JOHN T. MASHIRI t/a GWAI MILLERS
versus
BROADWAY INVESTMENTS (PRIVATE) LIMITED
and
OWEN POTANI
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 27 May 2019 and 5 June 2019

**Opposed Matter**

*K Kachambwa,* for the applicant
Ms *M.N. Nyenya,* for the 1st respondent
Ms *D.L. Mutsikadowa,* for 2nd respondent
No appearance for 3rd respondent

MATANDA-MOYO J: This is an application to set aside the Sheriff's decision in terms of r 359 (8) of the High Court Rules 1971.

The brief facts are that on 28 November 2017 this court issued on order by consent whereby the execution of applicant's property following judgment in HC 10082/15 was suspended on condition applicant paid what he owed the first respondent. The applicant and the first respondent entered into a deed of settlement which was made part of the above order whereby the applicant acknowledged owing the applicant a total sum of $69 088-05 made up of $18 966.13 owed in terms of HC 10082/15 and $32 343.37 owed in terms of MC 16123/17. The applicant undertook to pay $3000.00 per month until the whole amount was paid up. In case of breach the first respondent was entitled to instruct the Sheriff to proceed with the sale in execution. The applicant breached the court order resulting in the first respondent instructing the Sheriff to proceed with the sale.

The property was subsequently sold in execution on 20 July 2018 to the second respondent who was declared the highest bidder for the sum of $155 000-00. The applicant

objected to the confirmation of sale on the basis that the property was sold for an unreasonably low price. He based his objection on the valuation of the property which was done by Rawson properties. Rawson properties put the market value at between $210 00-00 and $230 00-00. The evaluator who had been appointed by the Sheriff had put the sale value of the property at between $50 000-00 and $75 000-00. The Sheriff dismissed the objection and confirmed the sale.

The applicant also complained that the property was advertised for only four days prior to the sale. The sale was therefore not adequately advertised and hence failed to attract a wider section of potential buyers. The applicant complained further that the buyer that was willing to pay $200 000-00 was not accorded reasonable time to come through and purchase the property. The applicant was given a day to produce the buyer.

The applicant prayed that he be given an opportunity to sell the property by private treaty.

The first respondent opposed the granting of the order sought on the basis that this application lacks merit and has been filed for purposes of delaying the day of reckoning. The history of the matter would show that the applicant throughout had no intention of settling the debt and has been employing delaying tactics to avoid paying.

The projected sale figure done by the third respondent had pegged the market value for the above property at $70 000-00 and the forced sale value at $50 000-00. The property was sold at $155 00-00 way above the projected figures. The argument that the property was sold for an unreasonably low value can never be justified.

The first respondent averred that the immovable property was adequately advertised in terms of r 352. That explains why the first respondent and others participated in the public auction. The applicant's story of a possible purchaser of property at USD200 000-00 is a myth as the applicant provided no name of such prospective buyer. Up to date the applicant has never availed such buyer. Besides the applicant is trying to base his application on other factors which were not before the Sheriff. The first respondent prayed for the dismissal of the applicant's application.

The second respondent opposed the granting of the relief sought by the applicant on the basis that the applicant has failed to advance any justifiable cause for the sale to be set aside. The application has been made out of greed and out of need to profiteer.

This application has been made in terms of r 359 (8) which provides that:

> "Any person who is aggrieved by the Sheriff's decision in terms of subr (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."

In the case of *Garati* v *Mau Mau and Others* MALABA DCJ (as he then was) said;

> "At common law any person interested in a sale in execution may apply to court to have it set aside on good cause shown although courts are reluctant to set aside a sale which has been confirmed and even more reluctant where transfer of the immovable property had been effected. The law was restated by GILLESPIE in *J Mortpoulos* v *Zimbabwe Banking Corporation Ltd & Or*s 1996 (1) ZLR 626 (H) where at 628 G – H the learned judge in the course of a review of the authorities said:
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> "By the common law an owner of property which has been sold in execution but not yet transferred may seek order of restitution in integrum setting aside the sale on good cause."

From the above the court has a discretion to set aside sale on good cause shown. However it is more difficult for applicant to persuade the court to set aside the sale than it is before the Sheriff.

The applicant complained that the Sheriff failed to adequately advertise the sale. The Sheriff only advertised the sale four days before the public auction. Such advertisement was only done once. Rule 352 deals with advertisement and provides as follows:

> "The Sheriff shall appoint a day and place for the sale of property, such day being, except by special leave of the court, not less than one month after service of the notice of attachment upon the execution debtor; and he shall cause the sale to be advertised at least once in the Gazette and in a newspaper circulating in the district in which the property is situated and in such other manner as he may deem necessary……."

Rule 352 only provides for advertisement once in the Gazette and in a newspaper circulating in the district in which the property is situate. It does not provide time limits. Counsel for the applicant argued that reasonable notice must be given to would be bidders and he submitted that the advertisement of four days was not reasonable.

The purpose of advertisement in terms of r 352 is to attract bidders. I am of the view that it is not necessarily the number of days that determines reasonability of the period. The court should go further and look at such factors as;

(a) whether the public auction was well attended, and

(b) whether the bid realized was more than the forced sale value.

The court should determine whether the advertisement achieved its objective of notifying bidders. If the public auction was well attended, and the bid price realized reasonable, there would be no cause for complaint. Unfortunately the reports from the Sheriff do no highlight the number of attendees. However the courts use the bid price value versus forced sale value and open market value to determine the reasonability of the bid price. I am of the view that the question of whether sale was adequately advertised cannot be viewed in isolation of the totality of the factors affecting the sale. The question of whether reasonable notice was given should be looked at *vis-à-vis* the bid price

It is important to note that the applicant does not complain that the advertisement inadequately described the property. The property was sufficiently described. The public "was adequately advised of what was being sold with the aim of attracting the interest of potential purchasers to the auction" See *Chasfire Investments (Pvt) Ltd* v *Majorie and Others* 1971 (1) SA 219 (c) and *Chizikani and Another* v *Central African Building Society* 1998 (1) ZLR 371 (S). The present case can be distinguished from the *Chizikani* case *supra* in that in the matter *in casu* the property was properly and sufficiently described.

The applicant submitted that as a result of the insufficient time that the advert was flighted, the price obtained was unreasonably low. The applicant relied on an evaluation done by Rawson Estate Agents which put the market value of the property at between $210 000.00 and $230 000.00. The applicant also relied on the fact that he had secured a buyer who was prepared to pay usd 200 000.00 for the property then, which buyer was frustrated by the Sheriff.

On the issue of the purported buyer, without the identity of the buyer or any affidavit from the purported buyer, this court is unable to accept as fact that such buyer existed. This court would thus concentrate on figures offered at the public auction as compared to the evaluation report presented by Rawson properties was done on 9th July 2018. At that time the exchange rate of usd to rtgs was 1:1. Counsel for applicant attempted to bring in SI 23/19 to argue that the property was priced in us dollars. The court rejects that argument.

Unfortunately the evaluation report presented by the applicant did not include the forced sale value. It only spoke to the market value. Public auctions are forced sales which ordinarily are not expected to fetch open market values. The Sheriff's valuations were $75 000.00 and $50 000.00 respectively. The public auction managed to sell the property for $155

000.00. If the court adds 15% VAT and 7% commission the total value comes up to $186 000.00.

GILLIPSIE J in *Morfopolous* v *Zimbabwe Banking Corporation Limited and Others* 1996 (1) ZLR 224 said;

> "It must be recognised that the prices at a forced sale will tend to be lower than those realised otherwise, and the price achieved is taken as a reliable indication of value. There is therefore an onus upon a challenger to prove that the price was unreasonably low. To discharge this onus a litigant must be fully prepared with properly supported valuations of the property, reflecting the upper and lower limits of the suggested market price."

The applicant has not shown that the property was sold at an unreasonably low price. The price obtained at the public auction far exceeded the market value and forced sale value prices as provided by the Sheriff's evaluation. Even considering the evaluation report submitted by the applicant of $200 000.00, the price obtained can never be said to be unreasonably low. See *Lalla* v *Bhura* 1973 (2) ZLR 280 (GD). The prices obtainable on an auction reflects reasonable prices. See *Zvirawa* v *Makoni and Another* 1998 (2) ZLR 15 (SC) where the court said;

> "It seems to me that in general one must hesitate before one accepts the theoretical evidence of a valuation against the specific evidence of a price offered in open competition at an auction sale, properly advertised an properly conducted.
>
> It is also settled that what is meant by unreasonably low price is a price which is substantially less than the market price."

Also in the case of *Clive Smith and Laurel Smith* v *Acting Sheriff and Levy Chibanda* SC 30/95 the court had this to say;

> "We must be careful not to drift into maudlin sentimentality and excessive sympathy for the hardluck stories. If we do, we undermine the very efficient and effective mechanisms by which housing is funded. There is no reason why the courts should not take into account the fact that forced sales generally realise lower prices than ordinary sale and that judgment debtor's interest ranks low in the scale of priorities in these sales-perhaps too low. It would be commercially unacceptable for courts to have, the power to set aside sales simply on the basis that in the absence of mistake or fraud or any other legitimate ground, one party has made a bad bargain."

In the result I am of the opinion that in the absence of proof that the four days advert prior to the sale negatively affected the bid prices, and in the absence of proof that the property was sold at an unreasonably low price, this application if meritless and ought to be dismissed.

Accordingly the application fails and is dismissed with costs.

*Musekiwa & Associates,* applicant's legal practitioners
*Matsika Legal Practitioners,* 1st respondent's legal practitioners
*Dzoro and Partners,* 2nd respondent's legal practitioners