IN THE HIGH COURT OF SWAZILAND

I

V S Simelane & 85 others

v

City council of Mbabane & others

Case No 1775/98

and

II

Auspect Property One (Pty) Ltd.

v

City Council of Mbabane and others

Case No 1776/98

JUDGMENT

The applicants in both these matters have joined in a common claim against the City Council of Mbabane. They all seek the setting aside of sales in execution of immovable property. The council, to recover unpaid rates levied by the Council owing by the applicants on their respective properties, sold the properties. That the debts to the city council were owing and long overdue for payment is not in issue. In many cases the Applicants have tendered payment of their indebtedness, but only subsequent to the sale of the properties. The council has however been advised that the properties have been validly sold, and the transactions cannot be reversed.

It would be difficult to muster much sympathy for the Applicants, most if not all

of whom, have only themselves to blame for the predicament in which they find themselves. This case is not however, to be decided on sympathy. The applicants' conduct could, however be a factor in considering the question of costs.

The Rating Act 1995 provides a streamlined procedure for the recovery of unpaid rates. Section 32 deals with "Legal Proceedings for recovery of rates"

As soon as possible after the expiry of two months from the date upon which the rate became due and payable, the collector of rates, is obliged to submit a schedule of those properties in respect of which the rate levied has not been paid, and the names of the registered owners of such properties, to the local authority, (in this case the Mbabane city council). The council then may institute legal proceedings for the recovery of the overdue rates from the defaulters together with interest and penalties.

Institution of the proceedings is not to be delayed beyond a period of two years except in circumstances not here applicable.

The procedure for the recovery of rates in terms of this section comprises a number of mandatory steps (Section 32(2)). The issue and service of a summons is dispensed with. Instead the local authority is

required to file with the clerk of the court a statement certified by the Treasurer, on oath, setting forth the amount of rates payable by the owner. The clerk of the court is required on receipt thereof to enter judgment in favour of the local authority against the owner of the property.

A copy of such statement is to be posted by the Treasurer to the owner on the same day as the statement is filed with the clerk of the court. This is not an invitation to the owner to defend the action but is only advice that the step of entering judgment has been taken.

It is specifically, and, peremptorily provided in Section 32(2)(c) that the statement referred to shall contain a copy of the provisions of that sub section and sections 29 30 and 31. The purpose of this is obviously to draw the attention of the owner to the possible consequences of his default and what has already been done. To achieve this and to ensure a proper realization by the owner of the hazards of further continued default in the payment of rates, the provisions of the sections mentioned must be brought to his attention.

With this provision there has been no compliance. The statement filed with the

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clerk of the court and posted to the owners of the properties did not contain a copy of all the sections mentioned. A copy of one such certificate appears as annexure "CC2" attached to the affidavit of Japp Motsa, filed by the First respondent in case 1776/98. That document which is intended as an example of the certificate generally used by the council for the purposes of compliance with this section, is I assume the form of certificate which was sent to all the applicants in both cases. It is patently fatally defective in that no reference at all is made in it to sections 29 30 and 31. Indeed in purporting to quote the provisions of section 32(2), reference to the provisions of 29 30 and 31 appears to have been deliberately omitted. This failure to comply with the provisions of Section 32 constitutes an omission of a fundamental requirement of the procedure prescribed.

The provisions of the section in this regard are for the reasons mentioned, mandatory. Like other provisions of the section, the purpose of the legislature is to ensure that the ratepayer is repeatedly warned of the possible consequences of persistent default in the payment of rates. Close attention to, and compliance with, the provisions of the section are essential not only to the fairness but to the very validity of action taken to recover arrear rates under Section 32.

Because of the failure to quote the portions of the act specified the certificate filed with the clerk of the court, a copy of which should have been sent to the defaulting ratepayer, the certificate is fatally defective. All the steps, which followed thereon, from the entry of judgment to the final sale of the properties are invalid and will on this account alone, have to be set aside.

Having come to that conclusion it is not necessary to base the decision of these applications on any of the other respects in which the applicants' point out the Council has failed to follow the procedures prescribed. As they have been raised, a brief reference thereto is not out of place to indicate the council's surprising inattention to the prescribed manner in which rates are to be recovered.

Section 32 (3) provides that if any rate remains unpaid after the end of the financial year for which it was levied, and for the satisfaction of which no sufficient execution can be made (my emphasis of the very words of the relative section) the local authority is obliged to take the further steps therein described. What is important to

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observe is that the council may only avail itself of the procedure provided in Section 32(2) (a) if the rates cannot be recovered by execution on the movable assets of the defaulting owner.

See Sandton Finance (Pty) Ltd v Clerk of the Magistrate's Court, Johannesburg and others. 1992 (1) SA 509. This principle is given statutory recognition by Section 41 (1) of the Magistrate's Court Act 66/1938

In Karaland (Pty) Ltd v Durban City Council 1957 (4) SA 672 Holmes J ruled that words to the effect of those quoted require the creditor to first exhaust the debtor's movables before seeking to execute on the debtor's immovable property.

In the present instances, no execution on movables was attempted. The council does not dispute this

In dealing with this point, Dr Fine on behalf of the Respondent, sought to argue that the provisions of the Section were directory and not mandatory. He referred to Baxter Administrative Law at page 446 and 450. There is nothing in the texts quoted which justifies the conclusion which he sought to draw namely, that the requirement of prior unsuccessful attempted execution on movables can be dispensed with. This then, is a second reason why the sale of the properties cannot be maintained. There are others.

Had the Council properly prepared the way for the succeeding step, it should then, after the end of the financial year for which the rate had been levied, and if the rate for which no sufficient execution could be made, remained unpaid, have caused publication to be made in the prescribed manner of the information specified in Section 32(3)(a). Such publication would include notice to the defaulting owner to make payment of the amount stated to be owing within two months of the date of publication. Such notice, in terms of the section, would, to comply with the provisions of the section, also inform the owner that in default of such payment application would be made to court to order that the property be sold by public auction.

A notice as contemplated in the section was published, but without judgment having been validly entered and without any attempt at execution on movables having been made. The Notice was itself therefore invalid.

Notwithstanding this invalidity, the council proceeded to apply to the magistrate for leave to sell by public auction, the properties of those owners still in default. No

notice of the application was given to the Applicants or for that matter to mortgagees of the properties. The magistrate should not have entertained the application, without proof of service of the notice of application. There is no statutory justification for granting relief on an ex parte basis. This is a grave irregularity, and constitutes a further reason for setting aside the proceedings.

The sales by public auction of all the properties were conducted in terms of the magistrate's order, by someone other than a messenger of the court. It is very arguable that the magistrate had no jurisdiction to order such a departure from the rules of the court. The procedure of the rules of court relative to the sale in execution was not followed. The propriety of this doubtful. I am not making any finding that the sales are to be set aside on this account, but local authorities would be well advised to take professional legal advice and opinion on these matters before embarking on the recovery of arrear rates in terms of Section 32.

I observed at the outset that the applicants find themselves having had to come to court, through their own fault in persisting in their default in the payment of rates. I have considered this in relation to the question of costs. I have decided not to mark disapproval of their conduct, by depriving them of the order for the payment of their costs. The respondent was at the outset informed of the many respects in which the procedure adopted was defective in non-compliance with the provisions of the act. It chose to defend its actions and must therefore suffer the consequences of losing the case.

The applications succeed with costs. The sale by public auction of each of the applicants' property is declared invalid and. set aside.

S W Sapire