

REPORTABLE: (96)

DOVES FUNERAL ASSURANCE (PRIVATE) LIMITED
v
(1) FERNABY INVESTMENTS (PRIVATE) LIMITED (2)
QUECOM ENGINEERING (PRIVATE) LIMITED (3) DENNIS
WILSON NGORIMA (4) STANDARD CHARTERED BANK
LIMITED (5) HOMELAND REAL ESTATE (6) THE
SHERIFF

SUPREME COURT OF ZIMBABWE
BHUNU JA, MATHONSI JA & CHITAKUNYE JA
HARARE: 1 JULY 2021 & 28 SEPTEMBER 2021

K. Kachambwa, for the appellant

N.P. Chinzou with *G. Chiuta* for the first, second & third respondents

MATHONSI JA: On 7 October 2020 the High Court handed down judgment in an application made by the first and third respondents in terms of r 359(8) of the High Court Rules, 1971. It set aside the Sheriff's sale of a property known as lot 8 Brooke Estate, Harare, in execution of a judgment in favour of Standard Chartered Bank Limited and granted the first, second and third respondents three months to either satisfy the judgment debt or find another purchaser willing to pay more than USD260 000.00 for the same property.

This is an appeal against that judgment of the High Court (the court *a quo*). After hearing submissions by counsel this Court issued the following order:-

- “1. The appeal succeeds.
2. By Consent, the first, second and third respondents shall bear the costs of suit.
3. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:-

‘(i) The application to set aside the Sheriff's sale be and is hereby dismissed

with costs.

- (ii) The sale of the applicant's property, being certain piece of land situate in the district of Salisbury called the remainder of lot Brooke Estate, measuring 7258 square meters, held under Deed of Transfer No. 4935/2004 sold by public auction to the third respondent in the sum of \$260 000.00 be and is hereby confirmed.”

After issuing the order we stated that the reasons for doing so would follow. What follows hereunder are those reasons.

THE FACTS

Quecom Engineering (Private) Limited, which is the second respondent herein, entered into a loan agreement with Standard Chartered Bank Limited, the fourth respondent herein, in terms of which the latter extended a revolving credit facility to it with a limit of USD 800 000.00. The first and third respondents, together with the third respondent's now deceased wife, bound themselves as sureties and co-principal debtors for the due performance by the second respondent, of its obligations under the loan agreement.

In addition, the first respondent executed a deed of hypothecation over its immovable property which is now the subject of the dispute between the parties, as security for the second respondent's indebtedness to the bank. In due course, the second respondent benefited from the loan but failed to pay the sum of \$241 056 which remained owing. The bank sued and obtained judgment against the first, second and third respondents in the sum of \$292 272, 12 together with ancillary relief.

A writ of execution against property was issued leading to the attachment by the sheriff of the immovable property forming the basis of the current dispute. Then began the haggling over the sale of the property which, when put on sale, would attract unreasonably low

prices. The first attempt at selling the property on 24 January 2015 attracted a sale price of US\$150 000.00. The first, second and third respondents filed a request to set aside the sale, which, by consent, was not confirmed by the sheriff.

On 6 August 2015 the judgment debtors were given an opportunity to sell the property by private treaty. They failed to do so resulting in the property being placed on public auction where, on 12 January 2017, it only fetched a price of \$150 000.00. Again the judgment debtors requested the setting aside of the sale by the Sheriff. At that stage the parties agreed that they be given a further 4 months to sell the property by private treaty failing which the sale for \$150 000.00 would be confirmed.

Again the judgment debtors failed to find a purchaser. As a result, the sale was confirmed by the Sheriff. Unhappy, the judgment debtors filed an application to set aside the Sheriff's confirmation in terms of r 359(8). This was under case number HC 7151/17. They obtained an order on 27 September, 2017 setting aside the sale by private treaty. The court gave them another period of 6 months to try and sell the property for a price above the \$150 000.00 previously achieved and if they failed, the court directed that the property be sold by public auction.

The judgment debtors again failed to sell the property. On 6 September 2018 the Sheriff sold the property by public action to the appellant for \$260 000.00. The judgment debtors would have none of it. They still filed with the Sheriff a request in terms of r 359(1) for the setting aside of the sale on two grounds, namely that:

- (a) The sale was improperly conducted; and
- (b) The property was sold for an unreasonably low price.

The Sheriff dismissed the request to set aside the sale and proceeded to confirm it on 29 November 2018.

PROCEEDINGS IN THE COURT A QUO

On 12 December 2018 the judgment debtors launched a court application in the court *a quo* in terms of r 359(8) for the setting aside of the Sheriff's decision to confirm the sale. They cited two grounds for seeking that relief namely, that the property was sold for an unreasonably low price and that they had found a financier who was willing to pay the full judgment debt on their behalf from the proceeds of the sale of its property. The financier was said to be in the process of selling its own property to raise funds.

The application was opposed by the appellant which set out the chequered history of the matter making it clear that the so-called financier was in fact a company known as Retour Investments (Private) Limited. It had in 2015 been touted by the judgment debtors as a potential financier without any headway.

In the course of preparing its judgment the court *a quo* came up with issues not raised by the parties. It *mero motu* invited the parties to address it on two legal issues, firstly whether the application before it was one for a review of the Sheriff's decision. Secondly, it desired to know whether it was open to the Sheriff to depart from the provisions of r 359 by allowing an oral hearing without the parties having filed formal pleadings. Having done that the court *a quo* refrained from determining the merits of the application before it but disposed of the application entirely on the issues raised by it *mero motu*.

The court *a quo* found that once a request to set aside the sale is made to the Sheriff, any person intending to oppose it should indicate the grounds for opposition and submit affidavits to support the grounds for opposition. It found further that as the appellant had failed to file written submissions opposing the objection to the sale but appeared before the Sheriff to make oral submissions, the hearing by the Sheriff was a nullity.

Having concluded that the Sheriff's proceedings were a nullity, the court *a quo* set aside the decision to confirm the sale. It however proceeded to grant the judgment debtors a further period of 3 months to either satisfy the judgment debt or find another purchaser willing to pay more than \$260 000.00 for the property failing which the sale to the appellant would be deemed confirmed and the property transferred to the appellant.

PROCEEDINGS BEFORE THIS COURT

The appellant was aggrieved by the judgment of the court *a quo*. It noted the present appeal on two grounds, namely that:

1. The court *a quo* erred in granting the first to third respondents a further three months to sell the attached property by private treaty without considering the merits of their objection and whether the objection constituted good cause to justify such order.
2. The court *a quo* erred at law in granting the first to third respondents the right to sell the attached property by private treaty when such right no longer existed having been granted such opportunity several times before and when there was no firm offer from a prospective purchaser to pay a price higher than the public auction.

This appeal requires the court to determine one issue namely, whether the court *a quo* erred in setting aside the confirmation proceedings of the Sheriff and affording the judgment debtors 3 months period to secure a buyer by private treaty.

WHETHER THE COURT A *QUO* ERRED IN SETTING ASIDE CONFIRMATION OF THE SALE

Mr. *Kachambwa* for the appellant submitted that the court *a quo* erred in determining the matter on grounds other than those provided for in r 359(1) as read with r 359(8) and (9). He submitted further that the court *a quo* did not focus on the relevant grounds but on points that it raised *mero motu* and then relied on those points to dispose of the matter.

It was further submitted on behalf of the appellant that where a request is made by an interested party to the Sheriff in terms of r 359(1) for the setting aside of a sale, the Sheriff has no power to grant default judgment as suggested by the court *a quo*. In all the circumstances, the Sheriff is required, even where no opposing papers are filed, to consider the request and decide whether there is a basis for setting aside the sale.

In advancing that argument Mr *Kachambwa* relied on the authority of *Zimunhu v Gwati & Ors* SC 43/02 which held that even if no opposing papers have been filed following a request to set aside the sale, the Sheriff still has a duty to consider the papers before him or her and decide whether they provide a basis for setting aside the sale.

In addition, the point was made on behalf of the appellant that once an application in terms of r 359 (8) had been made, the court *a quo* was enjoined to consider its merits. It

could not set aside the sale on mere technicalities. In this case the property had been sold on a number of occasions previously but the sales were set aside on the basis of low price.

The sum of \$260 000.00 offered by the appellant was the highest price ever achieved. The judgment debtors had been accorded opportunities before to sell the property by private treaty. They failed to secure a buyer offering more than what was achieved at the Sheriff's sale. The valuation report relied upon by the judgment debtors, which placed the forced sale value of the property at \$307 500.00 was done on 5 December 2018 long after the Sheriff's sale. It was therefore of no use in determining the application.

Per contra, Mr *Chinzou* for the first, second and third respondents submitted that the court *a quo* found an irregularity in the proceedings before the Sheriff. The irregularity was the failure by the appellant to file opposing papers to the request for the setting aside of the sale. He submitted further that having found an irregularity, the court *a quo* was correct in concluding that the proceedings were a nullity and setting aside the sale. It was correct in not relating to the merits of the matter.

Regarding the issue of whether the judgment debtors have a right to procure a new purchaser Mr *Chinzou* submitted that the Sheriff's price was unreasonably low. As such nothing stopped them from doing so. He however conceded that the valuation report submitted by the judgment debtors was irrelevant.

After the interventions of the court directed at whether the jurisdiction of the court *a quo* in an application of that nature could be triggered if the proceedings before the Sheriff

were a nullity, Mr *Chinzou* capitulated, he then suggested that the matter be remitted to the court *a quo* for a determination on the merits.

The dispute which gave rise to this appeal was initiated by a request made to the Sheriff by the judgment debtors in terms of r 359(1) of the High Court Rules. It provides:

- “(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”

Subrule (1) of r 359 therefore imposes limitations on the grounds upon which an interested party may approach the Sheriff, with a request to set aside the sale of property in execution of a judgment. In his affidavit in support of the objection to the sale which was submitted to the Sheriff the third respondent set out the grounds at paras 20 and 21 as follows:

“20 The purchase price of US\$260 000.00 is a slight improvement from the price of US\$150 000.00 fetched in July 2015 which was roundly condemned by the parties and subsequently set aside by consent of the parties.

21 Applicant is still objecting to the confirmation of the sale on the basis that the purchase price that is being offered by third respondent is below the forced sale value and the actual market value.”

The Sheriff dismissed the objection and confirmed the sale. The judgment debtors approached the court *a quo* in terms of r 359(8) for an order setting aside the sale. They did not seek to be given three months to sell the property by private treaty which relief the court *a quo* granted *mero motu*. I mention in passing that the court *a quo could* not grant relief which was neither prayed for nor established in the application.

It is a cardinal principle of our civil practice and procedure that the *onus* is on a person who claims something from another in a court of law to satisfy the court that he or she is entitled to it. See *ZUPCO Limited v Pakhorse Services (Private) Limited* SC13/17. Equally important is the principle that where there is a dispute on some question of law or fact, there must be a judicial decision or determination on the issue in dispute. A failure to resolve the dispute is a misdirection that vitiates the order given. See *Gwaradzimba v CJ. Petron & Co (Proprietary) Limited* 2016(1) ZLR 28 at p32 B-E.

By the same token, it is a grave misdirection for a court to determine an issue not placed before it by the parties and proceed to grant relief not sought by any of the parties.

A party interested in a Sheriff's sale can only approach the court in terms of r 359(8) where the Sheriff has refused a request made in terms of r 359(1). If terms of r359(7);(8) and (9):

- “(7) On receipt of a request in terms of subrule (1) and any opposing or replying papers filed in terms of this rule, the Sheriff shall advise the parties when he will hear them and , after giving them or their legal representatives, if any, an opportunity to make their submissions, he shall either-
 - (a) confirm the sale, or
 - (b) cancel the sale and make such order as he considers appropriate in the circumstances, and shall without delay notify the parties in writing of his decision.
- (8) Any person who is aggrieved by the Sheriff's decision in terms of subrule (7) may, within one months after he was notified of it, apply to the court by way of court application to have the decision set aside.
- (9) 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.”

The court *a quo* found that the Sheriff deviated from the rules of court rendering the proceedings irregular and the “decision reached thereon a nullity.” It however went on to issue an order giving the judgment debtors more time to sell the property. The jurisdiction of

the court *a quo* to exercise power reposed to it by r 359(9) arises from an application being made to it in terms of subrule (8). Such an application can only be made following a decision by the Sheriff refusing to set aside the sale in terms of subrule (7).

The Sheriff can only make a decision in terms of subrule (7) upon a request made to him by an interested party in terms of subrule (1). Where the proceedings before the Sheriff are a nullity, as the court *a quo* found erroneously in my view, the jurisdiction of the court *a quo* in terms of subrules (9) cannot be engaged. It can only be engaged where there were valid proceedings conducted by the Sheriff. There was a glaring misdirection in granting the judgment debtors relief as the court *a quo* did.

In any event, it occurs to me that the failure by the appellant to file written opposition to the request for setting aside the sale made to the Sheriff as required by r 359 (4) could not give rise to a default judgment. I do not read subrules (4) and (7) as giving rise to an automatic bar against an interested party from contesting the request made to the Sheriff. The use of the word “may” in subrule (4) suggests discretion on the party to lodge written notice to the Sheriff.

Equally so the expression: “On receipt of a request in terms subrule (1) and any opposing or replying papers” in subrule (7) is indicative of the fact that opposing papers may or may not be filed. All that does not detract from the duty of the Sheriff to consider the request and decide whether there is a basis for setting aside the sale. The Sheriff did that.

I am aware that having concluded that the proceedings before the Sheriff were a nullity, the court *a quo* did not fully engage the merits. The court *a quo* however granted 3 months for the judgment debtor to satisfy the judgment or find another purchaser. One can therefore safely say that it regarded the price as being unreasonably low without giving reasons. This is therefore not a case in which the matter can be remitted to the court *a quo* for a determination on the merits. Either it determined the merits or its judgment had that effect.

More importantly, this case has a chequered history wherein a beneficiary of a court judgment has struggled to execute it since 2014. The judgment debtors have had ample time given to them by the court to either pay the debt or sell the property in question at a higher price. They have failed to do so. There must be finality to this long standing case. No case whatsoever was made either before the Sheriff or the court *a quo* for the setting aside of the sale.

It is for these reasons that we issued the order mentioned above.

BHUNU JA : I agree

CHITAKUNYE JA : I agree

Chakanyuka & Associates, applicants' legal practitioners

Gill, Godlonton and Gerrans, 1st respondent's legal practitioners

Musekiwa and Associates, 3rd respondent's legal practitioners