



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

REPORTABLE

Case No. 429/2014

In the matter between

GILBERT MAJALIMANE ZULU

Applicant

and

THE NHLANGANO TOWN COUNCIL

1st Respondent

THE MESSENGER OF COURT SHISELWENI N.O.

2nd Respondent

NCAMSILE CAROLINE LUKHELE

3rd Respondent

NEDBANK LIMITED SWAZILAND

4th Respondent

THE REGISTRAR OF DEEDS

5th Respondent

THE REGISTRAR OF THE HIGH COURT

6th Respondent

THE CLERK OF COURT FOR NHLANGANO

7th Respondent

THE ATTORNEY GENERAL

8th Respondent

Neutral citation: *Gilbert Majalimane Zulu v Nhlanguano Town Council & Others* (429/2014) [2014] SZHC 166 (21 July 2014)

Coram: **MAMBA J**

Heard: **20 June, 2014**

Delivered: **21 July, 2014**

[1] Civil Law – law of property – registration of immovable property in Deeds Register does not per se transfer ownership thereof. Where the reason or cause for the registration is illegal or for whatever reason invalid such registration does not pass ownership and is reversible.

[2] Civil Law and Procedure – municipality setting in motion the collection of rates owing in respect of immovable properties within its jurisdiction and completely failing to follow the Rating Act, and in consequence property of the applicant sold by private treaty and without a Court Order. Such sale declared invalid and transfer of the property into the name of the purchaser set aside.

[3] Practice and Procedure – costs – in every case an award for costs at whatever scale is a matter for a judicial discretion of the Court which has to be based on fairness and equity. The Court is always reluctant or loath to make an award for costs on a punitive scale, but where on a consideration of all the circumstances of the case, a party has conducted or misconducted himself or herself in a manner that is deserving of the Court's censure in relation to the litigation, such costs may be awarded by the Court. The absence of a special or specific prayer in this regard is not fatal to such an order.

[1] At all times material hereto, the applicant was the registered owner of certain fixed or immovable property described as Lot 540 situate at Nhlangano Township Extension Number 5 in the District of Shiselweni.

Measuring : 1609 square metres.

He says the property was valued at about E200, 000-00.

[2] On or about April, 2013, he discovered that the said property had, without his knowledge and consent, been transferred to and registered in the name of one Ncamsile Caroline Lukhele, the third respondent herein.

- [3] On further search, he discovered that the property had been allegedly bought by the third respondent at a public auction sale on 19 October 2011 following a warrant of execution that had been issued by the 7th respondent in his capacity as the clerk of the Nhlangano Magistrate's Court. The said warrant of execution was in favour of the Nhlangano Town Council, which is the first respondent herein and was in respect of rates owing by him in respect of the property in the sum of E6227.50. He discovered further that the property had been purchased by the third respondent for E70,000-00 and had been subsequently bonded in favour of NEDBANK LIMITED Swaziland, the 4th respondent herein. According to the information sourced from the Deeds Registry, the judgment against him had been granted under case number 498/2011 on 19 October 2011, the same day on which the property was sold to the third respondent. The warrant of attachment, however, stated that judgment had been granted against him on 20 September 2010.
- [4] The applicant states that he had not been notified by the first respondent that there were rates owing in respect of the property or that the first respondent was taking the matter to Court to enforce the payment of such rates.

[5] The applicant has submitted that the first respondent failed to follow the provisions of the Rating Act in trying to enforce the payment of rates by him in respect of the property in question. He mentions amongst such failures:

(a) A notice in a local Newspaper and Swaziland Gazette, detailing the amount due and the deadline on which such amount ought to be paid;

(b) A publication of the Notice in (a) at the first respondent's offices. This is a mandatory requirement in terms of section 27 of the said Act. He also submits that the first respondent failed to follow the provisions of sections 30 and 32 of the said Act which all provide and obliges the first respondent to give notice to a property owner of all legal process that the municipality is embarking on in the process of collecting property rates. One notes that these notices bar those in section 32, must be given before legal action is taken by the municipality. Section 32 relates to the actual legal proceedings.

[6] That there was no compliance with the relevant provisions of the Rating Act in this case has not been denied by any of the parties herein. For purposes of these proceedings, these factual allegations by the applicant are not in issue. They are deemed to be true. The applicant avers that

‘22.2 Notwithstanding the peremptory required procedures, necessary court applications, official consents from the Minister to sell, publications in the print media and Government Gazettes (of all process) and timelines associated therewith and the publication of the conditions of sale, the first respondent simply sold the property, as per the information on the Title Deed, on exactly the same day it attained judgment against me or and in the alternative, exactly a month after the writ of attachment over the immovable property was issued under the hand of the seventh respondent. This was fatally irregular to the entire process.’

[7] Based on the above allegations, which have not been disputed, the applicant has applied for an order:

‘1. Setting aside of the sale by Public Auction – conducted in the 3rd respondents favour on the 19th October 2011 – of the Applicants fixed property described as:

Certain:	Lot	540	Nhlangano	Township
	Extension	Number	5	Shiselweni
	District. Swaziland			

Measuring: 1609 (one six zero nine) Square meters.

2. Setting aside the Transfer (and subsequent Deed thereof – Number 461/2012), of the fixed property described in (1) above, to the 3rd Respondent;
3. Setting aside the Registration of a bond over the property in favour of the 3rd Respondent Registered on the 4th June 2012 under Mortgage Number 453/13;
4. Thereafter, and immediately upon occurrence and / or compliance with prayers 1 to 3 above, reverting title, and at the 1st Respondent's cost, of the said fixed property described in prayer (1) above into the Applicants name;
5. That the 6th Respondent be authorized and empowered to sign all deeds and documentation necessary to give effect to the Orders of the Above Honourable Court in relation hereto.
6. That the 3rd 4th and 5th respondents be restrained from effecting transfer, from the name of the 2nd respondent, of the immovable property described in clause 1 (a) above and further be

restrained from conducting any transaction regarding the said property pending finalization of this application.

7. Costs of Suit only against the 1st Respondent and at the scale of Attorney and Own client;
8. Costs against the Rest of the Respondents, jointly and severally the one paying the other to be absolved, only in the event of unsuccessful opposition hereto.'

[8] On the issue of costs, the applicant has submitted that after discovering the above anomalies in the process leading to the sale of his property, he alerted the first Respondent about these through letters addressed to and received by first respondent's attorneys herein. He sought to have the matter resolved amicably and possibly out of court as this would have been in the best interests of all parties concerned. The first of these letters, of which there were seven in total, is dated 22 April 2013. The last was on 26 February this year, about ten months later. None of these letters solicited any response from the first respondent or its attorneys of record.

[9] It has to be noted that the pre-trial notices and processes that the applicant complains of, had to be made, executed or performed by the first respondent.

[10] This application was filed and served on the respondents herein or about 24 March 2014, about a month after the last letter that was sent by the applicant to the first respondent's attorneys.

[11] It is not insignificant to note or observe that the incumbent clerk of court at the Nhlangano Magistrate's Court has filed an affidavit wherein *inter alia* he states that;

‘3. I wish to confirm that, despite extremely diligent search of Nhlangano Magistrates Court File Number 498/11, I am unable to locate the same. I also wish to point out the following:

(a) The plaintiffs claim a quo was registered on the 14th December 2011 in the Courts Registry. I note however that the Court Processes exhibited to me, the writs and certificates, bear the 20th September 2011 which obviously precedes the date of Registration. This is quite an irregular anomaly on its own.

(b) The file's case number further does not appear in any of relevant civil Order Books amongst those in which any orders were granted at the periods relevant thereto to date.

4. It is my personal assessment and conclusion in the circumstances therefore that there was no Order entered in respect of the said file. The file is actually one synonymous with other matters which are simply registered and are not taken any further.

5. I do verily believe that the process I earlier signed in relation thereto was purely in human error and trust of the Officers of court who brought the documents to me on the 1st respondents behalf, presumably in bulk and I did not meticulously scrutinize the authenticity and veracity of their contents. This was purely in human error on my part.'

[12] The third respondent opposes this application and argues that she bought the property in question through a lawful public auction and that she was a *bona fide* purchaser thereof and thus should not be divested of its ownership *moreso* because she is now heavily indebted to the 4th respondent in respect thereof. Again, she states that she bought the property after being privately

approached by the 2nd respondent, who was already known to her, and told that the property had remained unsold after a public auction sale that ‘had been held recently’. This is simply an admission by her that she did not buy the property at a public auction sale. It was sold to her by the second respondent by private treaty.

- [13] Although, the first respondent filed and served its notice of intention to oppose this application on 27 March 2014, it only filed its opposing affidavit on 20 June, 2014. This affidavit was filed by counsel during argument, from the bar. The substance of that affidavit is that the first respondent does not oppose the application save an order for costs against it. First respondent submits that the process leading to the sale of the property to the third respondent was fraudulent and that this fraud was committed by the second respondent who has agreed to refund or reimburse the third respondent. First respondent argues that this willingness and undertaking by 2nd respondent to reimburse the third respondent is an admission of wrongdoing by the 2nd respondent and thus the first respondent should not be saddled with the responsibility or task of paying the costs of this application but the second respondent must instead shoulder that burden. First respondent concludes by submitting that the applicant’s attorneys were ‘telephonically

...kept abreast of all developments [and] the first respondent is in no way liable for the costs as the second respondent was never instructed to dispose of the property in the manner he did.’ The manner referred to herein, I think, is the sale by private treaty and fraudulent attachment referred to in paragraph 12 of the first respondent’s affidavit.

[14] The first respondent also makes the point that ‘the applicant cannot deny ... the fact that he owed rates to the municipality. These rates had to be recovered by the municipality, it is entitled to the rates. These rates, I concede, must be collected in accordance with the law.’ This is a clear admission by the first respondent that it set in motion the process of recovering the rates in question; but that the first respondent cannot say which firm of attorneys were instructed to do so between its present attorneys and MP Simelane Attorneys.

[15] It is plain to me and indeed all the parties herein, that there were numerous violations of or non-compliance with the peremptory or mandatory provisions of the Rating Act in this case leading to the sale of the property of the applicant to the third respondent. The third respondent herself is unable

to deny or refute this save to argue that she was a *bona fide* purchaser of the property and thus she should be allowed to own it. Some of the glaring irregularities or anomalies in the papers relate to

(a) the case number. At page 30 of the Book of Pleadings, the case number is 498/2011 yet the judgment is said to have been granted on 20 September 2010. Again at page 31 of the Book of Pleadings, the Clerk of Court appears to have signed the warrant of attachment on 3 December 2008, before the case was filed with the Court. This warrant was signed by two Clerks of Court on two different occasions.

(b) At pages 21 and 26 of the Book of Pleadings, the applicant's date of birth is stated as 08 October, 1938 whereas at page 34 his date of birth is alleged to be 18 May 1925, where his first name is given as Galbert.

(c) Lastly, the Clerk of Court emphatically says there was no Court Order recorded on the file in question and this file has since disappeared from the Magistrate's Court and cannot be traced; after an 'extremely diligent search.'

[16] From the above, it is plain to me that the whole process leading to the sale of the property herein is tainted by serious or profound irregularities and

illegalities. The sale itself was illegal. It was not sanctioned by a Court of law.

[17] In *Sandile Cyril Mahlalela v Michael Mthembu and 2 Others*, Civil case number 940/2007, a judgment by this court delivered on 23 August 2007, the Court said the following:

‘[13] As a general rule, one may only sell property and transfer ownership of property of which he is the owner or is authorized by the owner thereof or the law to do so. This fundamental principle finds expression in the Latin phrase “*Nemo potest plus juris ad alium transferre quam ipse habet.*” There are exceptions to this general rule and one of such exceptions is that of estoppel, to which I shall return presently....

[16] In the case of **KLERCK N.O. vs VAN ZYL AND MARITZ NNO AND ANOTHER AND RELATED CASES, 1989 (4) SA 263 @ 273D**- the court had this to say:

“...there are two theories relating to the passing of ownership, viz the casual theory and the abstract theory. Simply stated, the former lays down that, if the *causa* for the transfer of ownership is defective, ownership will not pass, notwithstanding that there has been delivery (registration in the case of immovables). In terms of the abstract theory, provided that the right to transfer ownership (the real agreement ...) is valid, ownership will in general pass pursuance and

on implementation thereof, notwithstanding that the causa...is defective. In other words, all that is required is delivery (registration in the case of immovables) coupled with an intention to pass and to receive ownership. If the real agreement is defective, however, ownership will not pass. In *casu*, it would in fact not matter which theory were applied because, on an application of either, ownership in the property would not have passed to clinkscales as both the causa and the real agreement were defective. ...In regard to immovables counsel were only able to refer me to one authority where this question arose specifically for decision, viz **BRITS AND ANO. V EATON N.O. AND OTHERS, 1984 (4) SA 728 (T)** and my own researches did not uncover any further decisions. In that case Stafford J held, at 735, that in principle there is no difference, as regards the passing of ownership, between movables and immovables and that the abstract theory applies in respect of the latter as well. I am in respectful agreement ...it is important to note that, in terms of the abstract theory, what is required for ownership to pass is not only delivery, which in the case of immovables is constituted by registration in the deed registry, but also the requisite intention that ownership pass on the part of the transferor and the transferee – notwithstanding the views of some that the formal act of registration by itself is sufficient to effect ownership in immovables whatever defects there may be relating to the real right ... If, despite the formal act of registration, the real agreement in question is defective, ownership will not pass.”

[17] I, with due respect, agree with the statement of the law expressed above. Implicit in these judgements, however, is the fact that whilst registration of immovables is normally the best proof of ownership, of its own, it is not decisive of the issue. That is to say, it is not conclusive proof of ownership. One may own an immovable property without that property being registered in his name, e.g. where the registration is fraudulent, or where all the prerequisites to effect the registration have been complied with but the registration has not been done. Registration is but an incident of delivery. **MICAH PASCAL MKHONZA v BELARMINO BARROCA GIL AND 2 OTHERS, CASE NO. 3466/02 (UNREPORTED).**

[18] And in *Yonge Nawe Environment Action Group v Nedbank (SD) Ltd & 4 Others, Case 4165/2007*, judgment delivered on 24 October 2008. I had occasion to say:

‘[11] There is another issue to which I must refer. In the event that the property in question is transferred into the name of the Third Respondent and thereafter the Applicant is successful in establishing that the sale was invalid, the Applicant would not have an empty judgement as it would be in a position to have the property re-transferred to it. Transfer by registration is not irreversible. If after transfer or registration of the property into the name of the third Respondent, the sale is declared or held to have been invalid, the registration ipso facto becomes invalid and reversible. One suspects that it was with this point in mind that the Applicant was unable to state that it can not, if the application is refused, be granted substantial relief in due course. I am in respectful agreement with the views of

SAPIRE CJ in the case of **SIMON MUSA MATSEBULA v SWAZILAND BUILDING SOCIETY (case 66/96B)**, judgement delivered on 18th may, 1998 where the learned CJ stated that:

“It appears to be agreed that should transfer to the purchaser take place, the transaction could not be reversed should the Court of Appeal uphold the appeal and hold that the sale was invalid. This view shared by Counsel appearing for the contending parties find support in the decision of a South African court; See **GIBSON, NO v ISCOR HOUSING UTILITY CO. LTD AND OTHERS, 1963 (3) SA 783(T)**.

It must, however, be born in mind that decision turned on the wording of Act 32 of 1944, (the Magistrates Court Act (SA)) sec 70 which reads

‘A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect.’

No corresponding legislative enactment affecting sales in execution of immovable property by the Sheriff in Swaziland has been brought to my attention, nor have my own researches in this connection revealed any relevant provisions. In the absence of such provisions there seems to be no reason why a transfer effected pursuant to an invalid sale in execution should not be set aside even after registration.

In principle there seem no reason to me why in the absence of such legislation, a transfer of immovable property, pursuant to an invalid

sale in execution should not be reversed together with the setting aside of the whole execution process. There are of course a number of factors, including the rights of the purchaser and his financing institution, which may make it extremely difficult if not impossible practically to unscramble the egg. In this case the Applicant could be left with an action for damages against the sheriff and the respondent to the applicant building society. The balance of convenience could lie with the applicant in favour of granting an interdict if this were the only aspect of the matter to be taken into consideration. But it is not.'

These remarks are apposite in this application and I hereby repeat them. For these reasons, the third respondent's assertion or defence herein cannot stand. It is untenable and is hereby rejected.

[19] On the question of costs, the applicant has urged this court for an award of costs at the scale of attorney and own client against the first respondent. The reasons or motivation for this prayer has been already stated above in this judgment.

[20] It is axiomatic; like in matters of sentencing in a criminal trial, that the issue of costs is a matter predominantly within the discretion of the court. The

Court exercises a judicial discretion. Such discretion has to be exercised judiciously and in a just and equitable way.

[21] In *Intercontinental Sports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at para 25 Smalberger JA explained the nature of this discretion in the following terms:

‘The Court’s discretion is a wide, unfettered and equitable one. It is a facet of the Court’s control over the proceedings before it. It is to be exercised judicially with due regard to all relevant consideration. These would include the nature of the litigation being conducted before it and the conduct before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done as a mark of its displeasure at such party’s conduct in relation to the litigation.’

This rule applies across the board whether the order for costs is at the ordinary scale or on the scale as between attorney and own client or even where the costs are to be borne by one or more of the parties or their legal representatives *de bonis propriis*. In this case I deal with the issue of costs on a punitive scale; ie on attorney and client scale. See *Nel v Waterberg*

Landbouwers Ko-operatiewe Vereeniging, 1946 AD 597 at 607 and *Ward v Sulzer*, 1973(3) SA 701 (AD at 706-707). See also Herbststein and Van Winsen, *The Civil Practice of the Superior Courts in South Africa*, 3rd ed (1979) at 487 where the learned authors state the rule or position as follows:

“Tindall JA [in *Nel supra*] stated that by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case may consider it just, by means of such an order, to ensure more effectively than it can do by means of a judgment for a party and party costs that a successful party will not be out of pocket in respect of the expense caused to him by the litigation.

An award of attorney and client costs will not be lightly granted, as the court looks upon such orders with disfavour and is loath to penalize a person who has exercised his right to obtain a judicial decision on any complaint he may have.

The grounds upon which the court may order a party to pay his opponent’s attorney and client costs include the following: that he has been guilty of dishonesty or fraud or that his motives have been vexatious, reckless and malicious, or frivolous, or that he has

misconducted himself gravely either in the transaction under inquiry or in the conduct of the case.’

(I have omitted all foot notes and would also add that such costs may also be awarded against a party who has been mendacious).

[22] In *MCpherson v Teuwen and Another* (2009/27002) [2012] ZAGP JHC 18 (22 February 2012) KGOMO J stated as follows:

‘[55] Attorney and client costs are those costs which a litigant or attorney is entitled to recover on behalf of or from a client in respect of disbursements made on behalf of the client and for professional services rendered by him to and for his client. They are normally payable by the client whenever and whatever the outcome of the case. This is in contradistinction to or with party and party costs whose purpose of granting was clearly set out in *Die Voorsitter van die Dorpsraad van schweizer – Reneke v Van Zyl* 1968 (1) SA 344 (T) at 345.

...

[57] Attorney and client costs are mostly only awarded under extraordinary circumstances or where they are part of the parties’ agreement. For a party to be saddled with an order of costs an

attorney and client scale, such a party would most probably have acted or conducted itself *mala fide* and or misconducted itself in one way or another during the litigation process. Normally, such a party would have been capricious, brazen and or cowboyish in its approach to the litigious process and not have cared what the consequences of its acts or actions would be on the legal process and or the other side.’

The learned judge also noted that where a party has acted in good faith, although an element of fraud or recklessness could be inferred, the court might still refuse to grant costs at attorney and client scale. I fully endorse these remarks as reflective of the practice in this court as well. (See also *De la Guerre, Juanna Elize v Ronald Bobroff and Partners INC and 2 others, case 2264/2011 (RSA HC)*).

[23] I would add that where reference is made to the conduct of the litigation, this is not restricted to litigation that is already pending in Court. It also includes conduct prior to such litigation being actually commenced; so long as such conduct is closely connected with or leads to such litigation.

[24] In the instant case, there was no prayer for costs at attorney and client scale against the second respondent. This is, however, not a bar to the Court to

award such costs against him. (see *MCpherson (supra)* at para [61]. There is no doubt whatsoever in my mind that the second respondent acted rather recklessly if not fraudulently in selling the applicant's property herein. He sold it to his acquaintance and by private treaty. The sale was never advertised at all and he has failed to explain why he acted as he did. He has of course not opposed this application. This Court has only been told by the first respondent that the second respondent has offered to reimburse the third respondent herein; in full I hope. The conduct of the second respondent herein is highly prejudicial to the applicant and as I have already stated, perhaps fraudulent. An order for costs at attorney and client scale is in the circumstances appropriate against him and it is so ordered.

[25] I have already found that it was the first respondent that set the process of recovering the rates owing in motion. In so doing, the first respondent did not even keep a record as to which of its attorneys were instructed to carry out the task. To compound matters, it failed completely to follow the provisions of the Rating Act. In so doing, it acted Cowboyishly or recklessly, with utter disregard to the law and the rights of the applicant.

[26] When the applicant alerted the first respondent about the anomalies or irregularities attendant or pertaining to the whole transaction and sought an amicable resolution thereto, the first respondent or its attorneys did not bother or bothered very little at all. This went on for a period of about ten (10) months until the applicant was forced to approach this court for relief. When the application was filed and served on the first respondent, it promptly, as it was perfectly entitled to do, filed its notice of intention to oppose the application. But, again, no affidavit explaining its position was forthcoming from the first respondent until on the date of hearing, ie 20 June 2014. The said affidavit was handed to Court by Counsel from the bar during the hearing of the matter.

[27] The excuse that the first respondent is a huge entity whose Chief Administrative or Executive officers have changed since the inception of the rates recovery exercise is, in my view, a rather weak or fibble one. Such a factor or circumstance should not, in my judgement, be allowed to prejudice the applicant. Again that there were telephone calls between counsel for the applicant and first respondent, whereby the latter was 'kept abreast with what was going on is rather bland and inconsequential. Infact it is contradicted by the clear evidence (in the form of letters) submitted to Court

by the applicant. But even more importantly, one is left in the dark what is meant by the first respondent's attorneys keeping the applicant's attorneys abreast with what was going on. It is just too vague and perhaps meaningless in the context of this application.

[28] One further point that deserves mention in this case is the fact that even if the first respondent was not fully aware of what was going on in relation to the rates collection in respect of the property, the first respondent must have been aware or fully informed of the facts when or before the property was transferred to the third respondent. I say so because the first respondent would obviously have not permitted the transfer to go ahead without the rates owing being paid in respect of the said property.

[29] For the foregoing reasons, I ruled that the conduct of the first respondent herein, first in setting the rates recovery exercise in motion, without regard to the applicable law, and its actions or lack thereof thereafter is deserving of this Court's censure herein. Consequently, in its discretion, this Court marks its displeasure with such conduct with an order for costs at attorney and client scale. The applicant has been certainly and needlessly put out of pocket by such actions or omissions by both the first and second respondent.

I emphasise though that each of these respondents is being penalized for its own acts or omissions. There is no vicarious liability or even shared liability herein.

MAMBA J

For the Applicant : Mr. M. Ndlovu

For the 2nd Respondent : Messrs B. Ngcamphalala and Dlamini

For the 3rd Respondent : Ms. N. Sambo