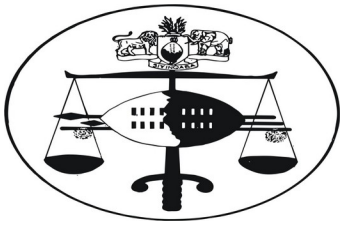

IN THE SUPREME COURT OF SWAZILAND

Held at Mbabane **Appeal Case No. 39/2010**

Citation: [2010] SZSC 8

In the matter between:

NOMPHUMELELO MKHONTA	**1st APPELLANT**
HOLINESS DLAMINI	**2nd APPELLANT**
THEMBA GAMA	**3rd APPELLANT**
AND	
LEWIS STORES	**1st RESPONDENT**
MELUSI QWABE	**2nd RESPONDENT**

CORAM	**FOXCROFT JA**
	MOORE JA
	FARLAM JA
FOR THE APPELLANT	**MR. T. NDLOVU with**
	MR. J. MZIZI
FOR RESPONDENT	**MR. N.D. JELE**

JUDGMENT

(Urgent application to restore possession of goods attached by Deputy-Sheriff after default judgment – no interpleader notice by Deputy Sheriff – whether interpleader available to the applicant – dismissal of the application – whether interlocutory or final order – disputes of fact – matter referred to trial)

FOXCROFT JA

[1] In January 2009 the first respondent issued summons against Gcina Cyril Mngomezulu for payment, in Claim A, of the sum of E14098-18 in respect of goods "delivered on the 16th August, 2008 at the defendant's special instance and request." Claim B, cast in the same language was for payment of the sum of E6893.31, and Claim C, again for "goods delivered", was for E8543.58. Claim D was for the sum of E10557.07 with interest at 9%. Interest on the sum allegedly due at 9% per annum was claimed in respect of Claims A, B and D, but the sum claimed as interest in Claim C was said to be

"Interest on the afroesaid (sic) amount of E821.12."

The amount claimed as interest was obviously incorrect.

[2] Judgment in the total sum of E40 092.14 was entered against Mr. Mngomezulu and a writ issued on the 27th February 2009. Movable property detailed in the Inventory to the writ was attached by the Deputy Sheriff, one Melusi Qwabe, who is now the second respondent.

[3] The first appellant, who was married to Mr. Mngomezulu, (the "judgment debtor") on the 19th April 2008, brought an urgent application on the 3rd April 2009 claiming the immediate restoration of property listed in the Inventory attached to the writ. She was joined by the other appellants. All claimed that certain attached goods belonged to them and not to the judgment debtor.

[4] The first appellant claimed that certain goods attached were necessary household items required by every family for daily use and therefore protected by law from attachment. She added that the goods listed in annexures E1 and E2 were not the property of the judgment debtor since they had been acquired by her deceased former husband and formed part of the

assets in his deceased estate, of which she was the executrix dative.

[5] The first appellant further averred that some of the attached items removed by the Deputy Sheriff were the property of her sister in law, cousin, and another family member. The last two are the second and third appellants. These goods are listed in annexures F,G,H,I,J and K.

[6] Among points **in limine** raised by the first respondent (Lewis Stores) was the advice received that

> "the correct procedure for the Applicant were(sic) to instruct the Second Respondent to deliver an interpleader notice in terms of Rule 58 of the Rules of the above Honourable Court, so that their claims can be proved in court."

It will be seen that this proposition found favour with the learned Judge a quo in dismissing the urgent application.

[7] In his affidavit, the Deputy Sheriff, who was joined as second respondent, confirms that he served the Writ of

Execution on the 23rd March 2009 on the judgment debtor at his residence. The judgment debtor told him that he and the first appellant were married in community of property and that most of the items in the house were owned by his wife. Since the goods in the house belonged, in the Deputy Sheriff's view, to the joint estate he attached and removed them.

[8] In reply, the first appellant asserted that an interpleader notice is a procedure available to a deputy sheriff and not to applicants.
She added that

"The Applicants have no power to compel the deputy

sheriff to issue an interpleader advice."

[9] The first appellant admitted that she was not in the house when the Writ was executed and claimed that the matrimonial home was at Big Bend where her husband lived while the house at Fairview was where she lived with the children of the former marriage. She confirmed that she and the judgment debtor are married in community of property, and added that the

furniture and utensils of her late husband devolved intestate to the children of the deceased.

[10] Several disputes of fact emerge on these papers. For instance the first appellant avers that the "Valentine lounge suite" referred to in her founding affidavit is totally different from the one referred to in the first respondent's affidavit. This is supported by the judgment debtor in his affidavit of the 17th June 2009 in which he also states that he made it clear to the first respondent's representative that the attached goods were not his. According to the judgment debtor this representative accepted that the goods attached were not those sold to him. The judgment debtor offered to return goods sold to him but the store refused to attach his goods, insisting on attaching goods that were not his.

[11] Mandla Themba Gama, the third appellant, confirmed in his replying affidavit that the PIONEER MINI HI FI set and CD player referred to in his founding affidavit belonged to him. He attached the invoice at p. 42 of the record which confirms that this equipment was bought by him.

[12] The second applicant also provided documentation indicating her ownership of goods removed by the Deputy Sheriff. The relevant invoices are attached to the founding affidavit of the first applicant.

[13] On these allegations and denials, several further disputes of fact emerged. Despite this, the learned Judge a quo determined that the goods in dispute were sold and delivered by Lewis Stores to the judgment debtor between October 2007 and August 2008, adding that

> "None of the three Applicants caused an interpleader to be filed"

[14] In paragraph [11] of her judgment, the learned Judge a quo said the following

> "If the deputy sheriff is not willing to assist; the Applicants are at liberty to report him/her to the sheriff who shall take the required action."

Authorities are cited in support of this proposition

[15] The first case cited was **Dlamini Malungisa v Msibi Timothy** 1987-1995 (2) SLR 121 (H.C.).

That matter concerned the alleged spoliation of six head of cattle from the applicant. The respondent filed an opposing affidavit in which he set out that the cattle were lawfully attached and handed to him by a messenger of the Swazi National Court, who had removed the cattle from the possession of one Petros Dlamini. The Court correctly held, inter alia, that there can be no spoliation if the removal of the property was lawful. Before discharging an earlier **rule nisi**, Dunn J remarked, obiter, that the correct procedure would have been for the applicant to proceed by way of interpleader action.

[16] The second authority cited by the learned Judge a quo was that of **Bhekizizwe Sibiya v Thomas Hlatshwayo and another,** High Court Case No. 189 of 2008 (unreported). This case concerned an application by the owner of a motor vehicle against the Sheriff or his lawful Deputy to return the applicant's vehicle to its lawful owner. Respondent took the point that the applicant had not followed the "correct procedure" and should have come to court by way of interpleader. The

judgment of Dunn J cited above was relied on and counsel for the applicant conceded that the applicant should have come by way of interpleader. The judgment of Maphalala J was based on this concession, but the learned Judge added

> "I also think that Applicant cannot be granted any order outside the procedure of law concerning interpleader and to grant any order as prayed for by the Applicant would do an injustice to the Rule of Court cited."

[17] In my view, this was an incorrect view of the law. It would seem that a fairly widespread view exists in the High Court that Rule 58 may, and should, be available to a claimant of property seeking restoration of his or her property from the dispossessor. This is not what was held in the case referred to by Maphalala J, namely **Ackermann v Kritzinger and others** 1974 (4) S.A 666 (C) where Baker J heard an application for directions as to the future course of an interpleader between the Deputy Sheriff of Joubertina, Cape and various claimants of farm movables attached by the Deputy Sheriff.

The Rule governing an interpleader in South Africa (Rule 58 of the Uniform Rules of Court) is identical to the Swazi rule. It is specifically directed to any person alleging that he is under any liability in respect of which he is or expects to be sued by two or more parties ("claimants") making adverse claims. The Rule ends as follows

> "In regard to conflicting claims with respect to property attached in execution, the deputy-sheriff shall have the rights of an applicant and an execution creditor shall have the rights of a claimant."

See also **Kamfer v Redhot Haulage (Pty) Ltd and ano**. 1979 (3) SA 1149 (W) at 1154B where Nestadt J said, in dealing with a stakeholder:-

> "It is only where he finds himself 'in the middle' so to speak, because he is faced with two prima facie valid and enforceable claims (or the threat thereof) to money or property that he is holding and to which he lays no claim, that resort can be had to Rule 58."

[18] **Bruce n.o. v Josiah Parkes and Sons Ltd and ano.** 1972(1) SA 68 (R), also referred to by Maphalala J, was another case where another deputy-sheriff instituted interpleader proceedings alleging that he was “willing to dispose of the goods in any manner determined by the court” and claimed further that “either party or both should be ordered to pay his costs.”
This does not support the argument advanced in **Sibiya v Hlatshwayo and Dlamini**, supra.

It is clear that the Rule was intended to protect stakeholders and persons in the position of a deputy sheriff from becoming involved in litigation, with attendant costs implications, where such holder of property laid no claim to the property held.

[19] Mindful of the fact that the applicants before her were not persons “expect[ing] to be sued by two or more parties making adverse claims” and could not therefore institute claims themselves, the learned Judge a quo adopted the argument of the first respondent that it was open to the applicants to seek the assistance of the deputy sheriff. She went further saying

> "If the deputy sheriff is not willing to assist the applicants are at liberty to report him/her to the Sheriff who shall take the required action."

It is not stated what the "required action" might be. None was suggested in argument before this court.

[20] What is known in this matter is that the Deputy Sheriff was joined and decided not to institute an interpleader to protect himself from adverse competing claims. If he had been approached by the applicants to institute an interpleader, he would have been fully entitled to decline to exercise any right to protect himself. If the applicants had insisted that he institute an interpleader on their behalf, he could equally have resisted the invitation. Rule 58 affords him protection, if he decides to use it, against them and Lewis Stores.

It is not a weapon to use on behalf of a claimant seeking relief from Lewis Stores, where he is joined as second respondent. In my view, Mr. Ndlovu submitted correctly that Rule 58 was

> "really intended for the protection of the Deputy Sheriff as opposed to being a conduit for

determination of vindicatory actions by parties with conflicting interests."

[21] Mr. Jele sought to persuade us that this reason for the order made by the court a quo, namely the availability of an interpleader to the applicants, made the order interlocutory and therefore not appealable without leave.

I cannot agree. In the first place, the remark of the learned Judge a quo about obtaining the assistance of the deputy sheriff was not a decision but rather a reason for her decision to dismiss the application. Appeals are not brought against reasons for decisions. Secondly, the learned Judge did not purport to exercise a discretion, but held that a particular procedure should have been adopted and went on to dismiss the application before her. As I have already said, there is no room for the procedure to which she referred.

This point **in limine** is without merit since the order dismissing the application with costs was clearly final.

Mr. Jele did not advance any other argument on the merits of the matter and in fact conceded that the court a quo "did not dispose of the merits of the main application which remain outstanding to date." In the end, he conceded that the matter should be referred to trial. Mr. Ndlovu submitted that certain of the disputed items should be restored immediately to the applicants since they should never have been removed from the first appellant, who had alleged in her founding affidavit that these items are necessary household items required for daily use and therefore protected by law from attachment.

These allegations were denied by the Deputy Sheriff who deposed an affidavit that he had left all cooking utensils in the house and all items "essential for the family to live on."

Mr. Ndlovu also urged this court to be robust in restoring goods to persons other than the first appellant who had provided receipts showing purchases to them. All the allegations by the appellants are denied and, applying the **Plascon-Evans**[1] rule to the affidavits

1 Plascon-Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

before us, this court cannot prefer the allegations on oath by the appellants over the denials of the respondents.

[22] Rule 6(17) provides that

> "Where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as to it seems fit with a view to ensuring a just and expeditious decision."

Rule 6(18) provides further that without prejudice to the generality of sub-rule (17),

> "the court may direct oral evidence be heard on specified issues …or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues or otherwise."

[23] In my view the court a quo erred in dismissing the application on a ground which was incorrect in law. The matter should have been referred to evidence or trial.

[24] It is accordingly ordered as follows:

(a) the appeal is allowed with costs;

(b) the order of the High Court dismissing the application of the appellants for the restoration of their goods is set aside with costs to be paid by the first respondent and is replaced with an order in the following terms;

"(i) the matter is referred to trial in order to determine the ownership of the movable property in dispute;

(ii) the affidavits of the parties will stand as pleadings in the trial."

_____
J.G. FOXCROFT
JUDGE OF APPEAL

I AGREE.

_____
S.A. MOORE
JUDGE OF APPEAL

I AGREE.

_____
I.G. FARLAM

JUDGE OF APPEAL

Delivered in open court at Mbabane on 30th November 2010.