

DISTRIBUTABLE (25)

Judgment No. SC 27/03
Civil Appeal No. 380/02

(1) CHARLES TAWENGWA (2) TAMU ENTERPRISES
(3) AGGREY TAWENGWA (4) NOBLE TAWENGWA
(5) GODFREY TAWENGWA (6) GEORGE TAWENGWA
(7) CHARLESTON INVESTMENTS v

(1) SCOTFIN LIMITED (2) SHERIFF OF ZIMBABWE N.O.
(3) JAY JAY ENTERPRISES (PRIVATE) LIMITED
(4) REGISTRAR OF DEEDS N.O.

SUPREME COURT OF ZIMBABWE
CHEDA JA, ZIYAMBI JA & MALABA JA
HARARE, JULY 15 & NOVEMBER 4, 2003

T Biti, for the appellants

F Girach, for the respondents

CHEDA JA: The first appellant is a shareholder in the second and seventh appellants. The first respondent is a duly registered company with limited liability according to the laws of Zimbabwe. The second respondent is the Sheriff of Zimbabwe (“the Sheriff”), cited in his official capacity. The third respondent is the purchaser of the property sold at the judicial sale in execution. The fourth respondent is the Registrar of Deeds, cited as the person who registered the transfer of the property.

Following a judgment obtained against the appellants in favour of the first respondent a warrant of execution was issued. The property of the appellants, Stand No. 60 Willowvale Township of Stand 50A Willowvale in the District of

Salisbury (hereinafter referred to as “the property”), was attached and sold by public auction for the sum of \$3 300 000.00.

The appellants lodged an objection with the second respondent against the sale price. The second respondent in turn rejected the price of \$3 300 000.00 and invited the purchaser to raise its bid to a sum of \$5 100 000.00. The purchaser agreed and paid this price. Transfer of the property was then effected.

When the second respondent rejected the initial price of \$3 300 000.00 he wrote a letter to Messrs Gainsborough, asking them to contact the purchaser about raising the bid. This letter, dated 25 July 2000, was copied to other parties, including the second appellant (Tamu Enterprises). I should point out here that Tamu Enterprises is the company against which the original judgment had been granted, and the first, third, fourth, fifth and sixth appellants are the directors of that company. There was no objection to the proposed price by the appellants.

On 29 August 2000 the Sheriff wrote again to Messrs Gill, Godlonton & Gerrans to advise that if no objections were made to a sale by private treaty at the price of \$5 100 000.00 within seven days the sale would be confirmed. This letter was copied to Tamu Enterprises. No objections were made.

On 10 October 2000 a document was issued by the Sheriff, advising that since he had not received any objections the sale was confirmed at the price of \$5 100 00.00. Again, this letter was copied to Tamu Enterprises.

The first appellant, who made the affidavit on behalf of the other appellants, said they were shocked when they discovered that the property had been sold and transferred to the purchaser without their knowledge. He said they were not informed of any developments that followed once they objected to the price of \$3 300 000.00. His application to the High Court to have the sale set aside failed. He has now appealed against that decision.

In his grounds of appeal, the first appellant says the court *a quo* erred in –

- (a) not holding that the property was sold for an unreasonably low price;
- (b) holding that the relevant correspondence had been forwarded by the Sheriff to the appellants; and
- (c) not setting aside the sale and transfer of the property.

The record clearly shows that many attempts had been made to sell the property previously. Previous advertisements failed to attract any interested parties. Even the appellants made an attempt to sell the property which failed.

The Sheriff did appreciate that the price of \$3 300 000.00 was very low. This is what the appellants had objected to. The Sheriff asked the highest bidder to raise its price, which was agreed at \$5 100 000.00. According to correspondence in the file, there is no reason why the appellants would not see the letter inviting objections to this sale if they saw other correspondence sent to the same

address. The Sheriff had good reason to believe that the appellants would receive correspondence sent to that address.

Mr *Biti* also conceded that, in the absence of any response, the Sheriff would not have known that the letters were not received. To the Sheriff, the letters had been sent to known addresses of the appellants; there were no objections; and that was the end of the matter. The factual position as to whether the appellants saw the letters or not does not assist the appellants, as the Sheriff had no way of knowing that letters sent to them at their known address did not reach them.

Rule 358(2) of the High Court Rules (“the Rules”) states as follows:

“(2) If, after a sale by public auction has taken place, the Sheriff is not satisfied that the highest price offered is reasonable as provided by Rule 356, the Sheriff may sell the property by private treaty subject to conditions of sale for such price, being greater than the highest offer made at the public auction, as he deems fair and reasonable. If the Sheriff is unable to sell the property by private treaty at such price, it may again be offered for sale by public auction.”

This is what the Sheriff did in this case.

It has not been shown that there was any irregularity in the sale. Nothing was done that would grant the appellants a right to act in terms of Rule 359 of the Rules.

As was stated in *Mapedzamombe v Commercial Bank of Zimbabwe and Anor* 1996 (1) ZLR 160 D-E:

“Once confirmed by the Sheriff in compliance with Rule 360, the sale of the property is no longer conditional. That being so, a court would be even more reluctant to set aside the sale pursuant to an application in terms of Rule 359 for it to do so.

When the sale of the property not only has been properly confirmed by the Sheriff but transfer effected by him to the purchaser against payment of the price, any application to set aside the transfer falls outside Rule 359 and must conform strictly with the principles of the common law.”

No fraud or any wrongdoing has been alleged on the part of the Sheriff or the purchaser, other than that the Sheriff should have communicated the new price to the appellants.

The suggestion that this new price was too low is well answered by the fact that several attempts had been made to sell the property without any success.

I would add that while it may look reasonable to place a figure against a property as the proper value, this does not assist if the property cannot be sold even for a lesser price than the one chosen as the value. Value depends on demand at the time and that is why prices of properties fluctuate.

I am satisfied that the appellants have not made out a case for the setting aside of the sale and transfer of the property.

The appeal is dismissed with costs.

ZIYAMBI JA: I agree.

MALABA JA: I agree.

Honey & Blanckenberg, appellants' legal practitioners

Gill, Godlonton & Gerrans, respondents' legal practitioners