IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No.: 95/2022**

In the matter between:

MANGALISO E. SONTO	**1st Appellant**
GLOBAL SPORTS AND LEISURE (PTY) LTD	**2nd Appellant**
And	
MCINISELI ZWANE	**1st Respondent**
STANDARD BANK SWAZILAND LIMITED	**2nd Respondent**
MBONGENI MNDVOTI	**3rd Respondent**

Neutral Citation: *Mangaliso E. Sonto and Another vs Mciniseli Zwane and 2 Others* (95/2022) [2023] *SZSC* 17 (29/06/2023)

Coram: **S.P. DLAMINI JA; M.J. DLAMINI JA and M.J. MANZINI AJA.**

Date Heard: 05th April, 2023.

Date Delivered: 29th June, 2023.

SUMMARY: *Civil procedure – Appeal against High Court Order directing ejectment of Appellants from property purchased by 3rd Respondent at a sale in execution – Appellants contending that High Court erred in refusing to determine Application to set aside sale in execution on the basis that it was not a valid defence to eviction proceedings – Appellants contending that sale was invalid for non-compliance with Rule46(8)(a) and therefore could not serve to pass ownership to 3rd Respondent – Principle that property may be vindicated from bona fide purchaser where sale in execution was invalid discussed – Test for determining whether sale in execution complies with High Court Rules discussed - Alleged grounds of invalidity discussed.*

Held: On the facts, Appellants failed to prove that non-compliance was material or defeated the objects of Rule 46(8(a) - Appeal dismissed with costs.

JUDGMENT

M.J. MANZINI, AJA:

[1] This is an appeal against a High Court Judgment handed down on the 16th December, 2022 directing that Appellants be evicted and/or ejected from certain premises described as Lot 1330 Madonsa Township (hereafter referred to as "Lot 1330"). The Deputy Sheriff, with the assistance of the Eswatini Royal Police, was directed and authorized to effect the said Order.

[2] 1st and 2nd Appellants, were dissatisfied with the Order and subsequently filed an appeal to this Court.

[3] From the pleadings serving before us it is not clear who, between the two Appellants, was the erstwhile registered owner of Lot 1330. What is clear, though, is that it was declared executable by the High Court at some point in time, and it was subsequently sold by public auction. 1st Appellant has at all material times hereto refused to vacate the property.

[4] 1st Respondent is Mciniseli Zwane, the Deputy Sheriff for the Manzini Region, who conducted the auction which is the subject matter of this litigation. 2nd Respondent is Standard Bank Swaziland Limited, the Judgment Creditor at whose instance Lot 1330 was declared executable. 2nd Respondent

also financed the acquisition of the property by 3rd Respondent, who purchased it at the public auction sought to be set aside.

[5] It is common cause that 2nd Respondent obtained default Judgment (at the High Court) for payment of the sum of E1, 645,695 (One Million Six Hundred and Forty Five Thousand Six Hundred and Ninety Five Emalangeni Ninety Eight Cents) against Appellants in respect of a home loan. Lot 1330, being held as security for payment of the home loan, was declared executable. That default Judgment remains extant.

[6] It is further common cause that Lot 1330 was put up for sale in execution by 1st Respondent at least on more than one occasion. All previous sales proved unsuccessful, save the impugned one, held on the 4th March, 2022. It is also common cause that in the previous failed sales the reserve price for Lot 1330 was pegged at E1,800,000.00 (One Million Eight Hundred Thousand Emalangeni); and that in the last sale the reserve price had been reduced to E1,400,000.00 (One Million Four Hundred Thousand Emalangeni).

[7] 3rd Respondent successfully bid for the property, and purchased it at the reduced reserve price. He obtained finance from 2nd Respondent, and subsequently had the property registered in his name on the 20th June, 2022.

[8] About three months after the sale in execution, and before registration of transfer, 1st and 2nd Appellants instituted an urgent application before the High Court seeking an Order to have it set aside, and an interdict restraining the transfer of the property to 3rd Respondent. In the alternative, they prayed for an Order directing the cancellation and expungement of any transfer that may have taken place in favour of 3rd Respondent. The proceedings were opposed, and when the matter came before Maphanga J, he struck it off the urgent Roll, ostensibly to allow the matter to take its normal course.

[9] In their application to the High Court, 1st and 2nd Appellants complained that the sale in execution was *"marred by irregularities"* and proceeded to set these out in their founding papers. However, only two of these alleged irregularities were pursued and argued before this Court. It is therefore not necessary to go into any details of what they were. The alleged irregularities which were argued on appeal will be dealt with presently.

[10] Whilst the proceedings to have the public auction set aside and/or transfer cancelled and expunged were still ongoing 1st, 2nd and 3rd Respondents launched a separate urgent application, with a different case number, to eject and/or evict 1st Appellant from the property. These proceedings were resisted by Appellants on the basis that the application to set aside the public auction and/or cancellation of the transfer of Lot 1330 was still pending, and the outcome thereof could have an effect on 3rd Respondent's title.

[11] Subsequently, both the application to set aside the sale in execution and/or to cancel and expunge the transfer, and application to evict and/or eject 1st Appellant, were consolidated and dealt with as such by Mavuso J. He concluded that 1st Appellant ought to be evicted and/or ejected from the property, and issued the Orders alluded to earlier in this Judgment. Hence, the appeal.

[12] The initial Notice of Appeal contained only three grounds. It was subsequently amended, resulting in twelve overlapping grounds, only two of which were pursued at the hearing. These are dealt with below.

Appellant's arguments

[13] According to counsel for Appellants, Mr. Ngwenya, Appellant's main ground of appeal was that the High Court erred by refusing to set aside the sale in execution. It was argued that the sale in execution was liable to be set aside for two reasons. Firstly, they argued that the sale was held at a different venue than that stipulated in the Notice of Sale in Execution. It was contended that the notice stipulated that the property would be sold outside the Regional Administrator's Office in Manzini; but on the contrary the property was sold at the *"old"* Regional Administrator's Office in Manzini. It was argued that the sale at a different venue than that advertised was prejudicial to Appellants in that potential buyers who could have purchased the property at a much higher price were excluded.

[14] Appellants submitted that the finding of the Court *a quo* that the property was auctioned at the advertised place was a misdirection because 2nd Respondent had admitted in its answering affidavit that the sale occurred at a place different from that stipulated in the Notice of Sale. It was argued that the only defence raised by the Respondents was that holding the sale at a different place was not material to vitiate the sale. Appellants further contended that the failure of the Court *a quo* to follow the decision in **Phangothi Investments (Pty) Ltd v. Swaziland Development and Savings Bank & 4 Others (2392/2008) and Taga Investments (Pty) Ltd vs Phangothi Investments & 4 Others (524/2016) [2016] SZHC 96 (17th June, 2016)** was a misdirection as the facts of both cases were strikingly similar. In the **Phangothi Investments** case the High Court set aside a sale in execution held outside the *"old"* Regional Administrator's Office Manzini, yet the Notice of Sale had stipulated that it would take place at the Regional Administrator's Office, Manzini. Appellants argued that based on the doctrine of *stare decisis* the **Phangothi Investments** case ought to have been applied with the result that the sale in execution be set aside.

[15] Secondly, Appellants argued that the property was sold at less than its market value. Appellants contended that in the previous failed sales the reserve price for the property was set at E1,800,000.00 (One Million Eight Hundred Thousand Emalangeni), but it was reduced to E1,400,000.00 (One Million Four Hundred Thousand Emalangeni) in the impugned sale in execution. Appellants contended that the sale of the property at the reduced reserve price was prejudicial as it resulted in a loss to 1st Appellant.

[16] The second ground of appeal was directed at the finding of the Court *a quo* to the effect that Appellants' pending application to set aside the sale in execution and/or cancel and expunge the transfer was not a competent defence to the eviction/ejectment application brought by 3rd Respondent, because the default Judgment in favour of 2nd Respondent had not been rescinded. Appellants contended that the High Court was misdirected, and that the legal authorities relied upon by the Court were clearly distinguishable and did not support the conclusion arrived at.

Respondents' arguments

[17] In their affidavits the Respondents admitted that the *"old"* Regional Administrator's Office in Manzini was a different place from the Regional Administrator's Office in Manzini, the latter being the place described in the Notice of Sale. Notwithstanding this concession, it was argued that there was still no sufficient legal basis to set aside the sale in execution, for two main reasons.

[18] Firstly, Respondents' Counsel, Mr. Vetten, strongly argued that a *bona fide* purchaser at a public auction acquires ownership of the property purchased if the seller and the purchaser intend to pass and receive ownership, and the property is registered into the name of the new owner. He contended that in terms of the abstract theory of the transfer of ownership which obtains in this jurisdiction, once there is a valid transfer of immovable property it does not avail a third party to seek to challenge the ownership of the new owner on

grounds that there may have been defects with the sale agreement that preceded the real agreement.

[19] Counsel contended that in terms of the abstract theory, the transfer of ownership becomes complete when two requirements are met. Namely, registration of the transfer of the immovable property with the Deeds Registry Office, coupled with the real agreement between the parties. He submitted that the essential requirements of the real agreement were the intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property. He further submitted that the abstract theory does not require a valid underlying contract, and that ownership will not pass despite registration of transfer only if there is a defect in the real agreement. For this proposition we were urged to follow the decisions of the Supreme Court of Appeal of South Africa in **Legator Mc Kenna Inc v. Shea and Others 2010 (1) SA 35 (SCA)** and **Oriental Products (Pty) Ltd v. Pegma 178 Investments Trading CC 2011 (2) SA 508 (SCA)**.

[20] Counsel for Respondents contended that, on the facts of the present matter, Appellants had raised issues relating to the sale in execution which did not affect the real agreement between the Sheriff (1st Respondent) and the purchaser (3rd Respondent). He submitted that what was definitive was that these two parties regarded the sale as valid and binding; the purchase price had been paid; and the necessary formalities for the transfer effected. We were urged to dismiss the appeal on this basis.

[21] Secondly, it was contended that the Sheriff (1st Respondent) had complied with Rule 46, which empowered him to conclude the agreement that entitled him to transfer ownership to 3rd Respondent. Respondents contended that the sale in execution was conducted at the place at which it was advertised. It was argued that there was no evidence that would show that people did not have a general understanding that a reference to Regional Administrator's Office in Manzini was a place other than where the sale in execution took place. It was submitted that those persons who did attend the auction at what is described as the *"old"* Regional Administrator's Office did so because they had no difficulty in identifying it as the place being referred to in the Notice of Sale, probably because it was the place where public auctions traditionally took place. The argument was taken further to say that the Notice of Sale stipulated that additional particulars could be obtained from the Sheriff if there was any doubt or ambiguity as to the correct address of the auction.

[22] Counsel for Respondents argued that on the facts of this matter the Sheriff (1st Respondent) complied with Rule 46 (8) (a), in that he appointed a place for the sale of the property, being outside the Regional Administrator's Office, Manzini; and that the sale was then conducted at a place that can be described as the Regional Administrator's Office, Manzini. It was contended that even if there could have been ambiguity as to the place, such ambiguity was cured by the provisions of Rule 46(8) (e) and the particular terms of the Notice of Sale. Rule 46(8) (e) requires the Sheriff to affix a copy of the Notice of Sale *"at or as near as may be to the place where the said sale is actually to take place."* It was argued that this sub-rule removed any ambiguity in that a prospective bidder is told by the Rule to seek at the place where the sale is

actually to take place the Notice of Sale. In this instance the Notice of Sale was affixed at the *"old"* Regional Administrator's Office, and not at any other place, it was argued.

[23] Counsel further urged us not to follow the **Phangothi Investments** case as the facts thereof were distinguishable, and the Court there had erred through its liberal recourse to *"common knowledge"* as to the address of the place of the sale which it took judicial cognizance of, while at the same time asserting that *"there is no common understanding on what is meant by the phrase 'outside the Regional Administrator's Offices'."* He contended that the High Court had contradicted itself in that regard.

Analysis

[24] I find it apt to deal first with the proposition that it is not open to Appellants to challenge the new owner's (3rd Respondents') title on grounds that there may have been defects in the sale in execution. This proposition, in my view, is incorrect and is not based on a proper assessment of the common law. As a general rule, property sold at a sale in execution in terms of a valid, existing Judgment cannot be vindicated from a *bona fide* purchaser once the property has been transferred to the purchaser, provided the sale in execution was not a nullity. In principle, where the essential statutory requirements pertaining the sale in execution have not been complied with, the immovable property in question can still be vindicated even from a *bona fide* purchaser who had taken transfer of the property.

[25] There is ample authority for the above-stated common law rule. In **Joosub v. JI Case SA (Pty) Ltd (now known as Construction & Special Equipment Co. (Pty) Ltd) and Others 1992 (2) SA 665 (N)** Mc Call AJ extensively dealt with the history of the common law rule referred to above. The **Joosub** case has been cited by various authors and the Supreme Court of Appeal of South Africa as espousing the correct legal position of the Roman-Dutch common law. Mc Call AJ concluded that:

> *"If there was no sale in execution or if the sale which purported to have taken place was a nullity, then, in my opinion, it could not have served to pass title to the purchasers or their successors into whose names the properties were subsequently transferred. The Plaintiff, as owner of the property would be entitled to recover the properties by way of rei vindicatio."*

[26] In **LAWSA Vol 27, paragraph 394** the learned authors deal with limitations to an action for *rei vindicatio* and state that things sold at a judicial sale cannot be vindicated from a *bona fide* purchaser, but they go on to add in a footnote that:

> *"The provisions must be strictly complied with for ownership to pass..."*

The *"provisions"* being the relevant rules of court.

[27] The rationale for the rule allowing immovable property purchased at a sale in execution to be vindicated from a *bona fide* purchaser even after transfer has

been effected is easy to fathom. Where a sale in execution is invalid, the Sheriff would have had no authority to conduct the sale and to transfer the property to the purchaser. The result would be that the underlying sale agreement concluded at the sale in execution is invalid, and the real agreement between the Sheriff and successful bidder defective, since the former lacked authority to transfer the property to the purchaser. A Sheriff has authority to transfer property purchased at a public auction only where a valid sale in execution has taken place.

[28] In **Rossouw and Steenkamp v. Dawson 1920 AD 173** (at page 180) Maarsdorp JA cited with approval the cases of **Maynard v Filmer's Trustee (3 Men. 116) and Zieler v. Rosseau (1 Kot 35)** and had this to say:

> *"Both the cases abovementioned decided that an attachment or sale made by the Sheriff, which he was not authorized by law or by his writ to make, was invalid...But it is by no means essential to the invalidity of a sale by the Sheriff that the purchaser shall know that the Sheriff is acting without authority. The Sheriff acting without authority is in no different position to any other person acting without authority in selling the property of a person who has not authorized such sale. In neither case is it necessary for the owner to set the sale aside before asserting his rights to the property."*

[29] Notably, there are several Judgments where the Supreme Court of Appeal of South Africa has declared that a Judgment debtor retained ownership of immovable property acquired by a *bona fide* purchaser at a sale in execution,

if it is found to have been invalid. In **Menqa v. Markom 2008 (2) SA 120 (SCA)** the sale of a property in execution and the transfer thereof, as well as subsequent sales and transfers of the same property were declared null and void for non-compliance with the Magistrates Court Act.

[30] In light of the foregoing legal authorities, I am not inclined to accept Respondent's contention that it is not open to Appellant(s) to challenge 3rd Respondent's title to the property on the basis that the sale in execution was invalid. In principle they can. If it can be proved that the Sheriff (1st Respondent) was not legally competent to transfer the property for want of authority, it follows that 3rd Respondent was also not legally competent to acquire the property. Therefore, it follows that the validity of the real agreement in terms of which 1st Respondent transferred the property to 3rd Respondent must be examined by this Court, in order to determine whether the latter was entitled to the relief granted in his favour by the Court *a quo*. Put differently, the real agreement between 1st and 3rd Respondents cannot escape scrutiny simply on account of the fact that Lot 330 was subsequently registered in the latter's name.

[31] But before doing so, I want to deal with two pertinent issues. First, it is the finding of the Court *a quo* that Appellants were non-suited to challenge the eviction/ejectment proceedings on the basis that they had instituted their own application (Case No. 1320/2020) challenging the validity of the sale in execution. In other words, that Appellants' challenge to the sale in execution was not a defence to the claim for eviction/ejectment. For this conclusion the

Court *a quo* relied on the cases of **Charlton Moyo v. Martin Zuze High Court of Zimbabwe, HB 105/19** and **Twin Wire Agencies (Pty) Ltd v Central Africa Building Society (38/04) (SC 46 of 2005, Civil Appeal 38 of 2004) [2005] ZWSC 46 (18 July 2005)**.

[32] I have occasion to read the **Twin Wire Agencies (Pty) Ltd** case and, in my opinion, these cases are clearly distinguishable. The legal position in Zimbabwe is slightly different from ours, and this makes the cases relied upon by the Court *a quo* clearly distinguishable. In **Twin Wire Agencies (Pty) Ltd** (*supra*) the Supreme Court of Zimbabwe, per Chidyausiku CJ said:

> *"Accordingly the Court a quo, in my view, was correct in proceeding on the basis that the proceedings which the appellant alleged were pending, and because they were pending, afforded him a defence, were in fact not pending. But even if those proceedings were pending they would not afford the appellant any defence to a claim for eviction. In Case Number HC 3750/01 the appellant was seeking to prevent eviction on the basis that it was challenging the sale in execution. A challenge to a sale in execution does not constitute a defence against a claim for eviction by the registered owner of the property."*

[33] However, the Learned Chief Justice did not stop there. He cited a previous decision by the same Court in **Mapedzamombe v Commercial Bank of Zimbabwe and Another 1996 (1) ZLR 257 at pp 26 OD** where Rule 359 of the High Court Rules was discussed; and the Learned Chief Justice concluded as follows:

"It is quite clear from the remarks of the Learned Chief Justice that the remedy to set aside a sale in execution in terms of rule 359 of the High Court Rules is only open to a litigant in circumstances where transfer has not taken place. After transfer any application to set aside such transfer should conform strictly with the principles of the common law and falls outside the ambit of Rule 359 of the High Court Rules. Thus, even if the proceedings in HC 3750/01 were still pending such proceedings would not amount to an adequate challenge of the respondent's ownership of the property in question and his entitlement to possession or occupation of the property. The appellant in the above case sought to set aside the confirmation of the sale in execution by the Sheriff and was not seeking transfer of the property from the respondents to itself."

[34] It is abundantly clear from the preceding paragraph that execution procedures under the High Court Rules of Zimbabwe are different from ours. There, the procedure, set out in Rule 359, entitles any person who has an interest in a sale in execution to request the Sheriff to set it aside on any of the grounds stipulated in the Rule. The aforesaid Rules set out in detail the timelines for dealing with the request and other ancillary processes. Rule 359 applies before the property has been transferred to a successful bidder. In the **Twin Wire Agencies (Pty) Ltd** case the Applicant had sought refuge in Rule 359 in opposing eviction proceedings, yet the timelines stipulated under the Rule had lapsed. The High Court held that it was not competent to invoke Rule 359 under those circumstances, and the decision was subsequently confirmed on appeal. In our jurisdiction, there is no comparable rule. This is a significant

point of departure which ought not to have escaped the attention of the Court *a quo*.

[35] Apart from the clear distinction in the Rules, the **Twin Wire Agencies (Pty) Ltd** case confirms in no uncertain terms the availability of a remedy at common law – *"After transfer any application to set aside such transfer should conform strictly with the principles of the common law and falls outside the ambit of Rule 359 of the High Court Rules."* I have no doubt that the Court *a quo* misread the **Twin Wire Agencies (Pty) Ltd** case, thereby coming to a wrong conclusion on the law.

[36] It is clear from paragraph 10.1 (iii) of the impugned Judgment that the Court *a quo* refused to even consider the application to set aside the public auction and cancellation of the transfer largely as a result of its misreading the **Twin Wire Agencies (Pty) Ltd** case. In its conclusion, which was wrong, the Court *a quo* said:

> *"What is discussed in the above cases bears great similarity with what this Court, is called, to decide upon. Were it not for the fact that the Court had to decide the matter on the papers, this would have been the last paragraph of the Judgment, preceding the Order."*

[37] Immediately below the preceding extract there is a sub-heading *"Setting aside sale in execution not competent, unless default Judgment rescinded"*. It is not clear whether this statement was meant to be another reason for refusing to

consider the application to set aside the public auction and cancellation of the transfer, as the paragraphs or discussion that follows has no bearing on it. The statement is just *"hanging"* in the Judgment without any support or justification by the Court *a quo*, as it were. As a result, it does not merit any further discussion or analysis.

[38] In my view, the Court *a quo* was clearly wrong in its refusal to consider the application to set aside the public auction and cancellation of the transfer on the basis of the two Zimbabwean cases it relied upon. The application ought to have been considered. Indeed, before directing that Appellants be evicted it needed to be ascertained that 3rd Respondent's title and ownership was unassailable.

[39] The second pertinent issue I propose to deal with relates to the two cases heavily relied upon by Respondents, namely, **Legator Mc Kenna Inc and Another v. Shea and Others** (*supra*) and **Oriental Products v. Pegma 178** (*supra*). Having read these cases, my opinion is that although they both dealt with principles underlying the abstract theory of the transfer of ownership, they are distinguishable from the case at hand in that neither case dealt with a challenge to the validity of sale in execution. Specifically, neither of these cases dealt with the aforementioned common law principle that where a sale in execution is invalid a Sheriff has no authority to transfer the property which is the subject matter of the sale, and therefore no ownership passes.

[40] Significantly, and contrary to what Respondents contend, the **Oriental Products** case confirms the position that where a person is found not to have been properly authorized to transfer property, the transfer is void. At paragraph [9] Shongwe JA stated as follows:

> *"[9] The Court a quo found that the third respondent was not properly authorized to pass transfer of the property to the second respondent, therefore the transfer was void as it lacked the prerequisite to effect registration of transfer, being that the transferor (in this case the appellant), must intend to transfer and the transferee (in this case the second respondent) must intend to take transfer..."*
>
> *[10] The above conclusion, which I respectfully agree with, answers the first question referred to oral evidence."*
>
> (Own underlining for emphasis)

[41] Notably, in the **Oriental Products** case the Supreme Court of Appeal dismissed the appeal based on the application of the principles of estopped. The Court concluded as follows:

> *"[23] In the context of this case, the appellant is entitled to retransfer of the property but for the fact that it cannot assert its right of ownership because of estopped. Hence the applicant loses its right of ownership."*
>
> (Own underlining for emphasis)

[42] In my opinion, the preceding paragraphs extracted from the **Oriental Products** case put it beyond doubt that lack of authority may amount to a defect in the real agreement requirement of the abstract theory of transfer of ownership. Thus, a purported transfer by a person who lacks proper authority is open to challenge on the basis of a defect in the real agreement. This principle equally applies to a Sheriff who derives his authority to sell immovable property by public auction from the Rules of the High Court. If he/she fails to comply with the Rules, a purported sale in execution should be visited with nullity, and any transfer effected by him/her liable to be set aside.

[43] I now turn to deal with the critical issue in this case, that is, whether Appellants discharged their onus of proving on a balance of probabilities that the sale in execution was invalid by reason of non-compliance with Rules 46 (8) (a) and (b), which read as follows:

> *"46(8)(a) The Sheriff shall appoint a day and place for the sale of such property;*
>
> *(b) The execution creditor shall after consultation with the Sheriff, prepare a notice of sale containing a short description of the property, its situation and street number, if any, the time and place for the holding of the sale and the fact that the conditions may be inspected at the office of the Sheriff, and he shall furnish the Sheriff with as many copies of the notice as the latter may require."*

[44] The thrust of Appellant's complaint is that the public auction was not held at the place advertised in the Notice of Sale. During the course of his address Counsel for Respondents conceded that *"outside the old Regional Administrator's Office"* and *"Outside the Regional Administrator's Office"* were in fact two different venues. This begs the question, was this material non-compliance with the Rules? According to the old authors on Roman-Dutch common law, particularly **Matthaeus**, this would constitute material non-compliance. The writings of **Matthaeus** were aptly summarized by Cloete JA in the **Menqa** case as follows:

> *"[31] The most extensive treatment of the common law relating to sales in execution can be found in Matthaeus II's De Auctionibus. The learned author, writing of the law in the mid-seventeenth century in the Netherlands, deals in Ch 16 of Book 1 of the circumstances in which a sale in execution is void from the outset or can be set aside by a court. Examples of a sale being void from the outset are where the sale did not take place at the prescribed place; where what was decreed did not take place on the day advertised; where there was a failure to comply with other formalities (although a distinction was drawn between formalities which preceded the sale, which had to be complied with strictly, and formalities after the sale, for example, inability to deliver the goods sold to the purchaser, which did not), and where the sale was not conducted by the proper official, or where the debtor and other interested parties were not notified of the sale. Matthaeus concludes his treatment of the topic by saying that, although all the requisite formalities must be strictly and*

precisely complied with, the proceedings are not vitiated by non-compliance which does not go to the root of the matter. Examples give of the latter type of formalities include where the official did not properly record a description of movable goods attached or for how much each article was sold, where the advertisements were put up on three and not, four market days and where the King's standard was not displayed at the immovable property sold. In these and similar cases, says Matthaeus, the sale remains for value because the authorities did not have regard to trivialities and it would be contrary to good faith to split hours over every small legal subtlety."

[45] As can be deduced from the preceding extract, if this Court were to follow strictly the writings of **Matthaeus**, the impugned sale in execution would be visited with nullity.

[46] However, the difficulty lies in the fact that this Court cannot adopt such a simplistic approach. This Court is enjoined to interpret and place a correct meaning to Rule 46(8) (a) and (b); and then decide whether on the facts of this matter, the Rule was complied with. Useful as the examples provided by **Matthaeus** may be, on their own they may not be conclusive guides in the interpretation of the Rule in issue in this matter. In the **Menqa** case the Supreme Court of Appeal also cautioned that *"the old authorities would not necessarily be a safe guide"* when considering modern legislation governing formalities required for a valid sale in execution. The Court, instead, followed

a robust approach, and held that – *"In each case regard would have to be had in particular to the reason for the formality, the extent of the non-compliance and the prejudice or potential prejudice caused to interested parties, specially the Judgment debtor."*

[47] In **Todd v. First Rand Bank (497/11 [2013] ZA SCA 61 (14 May 2013)** the Supreme Court of Appeal confirmed the robust test adopted in the **Menqa** case. Lewis JA, in a unanimous Judgment, said:

> *"[21] The common law allows a Court to condone non-compliance only where it does not go to the root of the matter. As I have said, that entails an enquiry whether the failure to observe a requirement defeats the purpose of the rule or sub rule and that prejudice would be suffered by the debtor if absolute compliance were not required. That test gives the Court the discretion to determine what effect the non-compliance has had – whether it prejudices the Judgment debtor, or whether the Judgment creditor (who may not be responsible for the failure to observe a formality, as was the case here) will be prejudiced by an order that the sale is invalid. A requirement of absolute compliance could operate harshly against both debtors and creditors and might have unjust consequences."*

[48] This Court, in **Majazi Investments (Pty) Ltd v. Swaziland Building Society & Others (78/2017) [2018] SZSC (17/2018)**, although dealing with Rule 45 which applies to execution of movables, not only cited with approval, but

applied the robust test laid down in **Menqa** (*supra*) and **Todd** (*supra*), where it stated that:

> *"[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."*

[49] The purpose of advertising a sale in execution is to inform the public and garner interest in a prospective public auction, and to ensure that the proper and fair value of property is realized. By stating the *"date"* and *"place"* of the sale in execution the object of the rule is to inform as many interested persons as to *"where"* and *"when"* the sale shall take place. In the matter before us the Notice of Sale stated the date (being 4th March, 2022); and the place *("outside the Regional Administrator's Office, Manzini")* as is required by the Rule. At face value the Notice of Sale complied with the Rules. To an ordinary reader the *"place"* where the sale was to take place was sufficiently described. On its own, there is nothing ambiguous about the phrase *"...outside the Regional Administrator's Office, Manzini..."* I find no ambiguity in the description of the place.

[50] However, if the sale did not take place at the advertised venue *("...outside the Regional Administrator's Office, Manzini...)* but elsewhere, it behoves this Court to investigate whether this is an occurrence which defeated the purpose of the Rule, resulting in non-compliance prejudicial to Appellants.

[51] Although the sale in execution was conducted outside the *"old"* Regional Administrator's Office, there is evidence that there was more than one bidder who attended. On the Appellant's own version *"...at the auction there was a total of three bidders, one lady, another gentleman, and they looked like a couple, and the elderly man."* 1st Appellant also deposed that he requested his brother to attend and monitor the auction on his behalf at the *"old"* Regional Administrator's Office, whilst he went to the current Regional Administrator's Office. 1st Respondent did not explain what prompted him to send his brother to the *"old"* Regional Administrator's Office. 1st Respondent (Deputy Sheriff) confirmed in his affidavit that before the auction commenced he was approached by 1st Appellant's brother who enquired if it (the auction) would take place at that venue; and that he affirmed that was so. 1st Respondent further confirmed that the auction proceeded without any objection from 1st Appellant's brother, or himself.

[52] In my view, the fact that there were three competitive bidders at the auction, notwithstanding the fact that it was conducted outside the *"old"* Regional Administrator's Office, negatives and neutralizes the allegation that the Notice of Sale was misleading. It may not have been entirely accurate by not prefixing "Regional Administrator's Office" with *"old"* but prospective buyers who were interested in the sale in execution somehow knew where to go. Seemingly, the interested prospective members of the public that we know of understood the place designated in the Notice of Sale to mean the *"old"* Regional Administrator's Office, as opposed to the current location. That is why they went were there. Ostensibly this is because the *"old"* Regional Administrator's Office is where public auctions normally took place, as

contended by Respondents. In the absence of any allegation or evidence of collusion among Respondents and the bidders who attended the auction, it is reasonable to infer that prospective buyers who were interested in the sale understood the Notice of Sale to refer to the *"old"* Regional Administrator's Office as the venue for the sale. To this extent the Notice of Sale achieved its purpose, that is, to notify interested prospective buyers of the place where the auction would be conducted.

[53] I take cognizance of the fact that 1st Appellant has not anywhere in his affidavits complained that there were, as a matter of fact, interested prospective buyers who were with him at the current Regional Administrator's Office. No one is said to have been waiting to participate in the auction but could not do so. On this basis, it is reasonable to infer that no potential buyers were excluded from participating in the auction. I emphasize that it would be an entirely different story had 1st Appellant alleged or produced some tangible evidence that there was a prospective buyer (or buyers) who wanted to participate in the auction but could not do so because it was held at the *"old"* Regional Administrator's Office. If there were prospective buyers who were misled by the Notice of Sale surely 1st Appellant would have seen them.

[54] In my view, the fact that there is no evidence of prospective buyers who were misled by the Notice of Sale works against Appellants. No prospective buyers were excluded from participating in the auction. The sale in execution cannot be set aside on the basis of non-existent persons who are alleged to have been

excluded. Therefore, I see no factual basis for finding that the objectives of Rule 46(8) (a) were not met by the notice of sale in this instance. On the contrary, there is conclusive evidence that it attracted three competitive bidders.

[55] Similarly, I find no factual basis for finding that the Appellants were prejudiced by having the public auction taking place at the *"old"* Regional Administrator's Office. Clearly, if no prospective buyers were excluded, the auction was attended by those who showed interest, and was as competent as it could possibly have been. Any suggestion that the auction would have been more competitive had other "unknown" prospective buyers attended, would amount to sheer speculation.

[56] I now turn to deal with the **Phangothi Investments** case on which heavy reliance was placed by the Appellants, who argued that the aforementioned case was on all fours with the present matter. In **Phangothi Investments** (*supra*) a sale in execution was declared to be invalid on the basis that it did not take place at the advertised venue. In that matter, too, the notice of sale stated that the sale would take place outside the Manzini Regional Administrator's Office, yet it took place outside the old Manzini Regional Administrator's offices. The High Court proceeded from the premise that Rule 46(8)(a) was a *"peremptory rule as it uses the word shall"*. The Court went on to say that *"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."

[57] With respect, on the facts of the matter at hand I am not inclined to follow the reasoning of the Court in the **Phangothi Investments** case. As already indicated, before us there is evidence that competitive bidders attended the auction notwithstanding that it was held at the *"old"* Regional Administrator's Office, as opposed to the current location of the Regional Administrator's Office. Furthermore, there is no evidence that the Appellants suffered any prejudice by having the sale in execution conducted at the *"old"* Regional Administrator's Offices, as the sale was competitive. 3rd Respondent was the eventual winner of the bidding.

[58] Based on the foregoing reasons, although there is a difference of opinion on other legal principles, there is no basis to upset the Order issued by the Court *a quo*.

[59] Appellant's second ground for claiming that the sale in execution was invalid is that the property was sold for E1,400,000.00 (One Million Four Hundred Thousand Emalangeni) whereas it had a market value of E1,900,000.00 (One Million Nine Hundred Thousand Emalangeni). Appellants have not cited any specific High Court Rule which prescribes that the reserve price of property shall, or must, be equal to its market value. In fact, there is none. However, reliance was placed on the majority decision of this Court in **Rodgers**

Bhoyane Du-Pont v. Swaziland Building Society and 2 Others (07/2015) [2016] SZSC 79 (5th August 2016) where, on Review, the sale of property at less than its market value was set aside. In the Judgment of the majority (the Full Bench was split3-2) this Court said:

> *"[96] Our view is that Rule 46(13) propagates an unfair practice. It should be revisited and amended to provide for the sale in execution of immovable property at market value. The Applicant's property should and ought to have been sold at market value. That way the Applicant would have received the difference of the market value and the amount owed to the 1st Respondent."*

[60] The Court then issued an ancillary Order to the effect that:

> *"(d) The current provisions of Rule 46(13) is referred to the Rules Committee of the High Court, for re-consideration vis-à-vis the objective to avoid mortgaged immovable property being sold in execution below market value."*

[61] It is common cause that to this day Rule 46(13) has neither been revisited nor amended as directed by this Court. As things stand, there is no High Court Rule which prescribes that a property shall, or must, be sold at reserve price equal to its market value. As a result, where a property is not sold at a reserve price equal to its market value there is no question of non-compliance with High Court Rules.

[62] In my view, the **Rodgers Bhoyane Du-Pont** case must be treated with caution and not be quoted out of context. In that matter this Court was inclined to intervene on the basis that the property of Mr. Du-Pont had been sold at a reserve price disproportionately below its market and forced sale values. In the matter serving before us the reserve price was slightly lower than the forced sale value of the property. According to the Valuation Report annexed to Appellant's affidavits the forced value was E1, 520, 000-00 (One Million Five Hundred and Twenty Thousand Emalangeni).

[63] Furthermore, to compel a judgment creditor to set a reserve price equal to the market value of a property, as was postulated in **Rodgers Bhoyane Du-Pont** (*supra*), would have far reaching and adverse effects on the secured-lending market. I expressed this view in my dissenting Judgment, and still maintain it. The reality is that even where parties are dealing with each other at arms-length it is not always the case that the sale price of property shall be equal to its market value. There may be adverse market conditions which affect the sellability of property which result in it not fetching its market value price. Thus, the market valuation of property is not always determinative of its sale price. More often than not, property valuations are premised on the *"willing buyer, willing seller"* principle, and so is the ultimate sale price of property.

[64] Therefore, I find it illogical to compel a secured lender (who is a judgment creditor) to set a reserve price equal to the market value of a property, when the owner of that property (being the judgment debtor) would have had no guarantee, in an open market, that it will sell at its market value price. In the

matter at hand, Respondents have stated that several attempts were made to sell Lot 1330 at a reserve price of E1,800,000-00. All proved futile, hence the reduction of the reserve price to E1,400,000-00, being a figure proximate to the forced sale value of the property.

[65] Based on the foregoing, Appellants' contention that the sale in execution was invalid on the basis that the reserve price was lower than the property's market value stands to be dismissed.

[66] No reasons have been advanced to justify a departure from the trite principle that costs follow the cause.

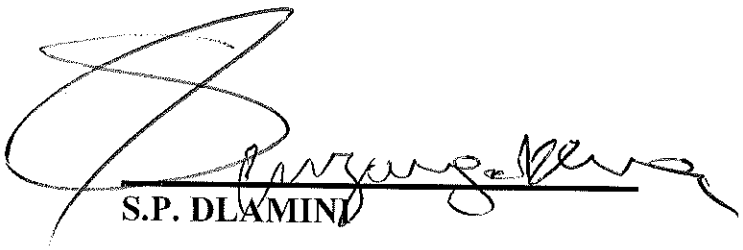
[67] In the result the Court makes the following Order:

1. The Appeal is dismissed.
2. Costs, including the certified costs of Counsel, shall be paid by Respondents.

M.J. MANZINI

ACTING JUSTICE OF APPEAL

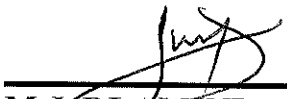
I agree



S.P. DLAMINI

JUSTICE OF APPEAL

I agree



M.J. DLAMINI

JUSTICE OF APPEAL

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For the Respondents: ADV. D. VETTEN (INSTRUCTED BY ROBINSON BERTRAM ATTORNEYS