IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 681/2012

In the matter between

VUSELA PROPERTIES (PTY) LTD	**1ST APPLICANT**
SWAZI GLASS (PTY) LTD	**2ND APPLICANT**
And	
MUNICIPAL COUNCIL OF MBABANE	**1ST RESPONDENT**
NQOBILE MKHUMANE	**2ND RESPONDENT**
THE REGISTRAR OF DEEDS	**3RD RESPONDENT**
THE MASTER OF THE HIGH COURT	**4TH RESPONDENT**
THE ATTORNEY GENERAL	**5TH RESPONDENT**
In Re	
NQOBILE MKHUMANE	**APPLICANT**
And	
VUSELA PROPERTIES (PTY) LTD	**1ST RESPONDNET**
SWAZI GLASS (PTY) LTD	**2ND RESPONDENT**
THE REGISTRAR OF DEEDS	**3RD RESPONDENT**
THE MASTER OF THE HIGH COURT	**4TH RESPONDENT**
THE ATTORNEY GENERAL	**5TH RESPONDENT**

Neutral citation	***Vusela Properties (Pty) Ltd and Another vs Municipal Council of Mbabane and Four Others (681/2012)[2014]* SZHC 88 (22 *April 2014)***
Coram:	**Ota J.**
Heard:	**15 April 2014**
Delivered:	**22 April 2014**
Summary:	**Civil procedure: Urgency; principles thereof; section 116 of the Urban Government Act 1969 considered; Municipality breaching section 32 of the Rating Act; they advertised the sale of the property on which rates was owed and persisted in execution against same without first obtaining a court order declaring the property executable; this course informed the urgency procedure and special leave in terms of section 116 of the Urban Government Act; interdicts; principles thereof; application granted.**

JUDGMENT

OTA J.

[1] By Notice of Motion commenced on the premises of urgency, the Applicants claimed the following reliefs:-

> **"1 Dispensing with the usual forms and procedures relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.**
>
> **2 Condoning Applicant's non-compliance with the said rules and provisions as relating to form, service and time limits and hearing this matter as urgent;**

3 Interdicting the First and / or Second Respondent from executing against and / or selling the property described as Portion 90 of Farm 117, District of Hhohho, currently registered under the name of the late ABNER MKHUMANE, pending finalization of the main Application.

4. Interdicting the Third Respondent from transferring the property to a third party pending finalization of the main Application.

5 Directing that Prayers 3 and 4 above operate as an interim Order with immediate effect pending finalization of this Application.

6 That a *rule nisi* do hereby issue calling upon the Respondent to show cause on a date to be determined by this Honourable Court why the Orders in Prayers 3 and 4 above should not be made final.

7 Directing the 2nd Respondent to pay all outstanding rates in respect of the property described in Prayer 3 above.

8 Granting the Applicant the costs of this Application.

9. Granting any further and / or alternative relief".

[2] The parties herein are described as follows in the founding affidavit:-

"5 The First Applicant is Vusela Properties (Pty) Ltd, a company duly registered and incorporated in accordance with the Company Laws of the Kingdom of Swaziland whose principal place of business is in Mbabane, Hhohho District.

6. The Second Applicant is Swazi glass (Pty) Ltd, a company duly registered and incorporated in accordance with the Company Laws of the Kingdom of Swaziland, whose principal place of business is situate in Mbabane.

7. The First Respondent is the Municipal Council of Mbabane, a body corporate with capacity to sue and to be sued in its name with its office situate at Mahlokohla Street, Hhohho District.

8. The Second Respondent is Nqobile Mkhumane, an adult spinster of Sandla Township, Mbabane whose chosen *domicillium citandi* for purposes of service in these proceedings is the office of Mngomezulu Attorneys, Fourth Floor Mbandzeni House, Mbabane, Hhohho District and who has been cited herein as the executrix testamentary of the estate of the late Abner Mathokoza Mkhumane, ES-52/2002.

9. The Third Respondent is the Registrar of Deeds, cited herein in his capacity as the public office entrusted with the responsibility of transferring properties in the Kingdom of Swaziland from one person to another and whose offices are situate at the Deeds Office, Mbabane, Hhohho District.

10. The Fourth Respondent is The master of the High Court, cited herein in his capacity as the public office in charge over the administration of deceased person's estates and whose offices are situate at Millers Mansion Building, Mbabane, District of Hhohho. No specific Order is sought against the Fourth Respondent, he has been cited herein merely for purposes of convenience.

11. The Fifth Respondent is The Attorney General, cited herein in his official capacity as the legal representative of all Government Departments in the Kingdom of Swaziland and whose offices are situate at Fourth Floor, Ministry of Justice Building, Mhlambanyatsi Road, Mbabane, District of Hhohho".

[3] The application is supported by the affidavit of Walter Phillip Bennett described therein as a businessman of Mbabane in the Hhohho District and the Director of the 1st and 2nd Applicant Companies. Attached to this affidavit are several annexures. There is also a replying affidavit sworn to by the same deponent, to which is exhibited annexures WB1 and WB2 respectively.

[4] The 1st Respondent opposed this application with an answering affidavit sworn to by one Nhlanhla Vilakati described therein as the Director Finance of the 1st Respondent. The other Respondents filed no opposing processes.

[5] When the matter served before me on 3 April 2014, I granted a rule in terms of prayers 2, 5 and 7 of the notice of application.

[6] I subsequently heard arguments from both sides on 15 April 2014.

[7] In its answering affidavit the 1st Respondent raised the following points of law seeking to defeat this application *in limine*.

1. Non-compliance with the provisions of section 116 of the Urban Government Act 1969
2. Urgency.

[8] I'll first deal with these points of law before dabbling into the merits if the need arises. It is convenient for me to first address the point taken on urgency, even though this seems to be a roundabout course.

[9] **Urgency**

In my view, the point taken on urgency has fallen away. This is because when taxed with the history of this matter during argument, Mr Ngcamphalala who appeared for the 1st Respondent, conceded, that the

matter could rightly be enrolled on the premises of urgency. He was however, quick to entreat the court that the circumstances informing the urgency should not be taken as constituting the exceptional circumstances requisite for the court's special leave in the face of the Applicants' non-compliance with section 116 of the Urban Government Act 1969.

[10] I am inclined to agree that this is a matter that should properly be enrolled on the premises of urgency.

[11] I say this because, in their pleadings the Applicants allege that around 9 January 1996, one Abner Mkhumane (deceased) sold two proposed subdivisions of Portion 90 Farm 117, Hhohho District (the property) to the Applicants. The deceased failed to effect transfer of the properties to the Applicants despite receiving the full purchase price.

[12] The Applicants approached the court for an interdictory order compelling the deceased to complete the subdivision of the property and the transfer to the Applicants, which order was granted.

[13] The deceased unfortunately passed away before the subdivision was completed and the property duly transferred to the Applicants. Before his death the deceased was owing the 1st Respondent rates in respect of the property. He had made an undertaking to settle the rates owing as evidenced by annexure SG1.

[14] After the passing of the deceased, the Applicants applied for subdivision of the property to enable them get the requisite transfer but this was refused due to the rates owing and a need to modify the subdivision diagram to allow for access to the remaining portion of the property.

[15] The Applicants subsequently entered into an agreement with the 1st Respondent to pay 10% of the portion of the rates then owing amounting to E3,882.05 as evidenced by annexures SG2 and SG3 respectively. The rates then owing was the sum of E38,820.50.

[16] It appears that it was against the foregoing background that the 2nd Respondent who is the executrix of the deceased estate, commenced an application filed on 10 April 2012 against the 1st and 2nd Applicants (as 1st and 2nd Respondents), as well as 3rd, 4th and 5th Respondents *in casu*, seeking,

inter alia, for a order, interdicting and restraining the Respondents from transferring and / or registering the property in issue into the name of the Applicants as well as an order declaring that the property lawfully vests on the estate of the late Abner Mathokoza Mkhumane ES 52/2002. (the main application)

[17] The application was opposed by the Applicants. It appears that during the pendence of the main application and on or about 12 December 2013, the 1st Respondent advertised a list of properties that owe rates, which included the property in issue which allegedly owes rates in the total sum of E129,297.57 as evidenced by annexure SG5.

[18] Following the said advertisement and on 14 February 2014, the Applicants through their attorneys wrote a letter contained in annexure SG6 to the Applicants. SG6 states as follows:-

> **"RE <u>NQOBILE MKHUMANE / VUSELA PROPERTIES (PTY) LTD AND SWAZI GLASS (PTY) LTD – HIGH COURT CASE NO. 681/2010</u>**
>
> **1. We refer to the above.**
> **2. It has been brought to our attention by our client that you are planning on selling Portion 90 of Farm 117, District of Hhohho. As such, you advertised in the Times of Swaziland of the 12th of December 2013 that the above mentioned property was one of the properties owing rates to the Mbabane City Council.**

3. Take notice that the above mentioned property is still in the process of being transferred to a company owned by Mr. Walter Bennett, and is the subject matter of litigation under High Court Case No. 681/2010.

4. If the Mbabane City Council is so inclined, it may apply to court to be joined as a party to the proceedings.

5. We are otherwise instructed that our client was given an option to pay E3882.05 for rates and to have the property transferred to him. Take note that our client duly paid the amount as directed by the municipality. As such the municipality cannot proceed to sell the property for recovering rates in light of the aforementioned agreement".

[19] SG6 as is clear from its tenure called upon the 1st Respondent to join in the pending substantive suit. The 1st Respondent refused to join in the suit as invited, rather insisting on executing against the property. This is clear from the 1st Respondent's letter dated 18 February 2014, annexed as SG7, which states as follows:-

"NQOBILE MKHUMANE / VUSELA PROPERTIES (PTY) LTD AND SWAZI GLASS (PTY) LTD – HIGH COURT CASE. 681/2012

1. Reference is made to your letter dated 14th February 2014.

2. The registered owner of the property (portion 90 of farm 117) which you are making reference to is the late Mathokoza A. Mkhumane and it has been owing rates to Council for many years.

3. We do not appreciate how you want to mix two distinct processes here;

i) that in which, in line with the provisions of the Rating Act 1995, Council is collecting outstanding rates legitimately due to it and

ii) your intention to transfer the property to a company owned by your client.

4. We appreciate your suggestion to have Council applying to be joined in your court case but would like to bring it to your attention that

Council's interest in this matter is only limited to the outstanding rates balance and no more.

5. **Your client and the attorney, who was handling this issue on his behalf then, are very much aware that there is no agreement of any sort between Council and him or his companies after they failed to provide Council with the guarantee that they had promised to settle the outstanding rates with. As such the rates clearance certificate that had been issued was withdrawn, cancelled and is kept here at Council under lock and key.**

6. **For your information the outstanding rates are much more than the E3 882.05 which you have been told about.**

7. **<u>In this regard Council will go ahead and sell the property in order to recover the outstanding rates on it as advertised in the print media in December 2013".</u> (emphasis mine)**

[20] It was the advent of SG7 that prompted the Applicants to write the letter contained in annexure SG8 wherein they sought a written undertaking from the 1st Respondent within 5 days thereof, that it will not proceed with the sale of the property failing which Applicants will approach the court under a certificate of urgency for an interdict. Annexure SG8 states as follows:-

"RE: <u>NQOBILE MKHUMANE / VUSELA PROPERTIES (PTY) LTD AND SWAZI GLASS (PTY) LTD – HIGH COURT CASE NO. 681/2012</u>

1. **We refer to the above matter and in particular your correspondence dated 18th February 2014, contents of which have been noted.**

2. **The Municipality is well aware of our client's interest in the property hence the agreement between the Municipality and our client to pay a portion of the rates in the amount of E3,882.05. as such if the Municipality had a claim against the Estate of the Late Abner Mkhumane for rates, the Municipality should have filed its claim with the Executor of the Estate in line with the provisions of the Administration of Estates Act of 1802 before seeking to proceed against the immovable property. The Municipality is well aware that such**

property was sold to our client and is in the process of being transferred.

3. In the circumstances therefore, may we have a written undertaking from you within the next five (5) days that the property will not be sold in execution for rates owing pending finalization of court proceedings. Should we not receive such undertaking, we have instructions to approach the court for an interdict under a certificate of urgency.

4. Kindly let us hear from you within the next five days".

[21] It is on record that the 1st Respondent failed to give such written undertaking as requested. Applicants in the face of this made good their word by commencing the present application on 31 March 2014.

[22] In my view, the urgency in this matter is palpable from the history of the case and cannot be gainsaid. The 1st Respondent obviously flaunted the laid down procedure for recovery of rates in terms of section 32 (3) (a) of the Rating Act by threatening to execute against the property without first obtaining an order declaring the property executable.

[23] Section 32 (3) (a) of the Rating Act provides as follows:-

"(a) after the expiry of such financial year, the local authority shall cause to be inserted, in the Gazette and in at least one newspaper circulating in Swaziland particular of every such property and of the rates payable together with a notice requiring the owner, by name, if known, or otherwise whom it may concern, to make payment of such amount, and any accruing penalties thereon within two (2) months from the date of publication of such notice in the Gazette, or newspaper and stating that, in default thereof, the application will be

> **made to court to order such property to be sold at public action in satisfaction of the rates which will be due in respect of such property up to an at the time of such application, and of all rates that may accrue between the date of such application and such sale".**

[24] In terms of the Rating Act, the 1st Respondent should have applied to court for the property to be declared executable and with notice to all interested parties prior to the advertisement. This was not done. This rendered the advertisement of 12 December 2013, invalid.

[25] Speaking on this selfsame issue in setting aside the sale of a property by the Municipality carried out without first giving notice to the rate defaulter and obtaining an order of court declaring same executable, in the consolidated case of **Simelane and 85 Others v City Council of Mbabane and Others Case No 1775/98, and Auspect Property One, (Pty) Ltd v City Council of Mbabane and Others Case No 1776/98,** the court made the following illuminating pronouncement:-

> **"Had the Council properly prepared the way for the succeeding step, it should then, after the end of the financial year for which the rate had been levied, and if the rate, for which no sufficient execution could be made, remained unpaid, have caused publication to be made in the prescribed manner of the information specified in section 32 (3) (a). such publication would include notice to the defaulting owner to make payment of the amount stated to be owing within two months of the date of publication. Such notice, in terms of the section would, to comply with the provisions of the section, also inform the owner that in default of such payment application would be made to court to order that the property be sold by public auction.**

A notice as contemplated in the section was published, but without judgment having been validly entered and without any attempt at execution on movables having been made. The notice was itself thereof invalid".

[26] The 1st Respondent in my view, put the carte before the horse. Having been so ambushed, the Applicants were to my mind, quite entitled to rush to court on the premises of urgency as they did. Having so violently abused the Rating Act in the way and manner that it did, it does not lie in the mouth of the 1st Respondent to now insist that the Applicants must strictly comply with the rules of court in commencing this action, which was urgently necessitated in the first place by the untenable situation created by the cavalier manner in which the 1st Respondent dealt with the Applicants.

[27] The point taken on urgency is bad in law. It fails and is accordingly dismissed.

[28] 2. **Non compliance with the provisions of section 116 of the Urban Government Act 1969**

In this regard the 1st Respondent contends that the Applicants did not comply with the peremptory provisions of section 116 of the Urban Government Act. This, 1st Respondent submits, is because, the Applicants failed to give it thirty (30) days written notice of the intention to bring these

proceedings and have also, in the face of this omission, failed to seek for special leave of the court to institute same.

[29] Now, section 116 of the Urban Government Act provides as follows:-

> **"(1) No legal proceedings of any nature shall be brought against a Council in respect of anything done or omitted by it after the commencement of this Act, unless such proceedings are brought before the expiry of twelve month from the date upon which the claimant had knowledge or could reasonable have had knowledge of the act or omission alleged.**
>
> **(2) No such action shall be commenced until thirty days written notice of the intention to bring such proceedings have been served on the Council, and particulars as to the alleged act or omission shall be clearly and explicitly given in such notice.**
>
> **(3) The High Court may, on application by a claimant debarred under subsection (1) or (2) from instituting proceedings against a Council grant special leave to him to institute such proceedings if it is satisfied that –**
>
> **(a) the Council against which the proceedings are to be instituted will in no way be prejudiced by reason of the failure to institute the proceedings within the stipulated period or by reason of the failure to give or the delay in giving the required notice; or**
>
> **(b) having regard to any special circumstances, the person proposing to institute the proceedings could not reasonably be expected to have complied with the requirements of subsection (1) or (2)".**

[30] There is no doubt, as rightly contended by the 1st Respondent, that the notice of intended proceedings given by the Applicants via annexure SG8 which is dated 6 March 2014, when juxtaposed with these proceedings which were instituted on 31 March 2014, falls short of the statutory thirty

(30) days notice prescribed by the Act. The fact that this requirement must be met in any nature of proceedings, whether interim, final or urgent, launched against a council, has been judicially settled in this jurisdiction. I need not belabor this point.

[31] See for instance the case of **SB Civil Roads (Pty) Ltd v The Municipal Council of Manzini,** where his **Lordship SB Maphalala PJ,** made the following condign remarks:-

> **"The ultimate question for decision by this court is whether an application for 'interim relief' such as the present application is excluded from the ambit of enactment cited above. It appears to me ---that this is not so.**
>
> **The answer to this issue lies in determining the proper meaning to be given to the enactment i.e it is a question of interpretation which involves ascertaining the intention of the enactment. The court is required to determine the legal meaning intended by the legislator. The starting point is the phrase "legal proceedings of any nature" as used in the first line of subsection (1). This is a wide and all embracing phrase. It would clearly include actions in the narrow sense, that is, proceedings commenced by way of summons and which envisaged and necessitated the hearing of testimony and motion proceedings of all kinds, including an application for interim relief such as the present case"**

[32] I am persuaded by the foregoing exposition. I have no wish to depart from it. The Applicants were thus required to give 30 days notice of the intended proceedings to the 1st Respondent. They failed to do so.

[33] In the light of their non-compliance with the statutory thirty (30) days notice required by the Act, the Applicants have in their replying affidavit sought for condonation of the non-compliance with the provisions of the Act and for leave allowing them to institute these proceedings without complying with the thirty (30) days notice. This is in terms of section 116 (3) (a) and (b) of the Act recited in para [29] above.

[34] The 1st Respondent is opposed to this application on grounds that there is no special circumstance demonstrated by the Applicants, warranting the grant of such special leave in terms of the Act.

[35] I beg with respect to differ with the 1st Respondent on this issue. I have hereinbefore detailed the history of this case. Particularly, the correspondence between Applicants and 1st Respondent in the wake of the

advertisement of the list of properties by the 1st Respondent on 12 December 2013.

[36] The tune of the letters written by the 1st Respondent to the Applicants denoted an imminent sale of the property. This, in my view, created the special circumstance in which the Applicants could not have reasonably been expected to comply with the provision of section 116 (1) and (2) of the Act by giving the statutory thirty (30) days notice.

[37] This is to my mind, moreso, as the steps taken by the 1st Respondent in insisting on execution against the property, contravened the laid down procedure pursuant to section 32 (3) (a) of the Rating Act of 1995.

[38] It is obvious from the papers that the Applicants had not been served with the order granted in terms of section 32. It is also obvious that the 1st Respondent did not make any application to court for an order declaring the property executable before it embarked on the letter contained in annexure SG7, wherein in para 7 it informed the Applicants that it will go ahead and sell the property in order to recover the outstanding rates on it as advertised in the print media in December 2013.

[39] It is the short cut approach adopted by the 1st Respondent in flagrant breach of the provision of the Rating Act, that informed the exceptional circumstance, warranting the special leave sought. In my view, the special leave procedure allowed by section 116 (3) (a) and (b) of the Urban Government Act, is apposite in these circumstances.

[40] In any case, I see no prejudice which the 1st Respondent will suffer by reason of failure to give the statutory thirty (30) days notice. This is because of the history of this case which shows that the 1st Respondent is very much alive to the issues and has not been hamstrunged by the procedure adopted by the Applicants.

[41] There is also the fact that the main interest of the 1st Respondent in these transactions, which is collection of rates owing on the property, appears to have been met by the 2nd Respondent who has not opposed the relief sought in prayer 2 of the application for an order directing her to pay all outstanding rates in respect of the property. I therefore see no prejudice that will be suffered by the 1st Respondent.

[42] On these premises, the Applicants' non-compliance with section 116 of the Urban Government Act is hereby condoned. Leave is granted to the Applicants to institute these proceedings without complying with the thirty (30) days notice prescribed by section 116 (1) and (2) of the Act.

[43] MERITS

Since this is an application for interim interdict, it is apposite that I acknowledge at this juncture, that the success of such a relief resonates on the Applicant demonstrating the following factors.

1. A *prima facie* right (though open to some doubts).
2. Injury committed or reasonably apprehended.
3. The absence of an alternative remedy.
4. Balance of convenience which favours the grant of such an order.

See **Setlogelo v Setlogelo 1914 AD 221.**

[44] Mr Ngcamphalala conceded that the Applicants have shown a *prima facie* right, as well as apprehended injury. He however argued that the balance of convenience weighs heavily against the grant of such an order because the 1st Respondent is statutorily empowered to collect rates which is meant for

the development of the city of Mbabane. It is thus against public interest that its statutory responsibility should be interdicted, so argued counsel.

[45] In my view, the 1st Respondent was well advised to concede that the Applicants have made out a *prima facie* right for the interdict. This right lies in the pending litigation between the Applicants and 2nd Respondent in the main suit, in which ownership of the property which is the subject matter of this application for interim interdict, is the issue. Similarly, the question of injury lies in the insistence of the 1st Respondent in executing against the property even in the face of the said litigation between the Applicants and 2nd Respondent over the property.

[46] Furthermore, I agree entirely with learned counsel for the Applicants, Mr Shabangu, that the balance of convenience weighs heavily in favour of the grant of the interim order. This is because there is clearly no adequate remedy open to the Applicants if the interdict is not granted and the 1st Respondent proceeds with execution against the property to recover the rates owing. The loss that will be occasioned to the Applicants cannot be adequately compensated by an award of damages against the 2nd Respondent in the event that the Applicants are successful in the substantive

suit. Not only will the Applicants have lost their property in that event, they will also be subjected to a whole new litigation against the 2nd Respondent for damages, with its attendant waste of time and resources.

[47] The 1st Respondent acknowledged the pendence of the substantive suit and its implication in para 19.1 of the answering affidavit as follows:-

> **"19.1 I have in the exercise of my discretion, refrained from instituting legal action against the estate, because the explanations provided to me, were credible. In addition, my attention has also been drawn to various legal proceedings involving the second respondent and the applicants over the same property. This prompted the first respondent not to institute legal action in order to recover the rates as it would not have served a useful purpose. I may point out that the first respondent does not in the ordinary course submit claims for the payment of rates to a deceased person's estate. The first respondent normally waits for an approach to transfer whatever property to the heirs or beneficiaries, and then insists on the payment before a rates clearance certificate can be issued. To do otherwise would be unconscionable".** (emphasis mine)

[48] What is also evident from the foregoing averment is that the 1st Respondent has an option to insist on payment of the rates owing before rates clearance certificate is issued to any of the heirs or beneficiaries to whom any property in the deceased estate is transferred.

[49] More to the above, is the fact that it is common cause that the 2nd Respondent has not only undertaken to pay the rates owing to the 1st

Respondent but has not opposed the relief sought in prayer 7 of the application directing her to pay said rates, as I have already abundantly demonstrated in this judgment.

[50] It appear to me therefore, that the prejudice the Applicants stand to suffer if the interim interdict is not granted far outweighs the prejudice the 1st Respondent will suffer if it is granted.

[51] CONCLUSION

The Applicants have made out a case for the interim interdict sought. This application succeeds.

[52] ORDER

I hereby order as follows:-

1. The 1st and 2nd Respondents be and are hereby interdicted from executing against and / or selling the property described as portion 90 of Farm 117, District of Hhohho currently registered under the name of the late Abner Mkhumane pending finalization of the main application.

2. The 3rd Respondent be and is hereby interdicted from transferring the said property to a third party pending finalization of the main application.

3. The 2nd Respondent be and is hereby directed to pay all outstanding rates in respect of the said property

4. The 1st Respondent is to pay the costs of this application.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE …….. DAY OF …….2014

OTA J.
JUDGE OF THE HIGH COURT

For the Applicants: **Z. Shabangu**

For the 1st Respondent: **B. Ngcamphalala**