ROBSON MAKONI
versus
CBZ BANK LIMITED
and
ELTON SANGURAYI
and
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 29 January 2019 & 6 February 2019

Opposed Application

M Mututu, for the applicant
T Biti, for the 1st respondent

MATHONSI J: It is regrettable that the institution of judicial sales in execution as a procedure available to a judgment creditor to recover what has been awarded to him or her by a court of law and as an institution by which *bona fide* purchasers of property and indeed investors in real estate acquire property is fast losing its lustre and credibility as a result of debtors who presently appear unwilling to respect that process. What has gained currency at the moment is the undesirable habit by judgment debtors to do anything and everything to contest every sale in execution with whatever means possible which quite often are thin on substance but not lacking in noise and fury signifying absolutely nothing. There is therefore a pressing need, if the institution of judicial sales is to be protected from extinction, that the courts should purposely discourage frivolous and vexatious contestation of these sales.

The applicant is the registered owner of an immovable property, being stand 154 Rusape, also known as 11 Mbuya Nehanda Street, Silverbow, Rusape which he holds by Deed of transfer No. 5678/09 but has had it encumbered by Mortgage Bond numbers 433/09 and 1373/09. In HC 2525/15 the 1st respondent sued and obtained judgment against the present applicant in July 2015 and in due course issued a writ leading to the attachment and sale of the applicant's immovable property in Rusape by the Sheriff on 9 February 2018. The property was sold for $28 000 despite spirited efforts by the applicant to stop the sale.

Although the sale took place on 9 February 2018 it was not until 21 March 2018 that the applicant lodged an objection with the Sheriff in terms of r 359 (i) (b) of the High Court Rules, 1971. The affidavit of objection was deposed to by the applicant's legal practitioner, one Pepukai Mabundu who only stated:

> "I PEPUKAI MABUNDU, do hereby take oath and state that,
> 1. I am a legal practitioner practicing under the firm Mabundu and Ndlovu Law Chambers. I am also representing the judgment debtor."

It became an issue at the hearing before the Sheriff that Mabundu could not swear positively to the facts, neither did the legal practitioner state that the facts were within his knowledge. Be that as it may, the applicant raised only one ground for objecting to the sale, namely that the property had been sold for an unreasonably low price of $28 000-00 when its open market value was $90 000-00. To substantiate that assertion Mabundu attached a "valuation report" prepared by Preferred Properties Estate Agents on 19 February 2018, days after the sale, to the effect that "the open market value of the said property as at 19th February 2018 is US$90 000-00".

In contesting that objection the respondent raised quite a number of points chief of which was that the affidavit of objection deposed to by Mabundu was of no legal consequence because the rules required the judgment creditor "himself" to file the objection. If the objection were to be made on behalf of the judgment debtor by the lawyer the latter must establish the legal basis for the objection. As Mabundu did not purport to have personal knowledge of the facts the objection was defective.

The respondent also drew attention to the valuation report filed by the applicant holding that it was invalid by reason that it was not a sworn valuation. In addition, the qualifications of Faith Mushambi who prepared it were not stated. Apart from that, the said valuation adverted to a market value of the property which is irrelevant considering that the Sheriff's sale is a forced sale. To the extent that the valuation in question was not based on the forced value, it was of no use and could not be used to discredit the Sheriff's sale.

In his ruling, the Sheriff upheld the objection relating to the affidavit of Mabundu. He reasoned that the founding affidavit was unacceptable in that the deponent did not state the basis upon which he made the affidavit or that he had personal knowledge of the facts contained in the affidavit. In addition to that, the Sheriff rejected the applicant's valuation report on the basis that it was not a sworn statement. As it was not made under oath, it was of the evidentiary value.

The applicant was unhappy with findings of the Sheriff in confirming the sale and made this application purportedly as a review application on two grounds namely that:

(a) The Sheriff was biased in the manner in which he handled the objection; and

(b) The Sheriff's decision to dismiss the objection is very unreasonable given the valuation report of $90 000-00 relied upon by the applicant.

Regarding bias, the applicant did not substantiate it at all. The closest he came to relating with the issue is para 13 of the founding affidavit which states:

> "13. The Sheriff in her decision showed bias as against the applicant in that she dismissed the affidavit which was deposed to by applicant's legal practitioner of record who, according to the previous dealings between the parties had knowledge of the facts he had deposed to."

Since when did an adverse finding on a dispute constitute bias? It is trite that in our law, he or she who alleges, must prove. Where an applicant alleges that a tribunal is biased, the said bias must be stated so that the court is satisfied from the facts set out that indeed the potentiality of bias exists. It has never been a factor of bias that a tribunal has made a decision not favourable to the applicant. Adjudication in adversarial proceedings by its very nature involves disappointing one of the parties while deciding in favour of the adversary. That is the whole essence of adjudication. Where the tribunal has arrived at a decision which it is able to justify by giving reasons how it is arrived at, that is enough. It cannot, by any stretch, be regarded as indicative of bias that a decision has been made which a party is not happy with. Indeed the fallacy of that ground of attacking the decision of the Sheriff is shown by not only the applicant's inability to substantiate it but also by Mr *Mututu's* signal failure to advance any meaningful argument in that regard.

Nothing more needs to be said about that meritless argument other than to register indignation at what is fast becoming common place in this jurisdiction, the readiness of litigants even with the benefit of legal counsel, to gratuitously launch endless and unjustified accusations of bias against judicial officers. It is a respected principle of our justice system that decisions of the courts and other tribunals should be subjected to intense scrutiny and indeed criticism where they are shown to be wrong. That is acceptable and healthy in any democratic society as it enhances not only the rule of law but also advances our jurisprudence.

It is however extremely unacceptable for litigants to derive sadistic pleasure in taking undeserved pot shots at judicial officers and their decisions without even beginning to make sense. It is retrogressive and a lamentable lack of respect for judicial office for litigants to exhibit excitable readiness to direct false and unwarranted accusations of bias at the slightest available opportunity. Our legal system provides robust and time-tested mechanisms for redress to litigants aggrieved by decisions of the courts and other tribunals which should be put to use instead of resort to undermining the authority of the courts and other quasi-judicial institutions. As demonstrated above the applicant in this case is also guilty of that.

The applicant also challenged the decision of the Sheriff to confirm the sale on the basis that the property was sold at an unreasonably low price. This is because he had submitted to the Sheriff a valuation report which pegged the market value of the property at US$90 000.00. Mr *Mututu* persisted with that line of argument even after Mr *Biti* for the first respondent had submitted authority for the proposition that a valuation report which is not made on oath is of no evidentiary value at all. It is useless. Mr *Biti* also made the submission, correctly in my view, that a sheriff's sale is concerned mainly with the forced value of the property being sold and not the open market value as assessed by Faith Mushambi of Preferred Properties Estate Agents.

In that regard, whether Mushambi submitted a valuation certificate in which she listed the organisations in which she is a member or not pales to insignificance in light of her pursuit of an irrelevant valuation. She simply missed the point and the Sheriff's sale cannot be impugned on the strength of a spectacularly irrelevant valuation. In my view, there is no discernable misdirection on the part of the Sheriff in rejecting the applicant's valuation report. The reasoning is sound and beyond reproach. In fact when arriving at that decision, the Sheriff relied on the authority of *Zimunhu* v *Gwati & Ors* 2002 (1) ZLR 602 (S) at 604H – 605A where SANDURA JA pronounced:

> "The third reason why the valuation report is of no value is that it is not made under oath. In addition, it does not show the qualifications of the person who carried out the valuation. In any event, a valuation is an opinion of the person who made the valuation and one opinion does not constitute market value."

In that case the court made it clear that for a valuation report to be taken into account, it must be a sworn statement. That relied upon by the applicant was not. In addition, the court followed the reasoning in *Zvirawa* v *Makoni & Anor* 1988 (2) ZLR 15 (S) at 17D – E where MANYARARA JA said:

> "It is settled that the market price of property lies between the highest and lowest prices which the property could reasonably be expected to fetch in the open market. It is also settled that what is meant by an unreasonably low price is a price which is substantially less than the market price …. As the learned judge in the court *a quo* indicated in not so many words, Mr Watson's report, however well informed does not assist in the ascertainment of the market price in this case, if only because it does not indicate the upper and lower limit upon which he arrived at his figure…"

If one applies that reasoning to the facts of this case, even if one were to accept for a moment Mushambi's valuation, all it does is to peg the upper limit price which is what she calls the open market value. We know that the correct price lies below that. As she did not set out the lower limit, nothing can be gained from her unsworn statement. In my view the matter is resolved.

Mr *Mututu* for the applicant spent a lot of time on the findings by the Sheriff that the applicant's legal practitioner's founding affidavit was unacceptable. I agree with Mr *Biti* that these findings are insignificant though sound, because the Sheriff decided the matter on the merits. He concluded that the applicant had not shown that the price that was achieved was unreasonably low.

Looking at this application in totality it lends credence to the view that the institution of sales in execution is under threat from debtors who have no respect both for their commitments to pay debts and the process of the law available to creditors to seek recourse from the courts. Quite often stubborn resistance to execution is pursued by defaulters for no tangible reason than to frustrate legitimate claims. It has been stated that courts of law should not lightly set aside sales in execution under r 359 as that may have a profound defect upon the efficacy of this type of sales as would be purchasers would be deterred from attending and bidding if they consider that their efforts might be frustrated by an application like the present. See *Lalla* v *Bhura* 1973 RLR 280 (G) In my view, these unscrupulous defaulters should know that the courts will not come to their rescue for no apparent reason. They should simply service their debts or face the consequences of losing their homes.

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

Mabundu & Ndlovu Law Chambers, applicant's legal practitioners
Tendai Biti Law, respondent's legal practitioners