

MATABELELAND HAULIERS (PVT) LTD

Versus

JOSHUA REUVAYN LEPAR

And

SHERIFF OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 19 OCTOBER AND 5 NOVEMBER 2020

Opposed Application

Advocate S Siziba, for the applicant
Advocate L Nkomo, for the 1st respondent

MAKONESE J: This is an application seeking to interdict the respondents from evicting the applicant from a property sold at a sale in execution. The applicant further seeks an order setting aside the transfer of the property sold in execution without setting aside the sale in execution itself. The order sought by the applicant is in the following terms:

“IT IS ORDERED THAT

1. The 1st respondent be and is hereby interdicted from evicting the applicant or those claiming through it from stand 11, Bulawayo Light Industrial Site of Bulawayo Township Lands, Bulawayo pending the finalization.
2. The transfer of Stand 11, Bulawayo Light Industrial Site of Bulawayo Township under Deed of Transfer 2290/2018 by the 2nd respondent to the applicant be and is hereby set aside and reverted into the name of the applicant.
3. 1st respondent to bear all the legal costs.”

FACTUAL BACKGROUND

Under Harare High Court case number HC 3464/13 African Banking Corporation of Zimbabwe (Banc ABC) sued the applicant for the sum of US\$152 140 together with interest at the rate of 33% per annum and costs of cost. The court entered judgment against Dawood Services (Pvt) Ltd, jointly and severally with Matabeleland Haulers (Pvt) Ltd, David Bruno

Phiri and Rose Shingirai Luwo. The judgment was granted on 20th August 2014. The operative part of the judgment was in the following terms:

- “1. The plaintiff’s claim succeeds.
2. Stand 11 Bulawayo Light Industrial Site, Bulawayo Township Lands situate in the district of Bulawayo measuring 1487 square metres in extent held by the 2nd defendant under Deed of Transfer 492/97 dated 26th February 1997 shall be executable.
3. The first, second, third and fourth defendants jointly and severally, the one paying the others to be absolved, shall pay to the plaintiff the sum of US\$152 140 together with interest thereon at the rate of 33 % per annum from 29 March 2013 to date of payment.
4. The defendants shall pay costs of suit on the legal practitioner and client scale.”

Pursuant to the order of this court, the property that was declared executable in terms of the order was attached and sold in execution by 2nd respondent. The property was duly advertised in terms of the law and Arenel (Pvt) Ltd, trading as Arenel Quality Sweets purchased the property at an auction. The auction was conducted on 29th July 2016 and Arenel was declared the highest bidder. By letter dated 5th August 2016, 2nd respondent declared Arenel as the purchaser of the property and invited all interested parties with objections to the confirmation of the sale, to raise such objections within 15 days. The applicant and its co-judgment debtors in case number HC 3464/13 raised objections to the confirmation of the sale. 2nd respondent convened a hearing to inquire into the objections on 30th September 2016. In a ruling dated 6th October 2016, 2nd respondent dismissed the objections and confirmed the sale. Arenel purchased the property for US\$73 000. It is noteworthy that in objections raised by Dawood Services (Pvt) Ltd the following issues were raised;

- (a) BancABC is owed US\$152 140 in terms of HC 3464/2013 which figure is being challenged at the High Court in case number HC 9928/16.
- (b) The property was sold for an unreasonably low price of US\$73 000.

In his report, 2nd respondent indicated that according to a valuation made by the Sheriff’s appointed Real Estate agents the forced sale value was placed at US\$60 000, and the open market value was pegged at US\$ 100 000. The property was sold for US\$73 000. A

valuation report presented by the objector pegged the open market value of the property at US\$140 000 and the sale value at US\$91 000. 2nd respondent concluded that inspite of the valuations presented by the objectors, the price of US\$73 000 is not unreasonably low. Having failed to overturn the sale on the grounds that the price was an unreasonably low, applicant filed an application with the High Court at Bulawayo under case number HC 2657/16 seeking to have the 2nd respondent's decision to confirm the sale set aside. The application was made in terms of Order 40 Rule 359 (8) of the High Court Civil Rules. This was the second attempt to set aside the sale. This court dismissed the application with costs. The applicants had in that matter failed to file their Heads of Argument timeously.

The applicants were undeterred. A third attempt was made by the applicants to set aside the sale. On 2nd November 2016 the applicants launched another application at the High Court Bulawayo under case number HC 2746/16 in terms of Rule 359 (8) of the Rules, seeking the same relief as the one sought in case number HC 265/16. This application was dismissed with costs *per* MOYO J on the 19th July 2017. The applicants remained resolute. A fourth attempt was made to pursue their bid to have the sale set aside. Under case number HC 1966/18 applicants applied for rescission of judgment. The application was opposed by the Judgment Creditor and applicants withdrew their application on 11th February 2020. This application before me now is the applicant's fifth attempt to frustrate the sale in execution by seeking to interdict 1st respondent from taking occupation and having the Title Deed cancelled.

There can be no doubt that the activities and conduct of the applicant amounts to gross abuse of court process. The application is *mala fide* and designed to mislead the court. Having failed to have the sale set aside way back in September 2016, the applicant filed a number of applications in this court with the aim setting aside a lawful sale in execution. The pleaded cause of action in the present application is that the 2nd respondent conducted a fraudulent sale in execution. The applicant avers as follows in paragraph 5 of the Founding Affidavit:

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- 5.1 The Title Deeds are fraudulent because they lie in that 1st respondent bought the property through 2nd respondent. It was in fact Arenel (Pvt) Ltd. For this reason the Title Deeds must be canceled and revised.

- 5.2 The 2nd respondent is aware of a case including the estate agents fraud case reported to both the police and the Judicial Service Commission as set out in Annexure “G” hereto which is still pending.”

What the applicant omits to mention in the entire application are the previous bids to have the sale set aside on the grounds that the sale price was unreasonably low. The applicant did not disclose a material fact deliberately. The applicant does not disclose the fact that pursuant to the sale, Arenel had decided to transfer the property to a nominee, 1st respondent. I am not aware of any rule that forbids a purchaser of a property at a sale, who is declared the highest bidder, to have such property transferred to a nominee of their choice. In my view, the highest bidder is entitled at law to transfer the property to themselves or to a nominee.

APPLICATION BEFORE THE COURT

In this application the applicant seeks an order interdicting 1st respondent from evicting it from the property and an order declaring the transfer of the property into 1st respondent’s name to be null and void. The applicant’s cause of action is that transfer of the property was done fraudulently in a bid to circumvent litigation under case number HC 1966/18. As a matter of fact, there is currently no pending litigation before the court in respect of this matter. To be more precise, there is no longer any pending litigation seeking to challenge confirmation of the sale of the property by 2nd respondent. Applicants make a bold allegation that the transfer was fraudulent in that it was meant to avoid payment of capital gains tax to ZIMRA (Zimbabwe Revenue Authority). It is significant to note that applicant’s Founding Affidavit does not provide any detailed particulars of the alleged fraudulent conduct by the respondents. It is trite that a party wishing to rely on fraud must not only plead it but must also prove it clearly and distinctly. Rule 104 of the High Court Rules provides as follows:

“The defendant or plaintiff, as the case may be, shall raise by his pleading all matters which show the action or claim in reconviction not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, prescription, release, payment, performance or facts showing illegality either by statute or common law.”

The applicant’s Founding Affidavit is silent on how the respondents allegedly committed the fraud. Applicant claims that respondents defrauded ZIMRA. If that is so, the

applicants have no *locus standi* to complain on behalf of ZIMRA. In any event no explanation is forthcoming from the applicant as to why the Judgment Creditor, (Banc ABC), Arenel (Pvt) Ltd and the Registrar of Deeds who are all interested parties have not been cited in this matter. Applicant was lawfully divested of ownership of the property through a judicial sale. The sale was duly confirmed by the Sheriff. It is clear that applicant has absolutely no legal basis for seeking to interdict 1st respondent from evicting it from the property neither does it have a defence to the counter-claim for eviction.

In *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 226 (H) at page 237 C-D, MAKARAU JP (as she then was) had this to say:

“There are no equities in the application for rei vindicatio. Thus, in applying the principle, the court may not accept and grant pleas of mercy or for extension of possession of the property by the defendant against an order for the convenience or comfort of the possessor once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it. It is a rule or principle of law that admits no discretion on the part of the court. It is a legal principle heavily weighted in favour of property owners against the whole world and is used to ruthlessly protect ownership.”

It is an acceptable principle of law in our jurisdiction that the courts are reluctant to set aside a sale where the sale has been confirmed and transfer has already been effected. See: *Garati v Mudzingwa & Ors* 2008 (2) ZLR 89 (S) and *Mapedzamombe v Commercial Bank of Zimbabwe and Another* 1996 (1) ZLR 257 (S)

In applying the principles laid down in these decisions of the Supreme Court, it is settled that before a sale is confirmed in terms the Rules, it is a conditional sale and any interested party may apply to court to have it set aside. At that stage, even though the court has a wide discretion to set aside the sale in certain circumstances, it will not readily do so. Once the sale has been confirmed by the Sheriff, the sale of the property is no longer conditional. That being so, a court is more reluctant to set aside a sale that has been confirmed. Where the property has been transferred to the purchaser, the court may not lightly cause a reversal or cancellation of the Title Deed.

In a completely confusing and unprocedural manner, applicant sought to introduce a new cause of action in paragraph 15 of its Answering Affidavit filed on 4th August 202, years after the sale in execution. The new cause of action is to the effect that Arenel did not pay the purchase price of US\$73 000. Not only is the fresh cause of action based on false and

misleading claims, it is not permissible for an applicant to substitute a new cause of action through an Answering Affidavit. This principle was set out in *Milrite Farming & Ors v Porusingazi & Ors* HH 82-10, where it is stated:

“The basic rule pertaining to application procedures is that the applicant’s case stands or falls on averments made in the Founding Affidavit and not upon subsequent pleadings. The rationale for the rule is quite clear. It is to avoid the undesirable effect of litigation assuming a snowballing character, with fresh allegations being made at every turn of pleadings. Thus the fresh allegation contained in the Answering Affidavit must be ignored, leaving the same cause of action and substantially the same facts in both first and second applications.”

The inescapable conclusion is that applicant is not only a dishonest litigant who deliberately seeks to mislead the court but also delights in abusing court process by instituting multiple applications on the same subject matter, seeking the same relief on the basis of ever changing causes of action. In the case of *Parks and Wildlife Management Authority v H. J Vorster and Anor* HB 64-20 I had this to say about such litigants at page 3 of the cyclostyled judgment:

“These courts cannot adjudicate upon the same matter over and over with different parties seeking essentially the same relief.”

It is my view, that the applicant cannot be allowed to institute a multiplicity of actions all designed to set aside a sale in execution confirmed on 6th October 2016, some four years ago. At first the sale in execution was challenged on the grounds that the highest bid resulted in an unreasonably low price. An inquiry was conducted and it was held that the objection had no merit. An application to review the Sheriff’s decision was launched in this court. This attempt failed. A similar application was launched. The application was dismissed by this court. An application for rescission of that judgment was filed and that again failed. This application is a last ditch attempt to attack the sale on a completely new cause of action. An allegation of a fraudulent sale has suddenly emerged. There is absolutely no basis for the court to declare the transfer of the property null and void.

DISPOSITION

All in all therefore, applicant has no legal basis to challenge the transfer of the property to a nominee of the purchaser. In the relief sought, applicant seeks to have the transfer of the property by 2nd respondent set aside, without having the sale itself set aside. This is not competent, the Title Deed cannot be set aside or reversed, with the sale itself

remaining in force. In so far as the counter application is concerned, the rights of vindication have not been opposed at all. The counter-application remains uncontested. *Advocate Nkomo*, invited the court to grant an order in terms of the counter-application. In response to that request *Advocate Siziba*, appearing for the applicant argued that the fate of the counter-application was consequent upon a finding on the main application. My understanding of that response was that once it was determined that the application for an interdict could not succeed and that there was no basis for the cancellation of the Title Deed, there would be no meaningful challenge to the counter-application.

In the result, and accordingly the following order is made:

1. The application be and is hereby dismissed.
2. The counter-application by 1st respondent be and is hereby granted.
3. Applicant and all those claiming ownership of the property at Stand 11, Bulawayo Light Industrial Site known as 9 Preston Street, Belmont, Bulawayo, held under Deed of Transfer No. 2290/2018, shall vacate the premises within 5 days of this order, failing which 2nd respondent is authorized to forthwith evict applicants from the premises.
4. The applicants are to bear the costs of suit.

Mathonsi – Ncube Law Chambers, applicant's legal practitioners
Messrs Danziger & Partners, 1st respondent's legal practitioners

