



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Civil Appeal Case No: 01/2012

In the appeal between:

**BHEKITHEMBA DLAMINI N.O.**

**Appellant**

and

**LONG DISTANCE TYRES (PTY) LTD**

**Respondent**

**Neutral citation:** *Bhekithemba Dlamini N.O. vs Long Distance Tyres (Pty) Ltd 01/2012 SZSC 49 [2012] (30 November 2012)*

**Coram:** **A.M. EBRAHIM, JA**  
**S.A. MOORE, JA**  
**M.C.B. MAPHALALA, JA**

**Heard:** **12<sup>TH</sup> NOVEMBER 2012**

**Delivered:** **30<sup>TH</sup> NOVEMBER 2012**

**Summary:** *Practice and Procedure – execution – sale – Sheriff’s duty to account for proceeds – effect of failure to do so – judgment debtor entitled to claim damages - Appeal dismissed.*

**EBRAHIM JA:**

- [1] This is an appeal against the judgment of HLOPHE J, delivered on 7 December 2011 (reasons handed down on 1 March 2012).
- [2] Before dealing with the merits, I should deal, briefly, with the Application by the Appellant for condonation of the late delivery of the record of the proceedings and Heads of Argument. This Application is not opposed by the Respondent (or least nothing has been filed in opposition). The reasons advanced by the Appellant are reasonable and there would be no prejudice to the Respondent if the Application is granted.
- [3] The Appellant is the Deputy Sheriff for the Hhohho District. The Respondent was the Defendant in motion proceedings arising out of an action brought by Goldstar (Pty) Ltd arising out of non-payment of rent. Goldstar claimed the sum of E55 290-61, plus interest, and an order of ejectment. Goldstar also claimed an order for the moveable property at the premises to be seized and sold in execution. The order was granted on 3 October 2008 and the property was duly seized by the Appellant. A hand written list of the seized property appears at page 85-86 of the record.
- [4] The Respondent alleged that he agreed with the Respondent's attorneys that he would immediately pay E29 000-00 in part payment of the debt and the balance of E26 290-61, plus the current rentals, in monthly

instalments equating to double the normal rent. He said that it was agreed that the landlord would open the premises and allow the Respondent to continue trading, but that the landlord reneged on this arrangement. The Respondent also claimed that the value of the goods seized was more than E200 000-00, substantially more than the value of the debt. This last allegation has not been denied or contradicted.

A sale in execution was held on 13 February 2009.

[5] On 27 August 2009 the Respondent instituted an Application on Notice of Motion for rescission of the court order, alternatively, for an order directing the Respondents to account for the proceeds of the sale in execution and to hand over to the Respondent any surplus from the sale in execution. It also sought costs on the higher scale if the Application was opposed.

[6] On 30 July 2010 AGYEMANG J granted an order directing the Appellant to furnish to the court and to the Respondent's attorney all documents relating to the record of transactions that occurred during the sale in execution. This order was, according to the Appellant's attorney, granted *mero motu*, and was allegedly not what the Respondent had sought.

[7] On 10 June 2010, the Appellant had sent to the Respondent's attorney a letter, supposedly enclosing the "original recordings of the auction sale

together with the distribution of the sale in execution.” This letter was in answer to letters of complaint written by the Respondent’s attorney. These “original recordings” consist of three handwritten pages of items, with numerals next to them, presumably representing the prices at which the items were sold (see pages 118-120 of the record), together with a further printed list of items and the prices realised for them (pages 121-122) and a statement of his own expenses (pages 124-125).

[8] In his judgment, HLOPHE J rejected the Application for rescission. I am satisfied that he was correct in doing so. The Respondent clearly was indebted to the landlord. The learned judge was also skeptical, for good reasons, about the arrangement allegedly made between the Respondent and the landlord. There was no reasonable and acceptable explanation for the Respondent’s failure to appear in court to answer the claim and there was no defence to the landlord’s claim.

However, the issue remained of the Appellant’s duty to account.

[9] The Appellant had been ordered by AGYEMANG J to furnish the relevant documents; and this order was followed up by a similar order from HLOPHE J. The Appellant’s only response was to produce the letter previously sent to the Respondent’s attorneys. The printed document which was included listed various items sold and the values received for those items, the total of which comes to E26 100-00. This sum is, by

coincidence, almost exactly the same as the sum outstanding after the initial payment of E29 000-00.

[10] No original receipts were annexed.

[11] I agree with the learned judge that the explanation for the lack of original receipts is unacceptable. The handwritten list is written in a very slovenly and untidy fashion. As HLOPHE J says, it was “prepared in a hurried attempt to satisfy the order... that the original records be filed”. To my mind, it is highly improbable that a properly conducted sale in execution would be recorded in such a slipshod manner. It causes one to doubt the whole sale in execution process, if this is a typical example of the way the Appellant conducts himself.

[12] HLOPHE J concluded that the goods attached “were abused and misapplied or if they were ever sold, the exact amount of the proceeds was deliberately concealed.”

[13] The learned judge found, accordingly, that the Appellant failed to give a genuine account as to how much the sale in execution realised and how the proceeds were distributed. He concluded that the sale was not properly conducted and that the Respondent could institute an action for damages.

[14] In so doing, he admitted that he was not granting the order requested by the Respondent, neither was refusing it. In his words,

“I made the following order, which I took to be the best I could make in the circumstances although I had no doubt the [Respondent] was not finding much assistance to [right] an apparent injustice.”

The Appellant’s grounds of appeal were that the learned judge erred in two respects:

(a) in granting orders which had not been sought by the Respondent, which related to matters which were issues which were not matters which the court *a quo* had been called upon to decide and which dealt with issues which were not argued before the court. The orders relate to the order that the Appellant had failed to give an account of sale in execution when he had in fact done so.

(b) in ordering the Appellant to pay the costs on a punitive scale when there was no basis for such an order as the Appellant had complied with the order granted by the court *a quo*.

[15] In fact, HLOPHE J did not grant any order at all, as he was quite clearly, and understandably, at a loss as to what to do. To have granted the Application for an order directing the Respondents to account for the proceeds of the sale in execution and to hand over to the Respondent any surplus from the sale in execution, in view of the Appellant’s failure (twice) to do so, would have been a fruitless exercise. Essentially, what

he did was simply to find that the sale was not properly conducted, and leave it open to the Respondent to institute proceedings for damages.

[16] In my view, that finding was entirely justified.

[17] With regard to the order for costs on the higher scale, this was a matter within the learned judge's discretion. Unless he can be shown to have misdirected himself or acted on wrong principle, we cannot interfere. In any event, it seems to me that his order was justified. The Appellant persistently failed to produce anything approaching a satisfactory account of the sale in execution. His excuses for such failure are lame, to say the least, and smack of incompetence, if not dishonesty.

[18] In the result, I would dismiss the appeal, with costs.

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A.M. EBRAHIM  
JUSTICE OF APPEAL

I AGREE :

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S.A. MOORE  
JUSTICE OF APPEAL

I AGREE : \_\_\_\_\_  
M.C.B. MAPHALALA  
JUSTICE OF APPEAL

**FOR APPELLANT : N.D. JELE**

**FOR RESPONDENT : M.P. SIMELANE**