ELMON DLOMO

Versus

SHERIFF OF ZIMBABWE

And

MARKO MOYO

And

TRYPHINE DUBE

And

THE REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 17 FEBRUARY 2006 AND 17 MAY 2007

E E Marondedze, for the applicant
S S Mazibisa, for the 3rd respondent

Opposed Application

NDOU J: The applicant's property was attached in execution of a judgment obtained against him by the second respondent. This is an application whereby the applicant seeks an order to the effect that sale by public auction of stand 3537 Cowdray park, Bulawayo on 25 August 2002 to third respondent be declared null and void. On 7 June 2002 a public auction duly authorised and sanctioned by the first respondent for the said stand 3537 Cowdray Park was conducted and a price was bidden there and the first respondent reasoned that the price was unreasonably low, and he then refused to confirm the sale by public auction. Upon the failure of the public auction to realise a reasonable price for the said property, the third respondent

proceeded in terms of Order 40, Rule 358(2) of the High Court Rules, 1971 to sell the property by private treaty and Bulawayo Real Estate was chosen and authorised by

the first respondent to conduct the sale by private treaty. Bulawayo Real Estate proceeded to advertise the house and the third respondent approached them and bought the house for $1 800 000,00. This was done on 25 August 2002. The first respondent waited for any objections to be lodged by any interested party in terms of the Rules and none was forthcoming. On 10 January 2003, some five(5) months after the sale by private treaty, the first respondent proceeded to confirm the sale by private treaty. On 11 April 2003 the applicant filed this application. This application was filed before the disputed property was transferred in favour of the third respondent. The application only came to the attention of the third respondent on 27 May 2005 when first respondent served same upon her agents.

In other words, the application was only served upon the third respondent on 27 May 2005 after having been issued in April 2003 by the now defunct Messrs Sibusiso Ndlovu Legal Practitioners. Messrs Marondedze, Nyathi & Partners have not assumed agency on the matter but seek to prosecute the matter on behalf of the applicant. This issue was taken as a point *in limine* by the third respondent. It seems to me from the scant information I am able to glean from the papers that Sibusiso Ndlovu Legal Practitioners was never de-registered by the Law Society of Zimbabwe. The firm appears to have changed hands in its partnership resulting in its eventually changing its name to identify with the new partnership structure, *viz* Marondedze, Nyathi & Partners. The same legal practitioner who is still handling the matter was the one doing so under the old name. So the point *in limine* taken by the third

respondent has to fail on that point alone. In any event, the third respondent recognised the latter name and communicated with the applicant through it. The third respondent even served the notice of set down for this hearing upon Marondedze,

Nyathi & Partners so they cannot complain now. In his draft order the applicant seeks an order to the effect that: "The sale by public auction … to Tryphine Dube be declared null and void" The third respondent rightly observed that this order is wrong because third respondent did not purchase this property at a public auction. She went to Bulawayo Real Estate who had been authorised to sell the property by private treaty by the first respondent as alluded to above. On account of this error in the draft order, the third respondent seeks that the application be dismissed. I will revert to this submission, if necessary, after dealing with the substantive application on the merits.

According to Order 40 Rule 359(1)(a) and (b) any person who has an objection or interest in a sale in terms of this order may request to set it aside on the ground that the sale was improperly conducted or the property was sold for an unreasonably low price, or any other good ground.

In terms of sub-rule (2) of Rule 359 a request in terms of sub-rule (1) *supra*, shall be in writing and lodged with the Sheriff within fifteen (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. There is a proviso that the Sheriff may accept a request made after that fifteen(15) day period but before the sale is confirmed, if he is satisfied that there is good case for the request being made late. *In casu,* no objection was lodged with the Sheriff within the 15 day period stipulated by the Rules. In fact the Sheriff waited for something like five(5) months

before confirmation of the sale by private treaty. The applicant was given ample time to lodge any objections he might have entertained.

It is trite law that as a general principle, it should be acceptable that a court will not readily interfere with the Sheriff's sales – *Lalla* v *Bhura* 1973(2) RLR 280 (A) at 283A; *Mapedzamombe* v *CBZ & Anor* 1996(1) ZLR 257 (S); *Twine Wire Agencies (Pvt) Ltd* v *CABS* SC 46-05; *Sookdeyi & Ors* v *Sahadeo & Ors* 1952(4) SA 568(A) and *Makuyana & Anor* v *Standard Chartered Bank of Zimbabwe* HB-52-07.

Further, it is trite that an action *rei vindicatio* does not lie against a *bona fide* purchaser at a sale in execution – *Gwanangura* v *Founders & Anor* SC 62-00.

Coming to the facts of this case, the papers do not show any objection raised by the applicant and do not show any objection as to price or irregularities in the handling of the sale by private treaty. In fact all documents filed of record are to the effect the sale by private treaty was handled properly. The sale of the disputed property to the third respondent was a sale by private treaty in accordance with Order 40 Rule 358(2). It followed a public auction conducted by the first respondent under Order 40 Rule 354. The first respondent declined to declare that the highest bidder was the purchaser. The first respondent made that decision because he was not satisfied that the highest price offered was reasonable. It is trite that the discretion as to the price lies with the Sheriff, to be exercised judiciously of course. When the Sheriff declines to confirm the sale by public auction, as he did here, he is empowered to proceed by way of private treaty and in the sale by private treaty the price must be

higher than that which has been offered at the public auction. *In casu,* the price of $1 800 000,00 was higher than that offered in the public auction and in 2002 a sum of $1 800 000,00 represented a fair and reasonable value of the property located in the township of Cowdray Park in Bulawayo. The price was reasonable. In any event, the judicial sale cannot be set aside simply because the judgment debtor made a bad bargain. In *Munyoro* v *Founders Building Society & Ors* 1999(1) ZLR 344(H), SMITH J, at page 348 rightly observed:

> "I accept, as indeed I am bound to do so, that a judicial sale cannot be set aside simply on the grounds that the judgment debtor had made a "bad bargain" and that the judgment debtor cannot rely on his/her own default to defeat the sale."

In *Lalla* v *Bhura, supra,* at 283A, DAVIES J, held;

> "Again I agree with the observation that if the courts were ever ready to set aside sales in execution under R 359, this might have a profound effect upon the efficacy of this type of sale. Would be purchasers might well be deferred from attending and bidding if they considered their efforts might easily be frustrates by an application under Rule 359 and as a general principle I think it should be accepted that a court will not readily interfere in these matters."

In *Smith & Anor* v *Acting Sheriff of Zimbabwe & Anor* 1995(1) ZLR 158(S), at 161F-G, McNALLY JA said;

> "… we must be careful not to drift into mandling sentimentality and excessive sympathy for the hard luck stories. If we do, we undermine the very efficient and effective mechanism by which housing is funded, but there is no reason why the courts should not take into account of the fact that forced sales generally realise a lower price than ordinary sales, and that the judgment debtor's interests rank low in the scale of priorities in these sales, perhaps too low."

In casu, the sale has been confirmed by the Sheriff, so it is no longer conditional. That being so, the court would be even more reluctant to set it aside

pursuant to an application in terms of Rule 359 to do so – *Mapedzamombe* v *CBZ, supra,* at 260D-E.

As alluded to above, the sale by private treaty was a genuine one. The third respondent was an innocent purchaser who went to Bulawayo Real Estate looking for a house, she got one and proceeded to buy it. She says this in her founding affidavit. This averment was not disputed by the applicant. In fact, the applicant did not bother to file an answering affidavit to dispute averments by the third respondent contained in her opposing affidavit. Neither did he oppose the third respondent's counter-application.

Further, attempts by the applicant to sell the property to any other party is unlawful. Once the Sheriff has been instructed to sell the property by a forced judicial sale, the judgment creditor cannot proceed to sell the property himself. The only recourse available to him was to raise objections within 15 days of the sale of the property by private treaty and this was not done.

From the foregoing, the application is without any merit. It was prompted by the Writ of Execution issued out on 18 October 2000.

Accordingly, the application is dismissed with costs on the legal practitioner and client scale.

Marondedze & Nyathi, applicant's legal practitioners
Cheda & Partners, 3rd respondent's legal practitioners