

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MA 13/2014

(arising in CM 5/2013)

[2014] SCSC 45

Dr Barney Marie

First Petitioner

Dr Ludmila Marie

Second Petitioner

versus

Development Bank of Seychelles

Respondent

Heard: 29 January 2014
Counsel: Pesi Pardiwalla for petitioners
Frank Ally for respondent
Delivered: 5 February 2014

RULING

Egonda-Ntende CJ

[1] The petitioners are seeking the amendment of the memorandum of charges filed in the above Commandment Notice for the sale of 2 properties belonging to the petitioners. The petitioners are the judgment debtors in these proceedings and the respondent is the Judgment creditor. The petition is supported by an affidavit sworn by the first petitioner.

It is contended for the petitioners that the *mise a prix* fixed in the memorandum is below the market value of the properties in question and unless the *mise a prix* is amended it is feared that the properties will be sold well below their market value.

[2] The relevant part of the affidavit states,

‘3. That recently my attention was drawn to the title headed *mise a prix* in the Memorandum of Charges whereby a *mise a prix* has been fixed in respect of Plot V. 8823 at SR4,600,000.00 and C.1248 at SR5,200,000.00.

4. That the *mise a prix* are a gross under valuation of the above mentioned properties and if allowed to stand would severely prejudice me and my wife Ludmila, the other judgment debtor in this case in that the Judgment Creditor would obtain two properties for values for less than the market value and could result in us still owing the Judgment Creditor after the properties are adjudicated to him.

5. The true value of the properties is more a kin to the valuation of the Process Server who had experience in such matters.’

[3] Mr Pardiwalla, learned counsel for the petitioners submitted that thrust of the petition is for an amendment of the *mise a prix* by court in respect of parcel C1248 which they contend is grossly undervalued and would lead to the property being sold well below its market value and not even extinguishing the whole of the indebtedness of the petitioners to the respondent. He submitted that the value given by the process server of SR10,000,000.00 was more in tune with the likely market value of the property and this is what should guide the *mise a prix*. In relation to the submission by respondent’s counsel that this application was time barred he stated that attempts were made to file the same on 17 January 2014 when it would have been in time but they failed to effect payment in court on that day which was a Friday and did so on the following Monday 20 January 2014.

[4] Mr Frank Ally, learned counsel for the respondent, submitted that this petition was out of time having been filed in less than 21 days to the date of the sale contrary to section 30 of the Immovable Property (Judicial Sales) Act. If a party is out of time such party must initially satisfy the court that there is cause for the court to entertain the application out of time. The petitioner in this case had not done so and Mr Pardiwalla’s explanation from

the bar, amounted to counsel giving evidence which was objectionable in itself. With regard to the fixing of the *mise a prix* Mr Ally submitted that in law this was left to the judgment creditor and not the process server and the judgment creditor had elected to assert the *mise a prix* at the level it did.

- [5] I agree with Mr Frank Ally that section 30 of the Immovable Property Judicial Sales Act provided a time limit within which petitions of this kind would be brought and provided an exception where an explanation was provided to the judge establishing a justification or a cause for the failure to meet the time line. It follows that such explanation must precede the hearing of [if not the filing of] the petition or at least be part of the petition with supporting affidavit instead of simply a statement from the bar when an objection is raised. Section 30 states in part,

'30. Whenever any inscribed creditor or the execution debtor may desire that the memorandum of charges, drawn up by the attorney having the carriage of the proceedings, be rectified and amended in any respect, **such party may apply by petition to a Judge, twenty one days at the least (unless cause be shown to the satisfaction of the Judge for entertaining such application, if made beyond the above period)** previous to the day fixed for the sale, to appoint a day for the appearance of parties before him. In all cases the execution creditor shall be made a party to such proceedings, as also the execution debtor (unless the application be made by him) and any other parties whom the Judge may in his discretion think proper to join.'

- [6] This would be sufficient to dispose of this application. However in light of the fact that it is possible to consider this application and rule upon it on its merits before the day appointed for the sale I am satisfied that no prejudice would be occasioned to the respondent, especially in terms of delay of sale. I am prepared to take this course in light of the fact that on examination of the court record the application was in fact lodged in the court on 17 January 2014 which was a Friday but payment was only effected on 20 January 2014, the following Monday. There is no explanation for this delayed payment as I cannot take Mr Pardiwalla's statement from the bar as evidence. Nevertheless the case is so border line that I am prepared to exercise some indulgence in the matter.

- [7] It is correct as submitted by Mr Frank Ally that the execution creditor is allowed by law to set the *mise a prix*. Nevertheless so is the court allowed to amend the memorandum of charges including the *mise a prix*, in light of the provisions of section 30 of the Immovable Property Judicial Sales Act where it is fair to do so and it is in the interests of justice. I have read nothing in the Act that sets the *mise a prix* stated by the attorney for the Execution Creditor in stone so as not to be immutable if sufficient cause is established.
- [8] In the instant case I do not have the aid of the evidence of experts in relation to market value of land in Seychelles and the only figure to go by is that of the process server. Process servers may have some sort of experience in this area by virtue of their work in relation to court ordered sales of property which they handle. On the other hand the execution creditor has opted to make no explanation at why the *mise a prix* he has fixed in the memorandum of charges should not be disturbed apart from the claim that it is his right to elect whatever figure he may choose. Such a position is susceptible to abuse and this is what is intended to be corrected by an application under section 30 of the Act.
- [9] I note that the variation of the *mise a prix* from the value of the property as provided by the process server with regard to parcel v 8825 is probably less than 25% which may well be more in accord with the fact that what is intended is a forced sale which would in all circumstances be unlikely to fetch the same price as the probable market value that would be raised in a none-forced sale. The difference between the value provided by the process server and the *mise a prix* in relation to parcel V1248 is just slightly over 50%. This should merit some explanation from the execution creditor and none has been provided.
- [10] I am satisfied that a case has been made for intervention by this court and will proceed to amend the *mise a prix* to SR6,800,000.00 for parcel C1248. In doing so I have taken into account this being a forced sale one cannot expect to raise the same price as in a private or open market sale.
- [11] The petitioners shall bear the costs of this application.

Signed, dated and delivered at Ile du Port on 5th day of February 2014

F M S Egonda-Ntende
Chief Justice