

ABIATHER MUJEYI
and
AFRASIA BANK ZIMBABWE LIMITED
and
COLBRO TRANSPORT (PVT) LTD
and
THE SHERIFF OF ZIMBABWE
and
REALGATE PROPERTIES

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 4 June 2019 and 4 March 2020

Opposed matter

J. Dondo, for the applicant
D. Tivadar, for the 2nd respondent

MUNANGATI-MANONGWA J: The applicant herein was the owner of a property known as Stand 73 Chicago Township of Lot 12 of Chicago Kwekwe (hereinafter referred to as “the property”) which was sold in execution in pursuance of a court order granted in favour of 1st respondent Afrasia Bank Zimbabwe Limited in case No HC1765/14. In that case the 1st respondent got an order for the payment of US\$396 782-00 interest and costs against the Applicant, one Robert Brian van Rensburg and Marlberaign Drive In Cinema jointly and severally the one paying the other to be absolved. The applicant’s property was sold to the 2nd respondent by the 4th respondent an estate agent on instructions of 3rd respondent the Sheriff of Zimbabwe. The applicant is challenging the said sale and seeks that the sale be set aside and costs. Only the 2nd respondent, the purchaser is opposing this application.

Prior to instituting his application the applicant had approached this court seeking the setting aside of the sale relying on the provisions of Order 40 r359 of the High Court Rules 1971. The second respondent had opposed the matter and raised a point *in limine*. MAKONI J (as she then was) upheld the raised point and dismissed the application on the basis that the application was not properly before her. The applicant appealed to the Supreme Court and that court upheld MAKONI J’s judgment. *In casu* the 2nd respondent raised a point that the

matter is *res judicata*. I dismissed the point on the basis that the application had not been determined on merits, the court simply held that the application was not properly before the court and further, the grounds or cause of action is now different. The application now relies on common law grounds to challenge the sale.

The brief history of the matter is as follows: The 4th respondent upon being instructed to sell the property by 3rd respondent, valued the property and indicated the market price as US\$65000-00 and the forced sale value at US\$39000-00. An attempt to sell the property by public auction on 4 November 2016 yielded no results as there were no bids received. Fourth respondent was then authorised to sell the property by private treaty and the property was then duly advertised for sale on 24 November 2016. The 2nd respondent put in a bid for US\$39000-00, the Sheriff accepted the offer. On the 7th February 2017 the 3rd respondent wrote to Sawyer & Mkushi the judgment creditor's legal practitioners *declaring and confirming* the second respondent to be the purchaser. The letter stated that the purchase price had to be paid into the Sheriff's account within 7 days of the date of receipt of the letter failure of which the sale was to be deemed cancelled. The letter was copied to the estate agent the fourth respondent, the purchaser 2nd respondent and one of the judgment debtors Robert Brian van Rensburg, and the applicant was not copied. On the 13th March 2017 the third respondent wrote to second respondent cancelling the sale and indicated that the property is to be put back on public auction with instructions from the instructing attorneys. Once again this letter was not copied to the applicant but was copied to the aforementioned previous recipients. On the 29 March 2017 the 2nd respondent paid the purchase price.

The applicant has approached court on grounds he says are common law based. He avers that the sale was done behind his back and he only became aware that his property had been sold by private treaty in March 2017, thus he was never given an opportunity to object to the sale. He could thus not invoke his right given under Rule 359 of the High Court Rules 1971. He further submitted that apart from an offer made through an email by a party known and sharing the same address as the 4th respondent the estate agent, for an amount of \$39000-00 exactly what the estate agent had indicated as the forced sale value no other offers have been produced so as to validate the claim that the offer was reasonable. Collusion could also not be ruled out. That the third respondent being the Sheriff had written to the purchaser cancelling the sale on the 13th March 2017 and not opposed the setting aside of the sale in his report of the 27th March 2017, to then allege in a letter of 22nd February 2019 that the sale was not cancelled shows the impropriety on the Sheriff's part. It is the applicant's case that a

purchase price of US\$39000-00 is grossly low given that when the property was rendered as security, Afrasia Bank Zimbabwe the 1st respondent, valued the property at US\$300 000-00 in April 2016. The applicant had also found a buyer who had offered US\$350 000-00. The applicant placed before the court a valuation report by Fitz & Des Real Estate placing the market value at US\$101 500-00 and the forced market value at US\$60 000-00.

The respondent sets his response in 5 paragraphs which averages 3 sentences per paragraph. In essence, the 1st respondent refers to his opposing affidavit in HC2474/17 which application was dismissed. The 1st respondent further refers to the hearing of the supreme court which of course is long since passed and the Supreme court as previously referred to upheld MAKONI J (as she then was)'s judgment that dismissed the applicant's previous application as not being properly before the court. Basically the facts of the case are not contested by the 1st respondent as the sale is documented from the time that the 1st respondent was advised that its bid had been accepted. It is when the applicant became aware that the 1st respondent avers that given that the property was being advertised it could not be that the applicant became aware of the sale on the 3rd March 2017. The 2nd respondent contends in the incorporated affidavit that the purchase price of US\$39 000-00 is not grossly and unreasonably low given the current economic conditions in Zimbabwe. The 1st respondent submitted that the grounds pleaded by the applicant do not suffice to have the sale set aside in that there was reference in the initial application of common law grounds hence this was piecemeal approach to litigation. Further that the amount should have been US\$60 000-00 is not sufficient.

It is now established that at common law any person interested in a sale in execution has an elective right to apply to court to have the sale set aside on good cause shown although courts are reluctant to set aside a sale which has been confirmed. The courts are even more reluctant to set aside a sale where transfer of the immovable property has been effected. See *Garati v Mudzingwa & Ors* 2008 (2)ZLR 88 at 94. It is also an entrenched rule that "under common law immovable property sold under judicial decree cannot after transfer has been passed, be impeached in the absence of an allegation of bad faith, or knowledge of the prior irregularities in the sale by execution, or fraud" per GUBBAY CJ in *Mapedzamombe v Commercial Bank of Zimbabwe & Another* 1996(1)ZLR 257 (S) at 260 F-G. Thus once the sale has been confirmed and transfer effected it is near impossible to have that sale reversed save in the limited instances referred to above. However for this to apply it is my view that

the sale must be properly advertised and properly conducted. There must be no irregularities or bad faith characterising the sale.

In casu the applicant has raised the complaint that the sale was carried out behind his back. He alleges that he became aware of the sale on the 3rd March 2017 when the property had been sold by private treaty in November 2016. Applicant does not dispute that the sale had to be carried out, it is the manner that the sale was conducted that he impeaches. The applicant avers that he never received any communication from any of the respondents pertaining to the sale by private treaty. There is an averment that the sale was advertised in November 2016 but the advertisement itself has not been produced or placed before the court. That aside only one offer which was made by way of an email on behalf of the 2nd respondent is on record. The 2nd respondent's offer came through an estate agent to the auctioneer and the offer of US\$39000-00 was made. The applicant made an averment that the fact that the 2nd respondent the purchaser and the 4th respondent the auctioneer share the same address being Shop 3 Tshaka Centre Fife Street & 11th Avenue, Bulawayo which address the 3rd respondent used to communicate with them. This has not been denied by the concerned respondents. The applicant submitted that this, coupled by the fact that the 2nd respondent offered the exact amount that the 4th respondent had indicated as the forced sale value is curious. The court finds it difficult to assume that the offer was coincidental in the circumstances especially given the casual manner in which the offer was made which clearly indicates familiarity. See Annexure "D" the email on p20.

It is common cause that there is no evidence from the Sheriff as regards any other offers he received since the Sheriff did not oppose this application. Suffice to state that where the conduct of the Sheriff is being challenged, it is imperative that that office shed light on the occurrences pertaining to the disposal of the property. That certainly assists the court in determining whether or not there are any irregularities that might vitiate the sale

It is on record that on 29 November 2016 the Sheriff wrote to the 1st respondent's legal practitioners, the creditors legal representative advising them that on that very date he had declared the 2nd respondent the highest bidder to be the purchaser of the property. In the same vein, the letter called for objections to be made in writing to him within 15 days from the date the highest bidder was declared. Of note is the fact that the letter was only copied to 2nd respondent the purchaser, 4th respondent the auctioneer and one of the debtors Mr Brian van Rensburg. Hastening to add that the said Mr van Rensburg could not be served as his

address could not be located as per the endorsement on the letter by the 3rd respondent. The applicant was not copied this crucial letter despite the fact that he was an interested party as the asset being disposed belonged to him. The said letter appears as Annexure “C” on p 20 of the consolidated record. Given this position, this renders credence to the applicant’s explanation as to why he was unable to raise objections as per the rules as he was unaware of the sale. The second respondent seeks to say that the fact that the 1st respondent did not object to the sale shows that the judgment creditor accepted the purchase price as reasonable. The court is not convinced that this is the position because even as of this date the 1st respondent did not oppose the application it might as well be a case of an indifferent judgment creditor. As no objections were received the Sheriff confirmed the sale.

On the 7th February 2017 the Sheriff wrote to the 1st respondent’s legal practitioners Sawyer & Mkushi advising that he had confirmed the 2nd responded as the highest bidder and hence purchaser of the property at the sum of US\$39000-00. The letter further reads:

“The full purchase price MUST be deposited into the Sherriff’s CBZ Account number 02123886430057 within seven days from the date of this letter of confirmation. Failure to do so the sale shall be deemed cancelled.” See Annexure “A” on p13-14

Again this correspondence was not copied to the applicant but to the aforementioned respondents who were initially copied the letter of 29 November 2016. Crucial are the conditions of sale imposed by the 3rd respondent. The purchase price had to be paid within a specified period of 7 days. This did not happen as no payment was made by that date. On the 13th March 2017 the third respondent wrote directly to the 2nd respondent referring to its letter of the 7th February 2017. The letter went on to state that:

“As earlier advised by previous correspondence, we do hereby cancel the sale in terms of Rule 357 of the High Court Rules 1971.

The property is to be put back on public auction with instructions from the instructing attorneys.” See Annexure “G” p33.

The letter was copied to the 1st respondent’s legal practitioners, the 4th respondent, the purchaser itself and Mr Van Rensburg, once again the applicant was left out. The effect of this letter was to cancel the sale agreement. It is thus inconceivable how the 3rd respondent then accepted the purchase price from the 2nd respondent on the 29th March 2017 for the purchase of the property when the sale agreement itself has been cancelled on the 13th March 2017. The cancellation was unequivocal and the Sheriff rightly took the decision to put the property back on public auction. It remains a mystery why the property was then not placed back on public auction. It is the subsequent revival of the sale by way of accepting payment

which constitutes a great irregularity. From the moment the Sheriff indicated that the sale was cancelled he became *functus officio*. There was no sale in existence by the time the 2nd respondent made a payment on the 29th March 2017, hence there was no reason for payment.

The court is aware that after the initial appeal had been argued at the Supreme Court the 2nd respondent then wrote a letter Annexure J to the Registrar of the Supreme Court. The contents thereof read:

“The sale of the above property was not cancelled as per Mr Nzvere’s letter dated 13 March 2017, since payment of the full purchase price by Colbro Transport was done on 23 March 2017 and received by the Sheriff on 29 March 2017.”

This letter does not salvage the situation. The contract was already cancelled and properly so. The fact that payment was made after the cancellation is of no legal significance there was nothing to buy. Of note is the fact that this is just a letter and not an affidavit hence its evidential value is minimal however it shows the double standards that the Sheriff exercises. Two points emerge out of this conduct being: ignorance of the law of contract and or lack of integrity in the office of the sheriff. Legally there is no sale agreement of the property as the transaction that followed is null and void. It is fortuitous that no transfer ensued from the purported sale. Most pertinent is the fact that the 3rd respondent in his report filed of record on the 27th March 2020 does not oppose the setting aside of the sale, this could only be because of its appreciation of the inappropriateness of its conduct.

The court notes that the 1st respondent being the judgment creditor has not opposed the application. The second respondent has not denied any of the improprieties by the Sheriff or that it shares the same address with the auctioneer. The condemned acts of the Sheriff were specifically mentioned and the 2nd respondent did not and could not deny them particularly failure to advise the applicant about the sale and subsequent proceedings as shown by failure to copy applicant the mentioned letters. The failure of the Sheriff to advise the applicant an interested party about the sale of the property, failure to advise him when he called for objections is in itself conduct which is deplorable and prejudicial to the applicant. To then cancel the agreement and purport to revive it by accepting payment puts the death knell to the whole matter. The disposal of the property cannot stand as the sale was cancelled. The above taken in conjunction constitute in the court’s view good cause to have the sale set aside.

The applicant has urged the court to consider that there was collusion between the auctioneer fourth respondent and 2nd respondent the purchaser. It has not been denied that the 2nd and 4th respondent share the same address. The manner the offer was made clearly shows

familiarity and this coupled by the fact that the amount offered by the 2nd respondent is exactly the amount that the 4th respondent had indicated to be the forced sale value creates great suspicion. However that alone cannot be reason for vitiating a sale. However when this is taken in conjunction with the fact that the Sheriff made sure that all the pertinent information was not being copied to the applicant, bad faith and connivance cannot be ruled out. The applicant can be said to have established this on a balance of probabilities.

Advocate *Tivadar* submitted on behalf of the 2nd respondent that what the applicant was alleging is insufficient to satisfy the burden that lies on applicant which is very high. He highlighted that the valuation which the applicant relies on is not sworn hence not much weight can be placed on it. Equally, a theoretical valuation should not be preferred over the actual offers received. He submitted that there should be a demonstration by way of evidence of any persons willing to pay the expected amounts which has not been done by the applicant. In that regard he referred to *Austerlands (Pvt) Ltd v Trade and Investments Bank Limited and Others* SC92/05. For that reason the applicant failed to establish that the property was sold for an unreasonably low price. Whilst the valuation placed before the court is not a sworn one, the court cannot turn a blind eye to the fact that when the property was rendered as security it was valued at US\$300 000-00 and sold in 2016 at US\$39000-00. Most pertinent the record does not refer to any offers which aspect the Sheriff should have clarified on given that the offer made by the 2nd respondent is the one whose casual nature has been questioned. At the same time the court cannot ignore the fact that the applicant's own valuation reflects the forced sale value as US\$60 000-00. This information is such that the court cannot readily rely on it in determining the issue of the price being unreasonably low.

It has been argued on behalf of the 2nd respondent that it must be considered that it is an innocent purchaser hence for public policy reasons the sale must not be set aside. The sale is not clean, it is tainted by irregularities which points to bad faith or bias, that being so the purchaser cannot escape the consequences. Mr *Tivadar* submitted that the applicant must have guarded his own interests. It must be noted that the Sheriff was to conduct a sale by private treaty. It is upon declaring a purchaser the highest bidder that objections could kick in, in terms of Rule 359. Deliberately omitting to inform the applicant of the sale and calling upon him to lodge objections if any, points to bad faith. The applicant cannot be said to have failed to guard his interests when no correspondence or information on developments was not being supplied. The court thus dismisses that argument.

The court is alive to the fact that courts should not readily set aside sales in execution under Order 40 for it affects the efficacy of the sales and erodes public confidence in sales in execution as expounded in *Lalla v Bhura* 1973(2) ZLR 280 (CD). Public policy considerations cannot be ignored. However the sales in execution themselves must be above board, the sale must be properly conducted. This is not the case herein. The outlined facts no doubt put the Sherriff's office into disrepute. The debtor's rights have to be considered hence the rules provide an opportunity for any interested party to be given an opportunity to challenge the sale within a number of given days. Equally, the Sheriff's conduct must be transparent in the interests of justice and for the integrity of the office. The court found that the conduct of the 3rd respondent fell far short of what is expected of such an office. The mandate given to the Sheriff's office to dispose off assets to satisfy judgments demands utmost transparency, fairness and adherence to rules for it to maintain its integrity. If these are found lacking the courts will always be inundated by complaints and applications due to suspect conduct of the Sheriff's officials. That the 2nd respondent later wrote a letter to the Supreme Court that the sale was not cancelled is an aside issue. That was not the issue before that court, the court just enquired in passing as a matter of interest. Nothing much turns on that.

Mr *Tivadar* argued that the applicant was approbating and reprobating and had brought piecemeal applications before the court hence was abusing the court. The court finds that this is not the matter. In the initial application the applicant sought to rely on the rule 359 subr 8 of the High Court Rules. The court found that the application was not properly before it as there was no decision made by the Sheriff such as to warrant a review by this court. The applicant cannot be penalised that he returned to court seeking to rely on common law grounds. That avenue being available to him it cannot be said that he sought piecemeal adjudication of applications as the grounds could not be combined in the court's view.

The decision herein is thus anchored not on the prejudice arising from the sale price but the manner in which the sale was conducted. It also being noted that no transfer had taken place which, if it were so the considerations would have been stringent. It is due to the foregoing that this court finds merit in the application. Accordingly it is ordered:

1. The purported sale of Stand 73 Chicago Township of Lot 12 of Chicago, Kwekwe to the second Respondent by fourth Respondent be and is hereby declared null and void.
2. The second respondent shall pay costs of this application.

Dondo and Partners, applicant's legal practitioners
Messrs Webb, Low & Barry, 2nd respondent's legal practitioners