DODS BAKERS (PRIVATE) LIMITED
versus
CENTRAL AFRICA BUILDING SOCIETY

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 10 and 12 July 2018

Opposed Matter

Applicant in person
E. Donzvambeva, for the respondent

MUNANGATI-MANONGWA J: The applicant has approached this court in terms of order 40 r 59 (8) and (9) of the High Court Rules seeking the setting aside of a sale in execution which the Sheriff confirmed on 22 March 2017 as Sheriff's Sale 04/17. The application is vehemently opposed.

The facts of the matter are as follows: The respondent obtained an order from this court on 16 December 2015 compelling the applicant to pay $275 385-19, interest and costs. A writ of execution was duly issued and property being stand 303 Umtali Township measuring 1115m^2 was attached and subsequently auctioned on 3 February 2016. The property was sold for US$180 000-00 and the applicant objected to the confirmation of the sale. The Sheriff dismissed the objection on 22 March 2017 on the basis that the applicant had failed to show that the property was sold at an unreasonably low price and or failed to justify why the sale should be set aside.

The applicant has raised the following issues in his current application:

(a) that the Sheriff erred in not advising the applicant of the need to place evidence before him and in not granting him reasonable time to furnish evidence.

(b) that the Sheriff should have satisfied himself that the balance claimed is lawfully due.

(c) that it was unfair for the respondent to be allowed to buy the property in the face of prospects of sale to a third party.

(d) further the amount for which the property was sold for had been refused by the creditor. That the price realised was unreasonably low.

The applicant in his affidavit referred to a document it referred to as 'a valuation and account and prospect of sale memorandum.' In essence this document is the objection filed with the Sheriff and contained a proposition to sale to a purported prospective buyer who allegedly intended to pay up to $350 000-00 for the property. It is not a valuation report.

The respondent raised a point *in limine* that the application was out of time given the provisions of r 359 (8) which states:

> "8 Any person who is aggrieved by the Sheriff's decision in terms of subrule 7 may within one month after he was notified of it, apply to court by way of court application to have the decision set aside."

The respondents argued that the decision of the Sheriff was/is dated 22 march 2017 hence the application had to be filed latest on 9 May 2017. The respondent further submitted that even accepting the applicant's position that it became aware of the determination on 8 May 2017, the deadline for filling the application would be the 22nd June 2017. Thus the application having been filed on the on 6 July 2017 would still be out of time. In the absence of condonation for failure to comply with the rules the application should be dismissed on that basis.

The applicant who although on the papers seems to have been represented by Chizikani Legal Practitioners had indicated in his replying affidavit that he was seeking condonation if the court were of the view that the application was done out of time. It does not escape the court's eye that despite the reflection of the name "Chizikani" on the applicant's papers, the affidavits are drafted in a way which does not reflect a legal mind at work. This is especially so in the answering affidavit which does not give attention to averments in each paragraph as would be expected and required by the rules. Further the affidavit is devoid of information, constituting only 6 paragraphs which do not address the extensive issues raised in 10 paragraphs of the opposing affidavit. The applicant's representative Mr Gabriel Chaibva who appeared in person after Mr Chizikani failed to turn up on the initial day, pleaded with the court that condonation be granted and the matter be heard on merits. The court hereby grants condonation for failing to adhere to the rules taking note that the delay in filing the application was not prolonged the applicant missed the deadline by about 14 days accepting its evidence on when it became aware of the Sheriff's ruling. Further it is in the interests of justice that the matter be heard on merits. In that regard the application will be determined on the merits.

In support of the application Mr Chaibva submitted that, if he had been given sufficient notice by the Sheriff he would have brought evidence that there indeed was a prospective buyer for $350 000-00. Further there was no open competition at the auction as the creditor was a participant in the process. As of the hearing date, offers by prospective buyers stand at $220 000.00. The respondent's counsel maintained that the applicant had failed to discharge the onus upon it to satisfy the court that the price accepted by the Sheriff was unreasonably low. It had not placed before the court nor the Sheriff any evidence that the property was worth much more than it was sold for and similarly no evidence was placed before the Sheriff that indeed there was a prospective buyer who had offered the $350 000.00 as alleged.

The setting aside of a sale in execution in this instance is provided for under Rules 359 sr 1 and 8 which in essence provide that:

> "… any person who has an interest in a sale may make a court application to have the sale set aside on the grounds that:
>
> (a) a sale was improperly conducted or
>
> (b) the property was sold for an unreasonably low price or any other good grounds."

The applicant has to state the grounds of the objection and upon hearing the application:

> r 359 (9)"(a) the court may confirm, vary or set aside the Sheriff's decision or make such order as it see appropriate in the circumstances."

The grounds wherein the applicant blames the Sheriff for not advising him on requirements as regards evidence to be placed before him and that the Sheriff should have checked on the correctness of the balance are without merit. It is not for the Sheriff to legally advise a litigant on how to prosecute his/its case. Whilst the applicant failed to produce evidence of the offer pertaining to a prospective purchaser who ia alleg to have over $300 000.00 this evidence could still have been included in this application which the applicant failed to do. Further, once the court has granted an order pertaining to indebtedness the Sheriff cannot challenge or interrogate that order.

Pertaining to the appropriateness of the respondent buying the property at an auction, no evidence was placed before the court that there was a bidder who offered more than what the ultimate buyer paid. Nothing prevents a creditor from participating in an auction where there is no evidence of the creditor influencing the outcome. In any case, the creditor purchased the property for the exact amount that the applicant had initially offered to the respondent being US$180 000.00. In his submissions the applicant indicated that during the auction the highest

price that had been offered was below $140 000.00 and when he expected the hammer to fall the judgment creditor offered $180 000.00. The court notes that this is evidence from the bar which is common with self-actors. Taking note of that information alone, it means the market was depressed and if anything the offer of $180 000.00 is beneficial to the debtor in terms of reduction of the debt. Whilst the applicant seeks to say a third party was willing to buy the property for much more no evidence was placed before the court of the existence of that third party, a firm offer and or proof of funds. If anything the document objecting confirmation of the sale by the sheriff refers to engagements between applicant and a private buyer willing to pay what is alleged to be upto $350 000-00 and that was in February 2017. At the time of the filing of this application nothing was said of the outcome of the purported engagement. The existence of the prospective buyer remained a bold assertion with no supporting evidence.

Where an applicant claims that the property was sold for an unreasonably low price, the onus is upon the applicant to satisfy the court that the price realised in a Sheriff's sale was unreasonably low GILLIESPIE J in *Morfopolous* v *Zimbank & Anor* 1996 (1) 626 (H) made the following remarks:

> "a litigant who wishes to discharge this burden must be fully prepared with supported valuations of the property under considerations. These valuations must reflect the upper and the lower limits of the suggested market price that the court might make determination of 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. The awe and finality which the law seeks to invest in the process of execution cannot be disturbed by ….. ill refined and non-specific averments …".

Thus when one alleges a price to be "unreasonably low" they speak of comparatives or a range of prices as noted by GILLESPIE J. Notably the Supreme Court in *Zvirahwa* v *Makoni & Anor* 1988 (2) ZLR (S) indicated that:

> "it is settled that the market price of property lies between the highest and lowest prices which the property can reasonably be expected to fetch in the open market. It is also settled that what is meant by unreasonably low price is a price which is substantially less than the market price."

It is however pertinent to note that valuations are important indicators although not decisive for the determination of fair market values. This is because prices offered in competition at an open auction which are determined by the nature of the property, demand and economic conditions cannot be ignored as reflections or indications of the market price of the property.

Of note is the fact that the applicant did not provide a valuation with indications of the upper and lower limits of the expected market price. It is these ranges that assist the court in

making a determination of the reasonableness or otherwise of the price for which the property was sold. It is on record that in one instance the applicant had written to the judgment creditors on 7 September 2016 even indicating that many buyers had pegged the property at $120 000-00 with the highest price set at $135 000-00. The letter further indicated that there was a slump in property demand in Mutare. Given that information, it is a plus that the property was then able to fetch US$ 180 000-00 less than 5 months later. In challenging the sale it has to be shown that the Sheriff did not sufficiently apply his mind to the matter when he accepted the price offered by the highest bidder. There is no evidence justifying such a finding and the setting aside of the sale, as the highest offer was found to be reasonable and in the absence of evidence indicating otherwise, the price offered represented a fair market price. The court does not find any impropriety in the way or manner in which the sale was conducted nor any other good grounds to set aside the sale. A reading of the findings of the Sheriff show that he had applied his mind to the objections and the court finds no fault in his ultimate finding. Where a sale is properly advertised and conducted the courts are reluctant to reverse the result in the absence of compelling evidence especially where the sale has been confirmed. This is partly because the public must maintain confidence in the execution process fully knowing that taking part and competing for an asset at an auction is a serious and important process the result of which can not be easily set aside as the highest bidder would have believed to have acquired rights in a fair bidding competition.

Regard being made to the aforegoing the court reaches a conclusion that the applicant's case has no merit. The applicant has failed to discharge the onus on it justifying the setting aside of the sale. The respondent seeks costs against the applicant on an attorney client scale. The loss of a property is never easy and the applicant may have received wrong legal advice from a lawyer who abandoned him, and, given that the property in question is a bakery cum residence it thus forms part of applicant's livelihood. Hence, the institution of the application cannot be said to be vexatious or reckless. As result the court will grant ordinary costs.

Accordingly, the application is dismissed with costs.

Wintertons, respondent's legal practitioners