CORNELIO SUNDUZA

And

YVONNE SUNDUZA

Versus

THE ADDITIONAL SHERIFF OF THE HIGH COURT IN BULAWAYO

And

MULTIRIDGE FINANCE (PRIVATE) LIMITED

And

NAPPON INVESTMENTS (PRIVATE) LIMITED

And

REGISTRAR OF DEEDS IN BULAWAYO N.O

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 26 JUNE 2019 AND 21 MAY 2020

Opposed Application

B Dube, for the applicant
No appearance, for the 1st respondent
Ms L Mumba, for the 2nd respondent
3rd respondent in default and barred
No appearance, for the 4th respondent

MABHIKWA J: This matter came to me as an opposed application. It was an application in terms of Order 40 Rule 359 (8) of the High Court Rules, 1971. After reading documents filed of record and after hearing counsel, I dismissed the application with an award of costs on the ordinary scale. Below are the reasons for my decision.

On 20 September 2010, the Honourable MTSHIYA J granted an order in favour of 2nd respondent and against the applicants in case No. HC 3189/10. The applicants' property known as stand No. 30 Sunninghill Township 2 of Entabeni of Willsgrove, Bulawayo was declared executable. A writ of execution was dully issued on 12 October 2010. Pursuant to the court order and the execution, the said immovable property was subsequently sold at a public auction to the 3rd respondent for $60 000-00 as the highest bid.

The now 1st applicant then filed an objection to the confirmation of the sale. I must re-iterate that the objection which is at page 10 of the bound papers in the record of proceedings shows only three (3) parties, that is to say Multiridge Finance, Cornelio Sunduza and CMS Leatherwear (Pvt) Ltd t/a Footwear and Rubber Industries. Yvonne Sunduza, now 2nd applicant is not a party in that objection document. Further, the objection, which is in affidavit form clearly shows Cornelio Sunduza only as the person raising the objection throughout the affidavit. It would therefore be erroneous to say that the two (2) applicants filed an objection to the confirmation of the sale.

After hearing the parties, the 1st respondent dismissed the objection in a six (6) paged ruling. Dissatisfied with the 1st respondent's ruling, the two applicants filed their application subject of this judgement in terms of Order 40 Rule 359(8) of the Court Rules. They seek an order setting aside the confirmed sale in execution by the 1st respondent. The applicants seek the following order that;

1. The confirmation of the sale of the immovable property known as stand No. 30 Roger Road, Sunninghill, in Bulawayo by the 1st respondent be and is hereby set aside.

2. The 1st respondent be and is hereby granted leave to accept the alternative offer of $100 000-00 for the property mentioned in 1 above.

Order 40 Rule 359 (8) of the High Court Rules reads as follows;

> "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.

Rule 359 (9) goes on to state as follows;

> "In an application in terms of Subrule (8) the court may confirm, vary or set aside the Sheriff's decision or make such other order as the court considers appropriate in the circumstances. "

It follows therefore and it is in fact trite that in essence, an application in terms of Rule 359 (8) of the High Court Rules is one that seeks a review of the Sheriff's decision in dismissing or allowing an objection made in terms of Rule 359 (1). The court is legally required to look at the grounds of objection raised before the Sheriff in terms of Rule 359 (1), opposing papers and arguments if any and test the Sheriff's decision to dismiss the objection as is the case *in casu.* The review or inquiry is therefore limited to what transpired at the hearing of, and the decision on the objection raised in terms of Rule 359 (1). All submissions or arguments falling outside this scope are largely irrelevant to the issue at hand and this court does not intend to waste much time on them.

Second respondent who has vigorously opposed the application, raised a point *in limine* that the applicants' application has not been made timeously in terms of the court Rules and also that the applicants did not seek condonation from the court before filing their application. The 2nd respondent contends that the Sheriff confirmed the sale on 7 September 2018 declaring the 3rd respondent as the ultimate purchaser of the property as the highest bidder at $60 000-00.

Second respondent submits then that the subsequent letter by the 1st respondent on 3 October 2018 being an "amended" letter of confirmation only had the effect of changing the name of the purchaser without altering the fact essence of confirmation of the sale on the 7th of September 2018. 2nd respondent further argues that when the applicants filed their application on 19 October 2018, this was a month and half after the Sheriff's confirmation of the sale and were therefore out of time, and should at the very least have sought condonation first before filing their current application.

In my view, although it may be said that the fact of confirmation was changed it may be properly argued that the 2nd letter of confirmation changed the period within which the applicants could file their application. In my view therefore, the respondents, were reasonably entitled to take the 3rd of October 2018 as the effective confirmation. That being the case, they would be within the time prescribed by the rules. What I would not be inclined to accept however, is the submission by the applicants that the sale should have been deemed

cancelled because of a reading of the 1st confirmation letter of 7 September 2018. This would be tantamount to allowing the applicants have it both ways.

Even if I be wrong in my findings the effect of the two letters would in my view at least credit the applicants with a substantial compliance with the rules. Non compliance on their part if any, would not be fatal. It would be a transgression that I would, in the exercise of my discretion, condone in terms of Order 1 Rule 4c of the Court Rules. I therefore dismissed the preliminary point.

Coming to the merits of the application it is, as stated above necessary to go to the grounds of objection raised by Cornelio Sunduza before the 1st respondent, any submissions in opposition and the rationale for the 1st respondent's decision in dismissing the objection.

Cornelio Sunduza's objection document reads as follows;

"3. I hereby object to the confirmation of the sale because;

3.1 The price is unreasonably low and I attach hereto as Annexture "B" a copy of the evaluation report by Beekstone Properties putting the property at $160 000-00 as the open market value and the forced sale value is said to be 60% of the value will be a sum of $96 000-00. Accordingly, the sale value of $60 000-00 is unreasonably too low. Even a private sale can fetch a better price.

3.2 Further, the plaintiff in the matter is under liquidation under the Reserve Bank and Depositors' Protection Fund. I dispute that there is authority to sell the property at all by the Sheriff. I need proof of such authority. Otherwise, I state that the sale is improper and unsanctioned.

3.3 Further there are proceedings to get the debt of CMS Leatherware assumed by and under the ZAMCO government debt/Loan facility and I attach the correspondence hereto as Annexture "C" and "D" for reference. The sale is therefore premature, irregular and unwarranted."

As already shown above, the court in an application in terms of Order 40 Rule 359 (8) has a discretion in terms of rule 359 (9) to "confirm", "vary" or "set aside "the Sheriff's decision or make any other appropriate order in the circumstances. It should be remembered also that the powers of the Sheriff under Order 40 are generally discretionary, moreso because of the constant use of the terms "reasonable", "unreasonable" and "may".

In *Zvirawa v Makoni and Another* 1988 (2) ZLR 15 (SC), aproperty subject of a sale in execution was put up for sale. Pursuant to a proper advertisement, eleven bidders were

attracted. However, only three (3) entered the bids. A Mr Mhika offered US$35 000-00 with no opposition. Unfortunately, he was later to be disqualified for failure to pay the purchase price in terms of the sale specifications. The property was put up again and was won by a Mr Mukalonda with an offer of US$27 000-00. The 2nd respondent (Sheriff), satisfied himself that the rules of court had been complied with and his report was to that effect. The Honourable MANYARARA JA (as he then was) concluded at page 16 F of the judgment that;

> "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 Lallas'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 realised 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, that;

> "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 *Kanokavanga v Messenger of Court & Others* 2007 (1) ZLR 124 (S) the appellant argued on the basis of what he referred to as "a pleathora of errors and omissions traceable to court officials" including the Messenger of Court, that the public auction sale was not properly conducted and should be set aside. He was unsuccessful. The property in question was registered in appellant's name but had been attached and sold in pursuance of a judgement obtained against him and four others. The 2nd respondent who had been declared the highest bidder in July 2002 had taken transfer of the property after the sale had been confirmed.

In *Marfopoulos v Zimbabwe Banking Corperation Ltd and Others* 1996 (1) ZLR 626 (H) the learned Judge stated the following on discharging the onus on an applicant in an application to set aside a sale in execution.

> "A litigant wishing to discharge this burden must be fully prepared with properly supported valuations of the property under consideration. These valuations must reflect the upper and lower limits of the suggested market price, so that the court

> might make a proper determination whether the price achieved is unreasonable, that is to say, that it is substantially lower than would reasonably be anticipated, given the expected range of prices."

It is thus improper to hold that a valuation report, especially one not done at the behest of the Sheriff, decides whether or not the sale is confirmed, as was held in *Z-Way Corp (Pvt) Ltd v Sheriff of Zimbabwe and Another* 1996 (2) ZLR 286 (H) per CHATIKOBO J. This is precisely why my brother MATHONSI J (as he then was) also held in *Success Auto (Pvt) Limited and Others v FBC Bank Ltd* HH 157/15 that the Sheriff's valuation is the most reliable. He held that the Sheriff's valuer is an independent party who has no interest in the matter and is accountable to the Sheriff only, an officer of the court.

In casu, Cornelio Sunduza presented a valuation report which only indicated the market value of the property as $160 000.00. It did not reflect the highest and lowest (forced market value) which the property would reasonably be expected to fetch in the open market to enable the 1st respondent to assess whether she had sold the property at an unreasonably low price. The valuation report was also not sworn to and these courts have always held that such valuation reports have no probative value. In my view therefore, the 1st respondent could not rely on the applicants' valuation report and was right in disregarding it.

It appears to me that the other two grounds or "requests" were not really grounds as envisaged in Rule 359 (1) They were essentially the kind of requests which if allowed to bring, parties whose houses are sold in execution would continue to bring *ad infinitum*. In any event the alleged sum of $100 000-00 was non-committal and was not guaranteed. This court, sitting to review the Sheriff's decision cannot inquire into issues that are raised for the first time in the present application and which issues were not before the Sheriff when she made the decision under review.

Quite often, applicants forget, perhaps conveniently so, that an objection in terms of Rule 359 (1) and moreso an application in terms of Rule 359 (8) should of course consider the rights and interests of other parties in the matter like the judgement creditor and the purchaser. A fortiori, these are very often innocent parties. For good reason, the courts have often been reluctant to readily set aside sales in execution under Rule 359. In *Lalla v Bhura* 1973 (2) RLR at page 283, the court has this to say, that;

> "If the courts were ever ready to set aside sales in execution under Rule 359 this might have a profound effect upon the efficacy of this type of sale. Would be purchasers might well be deterred in attending and bidding if they considered that their efforts might easily be frustrated by an application under Rule 359 and as a general principle I think it should be accepted that a court will not readily interfere in these matters."

and in *Media Homelink (Pvt) Ltd* 2011 (2) ZLR 516 the court held the following;

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

I would add that equally so, to set aside a sale in execution on account of applicants screaming that their property in their own view can fetch a better price or that they have found a better offer outside the court process is an action the court should not be ever ready to take. Such actions would certainly dampen participation of future buyers in such judicial sales in execution.

It is clear to me from the foregoing that the courts are generally reluctant to interfere and set aside a sale in execution of a judgement, unless in clear cases where good cause is shown, and where, in the judicious exercise of the courts' discretion, the interests of justice demand that the sale be set aside. The need for finality in litigation has also always been an important tenet of our law. And finally, the very essence of a judgement is to give relief to the judgement creditor, including through a sale in execution. It is 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 flimiests of excuses of alleged "violations" or "irregularities" by applications made in terms of the often abused Order 40 Rule 359 (8) of the Court rules.

I am convinced that the Sheriff did not err at all in dismissing the objection in this case. I am also overly convinced that this application has no merit, and it is for that reason that I dismissed it with costs of suit on the ordinary scale.

Mabundu & Ndlovu, applicant's legal practitioners
*Mawere Sibanda c/o Masiye Moyo & Ass*ociates, 2nd respondent's legal practitioners