other remedies, an order declaring the sale of a property by public auction a nullity and a reversal of the transfer of the property on the basis that the Sheriff had no power to reinstate a sale after having advised the purchaser that he was cancelling the sale. In a well-structured and reasoned judgment, the court laid out the different procedures open to a person seeking to set aside a judicial sale at different stages of a sale in execution. The court classified the challenges into three categories, the first being a challenge brought before a sale has been confirmed by the Sheriff in terms of Order 40 r 359 and one based upon a request made to the Sheriff to set aside the sale.

Order 40 r 359 (8) sets out the procedure for reversing a judicial sale and stipulates as follows;

> (8) Any person who is aggrieved by the Sheriff's decision in terms of sub rule (7) may, within one month after he was notified of it, apply to the Court by way of a court application to have the decision set aside.''

The import of r 359 as a whole is that any person who is aggrieved by the decision of the Sheriff and has an interest in a judicial sale may file objections with the Sheriff on the basis of grounds laid out in r 359 (1) as follows,

a) that the sale was improperly conducted; or

b) the property was sold for an unreasonably low price; or

c) on any other good ground.

This approach was echoed in the case of *Karigambe & Anor* v *Jogi & Ors* 2003 (1) ZLR 92 (S) at 93 E-F where the court noted as follows,

> "Generally, a sale by public auction should not be set aside unless it falls under the provisions laid down in r 359, that is, if "(a) the sale was not properly conducted; or (b) the property was sold for an unreasonably low price, or on any other good ground"

In the case of a request to set aside a sale made to the Sheriff, he is obliged to hear the objections in terms of r 359 (7) and make a decision either to confirm or cancel the sale. Any interested party who is aggrieved by the Sheriff's decision made in terms of r 359 (7) may make an application to court in terms of r 359 (8) to have the decision set aside. This rule applies exclusively in a situation where there is a prior approach to the Sheriff. Clearly, r 359 (8) is not applicable to the circumstances of this case.

The next category of challenges pertains to sales in execution that have been confirmed but before transfer has been effected to the purchaser in a case where there was no prior request to the Sheriff to set aside a sale. In the *Chiwanza* case, the court noted that the rules do not provide for the procedure to be adopted after the sale in execution has been confirmed. The court opined that any party with an interest in such a sale may approach the court based on the general grounds of review as provided for at common law. The court remarked as follows;

> "The approach to this court after a sale in execution has been confirmed and in the absence of a prior approach to the Sheriff in terms of the rules is in my view to be based on the general grounds of review as provided for at common law. These would include such considerations as gross unreasonableness, bias and procedural irregularities but cannot include such grounds as an unreasonably low price or that the sale was not properly conducted as provided for under the rules unless such can be subsumed in the recognized grounds of review at common law. It is my further view that this, which presents itself to me as the second approach, only obtains after confirmation of the sale but before transfer is effected to the purchaser."

The court was correct in this view. This court has inherent power to review proceedings of all administrative tribunals in Zimbabwe. The common law power of the court has been translated into statute form and finds expression in s 27 of the High Court Act [Chapter 7;06] which stipulates as follows,

> "27 Grounds for review
> (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be—
> (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
> (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
> (c) gross irregularity in the proceedings or the decision.
> (2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities."

There are two main grounds upon which the High Court may interfere with a decision of an administrative body or tribunal on review. They are that the administrative body has acted *ultra vires* its powers and secondly that it failed to comply with rules of natural justice. The court's review powers are reserved for testing the legality of the decision and action impugned. Section 27 lays down the various grounds a party may rely on for review, see *Affretair Pvt Ltd*

and Anor v *MK Airlines (Pvt) Ltd* 1996 at ZLR 15 (S), where the duty of the court in review proceedings was spelt out as being that of acting as an umpire to ensure fairness and transparency.

The views expressed in the *Chiwanza* case were confirmed in *Garati v Mudzingwa (Mau Mau) & Ors* 2008 (2) ZLR 88 (S) at 94B-D where the court observed as follows:

> "At common law any person interested in a sale in execution may apply to court to have it set aside on good cause shown. Although courts are reluctant to set aside a sale which has been confirmed and even more reluctant where transfer of the immovable property has been effected," see also Mortpoulos v *Zimbabwe Banking Corporation Ltd & Ors* 1996 (1) ZLR 626(H) where at the court said the following,
> "By the common law an owner of property which has been sold in execution but not yet transferred may seek an order of restitutio in integrum setting aside the sale on good cause shown." See also *Mapedzamombe* v *Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257 (S)."

In *Geddes Ltd* v *Taonezvi* 2002 910 ZLR 479 (S), the court held that setting aside of a decision is relief normally sought in an application for review. In such a case, the courts scrutinize the regularity of the procedure adopted by the administrative body.

A declaratur is provided for in s14 of the High Court Act as follows;

> "14 High Court may determine future or contingent rights
> The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

Section 14 provides for a procedure where a party's existing, future or contingent rights or obligations are declared. The requirements for a declaratory order were laid out in *Johnson v AFC* 1994 910 ZLR 95 (H) as follows,

> "Firstly the applicant must satisfy the court that he is a person interested in an existing future or contingent right or obligation. If satisfied on that point, the court then decides a further question of whether the case is a proper one for the exercise of the discretion conferred on it"

The third situation is where the sale has been confirmed and transfer of the property has been effected to a third party in which case any interested party may still approach the court for review in terms of the common law for the sale to be set aside. What is evident from this approach is that what determines the nature of the application one is required to bring to challenge a sale in execution is guided by the factual situation existing on the ground as well as the grounds relied on for setting aside the sale. Where an applicant relies on grounds laid out in the rules, he must bring an application in terms of the Rules. A common law application for review ought to be brought purely on common law grounds of review. The grounds set out

in the rules cannot be used to found a common law application for review to set aside a sale in execution. This point was articulated in the *Chiwanza* case as follows,

> "Mr Matinenga has ingeniously in my view, sought to argue that the applicant is approaching this court for a declaratur at common law, to have the decision of the second respondent set aside on the grounds that he did not abide by the rules of this court. The ingenuity of the submission lies in that on one hand it denies that this is an application that ought to be brought in terms of the rules for alleged violations of the rules yet it relies on those same violations for its sustenance at common law. The only hurdle in Mr Matinenga's way is the fact that common law does not recognise violations of court rules as a ground upon which a sale in execution may be set aside after transfer of the property has been effected in favour of the purchaser. This is the point made in the *Mapedzamombe* case cited above."

The court went on to make the following remarks,

> "He also alleges that the second respondent had no power to reinstate the sale after having advised the purchaser that he was canceling the sale. Even assuming that the applicant could sustain the allegations he raised, in my view, such grounds are irrelevant for the purposes of bringing and sustaining an application under the common law"

The court found that the ground that the Sheriff had no power to reinstate the sale after advising that he was cancelling the sale was irrelevant for purposes of bringing and sustaining an application under common law. The court held as follows;

> "Relying as he did on alleged violations of the rules by the second respondent; it is my view that the applicant ought to have followed the procedures laid down in the rules, culminating with an approach to this court for a review. Alternatively, he ought to have made out a case for condonation for the late institution of general review proceedings."

The court made it succinctly clear that an ordinary application for review was appropriate in the circumstances of the case and that the applicant ought to have approached the court on the basis of an ordinary review application.

In casu, there were no objections filed in terms of r 359 (1) and there was no prior approach to the Sheriff challenging the sale. The sale to the second respondent was confirmed and transfer of the property has not been made to the second respondent. The basis for this application is that the Sheriff exceeded his powers and acted *ultra vires* the rules. These grounds are not common law grounds of review. For the sole reason that the applicants relied on alleged violations of the rules by the Sheriff, it follows that the applicants ought to have followed the procedures laid down in the rules. The challenge in this case is no different from the challenge in the *Chiwanza case* and sentiments expressed therein apply equally to this case. The applicants ought to have brought an ordinary application for review of the Sheriff's conduct. Ultimately, the applicants are improperly before the court.

The court is not convinced that this case was properly brought as an application for a declaratur. The applicants sought to bring an application for review clothed as an application for a declaratur. A declaratur has no place in judicial sales because challenges to judicial sales are covered by the rules and where not so covered, they undoubtedly should be brought by way of review. The applicants erred by bringing an application for a declaratur in the circumstances. Although the application was labelled as a declaratory application, it in essence is an application for review and not a declaratur. The grounds relied on are grounds for review. The applicants were challenging the decision of the Sheriff and hence ought to have filed for review.

Having failed to challenge the confirmation of the sale on time, the applicants have resorted to a declaratur as a technical maneuver to escape the requirements of the rules. The proper approach would have been to bring an application for review within eight weeks of the decision impugned in terms of r 259, see *Nyamukapa* v *Minister of Local Govt and Town Planning* HH 363 /85, *Gula Ndebele* v *Bhunu* No 2010 (1) ZLR 78 (H). The applicants eluded the rules by bringing an application for a declaratur without applying for condonation for failure to file an application for review within the time specified in the rules. The attempt to hoodwink the court has hit a brick wall. Applicants cannot be allowed to do that. The application is improperly before the court.

As regards the Sheriff's report, my view is that this is a matter best left to be dealt with elsewhere, however I could not resist making the following observations. The Sheriff is an officer of this court. A judicial sale is a court managed sale. When the Sheriff conducts a judicial sale, he does so on behalf of the court. Where the Sheriff is sued over the manner in which he conducted a sale in execution, he may choose to either defend proceedings or elect to abide by the decision of the court, in which case he is not required to file a notice of opposition and opposing affidavits. The rules do not make provision for the filing of a report by the Sheriff to the court. The Sheriff did not oppose these proceedings choosing instead to compile a report which he filed with the court. The report was not prepared in terms of the rules. Of note however is that the report simply captures the events that led to the Sheriff confirming the sale and does not deal with the merits of the matter. As I have already noted, the report was not filed in terms of the rules of court. Perhaps it is time our rules made provision for the filing of a Sheriff's report where he has conducted a sale and does not wish to oppose legal proceedings challenging a sale he conducted. The purpose of the report would clearly be to give insight to the court regarding the conduct of the sale and would be of great assistance to the court. Nothing stops the court from requesting a report from the Sheriff in a matter such as this.

This application is fatally defective and must fail.

Accordingly, it is ordered as follows;

1. The application is dismissed
2. The first applicant, second applicant and the third respondent are to pay the second respondent's costs jointly and severally the one paying the other to be absolved.

Gill, Godlonton & Gerrans, 1st applicant's legal practitioners
Danziger & Partners, 2nd applicant's legal practitioners
Manase & Manase, 2nd respondent's legal practitioners
Kantor & Immerman, 3rd respondent's legal practitioners