IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2110/2009

In the matter between:

STANDARD BANK SWAZILAND LIMITED		**Applicant**
And		
TERRENCE MANDLENKOSI MABILA	**1st**	**Respondent**
ZANELE PRECIOUS MABILA	**2nd**	**Respondent**
THE COMMISSIONER OF THE ROYAL SWAZILAND POLICE	**3rd**	**Respondent**
ATTORNEY GENERAL	**4th**	**Respondent**

Neutral citation: Standard Bank Swaziland Limited v Terrence Mandlenkosi Mabila and 3 Others (1898/2012) [2012] 04 SZHC (23rd January 2013)

Coram: M. Dlamini J.

Heard: 27th December 2012

Delivered: 23nd January 2013

counter-application for stay of prosecution – when to be granted; Ejectment – based on ownership – both parties claiming ownership - requirements thereof

Summary: The applicant filed for an ejectment order following purchase by applicant of immovable property through public auction as a result of a writ of execution against the 1st and 2nd respondent's company. 1st respondent subsequently filed a counter-application for a stay of applicant's application pending finalization on an action proceedings lodged for the determination of certain alleged irregularities during the sale in execution of the said property.

Genesis

[1] The property, Portion 45 (a portion of Portion 19) of Farm 11 situate in Manzini District, was under mortgage bond as a result of an overdraft facility extended to a company Prime Trucking and Logistic (Pty) Ltd (Prime) wherein 1st and 2nd respondent are directors. The directors of Prime were sureties under the loan agreement.

[2] Subsequently the parties in the over-draft facility negotiated a settlement as a result of Prime's breach of the terms of the agreement. The result was a deed of settlement which was later entered as an order of court by consent. Again, Prime failed to abide by the deed of settlement. The applicant cancelled the deed and following writ of execution, advertised the property for sale. Prime, together with 1st and 2nd respondents moved an application stopping the sale. The matter came before my sister **Ota J**. as she then was who dismissed their application. A fresh advertisement for the sale of the property was issued by applicant. Again, Prime, 1st and 2nd respondents

moved an application stopping the sale. The matter came before me and I dismissed the application for reasons stated in my judgment delivered on 15th May 2012, the day scheduled for the sale. Applicant proceeded with the sale where it (applicant) purchased the property for the sum of E3 600 000.00.

[3] Registration commenced and the property was finally transferred to applicant on 27th November 2012. Following title to the applicant, 1st and 2nd respondents, by correspondence directed to their attorney, were informed to vacate the property. It appears that this fell on deaf ears, thus the present application. The 1st and 2nd respondents reacted by filing a counter-application praying for stay of applicant's application pending action proceedings where the 1st respondent is challenging the title to applicant.

[4] By consent of the parties, the two applications were argued simultaneously.

Counter-application

[5] 1st respondent avers at page 9 of Volume 3:

"6.1 I have since instituted legal proceedings against, amongst others, the respondent, under Civil Case No. 2132/2012 in this Honourable Court, challenging the title of the respondent to the said property. In particular I am contesting respondent's title to the property in that it is invalid to that the manner in which it was obtained was unprocedural and unlawful as such there was no passing of title from myself to the respondent. The summons in respect of the said proceedings are already part of the record in respect of the main application as they are annexed to my answering affidavit and are

marked "Annexure TMM2" and to avoid prolixity I shall not annex it hereto but shall request that the court refers to it in as annexure to the answering affidavit."

Stay of Proceedings

[6] **Solomon J. A. in West Assur. Co. v Caldwell's Trustee 1918 AD 262** at 274 eloquently propounded on the requirements of an application similar in *casu, viz.* stay of application pending action.

"*Now it is needless to say that strong grounds must be shown to justify a Court of Justice in staying the hearing of an action. The courts of law are open to all, and it is only in very exceptional circumstances that the doors will be closed upon anyone who desires to prosecute an action."*

[7] Later in **Hudson v Hudson and Another 1927 A. D. 259** at 267 his **Lordship De Villiers J. A**. states:

"*That every court has the inherent power to prevent an abuse of the machinery provided for the purpose of expediting the business of the court admits of no doubt."*

[8] While **Nicholus J.** in **Fisheries Development Corporation v AWJ Investments 1979 (3) S.A. 1331** at **1338** puts the position more succinctly as follows:

"*It is well established that the court has an inherent right to prevent the abuse of its process in the form of frivolous or vexations litigation.*"

[9] The learned Judge *supra* continues to highlight as grounds for stay of proceedings at page 1339:

> *"…a ground for the grant of a stay that the institution or continued prosecution of the action by the plaintiff is vexatious or frivolous, or an abuse of the process of the court*."

[10] It would appear from the aforegoing case law that in application for stay of prosecution or proceedings the court must interrogate the application with a view to determining whether such application is not frivolous, vexatious or does not amount to an abuse of the court.

[11] In *casu*, the 1st respondent (as 2nd respondent did not depose to any affidavit herein although Mr. Nkomonde indicated that he appeared on behalf of 1st and 2nd respondents) insists that the court should stay the present proceedings pending the determination of Case No. 2132/12. In support hereof they depose:

> *"The reason why I contend for, and humbly pray that the court grants, the stay of the main application is that should the court proceed to hear the main application, any decision the court would reach in respect thereto will in essence be pre-empting the court's decision in the action under Civil Case 2132/2013. This will create an undesirable and embarrassing situation where the court may find itself making contradictory and different finding or decisions. As*

such it is prudent to first determine the title to the property then deal with the issue of ejectment."

[12] It would be prudent that I recount the chronological events of this application:

[13] On the 4th December 2012, the applicant served the respondents with the main application (ejectment) and set the matter down for 7th December 2012 under a certificate of urgency. When the matter was called, 1st and 2nd respondents' attorneys requested for a postponement and by consent of both parties, the matter was set down for hearing on 19th December 2012 with 1st and 2nd respondents having to file answering affidavits on 14th December 2012, by noon and applicant, a reply on 18th December 2012 not later than noon.

[14] A consent order was entered in respect of the filling times. All parties filed accordingly.

[15] However, on the 13th December 2012, the 1st and 2nd respondents' attorney instituted and served applicant with combined summons under case No.2132/12 and the 1st respondent appears as the only plaintiff. This is the action proceedings that 1st respondent refers to when praying for stay of applicant's application.

[16] I have already highlighted authorities which sets the barometer for application for stay *viz.* that the application ought to be frivolous, vexatious or reflective of an abuse of the court.

[17] **Nicolas J.** *op. cit.* at page 1339 defined vexatious as:

"*frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant."*

[18] His Lordship further states at the same page:

"*Vexatious proceedings would also no doubt include proceedings which, although property instituted, are continued with the sole purpose of causing annoyance to the defendant.*"

[19] His Lordship at the same page at **F** states in relation to abuse:

"*abuse' connotes a mis-use, an improper use, a use mala fide, a use for an alterior motive."*

[20] It would appear from 1st respondent's averment at his paragraph 8 of the founding affidavit which reads:

"*This will create an undesirable and embarrassing situation where the court may find itself making contradictory and different finding or decision. As such it is prudent to first determine the title to the property then deal with the issue of ejectment.*"

that 1st respondent is pleading a special plea of *lis pendes*:

[21] Explaining the rationale behind this special plea, **Herbstein and Van Winsen; The Civil Practice of the High Court of South Africa, 5th Ed**. stated at page 606:

"*The court intervenes to stay one or other of the proceedings because it is prima facie vexatious to bring two actions in respect of the same subject matter.*"

[22] The learned author proceed to draw from **Nestle (S.A.) (Pty) Ltd v Mars Corporated [2012] 4 ALL S.A. 315** at **319** where it was stated:

"*The defence of lis alibi pendes shares features in common with the defence of res judicata because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendes). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (res judicata). The same suit between the same parties, should be brought only once and finally. There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal….. In the absence of any of those elements there is no potential for a duplication of action.*"

[23] Following the *ratio decidendi* in **Nestle** *supra*, my duty is to enquire whether the essentials of a defence of *lis alibi pendens* has been established by the 1st respondent thereby rendering applicant's main application vexatious.

[24] I must, however hasten to point out that the 1st respondent's application is attended by peculiar circumstances in that there were no proceedings pending in court at the time applicant filed its main application. The combined summons were filed after the date of postponement at the instance

of 1st and 2nd respondents who pleaded with the court to be given opportunity to file their answering affidavit. The 1st respondent on the 13th December 2012 lodged the action proceedings.

[25] **Herbstein and Van Winsen** *supra* at page 605 head-notes:

> *"A suit is "pending" in another court when summons has been issued in that court. It is not essential that litis contestatio should have occurred."*

[26] Considering the comment by **Herbstein and Van Winsen** *supra*, the plea of *lis alibi pendens* by 1st respondent must fail for reason that there was no action when applicant filed its application before court *viz.* on 4th December 2012 as the summons by 1st respondent were lodged on 13th December 2012.

[27] In this regard it cannot be said that applicant's application is vexatious, frivolous or an abuse of court.

[28] What confounds 1st respondent's special plea further is the failure by 1st respondent to inform court as to the reasons for his failure to file the action proceedings prior to the 4th November 2012. This is because it is not disputed that 1st and 2nd respondents were told to vacate the house, on 27th November 2012. Despite a lapse of seven days, respondent who now claims to be challenging title decided to wait until the 13th December 2012 to lodge his action. Even on the date of hearing, 7th December 2012, 1st respondent did not inform the court of his intended special plea but stood up to apply for time to file his answering affidavit.

[29] 1st respondent has informed the court that it is in the action proceedings where the issue to the title of the property will be ventilated and determined. However, not an iota of evidence is advanced on behalf of 1st respondent as to why such question of the title cannot be well ventilated on affidavit under the main application.

[30] I compare the case in *casu* with that of **Fisheries** *op. cit.* where his **Lordship Nicholus J.** was faced with a similar application for stay of proceedings on the basis that the plaintiff had failed to co-join the liquidator as defendant. The court dismissed defendant's special plea on the basis that defendant could have joined the liquidator and his failure to do so cannot compel the court to view plaintiff's action as frivolous, vexatious or abuse of court.

[31] Similarly 1st respondent's failure to challenge the title at the opportune time, that is, when given notice to vacate or being aware of the irregularities which tainted applicant's title, cannot turn applicant's application to be vexatious, frivolous or an abuse of the court's process.

[32] In the totality of the above consideration, 1st respondent's special plea stands to fail.

Applicant's main application:

[33] It becomes necessary therefore that I now turn to consider applicant's application.

[34] The issue before me is whether applicant's title to Portion 45 (a portion of Portion 19) of Farm No.11 situate in the District of Manzini, Swaziland is good in law.

[35] The following are common cause:

- A writ of attachment was issued and served upon the respondent on 26th April, 2011. The deputy sheriff who served this process was one Menzi Dlamini.

- A notice of sale was posted *inter alia* in the daily newspaper circulating in Swaziland for the sale of the property to take place although at various times which could not realize due to negotiations and litigation, but eventually on 18th May, 2012.

- In the intervening period 1st respondent and Prime challenged the sale of this property in the same application he contested sale of his motor vehicles. The application came under certificate of urgency and 1st respondent and Prime obtained a temporal order. On the return date however, the rule in respect of the immovable property was discharged.

- A fresh notice of sale scheduled for 18th May 2012 was served.

- The deputy Sheriff was Menzi Dlamini.

- The 1st respondent and Prime challenged the sale of this property under certificate of urgency.

- Their application was dismissed on the 18th May, 2012.

- The deputy Sheriff proceeded with the sale on the same day wherein the highest bidder was applicant.

- The 1st respondent's brother was present on the sale of 18th May, 2012.

- On the 27th November 2012 applicant having acquired transfer of the property into its name, through its attorney, communicated to 1st and 2nd respondents' lawyer about the *status quo* and requested that 1st and 2nd respondents who were occupants of the said property should vacate.

- 1st and 2nd respondents failed to vacate.

- On 4th December 2012 around 1530 hours applicant served 1st and 2nd respondents with the present application for orders of ejectment.

- 1st respondent has deposed and filed an answering affidavit. Although he raised misjoinder and foreseeable material dispute of facts, such were not pursued during submissions and I do not wish to deal with them.

[36] Addressing the merits of applicant's application, 1st respondent avers in his answering affidavit at pages 121, 121(b) and 122:

> *"7. It is apparent ex facie annex "TMM2" hereto that the applicant's title to the property is being challenged on various grounds including that it is invalid in that it was obtained through an invalid process rendering the passing of title to applicant void ab initio.*

9. The applicant is therefore not entitled to persuade this court for an order for my family's ejection from the property on the basis of an invalid title or one that is being impeached ending determination of the validity of its title to the property under Civil Case Number 2132/2012.

14.

Ad paragraph 6.1

Save to state, as alleged in the summons (annex TMM2 hereto) the Notice of Sale was invalid as it violated the provisions of Rule 46.

16.

Ad paragraph 6.3

Even the Notice of Sale referred to herein was invalid a it still violated the provisions of Rule 46 in that it stipulated a reserve price.

18.

Ad paragraph 6.5

18.1 I deny that a number of people bided for the property at the public auction sale.

18.2 I had sent my brother Mlungisi Mabila to observe the proceedings and he advised me as follows:

18.2.1 That there were only four (4) people that had attended the auction sale; One Gavin Munroe, Sibusiso Tfwala, and two officials from the applicant, one of who ended up being the purchaser;

18.2.2 That when the auction opened the auctioneer shouted "we are now starting, who buys on reserve?" The bank official raised her hand first before the other could and the auctioneer shouted "sold";

18.2.3 The other two members of the public that attended protested but the auctioneer told them the sale is concluded and thereafter did not entertain their protest and left with the bank officials. I refer to the confirmatory affidavit of my brother annexed hereto.

18.2.4 As such the sale was not conducted in accordance with the provisions of Rule 46 in that there was no biding but the auctioneer preferred the applicant's officer as such the property was not sold to the highest bidder as required by law.

18.2.5 At any case this issue is subject matter of determination by the court under the legal proceedings instituted in terms of "TMM2" hereto.

19.

Ad paragraph 7 and 7.1

19.1 The payment to the Deputy Sheriffs is not disputed.

19.2 However, it is averred that this payment is evidence of the flouting of Rule 46 by both the applicant and the Deputy Sheriffs and this I have complained of in "TMM2".

19.3 In terms of the Conditions of Sale annexed as "SBSL 5" to the founding affidavit, the Auctioneer's charges were to be paid on the day of the sale. In this case the Purchaser (the applicant) paid the charges virtually 6 months after. Furthermore, the payment was made to the wrong person; it was made to Menzi Dlamini yet the Auctioneer was Sandile Dlamini. This is further evidence of the blatant flouting of the procedure of Rule 46.

20.

Ad paragraph 7.2

20.1 The payment of the purchase price into the recoveries account of the applicant in payment of my company's debt is not disputed.

20.2 However, I aver that this two was irregular and in violation of rule 46. Payment of the purchase price was not supposed to be remitted to the Judgment Creditor until the provision of Rule 46 (15) had been complained with when this payment was made.

22.

Ad paragraph 8

I humbly state that the reasons why I did not comply with the demand to vacate was because I had already found out that the applicant's title to property was invalid. Just when I had instructed my current attorneys to challenge this, I received this application for ejectment."

[37] As the combined summons is part of these proceedings, I now deal with the particulars of claim. The 1st respondent states as follows in the particulars of claim:

"10. On the 30th May 2011 the Writ of Attachment was purportedly executed upon the plaintiff by the 2nd defendant. The said execution of the Writ was void ab initio and therefore of no force or effect in that:

10.1 it was purportedly executed by the 2nd defendant who was not a lawfully appointed Deputy Sheriff of this honourable Court and therefore lacked the authority to execute the said Writ of Attachment-Immovable Property; or alternatively

10.2 the Writ of Attachment was purportedly executed by the 2nd defendant upon the plaintiff in Manzini who sought to attach the plaintiff's immovable property situate in Manzini whilst the 2nd defendant was not a lawfully authorized Deputy Sheriff for the district of Manzini and therefore could not validly attach immovable property within the district of Manzini.

10.3 The lack of authority of the 2nd defendant as mentioned in both 10.1 and 10.2 above render the purported attachment invalid and of no force or effect.

11. On or about the 31st May 2011 the 3rd defendant executed and attached the plaintiff's immovable property by allegedly serving the Writ of Attachment upon the Registrar of Deeds (4th defendant herein). The said execution and purported attachment is invalid for one or all of the following reasons:

11.1 The 2nd defendant was not a lawfully appointed Deputy Sheriff of this honourable court in that his appointment had been lawfully revoked and therefore lacked the authority to execute the said Writ of Attachment; or alternatively.

11.2 The 2nd defendant failed and or neglected to comply with the provisions of Rule 46 (3) in that he did not serve the said Writ of Attachment upon the Registrar of Deeds and as such there was no lawful attachment of the said property hence any subsequent sale in execution was invalid.

*12. **1st defendant's failure to comply with Rule 46***

12.1 Purporting to act in terms of rule 46 (8) (b) the 1st defendant prepared various defective notices of sale in

respect of the said immovable property. The said notices were all defective and therefore invalid in that they all stipulated a "reserved price" much against the provisions of Rule 46 (13). The said notices are attached hereto and marked "TM2" to "TM5".

12.2 Further, even if the notices of sale were not defective, the 1st defendant failed to further comply with the provisions of Rule 46 (8) (c) in that it omitted to advertise the said notices of sale as required by the said provision.

12.3 Furthermore, the 1st defendant's issue of the numerous notices of sale was in itself wrongful in that it further violated the provisions of Rule 46 (8) (c) and had the effect of generally misleading the public of the actual date of sale in execution. This further prejudiced the plaintiff during the auction as members of the public did not attend the auction.

13. ***2nd defendant's Public Auction Invalid***

13.1 On or about 18th May 2012 the 2nd defendant purported to conduct a sale in execution by public auction of the plaintiff's immovable property. The said public auction was invalid and void ab initio in that:

13.1.1 The 2nd defendant was not a lawfully appointed Deputy Sheriff of this

honourable court and therefore was not authorized to conduct a sale in execution by public auction of the plaintiff's immovable property.

Alternatively

13.1.2 Even if the 2nd defendant was legally authorized to conduct the sale in execution by public auction, he failed and or omitted to conduct the auction in accordance with the provisions of Rule 46 (13) in that he did not conduct any bidding and sold the property to the 1st defendant's representative who raised her hand first without asking for other bids.

14. The 1st defendant was at all times aware of the violation of rule 46 complained of hereto, including the violation of Rule 46 (8) and 46 (13) committed by 1st defendant itself as alleged and therefore was not a bona fide purchaser of the property during the purported sale in execution regard being to the following:

14.1 The 1st defendant itself committed a fundamental violation of Rule 46 (8) (b) and (c); and Rule 46 (13).

14.2 The 1st defendant was alerted of the defective title or authority of the 2nd and 3rd defendants in

acting as Deputy Sheriff's in legal proceedings instituted against the 1st to 3rd defendants on or about 9th November 2011 in this honourable court under Civil Case No. 2361/2011. However, the 1st defendant proceeded to allow the 2nd defendant to conduct the sale in execution by public auction of the plaintiff's immovable property whereat 1st defendant purportedly bought the property on the 18th May 2012."

[38] I will deal with each point raised by 1st respondent *ad seriatim*.

[39] In summary, the respondents raises the following:

- The writ of attachment as served by 2nd respondent i.e. Sandile Dlamini on 30th May 2011 was null and void *ab initio* by reason that Sandile Dlamini was not deputy Sheriff for Manzini region, where the property is situate.

- The writ of attachment was not served on the Registrar of Deeds rendering the sale on execution invalid.

- The Notices of Sale stipulated reserve prices and this was contrary to Rule 46 (13).
- The Notices of Sale were advertised for lesser days than 14 days as required by Rule 46 (8) (c).

- There were no bids in the sale of 18th May, 2012 and the property was sold to applicant without inviting any further members of the public to bid.

[40] The respondents contend that for the above reasons, applicant does not hold any title to the property.

[41] The general position of our law is as laid down in **Graham v Ridley 1931 T.P.D. 476 at 479** where their Lordships, citing **Grotius** state:

> *"One of the rights arising out of ownership is the right to possession. Prima facie, therefore proof that the appellant is the owner and that respondent is in possession, entitles the appellant to an order giving him possession, i.e. to an order for ejectment".*

[42] In *casu* however, both parties i.e. applicant and 1st respondent are claiming ownership of the property although 1st and 2nd respondents are currently also in possession. My duty is therefore to determine who is in ownership of the property.

[43] **Joosup v J. I. Case S.A. (Pty) Ltd 1992 (2) S.A. 665 N** at **679 C McCall A.J.** (as he then was) wisely informs:

> "*If a purported sale in execution by the Deputy Sheriff … is null and void for lack of compliance with the statutory formalities, it confers no title upon those who purport to purchase the property*".

[44] At page 672, quoting from **Roman Dutch** authors, the leaned judge explains:

"…… that a sale will not be void if there has only been non-compliance with a slight formality which does not go to the root of the matter".

[45] The distinguished judge then cites direct **Groenewegen** as follows on the litmus test for the principle:

"*But if, indeed property has been sold by order of court but not with observance of all the formalities and arrangements of sales in execution, an opportunity to appeal is granted to a <u>prejudiced</u> party, and we follow this rule."* (underlined my emphasis).

[46] In brief, **Joosup** *supra* is authority that for a sale in execution to be set aside, the irregularities should go to the "*root of the matter*" and that the person alleging irregularities should show prejudice on his side.

[47] I consider **Lemuel Ndumiso Kota v Standard Bank Swaziland and 5 others (1532/10) 2012 [SZHC] 244** by **Ota J**. (as she then was) as *locus classicus* for the issues in *casu*. I therefore intend to draw an analogy from this case (**Lemuel** *supra*)

[48] In **Lemuel**, as in *casu*, the applicant complained of irregularities both in the writ of attachment and execution. The learned judge (**Ota J.)** in a very well researched and reasoned judgment found that the applicant had been served with the notices of sale, had not challenged the judgment leading to the notices of sale, and eloquently concludes at page 24 of the judgment:

"*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 time it was attached and advertised for the sale in 2011. ….Even if the applicant was not served with the writ of attachment as he alleges, he was, however, aware of the sale."

[49] At page 18, the distinguished judge observes:

"*He stood by and allowed the sale to take place notwithstanding being aware of the irregularities he now propounds*."

[50] *Fortiori*, in *casu*, the respondents by their own showing were served with the writ of attachment and notices of sale. 1st respondent's case is somehow aggravated in that he chose to come to court more than once, for orders stopping the sale but in all instances did not challenge the authority and actions of the deputy sheriff. They, like **Lemuel** *supra*, stood by and allowed the sale to take place in the light of the purported irregularities. Similarly in **Conradie v Jones 1917 O.P.D. 112** where plaintiff was present at the sale and later on an action to have the sale set aside the court held:

"*By his presence there and his silence, he allowed the plaintiff to place himself in a worse position, and is therefore now stopped from questioning the validity of the sale to the plaintiff*."

[51] **Maasdorp** as cited by **McCall A.J.** in **Joosup** *op.cit* at page 676 could not be more precise on the same point as he states:

"*Though it is true that no one loses his property without his own co-operation, still when a person who is not absent from the country*

neglects to object when he could have done so, it is clearly through his own action to some extent that he loses his right, to wit, his neglect, carelessness and negligence. Because by deed or co-operation is understood not only an express wish, but also a precedent neglect, which is regarded in law as containing within itself a tacit consent."

[52] In the present case, the writ of attachment complained about is one for 30th May 2011 and a sale eventually took place on 18th May 2012 following numerous applications by respondent to frustrate the sale. In all the applications, respondent did not challenge the authority of the deputy sheriff.

[53] 1st respondent informs the court that he was represented by his brother at the sale on 18th May 2012. Even then, he allowed the sale to take place and allowed transfer of the property to the applicant which took place almost after six months from the date of the sale. In fact, respondents did not come to court to challenge the deputy sheriff until served with an application for ejectment on 4th December, 2012.

[54] **De Villiers C. J.** in **Langa and Others v Lieschuing and Others (1880) Foord 55** (see **Joosup** at **674**) on the same question wrote:

"*In modern custom property sold by public auction under Judge's order without objection not vindicable – certainly if movable property has been sold without knowledge of the owner at public auction by Judge's order on the petition of creditors, it can hardly be that the customs of today would suffer the vindication of property so sold. Not even immovables, when sold by Judge's order and legally*

delivered after the sale has been prefaced by formal notices, can be vindicated if the owner does not promptly intervene and oppose." (words underlined my emphasis).

[55] I have already demonstrated that the 1st respondent failed to act promptly by challenging the authority of the Deputy Sheriff.

[56] A *ratio decidendi* is well articulated in the *locus classicus* (**Lemuel** case op.*cit*) at page 28 where the learned Judge propounds with reference to **Saim and Another v First Bank Limited and Others 2012 (4) S.A. page 38** at paragraph **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 its sale in the execution an aggrieved debtor will have to bring an application for rescission. …The relief sought by the applicants, however, fails to recognize the fact that 2nd and 3rd respondents bought the property from the Sheriff at a sale in execution. It did not buy it from the 1st respondent. When the Sheriff concluded the agreement with the 2nd and 3rd respondents he did not act as an agent of the first respondent but acted as "executive of the law". This is so because 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 & Others 2005 (6) S.A.***

96 (CC) [2005] 3 All S.A. 178 *in paragraph* ***66.****"*(underlined words, my emphasis)

[57] It is on the basis of the above that the learned judge wisely hold at page 25:

"*judicial accord that a sale in execution will not be set aside where the causa of the warrant still remains in existence*."

[58] Similarly in *casu*, the judgment warranting the attachment and sale has not been set aside nor has the debt been discharged. In fact, the 1st respondent did attempt to have it set aside on two various occasions but failed. For this reason, respondent's submission must fail.

[59] A further principle as outlined in **Lemuel**'s case is that the respondent should show prejudice. At page 36 her Ladyship juxtaposing the case with **A. H. Noorbhai Investment (Pty) Ltd and Others v New Republic Bank Ltd and Others 1998 (2) S.A. 575** at **581**, her Ladyship reveals:

"*The court held that where a judgment debtor sought to attach 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*."

[60] In the present case, respondents have not alleged any prejudice nor was any advanced during submission despite an invitation to do so even by supplementary affidavit.

[61] So cardinal is this requirement in setting aside sale in execution of judgment as pointed out by **Galgut J.** in **Gibson N. O. v Iscar Housing Utility Co. Ltd and Others 1963 (3) S.A. 783 T**. at **786** that:

> "*If one has regards in the importance attached to the system of land registration in our law and the faith which the public places therein, the inconveniences and improprieties that would be caused by holding that a transfer of land following upon a sale in execution effected not ….would be much greater than the consequences of allowing the transaction to stand. Mortgage bonds and subsequent transfer might fail to be set aside, even where a property has changed hands several times were one to hold otherwise."*

[62] **Galgut J.** in **Gibson N. O.** *supra* propounds further that there must be allegation of bad faith and knowledge of the defect. In *casu*, there are no such allegations.

[63] It was submitted on behalf of 1st respondent by Mr. Nkomonde that the cases cited herein are distinguishable from the present case in that in all the above cases, the plaintiff was dealing with third parties as purchasers unlike in *casu* where the purchaser was the judgment creditor.

[64] I do accept that judgment creditors may participate in public auction as appears in **Graham v Redley 1931 T. P. D. 476** and many other judgments. However, when the judgment creditor takes part as a purchaser, he does so not as a judgment creditor but as a member of the public in accordance with the published notice of sale, which is an invitation to the public. In that way, any person challenging title to such a person on the basis of non-compliance with formalities is liable to satisfy the requirements thereof.

[65] I now turn to make a factual findings on the averments made by respondents on the title of the deputy sheriff and his irregular action.

[66] The challenge that Sandile Dlamini is not a deputy sheriff was abandoned except that he is not a deputy sheriff for Manzini region.

[67] It turned out during submission that this challenge was in the attached combined summons and not in the answering affidavit when it was ferociously raised during submission, Counsel for respondent applied to file a supplementary affidavit in order to show that Sandile Dlamini was deputy sheriff for both Manzini and Hhohho region. This application was not opposed. The court, interested in justice and following the *dictum* in **Nokuthula N. Dlamini v Goodwill Tsela (11/2012)[2012]28 SZSC** that the court should avoid over reliance on technicalities at the expense of justice, allowed for a supplementary affidavit and further invited respondent to file any if so inclined.

[68] Mr. K. Motsa subsequently filed one reflecting that Sandile Dlamini is a deputy sheriff for Manzini region having been appointed as such by the then Sheriff of Swaziland Ms. T. Maziya.

[69] The second point raised by respondents is that the Registrar of Deeds was not served with the writ.

[70] At page 149 of the book of pleadings Vol. 1 respondent attached a return of service by deputy sheriff Menzi Dlamini who categorically states"

> "*On the 31st day of May 2011 at 1245 hours at Mbabane in the district of Hhohho at the registered office for Registrar of Deeds, I properly served the Writ of Attachment – Immovable property upon*

the Registrar of Deeds by delivering a copy to Mr. Juba Dlamini who is the Registrar of Deeds at the same time exhausting the original and exploring the contents…..”

[71] To allege that the Registrar of Deeds was not served is therefore without basis on respondent’s own demonstration.

[72] The third bone of contention by respondent is that stating reserve price on the notice of sale is contrary to Rule 46 (13).

Rule 46 (13) reads:

“*Subject to the provisions of sub-rule (6), the sale shall be without reserve and upon the conditions stipulated under sub-rule (7), and the property shall be sold to the highest bidder*.

Sub-rule (6) reads:

“*No immovable property which is subject to any claim preferent to that of the execution creditor shall be sold in execution unless:*

(a) the execution creditor has caused notice, in writing, of the intended sale to be served by registered post upon the preferent creditor, if his address is known and, if the property is rateable, upon the local authority concerned calling upon them to stipulate within ten days of a date to be stated a reasonable reserve price or to agree in writing to a sale without reserve; and has provided reserve; and has provided proof to the sheriff that the preferent creditor has so stipulated or agreed; or

(b) the sheriff is satisfied that it is impossible to notify any preferent creditor, in terms of this rule, of the proposed sale, or such creditor, having been notified, has failed or neglected to stipulate a reserved price to agree in writing to a sale without reserve as provided for in paragraph (a) within the time stated in such notice."

[73] 1st respondent has not alleged that the property is subject to sub-rule 6 nor has he tendered evidence on affidavit showing that the property is subject to sub-rule (6).

[74] There is therefore no basis for such submission and it stands to fail.

[75] The 1st respondent submits further that the notice of sale and gazette fail to comply with the rules in that the advertisement ran for less than 14 days. In their submission, Counsel for respondent calculated using court days.

Rule 46 (8)(c) reads:

"*The sheriff shall indicate a suitable newspaper circulating in the district in which the property is situated and require the execution creditor to publish the said notice once in the said newspaper and in the Gazette not later fourteen days before the date appointed for the sale and to furnish him not later than the day prior to the date of the sale, with one copy of the said newspaper and with the number of the Gazette in which the notice appeared.*

[76] As to the question of whether days refers to court days or ordinary calendar days, the answer lies under Rule 2, interpretation which stipulates:

> "*Court day means any day other than a Saturday, Sunday or Public holiday, and only court days shall be included in the computation of any time expressed in days prescribed by these rules or fixed by any order of court.*"

[77] Faced with a similar question, the court in **Rontgen v Reichenberg 1984 (2) S.A. 181 W Coetzee J**. stated at **184** quoting from **First Consolidated Leasing Corporation Ltd v Theron and Others 1974 (4) S.A. 244** at **246 – 247**:

> *"Now it is true that in Rule 1 which defines 'Court days' it is said that only Court days shall be included in the compilation of a number of days for which the Rules make provision, but that definition is subject to the context in which the word 'days' is used. I think in the context of Rule 46(7)(d) calendar days were intended and not Court days. Rule 46 has nothing to do with procedural steps connected with a law-suit, and the consideration which prompted the draftsman of the Rules to exclude Saturdays, Sundays and Public Holidays in computing the number of days allowed for*
>
> *procedural steps in litigation, could not have applied to the steps required to be taken when property is sold in execution."*

[78] Although **Coetzee J.** differed in the interpretation, I see no basis to depart from **Eloff J.**'s interpretation that days refers to calendar days which include

Sundays, Saturdays and holidays except where the legislature specifically promulgates "*court days*" as seen in other part of the Rules of this Act.

[79] Applying the above interpretation, the notices of sale in the newspaper and gazette were within the ambit of the legislature and therefore cannot be faultered.

[80] In the totality of the aforegoing, applicant's application must succeed.

[81] I enter the following orders in favour of the applicant:

1) 1st and 2nd respondents are hereby ordered to vacate Portion 45(a portion of Portion 19) of Farm No. 11 situate in Manzini District forthwith;

2) The Deputy Sheriff of Manzini District is hereby authorized to effect order 1) hereof, failing which the Swaziland Royal Police;

3) 1st respondent is hereby ordered to pay cost of this application and the counter-application.

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M. DLAMINI

JUDGE

For Applicant: **Mr. K. Motsa**

For 1st and 2nd Respondents: **Mr. M. Nkomondze**