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Judgment No. SC 34/05

Civil Appeal No. 210/03

KUMURAI TICHAPERA MUGONI v (1) BEVERLEY
BUILDING SOCIETY (2) THE SHERIFF FOR ZIMBABWE (3)
G GARANDE (4) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, MARCH 22, 2005

A M Gijima, for the appellant

A Mugandiwa, for the first and third respondents

No appearance for the second and fourth respondents

ZIYAMBI JA: This is an appeal against the dismissal by the High Court of the appellant's application to have the sale of his property by auction set aside.

The history of the matter is as follows:

On 5 November 1999, default judgment was obtained by the first respondent against the appellant for the sum of \$44 573.62. No payment having been made by the appellant, a writ of execution against the appellant's property was issued on 14 March 2000. On 13 April 2000, a *nulla bona* return was issued by the Deputy Sheriff and, on 30 November 2001, the appellant's immovable property was sold by public auction.

The third respondent was, on 17 December 2001, declared the highest bidder and the sale was confirmed on 14 January 2002.

On or about 17 January 2002, the appellant successfully filed an application in the High Court to set aside the confirmation of the sale. In its order, the High Court directed the Sheriff to consider, in terms of Rule 359 of the High Court Rules, the objections lodged by or on behalf of the appellant on 17 January 2002.

In compliance with the court order, (case number HC 731/02 refers), the Sheriff, on 21 March 2002, conducted a hearing at which all the parties were represented. After considering the arguments advanced by the parties, the Sheriff dismissed the appellant's objections and confirmed the sale. The appellant then sought, by a further court application to have the Sheriff's decision set aside on the grounds, *inter alia*, that the Sheriff misdirected himself by failing to give due consideration to his objections. The learned Judge in the court *a quo*, having carefully considered each of the above grounds, dismissed the appellant's application. It is against this judgment that the appellant now appeals.

At the hearing before us Mr *Gijima* applied, and was granted leave, to amend the grounds of appeal to include the following ground namely:

“That the second respondent did not comply with Rules 348 & 348A of the High

Court Rules such that the sale in execution was invalid”.

This point was not taken before the High Court and was being raised for the first time on appeal. The appellant submitted that this was a point of law which could be raised for the first time on appeal.

It is trite that a question of law may be raised for the first time on appeal. See *Nissan Zimbabwe (Private) Limited v Hopitt (Private) Limited* 1997 (1) ZLR 569 (S). However this will usually not be allowed where new matter is introduced or where the raising of the point would result in unfairness or injustice to any of the interested parties.

Mr *Mugandiwa*, who appeared for the first and third respondents, however, argued that the point being raised was one of fact in that there was no concession by the Sheriff that there was no compliance with the Rules; the appellant had pointed to no tangible evidence on the record of such non-compliance; and further, the matter was contentious and, being an issue of fact, could not be raised for the first time on appeal in the absence of a successful application to lead further evidence on appeal.

There is substance in the argument advanced by Mr *Mugandiwa*. There is, indeed, no evidence on the record of non-compliance with the Rules in question and this raises the issue whether or not the Sheriff complied with the Rules aforementioned. That question is undoubtedly one of fact which is improperly before us since no application for the adduction of further evidence on appeal was made or granted.

The other grounds of appeal relied upon by the appellant could not take the matter any further. The property was transferred to the third respondent on 17 June 2002, and in the absence of proof of bad faith or fraud the sale could not be impeached.

For the above reasons, we considered the appeal to be devoid of merit and dismissed it with costs at the end of the hearing.

SANDURA JA: I agree.

GWAUNZA JA: I agree.

Musunga & Associates, appellant's legal practitioners

Wintertons, first and third respondents' legal practitioners