

CHAMPION CONSTRUCTORS (PVT) LTD
versus
FIDELITY FINANCIAL SERVICES (PVT) LTD
and
THE SHERIFF OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS
and
MUNETSI ASSANEL SIBANDA
and
BLESSING MUSHOWE
and
BLESSING MAZARURA
and
TRAVOR BVUTE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 20, 22 & 26 May and 23 June 2015

Urgent Chamber Application

T. Zhuwarara, for the applicant
D. Kanokanga, for the 1st respondent
No appearance for 2nd, 3rd, 4th, 6th and 7th respondents
N.N. Jonasi, for the 5th respondent

MAWADZE J: This is an urgent chamber application in which the applicant seeks relief in the following terms:-

“TERMS OF INTERIM RELIEF GRANTED

Pending the determination of this matter, the Applicants are granted the following relief (sic)

- (a) That the 2nd respondent be and is hereby interdicted from passing transfer of a ownership of Applicant’s properties being stand numbers 1011, 1013, 1015 and 1039 of subdivision of Hilton of Sub-division A of Waterfalls from the Applicant to the 4th, 5th, 6th, and 7th respondents pending the sale by private treaty by the 2nd respondent, of applicant’s 2 immovable properties as per the 2nd respondent’s letter dated 22 October 2014.
- (b) That if the 2nd Respondent has already passed transfer of ownership of Applicant’s immovable properties being stand numbers 1011, 1013, 1015, and 1039 of Subdivision A of Waterfalls from Applicant to the 4th, 5th, 6th and 7th Respondents, that the same transfer be set aside and nullified”.

It would appear that that there is nothing interim about the terms of the order sought in paragraph (b) above.

The terms of the final order sought are as follows:

“TERMS OF FINAL ORDER SOUGHT

That the Respondents show cause to this Honourable Court on the return date why a final order should not be granted in the following terms:

- (a) that the sale in execution of Applicant’s immovable properties being stand number 1011, 1013, 1015 and 1039 of Subdivision of Hilton of Subdivision A of Waterfalls to the 4th to 7th respondents be and is hereby set aside.
- (b) the Respondents should pay costs of suit jointly and severally liable with the one paying the other to be absolved”.

On 16 May 2014 the applicant approached this court on an urgent basis seeking to interdict the respondents from transferring the purchased stands pending the finalisation of its application challenging the dismissal of the applicant’s objections to the sale by the second respondent (The Sheriff). In that urgent chamber application the terms of the interim relief sought were couched as follows:

“TERMS OF INTERIM ORDER GRANTED

Pending the determination of this matter Applicant is granted the following relief:

- (a) That the 2nd Respondent be and is hereby interdicted from passing transfer of ownership of Applicant’s immovable property to the 4th to 7th Respondents pending the finalisation of case number HC 2846/14”.

The terms of the final order sought were as follows:

“TERMS OF FINAL ORDER SOUGHT

That the respondents show cause to this Honourable Court on the return date why a final order should not be granted in the following terms:

- (a) that the confirmation of the sale in execution by the 2nd Respondents, declaring the 4th to 7th Respondents as the highest bidders of the Applicant’s immovable property be and is hereby set aside.
- (b) that the Respondents should pay the costs of suit jointly and severally liable with one paying the other absolved”.

The background facts of this matter can be outlined as follows:

The first respondent obtained several default judgments in 2012 and 2013 against the

applicant, some 2 years ago. Thereafter the first respondent caused the attachment of the applicant's 4 immovable properties being stand number 1011, 1013, 1015 and 1039 which are all situated in Waterfalls Harare. The applicant's 4 properties were then sold by private treaty by the Sheriff in 2013 to the 4th to 7th respondents who duly paid the purchase price. The applicant objected to the confirmation of the sale by the Sheriff on 3 December 2013 after which the Sheriff conducted a hearing to consider the applicant's objections. On 20 March 2014 the Sheriff made the following ruling:

“My ruling after going through the submissions filed by both parties is that the four properties which Stohill Estate has sold should be confirmed since they are still in the name of Champions Constructors who are judgment debtors”.

Thereafter the Sheriff instructed the first respondent's legal practitioners on 20 March 2014 to pass transfer of the 4 immovable properties to the 4th to 7th respondents. Irked by this decision the applicant in April 2014 in HC 2846 approached this court seeking an order setting aside the sale of the 4 immovable properties to the 4th to 7th respondents. This application was opposed and to date has not been pursued to its finality.

On 16 May 2014 the applicant approached this court on an urgent certificate in HC 4006/14 seeking a provisional order to interdict the transfer of the 4 immovable properties to 4th to 7th respondents. This urgent chamber application was heard by Ndewere J who in a judgment HH 423/14 ruled that the application was not urgent and ordered the applicant to pay the respondents' costs.

Apparently after the judgment by Ndewere J the transfer of the 4 properties was not effected as according to Mr *Kanokanga* for the first respondent there are a number of encumbrances on the 4 immovable properties hence the papers are not yet ready for lodging. Mr *Kanokanga* said all what has happened is that ZIMRA has interviewed the 4th to 7th respondents for purposes of issuing out capital gains tax certificates whose amounts are to be paid from the funds held by the Sheriff which were paid by the 4th to 7th respondents. Further, the rates clearance certificates from the City of Harare are still outstanding. It is common cause however that the judgment debt is yet to be extinguished.

According to the applicant what has triggered this urgent chamber application is the letter Annexure F by the Sheriff to Stohill Properties dated 22 October 2014 copied to the applicant and the respondents (See p 40) which reads as follows:

“We would like to advise you to sale on private treaty stand 1054 and stand 1006 of the 45 stands already listed by Messrs Kanokanga & Partners as the judgment debtor have stated that

they have no valid agreements of sale in respect of the two stands and we will not object to their sale.

You are mandated to sale the immovable properties for a period of 90 days failing which the property will be put back on public auction”.

It is important to note that hardly a month thereafter Stohill Properties responded to the Sheriff on 7 November 2014 that they were not able to carry out the requested mandate by the Sheriff. The response is attached as Annexure “N” to the 5th respondent’s opposing affidavit and reads as follows:

“We refer to your letter dated 22 October 2014, wherein you mandated Stohill Properties Private Limited to sale stand number 1006 and 1054 by private treaty. We inform your office that there structures on the above stands which is durawalled and gated. There is a family staying in the house.

On stand 1654 there are temporary structures occupied by the owner and his family. They both claim to have fully paid for the stands through Champions Constructions.”

Mr *Kanokanga* for the first respondent has taken the point *in limine* that this matter is not urgent as this was the same matter which was heard and dismissed by Ndewere J in HH 423/14. Mr *Kanokanga* submitted that the applicant is seeking the same relief as was sought before Ndewere J to no avail. Mr *Kanokanga* further submitted that the applicant was aware of the Sheriff’s letter dated 22 October 2014 as way back as in 2014 and the response thereto, hence cannot possibly argue that this matter is urgent. Mr *Jonasi* for the fifth respondent associated himself with the point *in limine* taken by Mr *Kanokanga* arguing that the applicant is simply bringing the same matter through the back door.

Mr *Zhuwarara* for the applicant submitted that while the matter deals with the same parties and the same object which are the four immovable properties, the applicant’s cause of action is different. Mr *Zhuwarara* relied on the case of *Flowerdale Investments (Pvt) Ltd & Anor v Benard Construction (Pvt) Ltd & Ors* SC -5-09. Mr *Zhuwarara* submitted that the applicant’s case is premised on para 24 of the applicant’s founding affidavit which reads as follows;

“24. This application has been necessitated by the fact that the second respondent (Sheriff) has regened from its own decision without informing applicant nor providing applicant with reasons for departure from its earlier decision. It is the second respondent who made a fair directive to sell only 2 free stands by private treaty thereby setting aside the sale of the 4 stands done to 4th to 7th respondents herein. That decision has not been rescinded.”

Mr *Zhuwarara* submitted that the Sheriff as per the letter dated 22 October 2014 accepted in preference the two properties stands 1054 and 1006 in execution of the judgement debt thereby setting aside the sale of the four immovable properties to the fourth to seventh respondents.

What constitutes urgency in matters of this nature is settled in our law. See *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 at 193 F (H); *Gifford v Mazarire & Ors* 2007 (2) ZLR 131 (H) at 134 H-135 A.

I understand the applicant's contention to be that as per the Sheriff's letter dated 22 October 2014, the Sheriff accepted in preference stands 1006 and 1054 in the execution of the judgement debt. Further the applicant contends that it only became aware that the Sheriff had reneged on this agreement on May 2015 without affording the applicant the right or the opportunity to be heard. Reduced to its bare bones the applicant's argument is that the Sheriff as per the letter dated 22 October 2014 did set aside the confirmation of the sale of the four immovable properties to the fourth to seventh respondents by accepting in preference stands 1054 and 1006 in execution and that the Sheriff has now reneged on this agreement. In essence the applicant is arguing that the Sheriff is now pursuing wrongful execution and that this is what has prompted the applicant to approach the court on an urgent basis for the interim relief.

I am inclined to uphold the point *in limine* taken by Mr *Kanokanga* that this matter is not urgent. To my mind nothing has changed from the time Ndewere J made the finding that this matter is not urgent on 20 August 2014. My view is that the applicant is simply trying to resurrect the same matter. My reading and interpretation of the Sheriff's letter dated 22 October 2014 does not alter at all the finding made by Ndewere J that the matter is not urgent. All what can be discerned from the history and facts of this matter is that the applicant has been desperate to save the four immovable properties from being sold in execution of a valid judgement. In my view para 24 of the applicant's founding affidavit does not at all introduce new facts or cause of action. A reading of the Sheriff's letter dated 22 October 2014 does not at all support the contention that the Sheriff had set aside the sale of the four properties which sale the Sheriff confirmed when he dismissed the applicant's objections.

Further, even if one was to assume that the applicant is correct (which, I do not agree) in its interpretation of the Sheriff's letter, it is clear to me that that after confirming the sale in March 2014, the Sheriff was now *functus officio* and could not revisit the same issue.

My view is that these are the same facts which were before Ndewere J who considered them and found that the matter was not urgent. I still share the same view that this matter is not urgent, and nothing has changed. On that basis I am inclined to uphold the point *in limine*.

It is clear that the applicant is resurrecting the same case in a bid to give it the proverbial nine lives of a cat. Unfortunately this is at the great inconvenience of the respondents who are put out of pocket unnecessarily. A punitive order of costs is therefore appropriate.

Accordingly it is ordered that this application is not urgent. The applicant shall pay the respondent's costs on a legal practitioner and client scale.

Ngarava, Moyo & Chikono, applicant's legal practitioners
Kanokanga & Partners, 1st respondent's legal practitioners