REPORTABLE ZLR (37)

Judgment No. S.C. 43/02

Civil Appeal No. 297/00

MICHAEL MUZONDIWA ZIMUNHU v

(1) DOCTOR B GWATI
(2) ZIMBABWE BANKING CORPORATION LIMITED
(3) SMALL ENTERPRISES DEVELOPMENT CORPORATION
(4) UNITED REFINERIES LIMITED (5) SCOTFIN LIMITED (6) SHERIFF OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA AJA
HARARE MAY 13 & JUNE 13, 2002

*I E G Musimbe*, for the appellant

*F Girach*, for the second respondent

No appearance for the first, third, fourth, fifth and sixth respondents

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellant's application for an order setting aside the sale in execution of his immovable property ("the property").

The relevant facts are as follows. The appellant owed the second respondent ("Zimbank") the sum of $1 941 127.00. Zimbank instituted legal proceedings against him and obtained an order compelling him to pay that sum together with interest at the rate of 43% per annum from 1 June 1996 to the date of payment in full, compounded monthly on the last day of each month, and costs of suit.

Thereafter, a writ of execution was issued and the appellant's immovable property was attached and sold by public auction on 24 September 1999. Before that date, the third, fourth and fifth respondents, all of whom were judgment creditors of the appellant, lodged their writs of execution with the sixth respondent ("the Sheriff") in order to participate in the distribution of the proceeds from the sale of the property.

The first respondent, whose bid was $1 050 000.00, was the highest bidder. He paid the required deposit of $105 000.00 on 24 September 1999, and was declared the purchaser of the property by the Sheriff on 4 October 1999.

Subsequently, before the sale was confirmed by the Sheriff, the appellant filed a court application in the High Court seeking an order setting it aside. That application was dismissed with costs. Aggrieved by the decision, the appellant appealed to this Court.

The appellant sought the setting aside of the sale on two grounds. The first was that the property was sold for an unreasonably low price, and the second was that the sale should be set aside on equitable grounds.

In submitting that the property was sold for an unreasonably low price, counsel for the appellant relied upon a valuation report prepared by an estate agent. That report indicates that in October 1998 the forced sale value of the property was $2 325 000.00 and that its market value was $3 100 000.00.

In my view, the report is of little or no assistance to the appellant, who must establish, on a balance of probability, that the property was sold for an unreasonably low price. I say so for at least three reasons.

Firstly, the valuation was carried out about twelve months before the sale. Such a valuation could hardly reflect the value of the property at the time of the sale, bearing in mind the fluctuating prices on the property market. A more recent valuation, giving a reliable indication of the value of the property at the time of the sale, should, therefore, have been produced.

Secondly, the valuation does not indicate the upper and lower limits of the suggested market price. In my view, every valuation should reflect such limits, to enable the Court to properly determine whether the price at which the property was sold is unreasonably low, bearing in mind the expected range of prices.

Thus in *Zvirawa v Makoni & Anor* 1988 (2) ZLR 15 (S) at 17 D-E this Court 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 limits upon which he arrived at his figure …".

The third reason why the valuation report is of no value is that it was 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. Thus, in *Thirlwell v Johannesburg Building Society & Ors* 1962 (4) SA 581 (D) at 586 F-G HENNING J said:

> "… the applicant faces a fairly formidable task to show that the price realised at the auction was not a fair market value of the property. His case as to value is mainly based upon two recent valuations of the property. Before I deal with those valuations I would refer to the case of *Estate Hemraj Mooljee v Seedat*, 1945 NPD 22 at p 24, where SELKE J, after saying that a price realised in open competition is properly to be regarded as indicating the market price of the property, proceeded to say at p 25, when dealing with evidence of a sworn valuation:
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> > 'But however that may be, the opinion of Mr Mallinson, though possibly entitled to some weight, is, after all, merely the opinion of a valuator and must, it seems to me, be of considerably less value than definite information about the price actually offered for the property in *bona fide* competition at auction, after due and proper advertisement.'
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> As was pointed out in *Buxmann's Executors v The Master and Ors*, 1932 CPD 241 at p 249, sworn appraisements often vary widely in amount. The acid test is what the property concerned will fetch in the market …".

Those comments, which were made in relation to a sworn valuation, apply to the present case with greater force because the valuation relied upon by the appellant was not sworn.

As already stated, the highest bid was $1 050 000.00. Central Real Estate Agents (Private) Limited, the company which conducted the auction, indicated in its report to the Sheriff that in its opinion the forced sale value of the property was $720 000.00 and the market value was $900 000.00. In the circumstances, it described the highest bid as excellent.

In addition, the Deputy Sheriff, the commissioner in whose presence the public auction was conducted, certified that the auction was duly and properly conducted and that the price achieved was fair.

In the circumstances, the appellant failed to establish that the property was sold for an unreasonably low price.

I now wish to deal with the submission that the sale should be set aside on equitable grounds. Four "equitable" grounds were advanced by the appellant.

The first ground was that if the sale is allowed to stand the proceeds from the sale of the property would be insufficient to discharge all the appellant's debts, whereas a sale of the property by private treaty would realise at least $2 000 000.00, which would clear all the debts. I do not think this has ever been recognised as a basis on which a sale in execution may be set aside, unless there is a firm offer by a prospective purchaser to pay a price higher than that achieved at the public auction, as was the case in *Woods v Spence & Anor* 1978 RLR 254 (GD). That certainly is not so in the present case.

The second "equitable" ground advanced by the appellant was that he was arranging a sale of the property by private treaty, which would realise at least $2 000 000.00.

However, it was common cause that no-one had offered to purchase the property at that price, whether before or after the sale. All that happened was that about four days before the sale, the appellant instructed Crusader Real Estate (Private) Limited to sell the property by private treaty as quickly as possible in order to avoid the sale by public auction which was imminent.

Commenting on the appellant's second "equitable" ground, Zimbank averred as follows in its opposing affidavit:

> "The second respondent (Zimbank) has, along with the other creditors, Scotfin and Sedco, allowed the applicant (now the appellant) ample time in the past to arrange for the sale of his property by private treaty. Indeed, the second respondent has previously arranged for the sale in execution of property belonging to the applicant but has cancelled the sales to enable the applicant to sell the property by private treaty. Regrettably to date previous promises have not been adhered to and no private treaty sales have been concluded."

These averments were not seriously challenged by the appellant in his answering affidavit. All he said was that he had not been given ample time within which to sell the property by private treaty. He did not deny that Zimbank had previously arranged the sale of his property by public auction but had cancelled such sales to enable him to sell the property by private treaty.

I am, therefore, satisfied that there is no substance in the second "equitable" ground.

The third "equitable" ground advanced by the appellant was that at the time of the sale he had and still has alternative means of settling the respondents' debts. In this regard, it was submitted that the appellant intended selling his immovable property at Darwendale, which had been subdivided into stands, for at least $2 500 000.00.

One wonders why the appellant has not paid his debts, if he has alternative means of doing so. The application for the authority to subdivide the immovable property in question was filed with the relevant Ministry in April 1997, and a permit authorising the subdivision was issued in 1998. Since then, the appellant has not sold any of the stands in order to pay his debts.

In the circumstances, it seems to me that the appellant has not exhibited a serious intention to pay his debts. There is, therefore, no substance in the third "equitable" ground.

I now come to the fourth "equitable" ground, which was that the first respondent, who purchased the property at the public auction, and the third, fourth and fifth respondents, who are creditors of the appellant, did not oppose the appellant's application. It was submitted that because of that the sale should be set aside.

With respect, I disagree with that submission. The property was sold by public auction at the instance of Zimbank, which had been forced to go to court to obtain satisfaction of its debt. In considering whether to grant the equitable relief

sought by the appellant, the Court ought to weigh the appellant's interest in setting aside the sale against Zimbank's right to the payment of its debt by him. The fact that the other respondents did not oppose the appellant's application is irrelevant to that exercise.

In my view, it is only when the balance of equities is in favour of the judgment debtor that a sale in execution should be set aside on equitable grounds. In the present case, I am not satisfied that that is so. The appellant has not exhibited a serious intention to pay his debts, notwithstanding the fact that he has immovable property which he could sell in order to raise the required money. It appears that he is entirely to blame for the sale of his property by public auction.

As GILLESPIE J said in *Morfopoulos v Zimbabwe Banking Corporation Ltd & Ors* 1996 (1) ZLR 626 (H) at 634D:

> "All too frequently, however, the debtor finds himself in an invidious position relating to the loss of his home precisely because of his own failure to address the problem efficiently at an early stage. Where his own tardiness or evasion has contributed to his problems, a debtor cannot hope to persuade a court that equitable relief is his due."

The learned judge's comments apply to the present case with equal force. I am not convinced that the appellant is entitled to any equitable relief.

Finally, I wish to say that, generally speaking, courts should not readily interfere with sales in execution. The reason for this was stated by DAVIES J (as he then was) in *Lalla v Bhura* 1973 (2) RLR 280 (GD) at 283A as follows:

"… if the courts were over ready to set aside sales in execution under rule 359,

> this might have a profound effect upon the efficacy of this type of sale. Would-be purchasers might well be deterred from attending and bidding if they considered their efforts might easily be frustrated 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 the present case, there is no reason why the sale in execution should be set aside.

In the circumstances, the appeal is devoid of merit and is dismissed with costs.

ZIYAMBI JA: I agree.

GWAUNZA AJA: I agree.

*I E G Musimbe & Partners*, appellant's legal practitioners

*Gill, Godlonton & Gerrans*, second respondent's legal practitioners