ASHURST INVESTMENTS

versus

THE SHERIFF OF THE HIGH COURT OF ZIMBABWE

and

TRISTAR INSURANCE COMPANY (PVT) LTD

and

CHARLES CHIRUME

and

REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE

DUBE J

HARARE 26 January 2012 and 10 April 2012

**Opposed Application**

*Advocate Zhou*, for applicant

 *B Mtetwa*, for the respondents

DUBE J: This is an application to set aside a judicial sale in terms of Rule 359 of the High Court of Zimbabwe Rules, 1971. The applicant is the judgment debtor, his property was attached and sold in execution. The applicant seeks to set aside an agreement of sale entered into between the first respondent, the seller of the property in issue who is the Sheriff of the High Court of Zimbabwe and the authority charged with conducting judicial sales in execution, (the Sheriff) and the third respondent. The third respondent is the buyer of the property whilst the fourth respondent is the Registrar of Deeds. The second respondent is the judgment creditor.

The facts of this case are as follows:

The second respondent obtained a judgment against the applicant in HC. 7540/10 and HC. 558/11. Pursuant to the judgement the applicant’s property was attached and sold in execution on 18 February 2011. On 4 March 2011, applicant’s legal practitioners objected to the sale of the property for $US 50 000,00 on the basis that the price was unreasonably low. The execution process proceeded. Following a public auction, the first respondent and the third respondent entered into a written agreement of sale for the sale of stand 169, Philadelphia Township of lot 8 of Philadelphia, (herein after referred to as the property). The contract of sale stipulated that the purchase price should be paid by 30 April 2011. On 29 April 2011 the judgement debtor satisfied the debt owed to the judgment creditor. The Sheriff was advised of that fact by letter dated 31 April 2011. On 6 May 2011, the judgment creditor confirmed by letter to applicant that the debt had been satisfied. The buyer failed to pay the purchase price of the property by the stipulated date and only managed to do so on 10 May 2011.The Sheriff later confirmed the sale and transfer into the buyer’s name has not yet been effected. Third respondent’s explanation for the failure to pay on due date is that he only became aware on the 28th of April 2011, that the Sheriff had signed the agreement of sale on 26 April 2011 and that he only began making arrangements to pay the purchase price then.

 The parties agreed that there was only one issue remaining to be resolved. Advocate *Zhou* who represented the applicant submitted that the Sheriff cannot condone non –compliance with the terms of an agreement of sale. He submitted further that the third respondent’s explanation for non - compliance is irrelevant and that the law requires the sheriff to comply strictly with the terms of the contract of sale, leaving him with no discretion in the matter. Mrs *Mtetwa* representing respondents conceded the point that the Sheriff cannot condone non- compliance with the terms of the agreement of sale and that failure to pay the purchase price on due date entitled the Sheriff to cancel the contract of sale. She submitted however, that the Sheriff, failed to comply with a term of the agreement of sale by failing to give the buyer notice that he was in breach. She drew the court’s attention to clause 7 of the agreement of sale which she submitted requires the Sheriff to give written notice to the buyer to remedy the breach within 14 days of the posting of a written notice and that he failed to do so. She contended that as there was no notice given to the buyer to remedy the breach, the seller failed to comply with the terms of the agreement of sale and that strict compliance would have required the seller to give notice in terms of clause 7. That as the seller failed to comply with this requirement, there is no legal basis to set aside the sale.

Both parties were agreed that the buyer failed to pay the purchase price by due date and that the buyer was in breach by virtue of his failure to pay the purchase price by 30 April 2010. Counsel however diverged over the legal implications of the Sheriff’s failure to comply strictly with the requirement to give notice and the effect of the subsequent acceptance of the purchase price by the Sheriff.

The issue that this court is being asked to determine is whether or not the indulgence the Sheriff granted to the buyer, by accepting the money after the due date, without having posted any notice in terms of clause 7, was one he was entitled to give and whether failure to adhere strictly to the terms of the agreement of sale the parties entered into constitutes a ground for setting aside the sale in terms of r 359.

Rule 359 provides as follows;

359 “(1) Subject to this rule, any person who has any interest in a sale in terms of this Order may request the sheriff to set it aside on the ground that-

1. the sale was improperly conducted; or
2. The property was sold for an unreasonably low price;

Or on any other good ground.”

Where a sale has been confirmed, any person with an interest in the sale who is aggrieved by the conduct or outcome of a judicial sale, may raise objections with the Sheriff and apply to court to have the sale set aside in terms of rule 359.It is more onerous to try and set aside a confirmed sale than an unconfirmed one as the courts are at this stage reluctant to interfere. This approach was aptly summarised in *Mapedzamombe* v *Commercial Bank of Zimbabwe and Anor* 1996 (1) ZLR 257 (S) where the court said the following;

“Before a sale is confirmed in terms of r 360, it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. See *Lalla v Bhura* supra 1973 (2) RLR 280 at 283A-B. 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 to do so. See *Naran* v *Midlands Chemical Industries (Pvt) Ltd* S-220-91 (not reported) at p6-7.”

Rule 360 was repealed by S.I. 80 of 2000 and the procedure for confirmation of a sale is now provided for in r 359.

This approach is based on the principle *Quoniam fiscalis haste fides facile convellinon debeat* which basically means that the public will lose confidence in judicial sales if courts were to easily interfere with judicial sales. Our courts are generally reluctant to interfere with judicial sales on the basis that the public will lose confidence in the process of judicial sales.

This court has a wide discretion in terms of r 359 when determining what factors to it constitute “any other good ground” for setting aside the sale. The court is required, in exercising its discretion to consider whether or not the irregularity complained of is one that entitles this court to set aside the sale in terms of r359.The court will therefore consider the nature of the irregularity as well as the legal implications of non-compliance with the requirement.

The court will now proceed and determine the clause in issue. The agreement of sale provides in Clause 7 as follows;

“7.Notwithstanding anything to the contrary hereinafter contained ,the seller shall, in the event of the Purchaser failing to pay any sum owing under this agreement on the due date or in the event of any breach of any other conditions of this Agreement of sale not being remedied within fourteen days of the posting of a written notice to the purchaser requiring the purchaser to do so, notwithstanding any previous indulgencies or concessions given by the seller to the purchaser be entitled forthwith to cancel and terminate this agreement of sale in which event the purchaser shall forfeit to the seller as Rouwkoop all monies paid under this agreementor alternatively the seller shall have the option to institute legal proceedings against the purchaser for the balance of the purchase price then owing under this Agreement of sale and for any other monies due to the seller whichever the seller shall elect without prejudice to any remedy which the seller might have against the purchaser.------”

The clause is in line with the provisions of r 357 which provides that where the purchaser fails to carry out any of his obligations under the contract of sale, the Sheriff shall cancel the sale after giving due notice to the purchaser and the property may again be put up for sale. The clause in issue was clearly crafted in order to meet the requirements of R 357.

The intention of the parties to the contract, was clearly that in the event of the buyer breaching any of the conditions of the agreement of sale or failing to pay any sum owing under the agreement on the due date the buyer would be placed *in mora.* This would afford the purchaser an opportunity to remedy the breach. The clause gives directions or options regarding the future course open to the Sheriff in the event of the buyer failing to remedy the breach within 14 days of the posting of written notice. The notification if exercised, would have the effect of extending the period of payment of the purchase price and would also chart the course the sale would take. The notice was meant to serve as notification to the buyer that he was currently in breach of contract. If the Sheriff wanted to cancel the contract for breach, he was required to place the buyer in *mora* first and in the event of the buyer failing to pay by the sum owing by the stipulated date, the Sheriff would be entitled to cancel the contract. The essential part of the contract is the requirement to give the buyer 14 days within which to remedy the breach.

The buyer failed to pay the purchase price by due date. The Sheriff was expected following the breach, to give written notice to the buyer, to remedy the breach within 14 days of the posting of the notice. Failure by the buyer to pay the sum owing within 14 days of the posting of notice would have entitled the seller to cancel the agreement of sale. The buyer paid the full purchase price before any notice was given to him. Contrary to this condition the seller failed to give notice in terms of the clause and proceeded to accept the purchase price 10 days after the due date. It is not clear from the pleadings if the failure to notify the buyer to remedy the breach was deliberate or was simply an omission on the part of the Sheriff. If the Sheriff intended to issue the notice at a subsequent stage, he was bitten to it by the buyer. The Sheriff did not comment on the matter when requested to do so in terms of the rules.

There are a number of cases in our jurisdiction that have considered irregularities occurring in judicial sales, the discretion the Sheriff has in such sales and the effects the irregularities have on such sales. In *Maparanyanga* v *The Sheriff of Zimbabwe and Ors* 2003 (1) ZLR 325 at p 338, GWAUNZA J said the following on the discretion that a Sheriff has with regard to judicial sales,

“In the case where the common law, the rules of the court and the administrative requirements of an office responsible for enforcing judgments are flouted, the court would be failing in its duty if it condoned such disregard of the law and rules. It would be doing exactly that where it to allow the sale in question to stand.”

The court emphasized the requirement for the Sheriff to adhere strictly to rules, regulations and contracts governing judicial sales. Another case in point is *Kanokanga* v *Messenger of Court* SC 68\06 where the court said the following on the need to adhere strictly to rules and procedures,

“Courts do not condone blatant disregard of rules governing judicial sales by officers whose mandate it is to uphold the rules. Such disregard does have the undesirable effect.... of bringing judicial sales into disrepute, and should be discouraged in the strongest terms.”

The Sheriff’s role remains purely that of a facilitator of such sales and his discretion is limited to the requirements of the sale and the rules. Both r 357 and the clause provide that the Sheriff shall, where the buyer has been given notice to remedy the breach and has failed to remedy such breach, cancel the sale. There is a condition precedent to the cancellation of the sale. The buyer must first be placed *in mora.* The Sheriff was required to comply with the formality of giving notice first before he could exercise the power to cancel the sale or accept the purchase price. This means that whether or not he was subsequently going to exercise the entitlement to cancel the sale or accept the purchase price, the Sheriff was expected to comply with the requirement to give notice to remedy the breach first. The use of the word “shall” denotes a peremptory requirement which is therefore mandatory. Failure to comply with a mandatory requirement renders a transaction null and void. As enunciated in Maxwell Interpretation of Statutes 7 ed, p 316:

“Where powers are ... granted with a direction that certain regulations, formalities or conditions shall be complied with it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the ... authority conferred, and it is therefore probable that such was the intention of the legislature”

This principle was followed in *Chizikani and Anor* v *Central African Building Society* 1988(1) ZLR 377 (SC).

 The power to cancel the contract was subject to the giving of notice. It was unprocedural and irregular for the sheriff to accept the buyer’s money without having given the requisite notice. The Sheriff had no discretion to dispense with the requirement to post written notice to the buyer. He was expected to comply strictly with the requirements of the contract of sale.

The second consideration is whether or not the irregularity is a material or essential formality that goes to the root of the contract. This principle was well enunciated in *Mackeurtan’s Sale of Goods In South Africa on p 253,* as follows,

“…it is not every formality the omission of which will give rise to the right under discussion, for as Matthaeus observes, although the formalities of a judicial sale must be observed to a nicety, if only an unessential or unimportant formality has been omitted, the sale will not thereby be vitiated. The reason for this is, he says is the maxim *minima praetor noncurat* and the fact that it is not consonant with good faith to wrangle over infinitesimal points of law (*de apicibus juris*) (Exparte Roberts 3 SC 208)”

The requirement to post notice is related to terms of payment of the contract of sale. The Sheriff qualified a term and condition of payment by accepting payment from the purchaser without having posted the required notice. Terms of payment of a contract of sale are by their nature material and essential as they form the basis of the contract. It is in that regard that the court finds that the term is material and is an essential term of the contract which was required to be complied with strictly. It follows therefore that failure to comply strictly with that requirement renders the contract a nullity.

Another valid consideration is that of prejudice. The test to be applied was laid down in *Jockey Club of South Africa & Ors v Fieldman,*1942 A,D340 AT *359* where the court remarked as follows,

“In respect of civil cases a test has been formulated in various decisions in Provincial Courts for instance, *Stemmer v Sabina* (1910,TS 479) and *Ablansky v Bulman* (1915 TPD71),where it was held that if the irregularity complained of is calculated to prejudice a party he is entitled to have the proceedings set aside unless the court is satisfied that the irregularity did not prejudice him.”

The Sheriff is expected to adhere strictly to and comply with requirements of sale so that neither the judgment creditor nor judgment debtor is prejudiced by an improperly conducted sale. In any sale which is attended by irregularity, which prejudices the debtor or if any undue advantage has been taken to the prejudice of the debtor, that sale may be set aside. This is especially so where the irregularity is attributable to the sheriff. Similar sentiments were expressed in the case of *Marfolous* v *Zimbank and Ors* 1996(1) ZLR 626(H) and are summarised in the head note as follows,

“The rules that have evolved concerning the sale of properties in execution are designed to find a balance, on the one hand, between the need to protect a judgment debtor who may unfairly be hounded to insolvency and homelessness and, on the other hand, the need to ensure that the judgment creditor, forced to go to court to obtain satisfaction of his debts, is provided with just relief. A further and major factor that is taken into account is the requirement that the reliability and efficacy of sales in execution be upheld.”

In every judicial sale, there are other people with a vested interest in the sales whose interests need to be secure. The Sheriff ought to have considered the fact that the judgment debtor had since paid his dues and further that the debtor was on the verge of losing his property. He allowed the buyer to pay the purchase price when he was aware of these developments and without following the terms of the contract. The Sheriff was not sensitive to the rights of the judgment debtor. The interests of the debtor were sacrificed and there was some unjust and unfair dealing. The conduct of the Sheriff discloses bad management on his part. If he had been alert he would have issued the notice immediately upon failure by the buyer to pay the purchase price. If this sale proceeds, the Sheriff will have the last laugh. The wrongdoer cannot be permitted to benefit from his own wrongdoing. This principle is no different from the ‘unclean hands’ doctrine which discourages courts from granting relief to parties whose conduct is wrong, unfair or deceitful. The Sheriff also clearly acted in bad faith as he was aware that the debt had been cleared. The Sheriff is an officer of the court and an agent of the court in a judicial sale in execution. His conduct is expected to be above board.

This court takes cognisance of the requirement in applications of this nature, to ensure that the reliability and efficacy of sales in execution is upheld. This court is however of the view that public confidence is also best conserved or retained by interfering with this sale. What is also true and possible in my view, is that the public may lose confidence in the process if judicial sales are not conducted in conformity with laid down rules and procedures. Both sides of the coin should be considered by the court. The applicant has shown the existence of good reasons why the court should interfere with the sale. Besides the key reason for upsetting this sale, which is the failure to adhere strictly to laid down formalities and rules, the court has considered that the debt has already been cleared and that there is no prejudice that the judgement creditor will suffer if the sale is set aside. The debtor will unnecessarily be hounded to homelessness when his efforts to stop the sale upon satisfaction of the debt, were not heeded to.

This court is also mindful of the sentiments expressed by DAVIES J in *Lalla v Bhura* 1973 (2) RLR280 (G) where at 283F the learned judge remarked that the basis of this relief is such that the court "can and should properly have regard to equitable grounds" other than irregularity in the sale or deficiency in the price obtained. In addition to the irregularity complained of, the court has also considered that the respondent has sold his family home and is now living in rented accommodation. The debtor on the other hand stands the risk of losing its property due to economic misfortune. What is in the applicant’s favour is the fact that it satisfied the debt and informed the Sheriff of this fact before the buyer paid the purchase price and hence tried to intervene early enough and prevent the sale. The judgment creditor also advised the Sheriff of this fact. Equity demands that the sale be set aside.

The court is satisfied that the sheriff acted unreasonably and negligently by failing to give the required notice and acted improperly by accepting the purchase price without complying with the necessary formalities. The applicant has established good grounds warranting this court to interfere with the sale process. This sale cannot stand.

In the result, the application is allowed. Costs follow the event.

*Matimba and Muchengeti*, Applicant’s legal practitioners

*Mtetwa and Nyambirai*, Respondents’ legal practitioners