

THE HIGH COURT OF SWAZILAND

NTOKOZO ND WAND WE

Applicant

And

STANDARD BANK SWAZILAND LIMITED (STANNIC) et al

Respondents

Civil Case No. 3874/2004

Coram: S.B. MAPHALALA - J

For the Applicant: Advocate L. Maziya (Instructed by Dlamini, Mahlalela attorneys)

For the Respondents: Miss L. Kunene

JUDGEMENT

(21<sup>st</sup> April 2005)

[1] The application before court brought under a Certificate of Urgency is for, inter alia, an order that a sale in execution scheduled for the 22<sup>nd</sup> April 2005 in this matter be stayed, suspended and/or cancelled; that the movable property belonging to the Estate of the late Luke Mjokozeli Ndwandwe which has been attached by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in this matter be released forthwith. The property being: a) 46 cattle; b) 32 goats; c) 1 x 50litre black container and d) 1 x 2 metres x 1 metre fence.

[2] In prayer 4 ordering that the 3<sup>r</sup> Respondent has no right to conduct the sale in execution in this matter in so

far as he is not the Deputy Sheriff for the district of Lubombo; and costs of this application.

[3] The Applicant has filed a Founding affidavit with various annexures outlining the pertinent facts in support of his application. He deposes therein that he is suing the Respondents in his capacity as the executor in the Estate of his late father one Luke Mjokozeli Ndwandwe after being appointed as such by the Master of the High Court.

[4] The 1<sup>st</sup> Respondent has joined issue with the Applicant and has filed an Answering affidavit of its attorney Miss Lomalangeni Phumzile Kunene with Confirmatory affidavits of one Sikhumbuzo Simelane (an Articled Clerk of Robinson Bertrams) and one Bongani Mamba who is the Deputy Sheriff of the Lubombo Region.

[5] The Applicant then filed a Replying affidavit with annexures.

[6] The history of the matter as gleaned from Applicant's Founding affidavit is that the 1<sup>st</sup> Respondent caused a summons to be issued against Lukton Enterprises and the Applicant in his personal capacity. At that time the 1<sup>st</sup> Respondent had already repossessed and sold by public auction the motor vehicle which was the subject-matter of the suit but had not realized the amount owed to it. The Applicant had stood as surety for the said company. Due to the fact that the first execution did not satisfy the debt the Applicant was pursued in the subsequent writ of execution as surety. This is the writ of execution which has sparked off the present litigation.

[7] According to the 1<sup>st</sup> Respondent the Applicant was served with others with this second writ on the 31<sup>st</sup> March 2005, whereupon Applicant and others refused to accept the writ and chased the Deputy Sheriff at gunpoint. The Deputy Sheriff with one Maswazi Nsibandze and the Articled Clerk of 1<sup>st</sup> Respondent ran helter-skelter and thereafter reported the matter to the Lubulini Police. At the said police station a criminal docket was

opened for contempt of court. The 1<sup>st</sup> Respondent then approached this court in an urgent application which appeared before Matsebula J on the 5<sup>th</sup> April 2005. The learned Judge then issued a rule nisi returnable on the 15<sup>th</sup> April 2005 calling the Applicant and others (who were cited as Respondents in that application) to show cause amongst other things, why they should not be held in contempt and further ordering the Station Commander of Lubulini Police Station to provide police officers to assist the Deputy Sheriff Bongani Mamba to effect the writ of execution.

[8] The Applicant's version is that he is not in contempt of court as he was not amongst those who chased the Deputy Sheriff on the 31<sup>st</sup> March 2005. He avers that in fact he was never served with the court order at all. The Applicant then launched the present application under a Certificate of Urgency stating therein that the property which has been attached by the 1<sup>st</sup> Respondent is not executable because it belongs to the estate of his late father, lie outlined the history of these cattle in his founding affidavit and later in his replying affidavit.

[9] The Respondents on the other hand maintain that the 1<sup>st</sup> Respondent is in contempt and further that the cattle which have been attached do not belong to the Estate because 1<sup>st</sup> Respondent has been transferring them at will thus giving the impression that they belonged to him. In fact, 1<sup>st</sup> Respondent insist that the cattle belonged to the Applicant and are thus executable.

[10] The issue of the Applicant's contempt has been postponed to the 26<sup>th</sup> April 2005, and presently the court is seized with the urgent application for the stay of execution scheduled for the 22<sup>nd</sup> April 2005. In this regard I heard arguments for and against this application on the 20<sup>th</sup> April 2005.

[11] These arguments raised a number of issues viz i) whether the movable goods are executable; ii) whether Rule 45 (8) (a) has been complied with; iii) whether Rule 6 (23) has been complied with and iv) whether Applicant has loci standi to move the present application. I shall address the points in reverse order, for convenience.

i) Whether Applicant has loci standi in judicio.

[12] Miss Kunene argued that the Applicant has no loci standi to move this application as he was only appointed to act as a curator bonis not as curator ad litem. Mr. Maziya on the other hand took the view that the instrument which empowers the Applicant to act as a curator bonis by the Master gave him wide powers to institute proceedings in order to "(b) ... to take charge, custody and control of all deceased property" and further under (d) thereof "to assemble all deceased property and keep them in a safe place". It appears to me that in the circumstances of the present case Mr. Maziya is correct that the Applicant has loci standi in this case. In this regard I agree with what the author C.B. Prest state in his textbook, *The Law and Practice of Interdicts*, Juta 1996 at 312 where the following appears:

"The broad based and flexible approach adopted by the Appellate Division in Jacob's case [1992 (1) S.A. 521 (A)] is likely to herald an era in which the courts will be less astute to deny locus standi and more ready to inquire into the merits of what might turn out to be unlawful conduct; in other words, to deal with the issue of locus standi in a practical manner rather than a formalistic or technical one".

[13] (See also in this regard the *Annual Survey of South African Law* (1992) 568 - 9). I thus adopt this approach and hold that on the facts the Applicant has loci standi in judicio to launch these proceedings. It would appear to me further that the Applicant could still have loci standi as one of the beneficiaries of his late father's estate. This will be in line with the general rule that in order to justify his participation in a suit or to bring proceedings for relief, a party must show that it has a direct and substantial interest in the right which is the subject-matter of the litigation and in the outcome of the litigation and not merely a financial interest which is only an indirect interest in such litigation (see Folio 67 in C.B. Prest op cit).

ii) Whether Rule 6 (23) has been observed.

[14] Mr. Maziya submitted that the above Rule has not been complied with in the present case. Per contra arguments were advanced for the 1<sup>st</sup> Respondent that it was the duty of the Applicant to comply with what rule requires. Rule 6 (25) thereof provides that a copy of every application to court in connection with the estate of a deceased person or a person alleged to be a prodigal, or under a legal disability, mental or otherwise, shall, before such application is filed with the Registrar, be submitted to the Master of the High Court for consideration and report; and if a person is to be suggested to the court for appointment as a curator to property, such suggestion shall likewise be submitted to the Master for report: provided that the provisions of this sub-rule shall not apply to an application under Rule 57 except where the rule otherwise provides.

[15] It would appear to me that the Applicant is obliged to follow the rule as it is clearly outlined above. In this connection I order that Applicant furnishes the Master of the High Court with all the papers filed of record in this matter for his report in due course.

iii) Whether Rule 45 (8) (a) has been complied with.

[ 16] The argument for the Applicant in this regard is that the purported sale of the 22<sup>nd</sup> April 2004, is irregular as it does not comply with the requirements of Rule 45 (8) (a) in that the 3<sup>rd</sup> Respondent has prematurely advertised the sale in execution in Case number 3874/2004 in that fourteen days has not elapsed since the attachment and the date of sale was set less than seven (7) days contrary to the rules of this court. Miss Kunene advanced a very lame argument, if I may say so, that although conceding the period prescribed by the Rule but that the Applicant is the author of this anomaly and should not be allowed to benefit from his own misdeed in

defying a court order. In this regard I am in agreement with Mr. Maziya that whether Applicant is in contempt or not is still to be determined in the application which has been postponed to the 22<sup>nd</sup> April 2005. In any event, it appears to me that two wrongs do not make a right. In the totality of the facts in this regard the sale in execution scheduled for the 22<sup>nd</sup> April 2005, is irregular and thus offends the clear provision of the relevant rule.

[17] Rule 45 (25) (a) thereof provides as follows:

"Where under sub-rule (4) and (6) (a) - any movable property is attached, the Deputy Sheriff shall where practicable and subject to Rule 59 sell it by public auction to the highest bidder after due advertisement by him in one or more newspapers and after the expiration of not less than fourteen days from the time of seizure thereof and not less than seven (7) days after the first publication or such advertisement".

iv) Whether the movable goods are executable.

[18] Mr. Maziya argued that in casu there is overwhelming evidence on affidavits filed of record that the cattle which have been attached in execution are not executable because they belong to an estate of Applicant's late father. He directed the court to various portions of the Applicant's affidavits viz, paragraph 14 of the Founding affidavit and paragraphs 5 and 6 of the Applicant's replying affidavit. The 1<sup>st</sup> Respondent on the other hand has taken the position that these cattle belonged to the 1<sup>st</sup> Respondent and to this regard the court was referred to annexure "STD3" to the 1<sup>st</sup> Respondent's answering affidavit. This being a stock removal permit. The argument for the 1<sup>st</sup> Applicant which in my view is short sighted is that because the Applicant has dealt with the cattle in the manner reflected in annexure "STD3" then the cattle belong to him. This argument loses sight of a possible eventuality that he may be squandering the estate of his father by transferring the cattle wily nily but that does not make him the owner of the cattle.

[19] In my assessment of the facts presented before me in this regard I find that there is a dispute of fact which has arisen and cannot be resolved on the affidavits. It also appears to me that for the final determination of this case it is imperative to resolve who the owner of the cattle is. Because if the court finds that the cattle belong to the Estate then that will be the end of the matter and I ought to grant the application. However, if it is found that the cattle belong to the Applicant then 1<sup>st</sup> Respondent can proceed to re-advertise for the sale of those goods. This is the crux of the matter.

[20] It is trite law that where, at the hearing of motion proceedings, a dispute of fact on the affidavits cannot be settled without the hearing of oral evidence, the court may, in its discretion, (a) dismiss the application; (b) order oral evidence to be heard on specified issues in terms of the rules of the court; or (c) order the parties to trial. In each case the court may give such directions to costs or filing of pleadings as it deems fit (see Herbstein & Van Winsen, The Civil practice of the Supreme Court of South Africa, 4<sup>th</sup> Ed at page 241 and the cases cited thereat).

[21] On the facts of the present case it is my considered view that (b) above applies that oral evidence be led of the Veterinary Officer as to who the owner of the cattle is and the explanation around annexure "STD3" to the 1<sup>st</sup> Respondent's answering affidavit. The affidavit of the Veterinary Officer filed of record is not conclusive on the question of ownership of the cattle.

[22] In the result, for the afore-going reasons the following order is issued for the time being:

1. The sale in execution scheduled for the 22<sup>nd</sup> April 2005, is stayed forthwith pending the finalization of this matter; ,
2. The Applicant to furnish to the Master of the High Court the application with all the affidavits filed of record

in terms of Rule 6 (23) for his report in due course;

3. The matter referred to oral evidence on the issue of ownership of the attached goods; and

4. Costs reserved.

S.B. MAPHALALA

JUDGE