

MTUMANI ALEXANDER MLAUZI
versus
EASY GAS (PVT) LTD
and
SHERIFF OF ZIMBABWE N.O
and
MXOLISI MPOFU

HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 12 JULY 2016 AND 1 SEPTEMBER 2016

Urgent Chamber Application

Miss T Sibanda for the applicant
Miss C Nunu for the 1st respondent

TAKUVA J: Applicant approached this court on an urgent basis seeking the following provisional order;

“Pending finalization of this matter

3. The 1st and 2nd respondents in this matter be and are hereby interdicted from transferring the immovable property being stand number 64688 Bulawayo Township of Bulawayo Township Lands, measuring 247 square metres.
4. The 3rd respondent be and is hereby barred from evicting applicant from the property described in paragraph 3 above.”

The facts are that, the first respondent sued Power Ridge Investments (Pvt) Ltd, a company in which applicant is a director. Applicant was cited as the second defendant in that matter which was filed under cover of HC 57/15. The summons were served by the second respondent at number 8 Aston Road, Donnington, Bulawayo, applicant’s *domicillium et executandi*. Applicant did not enter appearance to defend and first respondent obtained the following order per MUTEMA J on 27 February 2015;

“Payment of the sum of US\$26778-95 plus interest at the rate of 10% per annum from the 2nd of February 2014 to date of final payment in full.

- (b) An order declaring specially executable stand 64688 Bulawayo, of Bulawayo Township Lands situate in the district of Bulawayo and measuring 247 square

metres held by Mtumani Alexander Mlauzi under deed of transfer No. 236/2001 dated 15th February 2001.

(c) Costs of suit on a legal practitioner and client scale.”

Subsequently, a notice of attachment of the immovable property was served on the applicant in June 2015 at No 8 Aston Road, Donnington Bulawayo. Further, a notice advising of the sale of the applicant’s immovable property was duly published in the Government Gazette in December 2015. When no further communication was received from applicant, the second respondent proceeded with the sale and declared the third respondent, the highest bidder.

On 29 December 2015, the second respondent addressed the following letter to the first respondent’s legal practitioners;

“I refer you to the sale in the above matter by public auction and advise that on the 29th of December 2015, the Sheriff declared the highest bidder Mxolisi Mpofo of 98 Ashton Road, Fourwinds, Bulawayo to be the purchaser at the sum of US\$14500-00.

If no objections are made in writing to the Sheriff within 15 days from the date the highest bidder was declared to be the purchaser in terms of rule 356 or the date of sale in terms of rule 358 of the High Court rules 1971, the Sheriff will confirm the sale.

Copies of any objection made in terms of the above paragraph should be served without delay on all interested parties. Written notice in opposition from interested parties should in turn be lodged with the Sheriff within 10 days of being served with the written request.”

It is common cause that the second respondent attempted to serve this letter at No. 85 Aston Road Donnington Bulawayo on 8 January 2016. It should be noted that this is not applicant’s address for service. Neither was it Power Ridge (Pvt) Ltd’s *domicilium et executandi*. On 21 January 2016, first respondent’s legal practitioners addressed a letter to the second respondent enquiring whether any objections were lodged in respect of the offer from the highest bidder. The second respondent did not reply this letter but instead on 8 February 2016 addressed a letter to the first respondent’s legal practitioner in the following terms:

“I refer to the sale in the above matter and advise that on 29 December 2015, the Sheriff declared and confirmed the highest bidder Mxolisi Mpofo, the purchaser at the sum of US\$14500-00. ---.

Kindly pass transfer to the purchaser against payment of all costs, our charges and advise of the date of transfer. Also bear in mind that the transfer documents are to be drawn in

the name Kudakwashe Lawrence Nzvere in his capacity as Additional Sheriff for Bulawayo. Thereafter forward these documents to this office for his signature.”

It is clear from the above that the second respondent had confirmed the sale in terms of rule 359 (10) of this court’s rules. The third respondent delivered a notice to vacate the premises on 5 June 2016. The applicant was supposed to have vacated the property by 7 June 2016. The notice was brought to the applicant who at the time was visiting his son in Canada. He then brought this application on the following grounds:

- (a) the matter was urgent in that third respondent had given him two days to vacate the house and that, transfer was imminent following confirmation of the sale by the second respondent.
- (b) he gave a satisfactory explanation on the delay to file this application.
- (c) he was not informed of the sale in execution as is required in terms of O40 r347 (1) (a) of the rules
- (d) he was not served with the notice of attachment or writ;
- (e) he was not afforded an opportunity to object to the sale in terms of r359 of this court’s rules in that the return of service for the letter shows that there was an “attempted service” at No 85 Aston Road, Donnington.

The application was strenuously opposed on the following grounds. Firstly *in limine*, it was contended that the application lacks urgency in that the applicant through his son one Hugh Mlauzi was aware all along of the sale of the property, both having been notified in June 2015. Secondly, it was argued on the merits that the sale in execution complied with the provisions of this court’s rules in that service of the summons, the notice of attachment together with the writ of execution was properly made at the applicant’s chosen address being No. 8 Aston Road Donnington Bulawayo. This constitutes proper service in terms of r347 (3) of this court’s rules.

Thirdly, it was conceded that after the highest bidder was declared by the second respondent; a copy of the letter inviting objections was sent to an incorrect address resulting in an “attempted service.” Notwithstanding this anomaly, *Miss Nunu* for the first respondent argued that the

application should still fail because the applicant is only relying on improper service as a ground for nullifying confirmation without citing other grounds if any, for example the fact that the property was sold at a ridiculously low price. She also submitted that the applicant jumped the gun by filing this application instead of approaching the deputy sheriff in terms of r359.

As regards urgency, I find first respondent's argument unconvincing in that the fact that applicant may have been aware of the sale in execution does not deprive him of his right to be informed of the declaration of the highest bidder by the second respondent. Applicant as an interested person only got to know of the confirmation after the fact on 5 June 2016 in contravention of rules 356 and 359. After receiving information relating to the notice to vacate applicant who was then in Canada prepared papers and filed this application on 21 June 2016. I find the explanation of the non-timeous action he has proffered in the founding affidavit to be good. Therefore I find that this application is urgent.

On the merits, the issue is a simple one if one focuses on the interim relief sought by the applicant. It is trite law that a court has to decide in its discretion, whether or not to grant a temporary interdict. The court has to be satisfied that an applicant has proved an actual or well grounded apprehension of irreparable loss if no interdict is granted and it must have regard to the balance of convenience – see C.B Prest *The Law and Practice of Interdicts* Juta & Co. 1995 at page 57.

It is accepted that the requisites of an interlocutory interdict are;

- “(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;
- (b) that, if the right is only *prima facie* established there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- (c) that the applicant has no other satisfactory remedy .”

See *L F Boshoff Investments (Pvt) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267A –F per CORBETT J. See also *Airfield Investments (Pvt) Ltd v Minister of Lands and Others* 2004 (1) ZLR 511 (S).

In *Straffuer Chemicals v Monstanto Co* 1988 (1) SA 805 (T) at 809F –G, HARMS J said; “--- the basis of an interdict is the threat, actual or implied, on the part of a defendant, that he is about to do an act which is in violation of the plaintiff’s right and that actual infringement is merely evidence upon which the court implies an intention to continue in the same course. I would have thought it automatic that an interdict is not a remedy for past invasions of rights. It is for the protection of an existing right.”

In *casu* I agree with *Miss Sibanda* for the applicant that indeed the requirements of an interim relief have been met by the applicant. The relief is a temporary interdict halting the transfer of the property to the third respondent pending the return date. The final interdict sought is the setting aside of the confirmation of the sale by the second respondent. As I understand it, the remedy sought for now is not the setting aside of the sale. Consequently, what is critical is the procedure surrounding confirmation. In that respect once it is accepted that there was improper service of the letter referred to above, it becomes hard to argue successfully that the confirmation is not unlawful.

As regards a *prima facie* right, applicant, as the owner of the property, he can be said to have a real right, which right is clearly threatened by the unlawful confirmation of its sale by second respondent. With third respondent hovering around, applicant will without doubt suffer irreparable harm once transfer is effected. The balance of convenience favours the granting of the interdict in that first respondent is not likely to suffer prejudice since the default judgment and the writ of execution will remain intact after the setting aside of the confirmation order. On the other hand applicant will suffer great prejudice if the order is declined and he ultimately succeeds in the main action. I am aware that as at the time the matter was argued applicant had not yet filed an application for rescission of the default judgment. Without making a finding on whether or not there is good and sufficient cause to rescind the default judgment, I must however point out that in my view, and for purposes of this application, the rest of the documents were properly served upon the applicant and or Power Ridge (Pvt) Ltd at No 8 Aston Road, Donnington Bulawayo. I believe this is why despite his shrill about improper service of the summons and notice of attachment or writ, applicant has confined his remedy to the confirmation proceedings and not the setting aside of the sale. Clearly, the second respondent did not comply with rules 356 and 359 of this court’s rules, which rules are mandatory.

On the facts of this case, rule 359 cannot be said to amount to an alternative remedy because the second respondent has already confirmed the sale disregarding its provisions.

In the circumstances, it is ordered that;

Pending the finalization of this matter:

1. The first and second respondents in this matter be and are hereby interdicted from transferring the immovable property being stand No. 64688 Bulawayo Township of Bulawayo Township Lands, measuring 247 square metres.
2. The third respondent be and is hereby barred from evicting applicant from the property described in paragraph 3 above.

Messrs Majoko and Majoko, applicant's legal practitioners

Atherstone & Cook, C/o Calderwood, Bryce Hendrie and Partners, 1st respondent's legal practitioners