

FERNABY INVESTMENTS (PVT) LTD
and
QUECOM ENGINEERING (PVT) LTD
and
DENNIS WILSON NGORIMA
versus
STANDARD CHARTERED BANK LTD
and
HOMELAND REAL ESTATE
and
DOVES FUNERAL ASSURANCE (PVT) LTD
and
THE SHERIFF

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 24 July 2019, 7 September 2020 & 7 October 2020

Opposed Court Application in terms of Rule 339 (8) of High Court Rules, 1971

P Chakanyuka, for the applicants
G Ndlovu, for the 1st respondent
L.T Musekiwa, for the 3rd respondent

CHITAPI J: The parties in this application are as shown in the case heading. This application concerns a dispute on the attachment and sale in execution of a property situate in Harare called remainder of Lot 8 of Brooke Estate measuring 7258 square metres and held under deed of transfer No. 4935/2004 made in favour of the first applicant, Fernaby Investments (Pvt) Ltd. The brief background to the dispute is that the second applicant Quecom Engineering (Pvt) Ltd entered into a loan agreement with the first respondent, Standard Chartered Bank Ltd, the latter extending a revolving credit facility to the former with a limit of \$800 000.00. The first applicant, third applicant and third applicant's wife bound themselves as surety and co-principal debtors in favour of the first respondent for the due performance by the second applicant of its obligations in terms of the loan facility aforesaid. It was accepted that the second applicant accessed the loan facility by way of disbursements to it of

\$800 000.00. The second applicant incurred interest of \$63 431.80 and bank charges of \$24 656.33. the second applicant failed to meet its obligations as to repayment in that after making certain repayments totalling 4644 932.09, the sum of \$241 056 remained owing. The first respondent sued the applicants under case No. HC 5759/14 for the balance owing. The case was determined in favour of the first respondent for payment of the sum of \$292 272.12 and ancillary relief to be paid by the applicants herein jointly and severally one paying the other being absolved. Consequent on the judgment, the first respondent caused the issue of a writ of execution against the applicants' property held as surety as it had been declared to be executable. The attachment led to the immovable property being listed for sale by the fourth respondent using the agency of the second respondent. After the sale a series of objections to confirmation of the sale were filed and dealt with by the fourth respondent under his file reference SS 63/15.

This application is brought in terms of r 359 (8) of the High Court Rules. Where such an application has been made, the court's powers in relation thereto are set out in r 359 (9). It is convenient to set out what subrules (8) and (9) provide for

- “8 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 court application to have the decision set aside.
- 9 In an application in terms of sub rule (8), the court may confirm, vary or set aside the Sheriff's decision or make such other order as the court considers appropriate in the circumstances.”

In reference to subrule (7) referred to in sub-rule (8), the former rule provides that where a party who has in interest in a sale has filed a request for the setting aside of a sale in terms of subrule (1) on grounds set out therein and the request is opposed, the Sheriff, in this case, the fourth respondent is required to conduct a hearing at which parties or their legal practitioners shall be present. Following the hearing, the Sheriff shall confirm the sale or cancel the sale and make such order as he considers appropriate in the circumstances of the case.

The view I take in relation to granting the Sheriff wide powers to give an order “he considers appropriate in the circumstances” is that the unlimited powers are open to abuse and a potential for unending litigation. The scope of what the Sheriff must consider as appropriate has no parameters. In *casu*, it shall be seen that the problem has arisen partly because of the open ended powers given to the Sheriff in terms of subrule (7). That said the

application in terms of subrule (8) must be filed within one month of the decision of the Sheriff made in terms of subrule (7).

The third respondent is cited in this application as the purchaser of the property in issue whose purchase is under challenge by the first applicant. The Sheriff dismissed the applicants' objection to the sale hence this application. The applicants seek the following order as set out in the draft order:

It is hereby ordered that:

1. The sale of the 1st applicant's immovable property namely: certain piece of land in the district of Salisbury called remainder of Lot 8 of Brooke Estate measuring 7258 square metres held under Deed of Transfer No. 4935/2004 Harare (sic) on the 6th September, 2018 by public auction be and is hereby set aside.
2. The sale of 1st applicant's immovable property be referred for sale by private treaty. In the event that any of the respondents opposes this matter, such respondent be ordered to pay the applicant's costs of suit on a legal practitioner client scale."

The background to the decision under challenge is set out herein in brief. Following on the judgment in HC 5759/14 which led to the attachment of the property in issue herein by the fourth respondent, there were negotiations, promises and undertakings made between the first respondent and applicant to settle the matter and in particular in regard to having the property sold by private treaty. The property was initially sold by the fourth respondent for USD\$150 000 on 12 January, 2017. This was after attempts at selling the property privately failed and the debt owing was not fully paid some amount still remains owing.

Consequent on the sale for USD\$150 000.00 an objection to confirmation of that sale was filed by the applicants. The purpose of the objection was that the price of USD\$150 000.00 was unreasonably low. The sale was not confirmed by consent. The judgment creditor, first respondent herein also objected to the confirmation of the sale. The fourth respondent in his ruling dated 13 March, 2017 and by consent of the judgment creditor gave the applicants 4 months to 30 June, 2018 to find a buyer who could offer a bid of more than the USD\$150 000.00. The sale was therefore not confirmed. The first respondent then indicated that in the event of the applicants failing to find a better bid, the sale for USD\$150 000.00 to the highest auction bidders would be confirmed.

It is not clear from the papers nor indeed from the first respondent's record SS63/15 which I perused as to what happened following the expiry of the window given to the

applicants to find another buyer with a better offer. Suffice however that the property was put back on auction following a court order granted by ZHOU J on 27 September, 2017 consequent on an application to set aside the same sale which had attracted the offer of USD\$150 000.00 which parties agreed to be unreasonably low. In his order, ZHOU J granted the applicant a period of 6 months to find another purchaser willing to pay an amount above USD\$150 000.00. The learned judge further ordered that failing the sale of the property in terms of his order, the property would be referred to public auction at the next sale conducted by the fourth respondent.

The applicants it would appear failed to find a buyer with a better offer than USD\$150 000.00. The property was then publicly auctioned consequent on the order by ZHOU J. The third respondent was declared the highest bidder at the auction for the sum of USD\$260 000.00 on 6 September, 2018. The applicants pursuant to the provisions of r 359 (1) of the High Court Rules requested the fourth respondent to set aside the sale on the ground that the price realised was unreasonably low. The fourth respondent in a ruling dated 29 November, 2018 dismissed the request and confirmed the sale. It is the dismissal as aforesaid which gave rise to this application.

In the course of preparing judgment, I had cause to invite the parties to address a legal issue on firstly, whether the application before me was in the nature of a review of the fourth respondent's decision. Secondly, I invited the parties to address me on whether or not it was open to the fourth respondent to depart from the provisions of r 359 and allow for an oral hearing without parties filing formal pleadings referred to in the rule. The issue which arose upon a reading of the judgment is that the hearing by the fourth respondent appeared not to have been conducted in accordance with r 359. The point was raised by applicant's counsel at the hearing before the fourth respondent as a point *in limine*. The point *in limine* was dismissed by the fourth respondent who ruled that it was not mandatory for a party who objects to confirmation of the sale to file a notice of opposition. In this respect, Mr *Ndlovu* for the first respondent submitted that he had not dealt with the objection before the fourth respondent in his papers. He however first queried the competency of this court *mero motu* raising the issue of the propriety of the hearing conducted by the fourth respondent. Counsel did not however pursue the point after it was brought to his notice that the issue was a preliminary issue raised by the applicants' counsel at the hearing before the fourth respondent who dismissed the point.

It is important to unpack the provisions of r 359 (1) to 359 (7) which are the rules that set out the grounds for setting aside an auction sale which an interested party should rely upon and the procedure to be followed by the interested party in filing the application, by any objector to the application and by the Sheriff (fourth respondent). I must at the outset state that in terms of Order 1 r 4C of the High Court Rules, only the court or judge may direct, authorize or condone a departure from any provisions of the court rules in the interests of justice. It follows that the fourth respondent as is indeed the case with any other court official who is authorized to perform an act in terms of the rules has to discharge that function in strict compliance with the rule(s) which provide for such power. Only a judge or court and no one else can derogate from the rules in terms of r 4C. A deviation from the rule unless there is provision for that official to use a discretion or depart from the rules renders the act irregular and the proceedings irregularly conducted and decision reached thereon a nullity.

The provisions of r 359 (1) to (7) provide 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.

(2) A request in terms of subrule (1) shall be in writing and lodged with the sheriff within 15 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 15-day period but before the sale is confirmed, if he is satisfied that there is good cause for the request being made late.

(3) A request in terms of subrule (1) shall –

- (a) set out the grounds on which, according to the person making the request, the sale concerned should be set aside; and
- (b) be supported by one or more affidavits setting out any facts relied on by the person making the request, and copies of the request shall be served without delay on all other interested parties.

(4) A person on whom a copy of a request has been served in terms of subrule (3) may, within 10 days after it was served on him, lodge with the sheriff written notice that he opposes the setting aside of the sale concerned.

(5) A notice in terms of subrule (4) shall –

- (a) set out grounds on which the person who gives it opposes the setting aside of the sale concerned; and
- (b) be supported by one or more affidavits setting out any facts relied on by the person who gives it, and copies of the notice shall be served without delay on the person making the request and on such other persons as the sheriff may direct.

(6) Within 10 days after a copy of a notice has been served on him in terms of subrule (5), the person making the request may lodge with the sheriff a written reply and, if he does so, shall without delay serve a copy of his reply, together with any supporting documents, on the person opposing the request and on such other persons as the sheriff may direct.

(7) On receipt of a request in terms of subrule (1) and any opposing or replying papers filed in terms of this rule, the sheriff shall advise the parties when he will hear them and, after giving them or their legal representatives, if any, an opportunity to make their submissions, he shall either –

(a) confirm the sale; or

(b) cancel the sale and make such order as he considers appropriate in the circumstances, and shall without delay notify the parties in writing of his decision.”

It clears from the rules that the requites to set aside a sale is based on unlimited grounds in that apart from relying on the grounds of the sale having been improperly conducted and the sale having attracted an unreasonably low price, the fourth respondent can set aside the sale on “any other good ground”. The rule does not define the phrase “any other ground”. It would be futile to define what amounts to any other good ground. The circumstances of a particular case will determine if grounds alleged in the particular case, can be held to be good-grounds.

In regards to procedure, subrule (2) of r 359 is very clear that the request shall be in writing and lodged with the Sheriff within 15 days from the date that the highest bidder was declared purchaser. The Sheriff has a discretion to extent the 15-day period for good cause. Subrule (3) speaks to the peremptory matters which the request should contain. The request should contain the grounds for seeking the setting aside and should be supported by affidavit (s) deposed to by the person making the request.

Subrule (4) appears to be the problematic one going by the decision which the fourth respondent reached on the procedural issue on the manner of opposing the request for setting aside the sale. The subrule does nothing more than to give the interested person the opportunity when such person decides to oppose the requests to indicate so by lodging a written notice to that effect. If such person is minded to oppose, then the person must follow the provisions of subrule (5). The notice to oppose shall just as is required of the person making a request to set aside the sale indicate grounds of opposition and accompany them with affidavit(s) to support the grounds given in opposition. The written notice should be lodged with the Sheriff within 10 days of receipt of the request for setting aside. The word “may” in subrule (3) does not give a discretion to a person who wishes to oppose the order to just appear before the Sheriff and participate in the hearing through oral submission in

opposition. The subrule simply gives the person served with the request for setting aside the sale the option to oppose the request. Where the person chooses to do so, then a written opposition which complies with subrule (4) as read with subrule (5) must be filed before the person opposing can be properly before the Sheriff and to participate in the hearing convened by Sheriff in terms of subrule (7). The easiest way for the fourth respondent to understand the purport of subrule (4) is to simply ask oneself the question, “if a person who opposed can simply walk into the hearing and is allowed to participate orally, then why provide for subrule (5)?” Further, subrule (6) provides for the filing of an answering reply. If a person who just walks into the hearing can be given audience without having filed any opposing, the whole purpose of providing for the procedure in r 359 (1) to (7) is defeated.

In casu, the interested parties who appeared at the hearing under challenge in this application by counsel did not file any opposing papers. They submitted that the rules did not require as mandatory the filing of written notices in opposition. The fourth respondent allowed the respondent’s counsel to participate despite the valid objection submitted by the applicants’ counsel. The respondents counsel and the fourth respondent were wrong in their interpretation of subr (4) as already demonstrated. The fourth respondent conducted a hearing which was procedurally foreign to and not provided for in the rules. The respondents had no right of audience at the hearing before the fourth respondent. At best, the respondents could have asked for extension of time to prepare and file written notices and opposing affidavits as provided for in the rules. The application was therefore to all intents and purposes not opposed. The application ought to have been dealt with as unopposed. The fourth respondent had no cause to convene the hearing in the absence of the filing of opposing notices because in terms of subr (7), the fourth respondent only sets down the request for set down for hearing if there is filed the opposing notices. The parties can only make submissions on what appears in their papers filed of record. Neither applicants or respondents are permitted to orally present their cases or defences at first instance at the hearing.

The hearing by the fourth respondent was decidedly a nullity. In the case of *Maparanyanga v Sheriff of the High Court & Ors* SC 132/02, the Supreme Court emphasized the need for officers involved in judicial sales to strictly observe the rules which define how to discharge their duties and responsibilities. It is stated by GWAUNZA AJA (as she then was) at p 20 of the cyclostyled judgment as follows:

“The court is concerned with interpreting the law and dispensing justice. That being the case, and in relation to the subject of this case, a situation resulting in the system of judicial sales

being brought into disrepute would clearly not be desirable. The purpose of sales in execution is, in law, quite clear. The common law duties of sales in execution is, in law, quite clear. The common law duties of officers involved in judicial sales are also trite. The rules of the court and certain administrative measures, like the standard contract of sale *in casu*, are formulated with the object of ensuring that the purpose of such sales is achieved. 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 law and rules. It would be doing exactly that were it to allow the sale in question to stand.

It is crucial, for the proper performance of their work, that officers of the law comply with, rather than pay lip service to, the procedures designed to guide them in the performance of their duties. Needless to say, strict adherence to such rules and procedures would enhance public confidence in the system of judicial sales.”

In *casu*, the fourth respondent did not follow procedures clearly spelt out in r 359 (1) (7) and the *dicta* above quoted applies with equal force *in casu*.

This court has determination that an application such as *in casu* is in the nature of a review of the fourth respondent’s decision see *Nyadindu & Anor v Barclays Bank of Zimbabwe Limited & 3 Ors* HH 135/16 *per* DUBE J; *Fortune Manyimo v Sheriff of High Court Zimbabwe N.O & Ors* HH 316/16; *Chiutsi v The Sheriff of the High Court & Ors* HH 604/18.

Having determined that the application *in casu* is in the nature of a review of the fourth respondent’s decision, the question then is, whether or not having determined that the proceedings conducted by the fourth respondent were a nullity, there is anything to review. A nullity is as good as it is not there. Nothing arises from or sits on a nullity. See *Mcfoy v United Africa Co Ltd* (1961) 3 All ER 1169 in which it was held that if an act is void, then it is in law a nullity and incurably bad such that it is automatically null and void. This case has been followed in this jurisdiction in numerous decisions of all inferior courts right through to the Supreme Court See *Chenga v Chakadaya and Ors* SC 232/10.

None of counsels for the respondents who appeared in this application supported the procedure followed by the fourth respondent. There was no doubt a gross irregularity in the proceedings before the fourth respondent. The proceedings are a nullity. The court cannot sanitize them. The fourth respondent ought to have treated the applicants’ request to set aside the sale as unopposed and granted a judgment based on the applicants’ request only.

It is unfortunate that this matter continues to be unresolved. The latest setback arises from the failure by the fourth respondent to carry out his duties in terms of the rules. The issue of the sale in execution needs to be managed by the court or otherwise judicial sales will lose credence and where they are held, intending participating buyers may shun such

sales on the basis that the sale will remain indefinitely unconcluded because objections take forever to be dealt with and concluded by the objection procedures.

The objection before the fourth respondent as already noted was not opposed. In the application before me, rule 359 (9) provides that the court may confirm, vary or set aside the sheriff's decision or make any order considered appropriate in the circumstances of the case. I propose to set aside the decision of the fourth respondent and issue an appropriate order given the circumstances of this case. The circumstances of note in this case are that the conclusion of the judicial sale in execution has been outstanding for too long a period. No less than three auction sales have been held. The sale remains pending as none of the previous sales have seen the light of day. The third respondent opposed this application. I take it that it remains interested in taking transfer of the property. The order I make will take into consideration the fact that the fourth respondent had through the first respondent's legal practitioners as conveyancers tendered transfer of the property to the third respondent. I will suspend the tender of transfer on condition that the applicants should dispose of the property by private treaty for a price which is more than USD\$260 000.00. Should the applicants fail to dispose of the property for more than the USD\$260 000.00 within a reasonable period of 3 months, the transfer to the third respondent shall be proceeded with as ordered by the fourth respondent. In view of the indulgencies given and the disposal of the case having been based on a technicality arising from the mistake of the fourth respondent, there will be no order of costs made.

The application is disposed of by the following order

1. The ruling by the fourth respondent confirming the sale of the applicants' immovable property, viz, remainder of Lot 8 of Brooke Estate held under Deed of Transfer No. 4935/2004 to the third respondent is hereby set aside.
2. The applicants are granted 3 months from the date of this order to either satisfy the judgment by payment to the first respondent of the amount now due in terms of the judgment and costs in case No. HC 5759/14 or to find another purchaser willing to pay more than USD\$260 000.00 and to have concluded the sale agreement and paid within the said 3 months the purchase price to the fourth respondent who shall uplift the attachment on payment.
3. Failing the options given in para (2) above, the sale of the property to the third respondent shall be deemed confirmed and transfer to the third respondent

shall proceed to be finalized for the purchase price of USD\$260 000.00
tendered by the fourth respondent.

4. There be no order as to costs.

Chakanyuka & Associates, applicants' legal practitioners
Gill, Godlonton and Gerrans, 1st respondent's legal practitioners
Musekiwa and Associates, 3rd respondent's legal Practitioners