IN THE HIGH COURT OF SWAZILAND

CASE NO. 3011/03

ELVIS M. MAZIYA APPLICANT

AND

NATHANIEL S.B. NXUMALO 1ST RESPONDENT

PAUL TAYLOR 2nd RESPONDENT

AFRICAN ALLIANCE SWAZILAND

MANAGEMENT COMPANY LIMITED . 3rd RESPONDENT

CQRAM K.P NKAMBULE-J

FOR APPLICANT ELVIS M. MAZIYA

FOR 1st RESPONDENT MR. MKHATSHWA

FOR 2nd RESPONDENT . MR. P.R. DUNSEITH

FOR 3rd RESPONDENT MRS, CURRIE

JUDGEMENT 5/8/04

The applicant in this application seeks an order in the following terms:

1. Declaring the monies invested with the garnishee in the Lilangeni portfolio in the names of the following minor children, namely;

Mpumalanga M. Nxumalo

Vulindlela D. Nxumalo Mangaliso A. Nxumalo to be executable in satisfaction of judgements granted against the first respondent Nathaniel S.B. Nxumalo.

2. Directing and authorising the garnishee to pay the judgement debt in case No. 3011/03 in accordance with the garnishee notice issued on the 30th January 2004 act of the aforesaid monies declared executable in terms of paragraph 1 above.

3. Directing African Alliance Swaziland Management Company Limited to declare the interest gained on the investment of E2,000,000- in order to effect prayer (b) of the judgement granted on the 12th December, 2003 in case No. 3110/03.

4. Costs.

The brief background of the matter is as follows:

The applicant instituted action proceedings against the 1st respondent and was granted judgement against 1st respondent on 12th December, 2003 under case No. 3110/03 for the payment of the sum of E65,000-, being the agreed fees due upon a sale of undeveloped piece of immovable property - (Portion 1 Lot 2187 Mbabane Old Bus Rank) including further agreed fees of 10% of the interest earned on the sum of E2,000,000- invested by the first respondent with the garnishee in the Lilangeni portfolio in the names of his three minor children namely:-

1. Mpumalanga M. Nxumalo
2. Vulindlela D. Nxumalo, and
3. Mangaliso A. Nxumalo.

According to applicant, at all material times he was the 1st respondent's attorney and agent in respect of this transaction wherein Portion 1 of Lot 2187, Mbabane Extension 1, Hhohho District, was sold to Motsa Investments (Pty) Ltd for a purchase price of Three Million Emalangeni (3,000,000-).

The purchase price was paid into the Trust account of the 1st respondent's conveyancer P.M. Shilubane. After the transfer had been registered and certain deductions effected, Mr. Shilubane paid the sum of E2,380,087-50 to the first respondent (as per Annexure "B" of the Notice of Application).

The first respondent then invested a sum of E2,000,000-00 out of these proceeds in the Lilangeni portfolio of the African Alliance Swaziland Management Company Ltd, the Garnishee.

According to the applicant when 1st respondent invested the money in this way he was aware that there existed a written agreement between him and 2nd respondent, that 2nd respondent shall have a claim of half the proceeds of the sale of the property.

According to the applicant the other parties namely, Second respondent is not opposing the application. However, the garnishee namely, African Alliance Swaziland Management Company Ltd has refused to comply with the contents as set out in the garnishee notice.

Mr. Mkhatshwa for 1st respondent has raised the following point of law:

That the judgement debt that is sought to be satisfied is a judgement debt that was subsequent to proceedings that were instituted against the first respondent. The application for the garnishee seeks the attachment of monies that have been invested in the names of certain other people. That therefore, the judgement cannot be executable against third parties as they were not parties in the action proceedings and there was no judgement granted against them.

From the foregoing it is clear that the 1st respondent was trying to make a donation to his three minor children. Regarding this point of law the question that has to be answered is whether the 1st respondent complied with the law in making such a donation. From the papers filed of record it is clear that the 1st respondent had not paid the 2nd respondent half the proceeds of the sale of the piece of land. Secondly, he had not paid applicant his fees as agreed. It would seem that his intention in investing the money in the manner he did was not genuine, but was done with a simple intention of hiding it so as to defraud 2nd respondent of his half share of the proceeds.

The requirements for a donation from parent to child are clear. A donation from parent to child is a unilateral contract in the sense that it imposes obligations on one party only. However, it requires a bilateral consesus for its creation. The donor's gift should not only be offered to the donee, but, it must be accepted by or on behalf of the donee.

For a donation from parent to child to be effective against the parent's creditors and confer enforceable rights on the child there must be;

a) The intention to donate on the parent's part;

b) An overt and irrevocable act by the parent, manifesting this intention, whereby he divests himself of the subject - matter of the donation; and

c) A clear and unequivocal acceptance of the donation by or on behalf of the child.

In Contant Vs Contant 1912 EDL 63 it was held per Said Sherl J at page 71 that

"There can be no doubt that when a parent acquires property and has it registered in his child's name, there is a strong presumption that he intends to benefit the child; but his presumption is not juris et de jure, and may be rebutted by evidence manifesting a clear intention that the child shall only take as trustee"

In this matter where the above quotation was extracted an unrehabilitated insolvent, had not intended to make a donation to his son when he had acquired a mining concession and two farms in his son's name, as he had been under the impression that until he obtained his rehabilitation he was civilly dead, and that he could acquire no property as against his trustee. His object was to acquire property for himself, and by having it transferred into his son's name was to render it secure against the possibility of execution at the instance of his creditors, but that he never intended to confer any immediate benefit on his son.

It is clear from the instant case that there was no donation made by 1st respondent to the three minor children. The investment was made solely

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to render the money secure against the possibility of execution at the " instance of his creditors as is the case right now.

First respondent cannot therefore; hide behind this investment to say the money belongs to the three minor children, because there was no valid donation at the first place. This point of law fails.
The second point of law raised by the first respondent is that the application is irregular for non compliance with the rules of this honourable court as it is not preceeded by any attempt to levy execution of the judgement herein by a writ of execution against any movables.

Under common law a special application to court is necessary in order to enable the judgement creditor to execute upon money due to the judgement debtor and in the hands of the third party.

Garnishee proceedings are now governed by uniform rules of court. Whenever it is brought to the attention of the sheriff that there are debts which are subject to attachment, and are owing or accruing from a third person to the judgement debtor, the sheriff may, if requested thereto by the judgement creditor, attach the same, and thereupon shall serve a notice on such third person, hereinafter called the garnishee, requiring payment by him to the sheriff of so much of the debt as may be sufficient to satisfy the writ, and the sheriff may, upon any such payment, give a receipt to the garnishee which shall be a discharge, pro tanto, of the debt attached.
The effect of this rule is that without reference to the court a judgement creditor may cause to be issued a writ for the attachment of debts in the form of salary or any money accruing from a third party to the judgement debtor. If the garnishee refuses or neglects to comply with the notice, the

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sheriff must forthwith notify the judgement creditor who may call upon the garnishee to appear before the court to show cause why he should not pay to the sheriff the debt due, or so much thereof as may be sufficient to satisfy the writ.

If the garnishee does not dispute the debt due, or claimed to be due by him to the party against whom execution is issued, or he does not appear to answer to such notice, the court may order execution to issue, and it may issue accordingly, without any previous writ or process, for the amount due from such garnishee or so much thereof as may be sufficient to satisfy the writ.

It is clear from the above quoted rules that it is not necessary that a writ of execution against movables be issued in this instance. The applicant has complied with the rules of court. This point of law fails.

Regarding the merits of this application it is clear that the first respondent cannot rely upon the fact that the money deposited by him in the names of his minor children in the third respondents

undertaking belong to the children. This court has found that there was no valid donation and as such the money belongs to the first respondent and not the children. This therefore means that the applicant had no obligation to join the three children as respondents in this matter.

There is however, an order dated 3rd December 2003 issued by the Acting Chief Justice which does not reflect a case number. The order as annexed as Annexure 'D' of the Notice of Application is an interdict restraining the first, second, third, fourth and fifth respondents from in any manner dealing with the moneys in the custody of the fifth respondent including withdrawing from or transferring same.

This court will vary this order in so fax as it concerns this application and the satisfaction of this order. It is therefore ordered as follows:

1. It is hereby declared that the monies invested with the garnishee in the Lilangeni portfolio in the names of the following minor children namely;

Mphumalanga M. Nxumalo Vulindlela D. Nxumalo, and Mangaliso A. Nxumalo be and hereby executable in satisfaction of judgement granted against the first respondent Nathaniel S.B. Nxumalo under case No. 3011/03.

2. The garnishee is hereby directed and authorised to pay the judgement debt in case No. 3011/03 in accordance with the garnishee notice issued on the 30th January 2004 out of the aforesaid monies declared executable in terms of paragraph No. 1 above.

3. Directing African Alliance Swaziland Management Company Ltd to declare the interest gained on the investment of E2,000,000-in order to effect prayer (b) of the judgement granted on the 12th December 2003 in Case No. 3110/03.

4. 1st Respondent to pay costs of this application.

K.P. NKAMBULE

JUDGE