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Judgment No. SC. 51/05
Civil Appeal No. 127/04

(1) THE DIAMOND TOOL COMPANY OF ZIMBABWE (PRIVATE) LIMITED
(2) FORTRESS INDUSTRIAL INVESTMENT (PRIVATE) LIMITED

vs

(1) FIRST MERCHANT BANK OF ZIMBABWE LIMITED
(2) JOHN ANDREW GROTTIS (3) CRAIG NIGEL GROTTIS
(4) THE SHERIFF OF ZIMBABWE (5) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & GWAUNZA JA
HARARE, MARCH 7, 2005

J Musimbe, for the appellants

No appearance for the first respondent

E W W Morris, for the second and third respondents

No appearance for the fourth and fifth respondents

MALABA JA: This is an appeal against a judgment of the High Court delivered on 24 March 2004, dismissing with costs an application for an order setting aside a sale in execution of a judgment in favour of the first respondent. At the conclusion of argument we dismissed the appeal with costs and indicated that reasons for the decision would follow in due course. These are they.

On 18 August 2002 two immovable properties, Stand 17 Ardbennie Industrial Township of Subdivision A of Ardbennie and Stand 18 Ardbennie

Industrial Township of Subdivision A of Ardbennie ("the properties"), belonging to the appellants were sold by the fourth respondent ("the Sheriff") by public auction in execution of a judgment in case no. HC 3827/01, granted by the High Court on 9 January 2002 in favour of the first respondent.

By letter dated 28 August 2002, the Sheriff advised the parties that he had rejected as too low the price of $5 500 000 offered by the highest bidder at the public auction. He informed the interested parties that in terms of rule 358(2) of the High Court Rules 1971 ("the Rules") he had decided to sell the properties by private treaty at a price of not less than $16 000 000. On 16 September 2002 the Sheriff advised the parties that he had accepted as fair and reasonable a price of $16 000 000 offered for the properties and invited objections to the confirmation of the sale to be made within fifteen days, failing which the sale would be confirmed.

On 3 October 2002 the Sheriff received a letter from the appellants' managing director, which he took to be an objection to the confirmation of the sale. As a result, he invited all the parties to a meeting on 24 October 2002 to consider the objections to the sale. The appellant companies were not represented at the meeting of 24 October 2002. Their managing director claimed that the letter of 10 October 2002, inviting them to the meeting, was received on 25 October 2002. The Sheriff confirmed the sale of the properties to the second and third respondents for the price of $16 000 000.

On 25 October 2002 an objection to the price of $16 000 000 as being too low was addressed to the Sheriff on behalf of the appellants by their legal

practitioners. In response, the Sheriff advised that as confirmation of the sale had taken place the appellants should institute a court application for an order setting the sale aside. Transfer of the properties into the names of the second and third respondents was effected on 29 October 2002.

On 20 January 2003 a court application was made for an order setting aside the sale and transfer of the properties. The grounds relied upon were that the Sheriff had committed a procedural irregularity in the sale of the properties, in that he had not notified the appellants of his intention to accept the price of $16 000 000, and that the price of $16 000 000 was unreasonably low.

A point *in limine* was taken in the proceedings before the High Court, to the effect that the application, which was by way of review in terms of rule 259 of the Rules, was made out of time and no condonation of the late institution of the application had been sought.

The explanation advanced on behalf of the appellant companies for the delay in the institution of the application was that the names of the persons who had purchased the properties were not known until 26 December 2002. The explanation was unacceptable to the court *a quo*, which found that the appellants' representatives had been notified by letter dated 28 August 2002 that the properties were to be sold by private treaty and that a price of $16 000 000 was being invited from potential purchasers. Their legal practitioners wrote on 29 October 2002 objecting to the price of $16 000 000 as being too low on instructions given on behalf of the appellant companies with full knowledge that the properties had been sold at that price. It was

the unreasonableness of the amount of the price at which the objection was directed and it had not mattered to the appellants' cause who the purchasers were. The court *a quo* also took into account the fact that on 7 November 2002 the appellants' managing director instructed a firm of legal practitioners to challenge the propriety of the sale of the properties by court application, thereby disclosing on his part knowledge at the time of the fact that the properties had been sold and the sale confirmed by the Sheriff.

The reasons given by the learned judge for dismissing the application for condonation of the late institution of the application for review are unassailable.

Although it was not necessary to do so, the learned judge considered the merits of the application. He held that the application, which was based on an alleged violation of the procedure under rule 259 of the Rules, was ill-conceived because confirmation of the sale by private treaty and transfer of the properties had taken place. He held that the appellants in the circumstances could only claim *restitutio in integrum*, which was a common law remedy. To succeed they had to show bad faith or fraud on the part of the Sheriff in confirming the sale and transferring the properties to the second and third respondents. See *Mapedzamombe v CBZ and Anor* 1996 (1) ZLR 257 (S) at 260 E-G.

At the hearing of the appeal, Mr *Musimbe*, for the appellants, aware of the insurmountable difficulty in establishing such a ground, did not argue the Sheriff had acted fraudulently or in bad faith when he confirmed the sale of the properties and transferred them to the second and third respondents. That was not an unjustified

position because the price at which the properties were sold was much greater than the highest price offered at the public auction. The Sheriff was not under any obligation to obtain the consent of the judgment debtor before accepting the price offered for the properties in the private treaty, as long as it was greater than the highest price offered at the public auction and he considered it a reasonable price. In fact, there was no objection to the price that could prevent the Sheriff confirming it at the time he did. From the conduct of the Sheriff, it could not therefore be inferred that he acted with the intention to defraud the appellants of their rights in the properties. There was no cause, just or otherwise, for setting aside the sale and transfer of the properties.

The appeal was accordingly dismissed with costs.

SANDURA JA: I agree.

GWAUNZA JA: I agree.

J Musimbe & Associates, appellant's legal practitioners

Costa & Madzonga, second and third respondents' legal practitioners