

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE
39/09

CIVILAPPEAL CASE NO:

In the matter between:

Yonge	Name	Environmental	Action	Group
Appellant				

AND

Nedbank Swaziland Limited				1st
Respondent				

Sakhe	Ndzimandze	N.O.	(Deputy	Sheriff
2nd Respondent				

Hhohho Region)

SwazilandPaving (PTY) Ltd				3rd
Respondent				

Registrar of Deeds				4th
Respondent				

The Attorney General				5th
Respondent				

CORAM: FOXCROFT, JA

EBRAHIM, JA

DR. TWUM, JA

FOR APPELLANT

N. KADES SC

FOR RESPONDENT

ADV. FLYNN

JUDGEMENT

DR. S. TWUM J.A.

[1] This is an appeal from the judgment of Mamba J. dated 24th October, 2008. The judgment appealed from ended as follows:

“The applicant has simply failed to make out a case for urgency.”

As the application was filed on an urgent basis, that order seems appropriate. The difficulty is that counsel for the appellant informed this Court that arguments on the merits were fully argued before the court *a quo*. That notwithstanding, there was no judgment on the merits.

Background

[2] On 25th January 2008, Nedbank Swaziland Limited, (the 1st Respondent herein), obtained judgment against Yonge Nawe Environmental Action Group, (the judgment debtor) in the sum of E66,339.02 together with interest thereon at the rate of 17% per annum *a tempore morae* to date of final payment, together with costs.

[3] When the judgment debt and interest were not paid, the Bank caused to be issued out a writ of attachment – immovable property

- against the judgment debtor's property. This was served on the judgment debtor on or about 27th May 2008. The Notice of Sale in execution dated 27th May 2008 was advertised in the Swazi News on 28th June 2008 as well as in the Government Gazette on 4th July 2008. The advertisement mentioned that the sale was subject to a reserve price of E970, 000.00. It also mentioned that the property was a residential house turned into offices and that it had 4 offices, 2 en-suite, reception, kitchen and library. In the outbuilding there were one bedroom, kitchen and combined shower room and closet.

[4] The location of the property was given as LOT 274 Edwards Street, Mbabane, District of Hhohho.

[5] The judgment debtor tried to avoid the sale by a number of manouvres including a purported sale to a member of the Group for E800, 000.00 and the raising of a mortgage loan from a Building Society but these efforts came to nought and the property was sold by public auction on Friday, 8th August 2008 for E971, 000.00. The judgment debt was still not satisfied by that date.

[6] On 22nd August 2008, the judgment debtor filed a Notice of Motion praying the court, *inter alia*, for an order that the sale in execution of the property on 8th August, 2008, be declared invalid and set aside on the ground that it did not comply with Rule 46 (3), 46 (8) (b), 46 (8) (d) and 46 (13) of the High Court Rules.

[7] It is the judgment on this application which has been referred to in paragraph 1, above.

[8] The judgment debtor felt aggrieved by the judgment of the court *a quo* and appealed against it. An amended Notice of Appeal was filed on 18th November 2009. The grounds of appeal were:

- The learned Judge erred in finding that appellant had not complied with Rule 6 (25) (b) and should have found that the matter was indeed urgent particularly as first respondent did not oppose the interdict granted in terms of the urgent application on the 28th August 2008.
- Having regard to the fact that replying and answering affidavits had been filed and were comprehensively argued in the Court a quo the learned Judge erred in not giving a decision on the merits of the matter.
- The learned Judge erred in finding that first respondent had complied with the provisions of Rule 46 (3) and should have found that the mode of attachment pursued by second respondent did not comply with the provisions of this Rule and in the circumstances the attachment of the immovable property was not complete.
- The learned Judge erred in finding that the first and second respondents had complied with Rule 46 (8) (b) and should have found that:
 - (a) The notice of sale as prepared by second respondent's attorney did not comply with this Rule in that the situation of property did not appear in the aforesaid advertisement.
 - (b) The mere title deed description of the property did not comply with the provisions of this Rule.
- The learned Judge erred in not finding that the setting of a reserve price by first and second respondents for the sale of the property constituted a non-compliance with Rule 46 (13) and should have found that by the setting of such reserve price the first and second respondents failed to comply with the aforesaid Rule.

- The learned Judge erred in not finding that the non-compliance with each of the aforesaid Rules rendered the attachment and sale in execution both null and void and should have granted an order in terms of the Notice of Motion.

[9] Counsel for the parties filed respective Heads of Argument and the appeal was set down for hearing. This Court considered that in the special circumstances of this case particularly the statement in the Amended Notice of Appeal that the merits of the application were fully argued before the court *a quo*, the appeal on the merits should be heard.

1. Non - compliance with Rule 46 (3).

Under this, the appellant complained that the Deputy Sheriff did not comply with the sub-rule.

Counsel for the appellant conceded that it appeared that proper service of the writ of attachment was served. What he complained about was that the Deputy Sheriff who made the attachment did not notify the Sheriff as soon as it had been effected. He claimed in paragraph 8.1.1 of the Heads that this failure had been admitted by the respondents. In particular, he argued that the mere filing of returns of service in the court file did not constitute notice of such attachment to the Sheriff. He submitted that the non-compliance with this provision rendered the attachment incomplete. Consequently, the purported sale in execution was invalid.

In response, counsel for the appellant pointed out that the Sheriff was the Registrar of the court. He denied that the Deputy Sheriff did not notify the Sheriff of the attachment. He referred the Court to the Returns of service in respect of the attachment of the property which contained the following notation:

“To: The Sheriff of the High Court.”

He said the returns were filed in the court file under the control of the Registrar. He submitted that constituted sufficient notice to the Sheriff in terms of Rule 46 (3).

The relevant part of Rule 46 (3) states that the Deputy Sheriff shall notify the sheriff. In my opinion the sheriff (i.e. the Registrar of the Court) was duly notified. The appellant’s argument that the filing of returns of service in the court file does not constitute notice of such attachment to the Sheriff is untenable. In these court processes, I take judicial notice of the fact that the only way to notify any party or even the court is to file the process which is then put on the appropriate file. When this is done, there is a rebuttable presumption that there has been notification. There is no evidence on record that the returns of service filed by the Deputy Sheriff and placed on the file under the control of the Registrar, did not come to her notice. This ground of appeal therefore fails and it is dismissed.

1. Non- Compliance with Rule 46 (8) (b).

The main complaint here is that the property was advertised as being situate in “Edwards Street in the Town of Mbabane.” The Appellants’ Heads of Argument gratuitously added that this was the Title Deed description of the property. The point was further made that the name of that street had been changed to JSM Matsebula Street. Hence there was incorrect and defective description of the property. This it was submitted, rendered respective notices fatally defective making the sale in execution null and void. Counsel for the appellant further submitted that as a result of the defective notice of sale, there was only one bidder present at the sale. He said the only bidder was the First

Respondent's nominee who had been mandated not to bid above E1.3 million.

In reply, counsel for the respondents argued that full and adequate description of the property was given as follows:

1. The property was described as "LOT 274" situate at Edwards Street.
2. Rule 46 (8) (b) requires a street number to be put in the advert, if any. Counsel pointed out that there was no street number. This was not controverted by counsel for the appellant. Counsel for the respondents submitted that in the absence of a street number it was the Lot Number which gave the precise location of the property.
3. The respondents admitted that the name of the street had been changed. Counsel, however, said that the name change had not been entered in the Deeds Registry. He said that Rule 46 (8) (b) requires "a short description" of property, its situation and street number, if any. In the case of **Rossiter and Another v. Rand Natal Trust Co. Ltd.** 1984 (1) SA 385 (N) which both counsel relied on the headnote states: "what must be inserted in the advertisement are the main characteristics of the property to be sold which might reasonably be expected to attract the interest of potential purchasers. These include an express statement as to whether or not there are any improvements or building on the land in question and where applicable, the town planning zone of the property."

On how many bidders were present at the sale, counsel for the respondents pointed out that what was relevant was how many people attended the auction. He said the names of some of the people present had been stated in the Respondents' Answering Affidavit. He said that the appellant had sought to sell the property to the appellant's employee for far less than the reserve price. He submitted that the sale at the auction gave to the appellant more money than if its employee had

purchased the property by private treaty. He said the reserve price was E917, 000.00 and that was the price the property was sold for at the auction, instead of the E800, 000.00 the appellant had purported to sell it to its employee for. In the circumstances, the auction sale was well patronised, said counsel.

I have carefully examined the layout of the Lots of the Hhohho District of Mbabane where Lot 274 is. In my opinion the difference in the parties' respective positions on the description of the property cannot be described as non-compliance. What the **Rossiter** case emphasized was particulars that might entice prospective purchasers. Admittedly, the street name had changed but in my opinion that is of little consequence. The street still exists. The description in the Notice of Sale is one of a misnomer. Any prospective purchaser who already knows Edwards Street would go there and find the property. If he does not, he may seek directions to that street. He may be told that street was no longer called Edwards Street but JSM Matsebula Street. Any directions he gets will take him to the property.

There is another reason why I take the view that the re-naming of the street is of little consequence in this particular instance.

As I said, I have examined the topocadastral plan at page 105 of Book of Records. It is clear from that plan that the Lots are numbered consecutively without any reference to the adjoining or opposite roads or streets. I am persuaded that anybody looking for Lot 274 in the

Hhohho District, Mbabane will have no problem identifying it. Another important information on that Layout is that that plan still had Edwards Street thereon. Since there are no street numbers, a prospective purchaser armed with a copy of that topocadastral plan should find the property easily.

In paragraph 9.4 (page 8) of the appellant's Heads of Argument counsel for the appellant bemoaned the fact that the advert did not mention the zoning thereof. In my view that is stretching the requirement of "short description" too far. Even in the **Rossiter case** the Judge's statement on "town planning zone" of the property was qualified by him saying "where applicable." That judgment did not consider that a Lot number was essential. It did not mention it. Further in **Cummings v. Bartlelt No and Another** 1991 (4) S.A. 135 the court pointed out that it was not possible to lay down hard and fast rules about what the "brief description" of the property must contain. Every case must be judged on its particular facts.

In my opinion the details given in paragraph 3 of this judgment and others given thereafter constitute reasonable "brief description" of the property; including the improvements which have been effected therein. I hold that there was compliance of Rule 46 (8) (b) by the First Respondent in the preparation of the advertisement.

This ground of appeal also fails and is dismissed.

1. Non-compliance with Rule 46 (8) (d).

The appellant made a brief statement in paragraph 11.1 of the Heads that the notice of sale was not sent by pre-paid registered post to First Respondent. He then added that this was admitted by the First Respondent.

In his response, counsel for the First Respondent pointed out that non-compliance with Rule 46 (8) (d) was not set down as a ground of appeal in the Amended Notice of Appeal filed on 18th November 2009. Counsel for the First Respondent submitted that accordingly, it was not a subject of appeal. That ground is truly not in the appellant's grounds of appeal. Rule 7 of the Court of Appeal Rules provides that "the appellants, shall not, without the leave of the Court, urge or be heard in support of any ground of appeal not stated in his notice of appeal, but the Court of Appeal in deciding the appeal shall not be confined to the grounds so stated." No such leave was sought and none was given.

However, out of abundance of caution counsel for the respondents submitted that there was no need for the deputy sheriff to have sent by prepaid letter a copy of the Notice of Sale to the First Respondent who was actually instrumental in quoting the reserve price. The record shows that First Respondent's agent fully briefed it on all aspects of the sale and that the First Respondent had full knowledge of all the processes.

Counsel for the appellant had submitted in the Appellant's Head of Argument that non-compliance with this sub-rule effectively invalidated the sale. I am not persuaded that non-compliance of this sub-rule should invalidate the sale. I cannot see how that will adversely affect the judgment debtor whose property was to be sold? In my opinion that sub-rule is to notify the judgment creditor that the sale had been conducted. In any event, the

complaint on non-compliance should not come from the judgment debtor.

For now I do not make any definitive judgment on that since I have not had the benefit of legal submissions from counsel. In the meantime, on the facts in this case, I agree with counsel for the respondents. Despite the fact that Rule 46 (8) (d) was not properly before this Court as a ground of appeal, I hold that on the evidence this ground of appeal also fails and it is dismissed.

1. Non-compliance with Rule 46 (13)

No argument was offered by counsel for the appellants on this ground in the Appellants' Heads of Argument. In the circumstances, it is deemed to have been abandoned. It is accordingly struck out.

Result of Appeal

The appeal fails in its entirety and is dismissed with costs.

Delivered in open court on 27th May 2010.

DR. SETH TWUM

JUSTICE OF APPEAL

I agree: J.G. FOXCROFT

JUSTICE OF APPEAL

I agree: A.M. EBRAHIM

JUSTICE OF APPEAL