DR MILLICENT MOMBESHORA
versus
THE SHERIFF OF THE HIGH COURT OF HARARE
and
KINGDOM BANK LIMITED (IN LIQUIDATION)
and
TENDAI JEMWA

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 17 February and 8 November 2017

Opposed Matter

MacGown, for the applicant
Siyakurima, for the second respondent
Bherebhende, for the third respondent

MAKONI J: The application before me is an application for review of the Sheriff's determination. I shall summarise the facts leading up to the review below. The second respondent obtained default judgment against the applicant. The second respondent then obtained a writ of execution to sell the applicant's undivided half share in a property jointly owned by the applicant and her husband. This writ was served on the applicant on the 9th of July 2013. In December of 2013 the applicant filed an application for rescission of default judgment under HC 10468/13. The Applicant did not, however, prosecute the matter.

Pursuant to the writ of execution there was an attempt to sell the property via public auction. One of the attendees at the public auction placed a winning bid however the sale could not go through as the bidder subsequently failed to meet the conditions of sale. The amount of this bid is unknown. On the 4th of August 2015 the first respondent wrote to Homeland Real Estate giving them the mandate to sell the property by private treaty within 90 days. The applicant's undivided half share in the property was subsequently sold to the third respondent, via private treaty, for US$ 140 000.00.

On the 20th of October 2015 the Applicant objected to the sale of her undivided half share of the property to the third respondent in terms of r 359 (1) of the High Court Rules 1971. On the 5th of November 2015 the second respondent filed their opposing papers. The matter was set down for hearing before the first respondent on the 11th of November 2015. The basis of the applicant's objections were as follows:

1. That the property was sold for an unreasonably low price of US$ 140 000.00 when its open market value was US$ 500 000.00
2. That there was poor advertising of the sale which resulted in low bids and the low purchase price. In particular the adverts did not give a proper description of the premises and the structures thereon, and that the advert was small and in faint print in an obscure part of the newspaper.
3. That the property was the matrimonial home where the family lives and if sold the debtor would become homeless, and that the applicant had offered an alternative property in Kariba up for sale.

In opposing the applicant's challenge the second respondent argued that the applicant failed to provide a sworn valuation showing that the property was indeed worth US$ 500 000.00. The first respondent noted the same and requested that Applicant bring a sworn valuation to the hearing. The applicant failed to do so.

The first respondent dismissed the applicant's challenge to the sale on the basis that no sworn valuation was provided. He also found that the applicant did not provide an alternative buyer willing to pay more for the undivided half share. He also found that the sale was advertised sufficiently. The property was advertised twice in the Herald before the public auction and again when the sale proceeded by way of private treaty. The first respondent found that it was false that the auction was poorly attended and that the applicant had failed to prove this assertion.

As regards the argument that the property was the matrimonial home and if sold it would leave applicant and her family homeless, and that the applicant had offered the Kariba house up for sale the first applicant found that this argument amounted to pleading poverty and as such the applicant ought to have proceeded in terms of r 348 (5A) and not r 359 (1) as she did. In the result the first respondent confirmed the sale by private treaty. It is this confirmation of the sale that the Applicant seeks to have set aside. It is important to note that when the applicant made the present

application the first respondent had not yet transferred the undivided half share to the 3rd respondent.

The issue before this court is whether or not the first respondent's decision to confirm the sale to the 3rd Respondent should be set aside on review. The applicant put forward the following grounds of review as the basis for their application for review:

1. The property was sold for an unreasonably low price of US$ 140 000.00.
2. That there was poor advertising that resulted in poor attendance at the sale or auction. In particular, that the adverts did not give a proper description of the premises and the structures thereon, and that the advert was small and in faint print in an obscure part of the newspaper.
3. That the property is question was the matrimonial home and that the Applicant and her family would become homeless if her half share in the property was sold and that the Applicant had offered the Kariba property up for sale

Before this matter was heard by me, but prior to the parties having filed their heads or argument, there was a change in the circumstances of this case. The change in the circumstances of the case is in the fact that the first respondent effected transfer of ownership of the applicant's undivided half share to the 3rd respondent. The applicant did not file a supplementary affidavit to deal with the new facts. Instead the applicant introduced these new facts in their heads of argument. Furthermore, applicant sought to change the nature of the application in the heads of arguments. The applicant sought to abandon the abovementioned grounds of review in favour of the following:

i. That the first respondent did not exhaust applicant's movable property before moving to executing again the immovable property. No *nulla bona* return was rendered.
ii. The applicant had provided title deeds of a Kariba property as security to the second respondent
iii. Second respondent sold the entire property and yet with elementary due diligence, he would have established that the property is jointly owned by the applicant and her spouse.

As was correctly submitted by Mr *Siyakurima* the oral submissions on behalf of the applicant were at variance and totally divorced from the application itself and the heads of

argument filed of record. The oral submissions inter alia, reflected to evidence which should have been made in the founding affidavit. There is now mention of that fact that there was no *nulla bona* return which fact was not mentioned in the founding affidavit. As it turned out, had the applicant put this fact in issue in the founding affidavit, the *nulla bona* return is available. It was also not correct that the entire property was sold. The respondents could have produced proof that only the applicant's share had been sold.

It is trite that it is improper for a party to introduce new facts or attach evidence to the heads of argument and that such evidence will be disregarded. See *Nehowa* v *Berep Investments (Pvt) Ltd* 2012 (2) ZLR 176H. The new facts will therefore be disregarded and l will proceed to examine the grounds for review as identified in the court application.

It is the applicant's contention that value of the property is US$ 500 000.00 and that the sale of the applicant's undivided half share in the property for US$ 140 000.00 was unreasonably low. Although the applicant did not make mention of the following, it goes without saying that if the applicant contents that the value of the property is US$ 500 000.00 then an undivided half share ought be sold for US$ 250 000.00. The applicant accused the first respondent of colluding with the real estate agents in order to undervalue the applicant's undivided half share for the benefit of the purchaser in underhand dealings. Applicant also averred that advertising of the sale was poor and that this led to low attendance, low bids and ultimately the low price obtained by private treaty.

It is worth noting at this point that applicant did not produce a sworn valuation showing that the property was indeed worth US$ 500 000.00 in the founding affidavit. Instead of a sworn valuation Applicant attached Annexure "C", an estimate from Robert and Root Property Consultants dated 18 November 2015 stating that the open market value of the whole property was US$ 180 000.00. Applicant also failed to attach the adverts which she complained of in her affidavit.

Applicant also stated that she offered to sell a property in Kariba in order to liquidate the judgment debt. Applicant contends the fact that the 1st Respondent refused to allow Applicant to sell the Kariba property was further evidence of collusion and bad faith.

In opposing the application the second respondent denied that selling the undivided half share for US$ 140 000.00 was unreasonably low. Second respondent pointed to **Annexure "C",**

the estimate provided by the Applicant, which put the market value of the whole property at US$ 180 000.00 as evidence that the sale of an undivided half share of the property for US$ 140 000.00 was more than reasonable if not excessive. Second respondent also argued that the applicant failed to provide the first respondent with a sworn valuation report to prove that the property was indeed worth US$500 000.00. In the absence of said valuation there was no evidence on which the first respondent could have relied on to find in favour of the applicant.

The second respondent went on to state that matrimonial homes are not immune to attachment and that the applicant had been given ample opportunity to sell the Kariba property before the subsequent sale of the property in question to the third respondent.

Second respondent also argued that the applicant alleged low turn-out at the auction without stating how many people came or providing the attendance register. The second respondent also argued that the applicant's failure to attach the adverts complained of to prove that the sale and auction were indeed poorly advertised was problematic. Second respondent argued that the applicant carried the burden of proof and in the absence of evidence the applicant's matter must be dismissed.

The third respondent echoed the sentiments of the second respondent and went on to provide a Valuation Certificate from Chorus Marias Valuation and Estates Executives (Pvt) Ltd dated 15 November 2015. This valuation put the open market value of the whole property at US$ 185 000.00 and the forced sale value at US$ 130 000.00.

Order 40 Rule 359(1) High Court Rules 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.

Rules 359(7) and (8) goes on to state that:

"(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.

> (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 a court application to have the decision set aside.
> (9) In an application in terms of subrule (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."

An applicant who seeks to have the Sheriff's decision set aside in terms of r 359(8) bears the onus of proof. In *Morfopoulos* v *Zimbabwe Banking Corporation Limited and Others* 1996 (1) ZLR 626 (H) GILLESPIE J as he then was said:

> "A litigant wishing to discharge a burden of proof must fully be 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 reasonable that is to say, that it is substantially lower than would reasonably be anticipated, given the expected range of prices."

Also see *Mhlanga* v *Sheriff of the High Court* 1991(1) ZLR.

It is trite law that a court will not lightly set aside a judicial sale which has been confirmed. In *Mapedzamombe* v *Commercial Bank of Zimbabwe* 1996 (1) ZLR 257 (5) 260 the court stated:

> "Before a sale is confirmed in terms of Rule 360, it is a conditional sale and any interested parties may apply to court for it to be set aside. At that stage, even though the court has discretion to set aside the sale in certain circumstances, it will not readily do so. Once confirmed by the Sheriff in compliance with Rule 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 Rule 359"

In instances where the sale has been confirmed and the Applicant alleges that it was unreasonable for the Sheriff to confirm the sale on account of the low purchase price, attention must be paid to the fact that mere unreasonableness is not sufficient to enable the court to interfere with the Sheriff's decision. The unreasonableness complained of must be of a gross nature. In *Thirwell* v *Johannesburg Building Society* 1961 (4) SA 665 it was held that the court will not lightly interfere with the court's discretion to confirm or cancel a sale unless there is gross unreasonableness which can only be as a result of *male fide* or when it is clear that the Sheriff has not applied their mind to the facts.

> "There is no authority that I know of, and that has been cited, for the proposition that a court of law will interfere with the exercise of discretion on the mere ground of its unreasonableness. It is true that the word is often used in cases on the subject, but nowhere has it been held that unreasonableness is sufficient ground for interference. Emphasis is

> always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is inexplicable except on the assumption of mala fides or ulterior motive, or that it amounts to proof that the person on whom discretion is conferred has not applied his mind to the matter."

In the present matter there is no evidence put before the court that shows that the first Respondent acted so unreasonably that the only inference is that there was collusion or *male fides* from their office. In challenging the sale by the first respondent, the Applicant alleged that the Applicant's undivided half share was sold at an unreasonably low price of US$ 140 000.00. The first and second respondent called upon the applicant to prove that the price was unreasonably low by producing a sworn valuation which showed that the property was worth US$500 000.00. The applicant failed to do this. See *Zvirahwa* v *Makoni and Anor* 1988 (2) ZLR 15 (SC). The Applicant's excuse is that they were not given sufficient time to obtain a sworn valuation however this is not the case. On the 20th of October 2015 the Applicant objected to the sale. On the 5th of November 2015 the second respondent filed their opposing papers. The matter was set down for hearing on the 11th of November 2015. The applicant ought to have known that they need a sworn valuation from the moment they initiated the challenge, that is the 20th of October 2015. Furthermore the second respondent included the lack of a sworn valuation in their opposing papers and the first respondent gave the applicant an opportunity to file same papers with her answering papers.

In my view the applicant had sufficient opportunity to file the sworn valuation. In any event when the applicant realised that they did not have sufficient time to file the valuation they ought to have sought a postponement of the hearing which the applicant did not do.

In the circumstances it was reasonable for the 1st Respondent to dismiss the Applicant's challenge and to confirm the sale.

As for the applicant's allegation that adverts were inconspicuously placed in the newspaper in small font and faint print, applicant has failed to provide sufficient evidence to prove this. Applicant did not provided sufficient evidence to prove that there was poor attendance as a result of the poor advertising. As such it cannot be said that the first respondent's decision to confirm the sale was unreasonable as the challenge to the sale was unsubstantiated.

There is also no evidence put before the court that shows that the first respondent acted so unreasonably that one can conclude that the first respondent did not apply their mind. The first

respondent's decision and the reasons for making said decision show that the 1st Respondent appreciated the nature of the matter before him and that he applied his mind to the facts in reaching his conclusion.

As far as the argument that the house is a matrimonial home that is jointly is concerned the applicant did not present any cases to support the assertion that the applicant's half share cannot be sold in execution. Furthermore the applicant did not provide sufficient evidence to prove that the property was indeed the matrimonial home. It would seem the house was vacant at the time of the sale. The husband made no effort to challenge the sale of the applicant's half share and indeed the sale of the property does not in any way interfere with the husband's ownership of his half share of the property. In this regard I refer to Silberberg and Schoeman's *The Law of Property 5th Edition* at page 133 where the following is said:

> "Co ownership, joint ownership or ownership in common, denotes that two or more persons own a thing at the same time in undivided shares, that is to say each co-owner has the right to a share in the entire things".

At page 135 the authors continue:

> "Every co-owner has the right to freely and without reference to co-owners to alienate his or her share … if co-owners cannot agree on the manner in which the property is to be divided among them, the court will make such order as appears to be fair and equitable in the circumstances."

There is no reason why the applicant's half share could not be sold.

The applicant also tried to argue that applicant did not consent to the sale of her half share and as such the sale should have not gone through. The issue of consent is not before me as the court has been approached to review the first respondent's decision based on the three grounds of review cited. These grounds of review did not include the issue of consent.

In light of the above I am of the view that the applicant has failed to prove their case.

I thus make the following order:

1. That the application is dismissed with costs.

Venturas & Samukange, applicant's legal practitioners
Sawyer & Mkushi, 2nd respondent's legal practitioners
Bherebhende Law Chambers, 3rd respondent's legal practitioners