IN THE HIGH COURT OF SWAZILAND

CIV. T. 296/91

In the matter between:

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| ROBERT MSHWEMPEZANE MABILA | Applicant |
| and | |
| SWAZILAND DEVELOPMENT AND SAVINGS BANK | 1st Respondent |
| SAMUEL SIPHO KUHLASE | 2nd Respondent |
| DOUGLAS LITTLER | 3rd Respondent |
| PERCY THOMAS | 4th Respondent |
| SAMUEL JUBA DLAMINI - (Registrar of Deeds) | 5th Respondent |

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| C O R A M: | F. X. | ROONEY, J. |
| FOR APPLICANT: MR | H. | FINE |
| FOR 2ND & 4TH RESPONDENTS: | P. | SHILUBANE |

J U D G M E N T

09/10/92

Rooney, J.

In this application filed on the 4th April 1991 orders are sought in the following terms+

1. "Ordering the Sheriff and/or the Deputy Sheriff of the Manzini District to furnish a report as to whether the Fourth Respondent has carried out his obligations in trms of the Conditions of Sale in Execution of Immovable Property of Portion 6 of the Consolidated Farm 'PEEBLES SOUTH' No.8, situate in Sidvokodvo in the Manzini District, Swaziland

2. Cancelling and setting aside the Sale in Execution of Portion 6 of the Consolidated Farm 'PEEBLES SOUTH' No. 8, situate in Sidvokodvo in the Manzini District, Swaziland, to the Fourth Respondent.

3. Costs of this application.

The application has been opposed by the first and fourth respondents. The second respondent who is the General Manager of the first respondent was not properly joined. The 3rd respondent is the Deputy Sheriff of Manzini District who has not responded to the application. The fifth respondent is the Registrar of Deeds and against whom no relief has been sought.

On the 24th July 1985 the applicant became the registered owner of portion 6 of the consolidated Farm "Peebles South" No.8 situate at Sidvokodvo, Manzini District (the Farm). At about the same time the applicant mortgaged the Farm to the first respondent to secure a loan of E353,000 plus costs and interest charges. On the 10th July 1986 the applicant mortgaged the Farm a second time to the first respondent to seeure a further advance of E40,000 plus interest and costs.

Between May 1987 and July 1988 the applicant was detained in prison for reasons which are not relevant to these proceedings, but, the applicant cites this as the reason why he was unable to meet his obligations to the first respondent in terms of the mortgage bonds.

On the 5th October 1987 the first respondent instituted proceedings to recover the debts due on both bonds. On the 24th February 1988 the applicant consented to judgment for the payment of E559,080-01 plus interest and costs. The Farm was declared to be immovable property executable in terms of the judgment.

On the 30th May 1988 the first respondent issued a writ of attachmet. This was followed on the 24 June by the publicaion of a notice of sale to be held on the 5th August 1988 at the Manzini Regional Offices. This sale was cancelled by a subsequent notice published in a newspaper on the 27th July. Another notice of sale was published on the 12th August in the Government Gazette. The notice announced that the sale would take place at the same place as before on the 2nd September 1988.

The applicant alleges that thereafter the conduct of the sale by the Deputy Sheriff was irregular on a number of grounds including the following.

1) That the notice given in the Government Gazette dated 19th August 1988 was insufficient.

2) That the fifth respondent as purchaser of the Farm at the Deputy Sheriff's sale failed to comply with the conditions of sale in that he failed to secure the balance of the purchase price as required.

3) That the 3rd respondent, as deputy Sheriff failed to furnish a report to the applicant's attorney.

4) That the fifth respondent failed to comply with the conditions of sale in that he failed to register the property in his name within one month as required.

5) That the first respondent failed to support the application to cancell the sale.

It appears from a recital in the Deed of transfer which vested the Farm in the fifth respondent that the third respondent executed a power of attorney to pass transfer on the 25th October 1990 and the Deed of Transfer was registered on the 19th March 1991.

Mr Shilubane for the fifth and third respondents raised a point of law in limine that the applicant had no locus standi in judicio to bring the application on the 4th April 1991 as on that date he was no longer the registered owner of the Farm. Secondly the applicant was asking for relief of an academic nature as the application did not contain a prayer that the Deed of Transfer in favour of the fifth respondent be set aside. I took the view that these matters need not be decided in limine, but, could be considered together with the issues raised by the application itself.

Dr. Fine submitted that the notice of sale published in the Government Gazette of the 19th August 1988 was an insufficient compliance with Rule 46 (8) (b) of the High Court Rules which requires "the execution creditor to publish the said notice once in the said newspaper and in the Gazette not later than fourteen days prior to the date of the sale". There are fifteen days between the

19th August and the 2nd September both days inclusive. Dr. Fine referred me to Rontgen v. Reichenberg 1984 (2) S. A. 181 in which Coetze J. at 184 and 185 considered the meaning to be attached to "days" in the corresponding provision in Rule 46 (7) (a) (b) and (c) of the uniform Rules of Court obtaining in the Supreme Court of South Africa.

In the High Court Rules at Rule 2, which deals with interpretation, the following appears:

"2. In these Rules and attached forms unless the context otherwise indicates .....

'Court day' means any day other than a Saturday, Sunday or Public holiday, and only Court days shall be included in the compilation of any time expressed in days prescibed by the Rules or fixed by any order of Court...."

Coetze J. held that the words "unless the context otherwise indicates " means that another meaning is to be given to the particular word or phrase so defined only if the parts which precede or follow that partcular word or phrase indicate that it is used in a different sense or with a different meaning. He pointed out that this approach is narrower than that employed in the interpretation of a statute, where the intention of the legislature is to be determined. Coetze J. held that the contrary view of Eloff J. in First Consolidated Leasing Corporation Ltd. v. Theron & Others 1974 (4) S.A. 244 at 246-7 was clearly wrong.

As there is nothing in Rule 47 (8) which indicates that the expression "not later than 14 days before the date appointed for the sale " that the word "days" is to be understood in another sense than "Court days", the context does not indicate any other meaning. I accept that Dr. Fine's argument is correct and that as far as the publication in the Gazette is concerned the rules of this Court were not complied with. There is no suggestion that this was known to anyone at the time the sale was conducted.

The accepted view is that a perfected sale in execution should not lightly be impugned [ Sookdeyi & Others v. Sahadeo & Others 1954 (4) S. A. 568]. However in Small Enterprises Development Co. Ltd. v. Silderhius & Another (1970 - 76) S. L. R. 444 Nathan C. J.

held that where there is a material defect or deficiency in the conduct of the sale itself, the common law does not require that the sale should stand even where there has been delivery to the purchaser. The learned Chief Justice relied on Reinhardt v. Ricker and David (1905 T.S. 179 at 188) where reference was made to Van Leeuwen's Proposition that the omission of any solemnity or formality in regard to a sale in execution ought to vitiate the transaction.

The purpose of the advertisment is to attract bidders. (Nepaul v. Messanger, Magistrate's Court, Port Alfred [1962] (1) S. A. 553] The advertisment in the newspaper was timely while that in the Government Gazette was a few days short of what was required. While it is possible that an application to interdict the sale might have succeeded for want of compliance with the exact requirements,, a pragmatic view must now be taken of the irregularity disclosed. Bidders are most unlikely to search the Government Gazette for advertisments for sales in execution, to the exclusion of what appears in the newspapers. There is no evidence that any potential bidder was denied participation in this sale in execution by reason only that the advertisment placed in the Gazette appeared later than required by the rules of this Court. The applicant should not now be permitted to rely upon this technicality to impugn the sale.

The second objection is of more substance. The conditions of sale stipulated:

"6A

- The purchaser shall pay a deposit of ten (10) per cent of the purchase price in cash on the date of the sale, the balance against transfer to be secured by a bank or building society guarantee, to be approved by the plaintiff's attorneys, to be furnished to the Deputy Sheriff within 30 days after the date of the sale."

This did not occur. What appears to have happened is that the first respondent as a bank entered into an arrangement with the fifth respondent as the purchaser in regard to the financing of the purchase. The Deputy Sheriff seems to have stepped aside and allowed the further conduct of this judicial sale to become the exclusive business of the execution creditor and the successful bidder at the public auction.

Dr. Fine submitted that the paragraph 6A of the conditions of sale constitute a suspensive condition and since it was not complied with by the purchaser no contract of sale come into existence. He cited such cases as Corondimas v. Badat 1946 A.D. 458 in support.

I do not think that paragraph 6 of the conditions of sale should be looked at in isolation from the other conditions. Paragraph 7 contemplated what the position would be if the purchaser failed to carry out his obligations. It made provision that:

> "... the sale may be cancelled by a Judge summarily on the report of the Sheriff or Deputy Sheriff on due notice to the purchaser...."

No such report was furnished and the sale was not cancelled by a judge. Whether the Deputy Sheriff failed in his duty to the present applicant, by not making a report to a judge under condition 7 is another matter and outside the scope of these proceedings. Since no action was taken under paragraph 7 the sale constituted a binding contract between the Deputy Sheriff and the fourth respondent from which neither party could resile. If paragraph 6 constituted suspensive condition, as Dr. Fine argues, the fact remains that no action was taken to confirm it by judicial intervention as provided in paragraph 7. I therefore do not accept that the circumstances described constituted an irregularity which would require this Court to set aside the proceedings.

The next objection refers to the failure of the Deputy Sheriff to furnish a report to the applicant's attorneys. The property was sold on the 2nd September 1988. It was not until 1990 that the applicant's then attorneys wrote to the Deputy Sheriff enquiring as to whether paragraphs 6 (a) and 6 (b) of the conditions of sale were

fulfilled. The matter was to be treated as urgent. Another letter was sent on the 11 July 1990. The Deputy Sheriff did not reply.

In May and July 1990 the plaintiff appeares to have had discussions with representatives of the first respondent about the "reaquisition" of the farm. By September it became clear to the applicant that the first respondent would not agree to cancell the sale of the farm. The applicant took no further steps to defend his interest until the 4 April 1991 when this application was filed.

The Deputy Sheriff was under no obligation to reply to the letters directed to him by the applicant's attorneys. But he was obliged to comply with Rule 46 (15) and prepare a plan of distribution which would be open for public inspection. The obligation is imposed by the Rule, whether or not there is more than one creditor. It is an essential formality to a judicial sale. It ensures that the public at large as well as interested parties have the opportunity to satisfy themselves that the sale was conducted properly and fairly by all concerned. If the Deputy Sheriff had done this in September 1988 the applicant would have been able to ascertain the procedure followed and he would then have had an opportunity to apply under the rules to a judge for relief. The Deputy Sheriff did not comply with the rules in this respect at all. If the present applicant can show that his dereliction of duty caused him loss or damage, he may have some redress against the Deputy Sheriff, but, that is outside the scope and purpose of this application.

The failure of the fifth respondent to register the property in his name within one month as required by 6 (b) of the conditions of sale rendered him liable for payment of interest at the rate of 15% per annum. Mr Fine submitted that this clause is vague and unreasonable and it vitiates the contract, because it makes the condition uncertain. [Lee Parker v. Izzet (No.2) (1972) 2 All E.R. 800.

The conditions of sale required to be used are to be found set out in Form 23 of the First Schedule to the High Court Rules. Clearly the Deputy Sheriff was at fault in departing from the prescribed form. In this case both the plaintiff and the bondholder

were one and the same person. The buyer became liable to the first respondent to pay interest on the balance of the purchase price at the stipulated interest until the date of transfer. The settlement of that claim was and remains a matter between the first and fifth respondents and does not impinge upon the rights of the applicant.

Finally it is alleged that the first respondent failed to support an application to cancell the sale, which the applicant alleges that the second respondent agreed to in July 1990. Mr Kuhlase the Manager of the first respondent agreed that he discussed matters with the applicant but he denies he undertook to cancell the sale in execution. All he was prepared to admit was that he would ask the fourth respondent to re-sell the property to the applicant, which request was refused.

It must be assumed that the applicant allowed the property to be sold by way of execution because he was unable to pay the debt due to the first respondent and that he took no action to impugn the sale between September 1988 and April 1991 because he was not in a position to pay the amount due. Even if Mr Kuhlase had agreed to support the applicant, he would not have agreed to do so without the condition that the applicant would pay the debts secured by the Bond over the Farm. By the time the applicant commenced these proceedings the fourth respondent had become the registered owner of the property. This brings me back to the point in limine that the applicant no longer has an interest to defend.

Before this application was filed, the fourth respondent became the registered owner of the farm and there exists a bond in favour of the first respondent. The fifth respondent has been at all times free to make other dispositions as there exists no restraint upon the exercise of his rights of ownership. This Court could not now make an order which would have the effect of restitutio in integrum. It certainly could not do so by granting the relief which the applicant now seeks. An order setting aside the sale in execution would not of itself divest the fourth respondent of his title to the Farm.

In the case of Gibson N.O. v. Iscor Housing Utility Co. & Others 1963 (3) S. A. 783 Galgut J. said at 786.

> " If one has regard to the importance attached to the system of land registration in our law and the faith which the public places therein, : the inconvenience and improprieties that would be caused by holding that a transfer of land following upon a sale in execution effected not in accordance with the provisions of the Insolvency Act would be much greater than the consequences of allowing the transaction to stand".

In this case the sale in execution was not conducted in all respects with the rules of this Court. But the applicant took no steps to impugn the transaction in the 2½ years between the sale and the registration of the property in the name of the purchaser. Had he done so it is possible that this Court might have prevented, the registration. Instead he stood aside and allowed the sale to be completed by registration. In Wolstenholme v. Boyes 8 Buchanan (1878) S. C. R. 175 De Villiers C.J. at 178 having commented about the inaction of the plaintiff's whose goods were sold in execution said:

> "The goods were sold. and eighteen months after the sale the plaintiff brings this action to have the sale set aside as illegal. Even if it had been clear as it by no means is, that the plaintiff had the right to object to the sale of the particular goods in question, he must, under the circumstances be held to have renounced his right to take objection."

So it is with the present applicant who has not even ventured an explanation which might account for his tardiness in bringing the matter before the Court.

This application is dimissed with costs.

F. X. ROONEY

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