VALLEY MINING (PRIVATE) LIMITED
and
ISAAC NJAINJAI
and
CONNECT INVESTMENTS (PRIVATE) LIMITED
and
FORGET YEBO NJAINJAI
versus
AFRICAN BANKING CORPORATION t/a BANC ABC
and
MIRIRAI APOLONIA WASHAYA
and
THE SHERIFF OF ZIMBABWE
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 3 June 2014 & 11 March 2015

Opposed Application

E K Mushore, for the applicant
A Muchandiona, for the first respondent
O Mutero, for the second respondent

ZHOU J: The applicants' immovable property, Stand 650 Borrowdale Township of Stand 10 of Lot C Borrowdale Estate, also known as 21B Crowhill Avenue, Borrowdale, Harare, was attached in execution of a judgment of this court granted in Case No HC 5872/12. The judgment was given in favour of the first respondent and against the applicants. Following its attachment by the sheriff the property was advertised for sale in the Government *Gazette* as well as in The Herald newspaper. An offer of US$275 000 was made by one David Chawota. The sheriff did not declare David Chawota the purchaser on the basis that the price was too low having regard to the value of the property. The property was therefore made available for sale by private treaty. The second respondent's offer to purchase the property by private treaty for a sum of US$360 000 was accepted by the sheriff on 27 June 2013. The instant application which the applicant filed as one for review seeks

the setting aside of the sale of the property to the second respondent. The application is opposed by the first and second respondents.

Applicant states that it received the letter notifying it of the Sheriff's acceptance of the second respondent's offer on 15 July 2013. The letter had a wrong date suggesting that it had been written on 26 June 2013. That clearly is a typographical error as the second respondent was only declared to be the purchaser on 27 June 2013. On 15 July 2013 the applicant, through its legal practitioners, wrote a letter to the sheriff. The letter stated the following, among other things:

> "We write to advise that our client objects to the sale/declaration and that the objections will be delivered within 15 days of the date it was notified of the sale [i.e. 15 days from the 15th July 2013]. Our client was only informed of Mirirai Washaya's offer on the 15th July 2013 and was not aware of this declaration prior to this date. In any event you posted the letter with this information on the 2nd of July a good five days after the declaration had been made."

On 23 July 2013 the Sheriff notified the first respondent's legal practitioners that the second respondent had been confirmed to be the purchaser on that day because no objection had been received. That letter also bears a wrong date, as it is dated 23 June 2013. While the first mistake is excusable, the officers of the second respondent must be cautioned to be meticulous in ensuring that appropriate dates are inserted in all documents which they send out. That is particularly important given that in respect of certain of their correspondence there are time frames provided for in the rules which are reckoned from the dates that their letters are written. If they continue to write letters bearing wrong dates with such amazing regularity then they risk having some of the sheriff's decisions being challenged based on confusion created by wrong dates. That scenario is clearly undesirable. Be that as it may, the applicant did not lodge an objection with the Sheriff as stated in its letter of 15 July 2013. Instead, on 30 July 2013 the applicant filed the instant application for review.

The grounds for review set out in the applicant's papers are as follows:

"1. The sheriff did not properly advertise the sale as envisaged by Rule 352 of the Rules of this Honourable Court.
2. In deciding to sell by private treaty, the Sheriff did not comply with Rule 358(1) of the High Court Rules in that he did not obtain the consent of the judgment debtors.
3. The third respondent did not exercise his discretion properly in terms of the proviso to Rule 359(2) in denying the first applicant lodge (*sic*) its objections late, or at all, to sale.

4. The Sheriff did not exercise his discretion properly in terms of Rule 358(2) and resultantly did not ensure that the sale and the price offered by second respondent was (*sic*) fair and reasonable.
5. The declaration that the second respondent was the purchaser was improperly made, alternatively, was not made at all. The sheriff's letter dated 26 June 2013 states that the declaration was made on 27 June 2013, a feat which is impossible.
6. The sheriff denied applicants an opportunity to be heard before the confirmation. This was the viotion (*sic*) of High Court Rules and the common law. The first applicant received the notice to object on 15 July 2013, and the other applicants did not receive the notice at all. The sheriff went on to confirm the sale on the 23rd July 2013 before the fifteen days expired."

Order 40 r 359 of the High Court Rules, 1971 provides as follows:

> "(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 fifteen 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 the fifteen-day period but before the sale is confirmed, if he is satisfied that there is good cause for the request being made late."

The applicants did not submit a request in terms of r 359 for the sale to be set aside. Rule 359 (3) provides that such a request should set out the grounds upon which the sale concerned should be set aside. The request must also be supported by one or more affidavits detailing the facts relied upon in seeking the setting aside of the sale. There is a requirement in terms of that subrule for copies of the request to be served upon interested parties. Instead of making the request, the applicants by letter dated 15 July 2013 advised the sheriff of their intention to file an objection to the sale within fifteen days from the date of their letter. The letter itself does not purport to be a request to have the sale set aside or an objection to the sale. Neither is it a request for an extension of the time within which to make the request. Such extension is provided for in the proviso to r 59(2). The period of fifteen days passed without the applicants making the objection to the sheriff as stated in their letter of 15 July 2013. The sheriff proceeded to confirm the sale to the second respondent on 23 July 2013 because no objection was made to the sale; neither was there a request for an extension of the

time within which to make that objection or request. It is clear, therefore, that the application *in casu* is improperly before the court. It is not an application made in terms of r 359 (8). The failure by the applicant to follow the correct procedure was of the applicant's own making. There is no provision for the setting aside of the sheriff's confirmation of a sale other than by way of an application filed in terms of r 359 (8).

The complaint regarding the advertisement relates to the description of the property in the advertisement published. But the sale to the second respondent was not made pursuant to the advertisement. It was made in terms of r 358 (2) because the sheriff was satisfied that the highest price offered after the public auction was not reasonable. In any event, the advertisement was made on 26 April 2013 and the offer made at the public auction was made on 3 May 2013. The instant application was instituted on 30 July 2013, almost three months after the auction. An application for review based on the advertisement and the public auction would be out of time. There is no requirement for the consent of the judgment debtor to be obtained when the sheriff is proceeding in terms of r 358(2). Rule 358 (1) which enjoins the sheriff to seek the consent of a judgment debtor applies where a sale by private treaty is considered prior to a sale by auction. In *casu* the sale by private treaty followed after a public auction had failed to produce a reasonable offer. The applicable rule is, therefore, r 358 (2). The applicants have not produced any valuation report to show that the price offered by the second respondent is not fair and reasonable. The applicants were notified by the sheriff of the offer by the second respondent. They therefore had the opportunity to produce a valuation report on the basis of which they could contest that offer. In fact, having been aware for many months that their property would be sold in execution it was incumbent upon the applicants to obtain a valuation report for the property. They did not do that. The court cannot accept their unsubstantiated assertion that the price of US$360 000-00 was unreasonably low.

The respondents prayed for costs to be awarded against the applicants on the higher scale of legal practitioner and client on the basis that the application by the applicants is frivolous and vexatious. While the application is without merit, it does not, in my view, constitute such an abuse of the procedures of this court to warrant a punitive order of costs. It is a case in which the applicants merely adopted the wrong procedures to protect their interests and advanced grounds which, in any event, would not support the setting aside of the sale. Costs on the ordinary scale are therefore warranted.

In the result, IT IS ORDERED THAT:

1. The application be and is hereby dismissed.
2. The costs shall be paid by the applicants jointly and severally the one paying the others to be absolved.

Mabulala & Dembure, applicants' legal practitioners
Danziger & Partners, first respondent's legal practitioners
Sawyer &Mkushi, second respondent's legal practitioners