IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE NO: 74/2016**

In the matter between:

FREDERIC MAPANZENE APPELLANT

AND

STANDARD BANK SWAZILAND LIMITED RESPONDENT

Neutral Citation: *Frederick Mapanzene v. Standard Bank Swaziland Limited (74/2016) [2017] SZSC 13 (15 May 2017)*

Coram: **DR. B.J. ODOKI, JA**

M.J. DLAMINI, JA

S.B. MAPHALALA, JA

Date heard: **1 March 2017**

Date delivered: **15 May 2017**

Summary: *Civil Procedure and Practice − Urgent application for stay of execution of judicial sale by Public Auction − Requirement under Rule 6 (25) (a) of the Rules of the High Court. To state what circumstances render the matter urgent, and why the applicant can not be afforded substantial relief at another hearing − Appellant's failure to state these requirements in the forwarding affidavit and certificate of urgency fatal to his application − Appellant's inordinate delay in bringing the application at the eleventh hour is an abuse of the urgency procedure − court* ***a quo*** *justified in refusing the application − Appeal dismissed with costs.*

JUDGMENT

DR. B.J. ODOKI J.A

[1] The Appellant brought an application on 15th September 2016 and served the Respondent's attorney at 10.14 am when the application had been set down for hearing at 2.00pm the same day, as it was stated that it was urgent.

[2] The Appellant sought the following prayers, among others,

" 2. Staying the sale in execution of the immovable property portion 804

(a portion of portion 675) of Farm 2 situated in the District of Hhohho scheduled for the 16th day of September 2016 pending the finalization of this application.

4. *Directing the respondent to sell in execution the subject property a market value of E2, 500,000.00.*

5. *Alternatively directing that the subject property be sold at a market value that is going to be fixed by an evaluator to be conducted and agreed between the parties*"

[3] The Respondent filed an answering affidavit before a hearing. The matter appeared before the Court in the afternoon of 15th September 2016, but the presiding judge in the court ***a quo*** raised the issue whether the certificate of urgency was proper and the appellant's attorney was granted leave to amend it.

[4] The matter was argued on 16th September 2016, but the ruling was reserved. The respondent decided not to proceed with the sale awaiting the decision of the court. On 23rd September, 2016, the court ***a quo*** delivered its decision refusing to grant the stay of execution, with costs on the grounds that the Appellant had not complied with the requirements of Rule 6 (25) of the Rules of the High Court regarding the need to state the circumstances which rendered the matter urgent and reasons for delay in bringing the application at a last minute. Furthermore the consolidated property was not the bonded property and therefor its market value was inapplicable to the judicial sale.

THE APPEAL

[5] The Appellant being dissatisfied with decision of the court ***a quo*** appealed to this court on the following grounds:-

> *"1. The learned judge **a quo** erred in fact and in Law that the appellant had not complied with Rule 6 (25) of the High Court Rules regarding urgent applications.*
>
> *2. The court **a quo** erred in fact and in Law that the certificate of urgency did not comply with the practice directive.*

3. *The court **a quo** misdirected itself in finding that a judicial auction sale that was to be held at a set time and date being the 16th July 2016 at 11.30 am was insufficient as circumstance to render a matter urgent.*

4. *The court **a quo** misdirected itself in fact (when it held) that a public sale that was due to take place at an appointed time and at a set reserved price that is complained of as far below the market price whilst rejecting that the same fact rendered the matter urgent.*

5. *The court **a quo** misdirected itself in fact and in law in finding that the delay was inordinate, unreasonable and disruptive to the normal court roll in the presence of a normal roll for urgent matters.*

6. *The court a quo erred in fact and in law (in holding) that the prejudice likely to be suffered by the court in administration of justice outweighed the prejudice likely to be suffered by the Appellant if the matter is dismissed for coming to court on urgency.*

7. *The court **a quo** misdirected itself by not considering the merits of the case in its entirety especially if there was any prejudice likely to be suffered by either of the litigants in granting the order as sought as against dismissing the application.*

8. *The court a quo misdirected itself in not considering the present status of the immovable property sought to be sold below in market value as being a consolidated property and the practical implications on the value of the property or the practical occupation of the property as a result of consolidation.*

9. *The court **a quo** erred in fact and in law in holding that there was any other remedy available to this court or any other forum for the appellant to complain about the reserve price being below the market value"*

APPELLANT'S ARGUMENTS

[6] The Appellant first dealt with the issue of urgency which in effect was the first ground of appeal. The Appellant submitted that the court ***a quo*** misdirected itself in holding that he had not complied with Rule 6 (25) (a) and (b) of the High Court Rules for several reasons.

[7] The first reason given was that there was no other alternative remedy available to the Appellant for the court ***a quo*** to intervene before the property is sold to a third party that may be innocent.

[8] Secondly, the matter was urgent because adherence to the normal rules of procedure as the time limits would defeat the purpose of the order sought since the sale had been scheduled for the 16th September 2016 at 11.30 am and therefore it was imminent.

[9] Thirdly, if the matter had been heard in the normal roll, the Appellant would have suffered irreparable harm, as the property could have been sold at a set reserve price of E1.5million instead of the market value of E2,5 million.

[10] Fourthly, the circumstances of the case demanded a greater relaxation of the rules to a degree commensurate with the exigencies of the case. The Appellant relied on the case of **Luna Merbel Versaadlis vs, Makin and Another** 1977 (4) SA 135 at 137. It was the contention of the Appellant that the court is enjoined to exercise its discretion judicially and not to allow technicalities to defeat the interests of justice. The Appellant cited a number of authorities to support his submission. The cases included: **Shell Oil Swaziland (PTY) LTD vs. Motor World (PTY) LTD t/a Sin motors** Civil Appeal Case No. 23/2006 **Savannah N. Maziya Sandanezwe vs. GD1 Covicents and Projects Management (PTY) LTD,** High Court case No.909/2009, **Phumzile Myeza and Others vs. The Director of Public Prosecutions and Another** Case No. 248/2009 and **Impunzi Wholesalers (PTY) LTD vs. Swaziland Revenue Authority** Case No. 6/2015.

[11] The next issue argued by the Appellant is the question of prejudice. This issue addresses grounds 4, 7, 8, and 9. The Appellant submitted that he would suffer pecuniary prejudice if his property was sold at E1.5 Million (One and a half million Emalangeni) less than the market value of E2.5 Million (two and a half Million Emalangeni).

[12] It was the contention of the Appellant that mortgage bonds are a matter of public interest and therefore any sale at a reserve price below the market value warrants intervention by the courts. In this connection, reference was made to the case of **Rodgers Bhoyana Du-Point VS. Swaziland Building Society and 2 others** (2016) SZSC 79.

[13] The Appellant submitted further that he should not be punished by the court closing its doors against him due to the fact that he engaged in negotiation rather than rushing to court. It was the contention of the Appellant that his action was intended to mitigate costs. The Appellant relied on the case of **New Mall (PTY) LTD vs. Tricor Investments (PTY) LTD** High Court Case No. 302/12.

[14] The Appellant also argued that he was within his rights to apply for modification of the reserve price in accordance with Rule 46 (9) (b) of the Rules of the High Court.

[15] Lastly, the Appellant submitted that the property having been consolidated through components of Remainder of Portion 804 (a portion of Portion 675), of Farm No. 2 in the extent of 791, square meters with Portion 1106 (a portion of Portion 675) of Farm No. 2 extending 139 square meters, increased the value of the property. It was the Appellants contention that the practicability of occupation of the consolidated property and legal implications demanded that the consolidation be accepted by the court.

RESPONDENT'S ARGUMENTS

[16] Arguing the seventh and ninth grounds of appeal together, the Respondent submitted that Portion 804 was not consolidated with Portion 1114 which was not the subject of the judicial sale.

The respondent argued that the property which was bonded in 2010 and 2014 to the Respondent by the Appellant was Portion 804 measuring 1000 square meters. As the Appellant himself confirmed, this property has not been consolidated with any other property. Furthermore, the records at the Deeds Office confirm that there is no Portion 1114 of Farm 2 which was mentioned by the Appellant as Annexture B.

It was the Respondent's contention that if there is no such property, there would be no valuation done.

[17] The Respondent submitted that the diagrams which the Appellant sought to produce in the replying affidavit could not advance the Appellant's case as in 2010 and 2014 when the Appellant signed the surety mortgage bonds these diagrams had not changed the registration of Portion804 at the Deeds Office, and hence the property was not consolidated. Furthermore, the Respondent argued, in terms of Section 40 (1) (c) of the Deeds Registry Act 1968, a consolidation can only happen if there are two properties which are registered in the same register. In this case the Appellant failed to produce a deed of transfer confirming consolidation of the two properties.

[18] It was also the contention of the Respondent that in terms of Section 40 (4) of the Deeds Registry Act, a consolidation can only happen if the bond holder consents, and in this case, the Respondent did not consent. The Respondent submitted that , therefore, the court ***a quo*** was correct in finding that Portion 804 had not been consolidated.

The Respondent also argued that it was prejudicial to the Respondent to stop the sale on grounds of property which was not the subject matter of the judicial sale and which was not registered at the Deeds Office.

[19] With regard to the issue of valuation of the property, the Respondent submitted that the complaints in grounds 7 and 9 of appeal have no merit.

The Respondent argued that before the Respondent advertised the sale of 15th July 2016, the Respondent relied on a valuation done in January 2016. When the Appellant brought the petition in July 2016, this valuation was attached to the opposing affidavit, and when the court issued a court order on 29th July 2016 it directed that this valuation be the one used in any re-advertisement.

[20] As a consequence of this order, the Respondent submitted , it re-advertised the property of the 5th August, 2016 using the same valuation report and set the price at E1,500,000 and the Appellant did not object. Furthermore the Appellant's new valuation was done for property which was yet to be consolidated, and therefore there was no basis for the court ***a quo*** to direct the Respondent to sell the property at a reserve price of E2,500,000 (two and half million Emalangeni) which related to a non-existent property.

[21] The Respondent submitted that the argument by the Appellant that the Respondent would not have suffered any prejudice if the property had been sold for E2,500.000 had no merit since there was no property called 1114, and therefore if the Appellant had succeeded the Respondent would not have been able to sell the property because it did not exist. In any event, the Respondent contended, the property bonded to the Bank is Portion 804 measuring 1000 square meters and not 930 square meters which is reflected in the new valuation.

[22] With reference to the case of **Rodger Bhoyane Du-Pont and Swaziland Building Society and Two Others** (Supra) relied on by the Appellant, the Respondent submitted that the case did not apply as the property in issue namely the Portion 804 was being sold at the market value.

[23] Lastly, the Respondent argued that the Appellant was aware that in accordance with the court order once the sale occurs on 16th September 2016, he and his family had to vacate the property by 31st October 2016, and therefore by coming up with a valuation which had nothing to do with the bonded property, the Appellant was buying more time to stay on the property which he had succeeded to do since he is still in occupation of the property.

Therefore, the Responded submitted there was no substance in the merits of the application.

[24] The Respondent next dealt with grounds of appeal number 1 to 6 together. It was the submission of the Respondent that the court ***a quo*** correctly found that there was no compliance with Rule 6 (25) of Rules of the High Court. The Respondent argued that it is now trite law that an appellant in an urgent application must provide reasons why he can not be afforded substantial redress in due course, and he must make his case in the founding affidavit. The Respondent relied on the following cases; **Salt and Another v.Smith** 1991 (2) S A 186 (NM) page 187, **Terrence M. Mabila and Another Standard Bank Swaziland Limited** High Court Case No. 2010/2009 pages 2 and 3, and **Yonge Nawe Environmental Action Group v. Nedbank (Swaziland) Limited and Others**, High Court Case No. 4165/2007 paragraphs 6 - 10.

[25] The Respondent submitted that the reason given by the Appellant for bringing the urgent application was correctly rejected by the court ***a quo*** because the Appellant was aware that the property was to be sold to a third party as early as 29th July 2016, and could be bought by Third parties and yet he did not object when it was advertised for the sale on 5th August 2016.

Therefore there was nothing new in his claim that the property would be sold to a third party.

[26] The Respondent submitted further that the Appellant was aware that the property was to be advertised as per valuation stipulated in the court order.

It was the contention of the Respondent that the fact that the Appellant then went to engineer another valuation on 5th August 2016 relating to the same property could not be a basis for bringing the matter on an urgent basis.

[27] Furthermore, the Respondent argued, the Appellant could not be allowed to bring a case in a replying affidavit, which was not the basis set out in the forwarding affidavit. Reference was made to the case of **Ngwane Mills (PTY) Limited v. Swaziland Competition Commission and others**, High Court Case No. 2589/2011, paragraphs 38 – 43.

[28] The Respondent also submitted that the letters which the Appellant wrote through his attorneys did not constitute any negotiations because they were telling the Respondent's attorneys about a new valuation which was rejected as it had no basis.

It was the Respondent's contention that from 12th September 2016, there was no justification for Appellant to wait for almost two days and launch an application in the morning of 15th September, 2016 for hearing in that afternoon, with extreme urgency and giving the court and the Respondent little time to deal with the matter. The Respondent submitted that the court ***a quo*** correctly found that this conduct undermined the administration of justice.

[29] Finally, the Respondent argued that the certificate of urgency filed was not in compliance with the Rules of Court by explaining the circumstances which rendered the matter urgent. It was the contention of the Respondent that the Appellant's attorney was the one who represented him when the court order of 29th July 2016 was entered directing the property to be sold at a reserve price of E1,500.000 as per valuation of January 2016. Pursuant to that court order the property was advertised for the sale at a reserve price of E1,500.000 for the 5th August 2016 and therefore, the Respondent maintained there was nothing new with the advert for 16th September 2016. Moreover, the Respondent submitted, the Appellant's new valuation did not relate to Portion 804 and this had been pointed out to the Appellant's attorney before the certificate of urgency was signed.

[30] It was therefore the submission of the Respondent that there was no basis for the court ***a quo*** to exercise its discretion and enroll the matter as one of urgency and that the application was purely an abuse of the court's process.

[31] The Respondent prayed that the appeal be dismissed with costs at attorney and client scale which according to him, the Appellant agreed that will be payable, on recovery of any monies owed to the Respondent.

CONSIDERATION OF THE GROUNDS OF APPEAL

[32] The main issues raised in this appeal are whether the court ***a quo*** erred in holding that the Appellant's application had not complied with the requirements of urgent applications and, secondly, whether the Appellant would be prejudiced by the rejection of the application.

The first issue deals with the point ***in limine*** of urgency and the second issue touches on the merits of the application relating to the consolidation of the property and new valuation thereof.

[33] On the issue of urgency, Rule 6(25) of the Rules of the High Court provides;

"(25) (a) *In urgent applications, the court or judge may dispense with forms and service provided for the in these rules and may dispose of such matter at such times and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to the court or judge, as the case may be, seems fit.*

(b) In every affidavit or petition filed in support of an application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."

[34] The learned judge in the court ***a quo*** stated that this Sub-rule had been interpreted on countless occasions in the High Court and the Supreme Court and cited several decisions on the point which included:

Nhlavana Maseko and 2 others vs. **George Mbatha & Another**, **Civil appeal 7/2005, New Mall (PTY) LTD v Trico International (Pty**) **LTD (302/2012) [2012] SZHC175 (10 August 2012)** and cases therein cited, **Magalith Holdings and RMS Tibiyo (PTY) Limited and Another, In re: RMS Tibiyo (PTY) Limited v HP Enterprises (PTY) Limited, Civil case 199/2000 and Swazi MTN Limited v Presiding Judge of the Industrial Court and Others (325/16) [2016] SZHC 33 (23 February 2016).**

[35] The court ***a quo*** also referred to the relevant practice directive of the High Court which enjoins the attorney to state in the certificate of urgency the circumstances which he avers render the matter urgent and why he believes the applicant could not be afforded substantial redress at a hearing in due course. However, the court ***a quo*** found that in his founding affidavit, the Appellant had stated that the matter was urgent simply because his property was due to be sold the next day by public auction following an order by a judge of the court ***a quo*** and the reserve price on the Notice of Sale was below the actual market value thereof.

[36] The court a quo made the following pertinent observations;

> *"[8] Nowhere in his founding affidavit does the applicant state when he first got to know about the judicial auction sale. His real and only concern is that his property is due to be sold and the reserve price has been set or fixed at a price below the latest evaluation that his consultant has advised him about. He therefore wants this court, as a matter of urgency, to stop the auction sale. The auction sale was due to take place at 11.00 am on 16 September 2016. He waited all along and only approached this court when the auction sale was due in less than 24 hours.*
>
> *[9] The Notice for the judicial sale was, according to the evidence, published in the local print media on 22 August 2016. On both occasions the reserve price was the one complained of in this application. The applicant filed or registered his complaint about the reserve price by letter dated 9 September 2016. He sent this letter to the respondent's attorneys who responded thereto by letter dated 12 September 2016, rejecting the applicant's entreaties.*

Still the applicant waited until 15th day of September, before he could file this application. I do of course accept the applicant's assertion that although the auction sale was advertised on 22 August 2016, he first got to know about it on 01 September, 2016. But again, he waited and did not register his complaint with the respondent's attorneys, until on the 9th day of September, 2016. He submits, however that 'it suffices to say the time I discovered the notice and the time of filing the application in my view is not far apart to be set aside as not urgent.' I cannot agree."

[37] The learned judge in the court ***a quo*** considered the pleas made by the Appellant that each case must be decided on its own facts and that the court must strive at all times to determine and dispose of every case on it merits rather than technicalities, and that the public auction was due to take place at the appointed time and the Appellants house may be sold at the reserved price.

[38] Despite the above pleas, the court ***a quo*** rightly came to the conclusion that the Appellant was not entitled to wait for ages and then take the matter to the court at the eleventh hour, on grounds of urgency.

The learned judge in the court ***a quo*** stated;

" [11] However, having said all the above in favour of the applicant, I do not believe that the litigant is entitled to wait as the applicant has done before taking up his complaint with the court. A litigant is not expected to wait for ages and then take up his matter with the court at the eleventh hour. This is exactly what the applicant has done in this case. Whilst I accept that the court must hear all matters brought before it, the urgency procedure must not be abused or used in underserving cases. This procedure is certainly not just there for the taking as it were. Bringing matters on an urgent basis where such urgency is unwarranted not only causes prejudice to the other party but to the roll of the court and the administration of justice in general. Where the court has to put aside, or, on hold its normal business for the day in order to attend to matters brought on a certificate of urgency, the ground for such urgency must be clearly and adequately explained and justified. A litigant who waits inordinately and only goes to court at the last minute, does so at his own peril. This is what the applicant has done in this case."

[38] I am unable to fault the findings and conclusion reached by the court ***a quo*** on the question of urgency. The certificate of urgency did not comply with the requirements of Rule 6 (25) (a) and (b) as it did not contain an explicit explanation of the circumstances which rendered the matter urgent and why the applicant would not obtain redress in due course. The Appellant waited until the eleventh hour to bring the application when he was aware days before that the property would be advertised for sale at the reserve price of E1500,000 decreed by the court ***a quo*** earlier on.

[39] This kind of conduct by the Appellant has been decried in a number of cases which include **Luna Menle Vernaardigers v. Taken and Another** 1977 (4) S A 135, **Gallagher v. Norman's Transport Lines (Pty) Ltd** (3) SA 500

Mangala v Mangala 1967 (2) S A 415 **Humphrey H. Heywood v Maloma Colliery Limited and Athers** Cases No. 1623/94 and **Nhlavana Maseko and Others v. George Mbatha and Another** Civil Case No. 7/2005.

[40] **<u>In Nhlavana Maseko and Others</u>** Case (Supra) Steyn JA observed:

> *" [2] There has been a tendency to bring matters to court as being so urgent as to justify a departure from the time constraints imposed by the Rules of court. There can be no doubt that the need exists to cater for facilitated and speedy access to the court where the delays of the law might cause harm to a litigant and effectively frustrate his chances of obtaining a just resolution of his dispute. Such cases are however, clearly exceptional and our courts must be on their guard to protect parties against the abuse of these special powers. Our Rules of court have been framed in order to ensure that the legal process will be orderly and that parties are given a fair opportunity to prepare and present their case."*

[41] I entirely agree with the above observations. In the present case, the Appellant did not observe the correct procedure relating to urgent matters and therefore the grounds of appeal relating to this issue have no merit and must fail.

[42] The second issue in the appeal is whether the Appellant stood to be prejudiced by the sale of the property at the reserve price of E1,500.000 instead of the market price E2,500.000. This issue in effect deals with the merits of the urgent application.

[43] The Appellant submitted that the property which was the subject of the judicial sale had been consolidated with another property on Portion No. 1114 of Farm 2 and the market value of both properties had been assessed at E2,500.000 and therefore that should be the reserve value for the judicial sale.

[44] On the other hand, the Respondent submitted that the property which was the subject of the mortgage bond was Portion 804 measuring 1000 square meters. The property had been valued in January 2016 at E1,500.00 and the value endorsed by the court ***a quo*** before it was earlier advertised for sale.

[45] Furthermore, the Respondent contended that the purported consolidation of the two plots had not been finalized as there it was not registered with the office of Deeds.

Secondly, the size of the property mortgage was 1000 square meters and not 913 square meters as indicated in the valuation report of July 2016, for the consolidated property.

Thirdly, the Respondent had not consented to the included consolidation. Therefore, the Respondent could not sell property which was not subject of the mortgage bond nor of the judicial sale.

(46) In his judgment, the learned judge in the court a quo observed;

"[12] *One further point deserves mention herein. The property that is the subject matter of the judicial sale is portion 804 (a portion of portion 675) of Farm 2 Hhohho region*.

The evaluation used by the respondent was done in January 2016. The applicant's valuation was done in July 2016 on a yet to be consolidated property involving the said property and another property measuring 139 square meters. The latter property is not the subject of the auction sale. It is therefore irrelevant for purposes of this proceedings.

[13] Lastly, if the applicant has a legitimate complaint about the reserve price set out by the respondent in the Notice of Sale, he may pursue it later in other proceedings properly brought before this or any other appropriate court or forum; not in this application."

[47] In my view the learned judge came to the correct conclusions on the issue of the purported consolidated property and the market value thereof, that they were irrelevant to the urgent application.

DECISION AND ORDERS

In the result, this appeal is dismissed. I make the following order:

1. ***The appeal is dismissed.***
2. ***The Appellant will pay costs of the appeal.***

DR. B.J. ODOKI
JUSTICE OF APPEAL

I agree **M.J. DLAMINI**
JUSTICE OF APPEAL

I agree **S.B. MAPHALALA**
JUSTICE OF APPEAL

FOR THE APPELLANT: **M.S. SIMELANE**
FOR THE RESPONDENT: **K. MOTHA**