

IN THE HIGH COURT OF SWAZILAND

Civil case no. 2268/96

in the matter between:

SWAZI PLAZA TOWERS PTY LTD.                      APPLICANT

AND

G.S. MABUZA T/A                                      1st RESPONDENT

NEDBANK (SWD) LTD                                2nd RESPONDENT

IN RE:

SWAZI PLAZA TOWERS (PTY) LTD                APPLICANT

AND

G.S. MABUZA T/A

BACKOFEN                                              RESPONDENT

CORAM                                                 : MATSEBULA J

FOR THE APPLICANT                                : MR. MASUKU

FOR THE 1ST RESPONDENT

2nd RESPONDENT                                    : MR. SIMELANE

JUDGEMENT 12/03/99

1. On 13th September 1996 the applicant moved an urgent ex parte application before this court, for an order perfecting the landlord's hypothec and obtained an order in terms of which the Deputy Sheriff for the District of Hhohho was

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empowered and authorised to attach all movable assets found on the premises at Shop nos. 7A and 7B Development House, Mbabane.

2. The order also empowered and authorised the Deputy Sheriff to evict the respondent from the said premises that is Shop 7 A and 7B.

Hereafter a writ of execution for all of 1st Respondent's movables was issued and subsequent to that a nulla bona return was filed.

3. Subsequently it transpired that the movables attached by the Deputy Sheriff were under a Deed of hypothecation entered into between 1st and 2nd Respondents and such a Deed of hypothecation was duly issued in terms of the provisions of Section 25 of the FINANCIAL INSTITUTIONS ORDER 23/1975 and was duly registered with the Registrar of Deeds for Swaziland.
4. The two counsel representing Applicant and 2nd Respondent has agreed upon the facts stated above respectively. They have now referred the matter, to this court on a question of law for a determination by this Court. The question of law reads thus:-

"Whether the claim of a holder of a Deed of Hypothecation, duly issued and registered in terms of the law defeats and/or had preferential right over the landlord's hypothec in respect of movable property found in and attached on the leased premises by the landlord.

Mr. Masuku who appeared for the Applicant argued that the failure by the 2nd Respondent to inform Applicant that the movable property found on the leased premises belonged to it and that it had entered into hypothecation deed with the 1st Respondent was detrimental to its rights. Mr. Masuku referred the court to BLOEMFONTEIN MUNICIPALITY VS JACKSON LTD 1929 AD @266 and also to book of the learned author Ellison Khan CONTRACT AT MERCANTILE LAW through the cases @392. Mr. Masuku argued that notwithstanding the provisions of the FINANCE KING'S ORDER - IN - COUNCIL 23/1975 Section 25 which reads: the heading is LOANS AND ADVANCE SECURED BY HYPOTHEC-

"Subject to the Section, a financial institution may on completion of a deal of hypothecation, secure any loans or advances by the hypothec of crops or other

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agricultural or nature produce, whether attached to the soil or not, felled timber, animals, fodder, industrial and fishing materials, rolling stock, boats, fishing tackle or nets, raw materials, equipment, machinery, stock-in-trade and generally all produce of labour and things necessarily used in connection with the production, or other movable property (including incorporeal rights) of whatsoever kind or description, of which the borrower is the owner, and in respect whereof he has the right of use and disposal, whether or not on the date of such deed of hypothecation the property offered as security is in existence or has been acquired by the borrower."

Mr. Masuku argued that this court should not follow that provision of the KINGS ORDER - IN - COUNCIL but rather that the common law should be followed which states that the proceeds are kept by the landlord.

Mr. Simelane on behalf of the 2nd Respondent submitted that once the landlord has knowledge that the movable property is hypothecated to any other party he may not sell the property. It was Mr. Simelane's argument that Registry at the Deeds office is a clear message to the world at large and that 2nd Respondent could not have been expected to inform the landlord of this fact.

Mr. Simelane then referred to Financial Institutions under KING'S ORDER - IN -COUNCIL Section 25 and stated that this order in council was designed for the protection of the rights of Banking Institutions. I could not agree with Mr. Simelane more. I find that the contention by Mr. Masuku that the provisions of Section 25/26 of the Order in Council it should be interpreted in such a way that the common law's position is not departed from is unacceptable. This is because the King's Order in Council was enacted precisely for the purpose of making inroads into the Common law position. To place an interpretation otherwise would be totally against the intention of the King Order - in - Council.

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In the result, I hold that the rights of a holder of a deed of hypothecation, duly issued and registered in terms of the law enjoys a preferential rights over that of the landlord's hypothec and in respect of movable property found on and attached on the property. In the premises, the court finds in favour of the second respondent in this matter.

J. M. MATSEBULA

JUDGE

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