

AGRICULTURAL BANK OF ZIMBABWE  
v  
(1) LUKE MANYANDU THEMBANI (2) TAKAWIRA FARIKISAI  
ZEMBE (3) EAGLE ESTATE AGENTS (PVT) LTD

SUPREME COURT OF ZIMBABWE  
CHEDA JA, MALABA JA & GWAUNZA JA  
HARARE, MAY 15 & NOVEMBER 19, 2007

*J C Andersen SC*, for the appellant

*S F Jarvis*, for the first respondent

*M Hogwe*, for the second respondent

CHEDA JA: The appellant is a bank that is registered according to the laws of Zimbabwe, trading as Agribank. It is an agricultural finance lending bank.

The first respondent, Luke Mandangu Thembani (hereinafter referred to as “Thembani”) had borrowed money from Agribank and by the year 2000 he was owing Agribank a certain amount of money whose exact amount is not clearly disclosed on the papers.

When Agribank demanded payment of the amount owed, Them bani did not pay. Agribank instructed that Them bani's farm be sold in terms of the agreement of loan.

An auction sale was arranged by the third respondent and at the sale, the second respondent purchased the farm.

Them bani then approached the High Court seeking an order that the sale of the farm to the second respondent be set aside.

The High Court granted that order. The appeal is against that order.

The appellant's grounds of appeal are as follows:

"GROUNDS OF APPEAL

- (1) Having found against the First Respondent in respect of all arguments raised, the learned Judge erred and misdirected himself in disposing of the application on the sole issue of whether or not the advertisement in respect of the sale of the farm was adequate.
- (2) The learned Judge erred and misdirected himself in comparing the advertisement for the sale of the farm with the valuation report done by Holland & Redfern and concluding on the basis of the comparison that the advertisement did not adequately describe the farm that was to be sold by public auction.
- (3) The learned Judge erred in finding as a fact that the advertisement was not adequate and did not comply with the requirements of the law applicable in sales by public auction of this nature.
- (4) The learned Judge erred and thoroughly misdirected himself by making an order in favour of the First Respondent (Applicant) to set aside a sale which took place on 29<sup>th</sup> November 2000 in light of the fact the transfer

of the farm had taken place to the Second Respondent in 2004 notwithstanding efforts by First Respondent to interdict the sale under case number HC 9306/01 especially taking into account that First Respondent did not expedite the application which was filed in 2000 and only finalized in 2006.

- (5) The learned Judge ought to have dismissed the application taking into account all circumstances of this case.

WHEREFORE the Appellant prays that the Order by the learned Judge be set aside and that the Order issued be substituted with the following:-

- a) that the application in case number HC 2965/00 be and is hereby dismissed with costs.
- b) that the First Respondent pays costs of this appeal.”

The High Court found it to be common cause that the first respondent was unable to pay the appellant what he owed.

The first respondent does not deny this fact but says he would have wanted to sell a portion of the property to settle the debt without disposing of the property securing the loan. He does not explain why he did not do this when the need to settle the debt arose.

On the other hand, it is not clear how he could sell a portion of the property securing the loan without first subdividing it, a process that would again require the consent of the appellant.

There is, however, no indication that any attempt was made to settle the debt in that way.

Having established the appellant's right to have the property sold, the decision of the High Court was based on one issue only, that is, the advertisement of the sale. It held that the advertisement was inadequate and set aside the sale purely on that basis.

A copy of the advertisement is attached to the record. It gives the names of the parties, the date of the sale, and the place where it was to be conducted. The size of the property is given as 1265.1208 ha. The nature of the improvements on the farm is stated and directions for those who wished to go and inspect the farm are given. Further details could be obtained from the auctioneers.

Developments in the form of buildings are listed, as well as boreholes, and the fact that the farm is 90% arable. In particular, the following are listed -

1. A farm house with 6 bedrooms;
2. A manager's house;
3. A general dealer's shop;
4. A school with 7 classrooms and teachers' houses;
5. 4 dams and irrigation pipes;
6. 18 tobacco barns and
7. 4 boreholes.

The advertisement mentions that there are numerous out buildings.

The court *a quo* held that certain important developments on the farm were left out, namely -

1. One bedroom;
2. Swimming Pool;
3. Guest Cottages;
4. Shopkeeper's one bedroom cottage;
5. Details of workers' accommodation;
6. Details of tobacco barns;
7. Fencing around the main house;
8. The orchard;
9. Fencing of paddocks and boundary;
10. Workshop;
11. Pigsty;
12. Ostrich incubators.

The *court a quo* held that the above omissions meant that the advertisement did not sufficiently detail the nature and characteristics of the property so as to afford potential purchasers a clear appreciation of what it was that was being offered for sale.

The Court went on to say the advertisement did not even advise them where to view the property. I do not agree.

The advertisement actually gives directions on how to get to the property from Mutare on the Harare Road and to turn at the 222 km peg to the right into Die Guns road and travel for 11 km straight into the farm. What other detailed directions could be more adequate than these?

Having listed the houses on the farm, I do not believe that the omission of one bedroom in a house, or not giving the exact number of rooms in the worker's compound would render the advertisement inadequate.

In my view, once it is mentioned that there is a general dealer's shop, a school and 2 teachers' houses, any inaccuracy on the exact number of rooms for each cottage cannot be said to render the advertisement inadequate.

It is clear that pigsties were omitted, but that, again, cannot render the advertisement inadequate. The advertisement, after listing certain developments, does state that there are numerous outbuildings. (my underlining)

Any interested person would certainly want to go and see for themselves what the outbuildings were, or whether they would be suitable for whatever project or purpose they have in mind.

It is common cause that most farms have fences, and that a farm of the size given on the advertisement would have paddocks. I do not consider that a person who is interested in buying a farm so well developed would decline to go and inspect it just because it was not mentioned that the farm has a fence.

The fact that directions were given, there was reference to numerous buildings, and that further details could be obtained from the auctioneers, was, in my view, sufficient for any interested persons to be attracted to the advertised property.

The fact that there were fewer bidders than the respondent expected is no fault of the seller. It depends on how many people wanted to purchase the farm, and how many people felt that they had the funds to do so at that particular time.

In his Heads of Argument the first respondent stated that the farm was productive. No reason is given for not meeting his obligation to pay his debt.

It does not assist the first respondent to argue that Agribank has not provided a copy of the agreement for the loan when he admits that he did owe to Agribank a debt which was due.

The issue raised by the first respondent concerning the appellant's right to sell the property without going to Court was not raised in the *court a quo*, and I do not intend to deal with it on appeal, save to mention that such a right has been determined

before in *John Nyamukasa v Agricultural Finance Company*, SC 174/94 and *Chizikani v Agricultural Finance Company*, SC 123/95.

The issue of farm sizes is in my view, not relevant to this appeal. The farm was in the hands of one person. It was not subdivided on being auctioned. It was sold as a whole unit, and the issue of its size can still be dealt with by the appropriate authorities in a different forum.

In conclusion, I find that the sole basis on which the sale was set aside by the *court a quo*, was the alleged inadequacy of the advertisement.

I find that, given the information on the advertisement, the directions to the property, and the mention of numerous buildings, the advertisement was adequate to attract any interested prospective purchasers, and it cannot be said to have been so inadequate as to justify the setting aside of the sale.

As for the price, purchasers at public auctions ordinarily offer, or bid, on the basis of what they are either willing to pay or can afford. They are not concerned about the perceived correct value of the property on offer.

On the other hand, for an auctioneer to refuse to sell to a bidder, the price offered must be unreasonably low.

It is common cause that prices at public auctions are generally dictated by the number of interested bidders. There are very few, if any instances, where the debtor gets the price that he wants for his property in a forced sale.

The main consideration in most of these sales is not to reward the debtor with extra money above the debt owed, but to assist the creditor to recover what he or it is owed.

In this case, it is noted also that the evaluation of the farm, as the first respondent put it, was done after the sale.

In its evaluation report, the valuer makes the following relevant comments

—

“A structural survey has not been requested nor effected and in this regard no examination has been made of plumbing, electrical or other service installations.

It should be noted that the valuation of this property has been made with the assumption that the subject property is in all respects in a fair and satisfactory condition.”

We have not been told, and we do not know what impression those who were bidding had of this property if they visited and inspected it.

In my view, an evaluation based on assumptions cannot be said to represent the proper value of the property in question. It would not be correct, in the

circumstances, to hold that the value was unreasonably low by comparing the price offered with the evaluation that was done in this case.

I therefore consider that there was no proper basis for setting aside the sale of the property concerned.

In the result, the appeal succeeds and the following order is made –

1. The judgment of the *court a quo* is set aside.
2. The application by Luke Manyandu Thembani in case No. 12965/00 is dismissed with costs.

MALABA JA: I agree.

GWAUNZA JA: I agree.

*Chinamasa, Mudimu, Chinogwenya & Dondo*, appellant's legal practitioners

*Atherstone & Cook*, first respondent's legal practitioners

*Hogwe, Dzimirai & Partners*, second respondent's legal practitioners