IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO. 438/2020

In the matter between:

JOYCE MALGAS	**Applicant**
And	
ZANELE MABUZA	**1st Respondent**
THABISO HLANZE N.O.	**2nd Respondent**

In re:

ZANELE MABUZA	**Plaintiff**
And	
JOYCE MALGAS	**Defendant**

Neutral citation: *Joyce Malgas v Zanele Mabuza & Another In re: Zanele Mabuza v Joyce Malgas* (438/2020)) *[2024] SZHC 149* (02 July *2024)*

Coram : **T. Dlamini J**

Delivered : 02 July 2024

[1] ***Civil practice – Urgency requirements – Inordinate delay in bringing application is an abuse of the urgency procedure***

[2] ***Civil Procedure – Writ of execution – Formalities for attachment of immovable property considered***

Summary: ***Before court is an application in which the applicant seeks an order setting aside the attachment of her immovable property on the allegation that the attachment is irregular and not in compliance with Rule 45 (3) of the Rules of this court. The applicant also seeks an order staying the sale of the property as advertised by the deputy sheriff, pending the final determination of this application. The applicant further seeks an order setting aside a bill of costs that was taxed on 01 December 2022 on the allegation that the bill was taxed in the applicant's absence, and that the parties be directed to re-tax the bill. The application is vigorously opposed by the first respondent, and the averments made by the applicant are strongly denied.***

Held: ***That on the preponderance of the evidence before court, the applicant failed to make a case for the relief sought. The application is dismissed with costs.***

JUDGMENT

T. Dlamini J

[1] The applicant approached this court under a certificate of urgency and seeks a *rule nisi* in terms of, *inter alia*, the following prayers:

2. Setting aside the attachment of her immovable property described as Portion 800 of Farm No.2, Fonteyn Road, Mbabane, held by Deed of Transfer No. 437/1993 which has been advertised for sale by auction on 26th May 2023 on the basis that the attachment is irregular and contrary to the rules of this Honourable Court.

3. Staying the notice of sale which has been advertised by the First and Second Respondents under High Court case number 438/2022 pending the final determination of this matter.

4. That the above prayers operate with immediate effect pending the finalization of this matter.

5. That the Bill of Costs taxed on 1st December 2022 be set aside on the basis of violating the *Audi Alteram Partem* principle and the parties be directed to re-tax the bill of costs with both parties present.

6. That the Respondents be called upon to show cause why the above prayers should not be made final on the return date as directed by the court.

7. Costs of suit.

[2] The *rule* sought was not issued by the court on the first court day as the respondents' attorney filed the respondents' answering affidavit on that very same morning. The parties were only given timelines for filing further papers and the auction of the property was voluntarily stayed by the attorneys as the matter was already pending before this court.

[3] The applicant described herself as an adult female of Fonteyn, Mbabane, in the Hhohho District. She owns immovable property described as *Portion 800 of farm No.2, Fonteyn Road, Mbabane,* held under *Deed of Transfer No.437/1993.* As background information, judgment was granted against the applicant on 29 September 2022 by this court following a lawsuit instituted by the first respondent for damages she sustained after she was bitten by dogs belonging to the applicant. The judgment was granted in the sum of E55, 000-00 for pain and suffering, E3, 650-00 for damage caused to her clothes, interest at the rate of 9% per annum calculated from the date judgment to date of payment, and costs of suit.

[4] The applicant states that pursuant to the judgment, she made an offer through her attorneys to liquidate the amount owing in monthly instalments of one thousand emalangeni (E1000-00), with effect from 31 October 2022. This monthly instalment was to be in respect of the capital amount, taxed costs, and interest. The applicant thereafter made a down payment of five thousand emalangeni (E5000-00). The offer, however, was rejected and the parties continued to negotiate by exchanging letters through their attorneys.

[5] While the negotiations were still on-going, the first respondent set the matter down for taxation of the bill of costs, according to the applicant. The bill was taxed on 01 December 2022 and allowed at the sum of E95,180-15. The applicant states that the bill of costs was taxed in her absence, an allegation that is vehemently denied by the first respondent. Following the taxation, the applicant avers that she became aware that the amount owing escalated to the sum of E153,830-15. That is when she then engaged the services of her new attorneys *S.V. Mdladla & Associates*. She avers that she requested her new attorneys to set the matter down for re-taxation as the bill had been taxed in her absence. Indeed the matter was set down for re-taxation on 10 March 2023 but the first respondent's attorneys did not make appearance despite having agreed to the re-taxation, contends the applicant. The contention is however, strongly denied by the first respondent

[6] The applicant states that on 12 April 2023, while perusing the *Times of Eswatini* newspaper, she came across a *Notice of Sale* of her immovable property. The sale was advertised for 28 April 2023. She contends in her founding affidavit that the execution of her immovable property violates *Rule 45 (3)* of the *High Court Rules* which provides that movables should be first attached before immovable property. She also contends that the reserve price set for the property is below its fair market value. She further states in paragraph 30.1 of her replying affidavit that "*the Second Respondent did not serve me or any person at my home with the Writ of Attachment of my immovable property.*" It is for these reasons that the applicant prays for an order setting aside the attachment of the immovable property as she contends that it is irregular and contrary to the rules of this court. It is her further contention that she has

movables in her property that ought to have been attached and can satisfy the judgment debt.

[7] The applicant also states that she thereafter made an offer to settle the judgment debt in monthly instalments of E2000-00 as this figure was all that she could afford at that time. While waiting for a response to this new offer, they were informed by the second respondent that the auction sale scheduled for 28 April 2023 had proceeded. However, the applicant heard that it was not successful and that a new advertisement of the auction sale was published on 19 May 2023 and to take place on 26 May 2023. It was then that the applicant instituted these proceedings, according to paragraph 18 of the founding affidavit.

[8] The respondents dispute all the allegations made by the applicant. They contend that the bill of costs was taxed in the presence of both the applicant and the first respondent's attorney. They also contend that the applicant was served with the writ of execution, in terms of which the immovable property was attached. They further contend that there was never an agreement between the attorneys for both parties that the auction sale of the immovable property will not proceed. Furthermore, they contend that the reserve price was based on a valuation of the property that was obtained from the Mbabane City Council, and that the applicant became aware of the reserve price on the day the notice of sale was published. These are the disputed merits of the case and the court is therefore called upon to determine them.

[9] Two points *in limine* were raised by the respondents before answering the merits of the case. The first point is that the matter is not urgent, and that the alleged urgency is self-created by the applicant. The second point is that the applicant's claim is barred by the principle of *peremption*, because the applicant

partly attended to the payment of the debt. This conduct, contended the respondents, constitutes an acknowledgement of the debt. I will first determine, hereunder, the points raised *in limine*, and then determine the merits.

[10] On urgency, *Rule 6 (25) (b)* of the *High Court Rules* provides that "*In every affidavit or petition filed in support of an application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.*"

[11] When applying the above rule, ***His Lordship Mamba J.*** (as he then was), stated in ***Frederick Mapanzene v Standard Bank Swaziland Limited In re: Standard Bank Swaziland Limited v Kapson Investments (Pty) Ltd & Others, High Court Case No.415/2015*** *(unreported)* that a litigant is:-

> *"not ... entitled to wait as the Applicant has done before taking up his complaint with the Court. A litigant is not expected to wait for ages and then take up his matter with the Court at the eleventh hour ... Bringing matters on an urgent basis where such urgency is unwarranted not only cause prejudice to the other party but to the roll of the Court and the administration of justice in general. Where the Court has to put aside, or on hold, its normal business for the day in order to attend to matters brought on a certificate of urgency, the grounds for such urgency must be clearly and adequately explained and justified. A litigant who waits inordinately and only goes to Court on the last minute does so at his own peril.*

[12] In the appeal case of ***Frederick Mapanzene v Standard Bank Swaziland Limited (74/2016) [2017] SZSC 13 (15 May 2017)***, the Supreme Court reiterated that there is a need:-

> *"to cater for facilitated and speedy access to the court where the delays of the law might cause harm to a litigant and effectively frustrate his chances of obtaining a just resolution of his dispute. Such cases are however, clearly exceptional and our courts must be on their guard to protect parties against the abuse of these special powers. Our rules of court have been framed in order to ensure that the legal process will be orderly and that parties are given a fair opportunity to prepare and present their case.*

[13] My brother ***Maseko J.*** expressed a view that I concur with. He stated in the case of ***Bhutana Samuel Dlamini v The Clerk of Parliament and 10 Others (1610/2021) [2021] SZHC 152 (14 September 2021)*** that "*...urgency is also gauged mostly from the date of the occurrence of the incident complained of.*" (paragraph 26).

[14] The applicant deposed in paragraph [14] of the founding affidavit that on the 12th April 2023, while perusing the newspaper, she came across a *Notice of Sale* of her property advertised in the *Times of Eswatini* newspaper. A copy of the notice of sale is attached to the correspondence which the applicant says she requested her attorneys to direct to first respondent's attorneys and is dated 12 April 2013 (annexure J5). The sale was advertised to take place on 28 April 2023. On the evidence placed before court, the sale was not concluded on the 28 April 2024 but was on 19 May 2023 re-advertised for 26 May 2023. On 24 May 2023 the applicant filed this application under a certificate of urgency for enrolment at 09:30 hours on the 25 May 2023.

[15] The first respondent deposed in paragraph 3.1.5 of her answering affidavit that her attorneys were served with the urgent application at 16:16 hours on 24 May 2023. She also avers that this was deliberately done in order for the applicant to obtain the interim order without her being afforded an opportunity to be heard.

[16] There is no satisfactory reason, in my view and conclusion, why the applicant did nothing to stop the advertised auction sale of the property from 12 April 2023 when she first saw her property being advertised for sale on 28 April 2023, until it was 25 May 2023 when the sale was re-advertised to take place on the following day of 26 May 2023. Again, when one looks at the certificate of

urgency to which the Notice of Motion and affidavit supporting the notice of motion are attached, the certificate was signed on 12 May 2023. In the certificate, the applicant's attorney certify that he read the applicant's founding affidavit together with the notice of motion and came to the conclusion that the matter is one of urgency, and states the reasons why he so concludes. There is however no explanation why the application was not filed with the court on 12 May 2023 or the next day of 13 May 2023.

[17] It therefore is my finding and conclusion that the application fails the urgency test and the point on lack of urgency is upheld. The matter ought not, therefore, to be heard under the roll of urgent matters. The application and prayer for the rules and procedures of this court to be dispensed with accordingly fails.

[18] The second point raised *in limine* is that the principle of *peremption* prohibits the applicant from challenging her indebtedness because she has partly attended to its payment. The part payment, it was pleaded, is proof that the applicant acknowledges the debt. During arguments, the parties did not make any submissions on this point, and did not address it even in their Heads of Arguments. I accordingly consider it to be a point that was abandoned. In the paragraph below, I make *obiter* on this point.

[19] According to the ***Black's Law Dictionary, 10th ed.***, the principle of *peremption* bars the action itself while prescription simply bars a specific remedy. *In casu*, it bars the applicant from denying her indebtedness. In my view, the fifteen thousand emalangeni (E15, 000-00) already paid by the applicant towards the debt owed, cannot be construed as an acknowledgement of the full amount claimed from her by the first respondent. The debt being claimed is inclusive of the judgment debt of E58, 650-00 which the court granted in the action

proceedings that were instituted by the first respondent against the applicant. This judgment amount is not denied, nor is it challenged, but is on the other hand acknowledged by the applicant as owing to the first respondent. The point *in limine* on *prescription* would therefore not have been upheld but dismissed.

[20] On the merits, I first consider the dispute concerning the issue of taxation of the bill of costs. The applicant avers that the bill was taxed in her absence, while on the other hand, the first respondent avers that the bill was taxed in the presence of both attorneys for the applicant and the first respondent.

[21] The applicant states in paragraph [11] of the founding affidavit that whilst negotiations were ongoing concerning payment of the judgment debt against herself, the matter was set down for taxation of the bill of costs. The taxation took place on 01 December 2022 and the bill was allowed at E95, 180-00, an amount that is higher than the principal debt. The applicant also states that the taxation took place in the absence of her attorneys, and that amounts that were to be objected to were allowed to stand. A request to have the bill re-taxed was unsuccessful as it was refused by the respondents, according to the applicant.

[22] In her answering affidavit, the first respondent states that the bill was taxed in the presence of both attorneys for the applicant and herself. There is also a confirmatory affidavit of Wandile Maseko who is the attorney for the first respondent. Mr Maseko states on oath that he personally attended the taxation on 01 December 2022. He also states that attorney N.E. Gwiji was in attendance and represented the applicant. The taxation was done after attorney N.E. Gwiji had been served with the bill of costs, as well as with a notice of set down for taxation.

[23] It is common cause that attorney N.E. Gwiji was the attorney of record for the applicant. The taxation was initially to be held on 30 November 2022 but was moved to 01 December 2022. The bill of costs, and the notice of taxation scheduled for 30 November 2022, are both acknowledged to have been received by the applicant's attorneys of record, N.E. Gwiji. This acknowledgement was endorsed on the court processes on 23 November 2022 at 10:15 hours. Another notice of set down for taxation scheduled for 01 December 2022 and dated 30 November 2022 is acknowledged to have been received by the applicant's attorneys of record, N.E. Gwiji, on 30 November 2022 at 11:55 hours.

[24] I therefore find no merit, and no good faith on the part of the applicant, on the allegation that the bill of costs was taxed in the absence of the applicant's attorneys. This denial, in my view, is an afterthought, made after realising that she is unhappy with her previous attorney's services. This is evident in paragraph 11.1 of her founding affidavit where the applicant states that "*the ineptitude of my previous attorneys cannot be imputed on myself.*"

[25] The above view is in line with the contents of a letter addressed to the Registrar of this court by the applicant's former attorney, N.E. Gwiji, dated 21 February 2023 (annexure Z4 of answering affidavit). The contents thereof are quoted hereunder:

> *The above matter refers, with particular reference to the anticipated re-taxing of the bill of costs, at the instance of the Defendant.*
>
> *This serves as confirmation that, I have absolutely no objection to the re-taxing of the bill being conducted by whoever has since been mandated to act on behalf by the Defendant.*
>
> *This position shall remain the same even if the Defendant was to opt for filing proceedings for review of the taxation without further reference to our office.*

[26] From the first paragraph of the letter, the implication, in my considered view, is that the contemplated re-taxing of the bill is not on account of the non-presence of the applicant's attorney at the initial taxation, but is solely pursued at the instance of the Defendant (the applicant herein). The second paragraph, in my opinion, makes emphasis of the fact that the applicant's previous attorney (N.E. Gwiji) has no objection if the applicant is unsatisfied with the taxed bill and wants other attorneys to re-tax the already taxed bill. The third paragraph makes emphasis of the fact that even if the applicant would subject the taxed bill of costs to review, the previous attorneys of record will have no problem with that.

[27] On the basis of the above observations, I reject the allegation that the bill of costs was taxed in the absence of the applicant or her attorneys. It is my finding of fact that the bill was taxed in the presence of the applicant's former attorney, N.E. Gwiji. The prayer for the taxed bill to be set aside and that it be re-taxed is refused and dismissed.

[28] The applicant also avers that the sale of her immovable property did not follow the formalities provided for under *Rules 45(3)* of the Rules of this Court and the auction sale is therefore irregular and ought to be set aside. She states in paragraph 14 of her founding affidavit that:-

> *"On or about the 12th April 2023, while perusing the newspaper, I came across a Notice of Sale of my immovable property advertised in the Times of Eswatini newspaper. ...It is apposite to mention that the Second Respondent had never at any material time sought to execute on my movable property in line with Rule 45(3) of the High Court Rules which demands that the Second Respondent should search for movable property of a Judgment (Debtor) in order to satisfy a judgment debt."*

[29] *Rule 45(3)* requires the Deputy Sheriff to first attach movable and disposable goods of a Judgment Debtor as may be sufficient to satisfy the judgment debt. The applicant's complaint, *in casu*, is that the Deputy Sheriff attached her immovable property without first executing on her movable and disposable goods. *Rule 45(3)* is quoted hereunder:-

> *Whenever by process of the court the Deputy Sheriff is commanded to levy and raise any sum of money upon the goods of a person, he shall forthwith himself or by his assistant proceed to the dwelling house or place of employment or business of such person, unless the judgment creditor gives different instructions regarding the situation of the assets to be attached, and there –*
>
> *(a) demand satisfaction of the writ and, failing satisfaction;*
> *(b) demand that so much movable and disposable property be pointed out as he may deem sufficient to satisfy the writ, and failing such pointing out;*
> *(c) search for such property.*

[30] The first respondent, on the other hand, pleaded that the applicant was first served with the court order and writ of execution against movables. No property to attach was found at the applicant's place of residence despite a diligent search. The first respondent also pleaded that the applicant informed the Deputy Sheriff that she does not have movable property. A confirmatory affidavit of the Deputy Sheriff (second respondent herein) is attached to the answering affidavit and it confirms that no movable property to attach was found at the applicant's place of residence despite a diligent search. The affidavit also states that the applicant informed the Deputy Sheriff that "*she does not have movable property*". A *Nulla Bona* was prepared and filed, and is attached to the answering affidavit as annexure Z5. It states that on the 08 December 2022 at 16:00 hours the second respondent (Deputy Sheriff) attempted to execute the writ of execution at the defendant's place of residence but was unable to do so as he could not find valuable movable goods to attach to satisfy the judgment

debt. A writ of execution against her immovable property was thereafter served upon the applicant on 27 January 2023, according to the Deputy Sheriff.

[31] A return of service in respect of the writ of attachment of the immovable property was prepared and filed, and is attached as annexure Z1. It reflects that it was served upon the applicant personally at her place of employment, *viz.*, *S.V. Mdladla & Associates*, on the 27 January 2023 at 14:00 hours. Another writ of execution of the immovable property was served upon the Registrar of Deeds on the same day, according to the attached returns of service.

[32] It is my finding that the evidence placed before court conclusively prove that the applicant became aware of the *Nulla Bona* notice and the writ of execution against her immovable property as early as January 2023. She did nothing to challenge these processes until about four months later when it was time for an auction sale to be conducted.

[33] Generally, a return of service is conclusive as to the terms of the transaction which it is required by law to embody. The denials made by the applicant concerning the contents of these legal documents (writ of attachment and *nulla bona*) offend the *parol evidence rule,* and ought to be rejected because they would operate to effectively stultify the processes of the courts and open gates for legal practitioners to disregard court processes and later come to court to say that they were not served with them. The applicant's contention that the attachment of her immovable property is irregular and contrary to the rules of this court is rejected and dismissed.

[34] The applicant further contends that her immovable property is being sold below its fair commercial market value. The auction reserve price is set at E500, 000-00 and the applicant argues that the commercial market value of the property is

E926, 000-00. On the evidence placed before court, the respondents used an evaluation of the property made by the Municipal Council of Mbabane, and same is attached to annexure J7 annexed to the founding affidavit and is dated 22 February 2023. The property is valued at E413, 000-00 (where E192, 000-00 is the value of the land while E221, 000-00 is the value of the building).

[35] The applicant, on the other hand, relied on a valuation report made by *Range Assessors (Pty) Ltd* which shows that the value of the property is E926, 000-00. The report also shows that the evaluation date is 11 April 2023 and the date of inspection is 08 April 2023. I find it apposite to mention that the report further states that "*A verbal instruction for this valuation was received from Mr. M. Dlamini on the 8th April 2023.* According to the respondents' attorney, Mr. M. Dlamini is the same attorney who represents the applicant in these proceedings. It is apposite, in my opinion, to note that the 08 April 2023 is the date on which the auction sale of the immovable property was first advertised in the *Times of Eswatini* newspaper.

[36] The first respondent's submission and argument is that the valuation by *Range Assessors (Pty) Ltd* is recent and was procured by the applicant solely to challenge the impending sale of the property. The first respondent also submitted that the applicant became aware on the 08 April 2023 that the reserve price for the property was set at E500, 000-00 and that the auction sale would take place on 28 April 2023. The applicant, however, did nothing but decided to launch this application on 24 May 2023, way after the set date of the auction sale of 28 April 2023. I find this argument persuasive. In my opinion, this is an indicator of the applicant's lack of seriousness and good faith.

[37] The applicant submits in paragraph 4.3 of her heads of arguments that her attorneys instructed an evaluator to evaluate the property on 08 May 2023 in order to establish its commercial market value. Mr Bongani Simelane employed by *Range Assessors (Pty) Ltd* filed a confirmatory affidavit in which he confirms that he undertook the valuation of the property on 08 May 2023. He also states that "*the valuation report date of 8th April 2023 is an error*" and further stated that "*the evaluation of the property was undertaken on the 8th May 2023 pursuant to being instructed.*"

[38] I take note that in terms of paragraph 14 of the founding affidavit, the applicant became aware on the 12 April 2023 that an auction sale of her immovable property had been advertised in the *Times of Eswatini* and scheduled to take place on 28 April 2023. I also take note that she became aware that the reserve price was fixed at E500, 000-00 as the notice of sale reflected the reserve price as well. She did nothing about that until it was the 24 May 2023 when she launched these proceedings. I am alive to the fact that the sale was to thereafter proceed on 26 May 2023. I am therefore inclined to agree, and I agree, with the first respondent's submission and argument, that the valuation conducted at the instruction of the applicant was solely to challenge and frustrate the impending sale. There is no satisfactory reason advanced on why the valuation was not done immediately after the notice of sale and the reserve price were seen by the applicant on 12 April 2023.

[39] It is my view and conclusion that the date of 08 April 2023 reflected in the valuation report as the evaluation date of the property is not an error. I say so because this date is recorded twice and on different pages of the valuation report. It first appears in clause 1 of the report wherein an instruction is stated to have been received to do the valuation. Secondly, the date appears in clause

15 of the report wherein the 08 April 2023 reflects as the date of inspection. The evidence of Mr. Bongani Simelane stated in the confirmatory affidavit he deposed to has, in my view, a very high probability of being untruthful and supports, in my conclusion, the first respondent's submission that the valuation report procured by the applicant is solely meant to repel and frustrate the impending auction sale.

[40] In the case of ***Mciniseli Zwane N.O. and 2 Others v Mangaliso E. Sonto and 2 Others; consolidated with Mangaliso E. Sonto and Another v Standard Bank Swaziland Limited and 4 Others (1191/2022) [2022] SZHC 292 (16 December 2022)*** this court held that the first respondent is estopped from complaining about the price at which the property was auctioned because on the papers before court, the price was made known to him before the sale took place. As I have already made known my observations in the above paragraphs, there is no satisfactory reason why the applicant did not launch these proceedings immediately after 12 April 2023 when she saw her immovable property being advertised for sale at the reserve price that she now complains about.

[41] I wish to add that the valuation reports relied upon by the applicant and the first respondent do not assist the court in determining the correct market value of the property. For the future, an additional report from another valuation expert is to be furnished to support the valuation report relied upon.

[42] On the totality of the evidence and the considerations made in the paragraphs above, the application is meritless, an afterthought, and constitutes an abuse of the process of the court. The applicant ought to have long surrendered to the

Deputy Sheriff the movable and disposable goods that she now claims to possess if she was honest and acting in good faith.

[43] For the foregoing, the application is dismissed with costs.

T. DLAMINI
JUDGE OF THE HIGH COURT

For Applicant : Mr. M. Dlamini

For Respondents : Mr. W. Maseko