IN THE SUPREME COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

Civil Appeal No. 21/2007

In the matter between

THEMBI DLAMINI Appellant

And

WESBANK, A DIVISION OF FIRST

NATIONAL BANK OF SWAZILAND LIMITED Respondent

Coram: BANDA, CJ

STEYN, JA

ZIETSMAN, JA

For Appellant: Mr. T.L. Maseko

For Respondent: Mr. N.S. Manzini

JUDGMENT

BANDA, CJ

[1] This is an appeal against the judgment of Maphalala J sitting in the High Court at Mbabane, on 13th July 2007 in which he dismissed the appellant's application for leave to intervene in the proceedings between the respondent and one Nkosingiphile Msibi.

[2] The appellant has filed two grounds of appeal and are as follows:

> (I)The court *a quo* erred in law and in fact in holding that the appellant was not a party in the proceedings in as much as she was joined as such on 13th October, 2006.
> (2)The court *a quo* erred in law and in fact in not dismissing the respondent's claim with costs on the ground that the rule nisi which the respondent obtained *ex parte* on the 30th November 2005 had lapsed because it was not extended on the return date nor revived in terms of the Rules of Court and the respondent had not issued summons within seven (7) days as ordered by the court on the aforesaid date.

[3] It is important to give a background history to this case before we consider the submissions which counsel have made before us.

[4] The respondents who were the applicants in the court below had instituted proceedings under Civil Case No. 4394/05 against one Nkosingiphile Msibi for the attachment of a motor vehicle leased to him by the respondents in terms of a lease agreement which was concluded between them. The legal effect of the lease agreement was that the respondent retained the ownership of the vehicle while Msibi got possession and the right of use of the vehicle until the repayment instalments had been finalised. The

application for attachment of this motor vehicle was heard on the 30th November 2005 when the respondents successfully obtained a rule nisi granted by the High Court. The returnable date was the 9th December 2005 when Msibi was called upon to show cause why the rule nisi should not be made final. The Deputy Sheriff was authorised and directed to attach the motor vehicle concerned. The Return of Service filed by the Deputy Sheriff showed that when he went to attach the vehicle he discovered that it had changed ownership after it was sold by public auction on 21st December 2004 in pursuant to a writ of execution issued under Civil Case No. 3432/04. A public advertisement had been made on 14th December 2004 in the Observer Newspaper.

[5] When the respondents realised what had happened they made an application to the High Court seeking the following orders:-

(i) the consolidation of cases No. 4394/05 and 3432/04.

(ii) Setting aside the attachment and sale in execution of its motor vehicle on the basis that the attachment and sale in execution was irregular for non-compliance with the Rule 45(8) of the High Court Rules. Rule 45(8) is in the following terms:

" *45(8) Where under sub-rules (4) and (6):*

(a) any movable property is attached, the Deputy Sheriff shall where practicable and

> *subject to rule 59 sell it by public auction to the highest bidder after due advertisement by him in one or more newspapers and after the expiration of not less than fourteen days from the time of seizure thereof and not less than seven days after the first publication of such advertisement; or*
> *(b) perishables are attached, they may with the consent of the execution debtor or upon the execution creditor indemnifying the Deputy Sheriff against any claim for damages which may arise from such sales, be sold immediately by the Deputy Sheriff concerned in such manner as to him seems expedient.*"

[6] It is the contention of the respondents that the sale in execution did not comply with these provisions in that seven days had not elapsed from the date of the first and only publication which was on 14th December 2004 and the public auction sale took place on 21st December 2004. The respondents contend that only four court days were allowed to pass by the Deputy Sheriff.

[7] It is common cause that the order for consolidation of the two cases was granted. On second February 2006 the appellant filed a Notice to raise points of law. On 15th May 2006 appellant filed an application to be joined as a party in the matter and it would appear that an order for joinder

was granted on 17th July 2007. Although Mr. Maseko has submitted that this order was granted by Annandale J there is no transcript of the proceedings to support his submission.

[8] Mr. Maseko for the appellant has submitted that the learned judge in the court below erred in finding that the appellant had not been joined. He has suggested that Mr. Manzini misled the court in not confirming that the appellant had been joined as a party because the order for joinder was made in open court and that a Mr. Mofokeng appeared at the time. Mr. Maseko has, therefore, contended that it was not open to the court below to hold that the appellant was not a party.

[9] Mr. Maseko has conceded, though, that at the time the points of law were being taken the order for joinder had not been granted but, in our view, it would not have prevented the appellant to raise the points of law subsequently and after the order for joinder had been granted.

[10] As both counsel made their submissions to us it became clear that there is some dispute as what exactly happened before the judge in the court below. Mr. Maseko has raised a suggestion in his heads that although he had made elaborate submissions and had made substantial references to authorities, the learned judge in the court below does not appear to have considered them. Mr. Manzini, on the other hand, has submitted that the critical point for determination was whether the execution and sale of the vehicle to the appellant was valid. He submitted

that he had argued this point in the court below although Mr. Maseko disputed it. Mr. Manzini contends that the attachment and sale in execution was the basis of the ownership on which the appellant relied and that it was very important that the court below should have determined the issue. It is clear on the papers, that Mr. Manzini, in his application for consolidation had specifically sought an order to set aside the attachment and sale in execution on the basis that it was irregular for non compliance with Rule 45(8) of the High Court Rules. It appears to us that the learned judge in the court below did not direct his mind to this issue. His judgment only refers to the nonjoinder of the appellant. We have already observed that there is no transcript of the proceedings in the court below, and it is difficult for us to discover what were the issues which were raised and whether they were argued before the court below.

[11] We believe that before we deal with the other points raised in the appeal, that is whether the rule nisi elapsed or not, it is important that the matters in dispute which counsel have raised should be referred to the court below for determination. We consider the issue of attachment and sale in execution of the motor vehicle to the appellant to be very crucial in this matter. We are, therefore, referring the matter back to the court below so that the learned judge is availed the opportunity to address it. Both Counsel have no objection to this course of action which we now take. This matter is, therefore, referred to the court below to determine whether the attachment and sale in execution of

the respondent's vehicle was valid. The appeal succeeds with costs. The decision of the High Court upholding the point *in limine* is set aside. The matter is referred back to the High Court for the purposes set out above. The costs order is to include the certified costs of counsel.

Delivered in open court at Mbabane on this 15th..day of November, 2007

R.A. BANDA, CJ

I agree

J.H. STEYN, JA

I agree

N.W. ZIETSMAN, JA