DISTRIBUTABLE (6)

Judgment No. S.C. 3/99
Civil Appeal No. 542/97

NICHOLAS MAWODZANI HATIDANI vs

(1) MICHAEL HEATH (2) FIONA HEATH

(3) CAIN USENGA (4) MR SHONIWA

(5) THE SHERIFF OF ZIMBABWE

(6) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
McNALLY JA, EBRAHIM JA & SANDURA JA
HARARE, JANUARY 20, 21 & FEBRUARY 11, 1999

C Hungwe, for the appellant

D P Carter, for the first and second respondents

G S Wernberg, for the third respondent

No appearance for the fourth respondent

No appearance for the fifth respondent

No appearance for the sixth respondent

McNALLY JA: The appellant ("Hatidani") owed money to the third respondent. He was unable to pay. In due course, and after due process of law, his farm was put up for sale by the Sheriff on public auction. It was bought by the first and second respondents. The sale took place on 16 August 1996. It was confirmed by the Sheriff on 13 September 1996 in terms of Rule 360 of the High Court Rules. Accordingly, as set out in *Mapedzamombe v Commercial Bank of Zimbabwe and*

Anor 1996 (1) ZLR 257 (S), the Court will be even more reluctant to set it aside than if the application had been made before confirmation.

However, transfer of the property into the names of the purchasers ("the Heaths") had not yet taken place when an application was brought by Hatidani to have the sale set aside. By way of interim relief he sought to hold up the transfer and his eviction pending a decision on the primary relief of cancellation of the sale.

This relief was granted on 7 October 1996 by GARWE J in terms of Rule 246. However, Hatidani took no further steps to set the matter down, being plagued, apparently, by financial problems. Eventually the Heaths set it down, and the matter came before the late ROBINSON J on 20 January 1997.

By that stage Hatidani had been automatically barred (Rule 238(2b)). Mr Zhou, who appeared for him, applied for the removal of the bar, but his application was refused on the grounds that no assumption of agency had been filed by Messrs Guni, Wabatagore & Company. In fact it now appears that it had been filed, but had been given the wrong case number. The provisional order was discharged.

The next step taken by Hatidani was to make a further application to court for the rescission of the judgment of ROBINSON J. That judgment was, I think rightly, seen as a default judgment, since as soon as the application for the uplifting of the bar was unsuccessful, Hatidani was in default of appearance.

On 4 July 1997 this application was heard and dismissed by SMITH J. He was satisfied that the default was inexcusable, but even more satisfied that the basis for the application to have the sale set aside was bogus and without merit.

When the appeal first came before us on 20 January 1999 there was an application to have it dismissed on the grounds that the appeal was noted six months out of time. The application was granted. As a result of a comedy of errors neither the Court nor any of the three counsel appearing were aware that leave to appeal out of time had been granted by another Judge of this Court. When the error was discovered the order was withdrawn by consent and the matter was re-heard on 21 January 1999.

I revert, then, to the merits. The basis of the application was twofold: First, that the price paid was too low and the advertisement was misleading since it did not mention that there was a school (four rooms) on the property. Second, that the property had allegedly been subdivided, so that only about two-thirds of it had actually been sold, so the buyers had no right to claim transfer of the whole. Alternatively, if the subdivision had not actually taken place (as was eventually conceded in the court *a quo* by Mr Guni), then there was no *consensus ad idem* as to the *merx* and therefore the sale was a nullity.

The first argument is based on the consideration which influenced this Court in *Chizikani and Anor v C.A.B.S.* 1998 (1) ZLR 371. But here the price was not so patently low as to vitiate the sale, and the omission to mention the school was due to the fault of Hatidani who would not allow the auctioneer to view the premises.

The second ground for setting aside the sale seemed to appear from nowhere. One would have expected it to have been the main issue. What happened was this. Hatidani had attempted to subdivide the property. He had been granted permission to do so, but subject to certain stringent conditions which he had been unable to fulfil. He, therefore, was better placed than anyone to know that the sub-division had not been effective.

Indeed there is among the papers a valuation which he requested from another estate agent to show that the farm was worth more than $550 000. That valuation, dated 21 August 1996 (i.e. five days after the sale) was a valuation of the whole 90, 9601 hectares. So he knew perfectly well that there had been no subdivision.

The property was advertised for sale as being "the remainder of Subdivision E of Binder measuring 90, 9601 hectares in the District of Goromonzi"; it was described in exactly the same words in the *Government Gazette* of 9 August 1996 - a week before the sale; again it was described in the same words in the sale catalogue. That catalogue also stated, among the conditions of sale: "The property is sold as represented by the Title Deeds, the Sheriff not holding himself liable for any deficiency whatsoever, and renouncing the excess" (my underlining).

Finally, and to my mind conclusively, the auctioneer, Central Real Estates (Pvt) Ltd, wrote to the Sheriff on 19 August 1996 (the Monday after the Friday sale) confirming the sale of "the remainder of Subdivision E of Binder measuring 90, 9601 hectares in the District of Goromonzi".

When then did the confusion arise? It arose first in the Sheriff's Report dated 24 September 1996 which for some reason was not in the papers before the learned judge. The Sheriff advised that he had been told by the auctioneer that he had not in fact sold the whole property, but only the balance of it, because he had discovered at the last minute that Lot 2, amounting to 14, 6809 hectares, had been subdivided off.

This Court has unearthed, on another High Court file in a related matter, the letter on which this assertion is based. It is from the same Central Real Estates (Pvt) Ltd, signed by the same person, dated 17 September 1996. We consider this letter to be totally beyond belief. It is in absolute contradiction of the letter written immediately after the sale, when the events of the sale would have been fresh in the mind of the writer. It is so wildly improbable that one would have expected an affidavit by the writer to confirm what he says. Yet there is none. One would also expect Hatidani himself, in his founding affidavit, to proclaim as his first submission that the Heaths did not buy the 90 hectare property but only 75 hectares of it.

This letter bears all the marks of falsehood, concocted at the last minute on behalf of a man desperate to save his farm from being sold. Why otherwise is there no affidavit? Why are there no supporting affidavits from other bidders at the sale, confirming that they were told before the sale that they were to bid for only 80% of the property (which would have rendered the sale ineffective since in fact there was no subdivision)?

We regret that we must reject the contents of this letter as completely unproven and false.

In the circumstances the appeal is dismissed with costs.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Guni, Wabatagore & Company, appellant's legal practitioners

Atherstone & Cook, first and second respondents' legal practitioners

Lofty & Fraser, third respondent's legal practitioners