THE SUPREME COURT OF SWAZILAND

JUDGMENT

Held in Mbabane Civil Appeal Case No. 32/2015

In the matter between:

BERNARD MSWELI KUNENE	**1st**	**Appellant**
EXECUTOR ESTATE LATE BERNARD MSWELI KUNENE	**2nd**	**Appellant**
v		
BRIDGES MUNRO	**1st**	**Respondent**
ANDRIES STEPHENUS DUPLESSIS	**2nd**	**Respondent**
SWAZILAND DEVELOPMENT & SAVINGS BANK	**3rd**	**Respondent**

Neutral Citation:	***Bernard Msweli Kunene& Another v Brigges Munro & 2 Others(32/2015) [2015] SZSC27(9th December 2015)***
Coram:	**N. J. HLOPHE AJA, M. DLAMINI AJA, &M. J. MANZINIAJA**
For Appellant:	**L. Maziya**
	Instructed by S. K. Dlamini & Company
1st Respondent:	**S. G. Simelane**
3rd Respondent:	**S. Mdladla**
Heard:	**24thNovember 2015**
Delivered:	**09thDecember 2015**

M. DLAMINI AJA

Summary: *Appellant - challenging sale in execution - determination by court is whether the irregularity alleged goes to the root of the sale – party who intends to challenge judicial sale must do so promptly – should not wait until transfer is effected – novation – there can be no novation by inference where the debt has been discharged such as by means of judicial sale and property transferred – party claiming costs must show reasons for departing from general rule that costs follow the events of the case.*

The respondent moved an application for ejectment against appellant on the basis that he was the owner of the land occupied by appellant by virtue of a judicial sale. The appellant opposed the application on two grounds *viz*. novation and irregular auction sale. The appellant aggrieved by the decision of the *courta quo* which granted the ejectment order, noted the present appeal.

JUDGEMENT

Chronology of events

[1] The impugned judgment was delivered on 15th May 2015. The appellant noted the present appeal timeously as it was served on respondents on 11th June 2015. The Notice of Appeal raised nine grounds. However, on the 3rd November 2015 with this court sitting on 9th November 2015, appellant filed amended grounds of appeal.

[2] The appellant's matter was enrolled for 12 November 2015. On this date, the appellant sought for a postponement in order to prepare Heads of Argument (heads). Counsel on behalf of third respondent also sought for a postponement in order to prepare heads following that third respondent was never served with appellant's heads. The first respondent's attorney objected to the postponement.

[3] Without any further ado and mainly on the basis that third respondent who was cited in these proceedings, was desirous to be heard, we granted the postponement and reserved the question of costs. The

matter was postponed to 24th November 2015. Parties were put to terms on pleadings.

[4] I must hasten to point out that on the 12th November 2015, it also transpired that the appellant had not filed its application for condonation for filing late its amended notice.

[5] As already highlighted, we did not prolong the application by inviting the appellant to show good cause on the application for postponement and on its failure to file for condonation. Paramount in our minds was the *audi alteram partem* principle which was well defined by **MCB Maphalala JA**[1]citing **Una Nath Pandey v State of U.P. Air 2009 SC 2375**.[2]*"...; no form or procedure should ever be permitted to exclude the presentation of a litigant's defence."*We took this line because third respondent wished to be heard as well. Appellant therefore had a windfall.

[1] Rudolf v Rex (26/2012) [2012] SZSC 44 (30 Nov. 2012 at para 20
[2] Supreme Court of India

Application for amendment by appellant

[6] On the return date, with all parties having filed accordingly, appellant revived his notice to amend. The court noted that there were only two new grounds in this notice which read as follows:

> "*1. The learned Judge a quo erred in law and committed a gross irregularity resulting in a complete failure of justice in that the judgment of the 15th May, 2015 was not preceded by addresses to the Court either oral or by way of written submissions much against the spirit of both the Common Law and the Constitution.*
>
> *6. The learned Judge a quo erred in law in not holding that the appellants are entitled to the costs including certified costs of Counsel up to the handing down of the earlier ruling of the 7th December 2006 in as much as the 1st Appellant was substantially successful in those proceedings."*

[7] The first ground on failure by the trial court to invite the parties to make representation quickly fell off on demonstration by both respondent's attorneys that parties were invited and the respondents did file written heads and duly served the same to appellant's instructing attorney. On the face of evidence proving service of the respondents' heads upon the appellant's attorney, appellant's counsel withdrew the first ground. We allowed the second ground on costs as we deemed it was unnecessary for the appellant to file an application for amendment just to seek for an order of costs. At any rate the principle of costs is that costs follow the event. In other words the question as to whether the appellant was enjoined to be paid costs of the *rule nisi* in the *court a quo* was a subject of the outcome of the case on merits. If, for instance, appellant would succeed on appeal, the setting aside of the judgment entails setting aside of the order of costs.

[8] In essence, there was no basis for the amendment. We then ordered the appellant to argue his case based on the initial notice of appeal and argue the ground on costs as well.

[9] The appellant then applied for a postponement of the appeal to the next session. The basis was that the heads were prepared based on ground one as the main ground. No strong points were raised on the other grounds of appeal. Again we allowed the appellant to argue on the merits and if he wished to supplement authorities on any ground, he would file further authorities. The application for a postponement was therefore abandoned.

The appeal

[10] The grounds for appeal were as follows:

> "*2. The Learned Judge a quo erred in law and in fact in granting the application in as much as the peculiar circumstances of this particular case suggest not only that there was no valid sale but also that the Judgment prompting the auction sale was novated and/or abandoned by the third respondent.*
>
> *3. The learned Judge a quo erred in law and in fact in that having said the following in her ruling of the 7th December 2006 on the issue of improvements:*

> ***"... I also take note of the submission that there were improvements on the property worth E320,000-00. The valuation was carried out on the 3/10/2005. The property was sold after these improvements were effected..."***

It was no longer open to her to say the following in her judgment of the 15th May, 2015:

> ***"... the issue of making improvements on the property by the Respondent does not help his case in anyway because he was aware that he no longer had title to the property when he made the said improvements and had deliberately remained in occupation of the same notwithstanding that he was aware that it was then the property of the 1st Applicant ..."***

4. *The learned Judge a quo erred in law and in fact in not only failing to show that she treated the evidence of Xolani Sithole and Titus Mlangeni with caution in view of the notorious fact that they were testifying against someone who had long died and thus no longer in a position to defend himself but also placing reliance on such evidence without making any*

credibility findings especially on Mlangeni's evidence which was not only highly suspect but also clearly inconsistent with the probabilities.

5. *The learned Judge a quo erred in law and in fact in finding that there was a valid sale of the property by placing reliance on the factors mentioned from the 2nd sentence of paragraph 12 of the judgment of the 15th May 2015 in as much as, notwithstanding the existence of these factors she had in her earlier ruling made an express finding not only that;*

> ***"... it is not just a question of having a title deed ..." and that "... buyer be aware..."***

but had also said the respective rights of the 1st and 2nd Respondents would only be cleared by evidence, and when such oral evidence was presented the then Respondent was already deceased and thus would no longer answer for himself. What then justified her change of mind?

6. *The learned Judge a quo erred in law in not holding that the appellants are entitled to the costs including certified costs of*

Counsel up to the handing down of the earlier ruling of the 7th December 2006 in as much as the 1st Appellant was substantially successful in those proceedings."

[11] The first respondent, on an urgent basis, moved an application for ejectment of appellant from Portion 26 of Farm "*Notchliffe*" No. 674 situate Siteki, Lubombo district (the farm). The basis for the ejectment was that the first respondent was a title deed holder. He had purchased the said property from an auction sale conducted by the deputy sheriff following an order to execute a judgment of the court *a quo*.

[12] It was common cause that the farm was a subject of a mortgage loan granted by third respondent to appellant. Third respondent instituted action proceedings in the court *a quo* against appellant who was said to have failed to service the loan mortgaged against the farm. A judgment was obtained against the judgment debtor, that is, appellant. This eventually led to the sale in execution of the farm. First respondent purchased it.

[13] At all material times, appellant resided in the farm. When first respondent bought it, he advised the appellant to vacate. Appellant failed and this compelled first respondent to move for an ejectment order before the *court a quo.*

[14] The appellant in his opposing affidavit admitted that he was indebted to third respondent for the sum of E180,263-29 at the time third respondent instituted action proceedings against him. In 2005 however, he sold one of his farms which was at Shiselweni region for the sum of E190,000-00. He then paid a sum of E94,701-60 towards his debt of E180,263-29. The third respondent advised him of the balance of E71,703-83. In 13 September 2005 the third respondent demanded a sum of E66,394-43. He paid a sum of E20,000. On the 10th November 2005, the bank advised him that if he paid the balance of E43,393-43, it would cancel the bond against the farm.

[15] Appellant further pleaded that upon the farm being advertised for sale in 2001, one lawyer by the name of Bheki G. Simelane advised him to pay a sum of E30,000 in order to stop the sale in execution against his

farm. He duly paid this sum over to Mr. Bheki G. Simelane who informed him that he was on third respondent's instructions.

[16] Appellant also challenged the sale. He stated that the farm was advertised for a reserve price of E100 000 and yet it was sold for E80,000, an amount below the reserve price. For this reason, he submitted that the sale to first respondent was irregular and therefore should be set aside.

[17] The second respondent joined the proceedings later. He stated by affidavit that he subsequently purchased the property from the first respondent. The learned judge *a quo,* presented with the above on affidavit, issued a ruling in favour of the appellant. She stated as basisof the ruling:

> "*[8] The first issue he raised was that it was a condition of their agreement that the property would be sold at a reserve price of E100 000.00 but was instead sold for E80.000.00. In my view the Swazi Bank had a duty to inform the Respondent if there had been a change in*

condition and why they would not be selling at the agreed reserve price especially as they were selling the property for less than the reserve price.

[9] The Swazi Bank could not unilaterally change the conditions without the Respondent's knowledge/input. In terms of the audi principle the Respondent had a right to be heard in this regard. In this respect the rules of natural justice have been breached and so have the Respondent's rights."

[18] However, the learned judge wisely noted:

"[13] I do however take the point that the account of the respondent was not credited with the proceeds of the sale and wonder where the money went to. Only oral evidence can explain that to this court. I agree with Counsel for the Respondent that until these issues are cleared up the Respondent has a right of retention. It is not just a question of having a Title Deed. A man's home is his castle and the Respondent has a right to shelter and

if there is a legal basis to that right then it is incumbent upon this Court to protect it."

[19] It is on the basis of the above preceding paragraph that the honuorable judge concluded:

> *"[19] In the event I order that the issues raised above be referred to oral evidence. Some disputes of fact are very technical as is the case herein and may not be apparent to a litigant when he first launches an application. For this reason costs will be costs in the cause including certified costs of Counsel."*

[20] The matter was then referred to oral evidence. Two witnesses appeared before court. The first witness was one Titus Mlangeni an admitted attorney then and now a Judge in the court *a quo*. He testified that he was instructed by the bank on the matter between third respondent and appellant. Having obtained judgment, a sale in execution took place. The property was not sold at its first sale. They

then decided to sell it at E80,000. The reserve price was E80,000 and not E100 000 although they did anticipate selling it at E100 000.

[21] The next witness was one Xolani Sithole, an employee of third respondent. He informed the court below that the appellant had two loan accounts with the bank. The first loan account was taken care of by the sale in execution. While the second loan account was pending. The correspondences attached by appellant were in respect of the other loan account.

[22] On the basis of the above, the learned trial Judge found in favour of the first respondent and ordered eviction against appellant. Appellant lodged the present appeal.

Irregular sale

[23] The appellant argued on appeal that the sale which gave title over the farm to first respondent ought to be set aside by reason of irregularity.

He submitted that the notice of sale indicated a reserve price of E100 000 whereas the farm was sold for E80 000.

[24] The argument advanced on behalf of appellant seems to find support from **McCall AJ.**[3]

> "*In my view, if a purported sale in execution by the deputy sheriff of the Supreme Court is null and void for lack of compliance with the statutory formalities, it confers no title upon those who purport to purchase the property and the owner may recover his property by means of a rei vindicatio unless possibly, he is estopped from doing so.*"

[25] The learned Judge refers to **Antonius Matlhaens *"De Actionibus"*** and points out that this Roman Dutch script, is authority that:

> "*a sale will not be void if there has only been non-compliance with slight formality which does not go to the root of the matter*."

[26] In other words, the question in an application for the setting aside of a sale in execution should be whether the irregularity goes to the root of

[3] Joosub v JI Case SA (Pty) Ltd 1992 (2) SA 665 N at 679

the sale.**McCall AJ** then found as an example "....*the root*" when he stated:

> *"In the present case there was no attachment such as is required by Rule 46 (3) before there can be a sale in execution and accordingly, there was no valid sale in execution."*

[27] However, in this case, the question of whether the alleged irregularity, of which was a sale below reserve price, went to the "*root of the matter*" does not arise because of the following reasons stated below:

[28] Firstly the appellant attached a one page document which had no official court stamp on its face as evidence of the Notice of Sale for the reserve price of E100 000. This document as evidence of Notice of Sale cannot be admitted for the reason that it is incomplete and without any official stamp. Its source is in doubt. In **Effie Sonya Henwood N.O. Estate late Israel Clarence v Monica Mathews N.O. and Pius Henwood N.O. (17/2015) [2015] SZSC 05 (29 July 2015)** the court rejected a one page document purporting to be a

written contract of sale of immovable. Similarly *in casu*, this document ought to be rejected.

[29] Secondly, and this came out as a result of the learned Judge in the *courta quo*'s abundance of caution of calling for *viva voce* evidence on this point. It turned out from the evidence that in as much as it was intended for the property to be sold at E100 000, it could not be for lack of interested parties. The property was sold at a reduced price and a Notice of Sale of that price was circulated.

[30] For the above reason, the appellant's assertion that the sale was irregular stands to fail by reason that it lacks factual basis.

[31] The authorities go further to propound that one who challenges a judicial sale should act promptly. He should not stand by and watch the property being transferred. *In casu* not only was the farm sold over fourteen years ago (2001) the appellant did not challenge its sale. He only came to court to defend an application for his ejectment and

only then raised the matter of an irregular sale. **Lord de Villiers CJ**[4] pointed out:

> *"In modern custom property sold by public auction under Judge's order without objection not vindicable – Certainly if movable property has been sold without the knowledge of the owner at public auction by Judge's order on the petition of creditors, it can hardly be that the customs of today would suffer the vindication of property so sold. Not even immovables, when sold by Judge's order and legally delivered after the sale has been prefaced by formal notices, can be vindicated if the owner does not promptly intervene and oppose."*

[32] The appellant's case is more confounded by the reason that he did not challenge the judgment that led to the sale in execution. That judgment is for all intent and purpose valid.**Ota J** cited: [5]

> *"First the applicants do not challenge the judgment which formed the basis of the sale in execution. According to the*

[4] Supra at 674 in Lange and Others v Liesching and Others (1880) Foord 55as cited by **Joosub** at 674.
[5] Lemuel Ndumiso Kota v Standard Bank Swaziland and 5 Others (1532/10 [2012] SZSC 244

Gundwana *judgment the mere constitution invalidity of the rule under which the property was declared executable is not sufficient to undo everything that followed and* *in order to set aside the subsequent transfer of property which followed upon its sale in the execution an aggrieved debtor will have to bring an application for rescission.* *...The relief sought by the applicants, however fails to recognize the fact that 2nd and 3rd respondents bought the property from the Sheriff at a sale in execution. It did not buy it from the 1st respondent. When the Sheriff concluded the agreement with the 2nd and 3rd respondent he did not act as an agent of the first respondent but acted as "executive of the law". This is so because the Sheriff commits himself to the terms of the conditions of the sale, he, by virtue of his statutory authority, does so in his own name and may enforce it on his own name (ivoral Properties (Pty) Ltd v Sheriff, Cape Town & Others 2005 (6) S.A."*

Novation

[33] The appellant contends that the judgment which led to the sale in execution was taken before 26th October 2001.[6] In January 2005 the first respondent accepted a sum of E94,70160 from him in discharge of the debt which was the subject matter of the judgment. First respondent went further to author a number of correspondences demanding the balances of E66, 39443 and E4639443. Third respondent did not only end there but also undertook to cancel the mortgage bond in the event the appellant settles the last balance of E46 39443.

[34] By these subsequent steps taken by third respondent after the judgment in its favour, it could be reasonably expected from him to infer that the judgment creditor (third respondent) had novated the judgment. **Lord deVilliers CJ**[7] authored:

> "*a novation cannot, in the absence of any express declaration by the parties, be held to exist except by way of necessary inference from all the circumstances of the case. It is of the*

[6] Date of sale in execution
[7] In Darling v Registrar of Deeds, Cape Town 1912 AD 28 at 35

essence of every mortgage or pledge that the mortgager or pledger has the right of redemption and this right can only be taken away by express words or by way of necessary inference." (my emphasis)

[35] Can novation be inferred in the circumstances of the present case? *When parties novate they intend to replace a valid contract by another valid contract..."*[8]His Lordship **Van Ransburg J**[9] held:

"*Novation can be described as the replacing of an existing obligation by a new one, the existing obligation being discharged by a new obligation*."

[36] The question of novation does not arise herein. This is not only by reason that the initial obligation upon appellant to pay the loan amount was not substituted but that in 2005 when the correspondences were written by third respondent, the sale in execution had taken place and also the transfer of the farm (mortgage property). There was, as pointed out by Xolani Sithole, no obligation existing against appellant as the third respondent had written off the balance due under the

[8] Wessels: The Law of Contract in South Africa 2nd Ed Vol. 2 para 2458
[9] Tauber v Von Abo 1984 (4) 842 at 485

mortgage bond following the sale in execution. Further, as correctly held by the learned Judge *a quo*, the first respondent had by then advised the appellant that he had since purchased the property through judicial sale.For these reasons the judgment of the court *a quo* cannot be faulted.

Costs

[37] The learned judge in the court *a quo* ruled "*for this reason costs will be costs in the cause including certified costs of Counsel*."The appellant submits that costs ought to have been granted in his favour following the interim ruling:

[38] **Greenberg**[10]pointed out as follows:

> "*In appeals upon questions of costs, two general principles should be observed. The first is that the Court of first instance has a judicial discretion as to costs, and the second is that the successful party should, as a general rule, have his costs. The discretion of such court, therefore, is not unlimited, and there are numerous cases in which courts of appeal have set aside*

[10]Merber v Merber 1948 (1) SA 446 at 452

judgments as to costs where such judgments have contravened the general principle that to the successful party should be awarded his costs."(my emphasis)

[39] **A C Cilliers**[11] propounds:"... *a judgment on the merits is a prerequisite for a costs order."*

[40] In the present case, the court correctly held that "*costs will be costs in the cause*", because the matter was yet to be adjudicated upon on the merits. The matter was still pending when the learned Judge referred it to trial. *Prima facie* on the papers, the appellant was successful. However, as the court pointed out that there were issues to be ventilated on trial. These issues were to give a definite decision on the first respondent's application. In the circumstances of the case, reasoning dictated that the question of costs follow the event in the final judgment of the matter. It is for this reason **A C Cilliers**[12] stipulated: "*an unsuccessful application for an interdict will not necessarily lead to the applicant being mulcted with costs*." He

[11] Law of Costs – Service Issue 17 at 1-6 (1)
[12]at 12 -13

further points out: "*In a case of the grant of an interdict pendete lite the court will ordinarily make the costs abide the result of the action*...."(my emphasis)

[41] **Greenberg**[13]expounded:

> "*But when, in the present case, the general rule has been followed, then the appellant must show that there were grounds for departing from the rule, and if there are such grounds, that the trial Judge, in refusing to depart from the rule, has either failed to take such grounds into consideration or has acted arbitrarily in not giving effect to them by depriving the successful party of his costs. In either of these events the appeal court would be free to exercise its own discretion.*" (my emphasis)

[42] So the question *in casu* is whether appellant has shown grounds upon which the trial Judge ought to have departed from the general rule. *In casu,* I am afraid, there were no grounds submitted on behalf of

[13]*supra* at page 453

appellant to motivatethe trial judge or the appeal court to deviate from the general rule. The submission that appellant ought to have been granted costs just because it succeeded on the rule nisi is without any justification in light of the legal authorities cited above.

[43] For the above, the following orders are entered:

1. The appeal is dismissed;

2. The orders of the *court a quo* are hereby confirmed.

3. Appellant is ordered to pay costs including costs of postponement of appeal on 12th November, 2015.

_____
M. DLAMINI
ACTING JUDGE OF APPEAL

I agree

_____
N. J. HLOPHE
ACTING JUDGE OF APPEAL

I agree

M. J. MANZINI
ACTING JUDGE OF APPEAL