IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 1532/10

In the matter between

LEMUEL NDUMISO KOTA	**APPLICANT**
And	
STANDARD BANK SWAZILAND	**1ST RESPONDENT**
REGISTRAR OF DEEDS FOR SWAZILAND	**2ND RESPONDENT**
THE ATTORNEY GENERAL	**3RD RESPONDENT**
THE DEPUTY SHERIFF-SHISELWENI DISTRICT	**4TH RESPONDENT**
ALI HUSSEIN DLAMINI	**5TH RESPONDENT**
MUSA M. MDLULI	**6TH RESPONDENT**

Neutral citation: *Lemuel Ndumiso Kota v Standard Bank Swaziland and 5 Others (1532/10*) 2012 [SZHC] 244 (19th October 2012)

Coram: **OTA J**

Heard: **21st September 2012**

Delivered: **19th October 2012**

Summary: Sale in execution challenged: default judgment birthing execution not challenged: previous negotiations to settle debt by installments: applicant defaulted in installmental payments: irregularities in process of execution alleged: held: sale will not be set aside where the causa of the warrant is in existence: judgment debt not satisfied therefore: causa of the warrant still in existence: application dismissed. Urgency procedure: principles thereof

[1] The Applicant launched this application on the premises of urgency contending for the following reliefs:

1. That the non-compliance with the Rules of court relating to forms, time limits and service, in the institution of proceedings is condoned and such Rules of court be dispensed with as far as is necessary so that this matter be enrolled as one of urgency.

2. Interdicting the Second Respondent from registering the transfer from the Applicant in favour of fifth and sixth Respondents of certain immovable property described as –

Certain Erf No 14 situate in Township of Hlatikulu District of Shiselweni, Swaziland;

Measuring 2855 (Two Eight Five Five) square metres.

Held Under Transfer Deed of No. 431/1988

For non-compliance with Section 13 (a) as read with sub-section (b) and sub-sub-section (vii) of the Deeds Registry Act, 1968 pending further order of the above Honourable Court.

3. *Interdicting Fifth and Sixth Respondents from selling, alienating or otherwise disposing of, or otherwise encumbering the said property pending further order of the above Honourable Court.*

4. *Setting aside the purported sale of the said property entered into between the First Respondent and Fifth and Sixth Respondents.*

5. *Specifically instructing the Registrar of the High Court to produce the court file for the Case 2596/2006 for forensic perusal.*

6. *That a rule nisi do hereby issue returnable on a date and time to be determined by the above Honourable Court, calling upon the Respondents to show cause why a final order should not be made as*

prayed for herein and that prayers 2 and 3 shall operate as an interim order pending determination of the rule.

7. Costs of the Application

8. Further or alternative relief.

[2] The application is premised on a founding affidavit of 15 paragraphs. Exhibited to this affidavit are annexures A to I respectively. The Applicant also filed a replying affidavit of 40 paragraphs. This application is opposed by the 1st Respondent which filed an answering affidavit of 35 paragraphs, to which is exhibited annexures S1 to S24.2 respectively.

[3] It is on record that there is a counter application filed by the 1st Respondent, which appears on pages 210 to 212 of the book of pleadings, wherein the 1st Respondent prays for the following reliefs:

1. *Directing the second respondent to transfer Erf 14 situate in Township of Hlatikulu, District of Shiselweni Swaziland, within Seven (7) days of the issuance of the Court Order by this Honourable Court.*

2. *Directing any party who opposes the counter-application to pay the costs including certified costs of counsel.*

3. *Further and/or alternative relief.*

[4] Now, it is apposite for me at this juncture to put this whole case in perspective by detailing a resume of it's established facts which are as follows:-

In 2006 the 1st Respondent instituted proceedings against the Applicant by way of simple summons in a suit styled Case No. 2596/2006, for the payment of the sum of E28,394-05 being in respect of monies it lent and advanced on overdraft to the 1st Respondent, plus interest and costs. The suit also prayed that Lot No. 1051 situate in Mbabane Township Extension No.9 in the Hhohho District Swaziland measuring 2000 square metres and held under Deed of Transfer No. 314/1992, be declared executable. (annexure S2).

[5] The summons was served personally on the Applicant on the 25th of July 2006 as evidenced by annexure S3 the Return of Service. It is common cause that the Applicant did not defend the action. Consequently, default judgment was granted against him as prayed via the summons.

[6] In the wake of the default judgment the parties entered into an acknowledgement of debt agreement wherein the Applicant agreed to liquidate the amounts owned by monthly installments of E1,000-00 commencing on the 31st of July 2006. The parties further agreed that in the event of default in payment by the Applicant, the full balance then outstanding in terms of the agreement shall become due and payable and the 1st Respondent, in addition to other rights which it has in law shall be entitled to enforce the provisions of the acknowledgement of debt agreement as if it were a judgment of the court. The acknowledgment of debt was subsequently made an order of court.

[7] It is common cause that the Applicant failed to honour the payment of the installments as per the acknowledgement of debt agreement.

[8] Against a backdrop of the foregoing, a warrant of execution issued against the movables of the Applicant simultaneously with a warrant of execution against the immovable property lot 1051 which had be declared executable. This is evidenced by the **Nulla Bona** return and Return of Service on the immovable property both dated 12th of September 2006 (annexures S6.1 and S6.2). It is on record that in January 2007, a notice for the sale of Lot No. 1051 which was scheduled for the 16th day of March 2007 was published (annexure S8). The sale did not however take place because the Applicant forestalled it by making some payments on the judgment debt. (annexure S9.1 and S9.2). The sale was thus cancelled and the interdicts from the Deeds office uplifted to make way for Swazi Bank who had also obtained judgment against the Applicant to execute against Lot 1051 in satisfaction of it's judgment. (annexure S10.1, S10.2 and S10.3). It is on record that Lot 1051 was eventually sold by other parties.

[9] It is common cause that thereafter the Applicant failed to make payments as per the acknowledgement of debt agreement. This event caused the 1st Respondent to take action by way of several Rule 45 (13) (1) procedures which spanned between 2007 to early 2011 seeking to elicit payment from the Applicant (see annexures S11.1 to S11.10). The Applicant admits that pursuant to one of the rule 45 (13) (1) processes, he appeared before **Justice Mbutfo Mamba** in 2011 and detailed to the Honourable Court his inability to pay the debt at the time.

[10] With the dismal failure of the rule 45 (3) (1) procedures, the 1st Respondent again attempted to execute against the movable property of the Applicant which proved abortive as no movable property was found (annexures S12.1 and S12.2).

[11] Following the above, a writ of attachment was issued against two immovable properties of the Applicant in May 2011, namely Erf 12 and Erf 14 (annexures E2 to E4 and S14.1 and S14.2) In the wake of these attachments and executions, a notice of sale was issued on the 27th of May 2011 for Erf 14 which sale was scheduled for the 1st of

July 2011. The Applicant admits that he saw this notice of sale. Applicant then entered into further negotiations with 1st Respondents to settle the debt. To this end he paid E3,000-00 in part payment but failed to service the balance as agreed. In consequence, the sale of Erf 14 was re-advertised for the 12th August 2011 (annexure S16.3). The sale could not proceed because there were no purchases. The sale of Erf 14 was again re-advertised to take place on the 16th of December 2011 as evidenced by annexures S16.4. On that date Erf 14 was sold to a party who did not have the purchase price with him and the sale was cancelled as evidenced by annexure S16.5. The Applicant admits that on the 22nd November 2011 he saw the notice for the sale of Erf 14 on the 16th of December 2012. He further admits that after seeing the Notice he in the company of a business associate one **Mr Mkhabela** who had agreed to stand surety for the payment of the judgment debt, approached the 1st Respondent's attorneys to negotiate payment . Suffice it to say that in February 2012 a notice for the sale of Erf 14 on the 16th of March 2012 again issued (annexure S16.6). It is common cause that in the wake of this notice, the Applicant and his business associate **Mr Mkhabela** again approached the 1st Respondent and offered to make a cash payment of

E5,000-00 to forestall the sale. This was refused by the 1st Respondent who insisted on a deposit of E10,000-00. (annexure 17). The Applicant failed to pay this amount.

[12] It is common cause that the sale of Erf 14 to the 5th and 6th Respondents took place on the 16th of March 2012 and the property was sold for E80,000-00. On the 21st of March 2012 the interdict placed over Erf 14 was uplifted (annexures S18.1 and S18.2). After the full purchase price was made the outstanding balance of the judgment debt being the sum of E25,271-18 was paid to the 1st Respondent. On the 24th July 2012 the Applicant was paid a cheque of E51,597-05 being the balance on the purchase price of E80,000-00 for Erf 14, as evidenced by annexures S22.1 and S22.2 respectively.

[13] It was against a backdrop of the foregoing facts that on the 17th of September 2012, the Applicant launched the application instant on the premises of urgency.

[14] The 1st Respondent has raised points *in limine* on urgency, sale impeachable and warrant of Execution not discharged, seeking to defeat this application.

[15] I deem it expedient at this juncture to deal with the point raised on urgency before taking further steps. I will deal with the other points when dealing with the merits of this case.

[16] Now, the urgency procedure which is sanctioned by rule 6 (25) (a) and (b) of the High Court rules is very well known to us. Rule 6 (25) (b) places a mandatory responsibility on a party seeking to be heard on the premises of urgency to demonstrate the following to the court:-

1. The circumstances which he avers render the matter urgent

2. The reasons why he cannot be afforded substantial redress at a hearing in due course.

3. These facts must appear ex facie the papers and must not be whimsical or contrived but cogent and compelling.

[17] See **Henwood Humphrey v Maloma Colliery and Another Civil Case No. 6232/94, Megalith Holdings v RMS Tibiyo and Another, Civil Case No 199/2000. Protronics Networking Co-operation v EMCON Africa (Pty) Ltd and Another Civil Case No. 852/2000.**

[18] What then are the Applicant's reasons for sourcing this application on grounds of urgency?

[19] In paragraph 12.3 of the founding affidavit the Applicant averred as follows:-

'' *12.3 As to urgency I state as follows, that*

(a) I am advised and accordingly humbly submit thereto that this application is urgent in order to preserve the status quo over the property since the exercise of discretion by the Registrar under Section 25 (5) as read with sub-section (7) of the Deeds Registry Regulations, 1973, not to register the Deed of Transfer in favour of fifth and sixth Respondents is not permanent relief but a temporary

departmental injuction in light of the objection lodged by myself and my attorney.

(b) I am further advised thereto that in the current event that a Deed of Transfer has been lodged in the face of an objection as outlined in 12.2 (b) above, there is a palpable urgency because in terms of the exercise of discretion under Section (7) the rejection of such Deed of Transfer should occur not later than three clear days after such event or longer period as the Registrar may at her discretion determine.

(c) I am accordingly advised that as opposed to a caveat as is at present prevailing a permanent interdict has to be in place timeously before the Registrar of Deeds exercises her discretion to lift the caveat – at which event I would have to resort to the alternative route of action proceedings, which are fraught with deleterious risk.

(d) Further, I believe that since there has been a purported sale, the purchasers may regard themselves at liberty to sell, alienate or encumber the property, and this needs to be urgently prevented by a cancellation of the said purported sale''.

[20] It is worth mentioning at this stage that on the 17th July 2012, the Applicant via a letter had requested the 2nd Respondent, the Registrar of Deeds, to place a caveat over Erf 12 and Erf 14. This was followed up by another request for a caveat by Applicant's attorneys on the 20th of August 2012. This request was granted.

[21] The question looming large here is . Do the foregoing facts when juxtaposed with the established history of this case, which I have hereinbefore recited in extenso, justify this application being sourced on the grounds of urgency? My answer to this poser is an emphatic No.

[22] I say this because the sale of Erf 14 in execution of the judgment granted to the 1st Respondent against the Applicant, is one that has a long lineage. This is because as rightly contended by the 1st Respondent and admitted by the Applicant, the Applicant has been aware of the process of execution against Erf 14 by way of it's sale since July 2011. The Applicant admitted in his papers that he saw 3 of the advertised sales of Erf 14 starting with the sale advertised in

the Times of Swaziland on the 31st May 2011 which was slated for 1st July 2011. Then the sale slated for 16th December 2011 and finally the sale billed for the 16th of March 2012. The Applicant did not object to the sales. He did not complain about the alleged irregularities as per service of the writs of attachment and execution which he seeks to raise now.

[23] Let me out of the abundance of caution at this juncture zero in on the sale of the 16th of March 2012. The sale was advertised in February 2012. The Applicant acknowledges knowledge of the advertised sale. He took no steps to interdict 1st Respondent. He did not raise any issues about the alleged irregularities of the court processes rather, he sought to forestall the sale, like he did in all previous occasions by negotiating settlement of the judgment debt by way of istallmental payments. Therefore, in the company of a business associate who had agreed to stand surety, he approached the 1st Respondent and requested to make a cash deposit of E5,000-00 to forestall the sale. The 1st Respondent according to it's papers refused this offer based on the established conduct of Applicant in reneging on previous undertakings to pay. Therefore, the 1st Respondent requested a

deposit of E10,000-00. The Applicant failed to pay this. The 1st Respondent proceeded with the sale on the 16th March 2012 and Erf 14 was sold to 5th and 6th Respondents for the sum of E80,000-00. After the outstanding balance owing to the 1st Respondent was paid to it on the 7th of July 2012, the balance outstanding from the sale being the sum of E51,597-05 was duly paid to the Applicant on the 24th of July 2012.

[24] It appears to me that the Applicant retired into a sleeping slumber after becoming aware of the impending sale in February 2012. He woke up on the 7th of September 2012, about 5 months later ran to court huffing and puffing seeking to frustrate the entire sale on the premises of urgency. There is no urgency here.

[25] In any case quite apart from the notice of the sale of 16th March 2012, Erf 14 was attached in May 2011, thereafter the first advertisement for it's sale issued on the 31st of May 2011. The Applicant admits that he saw this notice. The effect of the attachment is that the property remained in *custodia legis* with the sheriff until the attachment is uplifted or set aside. In the wake of the attachment and

in the absence of any order of court either uplifting or setting it aside, the sheriff had the powers to sell Erf 14 in execution of the judgment debt as he proceeded to do on the 16th of March 2012. The Applicant ought to have known therefore, that if no steps were taken to forestall the process of execution by either uplifting or setting aside the attachment, that Erf 14 would be sold in execution of the judgment. The sale of Erf 14 was therefore foreseeable from the time it was attached and advertised for sale in 2011. See **MPD Marketing Suppliers (Pty) Ltd v Roots Construction (Pty) Ltd and Another Civil Case No. 2709/09.** Even if the Applicant was not served with the writ of attachment as he alleges, he was however aware of the sale.

[26] There is therefore no urgency here. Whatever semblance of urgency propounded by the Applicant is a figment of his own imagination . It is a contraption of his vivid imagination geared to facilitate his crafty and dilatory stratagem directed at frustrating the 1st Respondent's victory. Applicant had ample opportunity if he chose from May 2011 when Erf 14 was attached and first advertised for sale, to 16th March 2012 when it's sale took place to approach the court within its

normal time limits to interdict the sale. He failed to do so. Rather choosing to enter into negotiations. He stood by and allowed the sale to take place notwithstanding being aware of the irregularities he now propounds.

[27] The urgency procedure was designed for real and palpable circumstances of urgency and not to aid litigants in disingenuous ventures based on flimsy, whimsical and slippery grounds.

[28] A very similar scenario as the one that enures in these proceedings presented in the case of **Henwood Humphrey v Maloma Colliery Ltd and Another (supra),** and the court held as follows:-

‘‘ *It is abundantly clear from the Applicant's own affidavit that he became aware of the alleged irregularities in the mining operations prior to May 1993. The advice he received regarding the validity of the mining lease should on it's own have driven the Applicant to put an end to the misery and hardship he states he was suffering by challenging the first Respondent's right to operate the mine. The Applicant, instead, allowed the operation to continue and expand with*

the attendant costs to the first Respondent and the obvious increase in the nature of the hardships he complains of. It turned out in the course of the hearing, that the mining lease had in fact been signed before a notary public and that it was valid---. As a farmer he was aware of the commencement of the cotton season. He took no steps to ensure that the matters he complains of were attended to in good time, to enable him to proceed with his cotton planting on time----. The question in the present application, however, is whether or not given the protracted negotiations between the parties the Applicant is entitled to rush to court without affording the Respondents the opportunity to reply and state their case to the serious allegation of law and fact set out in the application. The answer, in my view, is a clear no. The matters complained of by the Applicant are long standing---. Whatever sympathy one may have for the Applicant he cannot have it both ways. He elected to allow the operations whilst negotiating with the first Respondent and he cannot after some 18 months seek to enforce his rights in an application brought out with the provisions of rule 6''.

[29] Since I have determined that this application is not suited for the urgency procedure, it ought to be extinguished on this basis alone. However, I cannot resist the temptation of flipping the other side of the coin to weigh the Applicant's vociferous contentions that he is entitled to the reliefs sought on the merits.

[30] Let me say it categorically here that after a very mature consideration of the totality of papers serving before court, I am inclined to hold that this whole application, borrowing the words of learned counsel for 1st Respondent **Mr K Motsa**, *''Has got no merits''*.

[31] To my mind this whole application is suspect. It is certainly preposterous. It is a frivolous and vexatious ploy designed by the Applicant to perpetrate his resolve at stultifying the 1st Respondent's early dance of victory pursuant to it's default judgment of 2006. It is certainly a palpable abuse of the process of this court.

[32] The whole case is inconceivable. The Applicant is not challenging the default judgment which gave birth to the consequent execution. That judgment and the subsequent acknowledgment of debt agreement

attendant thereto, remain valid, subsisting and binding upon the parties and have not been set aside or reviewed by a competent appellate or reviewing court. The 1st Respondent thus had the right to proceed to it's execution irrespective of whatever negotiations the parties have been or may be exploring. In exercising it's right to enforce the valid and lawful judgment of 2006, the 1st Respondent was in law at liberty to enforce against any of Applicant's properties including Lot 1051 which had been declared executable. It is however apparent from the papers that Lot 1051 was no longer available to be executed against as it has been sold to other debtors. I say this because even though the Applicant denies the sale of Lot 1051, he is however not forthcoming as to whether it is still available or not. He is rather evasive on this issue. All he says in his papers is that there are other immovables that could be executed against. He has therefore failed to deny the unavailability of Lot 1051 in any point of substance. In the circumstances I'll uphold the 1st Respondent's allegations that Lot 1051 has been sold.

[33] In the absence of Lot 1051 the 1st Respondent was at liberty to enforce it's judgment against any immovable property of the Applicant

including Erf 14. I say this because it is an established fact that a writ of execution first issued against the Applicant's movable properties as attested to by the **Nulla Bona** returns filed of record. No movables were found. It does not appear that up till the date of sale any movables existed against which the judgment could have been executed. The Applicant has not even remotely suggested as such rather he has maintained all through that there are other immovables besides Erf 14. Applicant also admitted that he did not have the means to settle the judgment debt via the rule 45 (13) (1) procedures. In the absence of movables to service the judgment debt, the 1st Respondent was well within it's rights to proceed to execution against the Applicants immovables properties without any further order of the court. That is the entrenched position of the law as recognised by jurisprudence.

[34] This position of our law was hailed by **Andries C. Cillers in the text The Civil Practice of the High Courts and the Supreme Court of Appeal in South Africa (5th ed) (juta) page 1042**, as follows:-

‘‘ *After it appears that no, or sufficient, movable property is available to satisfy the judgment debt, the creditor can, <u>without any further order of court</u>, levy execution against the immovable property of the judgment debtor. Proof that there is no, or insufficient, movable property to satisfy the judgment is usually supplied by a nulla bona return. The return must show that no sufficient movable property is available for the purpose, and if this does not appear from the return to be the case, the immovable property cannot be attached in execution.’’* (emphasis added) See **Loescher v Kumst (1897) 7 CTR 428, Bosman v Estate Marnewick (1910) 20 CTR 4.**

[35] It follows therefore in these circumstances, that the Applicant’s alleged clear right to the interdict sought, predicated on his avowals of right of ownership of Erf 14 as guaranteed by Section 19 (1) of the Constitution Act of 2005, read with sub-section (2) (c) thereof, and his right of protection from deprivation of property as entrenched in Section 35 (1) and (1) (a) of the Constitution, is clearly irreconcilliable. His right of ownership and protection from deprivation of property must bow to the right of the 1st Respondent to execute against Erf 14 in enforcement of it’s lawful judgment of

2006. The constitution also recognizes this right. That is why Section 19 (2) (c) thereof provides as follows:-

‘‘ *19 (2) A person shall not be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied;-*

(c) the taking of possession or the acquisition is made under a court order’’.

As this case lies, I agree with 1st Respondent that Section 19 and 35 of the Constitution Act are defeated and have no application.

[36] Furthermore, the sale of Erf 14 cannot be set aside in the face of the valid and subsisting default judgment and acknowledgement of debt agreement, in favour of the 1st Respondent, which have not been set aside or reviewed by an order of court. The Applicant as I have indicated in this judgment has not challenged these orders rather he has persistently negotiated to settle the judgment debt by way of installments. It is obvious from the papers that the Applicant is still prepared even in the midst of this application, to honour the

agreement entered into with the 1st Respondent. This fact is exant from his averrals in paragraph 12.5 (d) of his founding affidavit as appears on page 22 of the book of pleadings, as follows:-

‘‘ *d I have every intention of honouring the bona fides of the agreement entered into with first Respondents, which they themselves advanced as adequate reason for releasing the property from attachment, in as much as they should not have a debt settled through unlawful means and in breach of a standing agreement’’.*

[37] In addition to the above the Applicant also admits that he defaulted in payment as per the agreement. In these circumstances, the prayer to set aside the sale is clearly inconceivable. This is because it is the judicial accord that a sale in execution will not be set aside where the causa of the warrant still remains in existence and also where the sale took place pursuant to a default judgment which an Applicant has not sought to set aside.

[38] A case in support of the above position of the law is the case of **Le Roux v Yskor Landgoed (EDMS) BPK en Andere 1984 (4) SA 252**

(T). The facts of that case are that the Plaintiff instituted proceedings for the setting aside of a writ of execution and the subsequent sale of his immovable property. The Plaintiff did not attack the judgment on which the writ was based but only the execution alleging that the writ of execution had been improperly obtained and that the sale in execution was invalid as he had tendered payment of the original debt by means of a mortage bond and the first Defendant (the creditor) had failed to react to this and to two letters from the building society which had granted him the bond. The second Defendant raised an exception to the Plaintiff's particulars of claim on the grounds that they did not disclose a cause of action. The court found that after judgment the first Defendant was entitled to immediate and unconditional payment of the judgment debt and costs and, as the Plaintiff had only tendered payment of the original debt against registration of the mortgage bond, his offer had amounted to an incomplete offer of performance. The court held further that it did not have such a wide discretion that it could order the setting aside (as opposed to the suspension) of the execution of a judgment on the grounds of justice and fairness where the causa for the execution still existed. The exception was upheld.

[39] Similarly, in the case of **Wichmann v Standard Bank Van Suid – Africa BPK en Andere (2002) ALL JA 558 (T)**. a farm owned by the Applicant was sold in execution by the Fourth Respondent, on the instruction of the first Respondent. The latter held a mortgage over the property. The Applicant now applied for an order setting aside the sale in execution. The application was opposed by the first Respondent. First Respondent bank had obtained judgment in default against the Applicant, and had proceeded to attach the farm. At that juncture, the Applicant made arrangements to pay the outstanding amount, which caused the bank not to proceed with the sale in execution. However, the Applicant then again defaulted with payments. This chain of events repeated itself a few times before the sale in execution which was challenged took place. The court held that a warrant of execuciton may be set aside where the warrant is no longer justified by the causa or debt. The causa of a warrant of execution falls away if the debt is discharged. That in that case the debt could not be regarded as having been discharged-either through payment or through any of the other ways in which it was capable of

being discharged. The causa of the warrant therefore remained in existence. As a result, the application was dismissed.

[40] Then there is the pronouncement of the court in the case of **Sani and Another v First Bank Limited and Others 2012 (4) SA at page 38 1, paragraph 48**, as follows:-

‘‘ *48 First the Applicants do not challenge the judgment which formed the basis of the sale in execution. According to the Gundwana judgment the mere Constitutional invalidity of the rule under which the property was declared executable is not sufficient to undo everything that followed and in order to set aside the subsequent transfer of property which followed upon it’s sale in execution an aggrieved debtor will have to bring an application for rescission. The relief sought by the applicants in para 1 of their notice of motion is for the setting – aside of the sale of immovable property concluded between the first Respondent on the one hand and second and third Respondents on the other. The relief sought by the Applicants, however, fails to recognize the fact that the 2nd and 3rd Respondents bought the property from the sheriff at a sale in execution. It did not*

buy it from the first Respondent. When the sheriff concluded the agreement with the second and third Respondents he did not act as an agent of the first Respondent but acted as ''executive of the law''. This is so because when the sheriff commits himself to the terms of the conditions of the sale he, by virtue of his statutory authority, does so in his own name and may enforce it on his own name ***(Ivoral Properties (Pty) Ltd v Sheriff, Cape Town, and Others 2005 (6) SA 96 (CC) [2005] 3 ALL SA 178 in para 66''***.

[41] It is certainly stating the obvious when I say that the pronouncement of the court in paragraph 48 ante, is a double edged sword. By this I mean that it serves two useful purposes. On the one hand it demonstrates that failure to challenge the default judgment and the consequent acknowledgment of debt agreement defeats the venture to set aside the sale predicated thereon since the judgment debt has not been satisfied. On the other hand and as rightly contended by **Mr Motsa**, it demonstrates the incompetence of the entire prayer for the setting aside of the sale which appears in paragraph 4 of the notice of motion and is couched as follows:-

‘‘ *Setting aside the purported sale of the said property entered into between the first Respondent and Fifth and Six Respondents’’.*

[42] This prayer as demonstrated in paragraph 48 ante is clearly misconceived. This is because the sale of Erf 14 was between the 5th and 6th Respondent and the sheriff of the High Court and not with the 1st Respondent.

[43] Let me also observe here that the Applicant’s contention that the fact that the bond holder over Erf 14, Swailand Building Society, was not notified of the sale defeats same, cannot lie. This is because as evidenced by annexure S23 (page 180 of the book) the said bond was cancelled on the 13th of March 2012, prior to the sale which took place on the 16th of March 2012. This fact was acknowledged by the Applicant himself in paragraph 10.5 of his founding affidavit in the following language:-

‘‘ *10.5 At all material times, my immovable property in Hlatikhulu, being Erf No 14 ---- was subject to a mortgage bond held by Swaziland Building Society, the mortgage bond was registered on*

the 3rd of August, 1988 as No 436/88 with preference. The bond was cancelled on the 13th of March, 2012, a fact that First Respondent's attorneys are well aware of'''.

[44] It appears to me therefore, that by contending for a setting – aside of the sale founded on the said bond, the Applicant was approbating and reprobating at the same time. He was clearly shifting goal posts to suit his purposes. He cannot blow hot and cold at the same time. Since it is established that there were no preferent creditors deserving of notice as at the time of the sale on 16th March 2012, the contention of the Applicant on this ground must fail. See **AH Noorbhai Investments (Pty) Ltd v New Republic Bank Ltd and Others 1998 (2) SA 575 (W) at page 581 paragraphs 18-20.**

[45] Similarly, I agree with the first Respondent that Applicant's belated complaints at this stage about the purchase price of the property, cannot avail him. This is because as admitted by the Applicant, he was well aware of the sale scheduled for the 16th of March 2012. He did not raise any issues in this regard. The sale was conducted on the 16th March 2012 and the property sold to the 5th and 6th Respondents

at the purchase price of E80,000-00. The Applicant has not alleged that he was not aware of the purchase price at that date. He however folded his hands and did nothing . He allowed the purchase price to be paid by the purchasers.

[46] Now five months after the sale he races to court complaining about the purchase price. This complaint cannot operate to extinguish the entire sale. This is more so as there is no evidence to show by way of a surveyors report of Erf 14, that it's value at the time of the sale was the sum in excess of E125,000-00 alleged by Applicant in paragraph 11.2 of his papers in contradistinction to the amount of E80,000-00 for which the property was sold. The Applicant categorically avers in that paragraph that the alleged sum in excess of E125,000-00 is to his estimation. This simply means that the alleged sum is a conjecture or surmise. Applicant is clearly speculating as to the value of the property. There is no concrete evidence to this effect upon which the court can find for him. The court cannot engage in prophesy.

[47] Let me now turn to the alleged irregularities in the process of execution which the Applicant vociferously laments and proposes as justifying this application. Learned counsel for the Applicant **Mr Maphalala** echoed these lamentations, contending that the whole sale was irregular, in that it contravened **Section 13 (1) (a) and (b) as** read with **Proviso (VII) of the Deeds Registry Act 1968**, **and Rule 46 (1) (3) and (4) of the High Court Rules**, for failure to follow the sequence of attachment before the sale. Counsel also contended that there was no proper service of the Notice of attachment in compliance with **Rule 4 (1) (a) and (b) of the Rules of the High Court**. This, counsel says is because the Return of Service shows that the property that was attached was Erf 12 and not Erf 14 which was eventually sold and that service was effected on Erf 14 which is an unoccupied empty piece of land.

[48] Now the processes filed of second show that quite apart from the attachment of Erf 12, that the sheriff of the High Court also attached Erf 14 in the process of the execution of the judgment granted to the 1st Respondent. This fact is clearly borne out of amexure S14.1 which appears on pages 137 to 138 of the book. This process is a writ of

attachment which shows that Erf 14 was attached on 4th May 2011. This fact is substantiated by the Return of Service of the said attachment sworn to by the Deputy Sheriff of the Hhohho region **Phumelela Malindzisa** (annexure S14.2 page 139 of the book). It was after this attachment took place that the series of advertisements of the sale of Erf 14 in satisfaction of the judgment debt, which I have already detailed here in extenso ensued. The effect of the attachment is that Erf 14 remained in *custodia legis* with the sheriff, until the attachment was uplifted or set aside. In the wake of the attachment and in the absence of an order of court either uplifting or setting same aside, the sheriff had the power to sell the property in the sale of the 16th of March 2012, in execution of the judgment granted to the 1st Respondent against the Applicant.

[49] It appears to me therefore in these circumstances, that the Applicant's contention that the sequence was not followed as there was no attachment is clearly misconceived. The mere fact that annexure S14.2 states that the service of the writ of attachment was effected on the Applicant at Erf 14, which it is not disputed is an uncoccupied empty plot, cannot defeat the fact of attachment. I also hold the view

that the issue of the alleged irregularity in the service of the writ of attachment on the Applicant is not a ground sufficient to set aside the sale. This issue to my mind has long been over taken by events. I say this because the Applicant admitted that on 31st May 2011, he saw the first advertisement of the sale of Erf 14 after the said attachment. That was when the Applicant ought to have raised the issue of the irregular service he is now raising. Rather than do this, he acquiesced to the process of execution. He approached the 1st Respondent and entered into negotiations with it to settle the debt. As a result of the said negotiations the Applicant paid E3,000-00 to 1st Respondent and agreed to pay other installments and the sale was cancelled. Applicant admits that on 22nd November 2011 he saw another advertisement for the sale of Erf 14. He still did not raise the issue of the irregularity of service of the writ of attachment but rather negotiated again.

[50] Finally, Applicant also saw the advertisement of the sale of 16th March 2012. He also did nothing about the alleged irregularities but again attempted negotiations to pay, which negotiations however yielded no results. It seems to me therefore that the Applicant was

all along aware of the impending sale of Erf 14. He has therefore suffered no prejudice by the alleged irregularities in the service of the writ of attachment of Erf 14, that is competent to defeat the sale.

[51] A similar situation presented in the case of **AH Noorbhai Investments (Pty) Ltd and Others v New Republic Bank Ltd (supra)** In that case Applicants applied to set aside a sale in execution by the judgment creditor of properties owned by the 1st Applicant. The Applicants relied *inter alia* upon the fact that the advertisement of the sale in execution in the Government Gazette had not taken place timeously, in that one day's notice less that the two weeks stipulated in the Rules had not been given. The 2nd Respondent filed a counter-application seeking condonation of the failure to comply. No evidence of any prejudice to any of the parties was placed before the court. The court held that where a judgment debtor sought to attack a sale in execution prior to delivery or transfer of his property sold at such a sale on the grounds of post-attachment formalities, he had to show at the very least a reasonable possibility that such non-compliance would have caused him

prejudice. The application was refused and the counter-application for condonation granted.

[52] Furthermore, in **Hoban v ABSA Bank Ltd 1997 CLR 403 (W) at 411-12, Tuchten AJ** stated as follows:-

‘‘ *Proceedings in execution are, it is true, inroads upon the rights and property of the individual. On the other hand, proceedings in execution are designed to enable a person who has sought and obtained judgment of the court to recover what is lawfully due to but unlawfully withheld from him by a judgment debtor. As* ***McCall AJ*** *pointed out in* ***Joosub v JL case SA (Pty) Ltd 1992 (2) SA 665 (N) at 672E****, ‘‘a non-compliance with a slight formality which does not go to the root of the matter’’ will not entitle a judgment debtor to have a sale in execution set aside. Balancing these consideration, it seems to me that where a judgment debtor seeks to attack a sale in execution prior to delivery or transfer of his property sold at such sale on the grounds of non-compliance with post-attachment formalities he must show at the very least a reasonable possibility that such non-compliance will cause him prejudice---’’*

[53] As I have stated before, the Applicant was aware of the sale of Erf 14, but did not oppose the sale, or the default judgment rather he entered into negotiations with the 1st Respondent to pay. This state of affairs brings the factual matrix of this case also within the purview of the case of **Standard Bank of South Africa Ltd v Prinsloo and Others (2000) I ALL SA 145 (c) page 155,** where the court stated as follows:-

‘‘ *In analysing this case and it's implication for the present case it is important to consider the respective factual matrices. In the present case first intervening Respondent was present at the sale. Indeed he said in his first affidavit that he had distributed a copy of the letter written on his behalf by his attorney to all the persons who attended the auction----. A warrant of execution had been sent by registered post to first Respondent, the sale had been advertised although it did not contain a short description of the property as required. A notice was affixed to the court notice board and at the place of sale. In* ***Joosub's case (supra)*** *the owner did not receive the notice of attachment nor any notices of attachment. He was unaware of the*

judgment, the writ, the purported attachment, the sale in execution and the transaction pursuant to such sales until after these events had taken place (at 667 H). In the present case it appears that first intervening Respondent (and it was alleged first Respondent) attended the sale, with full knowledge it did not oppose the taking of the default judgment, indeed raised certain issues with the sheriff and Deputy Sheriff prior to the sale having taken place. For these reasons the facts bear a greater resemblance to those which confronted the court in ***Conradie v Jones 1917 OPD 112*** *which was distinguished on the facts by* ***McCall AJ. In Conradie (supra)*** *the owner was actually present at the sale* ***Maasdorp CJ*** *said:*

By his presence there and his silence he allowed the Plaintiff to place himself in worse position and is therefore now stopped from questioning the validity of the sale to the Plaintiff'' (at 116)

Accordingly, the approach adopted in Gibson (supra) namely that minor irregularities are not sufficient to justify setting the sale aside is appropriate in this case. Thus an absence of knowledge of material facts in breach of the requirements relating to publicity would, for example, constitute the kind of justification that fuelled the conclusion in Joosub's case (supra)''.

[54] In casu, I respectfully align myself with the foregoing position of the court. I also echo, that the Applicant being fully aware of the sale and the alleged irregularities but however stood by and allowed the property to be sold to third parties who are *bonafide* purchasers in good faith, is estopped from raising these issues now.

[55] It appears to me from the totality of the foregoing that the balance of convenience is squarely against the grant of the interdicts sought see **Jacob Mashaba and Sixteen Others v The Municipal Council of Manzini and Six Others High Court Case No 3931/2009 at pages 19-20.**

[56] It is also beyond controversy that the Applicant has demonstrated no injury which he has suffered or which is reasonably apprehended that would warrant the grant of the interdicts sought. As **CB Prest SC, stated in the text The Law and Practice of Interdicts (Juta Law) (3rd Impression) at page 64.**

‘‘ *The injury which is apprehended is seen in terms of a wrong committed on the part of the person to be interdicted, and not in terms of irreparable damage to the Applicant if the conduct sought to be interdicted were to continue’’.*

See **Minister of Law and Order and Others v Nordien and Another 1987 (2) SA at 896 F-I.**

[57] In casu, there is no wrong that has been committed by the 1st Respondent. I have already held that it was entitled by law to execute against Erf 14 in the absence any movables of the Applicant found to satisfy the judgment debt.

[58] Let me for the sake of completeness state that I will not concern myself with the relief sought in paragraph 5 of the notice of motion to wit ‘‘*specifically instructing the Registrar of the High Court to produce the court file for the Case 2596/2006 for forensic perusal’’*. This prayer is clearly mischievous and is a dilatory stratagem to further frustrate the 1st Respondent’s victory. This is so when one considers that the relevant processes in Case 2596/2006 enure in these

proceedings via 1st Respondent's opposing papers. In any case, the Applicant is not challenging the judgment of the court in that case. There is therefore to my mind, no useful purpose to be served by such an order.

[59] In the light of the totality of the foregoing the Applicant's application lacks merits. It fails woefully and is dismissed in it's entirety with costs.

[60] Further, on these premises, since the Registrar of Deeds is not opposed to the 1st Respondent's counter-application, it succeeds. Order is hereby granted in terms of prayer 1 of the counter-application.

For the Applicant: A. Maphalala

For the Respondents: K. Motsa

DELIVERED IN OPEN COURT IN MBABANE ON THIS

----------DAY ---------- 2012

OTA J

JUDGE OF THE HIGH COURT