

THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 557/1999

In the matter between

ABRAHAM MUSA MKHALIPHI N.O.

Applicant

vs

SWAZILAND DEVELOPMENT AND SAVINGS BANK

1st Respondent

DEPUTY SHERIFF, SHISELWENI

2nd Respondent

Coram: BANDA, CJ

For the Applicant

For the Respondents

JUDGMENT

[1] This is an application by the applicant to set aside a sale in execution which was conducted by the second respondent on instructions of the first respondent.

[2] The applicant is the Executive Dative of the Estate of the late STANLEY VUSUMUZI DLAMINI. The deceased sought from and was granted a loan by the first respondent. The loan was secured by a mortgage bond over Farm 324 Mhlosheni South. The Estate was unable to service the loan and the farm was declared executable. Summary judgment was obtained against the estate. Notice to sell the farm was advertised.

[3] The essence of this application is that the applicant has suffered prejudice in that the sale was unlawful because the notice of sale did

not comply with the requirements of Rule 46(8)(b) of the High Court Rules. Mr. Dlamini, who appeared for the applicant, has submitted that the notice which advertised the sale of the farm did not give sufficient description of the property. He contended that the provisions of Rule 46(8) (b) are peremptory in nature and that they require strict compliance with it. He has submitted that the contents of the Notice of Sale should have mentioned the main features of the property and that the notice, in this case, did not set out the main characteristics of the property. The provisions of Rule 46(8) (b) are in the following terms:-

"The executive Creditor shall, after consultations with the Sheriff, prepare a Notice of Sale containing a short description of the property, its situation and street number, if any, the time and place for the holding of the sale and the fact that the conditions may be inspected at the office of the Sheriff and he shall furnish the Sheriff with as many copies of the notice as the latter may require."

[4] It is clear therefore that the Notice of Sale under Rule 46 (8) (b) must provide the following -

- (a) a short description of the property and its situation;
- (b) its location;
- (c) the time and place when and where the sale will take place;
- (d) that conditions of sale may be inspected at the office of the Sheriff.

[5] The Notice which the respondents advertised for sale is in the following wording -

NOTICE OF SALE

NOTICE is hereby given that pursuant to a writ of Execution issued in the above matter, the undermentioned property will be sold by Public Auction by the Deputy Sheriff for the District of Shiselweni outside the Magistrates Building, Nhlangano at 11.30 a.m. on FRIDAY the 4th MAY 2001.

CERTAIN : FARM NO. 324 at Mhlosheni, Swaziland

MEASURING: 584 8729 (Five Eight Four comma Eight Seven Two Nine) Hectares;

HELD: By the late Stanley Vusumuzi Dlamini under Deed of Transfer No. 668/1987;

RESERVE PRICE: E195,000.00 (One hundred and Ninety Five Thousand Emalangeneni)

The conditions of sale are available for inspection at the office of the Sheriff in the High Court Building, in Mbabane and at the offices of Robinson Bertram . Further particulars may be obtained from the undersigned.

Dated at Mbabane on this 30th Day of March 2001.

T.S. MAZIYA

SHERIFF OF SWAZILAND

[6] Mr. Jele, who appeared for the respondents, has submitted that the Notice of Sale satisfied the requirements of Rule 46(8) (b). He contended that the applicant made this application after the property was sold and only after he realised that there would be nothing left for him. Mr. Jele contended that it was open for the applicant, under Rule 46 (9) (b) to apply for modification of the conditions of sale and he did

not do that. Mr. Jele has also submitted that the applicant is estopped from challenging the sufficiency of the Notice of Sale after the property was sold. He contended that by his own conduct he had created the impression that the Notice had properly complied with the requirements of Rule 46 (8) (b).

[7] It is clear from the affidavits filed in this case and it is not disputed that the property in issue was advertised for sale on four different occasions with the same notice containing the same details. The applicant was aware of the contents of the notice and no objection was taken against it. It must also be remembered that the applicant was represented by counsel. The first attempt to sell the property took place on 28th July 2000. There were no bidders and the sale was cancelled. The second attempt to sell was made on 24th November 2000 again there were no bidders and the sale was cancelled. The third attempt to sell the property was made on 8 December 2000. The sale was held and a deposit was paid but the purchasers failed to raise the balance and the sale was cancelled. The fourth and final attempt to sell the property took place on 4th May 2001. There were no bidders for the property and the first respondent, in order to mitigate the costs, decided to buy the property at the reserved price.

[8] The applicant was aware of the Notice of Sale and its contents on all the four occasions the property was advertised for sale. Equally he had all along been aware of the reserved price on the property. I have looked at the affidavits which have been filed in this case and I have been able to study its historical background. It shows that the first respondent has been very indulgent to the applicant as there had been many occasions where the applicant had promised to settle the claim

and had failed to honour those promises. That indulgence by the first respondent spread over a period of four years and then came this application. Mr. Dlamini, for the applicant, has contended that delay to make this application does not waive the applicant's right to move the court to cancel the sale which arose from what he contends was an invalid Notice of Sale. He has cited the case of the MESSENGER OF THE MAGISTRATE COURT,

DURBAN v PILLAY [1952] SAR 678 to support his contention. In that case the court there found and indeed it was admitted that the notice was insufficient and invalid because it lacked particularity. It is not clear however for how long the applicant had stood by without doing anything about the Notice. But it is interesting to find that the court there held that what was required was a short description of the property and its situation. In attacking the insufficiency of the Notice in this case Mr. Dlamini submitted that the Notice should have contained the main features or characteristics of the property. But Mr. Dlamini was not able to state what those features or characteristics are that should have been included in the Notice of Sale. The characteristics which must be inserted into the Notice must be those that are expected to attract the interests of potential buyers. The property to be sold was the Farm 324, its location and size was given, the name of the freehold owner was given and the reserve price was given. The Notice informed the public where they would go and inspect the conditions of sale. The respondents submitted that there were run down buildings on the property and they did not think it prudent to advertise such buildings which would not add any value to the property. It is difficult, in my judgment, to see what else the Notice of Sale should have contained. The law allows any interested party to apply to court to have the conditions of sale modified. Rule 46(9)(b) is

in the following terms -

46(a)(b) "Any interested party may, not less than seven days prior to the date of sale, upon twenty-four hours notice to the execution creditor and any mortgagee apply to a judge for any modifications of sale, and the judge may make such order thereon including an order as to costs as when may seem meet".

[9] The applicant made no such application which had to be made not less than seven days prior to the date of sale. And after a period of almost a year after the first Notice of Sale was published he comes to court not with an application to modify the conditions of sale but to have the sale itself cancelled. This is a case in which the applicant had no defence to the plaintiffs claim. He had made several promises to settle the claim and none of them were ever fulfilled. This application is, in my judgment, yet another device to delay the plaintiff from receiving the benefits of his litigation. It would not be proper and, in my view, it would be an abuse of judicial process to allow the applicant to use the judicial process in this manner. The judicial process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery and will, in a proper case, summarily prevent its judicial machinery from being used as means of vexations in the process of litigation. I am satisfied that the Notice of Sale fully complied with the requirements of Rule 46(8) (b). There has been no application to modify the conditions of sale which should have been made not less than seven days prior to the date of sale. This application is devoid of any merit and it is dismissed with costs.

Pronounced at the High Court sitting at Mbabane this 9th...day of July
2007.

R.A. BANDA
CHIEF JUSTICE