IN THE SUPREME COURT OF THE KINGDOM OF ESWATINI

JUDGMENT

Civil Appeal Case No: 78/2017

In the matter between:

MAJAZI INVESTMENTS (PTY) LTD APPELLANT

And

SWAZILAND BUILDING SOCIETY FIRST RESPONDENT

PHUMELELA MALINDZISA N. O SECOND RESPONDENT

Neutral citation: *Majazi Investments (Pty) Ltd v Swaziland Building Society & Others (78/2017) [2018] SZHC 17(2018)*

Coram: **M. C. B. MAPHALALA, CJ**
R. J. CLOETE, JA
J. P. ANNANDALE, JA

Heard : 22ND MAY, 2018

Delivered : 31ST MAY, 2018

SUMMARY

Civil Appeal – validity of a sale in execution – whether they complied with the requirements of Rule 45 (8) of the High Court Rules – three contradictory adverts were published in a newspaper on different dates in respect of the same auction – the dates and venues of the sale in the adverts were substantially different – the sale was subsequently held in respect of the first advert but the two other adverts were not cancelled - the High Court dismissed the application on the basis that the non-compliance with the rule was not material;

On appeal the Court held that a sale in execution is vitiated by non-compliance with a material formality which goes to the root of the matter and to consequently defeat the purpose of the Rule of Court and causing prejudice to the aggrieved party;

Held further that Rule 45 (8) of the High Court Rules is peremptory to the extent that it provides that the Deputy Sheriff shall sell the attached movable property by public auction to the highest bidder after due advertisement by him in one or more newspapers and after the expiration of not less than fourteen (14) days from the time of seizure

and not less than seven (7) days after the first publication of such advertisement;

Held further that the non-compliance was material and going to the root of the matter on the basis that the respondents did not advertise the sale properly in view of the contradictory adverts that were issued pointing to different times, dates and venues; hence; the sale only attracted two bidders to the prejudice of the appellant;

Held further that the respondents failed to sell the attached movable properties to the highest bidder in order to realise the highest price, and, that the appellant suffered prejudice on the basis that the proceeds of the sale were insufficient to liquidate the debt; hence, further attachment was effected by the respondents for the outstanding arrear rental;

Accordingly, the appeal is upheld with costs on the ordinary scale

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JUDGMENT

JUSTICE M. C. B. MAPHALALA, CJ:

[1] The appellant lodged an application on the 5th May, 2017 on an urgent basis for an order in the following terms: Firstly, declaring that the purported sale in execution which took place on the 5th August, 2016 should be declared null and void. Secondly, staying the removal of the attached goods pending finalization of the application. Thirdly, calling upon the respondents to account for the proceeds of the purported sale of the 5th August, 2016 within seven (7) days. Fourthly, costs of the application in the event that the application is opposed. The respondents opposed the application and filed an answering affidavit. The respondents subsequently filed a replying affidavit.

[2] It is common cause that the first respondent obtained a Court Order in terms of which the appellant was ordered to pay arrear rentals of E80 412.87 (Eighty Thousand Four Hundred and Twelve Emalangeni and Eighty-seven cents); subsequently, the first respondent issued a writ of execution for the debt. On the 15th July, 2016 the first respondent advertised a sale in execution for the attached movables to

be held at Asakhe House, Shop No. 6 in Mbabane at 10.00 am on the 5th August, 2016.

[3] The first respondent further re-advertised the sale on the 3rd August, 2016 advising that the sale would be held on the 5th August, 2016 at the High Court at 1130 hours; however, the first advert was not cancelled. It is common cause that Rachel Pereira, the appellant's agent attended the sale as advertised at the High Court; however, the sale was not held until she left the High Court premises at about 1200 hours.

[4] It is not disputed that the first respondent published a third advert in respect of the same sale on the 5th August, 2016 which was the day of the auction sale. This advert was similar to the first advert in terms of the date and place of the auction sale; however, the second advert was not cancelled. According to the first respondent, the second advert was made to generate public interest in the auction sale. The first respondent further contends that the second advert had an error that the sale would be conducted at the High Court as opposed to the premises of the first respondent at Asakhe House.

[5] The sale in execution was held on the 5th August, 2016 at Asakhe House in accordance with the first and third adverts. The movable property was purchased by WSM Investments (Pty) Ltd with a bid of E10, 000.00 (Ten Thousand Emalangeni); it is not disputed that a reserve price was not set by the respondents. The second respondent was mandated by the first respondent to use his discretion in determining the purchase price of the property. The buyer of the movables was being assisted in the bidding by another Deputy Sheriff, Wiseman Dlamini. The respondents justify the acceptance of the low bid of E10, 000.00 (Ten Thousand Emalangeni) on the alleged dilapidated condition of the movables; however, no evidence was presented in the *court a quo* to prove that the attached movables were dilapidated.

[6] The failure by the second respondent to set a reserve price on the attached movable property constitutes an irregularity and further contributed to the low purchase price. Furthermore, the involvement of another Deputy Sheriff assisting the buyer smacks of collusion and lack of transparency and fairness in conducting the sale in execution. Similarly, the failure by the respondents to cancel the second advert

created a confusion with regard to the date, place and time of the sale in execution; the contradictory and conflicting adverts were material and going to the root of the matter, and, it contributed to the poor attendance of potential buyers.

[7] It is not clear what factors were taken into account by the second respondent in determining the acceptable bid. This becomes apparent when considering that only E10, 000.00 (Ten Thousand Emalangeni) was realised, and, a debt of E70, 412.87 (Seventy Thousand Four Hundred and Twelve Emalangeni and Eighty-seven cents) was still outstanding. Subsequently, the first respondent attached additional movables to satisfy the balance of outstanding arrear rental.

[8] In its replying affidavit, the appellant states that it would conduct a search at the Registry of Companies in order to establish the identity of the buyers. Subsequently, on the 7th June, 2017 the Registrar of Companies, Msebe Malinga issued a written confirmation that WSM Investments (Pty) Ltd is not a registered company and that it does not appear in the list of companies registered in Swaziland.

[9] The appellant disputes the alleged arrear rental of E80, 412.87 (Eighty Thousand four Hundred and Twelve Emalangeni and Eighty-seven cents) as outstanding and contends that it paid E20, 000.00 (Twenty Thousand Emalangeni) to the first respondent which was never deducted as well as E33, 276.53 (Thirty Three Thousand Two Hundred and Seventy-six Emalangeni and Fifty three cents) which was paid to the first respondent's attorneys; the receipt of E20, 000.00 (Twenty Thousand Emalangeni) is annexed to the record of proceedings.

[10] The appellant contends that Wiseman Dlamini has a close relationship with the first respondent's attorneys. The appellant further contends that Wiseman had conceded that the first respondent's attorneys had asked him to secure a buyer for the movables, and, that Wiseman had confirmed to them that he had secured a buyer who was offering E10, 000.00 (Ten Thousand Emalangeni), and, that the respondents had accepted the offer. The appellant further rejected the respondents' assertion that Wiseman was assisting the buyer as he didn't know their language. The respondents have not filed a further affidavit to contradict these glaring irregularities.

[11] The sale of movable property in execution of judgment is governed by Rule 45 (8) of the High Court Rules. It is intrinsic in a sale in execution that the property should be sold to the highest bidder at the highest possible price. The rule provides:

> **"45 (8) Where under sub-rules (4) and (6):**
>
> **(a) any movable property is attached, the Deputy Sheriff shall where practicable and subject to rule 59 sell it by public auction to the highest bidder after due advertisement by him in one or more newspapers and after the expiration of not less than fourteen days from the time of seizure thereof and not less than seven days after the first publication or such advertisement;"**

[12] It is a trite principle of our law that a sale in execution can only be vitiated by non-compliance where there is a material formality which

goes to the root of the matter and consequently defeating the purpose of the rule and causing prejudice to the aggrieved party[1]. The enquiry entails a consideration of the basis for the formality, the extent of non-compliance as well as the prejudice or potential prejudice to interested parties especially the judgment debtor.[2]

[13] The purpose of advertising as required by the Rule 45 (8) is to ensure that the proper and fair value of the property is realised. It is apparent from the evidence that the sale in execution was not properly advertised due to the publication of contradicting adverts. Very few people attended the sale, and, they included Attorney Mancoba Ndlangamandla, two Deputy Sheriffs Wiseman Dlamini and the second respondent as well as the Director of WSM Investments (Pty) Ltd. At the High Court only Ms Rachel Pereira, the appellant's agent attended the sale. It is not disputed that Attorney Mancoba Ndlangamandla had attended the sale in his capacity as an attorney for

[1] Elizora Olivier Todd v. First Rand Bank Ltd and Six Others Case No. 497/12 at para 11 and 12 Supreme Court of Appeal of South Africa (497/11) (2013) ZASCA 61 (14 May 2013)

[2] Menga & Another v. Markom & Others 2008 (2) SA 120 paras 31 - 42

the first respondent, and, he merely offered E50, 00 (Fifty Emalangeni) for the bid.

[14] It is well-settled in our law that where non-compliance with a requirement of Rule 45 (8) of the High Court Rules is not material, does not defeat the purpose of the requirement and does not prejudice the judgment debtor, a sale in execution is not invalid solely by reason of the non-compliance. Rule 45 (8) is peremptory and provides that the Deputy Sheriff shall sell the attached movable property by public auction to the highest bidder after due advertisement by him in one or more newspapers and after the expiration of not less than fourteen (14) days from the time of seizure and not less than seven (7) days after the first publication or such advertisement.

[15] Hlophe J in Phangothi Investments (Pty) Ltd v. Swaziland Development and Savings Bank and Four Others; Taga Investments (Pty) Ltd v. Phangothi Investments (Pty) Ltd and Four Others[3] rejected the contention by the Learned Attorney for the Swazi Bank and the Deputy Sheriff responsible for the sale in execution of the property, that the sale in execution was properly advertised and sold at

[3] High Court of Swaziland Civil Case No. 2392/2008 para 30

the place advertised. In coming to this conclusion the Learned Judge had this to say:[4]

"19. Given that the Applicant's complaint in the main application is that the property was sold at a different place than that advertised which may have resulted in other interested buyers other than the eventual purchaser not being able to play a part thereat when by so doing they would have possibly influenced the bidding so as to result in an even higher bid, the applicable rule would be Rule 45 (8) (a) and (b) of the Rules. Rule 46 (8) (a) directs that the "Sheriff shall appoint a day and place for the sale of such property" while Rule 46 (8) (b) requires the execution creditor, after consultation with the Sheriff, to prepare a Notice of Sale containing the time and place for holding the sale, among other things.

[4] Phangothi Investments (Pty) Ltd supra at para 19 -23

20. There can be no doubt from the language used in Rule 45 (8) (a) as captured above that it is a peremptory rule as it uses the word shall. That such language is peremptory was decided in the South African cases of *Messenger of the Magistrate's Court, Durban vs Pillay 1952 (3) SA 678 (A)* and later that of *Rossiter and Another vs Rand Natal Trust Co.* LTD *and Others 1984 (1) SA 385 (N) at 387G – 388A,* which are highly persuasive in this court. This is all the moreso if considered in line with the purpose of the sale having been by means of an auction. It can hardly be in dispute that the purpose of a sale by auction is to ensure that the property being sold, is sold to the highest bidder, which is to say it is sold for the highest possible price. The underlying argument being that if the property is sold at a different place than that advertised, such has the tendency of defeating this purpose because other would be bidders may

end up not attending when their attendance could have influenced the sale towards achieving its purpose.

21. If in describing the place for the sale in execution as obliged to do so by Rule 45 (8) (a), the Deputy Sheriff in consultation with the Execution Creditor, at best gives an ambiguous place and at worst a different one altogether from that where the sale is eventually held, he clearly would not be complying with Rule 45 (8) (a).

22. Where there is no compliance with a peremptory rule resulting in the sale of the property, it should follow in my view that the sale in execution is void or invalid which should result in its being set aside. In fact in *Macboy vs Vac (1961) 3 All ER 11, 69* the same principle was expressed in the following words as quoted with approval in *Malwane vs True*

Reality Company (PTY) LTD and others High Court Civil Case No. 2217/2010;

> **"If in fact it is void then void then it is law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."**

23. I am in full agreement with this principle which in any event is an established one in this jurisdiction if one considered such local cases as ***Simelane and 85 Others vs City Council of Mbabane and Others – High Court Case No. 1775/98, Thembekile Cecilia Shabalala and 2 Others vs The***

Municipal Council of Manzini and 7 Others – High Court Civil Case No. 1978/12 as well as Meshack Dlamini vs Sandile Thwala N. O. and 8 Others High Court Case No. 3210/2010.”

[16] It is apparent from the evidence that only two bidders were present including the first respondent’s Attorney who offered E50, 00 (Fifty Emalangeni). The bid by the ultimate buyer smacks of serious and gross irregularity; the evidence of the appellant in the replying affidavit, which was not disputed, is that Wiseman Dlamini was asked by the first respondent’s attorney as well as the second respondent to secure a buyer for the attached movable property, and, that Wiseman had confided to them that the buyer whom he was allegedly assisting was offering E10, 000.00 (Ten Thousand Emalangeni) to buy the movable property. Such conduct is conclusive evidence that the goods were sold by private treaty. However, I take cognisance of the fact that the buyer was not joined in the proceedings, and, that it could not defend itself in these proceedings. However, this is a far-cry from saying that it was an innocent purchaser.

[17] It is also surprising that during negotiations between the parties, prior to the alleged sale in execution, the appellant had assessed the value of the goods at E128, 500.00 (One Hundred and Twenty-eight Thousand Five Hundred Emalangeni), and, the first respondent had placed the value at E69, 503.00 (Sixty-nine Thousand Five Hundred and Three Emalangeni). It is disturbing that the movable property was subsequently sold for E10, 000.00 (Ten Thousand Emalangeni); and, this points to evidence of a possible collusion between the buyer, the first respondent's Attorney, the respondents as well as Wiseman Dlamini.

[18] I am satisfied that the respondents did not comply with the requirements of Rule 45 (8) to the extent that the sale in execution was not properly advertised and the movable goods were not sold to the highest bidder. Such a failure by the respondents to comply with the requirements of Rule 45 (8) defeated the purpose of the Rule, which is to sell the property to the highest bidder and for the highest possible price. The appellant was greatly prejudiced by the sale because the amount realised was insufficient to liquidate the debt in the absence of a reserve price.

[19] The price realised after the sale in execution was prejudicial to the appellant to the extent that the proceeds of the sale left an outstanding debt of E70, 412.87 (Seventy Thousand Four Hundred and Twelve Emalangeni and Eighty-seven cents); hence, on the

27th February 2017, the respondents subsequently attached further movable property belonging to the appellant in respect of the outstanding rental of E70, 412.87 (Seventy Thousand Four Hundred and Twelve Emalangeni and Eighty-seven cents). It is against this background that on the 21st April 2017, the appellant lodged an urgent application in the *court a quo* staying the removal of the attached goods pending finalization of the present application. Contrary to the judgment of the *court a quo,* the application was urgent in view of the subsequent attachment of the appellant's movables.

[20] Having regard to the preceding evidence, I am satisfied that the

non-compliance of Rule 45 (8) goes to the root of the matter, and, it suffices to vitiate the sale in execution.

[21] Accordingly, the Court makes the following order:

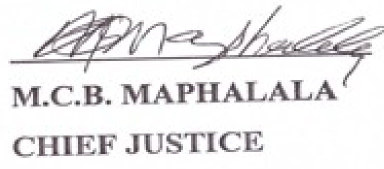
(a) The sale in execution conducted by the first and second respondents on the 5th August, 2016 is declared null and void, and, it is consequently set aside

(b) The respondents are interdicted from attaching and removing the appellant's movable property

(c) The first respondent is directed to pay costs of the appeal on the ordinary scale

For Appellant : Attorney Fezile Ndlovu

For First and Second Respondents : Attorney Hlomendlini Mdladla



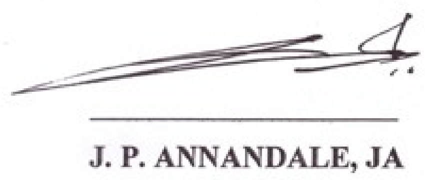
M.C.B. MAPHALALA

CHIEF JUSTICE

I agree

R. J. CLOETE, JA

I agree



J. P. ANNANDALE, JA