TINASHE ABLE CHIMANIKIRE
and
ARMINCO INVESTMENTS (PVT) LTD
versus
CENTRAL AFRICA BUILDING SOCIETY
and
TAWANDA JAKACHIRA
and
THE SHERIFF OF HIGH COURT

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 3 October 2018 & 10 October 2018

Opposed Application

Applicant in person
H. Mutasa, for the 1st respondent

MATHONSI J: That this is an application made by two judgment debtors whose immovable property has been sold by the Sheriff in execution of a judgment of this court in terms of r 359 (8) of this court's rules, is beyond any disputation because the application itself says so firstly in the Form 29 and secondly in para 6 of the first applicant's founding affidavit dealing with the nature of the application.

It states:

> "6. This is an application for an order setting aside the decision of the Sheriff in terms of Rule 359 (8) of the High Court Rules, 1971. The decision complained of was given on the 12th of March 2018. The basis of the application is outlined hereunder."

Yet it is that prouncement by the applicants which ironically brings the entire application to its knees. This is because the relief of bringing an application in terms of r 359 (8) is not available to any judgment debtor. It is one available to a judgment debtor who has objected to the sale of an immovable property by the Sheriff in terms of r 359 (1) and having so objected, the Sheriff has gone ahead to confirm the sale in terms of r 359 (7). Subrule (8) of r 359 then gives any person aggrieved with the Sheriff's decision made in terms of r 359 (7)

the window of opportunity within one month after being notified of the decision, to apply to this court by court application to have the decision set aside.

In order to appreciate the importance of the above assessment one needs to trace backwards to r 359 (1). It states:

> "359 Confirmation or setting aside of 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."

It has been stated by this court that like any other decision or proceedings, the decision of the Sheriff to confirm a sale of an immovable property can be taken on review before this court. See *Chiwadza* v *Matanda & Ors* 2004 (2) ZLR 203 (H) at 206. A judgment debtor who has not made a request in terms of r 359 (1) to the Sheriff to set aside the sale cannot approach this court in terms of r 359 (8) seeking the relief of setting aside the sale. This is because that remedy is only available to a judgment debtor whose request in terms of r 359 (1) for the setting aside of the sale has been rejected by the Sheriff who has then gone ahead to confirm the sale in terms of r 359 (7). Any other aggrieved party is at liberty to approach this court seeking a review of the decision or proceedings by ordinary review application in terms of Order 33 of this court's rules.

In other words, this court does review the decision of the Sheriff upon an application made in terms of r 359 (8) on the strict grounds set out in r 359 (1). It is the decision or the proceedings before the Sheriff leading to the decision to confirm made in terms of r 359 (7) which is the subject of scrutiny by the court in a r 359 (8) application and nothing else. DUBE J had a point in *Nyadindu & Anor* v *Barclays Bank of Zimbabwe & Ors* 2016 (1) ZLR 348 (H) at 353 F-H when she remarked:

> "The procedure envisaged by rule 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 359 (8) limits the grounds upon which this application may be brought to those raised in terms of r 359 (1) as objections. The High Court sitting as 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 challenged the decision to accept a bid price with the Sheriff cannot raised the objection in an application to set aside the Sheriff's decision to confirm a sale."

It is settled that the grounds not raised before the Sheriff, which he obviously did not consider for that reason in confirming the sale, cannot be raised for the first time in an

application to this court made in terms of r 359 (8). When this court sits to consider such an application it is merely interrogating the decision of the Sheriff to confirm the sale upon an application or request made by an interested person in terms of r 359 (1). Such an interested person is being given a second bite at the cherry, the same way a party does in a review or appeal, except that such a party is restricted to the 4 corners of the available record and no more.

That is exactly where the applicants' problems in the present matter begin. It is because the confirmation made by the Sheriff was made by consent after the parties signed a deed of settlement which they submitted to the Sheriff. He was therefore deprived the opportunity of hearing the objection and arriving at his own independent decision on the merits or demerits of the objection. What the applicants seek to do in the present application is to renege from the deed of settlement and to have this court substitute its own decision in a matter where the parties bound themselves to a settlement. The question for determination is therefore whether an interested person who has bound himself to a settlement endorsed by the Sheriff in terms thereof leading to a confirmation of the sale by consent, can approach this court in terms of r 359 (8) seeking to set aside the sale so confirmed. Before resolving that issue let me set out the facts for completeness.

In case number HC9692/13 the first respondent sued the 2 applicants jointly with 3 others and obtained judgment for payment of the sum of US$324 815,49 together with interest at the rate of 20% per annum from 24 October 2013 and costs of suit on 20 January 2014. The first respondent moved for execution of the judgment in question culminating in the sale of the immovable property held by the second applicant by Deed of Transfer number 4905/2002, being stand 130 Marandellas Township in the District of Marandellas in Marondera. Following the sale of the property by the Sheriff to the highest bidder, the second respondent, for the sum of $230 000-00, the applicants objected to the sale in terms of r 359 (1) on the ground that it was sold for an unreasonably low price.

The sheriff set down the hearing of the objection for 7 November 2017. The hearing did not materialize following a settlement reached by the parties who then submitted a consent to the Sheriff. The outcome is captured in the Sheriff's letter to the first respondent's legal practitioners dated 10 November 2017, to wit:

> "RE: CABS v ZIMSLATE QUARTZITE PRIVATE LIMITED AND 4 OTHERS: SALE OF STAND 130 MARANDELLAS TOWNSHIP ALSO KNOWN AS 20/19 HARARE MUTARE ROAD 5TH STREET MARONDERA MEASURING 3.1474 HECTARES

> Reference is made to the above matter. The objection and confirmation of the above matter was heard on the 7th November 2017 in the Sheriff's office and both the judgment debtor and judgment creditor filed an order by consent requesting the Sheriff to suspend the sale until the 28th of February 2018 to allow the judgment debtor to get an offer exceeding US$230 000. It was also agreed that should the offer exceeding US$230 000 fail to materialize, the Sheriff will confirm the auction bid of $230 000.00"

As it turns out the applicants failed to secure an offer for the property more than the bid price right up to 28 February 2018. Acting in terms of the agreement of the parties the Sheriff confirmed the sale. It is that confirmation by consent which the applicants would like to have set aside in terms of r 359 (8). Their case is that they obtained through estate agents appointed by them 2 offers for the purchase of the property. The first offer is by Advin Zurich Mine of Kadoma who offered to purchase the property for $470 000. It was not a cash offer. They proposed to apply for a loan from an unnamed bank to finance the purchase. Clearly this was a pie in the sky. Everyone knows that there are processes to be followed when applying for a loan from a bank involving the making of an application, assessment by the bank of that application, valuation of the property to be purchased, the qualification of the applicant to a loan of the proposed amount and eventually the approval of the loan. It has not been suggested that any of that occurred or that the process even commenced.

The second offer was from Restate Investments (Pvt) Ltd of Alexandra Park in Harare. It is difficult to ignore the funny names of the 2 prospective purchasers. The latter offer was for $300 000 to be paid in instalments of $100 000 upon signing the agreement of sale and thereafter monthly instalments of $40 000. Alternatively, they offered to also apply for mortgage finance. Again this offer has inherent difficulties. Apart from it not being a cash offer, even the source of the funds was left unclear and the credit worthiness of this company was left unknown. Can it be said therefore that these were better offers than the price achieved at the auction? I think not.

That however is not the only problem afflicting these offers. The most important one is that they were not brought to the Sheriff by 28 February 2018 as provided for in the agreement of the parties, as a result of which the Sheriff went ahead and confirmed the sale. As I have said, the confirmation merely gave effect to the settlement. On what basis therefore can this court set aside what was arrived at by agreement of the parties? Put in another tray, is there a legal foundation for impugning the decision taken by the Sheriff to give effect to the wishes of the parties? I do not think so. The Sheriff acted lawfully as the sanctity of contract is the cornerstone of our law. It was not for him in those circumstances to substitute his own

decision for that of the parties. On the other hand the applicants are bound by what they signed for and are not at liberty to renege or to ask the Sheriff or this court to protect them from the imperatives of the deed of settlement they entered into.

This court cannot overturn the decision of the Sheriff for yet another reason. It is that the grounds for setting aside the decision to confirm the sale upon an application made in terms of r 358 (8) are limited to those set out in r 359 (1), namely that the Sheriff's decision is wrong because the sale was improperly conducted, the property was sold for an unreasonably low price or any other good ground. As already stated, it is the decision of the Sheriff only which the court scrutinizes before deciding to set aside the sale. In this matter the Sheriff did not determine the objection at all but merely acted in terms of the consent of the parties. In my view there is no basis for setting aside the confirmation of the sale made by agreement because it was not the decision of the Sheriff on the merits to confirm the sale.

I am of the considered view that a r 359 (8) application is not available to a judgment debtor who has consented to the confirmation of the sale, albeit on certain terms and conditions. A party wishing to overturn a confirmation of the sale made by consent cannot do so in terms of r 359 (8) whose grounds for setting aside confirmation are restricted to a decision of the Sheriff on the grounds set out in r 359 (1). It occurs to me that if for some other reason one of the parties to a confirmation by consent desires to rescind it, they would have to do so by other means and not by r 359 (8). I do not think the application can even be brought under the "any other good ground" in subr (1) of r 359.

Even if one were to cast aside the binding nature of the consent of the parties to confirmation and the fact that the grounds relied upon by the applicants do not fall under a r 359 (8) application, the application will still not succeed because the applicants have not shown that the property was sold for an unreasonably low price. As stated in *Morfopoulous* v *Zimbabwe Banking Corporation Ltd & Ors* 1996 (1) ZLR626 (H) at 633 C-E, the price achieved at an auction is itself taken as a reliable indication of the value of the property:

> "For these reasons there is recognised an onus upon the challenger to prove that the price so achieved is unreasonably low. A litigant wishing to discharge this burden must be fully prepared with properly supported valuations of the property under consideration. These valuations must reflect the upper and lower limits of the suggested market price, so that the court might make a proper determination whether the price achieved is unreasonable, that is to say that it is substantially lower than would reasonably be anticipated, given the expected range of prices."

See also *Zvirawa* v *Makoni & Anor* 1988 (2) ZLR 15 (S) at 18 D-E.

In my view the applicants cannot discharge the onus of showing the unreasonableness of the price by attaching speculative, if not fanciful non cash offers by strange companies which are not even supported by considerations of credit worthiness or even firm confirmation of the funds to be harnessed. I conclude therefore that the only reliable price for the property is that achieved at the auction. It must be understood that the reasonableness of the price is not predicated on the wishes of a heavily indebted individual to secure a price that would leave him or her not owing anything at all, as Mr Chimanikire seemed to suggest. It is not the wishful thinking of the judgment debtor but the practical evidence on the ground that is relevant. This application cannot succeed.

In the result, the application is hereby dismissed with costs.

Gill, Godlonton & Gerrans, 1st respondent's legal practitioners