THE HIGH COURT OF SWAZILAND

CENTRAL BANK OF SWAZILAND

Applicant

And

ANDRIES STEPHANUS VAN WYK & THREE OTHERS

Respondents

Civil Case No. 1654/99

Coram	S.B. MAPHALALA - J
For the Applicant	Advocate P. Flynn
	(Instructed by Robinson Bertram)
For 1st and 2nd Respondents	Advocate D. Kuny S.C.
	(Instructed by R. J. S. Perry)

JUDGEMENT

(13/02/2003)

The relief sought

Applicant seeks an order against the 1st, 2nd and 3rd Respondents setting aside the transfer of a certain property described as Lot No. 2835, situate in Mbabane Extension No. 8 (Sidvwashini, Industrial Township), district of Hhohho, Swaziland which was transferred from 1st Respondent to 2nd Respondent on the 29th October 1997, directing

the 3rd Respondent to expunge and delete from its records the property being held in its name, and authorising 3 rd Respondent to reflect in its records that the said property is registered in the name of the 1st Respondent.

The matter came by way of notice of motion in the long form filed of record on the 6th July 1999, founded on the affidavit of the Governor of the Central Bank of Swaziland himself Mr. Martin Gobizandla Dlamini. Various annexures were also filed in support thereto.

The 1st and 2nd Respondent filed their notice of intention to oppose the application on the 12th July 1999, and thereafter on the 29th July 1999 filed an answering affidavit of the 1st Respondent and thus joining issue with the applicant.

The said answering affidavit was supported by the affidavits of Thembela Simelane and that of one R. Haw. Pertinent annexures to the Respondent's defence were filed thereto.
Dramatis personae.

The applicant is the Central Bank of Swaziland a body corporate incorporated in terms of the Central

Bank of Swaziland Order 1974 and carrying on business at Central Bank building, Warner Street, Mbabane, district of Hhohho, Swaziland.

The 1st Respondent is Andries Stephanus Van Wyk, an adult male of care of Lot 2835 Mbabane Extension No. 8 (Sidvwashini Industrial Township. District of Hhohho, Swaziland).

The 2nd Respondent is Jacaranda Investments (Pty) Limited a company duly registered and incorporated with limited liability according to the company laws of the Kingdom of Swaziland which has its principal place of business at Lot 2835 Mbabane Extension No. 8 (Sidvwashini Industrial Township) district of Hhohho, Swaziland.

The 3rd Respondent is the Registrar of Deeds for the Kingdom of Swaziland.

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The 4th Respondent is the Attorney-General of the Kingdom of Swaziland cited in his nominal capacity as legal representative of the third respondent.

The cause of action.

On the 2nd October 1995, the Applicant instituted provisional sentence proceedings against the 1st Respondent for the sum of E444, 793-39 plus interest thereon at the rate of 9% per annum from the 1st July 1995.

On the 8th March 1996, this court granted provisional sentence in favour of the plaintiff against the 1st Respondent. A writ of execution was issued and the Deputy Sheriff effected an attachment of the following movable goods:

- One bulldozer Komatsu.
- One tipper truck 29 Ton Bell.

According to the Applicant although this fact is strongly denied by the 1st Respondent, after the equipment had been attached, it transpired that the said equipment was in fact hypothecated and could not be sold in execution. The attachment was subsequently uplifted and the Deputy Sheriff attempted to attach other movable goods belonging to the 1st Respondent and on the 26th November 1996, he filled a nulla bona return (see annexure "MGD 3"). However, the 1st Respondent in his answering affidavit took issue to this search that he was unaware that the Deputy Sheriff conducted a diligent search and that this allegation as far as conducting a search is concerned this constitute hearsay and must be struck out.

According to the Applicant following the filing on the nulla bona return by the Deputy Sheriff, the Applicant's then attorneys Millin and Currie, conducted a search at the Deeds office in order to ascertain whether the first Respondent owned any immovable property. It transpired that the 1st Respondent was the registered owner of the following immovable properties:

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"Certain: Lot No. 950 situate in Mbabane Extension No. 8 (Sidvwashini
Industrial Township) district of Hhohho, Swaziland; Held: Under Deed of Transfer No. 143/1989 And Certain: Lot No. 951 situate in Mbabane Extension No. 8 (Sidvwashini
Industrial Township), district of Hhohho, Swaziland; Held: Under Deed of Transfer No. 29/1983".

The 1st Respondent however, denies that he was the registered owner of Lot 950 and Lot 951 during 1996 when the so-called diligent search was conducted, in fact at the time when the purported search was conducted there was no Lot No. 950 and Lot No. 951.

Upon learning this, the applicant's then attorney issued a writ of attachment and on the 6th December 1996, the Deputy Sheriff attached the 1st Respondent's properties in pursuance of the judgement which was granted by the court.

Millin and Currie thereafter attempted to sell the properties in execution in order to realise the amount of the judgment debt which the Applicant had obtained against the 1st Respondent. (See notices of sale marked "MGD 4".

The Applicant alleges that after the Deputy Sheriff had effected the attachment of the 1st Respondent's property, unbeknown to the Applicant, the 1st Respondent began making arrangements for the consolidation of the properties which were under attachment. On the 29th October 1997, the 1st Respondent succeeded in consolidating the properties and they were then held by the 1st Respondent under certificate of consolidated title No. 446/1997 (see annexure "MGD 5"). The property were consolidated into a new portion of land which became known as:

"Certain: Lot No. 2835, situate in Mbabane Extension No. 8 (Sidvwashini Industrial Township), district of Hhohho, Swaziland".

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Simultaneously with the consolidation of the properties, the 1st Respondent then transferred the property to the 2nd Respondent. On investigating the matter further, the Applicant found that the 1st Respondent is a Director and the major shareholder of the 2nd Respondent. According to the Applicant, the consolidation and transfer of the properties was designed specifically by the 1st Respondent to evade the execution of the judgment of the court (see annexure "MGD 5A" being extracts of records filed at the office of the Registrar of Companies).

The 1st Respondent answered per contra to the above assertion by the applicant this is denied and that same constitute defamation of character. Lot 950 and 951 Extension 8 were consolidated on the 11th January 1991. The consolidation having been approved by the Surveyor-General on the 11th January 1991. To this effect the 1st Respondent attached a copy of a consolidation diagraph and a letter from R. Haw a Chartered Land Surveyor (see annexure ASVM I and II). The 1st Respondent denies that he was a shareholder of the 2nd Respondent.

The above therefore is the causa which has led to the lis between the parties.

The matter came before me for arguments on the 7th November 2002, where I heard lengthy submissions from counsel and I then reserved judgement. Mr. Kuny filed Heads of Argument and I am grateful to counsel in this regard.

The applicant's case.

It is contended on behalf of the Applicant that in casu there was a valid attachment and the 1st Respondent either by design or unintentionally consolidated the properties which were under attachment. As a result the applicant was unable to enforce its rights as per the court order.

Mr. Flynn for the Applicant attacked the defence advanced by the Respondents in this case on a number of fronts. Firstly, that their defence that the consolidation took place in 1991 when there was an attachment there was no property as it had been consolidated in 1991. The difficulty with that, according to Mr. Flynn, is that the title deed that existed up to the point of transfer on the 29th October 1997 after the

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attachment was in respect of Lots 950 and 951 and the certificate of consolidation which then became the title deed only existed at the time of transfer.

What existed at the Deeds Registrar was the property which exists up to the point of transfer, which was Lots 950 and 951, and the existence of the consolidation diagraph is immaterial. To support this proposition Mr. Flynn directed the court's attention to the provisions of the Deeds Registry Act No. 37 of 1968 more particularly Section 39 (1), 39 (2) and 39 (6).

Mr Flynn further cited the South African case of Barclays Bank D. C. O. vs Ministry of Land 1964 (4) S.A. 284 on the duty of the Registrar of Deeds to act with caution in transferring properties under his care.

It was further argued on behalf of the Applicant that the transfer in the present case was not an innocent transfer as the 1st Respondent is also a director of the 2nd Respondent. There was therefore knowledge on the part of the 2nd Respondent that the property was under attachment. Mr Flynn cited the case of Mvusi vs Mvusi NO. and others 1995 (4) S.A. 994 to be at all fours with the instant case. Davies A J at page 1002 [I - J] in that case stated the following, and I quote:

"The alternative ground.

Since Jotham knew that he had no right to the farm but was under an obligation to return it to the deceased's rightful heirs when he transferred the farm to 2nd defendant, it follows that he acted in fraud of the true heirs in transferring the farm to 2nd defendant. Similarly, if the 2nd defendant was aware at the time of transfer that there were other heirs of the deceased who had a rightful claim to the farm (and, therefore, that Jotham had no right to dispose of the farm) - he would also be acting in fraud of the heirs in taking transfer. The question then is whether plaintiff has established on the evidence, on a balance of probabilities, that 2nd defendant had the necessary knowledge". (my emphasis).

Further, the learned Judge at page 1006 [C - D] continues, and I quote:

"In all the circumstances I am satisfied that the plaintiff has proved on a balance of probabilities that the 2nd defendant was not an "innocent" transferee of the farm at the time the relevant deed of transfer was registered but he knew that there were other claimants to the

farm who had a better right than Jotham to the farm. It follows that the plaintiff, acting on behalf of the heirs, is entitled to the transfer relating to the transfer of the farm from Jotham to 2nd defendant set aside".

The above extracts from Mvusi case (supra) summarises the case for the Applicant in casu.
1st and 2nd respondents' case

Mr. Kuny argued au contraire and advanced formidable arguments thereto. The submissions made on behalf of the 1st and 2nd Respondent can be conveniently summarised as follows (see page 7 of the Heads of argument):

a) Applicant has failed to discharge the onus it bears of showing that there was a proper attachment of the immovable property in terms of the Rules of Court such that the 3rd Respondent was interdicted or precluded from transferring the property to 2nd Respondent;

b) Even if there had been an attachment, but 3rd Respondent acted in ignorance of it or, if he had knowledge, in deliberate defiance of it, this would not have rendered the transfer invalid so as to entitle a court to set it aside and order its re-transfer to 1st Respondent;

c) The Applicant has abused the process of this court by acting in such a dilatory fashion and then expecting this court to come to its assistance on the basis of papers inadequately, inaccurately and shoddily drawn, and which lack the necessary averments to establish a cause of action.

In the premises 1st and 2nd Respondents contended that this court should dismiss the application with

costs, including the costs of Senior Counsel as taxed and allowed.
The court's findings.

I have considered the submissions by both counsel and would tend to agree with the submissions made by Mr. Kuny on behalf of the 1st and 2nd Respondents. The chronological outline of the relevant facts and events supports the submission made

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on behalf of the 1st and 2nd Respondents. The 1st Respondent acquired Lots 950 and 951 Mbabane Extension 8 in 1983 and 1989. The two properties were consolidated into Lot 2835 in a diagraph approved by the Surveyor-General on the 11th January 1991. It appears that no certificate of consolidated title was applied for or issued at that stage.

On the 8th March 1996, provisional sentence in an amount of E444, 793-39 was granted for applicant against the 1st Respondent in Case No. 2231/95 in this court. It is alleged in the founding affidavit that, pursuant to this judgement, a writ of execution was issued against movables. There is however, an anomaly about the date of this writ because on the writ of attachment itself as well as in the telefax message from the Deputy Sheriff the date is shown as 15th March 1995, whereas the judgement was granted on the 8th March 1996. Presumably this is an error on the part of Deputy Sheriff, but no attempt has been made by the Applicant to explain or even point out this anomaly and I would agree with Mr. Kuny that this only serves to further complicate and add to the confusion which emerges from the applicant's papers.

On the 27th November 1996, the Deputy Sheriff issued a nulla bona return in respect of "movables" in terms of Rule 45 (1) of the High Court Rules. There is no explanation given by the Applicant as to why, if the writ was issued on the 15th March 1996, the return was only made 9 months later. What occurred during this period? Why was there such a delay in executing on movable property?

Thereafter Applicant issued a "writ of attachment" in respect of immovable property in execution. The writ annexed as "MGD 4" relates to Lot 950 but there was apparently a separate writ in respect of Lot 951.

The sale in execution was scheduled for the 28th February 1997, but the Applicant's founding affidavit contains no details or explanation as to what occurred at that sale. It is not explained why, by the time the properties were consolidated and transferred in the Deeds Registry they have not, apparently, been sold either at the auction or otherwise.

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In paragraph 16, the Applicant alleges that after the attachment (i.e after 6th December 1996), 1st Respondent began making arrangements for consolidation of the properties which were under attachment. This cannot be correct if one looks at the Respondent's reply and the documents annexed thereto. The consolidated diagraph was signed by the Surveyor-General as far back as the 11th January 1991, and the formal issue of the consolidated certificate on the 29th October 1991, 9 months after the "purported" sale in execution.

There is considerate doubt, on the papers before court, whether the writ of attachment was ever served on the 3rd Respondent although the Deputy Sheriff says that it was served. It appears from the affidavit of the 1st Respondent's previous attorney Mr. Simelane, that he conducted a search in the Deeds office in 1997 after he had received instructions from the 1st Respondent to deal with the matter and he found no "interdict raised on Lot 950 and 951 nor was there any indication that the said properties were under attachment..."

The report from the Registrar filed as an annexure to applicant's affidavit tends to confirm this since he states "this anomaly was a result of that the interdict being only noted manually in the property register". What this means is not at all clear but the fact is that despite the alleged notification of the interdict to the

Registrar, he went ahead and issued the consolidation certificate and transferred the property to Jacaranda. He was either unaware of the alleged interdict or he acted in wilful defiance of it.

On the papers before court the Applicant has not established that it complied with the Rules of this court in effecting an attachment of the properties (Lots 950 and 951). It is not sufficient for the Applicant to aver that an attachment was made. Evidence must be placed before the court to prove this, particularly where the 1st Respondent avers that he had no knowledge of the attachment at the time that he caused his attorney in 1997 to obtain a consolidated certificate and to transfer the property to Jacaranda. The Applicant has not attempted, in reply to 1st Respondent's denial of knowledge of the attachment, to reply to this denial or to demonstrate that 1st Respondent indeed has such knowledge and how and when he acquired it.

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All in all, I agree in toto with the submissions made by Mr. Kuny for the 1st and 2nd Respondent and would in the result, dismiss the application with costs, including the costs of Senior Counsel as taxed and allowed.

S.B. MAPHALALA

JUDGE