HB 39/20
HC 1701/19

THABANI NDLOVU

Versus

CENTRAL AFRICA BUILDING SOCIETY

And

OBEY MAHWEKWE

And

SHERIFF OF HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 3 & 27 FEBRUARY 2020

I. Mafirakureva for the applicant
N. Mangena for 2nd respondent

Opposed application

MOYO J: This is an application wherein the applicant seeks to set aside a sale in execution. The facts of this matter are that applicant's immovable property namely stand number 131 Douglasdale Township 3 of subdivision 1 of Douglasdale situate in the District of Bulawayo wherein the property was sold by the Sheriff for a sum of $310 000,00

Applicant avers that the price was unjust, inequitable and unreasonable for the Sheriff to have sold the immovable property in question at a value of $310 000. Applicant based his contention on 2 valuation reports which put the open market value of the property at $566 387,50 and $480 578,00 respectively. The evaluation reports are annexed to the application. Applicant therefore avers that the sum of $310 000,00 is unreasonable low. In paragraph10 of his objection affidavit applicant seeks to be allowed to look for potential buyers and that the property be sold by private treaty or still that he be allowed to pay the debt off should he raise the requisite amount before the private sale is finalised. In his founding affidavit, the applicant in fact avers that as at

that date he had since paid off the judgment debt and therefore no longer owes anything. It would appear from applicant's papers that the basis for this application is firstly, that the sale was at an unreasonably low price, and that the debt has since been paid in full. 2nd respondent has opposed the application primarily on the basis that applicant has not made a case for setting aside the sale. Applicant's counsel argued that on the basis of the evaluation report, the sum for which the property was sold is unreasonably low warranting that the sale be set aside.

Respondent's counsel argued that it is trite that sales in execution will not be set aside easily upon every complaint and that the court will only interfere in justified circumstances, respondent's counsel argued further that applicant's case is not justified. At the hearing of the matter, the 2nd respondent's counsel raised issues on the valuation reports, that is to say they were identical in form especially even in relation to the grammatical errors in paragraphs 2 and 3 at page 25 of the bound record and at the top paragraph on page 26. Such information together with the grammatical errors is identical to the information in the other valuation report at page 14 paragraphs 2 and 3 as well as the paragraph immediately before the opinion of the Valuer. This brings to question if the valuation reports can be relied on. Whilst there could be similarity in style or wording and whilst it can be acceptable that certain professionals word their documents in a similar way, it is the grammatical errors that create discomfort. For the grammatical errors lead to a suspicion that one report was copied and pasted with slight modifications to the other report just to add weight.

What further complicates applicant's case with regard to the valuation reports which have glaring similar errors, is that they were not sworn to. This affects their probative value especially where the 2nd respondent has raised a red flag with regard to their propriety. In the Supreme Court case of *Zimunhu* vs *Gwati & Others* SC-43-02 the Supreme Court dismissed an appeal against the decision of the High Court dismissing an application to set aside a sale in execution. In that case a valuation report was used which the Supreme Court refused to accept for 3 reasons one of which was that the valuation was not made under oath and that it did not show the qualifications of the person who carried out the valuation report. The Supreme Court in that case, further stated that in any event a valuation is an opinion of the person who made the valuation and one opinion does

not constitute market value. The Supreme Court further quoted with approval the case of *Estate Hemaj Mooljee* v *Seedat* 1945 NPD 22 at 24 where SELKE J after saying that a price realised in open competition is properly to be regarded as indicating the market price said;

> "But however, that may be, the opinion of Mr Mallisa though possibly entitled to some weight, is, after all, merely the opinion of a valuation 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 an auction, after due and proper advertisement."

In that Supreme Court case, the property had been sold for $1 050 000,00 and the appellant in that case had submitted a valuation report that the forced sale value was $2 325 000,00 and that the market value would be $3 100 000,00. Of course one of the reasons why the Supreme Court rejected the valuation report was that it had been obtained 12 months down the line. Be that as it may, the issue of the weight I attach to the valuation reports before me, especially given their suspicious nature, not sworn to, and with no qualifications of the people preparing same, the Supreme Court held in that case that with such a valuation an application should be held to have failed to establish that the property was sold for an unnecessarily low price. In that case the Supreme Court further stated that a debtor who fails to manage his affairs will find himself in the position of the applicant in that case. The Supreme Court referred to the case of *Morfopoulos* vs *ZIMBANK* 1996 (1) ZLR 626 (H) at wherein GILLEPSIE J said;

> "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 the court that equitable relief is due."

The judge further stated thus;

> "Finally, I wish to say that generally speaking, courts should not readily interfere in sales in execution."

I accordingly, as analysed herein find that the applicant has not made a case for the setting aside of the sale in execution and I accordingly find no reason to exercise my discretion in his favour and set aside a seemingly proper sale for such relief shall not be given to an applicant for their mere asking. A strong case has to be made for the setting aside of a sale in execution as such

sales shall evidently not be set aside as a matter of course. An applicant in such a case must present cogent circumstances that pass a certain threshold, facts that will be enough to tilt the scales heavily in favour of setting aside. Such is not the case with the facts before me.

I accordingly, dismiss the application with costs for reasons stated herein.

Messrs Moyo & Nyoni, applicant's legal practitioners
Messrs Coghlan & Welsh, 2nd respondent's legal practitioners