

SUPREME COURT OF SWAZILAND

APPEAL CASE NO.23/07

In the matter between:

DAISY DLAMINI N.O.

APPELLANT

VS

SWAZILAND DEVELOPMENT & SAVINGS BANK

1st

RESPONDENT

DEPUTY SHERIFF -SffISELWENI DISTRICT

2nd

RESPONDENT

CORAM

BROWDEJA

TEBBUTTJA

RAMODIBEDIJA

FOR THE APPELLANT

MR. S.C.

DLAMINI

FOR THE RESPONDENTS

MR. Z.B.JELE

Browde JA

JUDGMENT

This appeal arises from an application in the High Court in which the present appellant's predecessor, as Executor dative of the Estate of

the late Stanley Vusumuzi Dlamini, sought an order setting aside a sale in execution which was conducted by the second respondent on the instructions of the first respondent. The sale in execution related to the Farm No.324 Mhlosheni South over which there had been registered, during the lifetime of the deceased, a mortgage bond in favour of the first respondent (the "bank") as security for a loan from the bank to the deceased. The estate of the deceased was unable to service the debt and the bank issued summons to have the farm declared executable. This order was duly granted and pursuant thereto the bank attempted to sell the property by public auction, after advertising the sale, by giving notice in terms of Rule 46(8Kb) of the High Court Rules.

The rule reads as follows:

"The execution creditor shall, after consultation with the sheriff, prepare a notice of sale containing a short description of the property, its situation and street number, if any, the time and place for the holding of the sale and the fact that the conditions may be inspected at the office of the Sheriff, and he shall furnish the sheriff with as many copies of the notice as the latter may require".

The notice given by the respondents of the sale of the farm which gave rise to the present case reads as follows:-

"NOTICE OF SALE

NOTICE is hereby given that pursuant to a writ of execution issued in the above matter, the undermentioned property will be sold by public auction by the Deputy Sheriff for the District of Shiselweni outside the Magistrates Building, Nhlanguano at 11.30am on Friday 4th May2001.

CERTAIN: FARMNO.324 at Mhlosheni, Swaziland;

MEASURING: 584, 8729 (five eight four comma eight seven

two nine) hectares; HELD: By the late Stanley Vusumuzi Dlamini under Deed of

Transfer No.668/1987; RESERVE PRICE: E195,000.00 (one hundred and ninety five thousand Emalangen)

The conditions of sale are available for inspection at the office of the Sheriff in the High Court Building, in Mbabane and at the offices of Robinson Bertram. Further particulars may be obtained from the undersigned.

Dated at Mbabane on this 30th day of March 2001.

T.S.MAZIYA

SHERIFF OF SWAZILAND"

In the founding affidavit to the application in the High Court the applicant alleged that the notice was defective in that-

- (i) It failed to mention that there were improvements on the property comprising the main farmhouse and other erections;
- (ii) The venue for the sale was incorrectly stated;
- (iii) The documents (which probably meant the Notice) were never served on the applicant.

It is now common cause that on the advertised date i.e. 4th May 2001 the auction was held at the venue mentioned in the notice (the complaint in (ii) above was denied by the respondents and the

appellant then accepted that the complaint was without foundation). It is further common cause that the bank purchased the properties for the reserve price of E195 00000 at the auction.

In stating that the sale was "a sham" because of the "shortcomings" set out above the appellant averred that "the attendance of the judgment creditor only at the venue is not what is contemplated by the Rules, and therefore any sale resulting therefrom is not a sale and cannot be allowed to stand". On that basis the appellant sought an order setting aside the sale.

The application was argued in the High Court before the learned Chief Justice who came to the conclusion that the application was devoid of any merit and therefore dismissed it with costs. It was against that order that this appeal was argued before us by Mr. S.C. Dlamini on behalf of the appellant. He submitted that on the authority of **ROSSITER AND ANOTHER v RAND NATAL TRUST COMPANY LIMITED AND OTHERS 1984(1) SA 381 (N)** what must be inserted in the advertisement of the sale in describing the property are the main characteristics of the property to be sold which might reasonably be expected to attract the interest of potential buyers. These include, so the submission went, an express

statement as to whether or not there are any improvements or buildings on the land in question.

In the application it was not contested that such buildings as there were on the farm were vandalized and dilapidated to such an extent that "*they do not constitute improvements and cannot be said to enhance the property*". That being so the submission that the structures might have attracted buyers and that they should have been mentioned in the notice is without foundation. It was pointed out by Mr. Jele, who appeared before us for the respondents, that under Rule 46(9)(b) the appellant had the right to apply for modification of the conditions of sale which, in terms of Rule 46(8) (e) are required to be published and to be exhibited in the Magistrates Court of the District, and which were so published and exhibited. This is clearly an answer to the argument advanced by Mr. S.C. Dlamini that the respondents had no right to fix the reserve price. This reserve price, on the appellant's own showing, was known and accepted as a valid condition of sale, from as far back as 1st December 2000 when, according to the appellant's founding affidavit, the following occurred, namely,

"On that day the highest bid received was for E195 000-00 being the reserve price for which the farm was sold to one Bernard Nxumalo in his capacity as Chairman Senabelo Paradise Farmers Association".

The appellant then went on to state in his affidavit-

"Unfortunately the Association later failed to comply with the conditions of sale, and as such 1st respondent moved an application in terms of Rule 46(12) [and] having obtained an order for cancellation of the sale, a new notice of sale by public auction was issued scheduled for 4th May 2001 in Nhlangano outside the Magistrates Court Building".

I have underlined "unfortunately" because it demonstrates not only that the appellant knew about the reserve price in the conditions of sale but that it was regarded as unfortunate that the farm was not sold at that price to the bidder in December 2000.

The learned Chief Justice set out fully the history of the dispute and the various abortive attempts to sell the property, and referred to the fact that on at least four of such occasions the appellant was aware of the conditions of the sale and made no effort to have them modified. Banda CJ went on to describe how indulgent the bank had been towards the estate which had no defence to its claim and that in his view it "*would be an abuse of judicial process to allow the applicant to use the judicial process in this manner*". I respectfully agree with that expression of disapproval in relation to the application, the ***bona fides*** of which are doubtful. I need only point out that in an attempt to suggest that the respondents were ***mala fide***, the founding affidavit of the appellant contained the following averment, namely,

***"At this auction (i.e. that complained of) there being no other bidders in attendance the 2nd respondent without any sanction of law, allowed the 1st respondent to bid and subsequently buy the property for the reserve price unilaterally fixed by itself ***

This clearly implies that the bank, with the assistance of the sheriff, took advantage of the absence of other bidders to "***snatch at a***

bargain". This was clearly not the case. After showing indulgence to the estate after the death of the deceased in 1996 until it bought the property itself in 2001 the bank had, according to the appellant's affidavits, not had the property registered in its name and had not done so even by 2002 when the application was launched.

The appeal is dismissed with costs.

Judge of Appeal

I AGREE

P.H. TEBBUTT Judge of Appeal

I AGREE

M.M. RAMODIBEDI Judge of Appeal

DELIVERED IN AN OPEN COURT ON THIS /[^]DAY OF NOVEMBER 2007.