REPORTABLE (79)

Judgment No. SC 71/2002
Civil Appeal No. 194/01

(1) FAITH FRANCISCA KONA
(2) ESTATE LATE WILLIAM KONA
(3) DUNCAN WILLIAM KONA v

(1) STALIN MAU MAU
(2) FIRST MERCHANT BANK OF ZIMBABWE
(3) THE SHERIFF OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE, JULY 2 & OCTOBER 30, 2002

F Girach, for the appellants

E T Matinenga, for the first respondent

No appearance for the second respondent

No appearance for the third respondent

ZIYAMBI JA: The first appellant and the late William Kona are the registered owners of the property known as Lot 118 of Greendale ("the property"). The second respondent entered into an agreement with Saffron Services (Private) Limited ("Saffron"), a company of which the third appellant is a director, in terms of which Saffron became indebted to the second respondent in the sum of $711 176.37. The first appellant and her late husband, William Kona, bound themselves as sureties and co-principal debtors for the payment of the loan to Saffron and registered a bond over the property as security for the loan. When Saffron failed to meet its repayment obligations, the second respondent issued summons and obtained judgment against

the appellants. Thereafter the property was sold in execution and purchased by the first respondent at a public auction in September 1999 for the sum of $1 350 000.00. The sale was confirmed by the third respondent, ("the Sheriff"), on 19 November 1999.

On 26 July 2000, the appellants filed a court application for the setting aside of the sale in execution in terms of Rule 359 of the Rules of the High Court.

Rule 359 of the High Court of Zimbabwe Rules, 1971, states:

> "359. Any person having an interest in the sale may make a court application to have it set aside on the ground that the sale was improperly conducted or the property was sold for an unreasonably low sum, or any other good ground. Any such person shall give due notice to the sheriff of the application stating the grounds of his objection to confirmation of the sale. On the hearing of the application the court may make such order as it deems just." (my underlining).

The first appellant, in her founding affidavit, alleged that William Kona was now deceased; that she had resided on the property which was the matrimonial home for twenty years; that she was duped into signing the suretyship agreement by her late husband; and that the house the subject of the sale in execution was her only asset and that the transfer of the property to the second respondent would leave her homeless. She averred further that the property is worth far more than it was sold for because there was in existence a plan for the building thereon of cluster houses, which plan was before the City of Harare for approval. Once this plan was approved the appellant would be able to raise sufficient money to pay the second respondent in full.

The learned judge in the court *a quo* dismissed the application, having found there was no substance in any of the submissions made on behalf of the appellants. With regard to the "proposal for repayment", he found it vague and lacking in certainty and finality. He found that the equities favoured the second respondent who "has waited a great deal for its money and there is no prospect of its being paid in the immediate future".

At the hearing before us, it was common cause that the plan for the erection of cluster houses on the property had been approved. The appellants sought to lead further evidence on appeal in the form of the permit granted by the City of Harare, as well as two offers for the purchase of the property, one of which was for $10 000 000.00.

FURTHER EVIDENCE:

The principles by which this Court will be guided in deciding an application of this sort were restated in *Warren-Codrington v Forsyth Trust (Private) Limited* 2000 (2) ZLR (S) 377 at 380G-381B where it was held that:

> "When a request is made to lead further evidence on appeal, this Court will normally, unless the evidence is simple, straightforward and uncontested, remit the matter to the High Court so that the witness can be tested by cross-examination. But we will only do so where certain criteria are satisfied … .
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> The criteria are, briefly -
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> 1. Could the evidence not, with reasonable diligence, have been obtained in time for the trial?
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> 2. Is the evidence apparently credible?
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> 3. Would it probably have an important influence on the result of the case, although it need not be decisive?

4. Have conditions changed since the trial so that the fresh evidence will prejudice the opposite party?".

See also *S v Kuiper* 2000 (1) ZLR 113 (S) at 116 A-C; *Farmers' Co-op Ltd v Borden Syndicate (Pvt) Ltd* 1961 R & N 28; *The Civil Practice of the Supreme Court of South Africa* 4 ed at pp 909-912.

Although the second respondent filed heads of argument, it did not appear before us to argue the appeal but filed a notice of withdrawal, the relevant part of which reads:

> "BE PLEASED TO TAKE NOTICE THAT the second respondent hereby withdraws its opposition to (the) appellants to appeal (*sic*) after receiving full payment of its debt by the appellants …".

Mr *Matinenga*, who appeared for the first respondent, submitted that the application to lead further evidence did not satisfy any of the requirements recognised at law.

I disagree. There is no doubt that the evidence sought to be led of the approval by the City of Harare of the subdivision is true. That much was common cause at the hearing. Further, it seems to me that this evidence is materially relevant to the outcome of the application and it is quite clear that the evidence could not have been led at the hearing before the High Court as the application was still being considered by the City of Harare at that time.

The only question which now remains to be resolved is whether the matter must be remitted to the court *a quo* for a rehearing in the light of this evidence

which has now become available. The evidence is "simple, straightforward and uncontested". It can be considered by this Court without the necessity for a remittal to the court *a quo* because it is common cause and there is therefore no dispute of fact which requires determination by a trial court after the hearing of oral evidence. The admitted evidence shows that permission has been granted for the subdivision of the property and the erection of cluster houses thereon. It requires no expert evidence to satisfy this Court that the value of the property will be significantly enhanced by that fact alone and more so, of course, once the buildings have been erected thereon.

The position is different with regard to the offers to purchase the property. These are intended to prove the value of the property. The amounts contained therein are not admitted by the first respondent as being an indication of the true value of the property and oral evidence would be necessary if the application in respect of these documents were to be upheld. In any event, I do not consider them to be material to the determination of the matter. I would therefore disallow the application insofar as they are concerned.

THE MERITS OF THE APPEAL:

In *Lalla v Bhura*, 1973 (2) ZLR 280 (GD) at 283 E-F, when referring to Rule 359, DAVIES J (as he then was) observed:

> "The wording of the rule itself is all-important. The concluding portion of the rule provides that 'on the hearing of the application the court may make such order as it deems just' and it seems to me these words clearly indicate that in considering what is meant by the rule, and particularly what is meant by the phrase 'any other good ground' the court can and should properly have regard to equitable considerations."

He then proceeded further by adopting as an appropriate approach, the following remarks of SOLOMON J in *Cairns' Executors v Gaarn* 1912 AD 181 at 189-90:

> "The discretion of the Court is a very wide one, and, in my opinion, it is impossible, and even if it were possible it would be undesirable, to lay down any hard and fast line as to the principles upon which its discretion should be exercised. Every case must be judged on its own facts, and these may vary indefinitely. But though we ought not, in my opinion, to lay down any principles as to the special circumstances which will justify the Court in granting relief, we are on the other hand bound by the rule itself, and we can only assist a party 'upon sufficient cause shown'."

This approach was endorsed by this Court in *Bhura v Lalla* 1974 (1) ZLR 31; see also *Morfopoulos v Zimbabwe Banking Corporation & Ors* 1996 (1) ZLR 626 (H).

The discretion of the Court is therefore a wide one and in the exercise thereof the Court can and should properly have regard to equitable considerations.

In arriving at a just decision in the present case, the fact that the debt has been paid in full is a material consideration. I must weigh the disadvantages of setting aside a properly conducted sale in execution (as set out in *Lalla v Bhura supra*), namely that:

> "… 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";

against the apparent injustice of, in effect, depriving the first appellant of a home in circumstances where the debt has been fully paid, the first appellant has offered to

reimburse the first respondent in respect of costs incurred in the purchase of the property and the first respondent is mainly concerned with the interest that he has lost by not investing the money spent on purchasing the property.

The first appellant averred in her founding affidavit that the sum of $1 350 000.00, for which the property was sold, was insufficient to satisfy the judgment debt which, with interest, was, at the time of the application, in excess of $2 000 000.00. She averred, although this was not accepted by the learned judge in the court *a quo*, that the property, which is situate in the "prime area of Greendale" and measures over two acres, was sold for an unreasonably low sum. Indeed, there was no evidence, on the papers, to support this averment. She averred further that various attempts had been made by her late husband to settle the indebtedness, including an approach to Beverley Building Society who were willing to provide funds with which to liquidate the indebtedness to the second respondent on the strength of the then proposed subdivision of the property and the erection of ten cluster houses thereon.

In the court below, the second respondent confirmed these "attempts" to settle the debt but averred that none of them materialised. Indeed, when the application came before the court *a quo* for hearing, the application for subdivision of the property was still before the City of Harare awaiting consideration and the proposals for payment based thereon were rejected by the second respondent and dismissed by the court as lacking in certainty. The evidence now before us establishes that a permit to erect six cluster houses on the property was granted on

17 December 2001, some six months after judgment was handed down by the court *a quo*.

Although the courts are indeed reluctant to set aside properly conducted sales in execution for the reasons stated above, the peculiar circumstances of this case are such as to satisfy me that the equities favour the first appellant and that sufficient cause has been shown for the setting aside of the sale in execution.

As regards the costs of this appeal, the success of the first appellant would normally carry with it an entitlement to costs. However, the first respondent ought not to be penalised for opposing the appeal as the matter turned on the admission in evidence of the permit by the City of Harare. I would therefore make no order as to costs.

Accordingly the appeal is allowed. The order of the court *a quo* is set aside and the following substituted –

> "The sale in execution of stand 118 of Greendale situate in the district of Salisbury be and is hereby set aside".

There shall be no order as to costs.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

IEG Musimbe & Partners, appellants' legal practitioners

Nduna & Partners, first respondent's legal practitioners

Wickwar & Chitiyo, second respondent's legal practitioners