

THE HIGH COURT OF SWAZILAND

PAULOS E. DAVIDSON

1st Applicant

MARGARET MABUZA

2nd Applicant

PETER J.DAVIDSON

3rd Applicant

MICHAEL P. DAVIDSON

4th Applicant

WILIAM T. DAVIDSON

5th Applicant

SIBHIMBI INVESTMENTS (PTY) LTD

6th Applicant

And

JANNIE DAVIDSON

1st Respondent

MASWAZI NSIBANDE N.O.

2nd Respondent

Civil Case No. 2139/96

Coram S.B. MAPHALALA – J

For the Applicants

MR. S.B. SHONGWE

For the Respondents

MR. P. M. SHILUBANE

RULING ON POINTS IN LIMINE (23/01/2004)

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Serving before court is an application under a certificate of urgency for an order inter alia setting aside the sale in execution advertised by the 1st Respondent's attorneys for the 12th December 2003, staying the sale in execution.

The founding affidavit of the Applicants is filed in support thereto.

The matter appeared before me on the 12th December 2003, where attorneys for the Respondent argued points of law in limine from the bar. Counsel for the Applicants replied to the points raised. I rule in favour of the Applicant and overruled the objections raised. The points raised then were issues of urgency the essence of which was that the Applicants have not followed the prescribes of Rule 6 (25) of the High Court Rules.

I granted an order as follows:

"1. That a rule nisi do hereby issue and returnable on Thursday the 18th day of December, 2003, staying the execution;

2. That the orders sought in terms of paragraph 2 and 3 hereof operate with immediate effect and interim relief.

In the intervening period the sale of the property proceeded regardless of the order cited above. Further the Respondent filed an answering affidavit of their attorney Mr. Paul Mhlaba Shilubane who has raised two points of law in limine. These are the subject matter of this judgment.

The points were argued before me on the 18th December 2003, being the return date of the rule nisi issued on the 12th December 2003. The objection is couched in this fashion:

"2. In limine, I am advised and accept that the Applicants application is fatally defective because;

2.1. At the time it was made the sale in execution had already been perfected and the rule nisi issued by the court on 12th December 2003, was brutum fulmen and was therefore not binding on any one. The sale in execution took place

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at approximately 11,30am in the presence of the Applicant's attorney who falsely represented to the court when the rule was made that a sale had not taken place.

2.2. The court made an error issuing the rule without giving the Respondents an opportunity to file their answering affidavit in as much as the application was not ex parte contrary to Rule 6 (9) of the Rule of court. Ex parte application are governed by Rule 6 (4) of the rules of court and requires that Form 2 be used and not Form 1 which was used in this case,

2.3. The application had not been served on the second Respondent.

Before outlining the various arguments for and against the points of objection I wish to record that Mr. Motsa was in attendance appearing on behalf of the purchaser of the property in dispute. He informed the court at the close of submissions by counsel for the Applicants and the Respondents that Ms client would not enter the debate at this stage but would only enter the fray when the matter is considered on the merits.

The facts of the matter are that a writ of execution was issued in terms of a court order of 1997 on instruction of the 1st Respondent to his attorney the said order of 1997 was an order in which the 1st Respondent was granted a sum of E104, 666-60 a percentage of shares that he held in Sibhimbi Investments (Propriety) Limited. The parties in this case save 2nd Respondent are siblings who were beneficiaries in the estate of their late mother.

Reverting to the writ of execution the said instrument was issued through the offices of L.R. Mamba & Associates who were the attorneys of 1st Respondent at the time. No attempts were made to execute the writ on the movable property of the Applicants and what followed thereafter was that the writ of execution against the immovable of the Applicants. The writ is annexed and marked "A".

The Applicants avers that on the 31st May 2003, this matter appeared before this court where a rule nisi was issued staying the execution of the writ of execution of immovable property issued by the 1st Respondent in case number 2139/1996 dated 8 day of April 2003 and judgement was reserved.

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According to the Applicants, although this fact is vehemently denied by the Respondents, negotiations

were held between the Applicants attorney and the 1st Respondent to have the matter settled out of court. As a result an agreement was reached between the attorneys to have the rule discharged based on the fact that they were attempting to settle the matter out of court. A settlement was reached between the attorneys, the terms of the settlement was the payment of E201, 733-31 annexure "B" a letter dated 11th July 2003 from P.M. Shilubane & Associates is filed by the Applicant indicated the amount agreed upon.

On the other hand, on the issue of the negotiations between the parties the Respondent's deny such negotiations. They aver that no settlement was reached because the Applicants did not pay the amount due to 1st Respondent notwithstanding numerous promises that payment would be made.

The Applicants further avers that while means were being made to have the sum of money paid to 1st Respondent's attorney placed a notice of sale in the local newspaper for the sale of the property.

Further negotiations were held with 1st Respondent's attorney to have the sale stopped as the Applicants had indicated their intention to pay the 1st Respondent the amount agreed upon.

At paragraph 17 of their founding affidavit the Applicants aver that they have since paid the sum of E201, 733-31 to the 1st Respondent's attorneys as full and final settlement of the matter. Despite such payment the sale in execution, which was scheduled for 12th December 2003 at 11.30am, was still to proceed. They therefore, sought the court's intervention to stop the sale as 1st Respondent's attorney has been paid the agreed sum of E201, 733-31 owed to the 1st Respondent,

However, the stance taken by the Respondent on the cheque issued by the Applicant's attorneys for the payment of the sum of E201,733-31 is that the said cheque is made in foreign currency, which is not legal tender in Swaziland in terms of Section 33 of Order in Council No. 6/1974 nor is it bank guaranteed. Furthermore, it did not include the costs which were due to 1st Respondent in terms of the deed of settlement

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made an order of court. Consequently, 1st Respondent was not obliged in law to accept the cheque which was tendered. The above, therefore are the facts of the dispute.

I now revert to the subject-matter of this judgment viz, the determination of the points in limine raised that at the time the application was made the sale in execution had already been perfected and the rule nisi issued by the court on the 12th December 2003 was brutum fulmen and was therefore not binding on any one. Without further ado, it would appear to me that this objection overlooks prayer 2 which seeks the setting aside of the sale in execution advertised by the 1st Respondent's attorney for the 12th December 2003. The argument advanced by the Respondent would only apply in respect of prayer 1 staying the sale in execution.

For the above reason this point of law in limine cannot succeed.

The second point raised is that the court made an error in issuing the rule without giving the Respondent an opportunity to file their answering affidavits. In my view, this cannot be a point of law in limine as this is not a proper procedure to challenge the decision of the court made on the 12th December 2003. It would not be proper for this court to revisit its own judgment. In this regard I agree with the submissions made by Mr, Shongwe for the Applicant. Therefore, this point of law in limine cannot succeed.

On the issue that the purchaser in this case has not been served with the papers my view is that when the application was launched on the 12th December 2003, the purchaser had not appeared in the scene as this was before the sale. During the arguments on the point in limine Mr. Motsa appeared for the purchaser and submitted before court that they will abide by the decision of the court on the points in limine. He intimated that they will join the suit in the event the court dismissed the points in limine and order that the matter proceeds on the merits. Therefore, for the above reasons the point of law raised has no real substance and is thus dismissed.

Coming to the last issue raised by Mr. Shongwe that this application is brought in terms of Rule 45 (13) (g). This issue is on the merits of the matter and therefore, I

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will not make any finding either way but would refer it to be argued on the merits, and so it is ordered.

In the result, the points of law raised by the Respondents are dismissed and the matter to be argued on the merits.

Costs are reserved.

S.B. MAPHALALA

JUDGE