TALLSPRING INVESTMENTS [PVT] LTD
and
JOTHAM NYAMAHOWA
versus
THE SHERIFF OF ZIMBABWE N.O.
and
LINAH NDOLI AGERE
and
HAPPYMORE MAPARA

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 15 September 2015 and 18 November 2015

Opposed Matter

T Bhatasara, for the applicant
B R Gwati, for the 2nd respondent
M Mbuisa, for the 3rd respondent

DUBE J: This is an application for the setting aside of a judicial sale brought in terms of r 359 of the High Court Rules, 1971. The first applicant is the judgment debtor. He is the owner of stand 157 Meyrick Park Township, Mabelreign, [hereinafter referred to as the property]. The second applicant claims that he has an undivided 7.7% share in the property owned by the first applicant. The first respondent is the Sheriff of the High Court of Zimbabwe cited in his official capacity. He conducted the sale that is subject of this challenge. The second respondent is the judgment creditor under HC 10410/12. The third respondent bought the stand at a public auction after being declared the highest bidder by the Sheriff.

The second respondent obtained a judgment against the applicant and others under HC 10410/12 on 29 November 2013. In July 2014, the second respondent caused the attachment of the property of the judgment debtor. A public auction was conducted on 12 December 2014. The third respondent was declared the highest bidder on 15 December 2014 at $220 000-00. A request

for the sale to be set aside was made by the first applicant to the Sheriff. The second respondent opposed the request and a hearing was convened. At the hearing the first applicant was advised that the bid price had been increased from $185 000-00 to $220 000-00 by the third respondent. On 16 March 2015, the first respondent confirmed the sale.

The applicants' case is that the second applicant has a 7.7% share in the property and a caveat is placed on the property. They submitted as follows. The Sheriff made an error in that he did not check, examine or verify if there were any bonds, caveats or encumbrances to the holding deed in the name of the first applicant on attachment. If he had done so, the Sheriff would have realized that in December 2013 the second applicant took title of a 7, 7% undivided share of the property. The second applicant has rights in respect of the property as a result this transfer. The Sheriff sold by public auction, the first applicant's property inclusive of a 7.7 % share belonging to the second applicant and not registered in the name of the judgment debtor. The second applicant had nothing to do with the judgment debt or the second respondent. The applicants contend that it was wrong for the Sheriff to sell the immovable property not registered in the name of the judgment debtor and that this renders the sale illegal and invalid.

The applicants also submitted that the Sheriff failed to follow the provisions of r 356 in that he failed to consider the post auction report by the commissioner before declaring the highest bidder. The respondents argued that it is irregular to declare a highest bidder at $185 000-00 and then confirm the same sale at $220 000-00 .That the Sheriff purported to have a private sale without adhering to the requirements of rule 358. There being no sale done at $220 000-00 the Sheriff could not competently confirm a sale held at $185 000-00 using the figure of $220 000-00.

The applicant took issue with the manner in which the sale was advertised. They argued that the sale was not properly advertised in that the advert did not give sufficient details of the nature and characteristics of the property. They contended that the failure to adequately advertise the property renders the sale null and void. The applicants submitted that the property was sold at an unreasonably low price and that the confirmed price is unacceptable. The applicants aver that there are people who purchased and paid for various units before attachment and subsequent sale. That if the sale is to stand all the purchasers will be prejudiced. That equity demands that the sale be set aside. Both applicants pray for an order setting aside the sale on the basis of illegality,

irrationality and gross irregularity in the decision of the Sheriff.

The Sheriff did not defend the application. The second respondent, the judgment creditor submitted that the second applicant was not part of the original case being HC 10410/12. He was not joined properly and has been bought in through the back door. The second respondent submitted that the second applicant's interest is that he registered a property on 19 December 2013 less than a month after the applicant was granted a consent order. That the second applicant was used to defeat the judgment granted to the second respondent. The second respondent submitted that the applicants are employing delaying tactics to delay paying her by bringing this application. The respondent argued that the order sought does not require her to do anything and she ought not to have been cited.

The third respondent challenged the authority of Munyaradzi Sagonda to dispose to both the founding affidavit and the answering affidavit on behalf of the second applicant. The basis of the challenge is that the applicants have failed to show that the second applicant authorized Mr. Sangonda to bring the application on his behalf. The second challenge is related to the authority of the second applicant to seek the setting aside of the sale. The respondent submitted that the second applicant did not challenge the decision of the Sheriff confirming the sale. That only the first applicant did and hence the second applicant is not entitled to bring this application. That he has a remedy in interpleader proceedings.

The third respondent's position is that there is no irregularity in the sale. He submitted that the rules do not provide what is supposed to be contained in the commissioner's certificate. Further that the information in the certificate is sufficient and clear despite that the certificate is not signed by the Commissioner. He also submitted that the auctioneer's report is not provided for in terms of the law. The third respondent conceded that the Sheriff did not follow the procedure under r 348 (2) which requires him to ascertain any encumbrances on the property before attaching a property. That if he had so checked, he would have noted the 7.7 % interest of the second applicant. It was submitted on behalf of the third respondent that the effect on the sale of this error is that this affects the rights of the second applicant which can be severed from the entire sale by a declaration that the 7. % belonging to him is not executable. The third respondent however challenged the timing of the purported transfer of the 7, 7 % share to the second applicant. He submitted that the applicants colluded to try and defeat the judgment debtor's

claim.

In the absence of actual authority authorizing him to act, the deponent to the Founding affidavit must place before the court a 'minimum of evidence' to show that he is authorized to bring the proceedings See *Mall [Cape] (Pty) Ltd v Merino Ko-operasie Operasie* BPK 1957 (2) SA 347 for this approach. The court must be satisfied that it has the correct litigant before it and that is the applicant who is bringing the proceedings and that the deponent to the founding affidavit is not on a frolic of his own.

The applicants did subsequent to the application file a board resolution authorizing Lenon Nyagura and Munyaradzi Sangonda to represent the company in any litigation in the name of the company. Munyaradzi Sagonda avers that he has authority to depose to the affidavits on behalf of the second applicant. This fact is confirmed by the second applicant's confirmatory affidavit. He avers in that affidavit that he gave Mr Sagonda power to depose to the affidavit verbally and he confirms, ratifies and adopts what Mr Sagonda deposed to in the affidavits. Each case has to be determined on its own merits. In *Madzivire and Ors* v *Zvarivadza and Ors* SC 10/06 the court remarked as follows:

> "Each case must be considered on its own merits and the courts must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorized person on its behalf"

Although the second applicant did not file documentary proof to show that it gave power of attorney to the first applicant's representative, Mr. Sagonda to represent him, the court is satisfied that the deponent to the founding affidavit is not on a frolic of his own. The confirmatory affidavit of the second respondent confirms the fact that he authorized him to act on his behalf. Even in the absence of a written power of attorney the court will for as long as it is satisfied that it has the correct litigant before it allow proceedings to go ahead. The court would be taking formality too far if it were to insist on a written power of attorney in the face of a confirmatory affidavit from the litigant concerned. I am satisfied that the deponent to affidavits filed on behalf of the applicants' case has authority to depose to the affidavits on behalf of the second applicant.

The applicants bring this application in terms of Order 40 r 359 .The respondents have taken issue with the fact that the second applicant did not file any request to set aside the sale in writing with the Sheriff in terms of rule 359 .The rules provides in part as follows ,

"**359. Confirmation or setting aside sale**
[Rule substituted by s.i. 80 of 00]
(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.
(2) A request in terms of sub rule (1) shall be in writing and lodged with the Sheriff within fifteen days from the date on which the highest bidder was declared to be the purchaser in terms of rule 356 or the date of the sale in terms of rule 358, as the case may be:
Provided that the Sheriff may accept a request made after that fifteen-day period but before the sale is confirmed, if he is satisfied that there is good cause for the request being made late."

Any person wishing to challenge the decision of the Sheriff to sell a property may do so in terms of r 359 (1) to (3). He is required to file his objections with the Sheriff. The first requisite is that he should have an interest in the outcome of the sale. He is required to set out the reasons for the challenge in terms of r 359 (1). Subrule 2 requires the request to be in writing, be lodged with the Sheriff, within 15 days from the date on which the highest bidder was declared the purchaser. Where the objector fails to do so within the prescribed time, the Sheriff has discretion to accept the request. He may only accept a late request where the sale has not been confirmed. The Sheriff may only do so on good cause shown. The request must be in the form set out in r 359 (3)

The second applicant did not file any objections challenging the acceptance of the bid price by the Sheriff. Only the first applicant did. The second applicant only surfaces at the stage of this application as second applicant. The second applicant fell into the error of thinking that he could challenge the sale without first raising objections to the sale with the Sheriff. He may not approach the court directly. There are no shortcuts. The second applicant did not follow the correct procedure. The procedure provided for in r 359 (8) is a review procedure. A person wishing to challenge decision of the Sheriff to accept a bid is required to first challenge the sale by filing objections with the Sheriff. Where the Sheriff after hearing the objections filed confirms the sale and the objector is aggrieved by that decision or outcome, he is entitled at that stage to approach the court for redress in terms of r 359 (8) to set aside the sale. Rule 359 (8) provides for a review mechanism. This court will only exercise its review powers in terms of r 359 (8), where it has been shown that there is a decision sought to be reviewed. There is no decision to review with respect to the second applicant. The second applicant has not been

properly joined to this application. His application is improperly before the court.

Fortunately for the second applicant, the same issues he raises in this application are the same as those raised by the first applicant. It appears that he can ride on the first applicant's application. The issues he raised are still going to be considered.

The court will deal first with the Sherriff's failure to check if there were any caveats, bonds or other encumbrances placed on the property before attaching and selling the property. Rule 348 (2) requires the Sheriff, on attachment of a property to check the property for any bonds, caveats or other encumbrances. The rule reads as follows,

> "348 (2) Subject to rule 348A, upon receiving the documents referred to in sub rule (1) the sheriff shall ascertain the particulars of all mortgages and other real rights registered against the immovable property concerned, as well as the particulars of any caveat lodged in respect of the property:
>
> Provided that the sheriff may require the party at whose instance the property was attached to ascertain those particulars and to report to him in writing therein".

The Sheriff did not check for any caveats on the property. If he had done so he would have noted the caveat placed on the property. An irregularity has occurred. In *Maparanyanga* v *The Sheriff of Zimbabwe and Ors* 2003 (1) ZLR 325 at p 338, the court said the following on irregularities in a judicial sale,

> "In the case where the common law, the rules of the court and the administrative requirements of an office responsible for enforcing judgments are flouted, the court would be failing in its duty if it condoned such disregard of the law and rules. It would be doing exactly that where it to allow the sale in question to stand."

Similar sentiments were expressed in *Kanokanga* v *Messenger of Court* SC 68\06, where the Supreme Court said the following,

> "Courts do not condone blatant disregard of rules governing judicial sales by officers whose mandate it is to uphold the rules. Such disregard does have the undesirable effect.... of bringing judicial sales into disrepute, and should be discouraged in the strongest terms."

It is not every omission to observe the rules that renders a sale invalid. In Mackeurtan's *Sale of Goods in South Africa* on p 253, the author states as follows,

> "…it is not every formality the omission of which will give rise to the right under discussion, for as Matthaeus observes, although the formalities of a judicial sale must be observed to a nicety, if only an unessential or unimportant formality has been omitted, the sale will not thereby be vitiated. The reason for this is, he says is the *maxim minima praetor non curat* and the fact that it is not consonant with good faith to wrangle over infinitesimal points of law (*de apicibus juris*)

(Exparte Roberts 3 SC 208)"

The Sheriff is required to adhere to the rules of court and ensure that he conducts judicial sales in terms of procedures outlined in the rules. Efficacy of judicial sales can only be achieved if officers tasked with the function of conducting judicial sales conduct their business above board. Failure to conduct sales properly and in accordance with the rules has the effect of bringing the administration of justice into disrepute .This results in the public losing confidence in judicial sales. I must accept however that it is not every omission or irregularity with the conduct of the sale that will result in a sale being set aside. The objector has to show that the omission complained against is an essential formality and that the omission is serious and material. Further, he is required to show that he has suffered prejudice resulting from the failure to conform to the rules.

Where a claim over ownership of a property which is subject of a sale is brought to the attention of the Sheriff during the hearing of objections, the Sheriff should not ignore such claims. He is expected to investigate the claim at that stage. He should only confirm the sale where he is satisfied that the claim is frivolous and lacks merit and is designed to cause delays. The Sheriff was not required to delve into complicated issues of title or fraud which questions should be left to courts of law. Where the challenge reveals that the objection has merit, this is a good enough reason to desist from confirming the sale. The Sheriff failed to place sufficient weight on the objection and proceeded to confirm the sale. The attachment and subsequent sale of the second applicant's interest in the property was misconceived and improper.

The first applicant transferred a 7.7% undivided share in the property to the second applicant when it knew that the second respondent held a judgment against it and that its property had not been attached because the first applicant had undertaken to settle the debt. It appears to me that the second applicant may have colluded with the first applicant in a bid to frustrate the judgment creditor's claim. However, the fact remains that there was a caveat placed over the property at the time of the attachment of the property. The second applicant had acquired a real right over the property. The second applicant had an interest in the property at the time of attachment. Whether the property was properly registered is not subject of this enquiry. The fact is the second applicant has title to a 7.7% stake in the property. The second applicant's interest in the property was not liable to attachment and sale. The respondents conceded that the Sheriff

ought to have checked for encumbrances before he attached the property. .

The Sheriff failed to comply with statutory formalities. This indiscretion is serious in that the Sheriff failed to comply with an essential formality of the sale. It is a material omission. A wrong person's property has been attached to satisfy a debt owed by the debtor. The second applicant has been prejudiced in that his property has been sold for a wrong cause. The sale ought not to have been confirmed in circumstances where it was clear that someone else owned a stake in the property. A sale under a defective title cannot succeed. Where the Sheriff sells property not belonging to the judgment debtor, this amounts to an irregularity that vitiates the sale.

Having found that the second applicant's property was wrongly attached and ought not to have been sold together with the first applicant's stake, it follows that the sale cannot stand. At the hearing, and in a bid to settle the matter, the purchaser offered to take the property without the second applicant's stake in it. This offer was turned down by the applicants. I am not persuaded by the third respondent's proposition that the court severs the rights of the second applicant from the entire property and declare that the 7.7 % belonging to him is not executable. It is difficult for the court to attempt to sever the second applicant's interest in the property and come up with a reasonable price for the remainder of the property without guidance. The first applicant's property, without the 7, 7% stake needs to be properly assessed and a valuation conducted .The initial valuations are no longer applicable to the trimmed down property that belongs to the first applicant. Both the market value and forced sale value of the property have changed. There is a need for new valuations comprising no more than the property belonging to the first applicant to be carried out.

I do not agree with the respondents that the remedy of interpleader proceedings is available to the objector whose property has already been sold. The purpose of interpleader proceedings is to stop an imminent sale. These proceedings are required to be brought immediately after attachment and before the sale. The procedure open to an applicant whose property has been sold at an auction who wishes to challenge the sale is provided for in r 359. A person in the position of the second applicant has no remedy in interpleader proceedings at this stage of the sale.

Having found that the sale ought not to have proceeded with the second applicant's stake in the property, it has been rendered unnecessary for me to progress and resolve whether the sale

was improperly conducted in other respects raised by the applicant. I have in the exercise of my discretion decided to set aside this sale to pave way for a proper enquiry regarding the value of the remainder of the property.

In the result it is ordered as follows,

1. The sale in execution conducted by the Sheriff with respect to Stand Number 157 Meyrick Park Township, Mabelreign is hereby set aside.
2. The respondents are to pay the first applicant's costs.

Mupanga Bhatasara, applicant's legal practitioners
Gwati Law Chambers, 2nd respondent's legal practitioners
Mtetwa Nyambirai, 3rd respondent's legal practitioners