ALOIS NDAZIVA CHIMERI
and
THE SHERIFF OF ZIMBABWE N O
and
CHESTERNOEL MUTEVHE
and
MBCA BANK LIMITED t/a NEDBANK ZIMBABWE
and
GRACE MUTEVHE
and
REGISTRAR OF DEEDS N O

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 20 May 2022 and 24 January 2023

Application to set aside a confirmed sale in execution

Mr *C C Mumba,* for the applicant
Mr *G Gapu,* for the respondent
Mr R E Nyamayemombe, second and third

CHINAMORA J

Introduction

An application was brought before me in terms of section 3 and 4 of the Administrative Justice Act [*Chapter 10:28*] ("the AJA") and, alternatively, under the common law. The application was filed on 21 May 2019, and was heard on 20 May 2022. Applicant seeks the setting aside of the first respondent's decision which confirmed the sale of his property in execution of a judgment debt. The property in question is 1 Holwood Lane, Umwinsdale, Glenlorne, Harare ("the property"), and the decision Sheriff's decision is being challenged on four grounds. The first is that the property was sold for an unreasonably low value, namely, USD$410 000,00. Secondly, it is argued that the first respondent did not properly advertise the property. Thirdly, the applicant avers

that the first respondent did not provide reasons for his decision on the objection. The final basis is that the first respondent did not initially attach movable property as required by the rules. It is the applicant's case that the first respondent's decision is irregular and contravenes sections 3 and 4 of the AJA to warrant the intervention of this court. After hearing argument, I reserved judgment in order to consider the respective submissions and authorities cited by the parties. I now hand down the judgment, which gives the background facts, preliminary points raised and the relevant law.

Background facts

From my reading of the papers, the objective facts reveal that, on 22 July 2016, the fourth respondent obtained an order of this court (per CHAREWA J) to the effect that the applicant and Edbury Engineering (Pvt) Ltd would pay, jointly and severally, the one paying the other to be absolved the sum of USD$773,534.03, and interest thereon at the rate of 23.34% per annum with effect from 1 August 2015 up to date of full payment with interest being capitalized monthly. To satisfy the judgment debt, the aforesaid property was put up for a sale in execution. At the first public auction in August the property fetched the highest price of US$320 000.00 through Bariade Investments (Pvt) Ltd which had been declared the highest bidder. Also dissatisfied with the sale, the fourth respondent through their legal practitioners, Scanlen and Holderness, objected to the sale citing that the property had been sold for an unreasonably low price. The property was then referred to a sale by private treaty as per the applicant's request, who stated that he had found a private buyer willing to purchase the property for USD$1,900,000.00. Unfortunately, the intended buyer failed to purchase within 40 days (and a further extension) which he had been given by the Sheriff.

The fourth respondent subsequently instructed the sheriff to sell the property by public auction. Pursuant to the second sale by public auction, the second respondent was declared the highest bidder at a price of USD$410,000.00. Aggrieved by this outcome, through his then legal practitioners, the applicant filed another objection to the sale. The objection was argued before the sheriff, who dismissed the objection and confirmed the sale. Thereafter, the fifth respondent transfer title to the second respondent and funds from the proceeds of the sale were disbursed to the fourth respondent. Further disgruntled by this turn of events, the applicant filed the application now before me seeking the following remedy:

1. The application be allowed with costs
2. The sale in execution under Case Number HC 10130/15 be set aside
3. The decision of the first respondent to confirm same be set aside
4. The subsequent transfer of the applicant's property (1 Holmweed Lane Umwinsdale, Glenlorne, Harare) by the first respondent be set aside
5. The deed of transfer number 350/2011 in favor of second and third respondents be set aside and title reverts back to the applicant with costs.
6. The fifth respondent (Registrar of Deeds) be ordered to revive the applicant's deed of transfer number 350/2011 within 7 days of the grant of this order.

It is at this point that I have to determine the respective rights of the parties. At the hearing of this matter and in the papers filed of record, the fourth respondent raised two points in *limine.* Firstly, that the matter is *lis pendens* in that there is a pending application for condonation under HC 10542/18, whose ultimate objective is the setting aside of the Sheriff's sale. The second preliminary point is that this application is not properly before this court, since the High Court Rules, 1971 (then applicable) provide for a review of the Sheriff's determination via rule 359 (8). The argument is that, while the present application purports to seek a review in terms of sections 3 and 4 of the AJA, it is in fact, an application for review under r 359 (8) or per Order 33 of the Rules. Let me now examine the applicable law and address these points in *limine* in that context.

The applicable law

I will start by highlighting that the points raised in the application, in *casu*, are more or less the same as were advanced in the objection to the sale made to the fourth respondent. Consequently, the applicant ought to have made an application to this court in terms of rule 359 (8) within a month of confirmation of the sale. The said rule 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".

The next pertinent point that I make is that the applicant did not make an application to this court as required by r359 (8) within the prescribed period or at all. Thus, position of the law is very clear on applications to set aside a Sheriff's sale after confirmation, and case law abounds in this jurisdiction. I find it imperative to state that the application must be founded either in terms of strict common law principles or in terms of rule 359 (8). In this respect, what has to be done was succinctly laid out by MANZUNZU J in *Nyamadzawo* v *Sheriff of the High Court of Zimbabwe N.O & Ors* HH 259-21. The learned judge unequivocally stated that a remedy through r 359 (8) is available to an applicant who initially requested the Sheriff to set aside the sale. In other words, one cannot seek recourse through rule 359 (8) in the absence of an initial request to set aside the sale in terms of r 359 (1). For completeness of the record, this rule reads as follows

> ***"359. Confirmation or setting aside sale***
> (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".

Thus, it is trite that an applicant who has not challenged a sale in execution to the Sheriff through r 359 (1) objection cannot seek relief under r 359 (8). From a reading of the case law, it is evident that the first consideration to be made is whether there was an initial objection to the sheriff to have the sale set aside on the grounds stated in r 359 (1). Nevertheless, it is important to note that rule 359 (8) is only available in circumstances where the sale has not yet been confirmed and transfer has not yet passed.

After confirmation and transfer have occurred, the legal position was set out in *Chiwanza* v *Matanda & Ors* 2004 (2) ZLR 203 (H) at 206 by MAKARAU J (as she then was) as follows:

> "After a sale has not only been confirmed but transfer of the property has been effected to a third party, interested parties may still approach this court at common law for the sale and transfer to be set aside. It further appears to me that an approach at this stage, <u>after the property has been transferred to a third party, cannot be sustained on alleged violations of the rules of this court</u> nor on the general grounds of review at common law but only on the equitable considerations aptly summarized by GUBBAY CJ (as he then was) in *Mapedzamombe* v *Commercial Bank of Zimbabwe and Another* 1996 (1) ZLR 257 (S)…"
> **[My own emphasis]**

So as put the examination of the second point *in limine* in a proper analytical framework, let me refer to what the learned Chief Justice said in *Mapedzamombe* v *Commercial Bank of Zimbabwe and Another supra* (at 26D*)*, which is:

> "Before a sale is confirmed in terms of r 360, it is a conditional sale and any interestedparty may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. See *Lalla* v *Bhura supra* at 283A-B. Once confirmed by the sheriff in compliance with r 360, the sale of the property is no longer conditional. That being so, a court would be even more reluctant to set aside the sale pursuant to an application in terms of r 359 for it to do so. See *Naran* v *Midlands Chemical Industries (Private) Limited* S 220/91 (not reported) at pp 6-7. When the sale of the property not only has been properly confirmed by the sheriff but transfer effected by him to the purchaser against payment of the price, any application to set aside the transfer falls outside r 359 and must conform strictly with the principles of the common law".
> **[My own emphasis]**

See also NDOU J's remarks in *Makuyana* v *Kadhuze* v *The Sheriff of Zimbabwe* HB 52-07.

Analysis of the case

It is apparent form the decisions I have referred to above, that the applicant faces an insurmountable difficulty. The contentions urged on his behalf that the price obtained was unreasonably low price and that the prospects of being able to settle the judgment debt without the need to sell his property, are not a basis for an application after confirmation and transfer of the property. This position at law has been settled. In fact, in *Chiwanza* v *Matanda & Ors supra*, the point was made that:

> "…after the property has been transferred to a third party, cannot be sustained on alleged violations of the rules of this court"

In these circumstances, an immovable property sold by judicial decree after transfer has been passed cannot be impeached in terms of the r 359 (1) grounds, or in the absence of an allegation and proof of fraud, bad faith, or knowledge of the prior irregularities in the sale in execution. What is apparent from the papers before me is that the r 359 (8) route to set aside the sale is not available to the applicant. As I have already alluded to, the only available recourse is the common law. The jurisprudence shows that the common law requirements are strict. The rationale behind this is to

protect the sanctity of judicial sales, so as not to discourage prospective buyers from participating in judicially conducted sales in execution. This court is not quick, without a robust inquiry made, to set aside sales where transfer has already passed, as pointed out in *Diesel Technical* v *Florenfield and Ors* HH 340-18, where KWENDA J pertinently observed:

> "I have no doubt that courts have jealously protected the sanctity of judicial sales. Once a judicial sale is *perfecta* and transfer has taken place, it is difficult to upset rights given/acquired in a judicial sale. Ironically, the case of *Mortopoulos* v *Zimbabwe Banking Corporation Ltd & Ors supra* is authority for the need for the courts to protect "… the reliability and efficiency of sales in execution."

See also *Garati* vs *Mudzingwa and Ors* 2008 (2) ZLR 88

In view of the facts and relevant law, I now proceed to determine the point in *limine* that the present application is not properly before the court. I note that the applicant has elected to rely on the AJA to have the Sheriff's decision set aside and, as consequential relief, to seek the cancellation of the deed of transfer in favour of the second respondent. I have shown in this judgment that the application, in *casu*, should have been brought in terms of r 359 (8) or as an ordinary review application under Order 33 of the High Court Rules, or the common law. While the application states that it has been brought under the common law that cannot be supported even by as little as a cursory examination. Nowhere does the application allege the following: (a) fraud on the part of the purchaser; (b) bad faith on the part of the purchaser; or (c) knowledge of prior irregularities in the sale of execution by the purchaser. I had occasion to deal with this issue in *Mukarakati* v *The Trustees of the Don Moyo Trust & Ors* HH 667-22, and concluded as follows:

> "As I have already observed, the applicant did not allege and give particulars which show that there was fraud, bad faith or knowledge of any defect on the part of the purchaser. The authorities are clear that these are the allegations which necessarily establish a cause of action for an applicant who makes an application to impeach a sale in execution and title after transfer has been effected, having failed to challenge the sale in execution in terms of r 359 of the High Court Rules".
> **[My own emphasis]**

In *casu*, the applicant makes other allegations that are far divorced from those required in application to set aside a sale after confirmation and transfer of the property to a third party. The applicant's allegations, instead are that the property was sold for an unreasonably low price, that the sheriff did not afford the applicant the chance to settle their indebtedness nor did he hear him

in his objection, that the sale was done contrary to a clear offer from the third party willing to pay the price that would have settled the applicant's indebtedness and that the sheriff acted *mala fide* by failing to properly advertise the property. For this reason, I am satisfied that the point in *limine* has merit. Accordingly, I uphold that preliminary point. The effect is that there is no application before the court. As I have decided the matter based on the preliminary point, I find it unnecessary to deal with the remaining point in *limine* or to delve into the merits of the application. On costs, I see no reason from departing from the general rule that costs follow the event.

Disposition

Accordingly, the application is struck off the roll with costs

Mudimu Law Chambers, applicant's legal practitioners
M C Mukome, second and third respondents' legal practitioners
Scanlen & Holderness, fourth respondent's legal practitioners