

NOXON INVESTMENTS (PVT) LTD
versus
AMON MURWIRA
and
STANBIC BANK LIMITED
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 23 November 2016 and 18 January 2017

Opposed Matter

N Bvekwa, for the applicant
E Jera, for the respondent

MATANDA-MOYO: This is an application for condonation for late filing of an application to set aside Sheriff's confirmation of sale. The founding affidavit was sworn to by Mr *Bvekwa* who averred that he was duly instructed by the applicant to apply to this court for setting aside of a sale by the Sheriff of a certain piece of land called stand 13975 Salisbury Township of Salisbury Township Lands measuring 2553 square metres. He duly filed the application albeit out of time. He does not state when. Mr *Bvekwa* acknowledges that he read opposing papers filed in respect of the application wherein the respondent raised the point that the application was filed out of time. Again he does not state when that was. He then states that the papers were filed away in the wrong file. He only realised when the file came back to him on the date he had diarized, which is not stated, that he had to apply for condonation. Mr *Bvekwa* in the middle of the founding affidavit noted that the judgment was only placed in their pigeon hole around 8 March 2016.

On the merits he alluded to valuations reports placed before the Sheriff.

The first respondent opposed the granting of the order sought on the basis that a distribution plan for the sale proceeds was done, advertised and concluded. Transfer has already been taken by the first respondent. There was no objection to the distribution plan.

The first respondent also took issue with failure by the applicant to be candid with the court. The applicant has not stated any dates in his application to try and cover up his own negligence. Mr *Bvekwa*'s explanation lacks reason and logic.

On the merits it is the first respondent's case that nothing has been put forward in the applicant's affidavit. The applicant does not show how the third respondent erred in dismissing his objection and confirming the sale.

The second respondent first took issue with the fact that this application has been brought to court through the chamber book application instead of a normal court application. The second respondent submitted that on 15 April 2016 it served its notice of opposition to the applicant's application to set aside the Sheriff's sale and pointed out that such application was being made out of time. No condonation had been filed and granted by court. The applicant has failed to explain failure to act for 55 days. Failure to be candid with court should result in the dismissal of this application. No good explanation has been provided on failure to file application on time.

On merits the second respondent submitted that the applicant's case has not been defined.

The requirements for condonation are well established in our jurisdiction. The court will have to look at the extent of the delay, the explanation and reasonableness thereof, prospects of success on appeal, prejudice to the party who is unable to execute his judgment and any other relevant factors. See *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) S.A 717 (A) where the court held:

"It is well established that, in considering applications for condonation, the court has a discretion, to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the rules, the explanation thereof, the prospects of success on the merits, the importance of the case, the respondent's interest in the finality of his judgment, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive"

The above factors are not considered individually but are interrelated and must be weighed one against the other. "A slight delay and a good explanation may help compensate for prospects of success which are not strong." Equally good prospects of success on the merits may

equally compensate for not so well explained delay. See also *Friendship v Cargo Camers Ltd & Anor* SC 1/13.

Before me on behalf of the applicant is an affidavit by applicant's counsel taking the blame for the delay. There is absolutely nothing from the applicant on what steps it took to protect its interest. The explanation by legal counsel borders on negligence. A prudent lawyer would upon reading a notice of opposition stating application has been filed out of time, immediately lodge an application for condonation. Herein Counsel for the applicant boasts of filing away such notice informing him that there was no proper application before the court. Such explanation is unreasonable. The explanation makes good reading of a fairy tale.

Worse the applicant has not even attempted to show that it has good prospects of success on appeal. On the prospects of success the lawyer wrote;

“On the merits, the applicant has a good case. Valuation reports were placed before the Sheriff. There is no other thing to rely on other than that. For the Sheriff to say value comes from the sale, it is very difficult to appreciate and understand.”

The above statement does not attempt to show any prospects of success. The above statements do not constitute sufficient averments to prove any good prospects of success. Besides at the time of the hearing the property had been transferred into the first respondent's name. As the Supreme Court stated in *Twin Wire Agencies (Pvt) Ltd v CABS* SC 46/05;

“Once the sale of property has been properly confirmed by the Sheriff and transfer effected by him to the purchaser against payment of the price, any application to set aside the transfer falls outside r 359 of the High Court Rules and must conform strictly with the principles of the common law.

Under the common law immovable property sold by judicial decree cannot after transfer has been passed be impeached in the absence of an allegation of bad faith, or knowledge of the prior irregularities in the rule of execution, or fraud.”

Obviously this application was filed before transfer. But now that transfer has been affected, this present application has been overtaken by events. The grounds upon which the sale can only be challenged are the common law grounds of fraud, knowledge of prior irregularities and bad faith as stated in the *Twin Wire Agencies* case cited *supra*.

In the result the application for condonation has no merit and is dismissed with costs.

Bvekwa Legal Practice, applicant's legal practitioners
Moyo & Jera, 1st respondent's legal practitioners
Atherstone & Cook, 2nd respondent's legal practitioners