

ROBERT NJANJI

Versus

KENN BONGANI SAMBO

And

PEOPLES OWN SAVINGS BANK

And

ADDITIONAL SHERIFF N.O

And

THE REGISTRAR OF DEEDS N.O

And

THE ZIMBABWE ANTI-CORRUPTION COMMISSION

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 2 MARCH AND 28 APRIL 2022

Opposed Application

M. Ndlovu, for the applicant
T. Matshakaile, for the 1st respondent
J. Mugova, for the 2nd respondent
No appearance for the 3rd – 5th respondents

KABASA J: This judgment relates to two applications, one filed under HC 1207/20 and the other HC 1350/20. This is so because the two matters were consolidated after it was adjudged convenient to do so.

Both applications seek declaraturus, in HC 1207/20 the applicant seeks the following order: -

- “1. The sale and transfer of the applicant’s property namely stand 473 Marvel Township 2 of Marvel A also referred to as house number 473 Murchison Road, Killarney Bulawayo to the 1st respondent at the instance of the 2nd respondent through the 3rd respondent transferred through the 3rd respondent be and is hereby set aside and be declared a legal nullity and or voidable at the instance of the applicant on account of common law grounds of fraud, corruption, irregularity and other grounds as expounded in the founding affidavit.
2. The applicant be and hereby directed to reimburse the 1st respondent all his legal and other costs paid to any of the other respondents for the direct and other costs incurred with connection with the sale (the purchase price) and transfer of the property.
3. The 1st respondent be and is hereby declared to a *mala fide* (sic) purchaser of the applicant’s property being stand number 473 Marvel Township 2 of Marvel A also referred to as house number 473 Murchison Road, Killarney, Bulawayo.
4. The respondents jointly and severally be and are hereby ordered to reverse the transfer of the applicant’s transfer (sic) being stand number 473 Marvel Township 2 of Marvel A also referred to as house number 473 Murchison Road Killarney Bulawayo within 60 days of granting of the order with all the relevant respondents signing all transfer papers, failing which the Additional Sheriff for Bulawayo be and is hereby ordered to sign all transfer papers at the 4th respondent’s offices and other statutory bodies.
5. The 5th respondent be and is hereby directed as a statutory body to take an active interest in this matter and all the issues raised with

the cooperation of the application (sic) as the complainant to make sure that the issues of fraud, forgery and corruption are investigated if need be prosecuted accordingly.

6. There be no order as to costs unless any of the respondents opposes the relief sought, in which case costs ought to be paid on an attorney-client scale.”

In HC 1350/20 the order sought is: -

- “1. The transfer of the applicant’s property namely stand number 473 Marvel Township 2 of Marvel A also referred to as house number 473 Murchison Road, Killarney Bulawayo to the 1st respondent at the through (sic) the 3rd respondent the 4th respondent offices (sic) be and is hereby set aside and be declared a legal nullity and or on account of the fact that there was an extant court order by this Honourable High Court under HC 249/16 granted by the Honourable Justice BERE at the time of the purported transfer.
2. The respondents jointly and severally be and are hereby ordered to reverse the transfer of the applicant’s transfer (sic) being stand number 473 Marvel Township 2 of Marvel A also referred to as house number 473 Murchison Road, Killarney Bulawayo, within 60 days of granting of the order with all the relevant respondents signing all transfer papers failing which the Additional Sheriff for Bulawayo be and is hereby ordered to sign all transfer papers at the 4th respondent’s offices and other statutory bodies.
3. The 5th respondent be and is hereby directed as a statutory body to take an active interest in this matter and all the issues raised with the cooperation of the applicant as the complainant to make sure that the issues of the illegal transfer is investigated, if need be, prosecuted accordingly.”

The background to the seeking of these inelegantly couched and long-winded orders is this: -

The applicant obtained a loan from the 2nd respondent which he secured by registering a mortgage bond against the immovable property described

herein. The debt was not paid as per agreement and the 2nd respondent successfully obtained judgment against the applicant, which judgment declared the immovable property executable. The 3rd respondent subsequently sold the immovable property at a judicial sale and the 1st respondent was declared the highest bidder. A purported request to have the sale set aside in terms of the then rule 359 (1) of the High Court rules, 1971 was dismissed by the 3rd respondent, who proceeded to confirm the sale.

The applicant challenged the 3rd respondent's decision and under HC 249/16 sought to have the sale set aside. The 2nd respondent opposed the application whilst the 3rd respondent did not.

The applicant proceeded to set the matter down on the unopposed roll citing only the 3rd respondent who had not opposed the application, leaving out the 2nd respondent. HC 249/16 was set down on 12th May 2016 and BERE J granted the following order: -

- “1. The decision of the Sheriff of Zimbabwe handed down on the 28th January 2016 under case number SSB 118/14 to confirm the sale in execution held on the 10th of November 2015 in respect of applicant's immovable property be and is hereby set aside.
2. The Sheriff of Zimbabwe is hereby ordered and directed to conduct another sale in execution in terms of the rules of this court in relation to applicant's immovable property presently under judicial attachment.
3. There shall be no order as to costs.”

The 2nd respondent in the meantime filed its own application under HC 1095/16 seeking the dismissal of HC 249/16 for want of prosecution. This

application was granted by MAKONESE J on 9th June 2016 and with it the 2nd respondent obtained the following order: -

- “1. The 1st respondent’s court application filed in case number HC 249/16 be and is hereby dismissed for want of prosecution.
2. The 1st respondent shall pay the applicant’s wasted costs in case number HC 249/16 and the costs of this application on the higher scale of attorney and client.”

The immovable property was subsequently transferred into the 1st respondent’s name.

The applicant then brought a rule 449 application to rescind MAKONESE J’s order in HC 1095/16, whilst the 2nd respondent also brought a rule 449 application to rescind BERE J’s order under HC 249/16.

The applicant’s rule 449 application was premised on the fact that when HC 249/16 was dismissed for want of prosecution, the matter had been successfully prosecuted and an order granted, whilst 2nd respondent’s rule 449 application was premised on the fact that HC 249/16 was opposed and ought not to have been set down on the unopposed roll.

In granting the 2nd respondent’s application MOYO J had no kind words for the applicant. The learned Judge had this to say: -

“First respondent (herein) then set the matter down on the unopposed roll and finalized it without notice to the applicant (herein). The matter was set down on the basis that the Sheriff who was a party also, had not opposed the application. That set down was thus irregular as applicant (herein) had opposed that application and had vested interests in the matter.

The order was therefore erroneously granted and one wonders why first respondent (herein) would snatch a judgment and then seek to cling to it. This is one application that need not have been opposed as the facts are crystal clear that the order obtained by the first respondent (herein) in HC 249/16 was not only premature and irregular, but it was clandestinely obtained. First respondent (herein) acted with *mala fides* and dishonesty in obtaining the order in HC 249/16, and as if that was not enough, first respondent still opposed this application, displaying an attitude which shows that the judgment was snatched deliberately, for there is no justification in clinging to a judgment one is not entitled to and was obviously granted in error.”

To show the court’s displeasure, the applicant was mulcted with punitive costs.

The applicant, who was also the applicant in the rule 449 application brought under HC 299/17 was equally lambasted by DUBE-BANDA J as he sought to vacate MAKONESE J’s order on the basis that he already had an order under HC 249/16 when HC 249/16 was dismissed for want of prosecution.

DUBE-BANDA J had this to say: -

“It is the order that was obtained by deception, cheating and undermining the system of this court that applicant anchors this application upon. Applicant asks this court to rescind the order in HC 1095/16 on the grounds that when it was granted, he had already been granted an order in HC 249/16. If it was not for the cheating, the order in HC 249/16 could not have been granted on the 12th May 2016.”

The learned Judge concluded that the applicant’s hands were dirty and the court would not have its hands soiled by allowing him to benefit from an illegally obtained order.

The applicant's attempts to hold on to the order under HC 249/16 was foiled by both MOYO J and DUBE-BANDA J. The two judgments were handed down on 28th September 2017 and 22 October 2020 respectively and are extant.

This consolidated application I am now seized with was filed on 24th July (HC 1270/20) and 18th August 2020 (HC 1350/20).

I found it necessary to give this detailed background in order to put the matter into its proper perspective in light of the opposition from the 1st and 2nd respondents.

In opposing the applications both respondents raised points *in limine*. The 1st respondent's point *in limine* attacks the procedure adopted by the applicant arguing that seeking a declaratur is a vain attempt at disguising an application for review as a section 14 application for a declaratur. It is therefore improperly before the court.

The second respondent raised the same point *in limine* but added five more. I intend to consider only 3 of these. The 3 are: -

- a) Material dispute of facts
- b) Material non-disclosure and
- c) *Lis pendens*

This judgment is concerned with these points *in limine* as their resolution is dispositive of the matter.

I do not propose to deal with them in the order they were raised. With that said, I propose to deal with the *lis pendens* issue first.

Ms. Mugova, for the 2nd respondent's contention is that HC 1350/20 raises the very same issues as those raised in HC 1207/20. The relief sought is substantially the same. HC 1207/20 has not yet been determined and so HC 1350/20 ought to be dismissed and the matter decided on the basis of HC 1207/20.

The authors Herbstein and Van Winsen in the *Civil Practice of the High Courts and Supreme Court of Appeal of South Africa, Fifth Edition* at 605 thereof describe *lis pendens* as follows: -

“Lis pendens is a special plea open to a defendant who contends that a suit between the same parties concerning a like thing and founded upon the same cause of action is pending in some other court.”

The learned authors go on to say: -

“In Nestle (SA) (Pty) Ltd v Mars Incorporated (2001) 4 ALL SA 315 (SCA), it was stated as follows:

The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally. There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In

the absence of any of these elements there is no potential for a duplication of actions.”

It is my considered view that were I being called upon to adjudicate over HC 1350/20 and HC 1207/20 was before some other Judge or pending set down before me, the argument by *Ms. Mugova* would be persuasive.

The fact of the matter is these applications have been consolidated and in terms of rule 34 of SI 22/2021 where such consolidation has been granted, “the said actions shall proceed as one action.” (my emphasis)

What therefore is pending elsewhere in the circumstances? With consolidation there will be no replication and there will equally be finality in litigation as both applications are now being adjudicated on as one.

Whilst I find *Mr Ndlovu*’s contention that HC 1350/20 is anchored on different facts and therefore cannot be said to raise same issues as those in HC 1207/20 an unattractive argument, I am however of the view that *lis pendens* does not apply following the consolidation of the applications and my decision to hear them as one application.

I therefore hold that this point *in limine* was not properly taken and accordingly dismiss it.

I turn now to the point on material non-disclosure. This point arises from the fact that the applicant did not disclose that the order in HC 249/16 which set aside the sale in execution was adjudged to have been fraudulently and irregularly obtained and was equally adjudged to have been clandestinely obtained in a later judgment by DUBE-BANDA J.

To therefore seek to anchor the section 14 application for a declaratur on such an order without disclosing the full facts amounts to deception.

I am persuaded by this argument. A reading of the applicant's application does not fully disclose what became apparent with the filing of notices of opposition and opposing affidavits by the respondents.

To argue that HC 249/16 was extant at the time HC 1095/16 was granted is a failure to appreciate the import of the decisions by MOYO J and DUBE-BANDA J. A litigant cannot seek to benefit from an order obtained through deception and anchor further litigation on such an order. It will be a sad day for justice if courts were to allow such chicanery to see the light of day by allowing a litigant to flaunt an irregularly obtained order to its benefit.

In *Anabas Services (Pvt) Limited v Minister of Health and Others* HB 88-03 NDOU J had this to say regarding litigants who do not provide complete information when seeking relief from the courts: -

“The courts should, in my view, always frown on an order, whether *ex-parte* or not, sought on incomplete information. It should discourage material non disclosures, *mala fides* or dishonesty. They may, depending on the circumstances of the case, make adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants.”

The applicant sought to hinge his case on the order in HC 249/16 without disclosing fully the circumstances under which such an order was obtained and subsequently vacated. (See also *Centra (Pvt) Ltd v Pralene Moyas and Anor* HH 57-12)

Mr Ndlovu's contention that the court ought to just consider that HC 249/16 was extant is tantamount to a fixation on a mirage insisting that such

mirage is reality. It does not change the fact that there was material non-disclosure.

This point *in limine* was properly taken and accordingly succeeds.

I turn now to the issue of material dispute of facts. The 2nd respondent's argument is that the allegations of impropriety on the part of the respondent are vehemently contested.

The applicant also contends that the immovable property had another mortgage bond registered in favour of ZB Bank and so the bond in favour of the 2nd respondent could not be cancelled without the consent of ZB Bank. The ZB Bank mortgage issue was not a fact known to the 2nd respondent and was raised almost 10 years later. Equally the issue of the service of the notice of attachment by the 3rd respondent and the pricing of the immovable property has been put in dispute and cannot be resolved on the papers.

In *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* HH 92-09 MAKARAU J (as she then was) had this to say on the issue of material disputes of fact: -

“A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

The applicant's assertions regarding the conduct of the 2nd respondent saw him enlisting the intervention of the National Prosecuting Authority, the Police, the Law Society of Zimbabwe and the Zimbabwe Ant Corruption Commission on allegations of fraud perpetrated by the respondents in the sale of his immovable property. He contends that there were sufficient movables

which could have been sold to satisfy the debt, the attachment notice was never served in terms of the rules of court and that the valuation relied on was by an auctioneer who was an interested party. These assertions are disputed by the respondents.

With such diametrically opposed positions how is the court to resolve such in the absence of further evidence? Can these be resolved by the adoption of a robust approach? I think not.

The dispute is material as that is where the applicant hinges his application for a declaratur seeking to set aside the sale and transfer of his immovable property. (*Room Hire Co. v Jeppe Street Mansions* 1949 (3) SA 1155).

In *Musevenzo v Beji and Another* HH 268/13 MAFUSIRE J enumerated the options available to the court where there is material dispute of facts. The court can take a robust approach and resolve the dispute on the papers, permit the leading of oral evidence in terms of rule 229 B of the rules of court, refer the matter to trial or dismiss the application altogether if the applicant ought to have foreseen that such dispute would arise.

The applicant has brought a number of applications over this same matter. The disputes between the parties were therefore obvious as the allegations of impropriety, fraud, corruption and irregularity levelled against the respondents have been vehemently contested. The documentary attachments filed with both the founding and answering affidavits were countered by the 1st and 2nd respondents who also filed documents that portray a different picture to that painted by the applicant.

He therefore chose to bring a section 14 application for a declaratur well knowing that such disputes would arise. He ought to have known better. I am therefore not inclined to opt for any of the options except a dismissal of the application.

This point *in limine* therefore has merit and equally succeeds.

I turn now to the last point *in limine*, this relates to the vehicle with which the matter was brought to court.

Both *Ms. Mugova* and *Mr Matshakaile's* contention is that a litigant can either challenge the sale in execution of an immovable property through rule 359 (8) of the then High Court Rules, 1971 or by way of review in terms of section 27 of the High Court Act, Chapter 7:06. The challenge in terms of rule 359 (8) would be available to a litigant who would have requested the Sheriff to set aside the sale in terms of rule 359 (1). Where however a litigant chooses to take the Sheriff's decision on review, such litigant would rely on common law grounds or on the grounds as stipulated under section 27 of the Act.

I do not lose sight of the fact that the applicant purportedly sought to rely on rule 359 (1) although it appears the request did not follow the procedure as articulated therein. That notwithstanding, the 3rd respondent adjudicated over it and dismissed the request. It was then that the applicant filed HC 249/16 in terms of rule 359 (8). This application did not achieve the desired result for reasons already stated elsewhere in this judgment. Attempts to resuscitate that application equally failed.

The section 14 declaratur application was obviously an attempt to circumvent the time limits which an application for review would have entailed.

The ruling by the 3rd respondent was in January 2016 and the declaratur applications were filed in 2020 after a merry-go-round which involved the deception in obtaining an order under HC 249/16 and the failure to cling to it when an application to rescind that order was granted by MOYO J.

Litigation is not about ingenuity but it is about prosecuting matters procedurally and once and for all. This is what the principle of finality to litigation is all about, which principle must be jealously guarded.

I got the impression that the applicant got himself entangled by the choices he made and when the one avenue appeared closed, chose to open another by filing two applications which in essence sought to have a second bite of the cherry but using unorthodox means.

I am persuaded by counsel for the 1st respondent's contention that the applicant ought to have been guided by the decision in *Chiwadza v Matanda and Others* 2004 (2) ZLR 203 (H) if he was of the view that his approach to the Sheriff in terms of rule 359 (1) was flawed and so did not amount to a request to the Sheriff to set aside the sale as envisaged by rule 359 (1). In which case he ought therefore to have sought a review of the Sheriff's confirmation of the sale on common law grounds. (See *Puwayi Chiutsi v The Sheriff of the High Court and 3 Others* and *Elliot Rodgers v McDuff Madega N.O and Anor* HH 604/18).

He could have had the 3rd respondent's decision reviewed or pursued the r359(8) application to set it aside. He chose not to pursue the r359(8) application after the matter was dismissed for want of prosecution and sought a declaratur instead. As stated earlier, the factual basis upon which the application

is hinged ought to have alerted him to the folly of proceeding by way of application.

That said I find this point *in limine* meritorious and it is accordingly upheld.

The applicant has been all over the place in terms of litigation, dragging the respondents with him and consequently putting them out of pocket.

Given the history of the matter as articulated earlier, the applicant's conduct is deserving of censure. His citation of the 5th respondent is equally misplaced. It is not for this court to order the 5th respondent to work with the applicant with a view to initiate prosecution. If the applicant's overtures to that body did not achieve what he desired, it is not for this court to lend weight to the unsubstantiated corruption allegations by granting an order ordering 5th respondent to take active interest in the matter and commence investigations.

The court therefore accedes to the respondents' prayer for an award of costs at a punitive scale.

In light of the nature of the points *in limine* and my determination on each one, the most appropriate disposition is a dismissal of the consolidated application.

I found it an exercise in futility to apply my mind to the issue of the new evidence counsel for the 2nd respondent had asked that it be expunged from the applicant's answering affidavits. My determination of the other points *in limine* makes this unnecessary.

In the result I make the following order: -

1. The points *in limine*, with the exception of *lis pendens*, be and are hereby upheld.
2. The application for a declaratur in HC 1207/20 and HC 1350/20 is hereby dismissed.
3. The applicant shall pay costs of suit in HC1207/20 and HC1350/20 on a legal practitioner and client scale.

Ndlovu Mehluli and Partners, applicant's legal practitioners
Sandi & Matshakaile, 1st respondent's legal practitioners
Mawere Sibanda c/o Titan Law, 2nd respondent's legal practitioners