Judgment No. HB 52/07
Case No. HC 2378/04
X Ref HC 1512/05

GILBERT MAKUYANA

And

ALBERT MUZONDIWA KADHUZE

Versus

STANDARD CHARTERED BANK OF ZIMBABWE

And

SWELUMUZI MPOFU

And

THE SHERIFF OF ZIMBABWE

And

THE REGISTRAR OF DEEDS, BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 4, 13 AND 26 APRIL 2007

Advocate S Nkiwane, for both applicants
P Ncube, for second respondent only

Opposed Matter

NDOU J: The applicants seek an order in the following terms:

"It is ordered that:

1. The sale of stand number 458 Kensington Township, Bulawayo to the 2nd respondent which was conducted by public auction by the 3rd respondent and [*sic*] the 1st respondent's instance be and is hereby set aside.
2. The 4th respondent be and is hereby directed to reverse the transfer of the property from the 2nd respondent's name into the 2nd applicant's name.
3. The 1st and 2nd respondents should bear the costs of this application on the attorney-client scale."

The background facts of this application are the following.

It is common cause that on 7 May 1996, first applicant's immovable property being stand number 458 Kensington Township, Bulawayo ("the property") was attached in execution pursuant to a writ issued by virtue of a judgment obtained by the first respondent against the first applicant.

On 28 November 1997, the third respondent, through Bulawayo Real Estates attempted to dispose of the property by public auction but such action was disrupted by a group going under the style of the Affirmative Action Group. It was aborted. A successful public auction was carried out by the third respondent again through Bulawayo Real Estates on 23 April 1999 but the third respondent was unhappy with the price offered by the highest bidder. The third respondent therefore asked him to raise the price to $100 000,00 but the highest bidder failed to do so leading to the cancellation of the sale to him. The third respondent, thereafter, and pursuant to Rule 358(2) of the High Court Rules, 1971, directed that the property be sold by private treaty. On 31 July 2000, the second respondent offered to buy the property for $130 000,00 and signed an agreement of sale with Bulawayo Real Estates, acting on behalf of the third respondent. On 28 November 2000 the third respondent formally accepted the second respondent's offer and payment of $130 000,00 for the property and, by notice, called for anyone who had an objection to that sale to file such objection within 15 days of his letter. Such letter was served on the first applicant by registered mail on 1 December 2000. When no objections were lodged with the third respondent, the third respondent confirmed the sale to the second respondent on 23 February 2001. On 13 February 2001 the first applicant wrote a letter of objection to the third respondent objecting to the sale to the second respondent. On 23 March 2001, the third respondent rejected the first applicant's letter of objection on the basis

that it was out of time and it did not comply with the Rules. The first applicant was advised to go to court if he was aggrieved by that decision. On the same day of 23 March 2001 Messrs Webb, Low and Barry Legal Practitioners were directed by the third respondent to proceed to transfer the property to the second respondent. On 4 April 2001 in case number HC 1058/01 the first applicant filed a chamber application with this court to set aside the third respondent's sale to the second respondent but was asked to serve the application on Messrs Webb, Low and Barry. He never did. Neither did he pursue the matter thereafter. On 19 September 2003 the property was duly transferred to the second respondent and title deeds issued in his

name for property. On 14 November 2003, the plan of distribution of the proceeds of the sale of the property was advertised in the Government Gazette. On 8 January 2004 all the creditors were paid out from the proceeds of the sale. The present application was filed by the applicants on 21 June 2004.

From the founding papers and *Advocate Nkiwane's* submissions the main thrust of the applicants' case is that the attachment of the property was incurably flawed on account of failure by the third respondent to comply with the provisions of Rule 347(3) of the Rules, *supra*, in that the Notice of Attachment was not served on the 2nd applicant who was in occupation of the property. This is clearly a high sounding nothing. First, at the time of the agreement between the applicants there was no dwelling but a structure built up to slab level and an unroofed blair toilet. It is beyond dispute that the second applicant was not staying in such minimal improvements. I do not think he was staying in a slab or an unroofed blair toilet. So Rule 348 does not apply here as there is no dwelling that was occupied by the second applicant.

As for Rule 347, *Advocate Nkiwane* was forced to concede that it does not apply here. The simply fact is that the attachment preceded the agreement of sale between the applicants. The date of attachment is 7 May 1996. The sale agreement between the applicants was in October 1996. In his own affidavit the second applicant states that he took occupation in October 1996. In fact what is clear is that the sale took place after attachment (about four months). Where did the first applicant derive the legal authority to sell the property when it was under attachment? This issue alone makes the application still-born or ill-conceived.

In the event I am wrong in this finding, still this application was made after transfer was made to the names of the second respondent. Once transfer was made, the confirmation of the sale by the third respondent could not thereafter be impugned. The only option available to the applicants was to file a court application to set aside the 3rd respondent's decision within one month of the sale i.e. before confirmation and transfer was made. It is trite that once the sale of the property has been properly confirmed by the Sheriff and transfer effected by him to the purchaser against payment of the price any application to set aside the transfer falls outside the Rules of this court, in particular Rule 359 – *Twine Wire Agencies (Pvt) Ltd* v *CABS* SC-46-05 and *Mapedzamombe* v *CBZ & Anor* 1996(1) ZLR 257 (S). As a general principle, it

should be acceptable that a court will not readily interfere with the Sheriff's sales -*Lalla* v *Bhura* 1973(2) RLR 280 (A) at 283A.

When the sale of property not only has been confirmed by the Sheriff, but transfer effected by him/her to the purchaser against payment of the price, as is the case here, any application to set aside the sale or transfer must conform strictly with the principles of the common law. Under common law, the sale of immovable

property by judicial decree cannot, after transfer has been passed, be challenged unless there was:

(a) fraud on the part of the purchaser;

(b) an allegation of bad faith on the part of the purchaser; or

(c) knowledge of prior irregularities in the sale of execution by the purchaser.

Once transfer has been effected, the person seeking to impeach the sale and transfer must allege and prove fraud, bad faith or knowledge of any defect on the part of the purchaser when he bought the property at such sale – *Sookdeyi & Ors* v *Sahadeo & Ors* 1952(4) SA 568(A) at 571H-572A and also 569H; *Twine Wire Agencies (Pvt) Ltd* v *CABS, supra* and *Mapedzamombe* v *CBZ, supra,* at 260E-H.

In casu, there is no iota of doubt that nowhere in their affidavits have the applicants alleged and/or proved bad faith or knowledge of any defect on the part of the second respondent who purchased the property by private treaty from the third respondent and/or his representative, Bulawayo Real Estates. There is a dearth of silence in that respect and in any event there must be because there was never any bad faith, fraud or knowledge of any irregularities in the purchase of the property by the second respondent. The second respondent was a *bona fide* purchaser for value at a sale in execution. The second respondent complied with all the formalities that were required and properly obtained transfer. This has not been challenged or denied in the applicants' answering affidavits. In *Mapedzamombe* v *CBZ, supra,* at 261B-C, GUBBAY CJ had this to say:

"No allegation was made, let alone proof offered by the appellant, or bad faith or knowledge of any defect entirely on the part of the second respondent. It follows therefore that the registration of the property in the name of the second respondent must be allowed to stand. If one has regard to the importance which attaches to the system of land registration in our law and the faith that the public places therein, the sense behind the rule that once perfected by transfer the transaction is virtually unassailable is easily understood. Where one to hold otherwise, mortgage bonds subsequent transfer might fail to be set aside."

It is trite that an action *rei vindicatio* does not lie against a *bona fide* purchaser at a sale in execution – *Gwanangura* v *Founders & Anor* SC-62-00. In the circumstances, the sale in execution to the second respondent is beyond reproach.

On costs, the applicants' conduct has amounted to an abuse of the court process and their actions have thereby brought about additional and unwarranted expenses to the second respondent – *Mudzimu* v *Municipality of Chinhoyi & Anor* 1986(1) ZLR 12 HC at 17C. The applicants in 2004 feigned ignorance of the sale of property to second respondent when in fact on 13 Febraury 2001 they wrote and even filed a chamber application attempting to set aside such sale in 2001. The clear impression they give in the founding papers in 2004 is that the sale to the second respondent was a recent discovery when they knew that that was not the case. The applicants only acted when the second respondent sought to eject them. In their papers, the applicants subjected the officers of this court to vicious attacks with no evidence supporting such attacks. They should also be penalised for such unfounded attack on the officers of this court. The cumulative effect of the applicants' conduct is such that the court should show its displeasure by a special award of costs.

Accordingly, it is hereby ordered that:

1. 1st and 2nd applicants' application be and is hereby dismissed with costs on an attorney and client scale.

2. 1st and 2nd applicants be and are hereby ordered to vacated stand number 458 Kensington Township, Bulawayo within ten(10) days of service of this order.

Mabhikwa, Hikwa & Nyathi, applicant's legal practitioners
Coghlan & Welsh, 2nd respondent's legal practitioners