

TAMBUDZE TANNING LIMITED  
versus  
SHERIFF OF THE HIGH COURT (GWERU)  
and  
VUSANI GRAY DIAMOND SIBANDA  
and  
VICTOR SIPONDO

HIGH COURT OF ZIMBABWE  
MAFUSIRE J  
MASVINGO, 29 January 2019 & 14 March 2019

Date of written judgment 25 July 2019

### **Urgent chamber application**

*T. Zishiri*, for the applicant  
Second respondent in person  
No appearance for first and third respondents

MAFUSIRE J

[1] This was an urgent chamber application. On 29 January 2019 I granted the provisional order sought, albeit with slight modifications. But on 14 March 2019 I rescinded that order *mero motu*. In between I had come to realise that there had been a patent error.

[3] Order 49 r 449 permits the court or judge, upon application by any affected party, or *mero motu*, to correct, vary or rescind any judgment or order:

- that was erroneously sought or erroneously granted in the absence of any party affected thereby;
- that has an ambiguity or patent error or omission;
- that was granted as a result of a mistake common to the parties.

[4] The power to correct, vary or rescind a judgment or order as provided above is in addition to any other power that the court or judge may have.

- [5] In this case, the patent error was in relation to the reach or scope of r 359. This is the rule that allows any person who has an interest in a sale in execution conducted by, or at the instance of, the sheriff to request him to set aside that sale on the ground that the sale was improperly conducted or that the property was sold for an unreasonably low price. Does the rule apply to both immovable and movable property or just to immovable property? The provisional order presupposed it applies to both immovables and movables. That was the error. The rule applies to immovables only.
- [6] What happened was this. The applicant's factory machines were attached and sold in execution by the sheriff, the first respondent herein. The second and third respondents were the successful bidders. Three days after the auction, the applicant lodged an objection with the sheriff raising multiple complaints about the propriety and fairness of the sale. These included allegations of bias and corruption by the sheriff; misleading or inadequate description of the items in the advertisements preceding the auction; acceptance by the sheriff of an unreasonably low price for the items sold; the propriety of the sheriff proceeding with the sale solely to recover his own costs and commissions when the judgment creditor at whose instance the goods had originally been attached had caused the sale to be cancelled, and so on.
- [7] Having been satisfied with the urgency of the matter, I caused the application to be set down for hearing on an urgent basis. Only the applicant's legal practitioner and the second respondent attended the hearing. All parties had been duly served. The sheriff submitted what he termed "Sheriff's Report". It dealt with the several issues raised in the application, including the applicability of r 359. On this he said:
- "8) The relief sought by the Applicants is premised on Rule 359. It is needless to point out to this Honourable Court that such relief is with regard to sales of immovable property."
- [8] However, the sheriff concluded his report by pledging his undertaking to abide by the decision of the court.

[9] After submissions by the applicant's legal practitioner and the second respondent, whose major concern, understandably, was on the delay being occasioned by the application and the attendant prejudice that he was suffering given that he was an innocent buyer, I granted the provisional order. The operative part read as follows:

- “a) The 1<sup>st</sup> Respondent be and is hereby directed to follow the provisions of Rule 359 and determine the objection filed on the 21<sup>st</sup> of January 2019.
- b) Pending the disposition of the objection filed with the 1<sup>st</sup> Respondent, removal of the following property from Owl Mine, Kadoma be and is hereby suspended:
  - i) Fleshing Machine
  - ii) Sammying Machine
  - iii) Experimental Drum 1
  - iv) Experimental Drum 2”

[10] Subsequently, it came to my attention that upon trying to implement the provisional order the sheriff's head office came unstuck. It was felt the rules are silent on the procedure to be followed where an objection such as had been filed by the applicant and which the provisional order had been all about, relate only to movable property. Therefore, it was being contemplated to seek directions. It was then that I had a closer look at the whole of Order 40 that deals with execution. I reconsidered my earlier decision. I came to the conclusion that r 359 applied to immovable property only and not to movables.

[11] Having formed an intention to rescind the provisional order, I caused to be dispatched to all the parties a notice in terms of r 449(2). The sub-rule says the court shall not make an order correcting, rescinding or varying a judgment or order unless satisfied that all the parties whose interests may be affected have had notice of the order. So part of my notice read as follows:

“It has come to my attention that the above Order was erroneously sought and erroneously granted, that it contains a patent error and that it was granted as a result of a mistake, more particularly in that the Urgent Chamber Application leading to the grant of the Provisional Order was premised on R 359 of Order 40 of the Rules of this Court which governs the confirmation and setting aside of sales of immovable properties and not movable property.”

- [12] The notice went on to advise the parties of their rights to make written representations, if any, before the order was actually rescinded. Only the applicant did. It objected to the rescission of the order. Its argument was that r 359 applied to "... **a sale in terms of this Order** ..." (*emphasis by applicant*); that sales made in terms of that Order (Order 40) apply to both immovable and movable properties, and that therefore there was no justification for restricting the scope of the rule to immovable property only.
- [13] I caused the matter to be set down for oral submissions upon notice to all the parties. Only the applicant's counsel and the first respondent appeared. The applicant stuck to its position as set out above. The first respondent, as before, was concerned by the delays. After hearing them I rescinded the provisional order, giving brief reasons.
- [14] The reasons why I concluded that the reach or scope of r 359 is restricted to immovable property and that it excludes movables, in spite of its wording as highlighted by the applicant, were these:
- At first brush, r 359 applies to both immovables and movables. On its own the rule does not say it applies to immovables only. It merely gives the right to any party who has an interest in a sale in execution to request the sheriff to set the sale aside. The relevant portion reads:

“(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.”
  - As the applicant argued, a sale in execution of immovable property is made in terms of Order 40. But so is a sale of movable property. No distinction is made.
  - But r 359 has to be read in context, not in isolation. The applicant was reading it in isolation. The whole of Order 40 has to be considered in order to discern the reach or scope of the rule.
  - The starting point is that Order 40, which governs execution, is divided into three parts: A, B and C. Part A is “**GENERAL**”. It is general to all sales in execution, whether of

immovables or movable. Part B is specific to sales of “**MOVABLES**”. Part C is specific to sales of “**IMMOVABLE PROPERTY**”. Rule 359 is in Part C.

- There are other more specific pointers. The sale of movables starts with the issuing of a writ of execution. It goes through several other processes. These include attachment; removal; inventory and evaluation, then the auction itself. The process ends by the disposal of any balance in hand. This is provided for in r 341. It reads:

“If the sheriff or his deputy has a balance in hand after payment of the judgment creditor’s claim and costs he shall pay the same to the judgment debtor if he can be found; otherwise he shall pay such balance into the sheriff’s account to be held for one year and thereafter to be paid into the Guardian’s Fund if unclaimed.”

- On the other hand, the sale of immovable property has far more elaborate provisions and some important interventions. One such intervention is the right or power given to government in r 348A(1) to (5). Through the line ministry, it can stop a sale in execution to facilitate the settlement of claims from the National Housing Fund where the attached property is a “**dwelling**” as defined.
- The other intervention is provided for in r 348A(5a) to (6). Where the dwelling that has been attached belongs to the execution debtor who himself or herself, or members of his or her family is or are occupying it, he or she may apply for a postponement or suspension of the sale in execution, or of the eviction of the occupants pending the settlement by the execution debtor of the judgment debt by instalments, or the procurement of alternative accommodation.
- Yet another intervention is provided for in r 358. The sale of an immovable property attached in execution is by public auction. But in terms of this rule, where all the interested parties, including the judgment debtor or a judge, consent thereto, the property may be sold by private treaty if the sheriff is satisfied that the price offered is fair and reasonable and that the auction is unlikely to realise a larger price. Furthermore, the sheriff can arrange a sale by private treaty where, after an auction, he is not satisfied that the price offered is reasonable.
- Then there is the intervention in r 359. As stated already, an interested person may request that the sale in execution be set aside if it was improperly conducted or the property was sold for an unreasonably low price. Sub-rule (2) is more revealing. Such a request should be made within fifteen days of the date the highest bidder is declared the purchaser “... **in terms of rule 356 or the date of the sale in terms of rule 358** ...” (*my emphasis*). The point is, both r 356 and r 358 provide for the declaration by the sheriff of the successful purchaser at an auction sale or sale by private treaty in respect of immovable property, not movables.
- Then r 361 and 367 provide for the registration of transfer or the cession of rights in immovable property after the confirmation of the purchaser. Rule 367 in particular,

providing for the power of the sheriff to sign any documents in place of the execution debtor in order to effect transfer or cession, specifically refers to immovable property sold by the sheriff in execution.

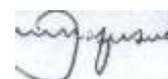
- Finally, the rules provide for the power of the sheriff to draw up a plan of distribution and distribute the sale proceeds accordingly. In this regard, there is that r 341, quoted above, which is for movable property. Its counterpart is r 366 which is for immovables. It reads:

“After the plan of distribution has been confirmed the sheriff shall proceed forthwith to distribute the said purchase money accordingly, and shall pay over the surplus, if any, to the debtor, taking proper receipts for all money so paid by him.”

- There would be no need for two rules if, as urged by the applicant, r 359 in Part C of Order 40 that deals with sales of immovables, refers to both movables and immovables. Rule 359 is undoubtedly part of a series of steps guiding the sheriff in the attachment and sale of an immovable property and his disposal of the sale proceeds thereof.

[15] In all the circumstances therefore, despite the apparent imprecision of the language of r 359, there can be no doubt that its scope is only in relation to immovable property. It was for these reasons that I concluded that the provisional order that I had issued previously contained a patent error which, when I became alive to it, prompted me to cancel it and dismiss the urgent chamber application, but with no order as to costs.

25 July 2019



*Garikayi & Company*, applicant's legal practitioners