

MUNYUKI ROBERT ARMITAGE CHIKWAVIRA  
versus  
THE SHERIFF OF ZIMBABWE  
and  
CENTRAL AFRICA BUILDING SOCIETY

HIGH OF ZIMBABWE  
DUBE J  
HARARE, 30 May 2013 and 16 October 2013

### **Opposed Application**

*T. Magwaliba* for the applicant  
*Miss D. Ndawana*, for the respondent

DUBE J: This is an application for the setting aside of the decision of the Sheriff of Zimbabwe, the Sheriff, to confirm a sale in execution in respect of the Remainder of Lot 330 Block B Hatfield of Hatfield Estate otherwise known as number 6 Wenlock Road, Hatfield, Harare .The application is brought in terms of Order 40 r 359(1) of the High Court Rules, 1979.

The applicant is the owner of the property in issue. The first respondent is the Sheriff of the High Court of Zimbabwe. The second respondent is Central Africa Building Society. The facts of this matter are summarised in the applicant's founding affidavit as follows: Sometime in August 2009 the applicant borrowed \$45 000-00 from the second respondent, against security of a mortgage bond over the applicant's residential property registered in favour of the respondent. The applicant failed to repay the loan. The second respondent sued the applicant and obtained a judgment from this court and a writ of execution was issued. The amount of the judgment debt was \$49 858-57. The applicant's residential property was attached and the house subsequently sold by public auction for \$81 000-00.The second respondent was declared the purchaser. The applicant filed objections which were dismissed by the Sheriff. On 3 May 2011 the Sheriff confirmed the second respondent as the highest bidder at \$81 000-00. The applicant seeks an order settling aside the sale and an order that the Sheriff be directed to conduct another sale in execution.

The applicant objects to the sale on the basis that the sale was improperly conducted and further that the property was sold for an unreasonably low price. The applicant takes issue with the fact that the property was advertised from 22 February 2011 to 2 March 2011. He contends that this period was too close to the date of the sale resulting in many people who would have been prospective purchasers failing to come to inspect the property and thus did not take part in the auction. The only person that inspected the property and subsequently bought it is the second respondent. It was the only bidder.

The applicant further asserts that the property was inadequately and misleadingly described in the advertisement. The applicant submitted that the advertisement stated that the property was held under Deed of Transfer number 1793 when that is the mortgage bond number. The main dwelling house is described as having 3 bedrooms whereas it has 5 bedrooms. That the following description of the house was omitted,

1. all rooms are carpeted
2. there are floor tiles in all the bathrooms, passages, kitchen and pantry.
3. there are two boreholes and two water tanks in the property and not one of each as mentioned in the advertisements
4. there is a big fowl run with a capacity to hold 1000 chickens
5. there is a second house on the property.

The applicant stated that there is a second house on the property with five bedrooms and not three. There is no cottage as advertised. The applicant contends that the advertisement was inadequate as it omitted to refer to matters which had a direct bearing on the value of the property and that this potentially affected the interest which prospective purchasers could have developed.

The applicant further avers that the price at which the property was sold was unreasonable and substantially lower than the market price. The applicant engaged his own valuers who placed the market value of the property at \$140 000-00 and \$105 00-00 as the forced sale value. The applicant contends that the purchase price of \$81000.00 is unreasonably low in relation to the forced sale value as assessed by the independent valuers.

The second respondent is opposed to the application and asserts that all the formalities were complied with by the auctioneer. The second respondent's submissions may be summarised as follows. The sale was advertised three times. Rule 352 has no time specifications as to when such advert must be made. The advertisements described the

property and its location in detail .They contained sufficient information required to attract potential purchasers. The auctioneer relied on a report from the valuations pegging the market value of the house at \$95 000-00 and the forced sale value at \$67 00-00. The valuation by the applicant's valuers is inflated. The house was not sold for an unreasonably low price. The debtor was given an opportunity to bring a buyer offering a higher purchase price and failed to do so and that the failure is due to the fact that there are no buyers in the market willing to pay the price suggested by the judgment debtor.

The grounds upon which applicant is entitled to have the sale set aside are listed in Order 40 r359 (1).

Rule 359(1) 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 .”

The courts will not lightly set aside a judicial sale which has been confirmed as this may discourage people from participating in judicial sales. *In Mapedzamombe v Commercial Bank of Zimbabwe & Anor 1996 (1) ZLR 257 (S) at 260C-E* GUBBAY CJ stated as follows,

"Before a sale is confirmed in terms of r 360, it is a conditional sale and any interested party 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 1973 (2) RLR 280 (G) 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 (Pvt) Ltd S-220-91* (not reported) at pp 6-7."

The onus rests on the applicant to show that the sale was improperly conducted or that the property was sold at an unreasonably low price or any other ground.

The requirement to advertise the sale is provided for in r 352 .The rule reads as follows.

**‘352. Day and place for sale: appointment: advertisement: notice to holders of mortgage**

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 to be necessary. The sheriff shall also send to each holder of a mortgage over the property, by registered letter addressed to his last known address, or to his attorney, notice of the date and venue of the sale.”

The rule places a duty on the Sheriff to advertise the property at least once in the Gazette and once in a newspaper circulating in the district in which the property is situated. The sale was advertised on three separate occasions being, the 23<sup>rd</sup>, 27<sup>th</sup>, and 2<sup>nd</sup> of February 2011, over a period of about 10 days. The sale was conducted on the 3<sup>rd</sup> of March. The rule does not specify when the advertisements must be made in relation to the sale date. Rule 352 places a duty on the Sheriff to advertise only once. That was done.

Whether the advertisements were adequate and proper and sufficiently informed the public of the property being sold is the next question. What is implied from r 352 is that the sale must be properly advertised. In *Chizikani and Anor v Central African Building Society* 1998(1) ZLR 371 the court allowed an application to set aside a sale on the basis that the advertisements were inadequate. Two advertisements were made in this sale. The first advertisement listed only the address of the property to be auctioned and the date of auction. A subsequent advertisement described the type of rooms available and gave the impression that there was one cottage instead of two. The court dealt with the question of the adequacy of advertisements and held that:

“An advertisement which inadequately describes the property is no advertisement at all. It will fail to comply with the Sheriff’s mandate obligation. The purpose of properly describing the property is not merely to identify it. It is also to inform the public of what which is being sold, with the aim of attracting the interest of potential purchasers to the auction ... for it is in the interests of the judgment debtor, and probably in the interests of creditors, that the property to be sold should obtain as high a price as possible”.

The court in that case remarked that what must be inserted in the advertisements are the main characteristics of the property. The court found that the advertisement of the sale was inadequate as it did not give sufficient details of the nature and characteristics of the property enabling potential purchasers to get a clear appreciation of the property. GUBBY CJ emphasized the need for an advert in its description of the property, to state the address, size of the stand, type of improvements or buildings if any and any special privilege related to the property.

In this case a number of features of the property were omitted. The anomaly regarding the title deed is minor and not material and could not have affected the outcome of the sale. The main house is described as having three bedrooms when it has 5 bedrooms. The

advertisement gives out that there is a cottage when there in actual fact is a second house with 5 bedrooms .There are two boreholes on the property. The advertisement only mentioned one borehole and did not indicate that these were fitted with tanks. The size and improvements on a property have a bearing on the value of the property. In this day of epileptic water supplies, it is important to inform interested parties of the existence of supplementary sources and substitute water supplies in the form of boreholes. The existence of two boreholes on a property is likely to generate more interest in the property than where there is one borehole. The chicken run with a capacity to carry one thousand chickens was not highlighted.

There is no doubt in my mind that the advertisement was inadequate. I do not think that the objective of informing the public of what was being sold with a view to attracting the interest of potential purchasers to the auction was achieved. The purpose of advertising is to ensure that all interested parties get to know of the sale. They must get sufficient notice of the sale. An advertisement in a sale in execution should give a full and complete description of the property concerned. I am not satisfied that this is the case here.

In Chizikani the court following the case of *South African Appellate Division in Messenger of the Magistrate's Court, Durban v Pillay 1952 (3) SA 678 (A.)*, found that the provisions of r 352 are peremptory and entitle the applicants to have the sale set aside .The term “shall cause the sale to be advertised” implies that the advertisement must be adequate and proper.

I am aware of the sentiments expressed in *Lalla Bhura 1973(2) RLR 280*, where the court remarked that,

“One would have expected here that anyone interested in buying the property would not have been misled by the statement in the brochure, but would have made his own enquiries.”

This approach places a duty on potential buyer to go to the property and view the property. One has to consider that the provision is mandatory, a failure by the sheriff to describe the property adequately or properly invalidates the sale. The application is allowed.

It will not be necessary for the court to decide whether the price at which the property was sold is reasonable.

In the result it is ordered as follows,

1. That the decision of the Sheriff for Zimbabwe handed down on 3<sup>rd</sup> May, 2011 under Case No. SS17/2011 to confirm the sale in execution held on 4<sup>th</sup> March,

2011 in respect of applicant's immovable residential property be and it is hereby set aside.

2. That the Sheriff for Zimbabwe is hereby ordered and directed to conduct another sale in execution in terms of the rules of this court in relation to the applicant's immovable property which is presently under judicial attachment.
3. That second respondent is ordered to pay the costs of this application.

*Musendekwa-Mtisi*, applicant's legal practitioners  
*Gill Godlonton & Gerrans*, 2nd respondent's legal practitioners