

IN THE HIGH COURT OF ESWATINI
JUDGMENT

CASE NO: 1156/2021

HELD IN MBABANE

IN THE MATTER BETWEEN

MANDZISA LABHO GAMA

Applicant

AND

THEMBA M. NDLANGAMANDLA

1st Respondent

NJABULISO P. NDLANGAMANDLA

2nd Respondent

MCINIISELI ZWANE N.O

3rd Respondent

IN RE-

THEMBA M. NDLANGAMANDLA

1st Plaintiff

NJABULISO P. NDLANGAMANDLA

2nd Plaintiff

AND

LUNGILE ANGELINA GAMA

Defendant

NEUTRAL CITATION: **MANDZISA LABHO GAMA VS THEMBA M.
NDLANGAMANDLA & 2 OTHERS (1156/2021)
SZHC 141 – [07/07/2022]**

CORAM: **B W MAGAGULA J**

HEARD: **27/06/ 2022**

DELIVERED: **07/07/2022**

CIVIL LAW – Urgent application to interdict a Deputy Sheriff from taking into execution a truck registered in the name of the Applicant. The writ of execution depicts a Defendant who is not necessarily the Applicant before court. The 3rd Applicant is a Deputy Sheriff appointed for the Manzini Region, yet he sanctioned the execution of a writ in Pigg's Peak, which is in the Hhohho Region.

Held - Interdict granted. The 3rd Respondent not authorized by the Sheriff to execute a writ of execution outside his mandated region.

Held further, the 3rd Respondent and those acting on his instructions acted unlawfully by attaching the Applicant's truck and trailer on the strength of a writ issued against the Defendant. Application granted with costs.

JUDGMENT

INTRODUCTION

- [1] I heard this matter on 27th June 2022. After hearing the arguments of both parties it became clear that there was no acceptable defence to the Application. The Applicant had made her case for the order sought in the notice of motion. I accordingly granted the orders *ex-tempora*. I now furnish my reasons.

BACK-GROUND FACTS

- [2] The matter pertains to an urgent interlocutory application, where the Applicant sought the prayers as fully set out in the notice of motion. During the first hearing of the matter, the parties recorded a consent order, for the

release of part of the attached goods (the trailer) to the Applicant. The truck tractor (hoarse) which pulled the trailer remained under attachment in possession of the 3rd Respondent (the Deputy Sheriff).

- [3] The crux of the matter is that the 3rd Respondent in the process of executing a writ of execution, attached a truck and a trailer which were found in the possession of Applicant's driver one Bernard Dlamini. The registration document of the truck, reflects that the owner is the Applicant.
- [4] The civil judgement which was being enforced is against the Defendant in the main matter. The truck was not in the possession of the Defendant. The truck was at Rocklands Timber Company. It was there to load timber on behalf of the Applicant's customer¹. All the Respondents are opposed to the Application. Answering affidavits and confirmatory affidavits have been filed in support thereof.
- [5] The Respondents main grounds of opposition are the following;
- 5.1 The registration document is only a prima facie proof of ownership not a conclusive proof. In support of this argument the case of **Jerry Dumsane Nkambule Vs Nelson Lokotfwako No. and two others (235/2011) 2013 SZHC 222** is cited.
- 5.2 The Defendant transferred ownership to the Applicant solely to evade her obligations (payment of the judgment debt) to the Respondents (the Plaintiffs in the main matter).

¹ See paragraph 15, 16 and 17 of the Applicant's founding affidavit.

5.3 The Applicant is only 18 years of age and is the biological daughter of the Defendant. As such, she has not demonstrated how she acquired ownership of the vehicle.

5.4 The 3rd Respondent must be condoned for executing the writ of execution outside his mandated region of Manzini. The grounds that are put forward for the condonation are that, the original Deputy Sheriff (for Lubombo Region) that was initially tasked to execute the writ, had failed to locate the truck within his region. It was therefore necessary that it be attached immediately, after it was located at Peak Timbers, the Hhohho region.

[6] This being an interlocutory application, the Plaintiffs in the main matter are Themba Ndlangamandla and Njabuliso P. Ndlangamandla. The Defendant is Lungile Angelina Gama.

[7] The judgment which the 3rd Respondent was enforcing was granted against the Defendant on the 18th November 2021

[8] The Plaintiffs had instituted action proceedings against the Defendant, seeking the following orders;

8.1 Cancelling the verbal agreement interdicts between the parties year two.

8.2 Directing the Defendant to pay the Plaintiff's and their Attorneys E533 485.25 (Five Hundred and Thirty Three Thousand Four hundred and Eighty Five Emalangenani Twenty Five Cent).

8.3 Directing the Defendant to pay interest on the said sum of E533 485.25 at the rate of 9% per annum on the date of issue of sums to date of final judgment.

8.4 Cost of suits against the Defendant.

- [9] The Plaintiffs were granted default judgment, as the Defendant had not defended the summons.
- [10] The parties subsequently entered into a payment arrangement. Subsequent to the Defendant negotiating payment terms. An agreement was reached between the parties whereby that the Defendant was to pay E100 000 Emalangeni as down payment. It was further part of the settlement agreement that she would then pay E10 000 monthly and E50 000 on the third month. After negotiations, the Defendant indeed paid the E100 000 in December 2021 and E10 000 Emalangeni in January 2022. She then reneged to make further payments.
- [11] Subsequent thereto, the current 1st and 2nd Respondents, who are the Plaintiff's in the main matter, then instructed a Deputy Sheriff for Lubombo to execute their judgment. The writ of execution was given to one Mr Bongane Msane, a Deputy Sheriff for Lubombo Region. It appears he was unable to execute the writ, as the truck which according to the Respondents was the only asset they knew to be owned by the Defendant, could not be located within his region. This was until the month of May when the Respondents received information that the truck was hidden somewhere in Manzini. It is then that the 3rd Respondent was roped in and instructed to execute the writ in the Manzini Region.
- [12] As it would appear from the facts, the 3rd Respondent did not find the truck in the Manzini Region where he is appointed as Deputy Sheriff. He then in turn instructed two other people, whom he refers to as 'his lawful agents', to execute the writ at Rocklands Timber Company. This place is in the Hhohho Region, where 3rd Respondent is not Deputy Sheriff. The truck and it's trailer was subsequently attached, seized and removed by the said "*lawfully*

appointed agents". At that time it was in the possession of the Applicant's driver Barnard Dlamini.

THE LAW APPLICABLE

- [13] It is common cause that the 3rd Respondent is a Deputy Sheriff of this court. His area of jurisdiction is the Manzini Region. The writ which he was instructed to execute is marked annexure "4" and attached to the urgent application. It was issued in terms of Rule 45 (1) of the Rules of court. The Rule states as follows;

45. (1) The party in whose favour any judgment of the court has been pronounced may at his own risk, sue out of the office of the Registrar one or more writs for execution thereof as near as may be in accordance with Form 20 of the First Schedule:

Provided that except where by judgment of the court immovable property has been specially declared executable, no such process shall issue against the immovable property of any person until a return has been made of any process which may have been issued against his movable property, and the Registrar perceives therefrom that such person has not sufficient movable property to satisfy the writ.

- [14] In **Sedibe and Another V United Building Society and Another, 1993 (3) SA 671 TPD at 676 – B, Eloff JP** held,

"...performing his functions, the messenger or Sheriff does not act as the agent of anybody but as an executive of the law".

- [15] In the matter of **Phila Gamedze and two others Vs Nozipho Dlamini Civil Appeal No 99/2016, His Lordship Annandale JA** exposed the position as follows;

The first appellant is a messenger of court who was tasked to attach moveable assets belonging to a judgment debtor. In so doing, he takes

a car which he finds with the debtor, is told that the car belongs to another person, which other person has *prima facie* real ownership – even though he still wants to “investigate” it a year afterwards.

Where a messenger (or Sheriff) so acts, he does so at his own risk and must answer to the true owner for any loss suffered. It is no defence that he believed the attachment to be lawful as consciousness on his part of the wrongful character of his act is not a requirement for liability (Minister of Justice V Hofmeyr 1993 (3) SA 131 (A) at 154 H – J; Ramsay V Minister van Polisie en Andere 1981 (4) SA 802 (A) at 818 E – 819C).

ANALYSIS AND CONCLUSION

- [16] The writ is clearly directed to the Deputy Sheriff or his lawful Deputy Sheriff for the District of Lubombo. It is not addressed to the 3rd Respondent who is the Deputy Sheriff for the Manzini Region.
- [17] In the answering and confirmatory affidavits before court, it has not been denied that 3rd Respondent is not the Deputy Sheriff for the Lubombo nor the Hhohho District. Therefore, it follows that the 3rd Respondent is lawfully permitted to execute a court process within his region, being Manzini. The 3rd Respondent, not being a Deputy Sheriff for the Lubombo Region can definitely not have the authority to execute a writ anywhere else. Even when executing a court process within his region, a court process should issue directed to him in his capacity as the Deputy Sheriff for Manzini. In the matter at hand, not only the 3rd Respondent was instructed to execute a process outside of his area of appointment. He also used a writ issued to a Deputy Sheriff for Lubombo.

- [18] It appears from the answering affidavit filed by the Respondents that they instructed the 3rd Respondent on the 13th June 2022, after they had been made aware that the truck would be around Pigg's Peak. Apparently it was scheduled to load and leave for South Africa that day. According to the 1st and 2nd Respondents, the 3rd Respondent advised them that he will not be available to attend to the attachment himself. He then advised that he would instruct his 'lawful agent' to attend to the execution². The lawful agents are Mr. Tsabedze and Mr. Dlamini who subsequently attended to the attachment on the night of 13th June 2022.
- [19] It does not appear on the answering affidavit why a lawfully appointed Deputy Sheriff for the Hhohho Region was not instructed to execute the writ. It is also not explained why a new writ directed to a Deputy Sheriff for Hhohho was not issued. Instead, a writ issued and directed to a Lubombo Deputy Sheriff was used by 'lawful agents' of a Manzini Deputy Sheriff.
- [20] The Sheriff is an independent officer of the law who cannot be seen to take sides. He does not act as an agent of the Attorney who gives the warrant to him nor for a party in whose favour execution is to take place. (**See Phila Gamedze and 2 Others Vs Nozipho Dlamini Civil Appeal Case No. 99/2016**). It is my considered view that the 3rd Respondent had no obligation to have gone over and beyond his area of jurisdiction to execute a writ. It is even worse that the goods which he sought to attach did not even belong to the Defendant.

² This in effect means the 3rd Respondent delegated the powers which were delegated to him by the Sheriff (Registrar) to other people. It is my view that he had no power to do so. Having assistants physically with you as a Deputy Sheriff is different train transferring your responsibilities to other persons in your absence.

[21] In the same judgment of **Phila Gamedze** ³, at paragraph 14 the Learned Justice of the Supreme Court stated as follows;

*It is no defence that the Deputy Sheriff believed the attachment to be lawful as consciousness on his part or the wrongful character of his act is not a requirement for liability.*⁴

[22] The other perplexing dimension that is evident in this matter is that, the writ of execution clearly identifies the Defendant as Lungile Angelina Gama. The registration document of the truck, which forms part of the documents before court, marked "annexure 1" specify the details of the owner of the truck to be one Mandzisa Labho Gama. This happens to be the Applicant before court.

[23] The writ of execution, which is "annexure 4" states the following clearly and unequivocally;

"Sheriff or his lawful Deputy for the District of Lubombo – You are hereby directed to attach and take into execution the movable goods of Lungile Angelina Gama. The above named Defendant, an adult Liswati female whose full and further particulars are to the Plaintiff unknown, residing at Malindza District of Lubombo and of same cause to be realise by public auction a sum of E533 485.25".

[24] The Deputy Sheriff for Lubombo, who is not the 3rd Respondent, had been authorized by a process of this court to attach and take into execution the movable goods of Lungile Angelina Gama. Not the movable goods of the Applicant before court, who is Mandzisa Gama.

³ Supra

⁴ See further Minister of Justice Vs Hofmey 1993 (3) (131) (a) at 154 South Africa H - J

- [25] It is my observation that there are a litany of errors that were committed by the 3rd Respondent in this matter. First, he is not the Deputy Sheriff for Lubombo. Second he had no power to delegate the alleged 'lawful agents' whatever that means, to execute a writ outside his authorized region, where he himself is not authorized to be a Deputy Sheriff. Third, the execution of the writ was effected against movable goods that did not belong to the Defendant mentioned in the writ of execution itself. Neither were there goods in the possession of the Defendant mentioned in the writ.
- [26] It was argued strenuously by the Respondents that the motor vehicle registration certificate is a *prima facie* proof of ownership. In as much as this legal principle is correct, the person who is alleging that he is the true and authentic owner of the goods other than the person reflected as the owner in the registration document, has the onus of demonstrating that he is the true owner of the motor vehicle. That person has not done so in *casu*, and is not known.
- [27] In buttressing their argument, the Respondents have cited the case of **Jerry Dumsane Nxumalo Vs Nelson Lokotfwako N.O and 2 others (235/2012) 2013 SZHC 222.**
- [28] The principle as stated in the above stated decision, is distinguishable from the facts in the matter at hand. In the **Jerry Dumsane Nxumalo decision**, the issue pertained to a bank that had financed the motor vehicle in question. Infact, there was a lease agreement between the bank and the debtor who was reflected as the owner in the registration document. The conditions in the lease agreement stipulated that the lessee who was reflected as the owner in the registration document, would not acquire full ownership of the vehicle until

the loan had been paid in full. It therefore makes sense that the true owner of the motor vehicle in question, was the bank. This is not the case in the matter at hand. During the arguments, the court invited the Respondents counsel to furnish proof of the existence of another true owner of the truck other than the Applicant. He was unable to do so.

[29] The Respondents also argued that the Applicant had not demonstrated how she acquired ownership of the truck from the Defendant, as she had not provided supporting documents. The argument was further laced with the allegation that the Applicant youthful age of 18 years makes her unlikely to have the financial means of making such an acquisition.

[30] There is no law preventing an 18 year old from owning a vehicle. To speculate the financial means of a person simple because she is 18 years old is unfortunate to say the least. The biasness towards the youth to succeed as entrepreneurs is not supported by facts and should not be accepted as such. The duty is on the party who seeks to execute the judgment to ensure that the goods sought to be attached belong to the Defendant.

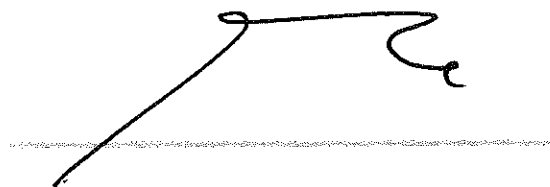
[31] In the matter at hand, the truck simple does not belong to the Defendant. It belongs to the Applicant. The Applicant has produced proof that she is the owner of the truck. In the absence of any other compelling evidence, the court has no reason not to believe that the Applicant is the owner of the truck. If she is the owner of the truck, then there is no legal basis for the Respondents to attach her vehicle in circumstances where she is not a party to a civil judgment that is sought to be enforced.

[30] In the matter of **Wicks and another Vs Amalgamated Agencies Ltd 1920 AD 218 page 226 deVilliers AJA** referring to the position of a messenger in that case stated the following;

“He is therefore not entitled to attach the property of another party. If he does so, he acts outside the limits of his functions and he is liable.....”.

[31] I cannot agree more with the sentiments expounded by His Lordship in the judgment cited above. The 3rd Respondent acted outside the limits of his jurisdiction and powers when causing an attachment of a property belonging to the Applicant who is not the Defendant. The instrument of attachment which he used to further delegate his powers, is also flawed. Annexure “4” only sanctioned a Deputy for Lubombo to effect the attachment, in the Lubombo Region not in the Hhohho Region.

The foregoing reasons form the basis of the *ex-tempore* order I granted on the 27th June 2022.

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BW MAGAGULA J

JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicants: Mr. M. Nsibande - Mongi Nsibande & Partners

For the Respondents: Mr. S. Kunene - KN Simelane Attorneys