



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 485/2010

In the matter between

**IRENE BASTOCK
ONE STOP (PTY) LTD**

**1ST APPLICANT
2ND APPLICANT**

And

**SWAZILAND BUILDING SOCIETY
PHUMELELE MALINDZISA**

**1ST RESPONDENT
2ND RESPONDENT**

In re:

SWAZILAND BUILDING SOCIETY

PLAINTIFF

AND

**ONE STOP (PTY) LTD
IRENE BASTOCK
CASSANDRA BASTOCK**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT**

Neutral citation: *Irene Bastock and Another v Swaziland Building Society (1262/2010)[2014] SZHC 338 (26 September 2014)*

Coram: OTA J

Heard: 26 September 2014

Delivered: 26 September 2014

Summary: **Civil Procedure: sale in execution; writ of attachment; misdescription of the parties in the writ not irregularity that should vitiate the writ of attachment; point taken *in limine* on lack of urgency and failure to satisfy the requisites for an interdict upheld; applicant's application dismissed.**

Ex-Tempore Judgment

OTA J

[1] The Applicants commenced this application under a certificate of urgency claiming, *inter alia*, for the following reliefs:

1. Dispensing with the rules relating to time limits, manner of service and procedures applicable in the institution of proceedings.
2. Staying the sale in Execution of the 2nd Applicant's property, to wit;

**Certain: Portion 1 of Erf no. 194 situate in the township of
Manzini in the Manzini District.**

3. That a *rule nisi* do hereby issue calling upon the Respondents to show cause why the writ of Execution dated **06 August 2014** and the subsequent attachment of the 2nd Applicant's property fully described in prayer 2 above should not be set aside for irregularity.
4. Pending the finalization of this application the sale in Execution of 2nd Applicant's property be stayed.
5. Granting costs of this application to the Applicants only in the event this application is opposed unsuccessfully.
6. Granting further and / or alternative relief.

[2] In response to the application, the Respondents took points *in limine* on urgency and failure to satisfy the requirements for an interdict.

[3] I heard the parties on the points of law taken by the Respondents. Having carefully considered the submissions from both sides on this issue, I hold as appear below.

[4] I find that the Applicants have failed to satisfy the requirements of urgency as laid down by Rule 6 (25) of the Rules of the High Court. The execution judgment was entered on 28 May 2014 by consent of the parties and then suspended for 8 weeks to allow the Applicants settle the debt. They failed to do so. Thereafter, on 8 August 2014, they were served with the writ of attachment attesting to the fact of the impending sale. This was followed by the Notice of Sale advertising the sale scheduled for 26 September 2014. The Applicants appeared to have folded their hands and did nothing, only to wake up and rush to Court on the eve of the sale crying urgency. In my view, this is self created urgency and cannot support the grant of an interim interdict.

[5] Furthermore, the contention that the Applicants now have a buyer for the property and have prepared an agreement of sale with the buyer, attached herein as exhibit C, is too late in the day. They had all the time, between 28 May 2014, when the execution judgment was rendered and 8 August 2014, when the property was attached, to procure a buyer and they failed to do so.

[6] In any case, the agreement of sale is a very worrying feature of this case. I say this because the property was attached on 8 August 2014, the agreement to sell the property took place on 23 September 2014. The Applicants, in my view, had no power at the time to sell the property. The title in the property having vested in the sheriff by virtue of the attachment. It is trite law that where a property has been attachment pursuant to the execution of a judgment, the title in the property no longer vests in the owner or Judgment Debtor. It now vests in the sheriff. The owner or Judgment Debtor has no power to sell or in any manner alienate or otherwise interfere with the property during the subsistence of the writ of attachment, as the property is now in *custodia legis* (custody of the law).

[7] Furthermore, it was wrong for the Applicants to have engaged in an act to the prejudice of the process of Court, to wit, the purported sale of the attached property, and thereby engage in self help. Upon being served with the writ of attachment, the Applicants should have initiated a due process of Court to have it set aside or stopped the sale on the basis of the alleged irregularity, instead of first embarking on self help action. They did not do so, rather they first engaged in self help action by purporting to sell the property, and have now come to the Court to seek its assistance in furtherance of the self help action to enable them succeed in same. This is not possible in law. This is because the law is against self help actions, especially those in abuse of pending Court processes, such as the writ of attachment. The agreement to sell is a nullity since title vests in the sheriff. The 2nd Applicant no longer has title in the property. The principle is *nemo dat quod non habet*.

[8] More to the above, is that the Applicants, in making a case that they have a legal right to be protected by the injunction, have argued that the writ of attachment is irregular because the name of the 2nd Applicant and the Judgment Creditor are wrongly described, even though the property is correctly described. There is no doubt that this issue is the basis for prayer 3 of the application. The Applicants have by their argument invited the Court to determine it at this stage instead of waiting until the application is fully heard. The Respondents have not complained that the issue shouldn't have been raised by the Applicants' now, but have rather tendered argument to counter the Applicants' case. I have considered that neither party will suffer any prejudice if it is dealt with at this stage, since both parties have joined arguments on it.

[9] I have considered the argument from both sides, and I do not think that there is any irregularity in the writ of attachment. A misdescription of any party to the judgment does not affect the substance of the writ of attachment which attaches the execution property. The writ is clear as to the property it is attaching. That is all Rule 46 (1) of the High Court Rules requires. Applicants have not alleged that the property attached is wrongly described or belongs to somebody else, for that would have been a veritable basis for an application to set aside the writ. They agree that the property belongs to 2nd Applicant which is one of the Judgment debtors, but contend that the name of the 2nd Applicant and Judgment Creditor have not been properly described. They have not also alleged that they were not served with the writ of attachment as required by law. Worthy of note is that the parties are properly cited in the heading of the writ of attachment. The error in their names appear in the body of the writ. Since Applicants were properly cited in the writ, it is not surprising to me that they were served with the writ of attachment. There is no complaint in this regard. So I do not see how the error in the description of the parties has prejudiced the Applicants in any way.

[10] Finally, assuming without conceding, that I were to view the alleged misdescription of the parties as an irregularity, it is doubtful if there is any statutory provision giving this Court the power to set aside a writ of attachment on account of errors of misdescription of the name of the parties. These are minor irregularities that do not affect the substance of the writ of attachment. The inherent jurisdiction of the Court can only be exercised to set aside a writ of attachment that is a nullity (e.g one that attaches a property that does not belong to the judgment debtor or that is not the subject of the judgment) and not one that is irregular. The alleged

irregularity cannot avail the Applicants as a clear legal right, entitling them to the interdict sought in these circumstances.

[11] Since the writ of attachment has not been set aside, there is no legal basis on which the Applicants can bring the application for an interdict. The person who has the legal right is the 1st Respondent, the J creditor. An injunction cannot be issued to defeat that right, especially in this case where there is no competing legal right.

[12] For the above stated reasons, the Applicants' application is dismissed with costs.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS
THE -----DAY-----2014**

**OTA J.
JUDGE OF THE HIGH COURT**

**For the Applicants: Mr Z. Magagula
For the Respondents: Mr K. Simelane**