SUCCESS AUTO (PVT) LTD
and
HONEYPOT INVESTMENTS (PVT) LTD
and
DOUGLAS MAKONESE
and
MERCY MAKONESE
versus
FBC BANK LIMITED
and
SHERIFF OF THE HIGH COURT OF ZIMBABWE, NO

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 27 January 2015 and 18 February 2015

Opposed Application

S Hashiti with T Zhuwarara, for the applicants
A Muchandiona, for the 1st respondent

MATHONSI J: This application is made in terms of r 359 (8) of the High Court of Zimbabwe Rules, 1971 for the setting aside of the decision of the second respondent, the Sheriff for Zimbabwe, confirming the sale in execution of the applicants' immovable property being stand 80 Borrowdale Township of Borrowdale Brook Harare. The property in question was sold by public auction through the medium of Cliprunt Real Estate on 5 May 2014 for a sum of US$355 000-00. The circumstances leading to the sale of the property are that the first respondent sued the applicants on 16 January 2013 in HC 361/13 for payment of the sum of US$454 874-62 plus interest being a loan advanced to them. The first respondent also sought an order declaring the property executable as it had been mortgaged as security for the loan in the event of a default in payment.

The applicants may have realised the folly of contesting that claim for, on 13 June 2013 they capitulated and signed a deed of settlement with the first respondent in terms of which they undertook to pay the debt on certain terms and conditions. They also agreed that

in the event of default, the first respondent was entitled to make a chamber application for judgment to be entered against them on the outstanding balance together with costs on a legal practitioner and client scale.

As is the case with most such acknowledgments of indebtedness in this jurisdiction, the applicants defaulted prompting the first respondent to move for judgment in terms of the settlement of the parties, but not before the first respondent had granted its consent to the applicants allowing them to sell the mortgaged property by private treaty if they so wished and pay the debt. It was after the applicants had failed to secure a buyer by private treaty and failed to pay the debt in terms of the deed of settlement that the first respondent took matters into its own hands.

Having obtained judgment against the applicants on 7 October 2013 which remained unsatisfied, the first respondent instructed the Sheriff to execute against the mortgaged immovable property. The Sheriff obliged, doing what he knows best on 5 May 2014, selling the property by public auction.

The applicants objected to the confirmation of the sale by public auction in terms of Order 40 r 351 (1) (b) of the High Court rules resulting in a hearing before the Sheriff on 27 June 2014. At that hearing the applicant placed reliance on valuation reports relating to the property which suggested that the property was worth more than the highest bid. Entredev Valuation Surveyors had on 7 May 2014 placed the Aggregate Market Value of the property at US $922 500-00 while Quadstar Real Estate said the value was US$945 700-00 as at 21 May 2014. The first respondent argued that by agreement of the parties, the applicants had been allowed to sell the property by private treaty but they had failed to secure offers in the region of the valuations which appeared to over-state the value. In fact by letter dated 13 June 2013, the same day that the deed of settlement was signed the first respondent had issued the following letter granting authority to the applicants to sell the mortgaged property:

> "TO WHOM IT MAY CONCERN
>
> **SUCCESS AUTO (PVT) LTD: Proposed Subdivision of Stand 80 Borrowdale Brook Township of Subdivision H of Borrowdale Estate registered in the name of Honeypot Investments (Pvt) Ltd**
>
> We have extended certain banking facilities to the captioned which facilities were secured by a mortgage bond over the above described immovable property. We do not object to the issuing of a Subdivision permit or an outright sale of the said property subject to the following terms and conditions:

1. The subdivision, bond cancellation and transfer will be handled by our lawyers.
2. The subdivision and/or sale should not go beyond seventy-five days from the date of signing the Deed of Settlement.

Please note the above condition shall lapse if the said subdivision or sale goes beyond seventy five days.

Please be guided accordingly.

Yours faithfully

Patricia F Nyazenga
Div. Director – Group Credit Management Division

Bernard Mutambara
Credit Service Officer"

The consent to sell the mortgaged property came to naught as, at the expiration of the period of 75 days set, the applicants had not managed to sell the property forcing the first respondent to fall back on remedies available to it, namely taking judgment and executing in terms of the court's rules.

After considering submissions made by the parties the Sheriff ruled, and in confirming the sale he reasoned that:-

> "The price of $355 000 which was realised at the auction is way above the forced sale value of $80 000 and even exceeds the stipulated market value of $300 000 so cannot be claimed to be unreasonably low since Sheriff sales are forced sales and not based on market value. It even exceeds the market value. The matter has been outstanding since 2012 and the judgment debtor was given a chance by the letter dated 13 June 2014 to sale (sic) the property by private treaty, to ask for 4-6 months to sale (sic) the property again by private treaty is not possible after they did not utilize the one year there (sic) were given to sale (sic) by private treaty. The Sheriff after considering all the submissions by both parties is going on to confirm the sale."

The objection of the applicants to the sale had been premised on firstly that the price was too low and secondly that they needed to be given four to six months more to try and sell the property by private treaty, a case of closing the gate after the horse had bolted. The Sheriff was unconvinced and his reasoning was clearly articulated in that regard. It is important to note that it was never the applicants' case before the Sheriff that the latter had not proceeded against their movable property before closing in on the mortgaged immovable property. In fact the issue of movable property has never been the applicants' case.

The applicants were unhappy with the decision to confirm the sale and they lodged this application in terms of r 358 (8) of the High Court Rules. In the founding affidavit of

Douglas Makonese, the third applicant, they stated, after giving a narration of the background, that:-

"9. The applicants realised that the value that the property was to be sold for was way below its forced sale value. The amount was unreasonably low.

10. A request for setting aside the sale was duly filed and was supported by two valuation reports. The first by Entredev showed that the market value of the property was nine hundred and twenty two thousand five hundred dollars (US$922 500) whilst its forced sale value was six hundred and forty six thousand dollars. See Annexure 'D'.

11. Another report by Quadstar Real Estate showed that the market value of the property is nine hundred and forty five thousand United States dollars (US$945 000) while its forced sale value was six hundred and sixty nine thousand dollars (US$699 000). See Annexure 'E'.

12. The Sheriff however, went on to reject the request to have the sale set aside and it is thus determination of the Sheriff which is the subject of the application. See Annexure 'F'

<u>GROUNDS FOR THE APPLICATION</u>

13. The Sheriff grossly erred in dismissing the valuation reports and relying on the report of his independent valuer who held that forced value of the property was eighty thousand dollars and that its market value was three hundred thousand dollars.

14. The Sheriff relied on this report when it is quite clear that the property is primeland which is situated in Borrowdale Brook…..

15. ……………

16. If the Sheriff had properly applied his mind to the report given by his independent valuer, he would have noted that it was far from reality and was only designed to ensure that the sale sails through.

17. …………..

18. ………….

19. The fact that the matter has been outstanding, a fact which was taken into consideration by the Sheriff, does not mean that the property should be sold for an unreasonably low price. The issue is whether or not the amount realised is not unreasonably low. Where evidence is adduced to the effect that it is low, the Sheriff must decline to confirm the sale. He cannot rush to confirm it simply because in his opinion the matter has been outstanding since 2012.

20. It is therefore just and equitable that the decision by the Sheriff be set aside.

21. I therefore pray for an order in terms of the draft."

I have deliberately quoted extensively from the applicants' founding affidavit to demonstrative the case which the first respondent was called upon to answer to because, at the hearing of the application, the applicants sought to advance a completely different case, a case not borne by the papers before me, namely that the sale was null and void by reason that the Sheriff had not exhausted the applicants' movable property before proceeding against the mortgaged property, movable property which was not even identified.

The first respondent opposed the application stating in the opposing affidavit of Bernard Mutambara, its Recoveries Manager, that in terms of the Deed of Settlement of the parties and the simultaneous consent issued by it, the applicant were supposed to sell the property by private treaty. They failed to secure a willing buyer and also failed to clear the debt in terms of the agreement. It was as a result of that that the first respondent took judgment which it executed.

The first respondent maintained that at the hearing before the Sheriff it became apparent that the applicants' valuers who had overstated the value of the property had themselves failed to secure a buyer willing to pay a price higher than the one realised at the public auction. Those valuers could not explain why they failed to secure a higher price between 13 June 2013 and 27 June 2014, a period of more than a year. According to the first respondent values of property have dropped significantly due to the liquidity crunch prevailing and as such the values relied upon by the applicants were not only fictitious but could also not be realised on the market. The Sheriff's decision to confirm the sale could therefore not be faulted.

In their heads of argument the applicants submitted that the sale ought to be set aside in terms of r 359 of this courts rules on the basis that the property was sold for an unreasonably low price for a property located in Borrowdale. They cited r 359 (1) which reads:-

> "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 any other good ground."

It was further submitted that in seeking to set aside the sale the applicants were relying on the ground that the property was sold for an unreasonably low price and no other ground.

In advancing that argument reliance was placed on the words of GILLESPIE J in *Morfopoulos* v *Zimbabwe Banking Corporation Ltd & Ors* 1961 (1) ZLR 626 (H) 633 C – E where he said:-

> "The price achieved is therefore itself taken as a reliable indication of value. For these reasons there is recognised an onus upon the challenger to prove that the price so achieved is unreasonably low. A litigant wishing to discharge this burden must be fully 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 unreasonable, that is to say that it is substantially lower than would reasonably be anticipated, given the expected range of prices. See *Zvirawa* (*supra*) at 17 D – E. The valuations that are commonly produced in such matters frequently tend nowadays to essay an assessment of a forced sale value. This is itself of some assistance to the court, in that one is by such an opinion assisted towards a finding as to whether or not the price achieved is what one would expect on a forced sale or unacceptably disproportionate even to such lowered expectations."

See also *Zvirawa v Makoni & Anor* 1988 (2) ZLR 15 (S) 17 D – E. I totally agree with the reasoning adopted by GILLESPIE J including his conclusion at 635 H; 636A that:-

> "The awe and finality with which the law seeks to invest the process of execution cannot be disturbed by such ill refined and non-specific averments as these. The rights which the third respondent has acquired cannot be denied him save upon sufficient proof that it is not fair that he should continue to enjoy them."

In the present case, the applicants relied on valuations that were not only heavily compromised but also that the authors of them were discredited at the hearing before the Sheriff firstly by the variance between their valuations and that of the Sheriff's independent valuer who pegged the forced value at $80 000-00 and the market value at $300 000-00 and secondly by the fact that the same estate agents had been afforded the opportunity to sell the property with the consent of the first respondent but for well over a year they could not secure a buyer at a price above the one achieved. Their valuations were demonstrably unreliable and the Sheriff properly rejected them.

It is not without significance that these two valuers were sourced by the applicants and were, for all intents and purposes, the applicants' agents whose independence, and therefore reliability was non-existent. Against their evidence was the evidence of the

Sheriff's independent valuer who had no interest in the matter and was accountable to the Sheriff only, an officer of this court.

The sale was confirmed by the Sheriff in terms of the rules and the applicants have not attacked it on the basis that it was improperly conducted. That confirmation sets into motion the position stated by the Supreme Court in *Mapedzamombe v Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257 (S) 260 D – E that:

> "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 do so. See *Naran* v *Midlands Chemical Industries (Pvt) Ltd* S – 220-91 (not reported) at pp 6-7. When the sale of the property not only has been properly confirmed by the Sheriff but transfer effected by him to the purchaser against payment of the price, any application to set aside the transfer falls outside r 359 and must conform with the principles of the common law."

See also *LMS Timbers (Pvt) Ltd & Anor* v *The Sheriff of Zimbabwe* & Ors HH 484/14; *Mhlanga* v *Sheriff of the High Court* 1999 (1) ZLR 276 (H).

I am of the view that the sale cannot be interfered with merely because of the self-serving interests of the applicants who desire a better price which they themselves failed to achieve ably assisted by their own extravagant estate agents for a period of over a year. The Sheriff was right in confirming it the way he did especially as he relied upon the opinion of an independent valuer who fixed the value at far less than what was achieved. An interested third party has come onto the scene having purchased the property for value, but has unfortunately not been cited, whose interest cannot be ignored.

The matter would otherwise end there but for the belated submissions by Mr *Zhuwarara* who took over from Mr *Hashiti* to advance the point that the sale should be set aside because the Sheriff did not proceed against and did not exhaust the movable property of the applicants before executing against the immovable property. He relied on r 326 which provides:-

> "It shall not be necessary to obtain an order of court declaring a judgment debtor's immovable property executable or to sue out a separate writ in order to attach and take in execution the immovable property of any judgment debtor, but where so desired the judgment creditor may sue out one writ of execution for the attachment of both movable and immovable property;

> Provided that the Sheriff or his deputy shall not proceed to attach in execution the immovable property of the judgment debtor unless and until he has by due inquiry and diligent search satisfied himself that there is no or insufficient movable property belonging to the judgment debtor to satisfy the amount due under the writ."

In my view the proviso to that rule must be read in conjunction with the rule itself and means that a judgment creditor does not have to obtain an order declaring the debtor's immovable property executable and does not have to issue a separate writ against such immovable property where he already has a writ against the debtor's movable property. In such situation the judgment creditor should simply issue one writ against both movable and immovable property. He will however, not be allowed to proceed against the immovable property until such time that the Sheriff has exhausted the movable assets.

Mr *Zhuwarara* submitted that even where an order of the court exists declaring an immovable property executable and a writ against such immovable property has been issued, the Sheriff still has to go through the formality of searching for movable property and exhausting it before he can lawfully proceed against the immovable property. As the Sheriff did not do that in *casu*, the sale is invalid as it offends r 326 and should be set aside.

He cited the judgment of PATEL JA in *Govere* v *Ordeco (Pvt) Ltd & Anor* SC 25/14 at pp 5-6 where the learned Judge of Appeal stated:-

> "In the present matter, it is common cause that there was no *nulla bona* return in respect of the assets of Coldrac and no attempted attachment of the appellant's movables. The order of the court *a quo*, so it is contended, entitles the first respondent, without any qualifications, to executive against the appellant's immovable, thereby circumventing the requirements of rule 326. I am unable to agree with that contention for the simple reason that the order for execution granted by the court *a quo* only comes into operation in the event that the appellant fails to pay the judgment debt. The order is clearly conditional and contigent upon such failure. Therefore, the appellant is perfectly at large to tender his movables in satisfaction of the judgment before any process for the execution of his immovables is iniated. In any event, the interpretation of Rule 326 propounded by Mr *Magwaliba* is clearly not supported by the wording of that rule…… First and foremost, the rule patently does not, as is contended for the appellant, differentiate as between secured and unsecured creditors. It applies to both without distinction. Secondly, the plain meaning of this rule is that the judgment creditor has the option to sue out a separate writ of execution for the attachment of immovable property or a single writ for the attachment of both movable and immovable property. In either event, before proceeding to attach immovable property, the Sheriff or his deputy is enjoined to satisfy himself that the judgment creditor does not own any or has insufficient movable property to satisfy the judgment debt."

See also *Pandhari Lodge (Pvt) Ltd & Ors* v *Central Africa Building Society & Anor* HH 720/14 at pp 6-7.

The difficulty which the applicants have is that this argument is not borne by the papers. Not only is the submission that the Sheriff did not exhaust their movable property being led from the bar as it is missing completely from the founding affidavit, I am also unable to verify its correctness. We simply do not know whether such movables were exhausted or not the parties not having addressed such facts in evidence. I am therefore not in a position to make any pronouncement in that regard in the absence of evidence.

It is a principle of our law that an application stands or false on its founding affidavit. See the dissenting judgment of MALABA DCJ in *Moyo & Ors* v *Zvoma NO & Anor* 2011 (1) ZLR 345 (S) 369 B where he said:-

> "My view of the case is that the application ought to have been dismissed or granted on the grounds on which the applicants made it."

That is the rule in application proceedings. That is as it should be because the respondent must be accorded an opportunity to respond to allegations made in the founding affidavit. He does so through the opposing affidavit where he places evidence before the court to rebut whatever is contained in the founding affidavit. He has no other bite at the cherry and as such the applicant cannot be allowed to crowl back after the respondent has submitted the opposing affidavit to introduce evidence which the respondent would not comment on. That would be an ambush. It is even mere reprehensible when it comes through evidence led by counsel from the bar. Such is untested evidence, it is not even sworn evidence and should simply be ignored as I proceed to do.

In the result, the application is hereby dismissed with costs.

Musoni Law Chambers, applicants' legal practitioners
Danziger & Partners, 1st respondent's legal practitioners