

IN THE HIGH COURT OF SWAZILAND

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CASE NO. 2063/97

IN THE MATTER BETWEEN:

DUMISANI MAZIBUKO

APPLICANT

VS

SYDNEY SABELO SITHEBE

1ST RESPONDENT

NDVODZILELE ELIJAH DLAMINI

2ND RESPONDENT

SWAZILAND DEVELOPMENT AND

3RD RESPONDENT

SAVINGS BANK THE REGISTRAR OF DEEDS

4TH RESPONDENT

THE ATTORNEY GENERAL N.O.

5TH RESPONDENT

CORAM:

S.B. MAPHALALA - A J

FOR APPLICANT:

H. FINE

FOR FIRST AND THIRD RESPONDENTS:

B. KHUMALO

FOR SECOND RESPONDENT:

L. MAZIYA

JUDGEMENT

(12/12/97)

Before court is a notice of motion brought by way of motion for an order in the following terms:

1. That the court dispense with the usual time limits, and provisions of service as are required in terms of rules of court and that this matter be heard as one of urgency;
2. That the fourth respondent be ordered and directed to cancel deed of Transfer No 131/1997 in terms of which the second respondent transferred to the first respondent certain Lot No. 467 situate in Ngwane Park Township, District of Manzini, Swaziland.
3. That the fourth respondent be ordered and directed to expunge from the records in the deeds registry all entries relating to the aforesaid deed of transfer;
4. That the first respondent be interdicted from alienating and/or encumbering Lot No. 462 situate in Ngwane Park Township, District of Manzini, pending the finalisation of this application;
5. That the first, second and third respondents be ordered to pay the costs of this application

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- on an Attorney and own client scale and that fourth and fifth respondent be ordered to pay costs only in the event of their opposing the application;
6. That this court grants such other and/or alternative relief.

The events in this matter are a very sorry tale. They involve a complex set of facts which is not easy to decipher. However, in an effort to do so I shall proceed to state the applicant's case "in extenso" which in my view lays a good background of the facts for one to begin to understand the issues involved. The applicant's founding affidavit lays such background. The applicant avers that on or about June, 1996 the third respondent who was plaintiff in Case No. 3009/96 caused an advertisement to be placed in the newspapers advertising a sale by public auction of immovable property described as certain Lot No. 467 situate in Ngwane Park Township in the District of Manzini.

A similar notice was also placed on the High Court Notice Board.

On or about the 2nd July, 1996, the date appointed for the sale by public auction of the aforesaid property, applicant attended the sale and purchased the property for the sum of E24,000-00. He paid a deposit of E4,800-00 and received a receipt which is one of the annexure marked Annexure "C". On or about August 1996 applicant paid the balance of the purchase price being an amount of E19,200-00. After payment of the purchased price applicant expected that the property would be transferred into his name as he had fully complied with the conditions of sale.

On or about the 26th November, 1996 he received a letter from Mlangeni and Company a firm of Attorneys, representing the third respondent, in terms of which they stated that they had been instructed by the third respondent to secure cancellation of the bond which the third respondent held over the property in order to enable registration of the said property into his name. A copy of the letter is attached marked Annexure "F".

On about the 3rd day of December 1996 he received a letter for the Acting Deputy Sheriff in which he instructed Attorneys Masina, Mazibuko and Company to transfer the property into his name. He attached a copy of the letter marked Annexure "G".

On or about February 1997 applicant telephoned Attorney Titus Mlangeni of Mlangeni and Company and requested the title deed for purpose of having the said property registered into his name. Mr Mlangeni informed him that he was waiting for his client, the third respondent, to cancel a mortgage bond, which they held over the property and also for the third respondent to hand the title deed in respect of the property to attorney Thulani Masina, the appointed conveyancer who was to effect the transfer of the property into his name.

On or about February 1997 Attorney Masina forwarded to him a statement of transfer costs in which he required payment of E1 ,318-50 in order to transfer the property into his name. He duly paid the required amount. A copy of his cheque is attached marked Annexure "H".

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On or about November 1996 the Acting Deputy Sheriff paid all the monies due, owing and payable by him in respect of his purchase of the said property to the third respondent as appears more fully in a copy of her letter and cheque to Mlangeni and Company which is attached and marked Annexure "I".

However, he avers, notwithstanding full compliance with the conditions of purchase and sale of the property he was unable to obtain registration of the property into his name and on about the 9th April

1997 he launched an application under Case No. 992/97 before this court for an order ordering and directing the third respondent to transfer the property in his name.

On or about the 9th May, 1997 applicant obtained an order from this court directing the third respondent to transfer the said property into his name as appears fully in the court order which is attached marked Annexure "J".

Notwithstanding such court order neither the third respondent nor the Registrar of Deeds were able to effect transfer of the said property.

He then conducted a search in the office of the Registrar of Deeds and discovered that on or about March, 1997 Moses Langwenya, the Siteki Branch Manager of the third respondent had applied to the fourth respondent for cancellation of the mortgage bond in respect of Lot 467, situated in Ngwane Park Township in the District of Manzini. Applicant attached the mortgage bond in question and the application marked Annexure "K".

He further discovered that the second respondent had transferred Lot 467 to the first respondent on the 27th March, 1997. A copy of the deed of transfer is attached in applicant's papers marked Annexure "L".

Applicant avers that the aforesaid transfer was effected notwithstanding the fact that the said property was under attachment and had been sold to him at a public auction sale conducted on the 2nd July, 1996.

On the 18th June, 1997 he wrote to the third respondent's attorneys requesting information concerning the deed of transfer and mortgage bond in respect of the property, he also requested copies of the file relating to correspondence between Lindiwe Khumalo - Matse and the aforesaid attorneys as he believed that a fraud had occurred in this matter. Applicant attached the said letter in his papers marked Annexure "M".

He duly received a letter dated the 26th February 1997 from attorneys Mlangeni and Company to attorneys Lindiwe Khumalo - Matse and Company wherein Mr Mlangeni pointed out that the property in question had been sold and that on the 8th November, 1996 they had received a cheque from the Deputy Sheriff in full settlement of the purchase price. A copy of the letter is attached in his papers marked Annexure "N".

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On or about the 3rd March, 1997 attorneys Lindiwe Khumalo - Matse replied to Mlangeni and Company letter dated 26th February, 1997 and pointed out that neither the second respondent nor the Manager of the third respondent had disclosed that the property in question had been subject to an attachment. A copy of the letter is attached to the applicant's papers marked Annexure

The applicant further submitted in his affidavit that notwithstanding the fact that on the 26th February, 1997 the first respondent's attorneys were apprised of the fact that the property in question had been under attachment and had been sold, the attorneys with full knowledge thereof nonetheless allowed the property in question to be transferred to their client, the first respondent. The second respondent had no legal right or title to the property in question when he purported to sell same to the first respondent and as he had already purchased and paid for the property, applicants stated further that the third respondent had no legal right to cancel the bond over the property in order to give effect to the sale between the first and second respondents. He avers that the first respondent acted malafides in securing transfer of the property into his name because his legal representative were fully

appraised of the position regarding the second respondent's lack of capacity to transfer the said property. That a substantial injustice has occurred and that the transfer of the said property into the name of the first respondent cannot be allowed to stand.

The applicant argued that this is a matter of urgency because there is real likelihood that the first respondent may at any time encumber or dispose of the property to an innocent third party.

Filed of record are a number of affidavits by the respective respondents save for the fourth (Registrar of Deeds) and the fifth respondent (The Attorney General N.O.). It appears from the look of things they are not opposing this application.

I will start with the opposing affidavit of Titus Mlangeni who represented the third respondent at the material time. His affidavit to a great extent supports most of the material averments made by the applicant in his Founding affidavit. Their only point of departure being that the third respondent should not be dragged into the fray as at all material times his client, the third respondent has been prepared to transfer ownership to applicant, has been perturbed by the manner in which events later unfolded, and would have liked to comply with the court order in favour of the applicant but at that stage it was impossible to either comply or facilitate compliance. Letters from the bank throw useful light in this respect, Annexure marked "3r5", "3r6" and "3r8". Mr Mlangeni's affidavit as I have said earlier is in tandem with most what the applicant has averred. Mr Mlangeni stated in his affidavit informed the court the third respondent, who is judgement creditor in Case No. 3009/95 caused a sale in execution of the property in issue. Third respondent proceeded to do all that was necessary to enable the applicant to take transfer of the property. Annexure "F" and "G" to applicant's affidavit are confirmation of this. In the meantime, and unknown to the third respondent, the judgement debtor has sold the property to

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a third party, the first respondent, despite the fact that the property was already under attachment and unable to be executed in terms of the law.

He revealed in his affidavit that the applicant having paid the purchase price in full, on the 2nd December, 1996 he issued a cheque to the third respondent's Siteki Branch. This cheque was rejected and advice given, for the first time, that the balance on the judgement debtor's loan account had been settled direct at Siteki branch of third respondent. He immediately wrote a letter to the first respondent's attorney, on the 26th February 1997, and requested that the matter be discussed with a view to resolving it. He believed that at that stage the process of transfer was not complete. First respondent's attorney responded by a letter dated 3rd March 1997 (Annexure "3xr"). On the 7th April, 1997 he again wrote to first respondent's attorney to sound urgency (see letter marked "3r4"). He states in his affidavit nothing was achieved. As we now know, the property was eventually transferred to the name of the first respondent. Mr Mlangeni's real gripe is on the question of costs. He avers that in view of the facts as he has outlined it would be extremely harsh and improper to hold the third respondent liable for legal costs, let alone at the scale of attorney and own client. It is clear that the cause of all these problems is the second respondent.

Now I come to the opposing affidavit of the first respondent to applicant's founding affidavit. His story in short is as follows:

He avers that at the time applicant launched the application under Case No. 992/97 he was aware that he (First Respondent) was an interested party in the proceedings but neither cited him as a party nor did he serve him with the process in this matter. He was never served with the order of the court.

He became aware of the order from his attorneys on/or about the 28th May, 1997 after they had received copy thereof undercover correspondence from Mlangeni and Company date the 26th May, 1997. At that point transfer of the property into his name had already been affected. Attorneys Mthembu, Simelane, Zwane and Kubheka handed the transfer. He received no documentation or order of court or on his attorneys regarding the allegation that the property had already been sold. He had no reason to believe it was true, in any, case because the third respondent continued to assist him in obtaining transfer of the property and accepted payment from him in this regard. That it was most misleading and dismiss of the third respondent or its attorneys to continue in this fashion. He believes that this whole confusion would have been averted, if the applicant had made him a party to the proceedings by which he sought to seek transfer. He maintains that he was a bona fide purchaser and did not act in bad faith when neither the second respondent nor the third respondent disclosed to him at the time that the property was sold.

It was only at a later stage that correspondence advising of a purported sale of the property at an auction sale was sent to his attorneys. Already the sale had been concluded and transfer was under way. In any case the correspondence of Mlangeni and Company was not consistent with that of the third respondent who maintained to him in word and in conduct that he was entitled

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to the transfer of the property. What he finds strange is that the third respondents attorneys did not advise the third respondent to discontinue their involvement in the transfer of the property if indeed, to their knowledge had already been sold to the applicant. What is even stranger is that applicant did not find it necessary to interdict him from proceeding with the transfer in his proceedings under Case No. 992/97 when it was known to him at the time that he was procuring a transfer of the property.

Coming to the second respondent. In his opposing papers he averred that at the time of the sale he was unaware of these events as outlined by the applicant. He admits that at a later stage the first respondent approached him advising that his attorneys Lindiwe Khumalo-Matse and Company had been informed by Mlangeni and Company that the property had been sold by public auction to someone else. He then took it upon himself to seek confirmation of this information from the third respondent as he had hitherto been unaware. The third respondent advised him that they had no knowledge that the property had been sold at an auction sale although they were aware that it had been advertised. He was told that he had nothing to fear and that he should proceed with the transfer to first respondent name. He obtained this assurance from the legal advisor of the third respondent stationed at the third respondent's head Office in Mbabane, Mr V.T. Simelane.

He further submitted that applicant did not become the owner of the property upon sale to him at the auction. If the third respondent breached the sale between itself and the applicant, the applicant is entitled to claim damages from the third respondent for the breach.

He denies any malafides on his part of the first respondent in securing transfer. He avers furthermore, that substantial injustice will occur to the first respondent as he has dissipated the proceeds of the sale to settle various of his personal debts and to set up a burglar proofing business.

The applicant then filed a replying affidavits in response to the opposing affidavits by the respondents in this matter.

These are the facts of the case as per the various affidavits by the parties concerned.

The matter came before me on the 22nd August, 1997 for arguments. In this case Advocate Mr Fine appeared for the applicant, Mr Khumalo appeared for the first and the third respondents. Mr Maziya appeared for the second respondent.

Mr Fine contended on behalf of the applicant that from the facts before court there is no doubt that the first and the second respondents were informed of the applicant's purchase of the property at an auction sale prior to the transfer of the property. He argued therefore that the second respondent at the time of the transfer to the first respondent had no right in law to effect such transfer. To this end he referred the court to the writings of Silberger and Schoeman in the

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work titled Law of Property (3rED) at page 76. "(No body gives what he does not have)". He further referred the court to the deeds Registry Act and the Land Act No 37 of 1968 in particular Section 96 of the latter enactment which gives provision for a setting aside of a wrong registration. The main thrust of Mr Fine's argument is that the original transferor (first respondent) had no right to transfer the property to the transferee (first respondent). That it would be argued by the first respondent that he was a bona fide purchaser. Mr Fine argued that cannot wash because the first respondent had been advised as to the position as regards the property prior to him taking transfer. The first respondent acted malafides in securing transfer of the property into his name because his legal representatives were fully apprised of the position regarding the second respondent's lack of capacity to transfer the said property.

Lastly Mr Fine argued that there has been a substantial injustice to the applicant because the manner in which the first and the second respondent conducted themselves amounts to fraud.

Mr Khumalo for the first and third respondents. The position adopted by Mr Khumalo is that the sale in execution by the Deputy Sheriff to the applicant was not in conformity with Section 46 (2) of the High Court Rules which govern sales in execution. In this instant case the Deputy Sheriff who conducted the auction sale is that of Manzini as evidenced by the return of service filed of record at page 64 of the book of pleadings. That the said Deputy Sheriff who effected the attachment is one Mrs Antonio Herpes and according to law she had no power to effect the attachment let alone to conduct a sale in execution. He argued further that it appears that the said Deputy Sheriff was also appointed for the Lubombo Region. The attachment must be treated as a nullity as the Deputy Sheriff acted *ultra vires* her powers in contravention of the provisions of the Sheriffs Act.

Mr Khumalo referred the court to the case of Joosua vs JHK (S.A.) (PTY) Ltd Construction 1992 (2) S.A. 658 at page 679 (para-b-c) and that of Sowden VS A bsa Bank and others 1996 (3)S.A. 814 at page 821 to the proposition that Rule 46 (3) was not complied with in the present case and thus making the resultant auction sale to the applicant a nullity. Because there was failure in complying with Rule 46 of the High Court Rules. The applicant did not acquire any personal right pursuant to the sale. The second respondent was perfectly entitled to transfer the property as an owner of the property.

In concluding his arguments he argued the court to dismiss this application with costs.

Mr Maziya for the second respondent aligned himself with the arguments advanced by Mr Khumalo.

The second respondent in fact had filed a notice to raise a point of law. In his notice he alleges as follows:

The application before court is fatally flawed and misconceived in that:

- i. The attachment of the subject property ex facie, the papers was not in accordance
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with Rule 46 (2) of the rules of this court.

- ii. The auction sale ex facie, the papers was not conducted by a Deputy Sheriff as envisaged by section 4 (1) of the Sheriffs Act No. 17 of 1902 as read with Rule 46 (4) and 11 of the Rules of the court in as much as there is nothing to show that the Acting Deputy Sheriff had been authorised to conduct an auction sale in the Manzini District.

In reply on points of law Mr Fine pointed out that the respondent who is represented by Mr Khumalo in an affidavit by Titus Mlangeni who was the third respondent in this transaction stated under oath at paragraph 6 of page 61 of the book of pleadings as follows:

"The attachment of the property was lawful by virtue of the fact that it was in terms of clause 9 of the mortgage bond (page 38 of the applicant's affidavit). I annex the Deputy Sheriff's return on attachment marked "3r1".

Mr Fine's point is that Mr Khumalo for the third respondent cannot now blow hot and cold and attack the attachment in the face of his clients clear admission under oath. He urged the court to throw out this argument. Mr Fine further argued vigorously that both Mr Khumalo and Mr Maziya introduced new matters a day before the matter came for arguments. The court has observed that the notice to raise a point of law has the Registrar's stamp dated the 21st August 1997 and the matter was urged in court on the 22nd August, 1997.

Mr Fine argued that these points were only advanced after the close of pleadings and thus putting his client at a disadvantage in that he was not given time to prepare and respond to these new matters.

He argued the court to decide the case on the papers before it and should be loathe to go outside the perimeters of the pleadings, moreso pleadings had been closed. The parties had ample time to canvas these issues in their opposing affidavits.

These are the issues before me as I have mentioned earlier on in this judgement this case is characterised by a maze of complex facts which tend to cloud the real issues involved.

It is clear from the arguments by the legal representatives of the first, second and third respondent they did not challenge the able arguments by Mr Fine as to the sequence of events in this case. Their only problem is that the attachment was not in accordance with Section 46 of the High Court Rules and thus the purported sale to the applicant was a nullity. With respect to Mr Khumalo, it is my view, that this cannot be the case when one looks at the damaging admission which was unsolicited by Titus Mlangeni who was at the material time was representing the third respondent in this very transaction. He stated clearly at paragraph 6 of his affidavit which I have referred to earlier that the attachment was in law proper. Mr Khumalo cannot stand before this court and contradict his own client on a material point made under oath during the flow of pleadings. He waits until the close of the pleadings to bring a surprise on the applicant. This

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court cannot allow such double dealing, surely one version has to stand. The court is inclined to accept the version which was made under oath by the self-same respondent represented by Mr Khumalo. I do not see why these points were not fully canvassed during pleadings and only spring up as a surprise after the pleadings were closed. For this reason I throw out this argument by Mr Khumalo and I am not going to bother myself in looking at the issue further. As for the second respondent represented by Mr Maziya the same applies. I will also go further in his case and refer to page 22 of the book of pleadings which is an answer to their second point that "...there is nothing to show that the Acting Deputy Sheriff had been authorised by the Sheriff to conduct the auction sale in the Manzini District". The Sheriff of Swaziland at that time a certain Mr J.P. Annadale caused a notice to be published in one of the local newspapers and in the Government Gazette in terms of the law a notice of sale of the subject property. In that notice he states inter alia as follows.

"Notice is hereby given that pursuant to a writ of execution issued in the above matter, the undermentioned property will be sold by public Auction by the Acting Deputy Sheriff for the District of Manzini....."

It is not disputed that the said Acting Deputy Sheriff of Manzini mentioned in this notice is Mrs Antonio Herpes who subsequently conducted the sale pursuant to this notice. The second respondent point of law raised falls on its face in view of this notice by the Sheriff of Swaziland.

For the reasons I have advanced above I rule that the applicant has made a case and he is entitled to the order he seeks. I grant the order in terms of prayers 1,2,3 and 4 and will address the 5th prayer for costs shortly.

ORDER AS TO COSTS

The applicant had applied that the first, second and third respondents be ordered to pay his costs on an attorney and own client scale and the fourth and fifth respondent be ordered to pay costs only in the event of their opposing the application.

I will then deal with the fourth and fifth respondents and make no order for costs in respect of them as they have not opposed the application.

I will then proceed to the third respondent to me it appears from the facts of the case that the third respondent represented by Mr Titus Mlangeni tried all means to avoid this rather unpleasant suit by writing a barrage of letters to the parties involved to come to an amicable solution to this problem. I am not going to order costs in respect of the third respondent in view of what I have just outlined.

Then I will jump to the first respondent and will give him the benefit of the doubt that at the

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material time he did not know of the sale execution. I am not going to order for costs in respect of him.

Now I come to the second respondent who presented a different problem. From the facts before me his actions borders on fraud as Mr Fine rightly pointed out. In our law grounds upon which the court may order a party to pay his opponent's attorney and client costs include the following: He has been guilty of dishonestly of fraud or that his motives have been vexations, reckless and malicious or frivolous or that he has misconducted himself gravely either in the transaction under inquiry or in the

conduct of the case (see Herstein and Van Winsen 'The Civil Practice of the Superior Courts in South Africa' (3rd) at page 487 and also the case of Van Dyk Vs Conradie 1963 (2) South Africa 413 (c)).

Clearly, in the present case the second respondent misconducted himself gravely in the transaction under inquiry. For this reason I rule that he pays costs at attorney and client's scale.

S. B. MAPHALALA

ACTING JUDGE