THE HIGH COURT OF SWAZILAND

MDEDE BHEMBE

Applicant

And

SIBONISO BHEMBE

1st Respondent

WILLIAM KELLY

2nd Respondent

In Re: SIBONISO BHEMBE

Plaintiff

MDEDE BHEMBE

Defendant

Civil Case No. 1087/2003

Coram:S.B. MAPHALALA-J

For the Applicant: MR. Z. JUMA

For the Respondents: MISS B. DLAMINI

JUDGMENT

(11/02/2005)

[1] Serving before court is an application brought under a Certificate of Urgency for a rescission of an Order of this Court issued on the 11"[1] July 2003, in terms of Rule 42 (1) of the Rules of the High Court. The Applicant in prayer 2 of the Notice of Motion filed thereof applies that a stay of execution of the said Order be granted and further in prayer 3.2 thereof interdicting and restraining the 1st Respondent and the 2nd Respondent from attaching and from taking into execution the movable goods of the Applicant. Furthermore, in prayer 3.3 thereof compelling and directing the 2nd Respondent to release Applicant's movable property, which were attached and removed by the 2nd Respondent from Applicant's residential premises on the 1st September 2004. Costs to be granted on the attorney and own client scale

[2] The Founding affidavit of the Applicant is filed of record outlining the pertinent averments in support thereto. Various anncxures are also filed.

[3] The 1st Respondent opposes the application and to that end has filed his Answering affidavit accompanied by confirmatory affidavits of one Bongani Mndzebele and that of the 2nd Respondent William Kelly.

[4] In turn the Applicant filed a Replying affidavit accompanied by two annexures *viz* Annexure "A" being a Birth Certificate of one Zwelinzima Bhembe and Annexure "B" being a Notice of Attachment of Movable Property.

[5] The nub of the Applicant's case under Rule 42 (1) is that he was never served with the summons and therefore the Order of the 11th July 2003, was sought and granted in his absence and without his knowledge. He admits, however that he was indebted to the 1st Respondent to the sum of E2, 500-00 following an oral agreement between them where he had sold Iˢ' Respondent a piece of land for the sum of E2, 500-00, which the latter paid. However, the 1st Respondent breached the agreement, in that he refused to possess the land which he had accepted and demanded a refund of the purchase price of E2, 500-00. He had promised to refund him the E2, 500-00 in three months time, however, 1st Respondent disappeared and never came back to collect his E2, 500-00, as a result he lost contact with him. He was perplexed to learn that 1st Respondent had instructed attorneys to sue him for E2, 500-00 being refund of purchase price for land which he never refused to pay.

[6] The Applicant further avers in paragraph 8 thereof that there are no valid grounds to attach and take into execution his movable goods and that he has a *bona fide* defence to the Plaintiff's claim. In his replying affidavit he avers in paragraph 5.1 that in terms of the common law and Rule 45 (1) of the High Court Rules applies when the judgment debtor had been **personally served** with the Court Order and he

had refused to pay his/her debt, then the writ or writs of execution may be issued. On the day of the attachment and removal of his movable goods he was not in his premises and there was no one above sixteen (16) years of age. In short, the Applicant alleges that the attachment by the 2nd Respondent was outside the Rules, more particularly Rule 45 (1) thereof.

[7] The 1st Respondent in opposition avers that Applicant is telling a blatant lie when he states that he was never served with the summons. In terms of the return of service, it is clear on the face of the document that summons were served personally on Applicant at New Village. Besides, so the arguments goes, a return of service is *prima facie* proof that Applicant was served personally with the summons. Further, 1st Respondent denies that when Applicant's property was removed from his premises there was no one over the age of sixteen (16) years. In this regard 1st Respondent had filed an affidavit from attorneys Mlangeni and Company. Furthermore, it is contended for the 1st Respondent that the Rules of court were followed in the attachment of the goods.

[8] The matter came before me for arguments on the 3rd December 2004, where it was revealed to the court and thereafter this fact became common cause that the movable goods which are the subject matter of this dispute were sold by public auction by the 2nd Respondent in satisfaction of the Order of the 11th July 2003. As a result of this eventuality a question arose whether the Court can grant any remedy as *per* the Notice of Motion. Counsel for the 1st Respondent contended that whatever Order the court grants as *per* the Notice of Motion would be *bruten fulmen* and that Applicant's remedies at this juncture lie in damages not in the present suit. However, Counsel for the Applicant persistent that the court can grant an order in this case for purposes of the record.

[9] It appears to me that the Respondent's contention is correct in the circumstances of the case. It will be a futile exercise to consider the prayers as they appear in the Notice of Motion. The prayer to stay execution of the Order dated 11th July 2003 is pointless as the Order has already been executed. Further, as regards prayers 3, 3.2 and 3.3 it would be academic to consider them in the present case. It appears to me that the horse has already bolted in that whatever Order the Court gives will be *bruten fulmen* and in this regard the submission by counsel for the Respondents that Applicant's remedies lie in damages is sound, (see ***Adbro Investment Co. Ltd vs Minister of the Interior 1961 (3) S.A. 2S3 (T)*** at page ***285; Ex parte Van Schalkwyk NO. and Hay NO 1952 (2) S.A. 407*** at ***411 and Ex parte Nell 1963 (1) S.A. 754 (AD)*** and ***Mario Masuku vs The Director of Public Prosecutions -Court of Appeal Case NO. 14/2002 (unreported))***

[10] For the afore-going reasons therefore Applicant cannot succeed on the relief sought and therefore I dismiss the application with costs.

S.B. MAPHALALA

JUDGE