DISPLAY SYSTEMS (PVT)
versus
RUWA LOCAL BOARD
and
NATIONAL OIL COPMANY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 29 November 2012 and 30 April 2014

Opposed application

T. Tandi , for the applicant
Ms *E. Chimombe* , for the 1st respondent
Advocate *L. Uriri*, for the 2nd respondent

MAKONI J: The applicant approached this court seeking an order in the following terms

"It is hereby ordered that:
1. The sale in execution of stand Number 9876 of Ruwa, concluded under case number MC 6022/07 be and is hereby set aside
2. That Stand Number 9876 of Ruwa be unconditionally delivered to the applicant.
3. Respondents to bear costs of suit on an attorney-client scale."

The background to the matter is that, prior to the sale in execution in issue (sale), the applicant was the owner of Stand No. 9876 of Ruwa (the property). It would pay rates for the property to the first respondent through bank deposits into the first respondent's bank account. On 10 September 2007 the first respondent instituted proceedings in the Magistrate's Court under Case No. 6022/07 claiming arrear rates against the applicant. The summons were served on a vacant and underdeveloped stand which is the property in issue. As a result the matter was not defended. The first respondent proceeded to obtain default judgement. Pursuant to the judgement, a sale in execution of the property took place at which the second respondent purchased the property. The sale was confirmed on 17 June 2008. The applicant became aware of the issue when it sent its representative to pay rates to the first respondent on 28 July 2008. The applicant applied for the rescission of the default judgement and it was granted. It then proceeded to file its plea in the main matter.

The applicant's basis for seeking the order is three pronged. Firstly it avers that as the judgement and the warrant of execution on which the sale in execution was founded had been set aside, the basis for the sale had fallen away. Secondly, it avers that the sale in execution could not and cannot give title to the second respondent as it was premised on a judgement which has since been set aside. Thirdly, it is contended that the first respondent's conduct in obtaining the default judgement, warrant of execution and attachment and consequently the sale amounts to a fraud.

The first respondent challenges the application on the basis that the applicant has not established grounds in terms of Order 26 of the Magistrate's court, Civil Rules (Rules) for the setting aside of the state.

The second respondent challenges the application on the same basis and further contends that the applicant's remedy would be to obtain damages for wrongful execution. It also contended it was an innocent purchaser.

The applicant formulates the issues for determination in its Heads of Argument, as follows

> " a) whether or not the sale in execution was valid, or founded upon a just cause or valid cause of action so as to found a proper sale in execution?"
> (b) whether or not the sale in execution can stand after the basis upon which it was founded has been rescinded or set aside". (sic)

Mr *Tandi* submitted that the default judgement was founded on a non-existent cause of action. This is based on the averments by the applicant that it was actually in credit when first respondent issued summons for arrear rates. There was therefore no cause of action justifying the grant of the default judgement. He referred the court to the case of *Ngani* v *Mbanje* 1988 (2) SA 649 (25) where it was held that if there is no cause of action, then a judgement pronouncing that a non-existent cause of action exists, is void and of no effect. He also made reference to *Joosub* v *JI* case SA (Pty) Ltd 1992 (2) SA665 W at 679 D-E where MCCALL J stated

> "In my view, if a purported sale in execution by the Deputy Sheriff of the Supreme Court is nullified for lack of compliance with statutory formalities, it court conters no title upon those who purport to purchase the property and the owner may recover his property by means of *rei vindicatio* unless possibly, he is estopped from doing so. In the present case there was no attachment such as required by r 46(3) before there can be a sale in execution and accordingly there was no valid sale in execution. ---"

On the second issue, Mr *Tandi* submitted that the default judgement leading to the sale was rescinded.

As regards the *bona fides* of the second respondent, for Mr *Tandi* conceded that the second respondent was a *bona fide* purchaser but went on to argue that the sale was invalid. He referred to the case of *Katsande* v *Katsande* HH113/10 where it was held that when an act is a nullity, the innocence or otherwise of the other party to the act is of no assistance.

Ms *Chimombe*, for the first respondent, submitted that the applicant had failed to lay a basis for the sale to be set aside as is provided for in Order 26 r7 (15C) of the Rules. She further submitted that the issue of whether there was a cause of action or not is still to be determined by the Magistrate Court and this court cannot interfere with those proceedings by making pronouncements of that issue.

Mr *Uriri* for the second respondent, submitted that the juristic act which the applicant wants set aside is an act provided for in the Magistrate court rules, undertaken by the Messenger of Court. The Rules provide for a procedure to set aside the sale. No explanation had been given why the procedure was not followed. As regards the second issue, he submitted that at the time of the sale, there was a valid order which was given effect to. The applicant's remedy would be to seek damages for wrongful execution.

Mr *Tandi*, in reply, indicated that r 7 (15C) applied where the sale had not been confirmed. That is why the applicant had approached the court in terms of common law.

Mr *Tandi* was not very clear on which common law principle he was relying on. It is also not clear from the founding affidavit and in the Heads of Argument no wonder why the respondents challenged the application *inter alia*, on the basis of non-compliance with rules.

Issue No. 1

The issue is whether or not the sale in execution is valid or founded upon a just cause. I would want to agree with the submissions made by Mr *Uriri*. As at the time when the sale was conducted, there was valid court order which could and was given effect to by the Messenger of Court. The sale was done under the sanction of a judicial process. In my view it was therefore valid.

I also agree with the positions of the first and second respondent regarding the question of existence or otherwise of the cause of action. The applicant argues that the first respondent obtained a judgement upon a non-existent cause of action. It attaches to its founding affidavit some proof of payment. The first respondent disputes these assertions. It is not for this court to determine whether the applicant does owe the respondent or not. It would be interfering with the proceedings which are pending before the Magistrate's Court if it were to make pronouncements on the issue.

The case of Mgani *supra* cited by the applicant does not take its case any further. In that that case, the court made a pronouncement that there was no cause of action at the time proceedings in that matter were instituted. I therefore went on to hold that the judgment was nullity and that no valid title can be passed to the purchaser in a sale in execution held pursuant to such judgment. In *casu* no court has made such a finding, that there was no cause of action in the action instituted by the first respondent. The fact that the judgement was rescinded does not necessarily mean that there was no cause of action in the first place. It could be the issue of the manner of service.

Earlier on in the judgement, I deliberately quoted extensively the relevant part, referred to by the applicant, in Joosub's case *supra*. The aim was to show that the case is clearly distinguishable from the present one. In Joosub's case the sale in execution was declared a nullity for lack of compliance with statutory provisions. In *casu* the applicant submitted that it was not impurning the sale in terms of the Rules but in terms of common law. The case does not therefore assist the applicant.

Issue No 2

Whether or not the sale in execution can stand after the basis upon which it was granted has been rescinded. The applicant is not disputing that the second respondent is a *bona fide* innocent purchaser. It however asks whether the *bona fides* of the second respondent would validate a sale in execution the basis of which is a nullity and or has been set aside.

I have already made a finding that no court has made a pronouncement regarding the existence or otherwise of a cause of action in this matter and whether the judgment is a nullity or not. As to whether the sale can stand after the basis has been set aside, the answer can be found in *Kanonyangwa* v *Messenger of Court & Ors* 2007 (1) ZLR 124 (S) at 129 F-130 A-C.

> "What presents itself in the final analysis is a situation where, on the one hand, there is a judgment debtor who was aware of the impending sale of his property by public auction, even though some requisite pre-sale formalities concerning advertisement of, and the service of certain notices concerning, the sale, were not observed by the relevant officials.
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> Against this, is the situation where:
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> (i) the sale by public auction was successfully conducted and the highest bidder declared;

(ii) the sale was then confirmed by the magistrate as required by the rules of the court;

(iii) the said highest bidder – the second respondent *in casu* – in good faith took transfer of the property after duly paying the purchase price and other related charges like auctioneers' fees, council rates and conveyancing fees; and

(iv) the proceeds of the sale were paid to the judgment creditor, that it, UDC.

Added to all this, is the fact that the sale in question took place some three to four years ago.

Given the situation outlined above, the determination of this dispute, in my view, requires that the interests of the appellant on one side, be balanced against those of the respondents, on the other. In other words, the case must be determined on the basis of equities and balance of convenience. This is what I shall proceed to do."

In *casu* the sale in question was confirmed although the second respondent had not yet taken transfer at the time of hearing. It was in the process of doing so. As expounded in its papers, the second respondent purchased the property in question together with the adjacent properties for commercial purposes. The balance of equities favour the second respondent. On the one hand, the applicant did not do enough to protect its rights. It discovered that its property had been sold, on the strength of a default judgement, on 15 June 2008. It only filed the present application on 27 September 2010. The law protects the vigilant and not the sluggard. In any event it had not done anything to improve the property since it purchased it in 2001.

In view of the above I will make the following order

(1) The application is dismissed.

(2) The applicant to pay the respondent's costs.

Kantor& Immerman, applicant's legal practitioners
Magwaliba & Kwirirai, 1st respondent's legal practitioners
Dube, Manikai & Hwacha, 2nd respondent's legal practitioners