

REPORTABLE (62)

GOLDLOCK INDUSTRIES 2003 (PRIVATE) LIMITED
v
**(1) SHERIFF OF ZIMBABWE (2) INTERFIN BANKING
CORPORATION (3) AL SHAMS GLOBAL BVI LIMITED (4)
JAYESH SHAH (5) REGISTRAR OF DEEDS (6) MASTER OF THE
HIGH COURT**

**SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, CHITAKUNYE JA & MUSAKWA JA
HARARE: 24 MAY 2022 & 30 JUNE 2023**

C. Nhemwa for the appellant

P. J. Chivanga for the second respondent

P. Dube for the third respondent

Fourth respondent in person

No appearance for the first fifth and sixth respondents

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MUSAKWA JA: This is an appeal against the whole judgment of the High Court (the court *a quo*) in which it dismissed the appellant's application for a declarator.

FACTUAL BACKGROUND

The appellant is a company under liquidation. The first respondent is cited in his official capacity. The second respondent is a banking institution incorporated in terms of the laws of Zimbabwe. The third respondent is a company incorporated in terms of the laws of the

British Virgin Islands. The fourth respondent is a male adult who is also the director of the third respondent. The fifth and sixth respondents have been cited in their official capacities.

On 12 December 2019, the appellant filed an application for a declarator through its liquidator, who was acting in terms of a certificate of appointment issued by the sixth respondent. In that application, the appellant sought a declaration to the effect that it is the owner of a certain piece of land known as Stand 666 Marlborough Township Extension 5 of Subdivision A of Strathmore held under Deed of Transfer No. 8810/2003 (hereinafter called the property). The appellant also wanted delivery of the original copy of the Deed of Transfer No. 8810/2003 under which the property was held, from the first and third respondents.

The events that led to the application are as follows: On a date that was not specifically stated, the appellant obtained a loan from the second respondent which was secured under Mortgage No. 2069/2010. The second respondent subsequently went under liquidation, but before that, it ceded the debts and rights in the mortgage bond registered in its favour, to the third respondent. The third respondent, later obtained a judgment against the appellant and issued a writ against the property which was sold in execution. During the sale of the property which had been declared specially executable by the court on 4 May 2016, the appellant instituted voluntary liquidation proceedings. The first respondent placed the property under a caveat on 24 August 2016. The appellant was placed under provisional liquidation on 9 August 2017 and the order was confirmed on 11 October 2017.

The first respondent conducted a sale in execution on 6 February 2017. Initially, the fourth respondent was confirmed as the highest bidder but failed to pay the purchase price. The second highest bidder, who happened to be the third respondent, was offered the property and

was subsequently confirmed as the winning bidder. The appellant claimed that the sale had been confirmed without it being given the required fifteen (15) days' notice to object to the sale in terms of the repealed High Court rules, 1971. In addition, the appellant claimed that there had been a sham scheme by the third and fourth respondents, with the fourth respondent being a major shareholder of the third respondent. The appellant claimed that the fourth respondent was competing with himself by offering the highest bid which he failed to pay so that the third respondent would be declared the second highest bidder.

When the order for the final liquidation of the appellant was granted by the court on 11 October 2017, the property had not been transferred to the third respondent. The appellant's liquidator requested the first respondent to give him the title deeds of the property. However, the first and third respondents are said to have refused to hand over the original copy of the deed of transfer. This prompted the appellant to file an application for a declaratur in the court *quo*. It is in that application that the liquidator of the appellant disclosed that he had already sold the property to one Mr Manyika on 24 July 2017, for the amount of US\$190 000.00 and that the purchaser had paid the full purchase price and was awaiting transfer of the property. The liquidator submitted that he was allowed at law to sell the mortgaged property in order to pay off creditors.

The application was opposed by the second respondent who contended that it had been unnecessarily joined to the proceedings as it would not be affected by the relief sought by the appellant. The third respondent also opposed the application and raised four points *in limine*. Firstly, the third respondent argued that there was an existing matter pending before the court *a quo* under HC 11203/17 which was premised on the same cause of action as the court application

that was before the court. The second issue raised was that the non-joinder of Mr *Manyika* as a party to the proceedings was fatal to the application. The third respondent also argued that the appellant ought to have sought leave to institute proceedings against the second respondent which was under liquidation. In addition, the third respondent contended that the application was fatally defective due to the appellant's failure to obtain leave to institute proceedings against it as it is a *peregrinus*.

In relation to the merits of the case, the third respondent opposed the application on the basis that the appellant had no real right of dominium over the property which had been declared specially executable by the court. The third respondent asserted that the property had been sold in execution before the appellant was placed in liquidation. It also argued that as the property had been bonded owing to the debt due to the third respondent as ceded by the second respondent, the appellant ought to have sought the consent of the second and third respondents before selling the property. Moreover, the third respondent prayed for the application to be dismissed, with costs borne by the liquidator of the appellant in his personal capacity.

The fourth respondent also opposed the application. As the fourth respondent had deposed to the third respondent's opposing affidavit in his capacity as its director, he associated himself with the averments made in that affidavit. Nonetheless, the fourth respondent added that the application was unwarranted and motivated by a desire to assist the appellant's shareholders. He argued that there was no basis at law in terms of which the appellant's liquidator could set aside an entire sale in execution and sell the property to a third party. He stressed that liquidation does not automatically set aside a sale in execution and permit the appellant to resell the property. Additionally, the fourth respondent submitted that the order confirming the liquidation

of the appellant only set out parts of s 221 (2) (a) – (h) of the repealed Companies Act [*Chapter 24:03*] (hereinafter referred to as the Act) as the powers which the liquidator could exercise in terms of the Act. As the liquidator of the appellant relied upon other provisions of the Act, the fourth respondent was of the view that he was acting in breach of the terms of his appointment. Lastly, the fourth respondent alleged collusion between the appellant’s legal practitioners and its liquidator and prayed for costs *de bonis propriis* to be granted against the legal practitioners.

Regarding the merits of the case, the appellant submitted that the liquidator had acted in terms of s 276 of the Act which empowered him to recover and take the assets of the appellant under liquidation. The appellant submitted that as the transfer of the property to the third respondent had not taken place; the property was still owned by the appellant. In addition, the appellant argued that the first respondent had not notified its directors at the material time of the sale of the property before confirming it and this nullified the whole procedure as it was done contrary to the rules of the court. The appellant also argued that the sale was invalid because it was not given fifteen (15) days’ notice within which to object to the confirmation of the sale in terms of the rules. Lastly, the appellant asserted that in terms of s 213 of the Act, transfer of the property could not proceed without the leave of the court.

Per contra, the third and fourth respondents argued that the judicial attachment of an immovable property creates a judicial mortgage and because of this, the appellant was deprived of any rights over the property. The respondents also submitted that when the property was attached, it became vested in the first respondent and nothing could be done without the first respondent’s consent or authority. Furthermore, the respondents were of the view that as the second respondent had ceded the debt to the third respondent, the third respondent assumed the

position of caveator whose interests in the property were protected by the caveat. The appellant therefore should have sought the consent of the third respondent before selling the property. Moreover, the respondents submitted that the Deposit Protection Corporation had the right to restrain dealings with the mortgaged property until payment of the debt and interest in full. As such, the disputed property could not be sold without the consent of the Deposit Protection Corporation.

The court *a quo* dismissed the points *in limine* raised by the third respondent. It found that the preliminary point of *lis pendens* was devoid of merit as the litigation in HC 11023/17 did not involve the same parties as those in the application before it. The court also dismissed the point that the appellant should have sought leave to institute proceedings against the third respondent which is a *peregrinus*. The court *a quo* held that the conduct of the third respondent showed that it had submitted to the jurisdiction of the court. Furthermore, the point *in limine* to the effect that there was a material non-joinder of Mr Manyika was also dismissed as the court found that such non-joinder was not fatal to the application.

On the merits, the court *a quo* found that the application by the appellant sought the setting aside of the sale of the property to the third respondent, which property had already been declared specially executable by the High Court. It was the court's observation that such an order could not be sought without first seeking the setting aside of the order which declared the property specially executable. In reference to the appellant's claim that the sale of the property to the third respondent was not *perfecta*, the court *a quo* held that the judicial sale had been completed by the time the appellant was declared to be under provisional liquidation on 9 August 2017. The court further noted that the appellant purported to sell a property that the first

respondent had already sold to the third respondent in the execution of a judgment debt. Likewise, the court *a quo* held that there was a judicial caveat on the property which the appellant ought to have respected.

In addition, the court *a quo* was of the view that the appellant's conduct frustrated the transfer of the property to the third respondent when the sale was *perfecta*. The court held that the attachment of the property by the sheriff vests a real right in the judgment creditor which means the property cannot be disposed of without the judgment creditor's consent. As such, the appellant could not deal with the property as it pleased. It was the court's finding that in light of the appellant's failure to set aside the order that declared the property specially executable or nullifying the writ which attached the property, the disputed property did not form part of the appellant's assets. The application was subsequently dismissed for lack of merit. It is against this decision that the appellant has noted an appeal on the following grounds:

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GROUND OF APPEAL

The grounds of appeal are as follows:

1. The court *a quo* erred in holding that the contention of the appellant was that the sale was not *perfecta* and should be set aside because transfer had not been effected and proceeded to accept that the first respondent had followed and fulfilled the correct procedure.
2. The court *a quo* erred and grossly misdirected itself in not finding that the first respondent failed to follow due process when conducting and confirming the sale thereby rendering the sale not *perfecta*.

3. The court *a quo* erred in holding that the third respondent had become the owner of Stand 666 Marlborough Township despite the fact that no transfer had been effected by way of registration of title at the Deeds Registry

The relief sought by the appellant is as follows:

RELIEF SOUGHT

WHEREFORE, the appellant prays for the following relief:

1. That the instant appeal succeeds.
2. That the order of the High Court be and is hereby set aside and substituted with the following:

- “(a) That the immovable property namely a certain piece of land situated in the District of Salisbury called Stand 666 Marlborough Township Extension 5 of Subdivision A of Strathmore held under Deed of Transfer No. 8810/2003 forms part of the assets of the applicant company in liquidation.
- (b) That the first and third respondents deliver the original copy of the Deed of Transfer No. 8810/2003 in terms of which applicant holds a certain piece of land situated in the District of Salisbury called Stand 666 Marlborough Township Extension 5 of Subdivision A of Strathmore to the applicant within ten (10) days from date of service of this order.”

Before this Court, the following submissions were made.

APPELLANT’S SUBMISSIONS

Mr *Nhemwa*, counsel for the appellant submitted that the effect of the order placing the appellant under liquidation was the creation of a common law principle known as *concursum creditorum* which is codified in terms of s 212 of the repealed Companies Act. He submitted that s 213 of the repealed Companies Act provided for the stay of any proceedings against the

property of a company under liquidation. As such, the property in question became part of the company's estate upon the granting of the order of liquidation. Furthermore, counsel submitted that ownership of the property remained vested in the appellant in whose name the title deed was registered. Mr *Nhemwa* also submitted that the judicial sale of the property was not *perfecta* as a sale only becomes *perfecta* upon registration with the Deeds Registry. Moreover, counsel argued that the judicial attachment of the property created a judicial mortgage (*pignus judiciale*) which did not have greater powers than an ordinary mortgage and had no effect on the liquidation proceedings.

SECOND RESPONDENT'S SUBMISSIONS

In response, Mr *Chivanga*, for the second respondent, submitted that it would abide by the decision of the court as it had no direct and substantial interest in the matter and the relief sought did not affect it.

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THIRD RESPONDENT'S SUBMISSIONS

Mr *Dube*, for the third respondent submitted that by the time the appellant was placed under liquidation, the judicial sale of the property was *perfecta*. Due to this, s 213 of the repealed Companies Act was inapplicable as the property did not form part of the assets of the appellant which the liquidator had the power to recover. Counsel further submitted that registration of a title deed in one's name was not the sole proof of ownership of immovable property. He stated that there are special circumstances where the court goes beyond the title deed to ascertain the true owner of the property. He averred that *in casu*, the judicial sale of the property and payment of the purchase price were special circumstances that warranted a finding by the court *a quo* that ownership of the property had passed to the third respondent.

FOURTH RESPONDENT’S SUBMISSIONS

The fourth respondent submitted that s 213 (b) of the repealed Companies Act makes an exception to the provision that anything done after liquidation proceedings have commenced is void. He further submitted that the court *a quo* had resolved the matter on the basis of equity as the sale had been confirmed and the third respondent had paid the purchase price and all that was outstanding was the transfer of the property and registration of the title deed in its name at the Deeds Registry.

ISSUES FOR DETERMINATION

The issues for the determination of this appeal are as follows:

1. Whether or not the court *a quo* erred by finding that the third respondent is the owner of Stand 666 Marlborough Township.
2. Whether or not the court *a quo* erred in finding that the judicial sale was *perfecta*.

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APPLICATION OF THE LAW TO THE FACTS

WHETHER OR NOT THE COURT A QUO ERRED BY FINDING THAT THE THIRD RESPONDENT IS THE OWNER OF STAND 666 MARLBOROUGH TOWNSHIP.

The issue of whether or not the court *a quo* erred in finding that the third respondent is the owner of Stand 666 Marlborough Township is central to the determination of what prevails over the other between a liquidation and a judicial attachment. *Mr Nhemwa*, Counsel for the appellant argued that in terms of s 213 of the repealed Act, all actions and proceedings against a company in liquidation cannot to be proceeded with without the leave of the court. As the transfer of the property had not been done when the appellant was placed under final liquidation,

he submitted that the third respondent had to seek leave from the court for the transfer to be effected. In addition, Mr *Nhemwa* maintained that the appellant holds a real right over the property whereas the third respondent only has a personal right. The thrust of these submissions is that since the appellant had been placed under liquidation, the liquidator had the authority to dispose of the appellant's assets despite the fact that there was a judicial attachment or caveat operating against the property in question.

The term "real right" is defined in s 2 of the Deeds Registry Act [*Chapter 20:05*] as "any right which becomes a real right upon registration." In the case of *Mavhundise v UDC Ltd & Ors* 2001 (2) ZLR 337 (H), at 342G, the court held that:

"Ownership of land can only be acquired by transfer of the ownership from the previous owner and such transfer must be registered in the Deeds Registry."

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In light of the above, it is clear that a real right in an immovable property is established by the registration of that right in the Deeds Registry. Nonetheless, this Court in the case of *CBZ Bank Limited v (1) David Moyo (2) Deputy Sheriff Harare* SC 170/18 stated the following:

"In any event, the registration of transfer in the Deeds Registry or registration of cession at the offices of a local authority or Deeds Registry does not always reflect the true state of affairs. A title deed or registered cession is therefore *prima facie* proof of ownership or cessionary rights which can be successfully challenged. When the validity of title or registered cession is challenged, it is the duty of the court to determine its validity in order to make a ruling which is just and equitable."

From the above, it is pertinent to note that there are instances where the registration of a real right to an immovable property at the Deeds Registry can only be *prima facie* proof of

ownership. This *prima facie* right is subject to challenge by any other person who may claim to have a real right over the same property. These special circumstances were explained by this Court in the *CBZ Bank case supra*, in the following manner:

“Special circumstances exist where a purchaser has failed to have the property registered in his name, when he and the seller have demonstrated a clear intention to effect transfer and when there was no legal impediment to such transfer or the impediment does not justify the refusal to grant protection to the purchaser.”

In the case of *Van Niekerk v Fortuin 1913 CPD 457*, the Court highlighted that:

“It seems to me that the plaintiff being a judgment creditor, and the property being still registered in the name of the defendant, *prima facie* the plaintiff has the right to ask that the property shall be seized in execution, unless the party interested can show that there are special circumstances why such an order should not be granted.”

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Based on the above, the court *a quo* found that the sale of the property to the third respondent had been completed before the appellant was placed under liquidation hence there was no legal impediment affecting the sale. This finding cannot be faulted.

In addition, the first respondent had attached the property in question and issued a writ of execution against it. The appellant did not challenge the attachment and the writ of execution was not set aside. The writ is still extant and valid. The effect of a judicial attachment of immovable property was dealt with by the court in the case of *Cold Chain Zambia Limited v Kingsley (nee Nehonde) & Ors HH 370-20* as follows:

“The attachment in execution of property at the instance of the judgment creditor creates a real right in favour of the judgment creditor in the property in question.”

The above puts to rest the contention by the appellant that the court *a quo* erred by declaring that the third respondent had become the owner of the property in the absence of transfer from the appellant and registration of ownership at the Deeds Registry.

Moreover, in the case of *The Sheriff for Zimbabwe & Anor v Willdale Limited T/A Willdale Bricks* HH -387-17, MAKONI J (as she then was) cited with approval the case of *Liquidators' Union and Rhodesia Wholesale Limited v Brown & Company 1922 AD 549* at p588 as follows:

“...While an ordinary arrest of the property under the Roman-Dutch law gives no preference, an arrest effected on property in execution of a judgment creates a *pignus praetorium* or to speak more correctly, a *pignus judiciale*, over such property. The effect of such a judicial arrest is that the goods attached are thereby placed in the hands or custody of the officer of the Court. They pass out of the estate of the judgement debtor, so that in the event of the debtor's insolvency the curator of the latter's estate cannot claim to have the property attached delivered up to him to be dealt with in the distribution of the insolvent's estate.” (my emphasis)

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In light of the above authority, I am of the view that the appellant cannot claim to have a right over the disputed property as it is no longer part of its assets. The appellant tried everything so that the property could not be attached. The property is vested in the first respondent and awaiting transfer whilst the third respondent has a real right of ownership over it. It is on this basis that I am inclined to remark that since judicial attachment took place first, it prevails over liquidation. Therefore, the appellant is not the owner of the property.

WHETHER OR NOT THE COURT A QUO ERRED BY FINDING THAT THE JUDICIAL SALE WAS PERFECTA.

The appellant contends that the court *a quo* erred by failing to find that the first respondent did not follow due process in conducting the sale in execution. The appellant argues

that the court *a quo* did not make a determination on the issue of whether or not the first respondent confirmed the sale without giving the appellant the requisite notice. It is on this basis that the appellant submits that the appeal ought to succeed as the court *a quo* misdirected itself in a way that vitiates the proceedings *a quo*.

The issue of whether or not the appellant was duly notified of the sale of the property before it was confirmed by the first respondent is fundamental to the determination of whether or not the sale in execution was *perfecta* at the time the appellant was declared to be under liquidation. This issue can be resolved by determining whether or not sufficient evidence was placed before the court *a quo* to support its finding. The relevant provision in terms of which notification of a judicial sale is given to interested parties before confirmation is r 352 of the repealed High Court Rules, 1971 which states the following:

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“The sheriff shall appoint a day and place for the sale of property, such day being, except by special leave of the court, not less than one month after service of the notice of attachment upon the execution debtor; and he shall cause the sale to be advertised at least once in the Gazette and in a newspaper circulating in the district in which the property is situated and in such other manner as he may deem to be necessary. The sheriff shall also send to each holder of a mortgage over the property, by registered letter addressed to his last known address, or to his attorney, notice of the date and venue of the sale.”

From the above, it is evident that the appellant ought to have been notified of the sale of the property by the first respondent. As the first respondent was not active in the proceedings *a quo*, no such evidence was produced to counter the appellant’s claim that it was not notified of the sale. Instead, the evidence that was before the court *a quo* was in the form of a notice which showed that the third respondent had been notified of the sale before it was confirmed. The appellant was also copied this notice advising the parties of the sale of the property. The third

respondent made reference to a letter dated 24 July 2017 written by the appellant's legal practitioners to the first respondent in which the appellant proposed to settle in full, the debt due to the third respondent, against the release of the property from attachment. The third respondent argued that this letter was proof that the appellant had been notified that the property would be sold in execution.

The court *a quo* held that there was nothing amiss in the manner in which the first respondent conducted the sale in execution. I am inclined to agree with the finding of the court *a quo*. This is because the evidence adduced by the third respondent before the court *a quo* demonstrated that the appellant was notified and was aware that the property was being sold in execution. The fact that the appellant wrote a letter to the first respondent proposing to settle the debt in full so that the property would not be disposed of buttresses the fact that it was aware that the property was up for sale. It is probable that the appellant was served with the notice of the sale of the property before the sale was confirmed.

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It is trite law that an appellate court is slow to interfere with the exercise of discretion by a lower court. In the case of *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S), Gubbay CJ at 62G-63A said:

“These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution provided always it has the materials for so doing.”

It is my considered view that the decision of the court *a quo* that the sale of the property was *perfecta* cannot be faulted. The property was sold in accordance with the provisions of the law and the purchase price was duly paid by the third respondent. In light of this, the appellant's grounds of appeal lack merit. There is no need to depart from the practice that costs follow the cause.

DISPOSITION

Accordingly, it is ordered that the appeal be and is hereby dismissed with costs.

MAVANGIRA JA I agree

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CHITAKUNYE JA I agree

C. Nhemwa & Associates, appellant's legal practitioners

Scanlen & Holderness, 2nd respondent's legal practitioners

Dube, Manikai & Hwacha, 3rd & 4th respondent's legal practitioners