SINGRUM SALES (PVT) LTD
and
JORUM MOYO
and
SINGWA MOYO
**versus**
THE SHERIFF OF ZIMBABWE N.O
and
O MOYO
and
STANDARD CHARTERED BANK

HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 8 JUNE 2018 AND 9 MAY 2019

**Opposed Roll**

*B Dube* for the applicants
No appearance for the 1st & 2nd respondents
*P Mukono* for the 3rd respondent

**MABHIKWA J:** This is an application simply tilted "Court application". It is not shown on the face of the application or the founding affidavit what application it is exactly and in terms of what rule of court it is made. It is continuously referred as "court application". The court has to infer from the totality of the papers and submissions made that it is probably made in terms of order 40 rule 359 (8) being an application for the setting aside of a sale in execution.

At the start of the hearing Mr B Dube for the applicants sought to make an application for the upliftment of the bar operational against the applicants. Applicants in short submitted that they realised they were barred. They should have filed their heads of argument on 7 March 2018 but only filed on 9 March 2018. In probably one of the shortest of applications, counsel attributed the two days delay to what he termed "a small technical hitch in our offices and thus apologise for the delay and seek the court's indulgence to uplift the bar in terms of rule 4C of the court rules."

The court did not take kindly to this lack of seriousness and taking the court for granted in respect of non-compliance with rules of court. Fortunately for them, counsel for respondents, who probably had intended to accede to the application then said literally noting in response other than leave it to the court to decide whether or not to grant the indulgence.

It is not for the court to fight battles for the parties. The court will thus grant the indulgence and proceed to deal with the merits.

The background facts of this matter are that under case number HC 7713/15, (Harare High Court) 3rd respondent obtained an order against 1st and 2nd applicants for payment of the sum of US$ 104 413-11 together with interest calculated at 13% p/a and ancillary relief. This order was granted on 16 January 2015.

Applicants then brought this application complaining of various alleged irregularities or misdeeds by the 1st respondent pursuant to the order and in an attempt to sell 2nd applicant's property in execution. Applicants claim that the property was sold to 2nd respondent in circumstances that are "unlawful; void or voidable under the High Court Rules and the Zimbabwe Constitution.

1st applicant, through its managing director who is also the 2nd respondent, states that he was advised by letter that his property had been to the 2nd respondent. Objections, if any, were invited.

2nd applicant says he attended the objections hearing with an evaluation report for the said property and objected to the sale to 2nd respondent. 2nd applicant then submits that after the hearing of objections, the 1st respondent made a ruling which was "grossly unreasonable." Thereafter, the founding affidavit goes on and on stating what particular rules of court demand that 1st respondent allegedly did not do.

Firstly, it was alleged that contrary to the provisions of rule 351 of the High Court Rules, 1971, the 1st respondent accepted and used an evaluation report not properly sworn to.

Secondly, it was alleged that the confirmation of the sale was also in direct contravention of rules 355 as there was no appointed commissioner present at the public auction as required by law.

Thirdly, it was contended that the highest bidder was therefore improperly declared and confirmation was null and void being in contravention of rule 356.

Finally it was contended that in contravention of rule 359, 1st respondent did not call upon all the parties involved to make submissions neither did he put his decision to confirm the sale, in writing as required by the rule.

It was contended further that having made the violations, 1st respondent confirmed a sale for the property for US$25 000-00 when the property was valued at US$150 000-00. As a result, the applicants contended that the acquisition of their property in execution therefore by the 2nd respondent is *void ab initio* and that whilst 1st applicant got a 2nd buyer offering more than what the confirmed buyer offered, 1st respondent had none of it.

The application was opposed by the respondents who in effect contended that the application was made simply to delay the day of reckoning as the applicants have not even paid a single cent towards the debt.

It was contended by the 2nd respondent that there was initially a sale by Public Auction, wherein the highest bidder offered US$5 000-00 only. Thereafter the property was sold for US$25 000-00 by private sale in which case some rules including rule 355 no longer apply.

It was contended by 3rd respondent that during the objections hearing both applicants were represented by Mr T Dube whilst Tellia Moyo was also present. It was also submitted that at the objections hearing, Ms T Moyo could not confirm or deny if she could pay the full purchase price on a specific date.

Apart from the fact that rule 355 would not apply in the case of the sale in issue, 3rd respondent argued that the issue of a commissioner to supervise the sale was being raised for the first time in the application when it was never raised before, particular at the objections hearing.

3rd respondent also contends that 1st respondent acted in terms of the law even in rejecting the "evaluation value of US$150 000-00 sought to be relied upon by the applicants which evaluation was not sworn to and was clearly fake and misleading.

3rd respondent further contended that 2nd respondent in any case offered a gross sum of US$34 000-00 which is higher than T. Moyo's US$28 000-0 for which she even failed to produce proof of funds.

The Law

1. It is common cause that the Sheriff or his lawful deputy is empowered and has the discretion in terms of order 40 rule 358 to sell immovable property in execution of a debt, by private treaty if not satisfied by the price offered at a public auction.
2. In terms of order 40 rule 359 (9), in an application to set aside a sale in execution, the court has a discretion to "confirm, vary or set aside the sheriff's decision or make such other order as the court considers appropriate in the circumstances."

The court will not waste its time going through the plethora of alleged violations by the sheriff as most of them were clearly not made in good faith but simply to buy time which in a way the applicants have succeeded in doing. Most of the alleged violations, like the alleged failure to appoint a commissioner, have easily been dismissed as rule 355 does not apply to private treaty sales.

Further, it should be noted that the powers of the sheriff under order 40 are generally discretionary moreso by the constant use of the terms "reasonable", "unreasonable" an " may."

In *Zvirawa* v *Makoni and Another* 1988 (2) ZLR 15 (SC), which in some ways is similar to the current case, the sale in execution, pursuant to a proper advertisement of the auction, attracted eleven bidders. Only three however entered the bids. A Mr Mhika offered US$35 000-00 with no opposition. However, he was disqualified when he failed to pay the purchase price in terms of the required specifications of the sale.

The property was put up again for bidding and was ultimately won by a Mr Mukalonda with an offer of $27 000-00. The 2nd respondent (sheriff of Zimbabwe) satisfied himself that the rules of court had been complied with and his report was to that effect.

The Honourable Judge (MANYARARA JA as he then was) concluded thus at page 16 F-H:

> "In my view before the applicant can succeed he has to establish the market value of the property. This is no easy task. As DAVIES J pointed out in *Lalla*'s case 1973 (2) RLR 280, that is a matter of opinion in most cases and one opinion in my view does not constitute market value. Where a sale has been properly advertised and well attended the highest price offered is a strong indicator of the market value of the property.
> In the present case (the) applicant has placed before the court an unsworn valuation of an estate agent as the basis for his estimated market value of the property in question. In my view the applicant has failed to discharge the onus on him to establish that the market

> value of the property is much higher than that realized by the sale and that the property was sold for an unreasonably low sum."

The judge went further to comment as follows at page 17F

> "It seems to me that in general one must hesitate before one accepts the theoretical evidence of a valuator against the specific evidence of a price offered in open competition at an auction sale, properly advertised and properly conducted."

In *casu*, the reasons for rejecting the valuation report by Capital Valuation Consultancy were well explained in the sheriff's ruling on 10 October 2016 in respect of the objection raised. The sheriff even quoted this very case by the Supreme Court in that ruling. To the sheriff, it was in fact capital's report that was absurdly unreasonably. One may well say no wonder why the valuator did not want to commit to the report by swearing under oath, and no wonder why in four (4) years the applicants failed to find a buyer offering at least US$30 000-00 let alone US$150 000-00.

In *Kanoyangwa* v *Messenger of Court and Others* 2007 (1) ZLR 124 (S), the appellant unsuccessfully sought an order setting aside a sale by Public Auction. The property in question was registered in appellant's name but had been sold and attached in pursuance of a judgment obtained against him and four others. The 2nd respondent, who was declared the highest bidder in July 2002 took transfer of the property after the sale of the property had been confirmed.

The appellant argued, on the basis of what he referred as "a plethora of errors and omissions traceable to court officials" including the messenger of court, that the sale was not properly conducted and should be set aside.

GWAUNZA JA, at page 126 C-D of the judgment had the following to say.

> "According to the evidence before the court, the appellant was aware that a number of judgments had been entered against him, jointly and severally with three others. He knew as far back as January 2001 that the property in question had been advertised for a sale in execution. He did not aver that he and his co-debtors had discharged any of the debts that had led to his property, and maybe others, being attached and advertised for sale by public auction. Therefore he must have remained aware of the real danger of his property being so sold. Specific evidence of his awareness of this particular sale is to be found in the letter dated 2 January 2002, copied to the appellant and referred to by the court a quo, in which an instruction was given by the first respondent to the auctioneers to advertise, and conduct, the sale of the property on 25 January 2002."

In *casu*, the order was obtained and has remained extant as against the applicants since 16 January 2015. As at the time of hearing (4 years later), the applicants allegedly have not paid a dime towards liquidating the US$104 413 debt.

Throughout their application and considering that there is no question now of their indebtedness, the applicants curiously avoided mentioning the issue of payment, not even at least a response to the 3rd respondent's lamentation that they have not bothered to pay even a cent throughout those years. The applicants simply bury their heads in the sand leaving outside on the surface the eyes so that they quickly jump and rush to court each time their property is to be sold in execution.

Indeed even by the time of the hearing, which was long after they had blocked the sale, confirmation and transfer their preferred "buyer" (Ms Tellia Moyo) still could not provide the required proof of funds and was still non-committal. One is tempted to ask the same question that counsel for the respondents asks- as to why the applicants, who claim that the property is valued at US$150 000-00, are prepared to accept, Ms T Moyo's uncertain US$28 000-00 notwithstanding the fact that Mr O Moyo, who offered US$25 000-00 in open competition is prepared to pay up to US$34 750-00 inclusive of ancillary charges like area water and related service charges.

In *Ziruhuru* v *Gwati* 2002 (1) ZLR 602 (S) the court held that the onus of showing that the sale price was unreasonably low is on the challenger.

In *casu*, the applicants have failed to discharge that onus on them and instead appear to be under the impression that the onus is on the respondents.

The court in *Ziruhuru (supra)* went on to comment as follows in dismissing challenger's valuation report.

> "The valuation obtained was out of date, it did not show the upper or lower limits. Of the suggested market price, it was not made under oath and in any event the opinion of a valuator is only an opinion and one opinion does not constitute market value."

In *Elimon Moyo* v *Sheriff of Zimbabwe* HB 55/07 the court underlined the sheriff's discretion in both the public auction and in the sale by private treaty which discretion is exercised judiciously of course.

And in *Media* v *Homelink (Pvt) Ltd* 2011 (2) ZLR 516, the court said the following:

> "It has to be noted that as a general rule, a creditor who has obtained judgment is entitled to enforce such judgment by levying execution and the court has no justification to restrain the judgment creditor from entering such legal right."

It appears clear to me from the foregoing, that in general, the courts are reluctant to interfere and set aside a sale in execution of a judgment, unless in a clear case were good cause is shown and were in the judicious exercise of the court's discretion the interests of justice demand that the sale in execution be set aside. The reason to me is clear and pertinent.

Firstly, the need for finality in litigation has always been an important tenet of our law.

Secondly, that the very essence of a judgment is to give relief to the judgment creditor including through a sale in execution. It is therefore not in the interests of justice that the court is taken back and forth and be used to "trip to the ground" its own orders at the flimsiest of excuses of alleged violations or irregularities made in "high sounding nothing" type of applications purportedly in terms of the often abused Order 40 Rule 359 of the High Court rules, 1971.

I am satisfied that the current application is one application with no merit at all. As already stated elsewhere herein, the applicants have in a way achieved their goal of delaying the day of reckoning. They had "their merry dance in their merry go round, they would be well advised to realize that the music has stopped playing and the time has come to pay the piper."

Strangely, the applicants have prayed for punitive costs against the sheriff of Zimbabwe (1st respondent). The court does not see any plausible explanation to support that prayer. On the other hand, there appears to be merit in the 3rd respondent's prayer that the applicants pay costs on the higher scale. It was an unmerited application with the sole purpose of buying time but sadly abusing the legal system and court process at the same time.

Accordingly, the application is dismissed on a legal practitioners and client's scale.

*Sengweni Legal Practice*, applicant's legal practitioners
*Danziger and Partners*, 3rd respondent's legal practitioners