



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 339/2014

In the matter between:

MAJAZI INVESTMENTS (PTY) LTD

APPLICANT

and

SWAZILAND BUILDING SOCIETY

1ST RESPONDENT

PHUMELELA MALINDZISA N.O.

2ND RESPONDENT

Neutral Citation : Majazi Investments (Pty) Ltd v Swaziland Building society
& Phumelela Malindzisa N.O. (339/2014) [2017] SZHC
181 (19 SEPTEMBER 2017)

Coram : MABUZA – PJ

Heard : 7 AUGUST 2017

Delivered : 19 SEPTEMBER 2017

SUMMARY

Civil Procedure – Applicant seeks a declarator that a sale in execution is null and void – Stay of removal of attached goods – Calling for an account of proceeds of sold goods – Application dismissed with costs – Costs to exclude those for advertisement incurred by the 1st Respondent.

JUDGMENT

MABUZA -PJ

- [1] The Applicant herein is Majazi Investments (Pty) Ltd- a company registered in terms of the laws of Swaziland trading in electronic equipment at Fourways Building, Mbabane. It is represented herein by its director, Syed Danish Zaidi.
- [2] The 1st Respondent is established by the Building Societies Act having its principal place of business at Mdada Street, Mbabane, in the Hhohho District.
- [3] The 2nd Respondent is Phumelela Malindzisa, a Deputy Sheriff for the district of Hhohho.

[4] The application purports to be an urgent one by virtue of a certificate of urgency drawn by Fezile Zanele Ndlovu dated 21st April 2017 even though the Notice of Motion does not refer to the usual platitudes of urgency. Mr. Mdladla for the 1st Respondent accepted the application as one of urgency, so be it. In this particular application the Applicant herein seeks an order in the following terms:

- (a) Declaring that the purported sale in execution which took place on the 5th August, 2016 under the above captioned case number is null and void.
- (b) Staying the removal of the attached goods pending finalization of the present application.
- (c) Calling upon the Respondents to account for the proceeds of the purported sale of the 5th August, 2016 within seven (7) days.
- (d) Costs of the application in the event that it is opposed.
- (e) Further and/or alternative relief.

[5] The application is defended by the 1st Respondent.

[6] The founding affidavit in support of the application is deposed to by Mr. Zaidi and is dated 21st April 2017. In it he states that the 1st Respondent procured an order in terms of which the Applicant was ordered to pay arrear rentals in the total sum of E80,412.87 (Eighty thousand four hundred and twelve Emalangi eighty seven cents) and that pursuant to the order, the Applicant issued a writ for the sum of E80,412.87 (Eighty thousand four hundred and twelve Emalangi eighty seven cents). These allegations are common purpose between the parties.

[7] That on the 15th July, 2016 the 1st Respondent caused to be advertised a sale in execution of the Applicant's movables which movables were listed in the advertisement. This advertisement indicated that the sale was to take place at Asakhe House, Shop No. 6 at 1000 hrs on Friday the 5th of August, 2016.

[8] He further states that the 1st Respondent again advertised a sale on the 3rd August, 2016 and the notice stated that it was still scheduled for the 5th August, 2016 at the High Court premises at 11.30 hrs.

[9] He says that on the scheduled date, the Applicant's agent, Ms. Rachel Pereira, attended the intended sale but no sale took place. Ms. Pereira was at

the Court premises from the time the sale was scheduled to begin but there was no indication that there was a sale that was going to proceed. She then left the Court premises around 12 pm. Her confirmatory affidavit is also annexed.

[10] The response by the 1st Respondent is that they confirm the first advertisement of the 15th July 2016 and that the sale would take place on the 5th August 2016. They further confirm the second advertisement of the 3rd August that the sale would take place on the 5th August 2016. They further confirm the third advertisement flighted on the 5th August 2016 that the sale would take place on that date, that is on the 5th August 2016.

[11] They explain that the second advertisement was flighted as a reminder to attract bidders. However unbeknown to the First Respondent the publisher, The Times of Swaziland committed an error and used a template for the advert indicating that the auction was to be at the High Court Building on the 5th August, 2016 despite explicit instructions that the venue was Asakhe House. The 1st Respondent Attorneys on the 4th August 2016, upon realizing same advised Nkosingiphile Lukhele the officer responsible for adverts of this error in the advert. She duly acknowledged the mistake and rectified it

by re-publishing the correct original advert which was flighted on the 5th August 2016 in the Times of Swaziland. Hence they contend there was no confusion as to the location of the auction sale as re-confirmed by the last advert flighted on the 5th August 2016 which complied with the rules as the original advert flighted on the 15th July 2016, which confirmed the same place being Asakhe House where the auction was to be held. A Confirmatory Affidavit by Nkosingiphile Lukhele is also attached to the application. It too confirms the contents of the 1st Respondent's answering affidavit in respect of the error and subsequent correction. Indeed a copy of the last advert was annexed and it confirms the venue as Asakhe House.

[12] I am satisfied that the sale took place at Asakhe House and not at the High Court. The Applicant says that on the 5th August 2016 as its agent, Ms. Rachel Pereira went to the High Court to attend the sale at the time it was scheduled to begin but it did not take place. She and the Applicant obviously did not read the advertisement that appeared on the morning of the date of sale that the venue was Asakhe House.

[13] The first advertisement complied with the rules. The 1st Respondent says that the second advertisement was flighted as a reminder to attract bidders.

According to the confirmatory affidavit of Ms. Lukhele, she says that on the 3rd August 2016, she received further instructions to re-advertise **a similar advert to that of the 15th July 2016** for the auction on the 5th August 2016. (my emphasis).

[14] However, in my view any confusion created is not material because the main advertisement has the correct date and venue and the second one has the same date and the third one has the same date and venue. The only prejudice in my view is the expense incurred by the three advertisements which I intend to order that they be paid by the 1st Respondent.

[15] Mr. Zaidi has also stated that he is aware that :

- (a) No public auction ever took place at Asakhe House as indicated in the 15th July, 2016 notice;
- (b) Certain individuals, two gentlemen, made an offer for the sum of E10,000.00 (Ten thousand Emalangi) for the movables which sum was accepted by the 2nd Respondent after consultation with the executing attorney;
- (c) The only people present when this transaction took place were

the 2nd Respondent, his secretary and the two gentlemen (the buyers).

[16] The 1st Respondent's response to that is that:

- (a) The auction did take place as advertised in the advert issued on 15th July 2016, and the confirmatory affidavit of Mancoba Ndlangamandla and Phumelela Malindzisa is evidence of this fact.
- (b) The 2nd Respondent accepted the bid of E10,000.00 (Ten thousand Emalangen) in exercising his discretion due to the dilapidated condition of the movables as bidders such as Mancoba Ndlangamandla were offering as little as E50.00 (Fifty Emalangen) per computer. The successful bidder purchased the movables as no substantial offer were being made.
- (c) It is denied that the goods were sold by private treaty as the purported two (2) gentlemen, one of them was Wiseman Dlamini, the Deputy Sheriff who was assisting the bidder on his behalf who was an Asian National. Hence, it is denied there were only two (2) people present and that the sale was private.

(d) Further, it is denied that the 1st Respondent's Attorneys accepted

any bids. The 2nd Respondent was advised to use his discretion for the bids as an Officer of the Honourable Court. If he decided E10,000.00 (Ten thousand Emalangi) was just; he did so lawfully, as the sole purpose was to recover the arrear rentals. And that the auction was conducted in a lawful manner.

[17] I accept the 1st Respondent's submissions supra more so because of the confirmatory affidavit by the 2nd Respondent, Mancoba Ndlangamandla and Phumelela Malindzisa.

[18] The Applicant stated further that at some point, the parties engaged in certain negotiations regarding the value of the goods and even though the Applicant had placed them at E128,500.00 (One hundred and twenty eight thousand Emalangi five hundred) and the 1st Respondent at E69,503.00 (Sixty nine thousand five hundred and three Emalangi), it was quite surprising that they were sold privately for E10,000.00 (Ten thousand Emalangi).

[19] The 1st Respondent's response is that the Loss Adjuster's findings on the fair value was a significant period long before the auction as the Applicant even refused to accept such finding yet the parties had agreed to instruct a Loss Adjuster and that the condition of the movables was not good even prior to the initial Court proceedings and by the time the goods were auctioned it had been over almost two (2) years. Therefore, at the auction the goods were being bidden for as little as E50.00 (Fifty Emalangeni) as they were old and others non-functioning computers and at an auction goods normally can be sold in excess of their market value or below the market value. The movables would not have even sold for the E10,000.00 (Ten thousand Emalangeni) due to their bad condition.

[20] I accept the 1st Respondents explanation.

Failure to account for the goods

[21] The Applicant says that the 1st Respondent has failed to account for the proceeds of the sale of the 5th August 2016 within the stipulated time. The 1st Respondent denies this and states that it duly filed the distribution account and it is in the Court record for the monies realized in the sale. A copy of the distribution account was attached and marked "SBS 6". The

Respondents further attached the receipt (annexure “SBS 5”) as proof of payment of monies received, being E10,000.00 (Ten thousand Emalangeni). It is their contention that the Applicant has not even alleged any attempt to obtain the distribution account but merely makes bald allegations that 1st Respondent has not accounted.

[22] I accept the 1st Respondent’s responses. This prayer falls away and I so order.

Urgency

[23] The Applicant stated that this matter was urgent because on the 20th April 2017, the 2nd Respondent attempted to remove goods from the Applicant’s premises which goods were worth hundreds of thousands of money and that given the nature of the goods, (computers and IT equipment) it feared that if they were removed they would not be properly stored and may be irreparably damaged.

[24] The 1st Respondent’s denied that the matter was urgent and that the urgency was self-created. It stated that:

- (a) As the Applicant has been aware since about the 23rd February, 2017 that the goods were attached and had done nothing for almost two (2) months prior to the execution for the removal of the goods. And that if the Applicant had such a genuine fear it would have approached this Court as early as February 2017 after the attachment.

- (b) The Applicant failed to comply with the peremptory requirements of Rule 6 (25) (a) and (b) of this Court to explain Firstly, the delay in institution of these proceedings as the auction was conducted on 5th August, 2016 and prior to the execution for removal nothing had been done to challenge the sale. Clearly, it was argued that urgency was self-created and the sole aim by the Applicant was to frustrate the 1st Respondent recover what was due to it.

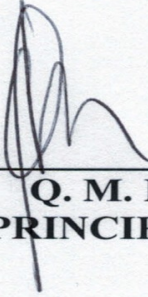
[25] I agree with the 1st Respondent that there is no urgency. The Applicant has failed to explain why it has taken over eight (8) months to institute these proceedings pertaining to the auction sale. In view of my order below there will be no need to address the issue of non-joinder.

[26] In view of the foregoing I order as follows:

- (a) The application is hereby refused and accordingly dismissed.
- (b) The Applicant is ordered to pay the costs of the application. These costs are to exclude the costs of the three advertisements in respect of the auction sale.

MBABANE

Crim. Case



Q. M. MABUZA
PRINCIPAL JUDGE

For the Applicant : Ms. Z. Ndlovu
For the 1st and 2nd Respondents : Mr. H. Mdladla