

PHANUEL CHIMANIKIRE
versus
THE SHERIFF FOR ZIMBABWE
and
REDAN PETROLEUM (PVT) LTD
and
PETROTRADE (PVT) LTD

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 26 May and 13 July 2016

Opposed Application

D.C. Ngwerume, for the applicant
R.K.H. Mapondera, for the 1st respondent
N.S. Manokore, for the 3rd respondent

TAGU J: The applicant filed this court application for an order setting aside the decision by the first respondent to confirm the sale of the property to the second respondent Petrotrade (Pvt) Limited. The application is made in terms of Order 40 Rule 359 subrule 8. The relevant rule reads as follows:

“359. Confirmation or setting aside sale

(1) Subject to this rule, any person who has an interest in a sale in terms of this Order may request the Sheriff to set it aside on the ground that:

- (a) the sale was improperly conducted; or
- (b) the property was sold for an unreasonably low price,

or on any other good ground.

(2) A request in terms of subrule (1) shall be in writing and lodged with the Sheriff within fifteen days from the date on which the highest bidder was declared to be the purchaser in terms of rule 356 or the date of the sale in terms of rule 358, as the case may be;

Provided that the Sheriff may accept a request made after that fifteen –day period but before the sale confirmed, if he is satisfied that there is good cause for the request being made late. (underlining is mine).

.....

(8) Any person who is aggrieved by the Sheriff’s decision in terms of subrule (7) may, within one month after he was notified of it, apply to the Court by way of a court application to have the decision set aside.” (my emphasis).

At the hearing of this matter counsels for the first and third respondents took two points *in limine* which they claimed are fatal to the applicant’s application and prayed that the application be dismissed with costs on a higher scale *de bonis propriis* without delving into the merits. The first point *in limine* was that the application is hopelessly out of time and no application for condonation has been made. The second point is that the ground relied on to set-aside the sale is *res-judicata*.

Application out of time

There being no challenge from anyone within the stipulated time frame the Sheriff advised the second respondent through his legal practitioners Messrs Mapondera & Company of the confirmation of sale and highest bidder on 28 April 2015. The applicant then challenged the confirmation of the sale in case HC 4823/15 filed on 27 May 2015. On 20 November 2015 the applicant then withdrew the said challenge on 20 November 2015. The applicant then reinstated the challenge on 23 November 2015. It was the contention of the respondents that the application was being made after the lapse of 30 days hence it was necessary for the applicant to apply for condonation first.

Counsel for the applicant opposed the point *in limine*. His argument basically being that it was not mandatory for the objection to be lodged within 30 days because the word “may” as opposed to “shall” was used in subrule 8. He urged the court to deal with the matter on the merits.

A clear calculation of the days confirms that indeed the application was brought out of the 30 day period stipulated in subrule 8. What complicates the matter for the applicant is that the application was made after the sale had been confirmed. Subrule 8 if read with the proviso in r 359 (2) clearly called for the applicant to first make an application for condonation because the proviso says-

“...the Sheriff may accept a request made after that fifteen-day period but before the sale is confirmed...”

In my view once the sale has been confirmed the Sheriff cannot accept any more requests. The applicant can only approach this court once the Sheriff has deliberated on the request and make a ruling in terms of subrule 7. The applicant sought to challenge the decision of the Sheriff in terms of subrule 8 but withdrew the challenge. He only has himself to blame. I agree with the counsels for the respondents that the application is hopelessly out of time, is fatally defective and is made without being accompanied with an application for condonation. For this reason alone the application will fail.

Res Judicata

The applicant has cited as one of the grounds upon which the confirmation of the sale by first respondent as being that the property belonged to him and he was not part of the judgment debt. He further avers there was no uplifting of the cooperate veil. In case HC 844/14 the applicant as Claimant caused interpleader proceedings to be issued wherein he argued that the attached property, which has since been sold in execution, did not belong to the then judgment debtor Zambezi Valley Petroleum (Pvt) Ltd.

The applicant defaulted appearance at the hearing of those interpleader proceedings and a default order was granted declaring the property whose sale confirmation is being challenged, declared executable. That decision is extant. This court cannot revisit that decision through subrule 8. In the premises I agree with the counsels for the respondents that that issue is res judicata. I find merit in the second point *in limine* and I uphold it.

In the result I make the following orders:

IT IS ORDERED THAT

1. The application be and is hereby dismissed.
2. Applicant to pay costs on a higher scale.

Hamunakwadi, Nyandoro & Nyambuya, applicant's legal practitioners
Mapondera & Company, 2nd respondent's legal practitioners
Chadyiwa & Associates, 3rd respondent's legal practitioners