

FRANCIS ANDREW ZVITENDO NYADINDU
and
SHILLAH NYADINDU
versus
BARCLAYS BANK OF ZIMBABWE LIMITED
and
THE SHERIFF OF THE HIGH COURT (N.O)
and
THE REGISTRAR OF DEEDS (N.O)
and
SOLID REAL ESTATE

HIGH COURT OF MZIMBABWE
DUBE J
HARARE, 28 January 2016 17 February 2016

Opposed matter

T K Hove for the applicants
F A Rudolf, for the respondents

DUBE J: A judgment debtor or any person who has an interest in a sale is entitled to bring objections challenging the conduct of a judicial sale by the Sheriff in terms of r 359 (1). Objections may be taken on all process leading to the sale and are not limited to the actual conduct of the auction sale. Where a petitioner challenges the decision of the Sheriff to confirm the sale, he may do so by approaching the court for the setting aside of the sale on review in terms of r 359 (8). He may not challenge the Sheriff's decision on grounds not raised as objections.

The applicants seek an order for the setting aside of a sale conducted by the Sheriff. The application is brought in terms of r 359 (8) of the High Court Rules 1971.

The first applicant is the judgment debtor and the second applicant is wife. The first respondent, the judgment creditor opposes this application. The second respondent, the Sheriff of the High Court, (hereinafter referred to as the Sheriff), the Registrar of Deeds and the fourth respondent, who is the purchaser of the property, have not opposed the application.

The first applicant took a mortgage bond against house number 116 Eastern Road, Greendale to finance his farming operations. The applicant failed to service the loan resulting in the first respondent issuing summons to recover the outstanding balance. On 8 May 2013 the first respondent obtained an order against the first applicant for payment of the outstanding balance on the loan. On 5 October 2013 the Sheriff of the High Court sold the applicants' house by public auction to the highest bidder at \$151 000-00. The first applicant objected to the sale resulting in the highest bidder withdrawing his bid. The Sheriff accepted the second highest bid. The first applicant filed an objection to the sale with the Sheriff in terms of Order 40 r 359. The basis of the applicant's challenge was that the bid price was unreasonably low, in that the price realized at the sale could not extinguish the debt owed to the judgment creditor and given time to sell the property by private treaty they could get a higher offer for the property. After hearing the objections, the Sheriff dismissed the objections declaring the fourth respondent the highest bidder. The Sheriff ruled that the price realized at the auction was not unreasonably low as the price fetched at the auction was far more than the forced sale value of the property pegged at \$100 00-00 and the price obtained at the sale is close to the open market value of \$170 000-00. The Sheriff confirmed the sale at \$150 000-00.

The applicants submitted that the property which is the subject of the application is a family home and the family's primary home and ought not to have been sold. The applicants submitted that the effect of the respondents' action is to make the applicants' family destitute. The first applicant is 58 years old and the second applicant 51 years old. Should the house be sold, the applicants have nowhere to stay. They are pensioners and there is no likelihood of buying another house. The respondents have taken all the applicants' movable property including their motor vehicle and furniture. The applicants argue that the respondent's actions of selling the applicants' primary residence are contrary to public policy and s 28 of the Constitution. They contend further that they should be given a chance to settle the debt and exhaust all avenues available to them before respondents sell their home. The applicants aver that they have a payment plan and wish to be given a chance to liquidate the debt in terms of the payment plan. The applicants also challenge values given by the auctioneers. They allege that there was no proper valuation of the property as the auctioneers visited the property late in the evening around

17.15 pm and simply moved around the property briefly and hence did not properly value the house.

The applicants submitted further that there was a failure to comply with Order 40 r 48 A (2) (a) in that the period of 6 days given as notice of the auction is too short. The applicants also take issue with the fact that after the highest bidder had withdrawn his bid, the second respondent went on to accept the second bid without having re-advertised the property or invited other parties to bid. The applicants challenge the judgment creditor's interest rate of 30% for the loan on the basis that it is usurious. The applicants also take issue with the Sheriff's failure to advise the Housing Secretary of the attachment in terms of r 48 A (2) (a).

The first respondent defends the application. The respondent takes a *point in limine*. It argues that the application was filed out of time, in that it was filed more than a month after the aggrieved party was notified of the Sheriff's decision to dismiss its objections to confirmation of the sale contrary to the provisions of r 358 (8). On the merits the respondent's position is that the property was properly sold after the applicants failed to repay the loan advanced to them. The respondent submitted as follows. There is no way that the applicants can be rendered destitute as the applicants own a farm where they are ordinarily resident. No Constitutional issues arise from the sale in execution.

The respondent argued that it was never the applicant's case before the Sheriff that the latter had not complied with the provisions of r 348 A (2) (a) in that he failed to communicate to the Secretary of Housing the fact of the sale nor that the sale had been improperly conducted. The respondent maintained that the applicants cannot bring up the issue for the first time in this application. The respondent submitted further that the Sheriff was not required to comply with the requirements of r 348. It contends that the issue of the interest rate is not relevant to this application. The respondent refutes that the property was sold for an unreasonably low price.

The objections to the sale were filed in terms of r 359 (1). The rule provides as follows:

“359 (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 any other ground.”

The objections that may be raised under this rule are not limited to those listed under the rule. This is evidenced by the inclusion in r 358 (1) (b) of the clause ‘any other ground.’ The objections challenging the sale may be raised on any impropriety that may have occurred from the moment of commencement of execution of the order given against the judgment debtor to the time of the judicial sale including its conduct. The objections are not limited to the actual conduct of the judicial sale.

The applicants challenge the interest rate of 30% ordered in terms of the court order of 8 May 2003 granted in default and which is the subject of these proceedings. I do not see the relevancy of that argument in an application for the setting aside of a judicial sale. An objector may not challenge the interest rates agreed to between the parties in a loan agreement or interest rate as ordered by the court, with the Sheriff. The subject of the interest is outside the ambit of r 359 (1). The Sheriff has no power over the court order. The avenue open to a litigant who was given default judgment and who wishes to challenge any aspect of that matter, including interest rates, is to apply for rescission of the default order. The subject of interest charged on the loan and ordered by the court, has nothing to do with the Sheriff’s decision to sell the property. The Sheriff has no power to review an order of court nor may the court at this stage enquire into the issue of interest charged by the judgment creditor. The inquiry under r 359 is limited to the conduct of the sale. The challenge related to interest rates is improperly before the court.

The Sheriff is expected to hear the objections and render a ruling. A party aggrieved by the decision of the Sheriff may apply to this court to set it aside in terms of r 359 (8). The rule provides as follows:

“359 (8) Any person who is aggrieved by the Sheriff’s decision in terms of subrule (7) may, within 1 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 (8) provides for a party aggrieved by the decision of the Sheriff to challenge the decision within one month after he was notified of it. There are two letters on record from the Sheriff which are identical except that they give two different dates of confirmation of the sale. The two dates given are stated as 8 December 2014 and 19 January 2015. These two letters went unexplained by both parties. This court finds itself in a position where it is unable to establish the exact date when the purchaser was confirmed the highest bidder. There is also no indication of

when the applicants became aware of the confirmation of the sale. The court is not fully equipped to resolve the issue. The preliminary point fails.

Rule 348 deals with a scenario where a dwelling is attached. Rule 348 A (2) (a) provides that when the Sheriff receives documents and particulars relating to the attachment, he shall forthwith, send written notice to the Secretary responsible for Housing and Building indicating that the dwelling has been attached and is to be sold in execution. The applicants allege that this was not done.

The first respondent has a mortgage bond over the property and instituted foreclosure proceedings when the applicants failed to pay the debt. In *Meda v Homelink (Pvt) Ltd and Anor* HB 195/11 the court dealt with r 348 A in the context of foreclosure proceedings and held as follows;

“The only interpretation that makes sense rather than a mockery of justice is one which says that Rule 348 A is not applicable to foreclosure proceedings.”

See also *Electroforce Wholesellers (Pvt) Ltd v FBC* HH 14/15.

In *Meda (supra)*, the court also remarked as follows with respect to sale of residential properties in execution,

“To put residential property which is a person’s home into that class of assets beyond the reach of execution would be to sterilize the immovable property from commerce thereby rendering it useless as a means to raise credit. Preventing debtors from using their homes as security to raise credit will create a class of homeless persons those who are unable to afford the full purchase price of their homes in a cash sale, but could afford to repay a loan for the purchase price. It would lock up capital and prevent the home owning entrepreneur from using his home as security to finance business initiative. Members of the poor communities will not be able to obtain finance from banks who will not advance money to purchase immovable property if the immovable property cannot be used as security for repayment.”

I agree with these observations. Rule 248 A is applicable where the Sheriff attaches a “dwelling” in circumstances where the debt sought to be recovered is not linked to the dwelling concerned. It applies where the dwelling attached is not under mortgage. Rule 348 A is not applicable to foreclosure proceedings. Where a person approaches a bank for a loan and mortgages his house as security for a debt, he cannot when he defaults, plead that his house is his sole dwelling .Any person who puts his home up as security for loan and does so being well aware of the fact that should he fail to service the loan, his house will be up for sale, cannot complain when he fails to service the loan and the bank attaches his home. Such a person takes a

risk which he should live with. The applicants cannot cry foul now and seek to avoid their financial and lawful obligations by invoking r 348 to avoid their obligations. The applicants should live with the consequences of mortgaging their house. To allow litigants in foreclosure proceedings to hide behind the fact that the mortgaged house is a family dwelling would amount to home seekers getting mortgages without security. This would naturally have a negative effect on the mortgage lenders as they will not be able to recover their investments. They will no longer be keen to give mortgages to home seekers. There is nothing that is contrary to public policy about two parties entering into a loan agreement and a mortgagor calling up loaned monies and foreclosing on the mortgage bond. This arrangement remains purely a commercial transaction and is legal.

Having found that a 348A application cannot be brought where there have been foreclosure proceedings, I find that the failure by the Sheriff to comply with the requirement to write to the Home Secretary concerning the attachment is immaterial and of no consequence. The Sheriff was not required to comply with the requirements of r 348 A.

Section 28 of the Constitution provides as follows,

“The state and all institutions and agencies of government at every level must take reasonable legislative and other measures, within the limits of resources available to them, to enable every person to have access to adequate shelter.”

The section speaks to the responsibility placed on the State, institutions and agencies of government to take reasonable and other measures to enable every person to have access to adequate shelter. What is clear from the constitutional provision is that it is not only the State that has the responsibility to take measures to ensure provision of houses. Other agencies of government and institutions like banks that can offer mortgage facilities bear the responsibility to ensure adequate shelter for every person. They have to be enabled by legislative and other measures to provide housing. The intention of the legislature was clearly to facilitate the provision of shelter .Section 28 does not create a right for the applicants. This case does not involve the availability of a facility to enable the applicants to own and have access to shelter. The loan was for farming activities. The relevance of s 28 to this case eludes me. There is no constitutional issue arising from these facts.

Rule 359(1) provides for a procedure enabling any interested party to raise objections to a sale. The rule outlines the grounds upon which the application may be brought. These are that the

sale was improperly conducted or that the property was sold for an unreasonably low price, or any other ground. Where the Sheriff dismisses the objections and confirms the sale, a party aggrieved by such a decision may in terms of r 358 (8) apply for the setting aside of the decision by making an application to this court. The procedure envisaged by r 359 is that of a review of the decision of the Sheriff by this court. The court is required to look at the objections raised and test the decision of the Sheriff. Rule 358 (8) limits the grounds upon which this application may be brought to those grounds raised in terms of r 359 (1) as objections.

The High Court sitting as a review court, cannot enquire into questions that were not raised initially as objections and deliberated on by the Sheriff. A party who has failed to raise an objection at the time he challenges the decision to accept a bid price with the Sheriff, cannot raise the objection for the first time in an application to set aside the Sheriff's decision to confirm a sale. The issues regarding the interest charged for the loan amount and that in the default order, and the short notice of the auction were not raised in the objections. It is not competent for the applicants to raise these objections at this stage.

The bid price was obtained at an auction. In *Morfopoulous v Zimbank Limited and Ors* 1996 (1) ZLR 626, the court dealt with a challenge to a price obtained at an auction. The court held that the bid price realized at an auction is a reliable indication of the value of the property. Where a property has been properly advertised and a public sale conducted, the bid price obtained at an auction, is the best indication of the property's market value. The bid price accepted by the Sheriff is way far higher than the forced market value of \$100 000-00 and is slightly less than the open market value of the property of \$170 000 -00. This goes to show that the price obtained is reasonable. The applicants aver that they have a valuation which shows the market price of the property to be \$240 000-00. No evidence of any other evaluation to the contrary has been produced. The applicants failed to produce proof to support the assertion that the price realised at the auction was unreasonably low. The Sheriff exercised his discretion properly.

The applicants instructed estate agents to sell the property but failed to find a buyer. The Sheriff was justified in rejecting the applicant's plea to sell the property by private treaty. Where a judgment debtor has already instructed an estate agent to sell property which is subject of a judicial sale, and the estate agents fail to find a buyer with a better price, no basis remains for the

Sheriff to try and put up the property sale by private treaty. A sale by private treaty should only be resorted to where there is a possibility that a higher price may be realized. The Sheriff exercised his discretion properly in refusing to sell the property by private treaty.

In the absence of sufficient proof that the price fetched is unreasonably low, the court will not interfere with the decision of the Sheriff. A judicial sale cannot be upset simply on the say so of the judgment creditor. The fact that the applicant desires for a better price is not on its own a good enough reason to upset a sale.

The Sheriff was entitled in his discretion to consider the second highest bid after the highest bidder withdrew his bid. The second highest bidder offered an amount of one thousand dollars less than that of the first bidder. The difference is negligible and hence this is not a good enough reason to upset the sale. I view that the Sheriff exercised his discretion judiciously.

I am not convinced that the property belonging to the applicants was sold at an unreasonably low price or that there was an impropriety in the manner in which the Sheriff conducted the sale. No case has been shown to upset the judicial sale.

In the result it is ordered as follows:

The application is dismissed with costs.

T. K. Hove & Partners, applicants' legal practitioners
Scanlen & Holderness, respondent's legal practitioners