SWAZILAND HIGH COURT

HELD AT MBABANE

Civil Case No. 1952/2003

In the matter between

GRACE NTOMBANE DLUDLU	Applicant
And	
PHILEMON NGULUBE SIFUNDZA	Respondent
Coram	Annandale, ACJ
For Applicant Advocate	P.E. Flynn
Instructed by Cloete Corporate In association with	E.J. Henwood
For Respondent Mr.	P.M. Shilubane

JUDGMENT 6th February 2004

Following the purchase of his property at a sale in execution, the erstwhile owner of the land refuses to vacate it in favour of the purchaser, due to his insistence on an alleged lien he holds over the property. The purchaser now seeks to have him evicted so that she can take possession of the property.

The applicant seeks an eviction order to eject the respondent from Lot 522, Ngwane Park, Manzini, with costs. In her founding affidavit, Grace N. Dludlu states that she is the lawful owner of the property concerned having purchased it from the Swaziland

Building Society on the 16th May 2002 at E200 000. A copy of the Deed of Transfer, No. 493 of 2002 is attached to her application in support thereof.

The same property is also described in a further and earlier Deed of Transfer, No. 122 of 2002, wherein by virtue of a Writ of Execution following a judgment of the High Court dated the 5th May 2002, in a matter between the Swaziland Building Society as Plaintiff and Philemon Ngulube Sifundza as Defendant (the present Respondent), wherein it was sold after attachment at a Public Auction on the 21st December 2001 for the sum of E121 000 to the Swaziland Building Society. Thus, the property, which used to belong to the present respondent, was sold after attachment on an order of Court to the Building Society, which in turn sold it to the present Applicant.

It is the former ownership of the property by Sifundza that is said to be the fly in the chemist's ointment, as Sifundza is alleged to be "embroiled in a dispute with the Swaziland Building Society relating to the property and in the light of this fact he simply refuses to vacate the property concerned."

This state of affairs is not in contention, save for the respondent's averment that the "applicant bought the property from the Swaziland Building Society which has a defective title in that it purported to have purchased the property at a public auction when in fact and in law the property was bought by Mr. E.J. Henwood". He goes on to say that: -

"In any event I have a Hen over the property for useful and necessary improvements made on the

property by me in the sum of E259 000. "

In limine, the Respondent pleads that the present matter ought to be stayed pending finalisation of Civil Case number 1033/2002 between the Swaziland Building Society and Philemon Ngulube Sifundza wherein ejectment of the same respondent from the same property is sought, Mr. Shilubane argues that the plea of lis pendens meets all the requirements as set out in Amler's pleadings, 5th edition, at page 260 and the authorities there cited. I have yet to receive the relevant photocopies of Amler's from the attorney because the High Court Library does not have it available. Attorneys by now should know that when they refer to textbooks which are not available to the

Court and if they do not file copies of the portions referred to, it is difficult to properly consider the material they rely on. However, in Beck's Theory and Principles of Pleading in Civil Actions, 6th Edition at page 157, Mr. Justice Daniels refers to Voet 44.2.7, WESTPHAL V SCHLEMMER 1925 SWA 127 and MOSTERT V VON HIRCHBERG 1959(3) SA 956(0) as authorities to state that:

"The validity or otherwise of this dilatory plea depends on whether the same suit is in fact pending elsewhere. It must be pending elsewhere between the same parties concerning the same thing, and founded on the same cause of action. The demand made and the point at issue must be the same in the pending suit which it is sought to stay, and the court in which the suit is pending must have jurisdiction to entertain it. "

The Respondent argues that the Applicant derives her title to sue from the Swaziland Building Society, which is the Plaintiff in the other matter, relying on FERREIRA V MINISTER OF SOCIAL WELFARE, 1958(1) SA 93 ECD at 95, to state that the Building Society and Grace Dludlu are "privies" in the matter. Otherwise put, it is to say that the present applicant derives her action from the plaintiff in the other case. Mr. Shilubane says that Dludlu is to be deemed to be the same person as the Building Society, that it is merely a change of names, justifying the plea of lis pendens to succeed and to put the present proceedings on hold.

It is so that lis pendens does not have to be pleaded as a special plea (see MARKS AND KANTOR V VAN DIGGELEN 1935 DPD 29), but in appropriate • circumstances it can also be raised by way of an application for a stay of the action, as it is done presently (see KERBEL V KERBEL 1987(1) SA 562(W).

The essential problem with the raising of lis pendens that Advocate Flynn placed before Court is the assumption that Dludlu gets title for this action from the Building Society, that they are "privies" in that her action is derived from the plaintiff in the pending case. Essentially, the argument goes, although there might be an action for ejectment of Sifundza, which is instituted in a Court with jurisdiction to entertain it, it may also be for the same relief, but it is between different parties. Founded on the same cause of action, to have the defendant or respondent ejected from the same

premises, it is not the same suit, not pending elsewhere and not between the same parties.

The bottom line, so to speak, is whether the applicant in the present matter and the plaintiff in the pending matter can be said to be essentially one and the same party, causing the dilatory plea to be successfully upheld. Thus, it requires to be decided if the assumption made by the respondent, namely that the applicant obtains title to the application from the plaintiff in the pending action, is correct or not.

The Swaziland Building Society, who at the time was the owner of the property, instituted the pending action. In that action, it claimed to be the registered owner of Lot 522, Ngwane Park, Manzini, having purchased it at a sale in execution conducted by the Deputy Sheriff. It further filed a copy of the Deed of Transfer, wherein this is substantiated prima facie from the face of the papers, Inter alia it reads that: -

"Whereas by virtue of a Writ of Execution dated the 12th day of May, 2000 and issued out of the High Court of Swaziland for the execution of a judgment of the said Court, dated the 5th day of May, 2000 in an action wherein Swaziland Building Society was plaintiff and Philemon Ngulube Sifundza (born on the 8th February, 1948), was Defendant, in case No. 955/2000 the undermentioned property was attached and sold by Public Auction on the 21st December, 2001 to the undermentioned transferee" (the Building Society took transfer from the Deputy Sheriff of the High Court.)

The pending action was instituted by the Building Society against the occupant, Sifundza, who initially held title to the property but lost it in the aforesaid action, after which the Building Society purchased the property at a public sale in execution, giving it dominium over it and on which basis it sued for ejectment. The lis therein is between the then registered owner, Swaziland Building Society, and Sifundza, the erstwhile owner. It sued qua registered owner of the property, with a defence (an improvement lien) raised by the defendant against the claim, which still has to be decided in the High Court of Swaziland.

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Historically, the property again acquired new ownership on the 17th September 2002 when it was transferred by the Building Society to Grace Ntombane Dludlu, following the selling of it to her on the 16th May 2003. She acquired full ownership of the property, financed through a bond in favour of the Building Society, from which she bought it, which in turn bought it at the execution sale, following a judgment against Sifundza. The conditions of the Sale in Execution contains in paragraph 8 thereof provision that the property may be taken possession of immediately after the sale, pending payment of a deposit in cash and furnishing of security for the balance. The sale in execution was concluded on the 21st December 2001 and the Building Society which bought it through its agent, attorney E.J. Henwood, instituted the still pending action against Sifundza on the 8th April, 2002, thereafter, on the 16th May 2002 selling it to the applicant with transfer effected on the 17th September, 2002.

Clearly, the Building Society is not the owner of the property anymore, as it was at the time it instituted the action against the Defendant, Sifundza. It is questionable whether it still has any interest to pursue that matter as it is not affected by it anymore, having sold it off to Dludlu, the Applicant herein.

Dludlu sues the same person, for the same cause, but based on her present ownership, just as the Building Society did. She is the registered owner and cannot take occupation of her land and house, while the respondent continues to occupy it. She has no quarrel with any claim Sifundza might have against the Building Society for any improvements he may have made over the property. She does not sue him for ejectment because he did not service his bond with the Building Society. She does not sue him on strength of a cession either. She sues as registered owner of the property having purchased it from the erstwhile owner, Swaziland Building Society, who bought it through Henwood at a Public Sale in Execution. She has no privity of interest in the action between the former owner and Sifundza.

The present Applicant and the Plaintiff in the pending action are two entirely different parties. To succeed on a plea of Us pendens, it has to be shown that the same suit is pending elsewhere, between the same parties. Elsewhere or not, the parties are simply not the same, nor can it be found that the applicant derives title to sue from the

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plaintiff Society, She obtains title to sue by virtue of being registered owner of the property, which the Respondent prevents her from occupying.

Accordingly, the plea that there is a pending suit between the same parties concerning the same thing and founded on the same cause of action stands to be dismissed. Costs of arguing the point in limine are to follow the event, as already indicated during the hearing of the matter.

On the merits, the applicant's case is that she bought the property concerned from the Swaziland Building Society for E200 000, that she is the registered owner of the property and that she cannot take occupation due to the respondent's refusal to vacate it. She filed a copy of the Deed of Transfer in support of her claim of ownership. Therein, it appears that Lot 522, Ngwane Park, Manzini, was sold to her by the Building Society and transferred in her name, with registration on the 17th September 2002. This transfer followed on an earlier transfer, on the 21st March 2002, from which it appears that the same property was sold at a sale in execution by the Sheriff following a judgment of the Court on the 5th May 2000, wherein the Swaziland Building Society was the plaintiff and Philemon Ngulube Sifundza, who was the owner of the property prior to the sale in execution, presently the respondent. The transfer was in favour of the Building Society. The second paragraph on page four of the Deed of Transfer reads that: -

"Wherefore the appearer (the conveyancer authorised by a power of attorney granted by the Acting Registrar of the High Court of Swaziland - my insertion) renouncing all the right and title his (sic) said Philemon Ngulube Sifundza heretofore had to the premises, on behalf as aforesaid, did in consequence also acknowledge her (sic) to be entirely disposed of and disentitled to the same... ".

The purchase price was recorded as E121 000. There was no reserve price, but no bids under E1 000 were to be accepted.

From papers filed in the initial litigation between the Building Society and Sifundza, incorporated by reference in this matter by the respondent, it appears that in March

2003 a valuation surveyor, subject to various pre-conditions, determined the open market value of the property as E259 000 . The execution sale realised E121 000.

It is common cause that the successful bidder at the auction was attorney E.J. Henwood. Applicant's counsel argues that Henwood purchased on behalf of his principal, the Swaziland Building Society, which then became the registered owner of the property. There is no evidence to gainsay this argument and the Deed of Transfer, according to which ownership was conveyed to the Building Society from the former owner, Sifundza, and not from Henwood, supports it.

In this regard, in his terse answering affidavit, the respondent avers that the "...applicant bought the property from the Swaziland Building Society which has a defective title in that it purported to have purchased the property at a public auction when in fact and in law the property was bought by Mr. E.J. Henwood. "

Mr. Shilubane argued in court that it cannot be said that the Building Society bought the property, with its improvements, as it was not sold to the Society but to Attorney Henwood, who did not disclose that he acted as agent for a principal. This argument is not contained in the respondent's heads, but nevertheless requires consideration.

Reliance is placed on Rule 49(9)(a) and Form 23, and the absence of a statement by Henwood that he purchased as agent for a principal. Therefore, it is said that the Building Society did not buy the property and it could not take title as purchaser, as only Henwood could do so.

This argument misses the point. The dispute is not whether the Building Society acquired ownership, which it could pass onto the applicant, but whether the respondent is entitled to retain possession. To now use bad title by the applicant, vis-a-vis the Building Society, is to raise a smokescreen. Whether Henwood purchased on behalf of an undisclosed principal or not, is not the issue. Fact remains that the Court granted a judgment against the present respondent, ordering the property to be executable, following which it was sold at a sale in execution. This did happen, and it eventually found its way to the applicant. For the present circumstances, it does not matter whether she obtained her title from the Building Society, with, or without

Henwood's intervention. The property now belongs to the applicant and not to Henwood, or the Building Society, or to the respondent for that matter. Transfer was affected to the Building Society in consequence of the sale in execution, before it was eventually sold off to the applicant. The sale itself has not been set aside and there is no pending application or action to have it done. The sale was conducted as long ago as the 21st December, 2001, with no action having been taken to nullify it, at least until the present application was instituted on the 12th August 2003 and argued on the 7th November, 2003.

This point cannot be accepted as a bar to the application before court.

The second point on which the respondent misplaces his hope for a dismissal is a purported lien.The respondent states in paragraph 5.2 of his answering affidavit that: -

"In any event, I have a lien over the property for useful and necessary improvements made on the property by me in the sum of E259 000 as morefully appears in annexure "PNS2 " "

Again, it is a very terse statement of fact. The applicant does not disclose at which time the alleged improvements were made, before or after the sale in execution. He also does not state whether all or only some of the buildings etcetera, as described by the valuation surveyor, (annexure "PNS2") were made by him, nor how it was financed. One has to bear in mind that the original cause of the action against him would have been non-servicing of a registered bond, without any details of it placed before court. For instance, it is unknown what the initial bonded value of the land was or whether there were any improvements way back then, further, what the amount of that bond was. It also remains unknown whether the alleged improvements by the respondent were financed by the Building Society or from his own pocket. In addition, the value of the alleged lien is questionable. It is founded on the valuation report, which is not before court as an affidavit, which has as basis the open market value, limited by the valuer for "...the stated purpose and sole use of the client to whom it is addressed. "

The opinion is furthermore based on "the best price at which the sale of an interest in the property would have been completed unconditionally of cash consideration" as at March 2003; subject to "a willing seller"; "a reasonable period for the completion of the sale"; "the state of the market, level values and other circumstances"; "no account of any additional bid by a prospective purchaser with special interest" and "that both parties to the transaction had acted knowledgeably, prudently and without compulsion."

The applicant states in paragraph 6.2 of her replying affidavit that the applicant

"...studiously avoids to point out ...that he was granted a loan by the Swaziland Building Society to build/purchase the property concerned at the time. Acting in accordance with the provisions of the mortgage bond, the Swaziland Building Society called up the bond and sold the property in execution ".
Although no papers are before court to sustain this averment, it is common practice for properties to be sold in execution following orders of Court, despite improvements that may have been effected on it, when bond repayments fall into arrears.

The gist of the matter is however not based on the above scenario, but whether the existence of a lien by the respondent can successfully be raised against the applicant, an innocent purchaser from the Building Society, who obtained title through a sale in execution.

Respondent relies on a lien, said to be a valid defence to a claim of rei vindicatio raised against the applicant on her claim for eviction, founded on Carey Miller in his work "The Acquisition and Protection of Property", at page 267, where it is stated that: -

"The basis of a salvage or improvement lien — which, in view of its proprietary nature, may,

appropriately be designated a real lien, is recognised to be the unjustifiable enrichment of the owner at the expense of the one who
has incurred expenditure in preserving or usefully improving the property. "
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The respondent further relies on the judgment in SINGH V SANTAM INSURANCE LTD 1997(1) SA 291(A), by saying that he has proved all the requirements of an improvement lien, i.e. that the improvements were made whilst respondent was in possession of the property and that such improvements were made lawfully.

That this may be true or not does not resolve the matter. There is absolutely no averment or proof that any of the improvements allegedly affected by the respondent were made after the date of sale to either the Building Society vis-a-vis Henwood as its agent, or the later sale to the applicant, which might have established a lien in respect of the applicant. The vague allegation by the respondent cannot be sustained against the claim of the applicant. An improvement lien over the property, effected by the respondent at the time he was the owner of the property and which ownership finally came to an end in December 2001 when it was sold in execution, cannot now be validly raised against the subsequent purchaser, the applicant, when regard is had to the existing circumstances.

I refrain from expressing any opinion on the outcome of a possible action by the respondent against the Building Society, by Sifundza. The fact remains that the former had the property sold at a sale in execution, pursuant to the judgment it obtained against the latter.

Mr. Flynn correctly pointed out that a lien, or right of retention (ius retentionis), is a right tacitly conferred on a person who is in possession of someone else's property, of retaining the property until the value of improvements (or necessary expenses to retain its value or preserve it), is paid to him. It is a right that arises when the occupier incurs necessary or useful expenditure on the property of another. (See Wille and Millin's Mercantile Law of South Africa) 18th edition, at page 417). Such an occupier acquires a "real" or enrichment /improvement lien.

The maxim of superficies solo cedit also applies. All the permanent structures erected on the then bonded property, owned at the time by the respondent, permanently attached to the land, Lot 522 Ngwane Park in Manzini, which property was sold in execution.

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For the above reasons, the application stands to be granted. It is ordered that the Deputy Sheriff for the district of Manzini is hereby authorised to eject the Respondent and/or any other person in occupation of the property under his authority from Lot 522 situate in Ngwane Park, Manzini. For no other reason than purely humanitarian grounds and a consideration of the practical difficulties to arrange alternative accommodation, it is further ordered that the eviction be held over for a period of twenty one calendar days following service of this order on the respondent, to allow him to vacate the property, failing which the deputy sheriff shall evict forthwith,.

Costs of the application are ordered against the Respondent.

ANNANDALE, ACJ