

IAN DLAMINI

Versus

JOSEPH MVERE MABUREKI

And

THE MABUREKI TRUST

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 9 JULY 2004 AND 21 APRIL 2005

K Ndlovu for applicant
N Mazibuko for the respondent

Opposed Application

NDOU J: On 7 November 2003, the applicant purchased respondent's immovable property known as Share number 2 of Lot 1 of stand 574 Bulawayo Township otherwise known as 2 Danor Court, 14th Avenue/J Tongogara Street, Bulawayo at a public auction conducted by Messrs Bulawayo Real Estate (Pvt) Ltd. The purchase price was thirty-two million dollars (\$32 000 000,00). The terms and conditions of the sale were reduced to writing on 5 December 2003. On 10 December 2003 the Messenger of Court instructed the conveyancers to attend to the registration of transfer into the applicant's names. On 18 December 2003 the said property was indeed transferred into the applicant's names and he now holds the property under Deed of Transfer Number 3427/2003. Thereafter the applicant informed the first respondent and all claiming through him to vacate the property by 31 December 2003. Applicant did this out of courtesy to allow the first respondent and all those claiming through him to vacate because as far back as 30 September 2003 the messenger of Court had written to the respondents advising them of the sale of property arising

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from a judgment against both respondents in the magistrates' Court. The respondents did nothing to protect their property from going under the hammer, so to speak. After the sale and transfer into the applicant's names the respondents refused or neglected the applicant's demands to vacate the property. The first respondent never lodged any objection with the Messenger of Court before confirmation of the sale. The respondents, according to order 26 rule 7 (15d) of the Magistrates' Court (Civil Court) Rules, 1980, had seven(7) days within which to object to the confirmation of the sale. They did not do so. The applicant, as the highest bidder at the public auction sale, was confirmed. In the circumstances, the sale is no longer conditional. That being so, the court would be reluctant to set aside the sale pursuant to an application in terms of order 26 rule 7(15C) of the magistrates' Court (Civil Court) Rules, *supra* – *Mbewe v CABS and Anor* HH-83-92; *Naran v Midlands Chemical Industries (Pvt) Ltd* SC-220-91; *Mapedzamombe v CBZ & Anor* 1996 (1) ZLR 257 (S) at 260D-E; *Marufu Wintertons & Ors* HH-85-02 and *Mapondera & Anor v Ncube & Ors* SC-118-02. Normally, the court will only interfere and grant an application to set aside such confirmation of a public auction sale in exceptional circumstances. There are no such exceptional circumstances in the facts of the present matter. I accept that public auction sales of this kind should be properly advertised and properly conducted. The responsible officials have the responsibility to ensure that neither the judgment debtor nor the judgment creditor are not prejudiced by an improperly conducted sale – *Smith and Anor v The Acting Deputy Sheriff of the High Court of Harare and Anor* HH-133-94 and *Naran v Midlanda Chemical Industries supra*; *Maparanyanga v Sheriff & Ors* SC-132-02. See also *Woods v Spence & Anor* 1978 RLR 254(G).

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The respondents only launched an application to set aside the public auction sale some two months after this application and also more importantly, some three months after the sale was confirmed by the Provincial Magistrate pursuant to the provisions of order 26 rule 7 (15) *supra*. In fact, it was issued about a month after the respondents filed opposing papers in this matter. The applicant had even filed an answering affidavit and pointed out that the respondents were not honest in purporting to allege that they had filed an application to set aside the sale when they had not done so. In simple terms this allegation by them was simply false. In order to “regularise” this apparent misrepresentation they, almost a month later, filed the application to set aside the sale – see HC-833-04. They also had the property evaluated on 3 February 2004 and naturally its value was far much higher than it was some four months or so earlier at the time of the sale. The latter application is also out of time and there is no application for condonation. Although I am not dealing with the latter application here, its relevance is that it evinces the lack of bona fides of the respondents in their opposition of the application in *casu*.

Their latter application was triggered by the exposure of the falsehoods contained in their opposing affidavit (by the applicant in his answering affidavit). All this is done to avoid eviction by the applicant who is the registered owner of the property. At the time the applicant sought their eviction they did not have any legal basis to resist the eviction. They are subsequently trying to create such legal foundation. They were given notice to vacate the premises by the Messenger of Court. They did nothing until towards the conclusion of the eviction proceedings in *casu*. The inescapable conclusion is that they just want to buy time by abusing the court process. This is a case where costs should be awarded on a punitive scale.

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Accordingly, it is ordered:

1. That the respondents and all claiming through them be and are hereby evicted from the individual 17% share number 2 in Lot 1 of stand 574, Bulawayo Township, also known as number 2 Danor Court, 14th Avenue/J Tongogara Street, Bulawayo within five (5) working days of the service of this order.
2. That the respondents pay the costs of this application jointly and severally the one paying the other to be absolved on a legal practitioner and client scale.

Lazarus & Sarif, applicant's legal practitioners

Calderwood, Bryce Hendrie & Partners respondents' legal practitioners