

**DISTRIBUTABLE** (1)

PASCAL TSUNGAI CHIVAKU MATANDA  
v  
(1) AGRICULTURAL BANK OF ZIMBABWE LIMITED  
(2) STEPHEN MUTUMHE  
(3) REGISTRAR OF DEEDS N.O.  
(4) SHERIFF OF ZIMBABWE N.O.

**SUPREME COURT OF ZIMBABWE  
ZIYAMBI JA, GWAUNZA JA & PATEL JA  
HARARE, NOVEMBER 16, 2015**

*A. Muchadehama*, for the appellant  
*J. Dondo*, for the first respondent  
*T. Zhuwarara*, for the second respondent

**PATEL JA:** After having heard argument from counsel, the Court unanimously dismissed this appeal with costs on the ordinary scale in respect of the first respondent and costs on a legal practitioner and client scale in respect of the second respondent. We further indicated that the reasons for judgment would follow in due course. Those reasons are set out hereunder.

**The Background**

Prior to the institution of litigation in this matter, the appellant had undertaken to stand as guarantor and surety for a loan in the sum of US\$65,000 advanced to his relative (Tapiwa Chengu) by the first respondent. On 31 January 2011, he duly signed a deed of suretyship “*as surety and co-principal debtor for the payment on*

*demand of all or any such sum or sums of money which the debtor may now or from time to time hereafter owe or be indebted to the said bank*". The appellant offered his property in Ruwa as security for the loan. At various stages, the loan advanced to Chengu was rolled over to avoid cumulative interest.

Thereafter, following Chengu's failure to repay his debt, the first respondent sent him a letter of demand by registered post, dated 12 December 2012, to an address other than his given address. Chengu did not at any stage disown that address and made an undertaking to pay the outstanding debt. Later, by letter dated 4 March 2013, the estate agent mandated to auction the property gave notice of the impending sale to the appellant in Ruwa by serving the notice on his neighbour. Having become aware of the sale, both Chengu and the appellant attended several meetings with the first respondent, between May and August 2013, to negotiate a settlement between the parties. The appellant also engaged lawyers to arrest the impending sale of his property.

Pursuant to the outstanding debt remaining unpaid, the encumbered property was attached and sold by public auction at the instance of the first respondent to satisfy the loan secured by the deed of suretyship. The sale was initially scheduled to be held in March 2013 but was then postponed to a later date in September 2013. The second respondent was the successful bidder and, after paying the purchase price, took transfer of the property in June 2014.

Subsequently, in Case No. HC 6278/14, the second respondent applied for the eviction of the appellant from Stand 7390 Ruwa Township. At a later stage, in Case No. HC 6831/14, the appellant sued the first and the second respondents to nullify the attachment and sale of the stand, cancel its transfer to the second respondent and restore its title into his name. Both cases were consolidated for determination by the High Court.

### **Decision of the High Court**

The court *a quo* noted that the second respondent's functions are regulated by the Agricultural Finance Act [*Chapter 18:02*] (the Act). In terms of s 38 of the Act, it is entitled to attach and dispose of any loan security without having to institute court proceedings, as long as it complies with the provisions of that section. Accordingly, the court held that the failure to sue the appellant and Chengu did not constitute an irregularity.

As regards notice of the impending sale, the court found that the notice had found its way to the appellant. He was therefore fully aware that there were arrears on Chengu's loan and that his property would be sold by public auction on 29 March 2013. Moreover, when the initial sale scheduled for 29 March 2013 was postponed, there was no need to give the appellant another notice of the intended sale. The court was satisfied that both Chengu and the appellant were duly notified of the outstanding debt and the first respondent's intention to sell the secured property. Accordingly, there was nothing irregular in the manner in which the property was sold.

With respect to the second respondent's claim, the court found that he had purchased the property in good faith. Given that the sale had been effected as authorised by statute, the sale of the property to the second respondent thereafter had the same effect as a sale in execution by the Sheriff. Thus, it could not be impeached in the absence of bad faith, fraud or prior knowledge of any defect or irregularity. The court held that the second respondent was entitled to vindicate the property and evict the appellant. In the event, the appellant's application was dismissed, while the second respondent's application was upheld, with the appellant being ordered to bear the costs of both applications.

The grounds of appeal herein are essentially twofold. The first is premised on the contention that the first respondent had failed to comply with the mandatory provisions of s 38 of the Act relative to notice of the intended sale, in respect of both Chengu and the appellant, and that the sale was therefore invalid. The second is grounded in the position that the sale of the property having been tainted with serious irregularities, there could be no procedural and lawful transfer of the property to the second respondent.

### **Validity of Notices of Sale**

Part V of the Act regulates the rights and powers of the first respondent in relation to advances made by it and the securitisation of such advances. In particular, s 38 prescribes the remedies available to the first respondent as against defaulting debtors. In its relevant portions, being subs (1), (2) and (3), it provides as follows:

“(1) If—

- (a) at any time any sum of money, whether principal or interest, due in respect of an advance is unpaid; or
- (b) in the opinion of the Corporation an advance or any part thereof—
  - (i) has not been used within a reasonable period for the purposes for which it was made; or
  - (ii) was used for a purpose other than that for which it was made; or
  - (iii) has not been carefully and economically expended; or
- (c) the security for an advance is declared executable by order of a competent court or is attached in pursuance of a judgment of a competent court; or
- (d) it comes to the notice of the Corporation that a movable asset secured to the Corporation under a notarial bond has been or is about to be—
  - (i) attached in pursuance of a judgment of a competent court; or
  - (ii) removed from the place where it is ordinarily kept; or
  - (iii) disposed of in any way without the consent, in writing, of the Corporation; or
- (e) the debtor vacates, abandons, relinquishes possession of or is dispossessed of the security for the advance; or
- (f) there is a breach of any other condition of the advance;  
the advance concerned or to which the security relates, together with any interest thereon, shall immediately become repayable to the Corporation and the Corporation may sue for and recover the whole or any part of the debt and, whether or not it sues for the debt, it may refuse to pay any part of the advance which has been approved but not yet paid.

(2) The Corporation may, in the case of an advance in respect of which security is given, including any security by way of a notarial bond or note of hand, stipulate that it shall be a condition of the advance that if any advance in respect of which security has been given becomes repayable in terms of subsection (1) the Corporation, in addition to the powers conferred by subsection (1), shall be entitled, subject to subsection (3), after a period of ten days have elapsed since the posting of a registered letter of demand addressed to the borrower at his last known address or at the address given by him in his application for the advance, to enter upon and take possession of the whole or any part of the security concerned and to dispose of such security in accordance with the Second Schedule.

(3) The Corporation shall be entitled to exercise the powers conferred upon it in accordance with any condition referred to in subsection (2) as soon as it has posted a registered letter of demand to the borrower in terms of that subsection where any event referred to in paragraph (c), (d) or (e) of subsection (1) occurs:

Provided that the Corporation shall not dispose of any security so seized until the period of ten days has elapsed since the posting of the registered letter of demand.”

In his heads of argument, Mr. *Muchadehama* for the appellant focused his attention on s 38(2) of the Act as being the crucial provision for consideration *in casu*. He submits that the use of the word “shall” in that subsection denotes the creation of a mandatory obligation to post a registered letter of demand to the borrower before the security given in respect of any advance can be attached and disposed of by the first respondent. In this respect, so he contends, the first respondent’s failure to strictly comply with this obligation was fatal to the validity of the sale and subsequent transfer of the property to the second respondent. I note that neither counsel for the respondents took issue with the supposedly peremptory nature of the obligation as contended by counsel for the appellant.

In my view, counsel appear to have totally misconceived the structure of s 38 of the Act and the rights and obligations of the first respondent thereunder. In terms of subs (1), where the borrower fails to repay any sum due in respect of the advance or commits any other actual or potential breach referred to in that subsection, the outstanding advance coupled with any interest thereon becomes immediately repayable. In that event, the first respondent is entitled to sue for and recover the whole or any part of the debt and/or refuse to disburse any part of the advance which remains unpaid.

Subsection (2) deals with the situation where security has been given for any advance. In any such case, the first respondent **may stipulate as a condition of the advance** that, if any advance becomes repayable in terms of subs (1), it **shall be entitled**, subject to subs (3) and ten days after posting a registered letter of demand, to seize and dispose of the security. Subsection (2) *per se* does not prescribe the requirements subject to which seizure and disposal of a security may eventuate. Rather, it sets out the terms that the first respondent may stipulate as a condition of any advance in respect of which security is given. Moreover, the use of the word “shall” relates to its stipulated future entitlement to seize and dispose of the security and not to any supposed peremptory requirement to post a registered letter of demand to the borrower.

It is subs (3) that governs the right of the first respondent to seize and dispose of the security in accordance with the condition contemplated by and stipulated under subs (2). By virtue of subs (3), the first respondent **shall be entitled** to exercise the powers of seizure and disposal conferred by the stipulated condition. However, the exercise of these powers by the first respondent is subject to two prerequisites. The first is that it has posted a registered letter of demand to the borrower at his last known address or at the address given by him. The second is that a period of ten days must have elapsed since the posting of that letter.

It is not disputed on appeal, although it was in the court below, that the first respondent is entitled to attach and dispose of immovable property given as security for a loan without recourse to the courts, so long as the procedure prescribed by s 38 has

been followed. See *Nyamukusa v Agricultural Finance Corporation* SC 174/94 and *Chizikani v Agricultural Finance Corporation* SC 123/95. What is disputed *in casu* is the procedure to be followed and, in particular, the nature and scope of the requirement to post a registered letter of demand to the borrower and the consequences of any failure to do so.

As I have already stated, the plain language of s 38 cannot be read to ascribe any measure of peremptoriness to the requirement under scrutiny. That being so, it is not a requirement that would ordinarily command strict and exact compliance. My reading of s 38, taken as a whole, is that the purpose of the requirement is to ensure that the borrower is given not less than ten days' notice, in the form of a letter of demand, before the first respondent is entitled to take possession and dispose of the security in question. This is the critical essence of the requirement and, therefore, the fact that such notice is not by way of registered post does not necessarily negate the underlying objective of due notice. Admittedly, the reason for specifying notice by registered mail is that this is probably the most expedient and effective means for achieving that objective as well as securing acceptable proof of notification. However, this may not always be practicable, particularly in rural and remote areas, where fixed postal addresses may not actually be availed or readily ascertainable within the prescribed period of ten days. In my view, so long as the borrower is duly notified of the outstanding debt and the intended seizure and disposal, there would have been substantial and sufficient compliance with the requirement so as not to invalidate any subsequent attachment and disposal of the security.



Insofar as concerns the intended recipients of the notice envisaged by s 38, counsel for the first respondent argues that it is only the principal debtor who must be notified and not necessarily the surety as well, even though the latter, *qua* co-principal debtor, effectively assumes the same rights and obligations as the former. Mr. *Dondo* is clearly wrong in that regard, being contradicted by the express provisions of the Act itself. The term “borrower” is defined in s 2 of the Act to embrace not only the principal debtor but also “any surety for an advance”.

Turning to the facts *in casu*, it is common cause that a registered letter of demand, dated 12 December 2012, was sent to Chengu at his address in Harare. It is also common cause that, subsequently on 4 March 2013, the first respondent’s mandated agent wrote a letter to the appellant informing him of the impending disposal of his Ruwa property by public auction scheduled to take place on 29 March 2013. This letter was received and signed for by the appellant’s neighbour on 6 March 2013. Thereafter, several meetings were held between all the parties concerned to negotiate a possible settlement of Chengu’s debt. The actual sale of the property only took place in September 2013 due to these negotiations and various undertakings to settle the debt. Consequently, as was quite properly conceded by Mr. *Muchadehama*, there can be no doubt that both Chengu and the appellant were fully aware of the outstanding debt and the impending sale of the property in order to satisfy that debt well before it was actually sold.

Given these circumstances, the fact that the registered letter to Chengu was sent to his last known address as opposed to his given address, or that the letter to the

appellant was not by registered mail, or that the letter was received by his neighbour rather than by himself, do not detract from the reality that they were both duly notified of the impending sale, with ample time to resolve Chengu's outstanding indebtedness and thereby obviate the sale of the appellant's property. It follows that the requirement of due notice contemplated by s 38 of the Act, as construed and articulated above, was substantially and sufficiently complied with in this case and that, therefore, the subsequent sale of the secured property cannot be held to have been irregular or invalid.

### **Validity of Transfer of Property**

The Second Schedule, referred to in s 38(2) of the Act, sets out the manner in and conditions under which the property of defaulting debtors is to be sold.

Paragraphs 2 of this Schedule is pertinent in the present context:

“2. Where a security has been seized by the Corporation in terms of subsection (2) of section *thirty-eight*, such seizure shall, subject to the provisions of this Schedule, have the same effect as an attachment made by the Sheriff or his deputy under a writ of execution issued by the High Court.”

The court *a quo* found as a fact that the second respondent was an innocent purchaser of the property sold by public auction in September 2013. This finding has not been challenged on appeal. Indeed, at the hearing of the appeal, counsel for the appellant could not dispute that the second respondent was an innocent purchaser. It is also not disputed that the appellant only filed his application in the court *a quo* two months after the property had been transferred to the second respondent and one month after the latter had instituted proceedings for the appellant's eviction from the property.

At common law, the sale of immovable property sold in execution by judicial decree cannot be impeached after transfer has been passed in the absence of an allegation of bad faith, knowledge of prior irregularities in the sale or fraud on the part of the purchaser. See *Mapedzamombe v Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257 (S) at 260-261, cited and applied in *Twin Wire Agencies (Pvt) Ltd v CABS* 2005 (2) ZLR 34 (S). In the present context, para 2 of the Second Schedule to the Act provides that the seizure of a security by the first respondent in terms of s 38 of the Act has the same effect as an attachment by the Sheriff under a writ of execution issued by the High Court. Although this provision refers only to the seizure or attachment of a security, it must, by necessary implication, extend as well to the disposal or sale of the security in accordance with the Second Schedule as expressly contemplated by s 38. In my view, the two processes are so interlinked in the enforcement and recovery of debts that they cannot logically or legally be separated.

In the instant case, the second respondent purchased the property in question at a public auction and thereafter complied with all the formalities for transfer and registration of the property in his name. The appellant has neither alleged nor proved any fraud, bad faith or knowledge of prior irregularities on the part of the second respondent. Consequently, the sale of the property to the second respondent as an innocent and *bona fide* purchaser, having the same effect as a judicial sale in execution, cannot now be reversed or set aside after the property has been duly transferred and registered in his name. The decision of the court *a quo* in this regard cannot be faulted.

**Costs**

The appeal, being devoid of merit, was unanimously dismissed for the foregoing reasons. With reference to costs, we found no reason to depart from the usual rule that costs should follow the event. However, insofar as concerns the second respondent, it is clear that the appellant had no proper footing for persisting with this appeal as against him, particularly after being apprised of the basis of his opposition. We agree with Mr. *Zhuwarara* that the appellant's conduct was tantamount to abuse of court process. In contrast, Mr. *Dondo* did not seek an award of punitive costs in favour of his client.

In the result, the appeal was dismissed with costs on the ordinary scale in respect of the first respondent and costs on a legal practitioner and client scale in respect of the second respondent.

**ZIYAMBI JA:** I agree.

**GWAUNZA JA:** I agree.

*Mbidzo Muchadehama & Makoni*, appellant's legal practitioners  
*Dondo & Partners*, 1<sup>st</sup> respondent's legal practitioners  
*Gill Godlonton & Gerrans*, 2<sup>nd</sup> respondent's legal practitioners