IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.2392/2008

In the matter between:

PHANGOTHI INVESTMENTS (PTY) LTD	**Applicant**
And	
SWAZILAND DEVELOPMENT AND SAVINGS BANK	**1st Respondent**
MELUSI QWABE	**2nd Respondent**
TAGA INVESTMENTS (PTY) LTD	**3rd Respondent**
REGISTRAR OF DEEDS	**4th Respondent**
THE ATTORNEY GENERAL	**5th Respondent**

And **Case No.: 524/2016**

TAGA INVESTMENTS (PTY) LTD	**Applicant**
And	
PHANGOTHI INVESTMENTS (PTY) LTD	**1st Respondent**
SAN PROJECTS (PTY) LTD	**2nd Respondent**
SPOT LITE INVESTMENTS (PTY) LTD	**3rd Respondent**
MDF ACCOUNTANTS (PTY) LTD	**4th Respondent**
GUARD ALERT SECURITY SERVICES (PTY) LTD	**5th Respondent**

Neutral citation: *Phangothi Investments (PTY) LTD vs Swaziland Development And Savings Bank & 4 Others (2392/2008) And Taga Investments (PTY) LTD vs Phangothi Investments (PTY) LTD & 4 Others (524/2016) [2016] [SZHC 96]*

(17th June 2016)

Coram:	Hlophe J
For Applicant:	Adv. M. Van Der Walt instructed by M. P. Simelane Attorneys
For 1st & 2nd Respondents:	Mr. S. V. Mdladla
For 3rd Respondent:	Adv. M. T. Mabila instructed by Henwood Attorneys
For 4th & 5th Respondents:	Mr. Sibandze
Date Heard:	2nd and 3rd June 2016
Date Judgment Delivered:	17th June 2016

JUDGMENT

[1] The above cited matters were consolidated and heard together in court because of their perculiar facts which reveal a close relationship between them. It is safe to say both cases are a result of the sale of the property referred to in the first of these cases, that is Case No. 2392/2008.

[2] Owing to the fact that the parties who joined issue in these matters are all those mentioned in case No. 2392/2008, the parties in both these matters are going to be referred to as they appear in that particular case. For the sake of clarity, it is important to emphasize that the 2nd to 5th Respondents in Case No. 524/2016, did not join issue with the matter which I took to mean that they would abide the order of this court.

[3] The brief facts of these matters will be stated in the following manner. Sometime in 2008, the Applicant (Phangothi Investments (PTY) LTD) was sued by the First Respondent (Swaziland Development And Savings Bank – Swazi Bank) for the recovery of monies allegedly loaned and advanced to it, in the sum of E1, 996, 205.31 (One Million Nine Hundred and Ninety Six Thousand Two Hundred and Five Emalangeni Thirty One Cents). As the matter was not defended, Swazi Bank obtained a Default Judgment against the current Applicant – Phangothi Investments (PI). For reasons not disclosed in this matter, this default Judgment was not executed for years, until sometime in 2015. It is however not in dispute that as this Judgment was not executed, PI was allowed to continue paying some monies in a manner not disclosed in the papers, to Swazi Bank. This latter fact becomes apparent when one considers the fact that in 2015, the Bank issued a Certificate of Indebtedness indicating the amount owed or balance owed by PI to be a sum of E1, 200, 572.11 (One

Million Two Hundred Thousand Five Hundred and Seventy Two Emalangeni Eleven cents).

[4] Again for whatever reason not fully disclosed in the papers, the First Respondent decided to revive its judgment which it said it did in terms of Rule 64 of the Rules of this court. This it did in 2015 by filing a document titled Notice To Revive Judgment In Terms Of Rule 64. Although there had been entered a notice to oppose the said application, same was granted and the 2008 Judgment was revived even though for a much lower sum than the initial Judgment debt. The revival of the said Judgment was not challenged by any of the parties.

[5] Armed with this Judgment, the 1st Respondent caused the Deputy Sheriff, the Second Respondent herein to lay the Applicant's two properties fully described as Lot No. 118, Matsapha, District of Manzini and Lot No. 119, Matsapha, District of Manzini, under attachment. A sale in execution of the said properties was eventually advertised with a Notice being published in a Newspaper circulating in Swaziland and in the Government Gazette. It merits mention for whatever it may be worth, that the writ of execution had been issued for the recovery of the sum as claimed in the summons and not for that appearing *ex-facie* the Certificate of Indebtedness referred to above. This is notwithstanding the

fact that the revived judgment is for a sum much less than that granted in the initial judgment.

[6] On its face, the Notice of Sale provided that the attached properties as described above were to be sold by Public Auction by the Deputy Sheriff, outside the Manzini Regional Administrator, at 2.30 pm on Friday the 7th day of August 2015. It was not in dispute that the understanding attached to the place was that it was to be sold outside the Manzini Regional Administrator's Offices. There is however no common understanding on what is meant by the phrase "Outside the Regional Administrator's Offices". This is occasioned by the fact that the place currently referred to as the Manzini Regional Administrator's Offices is the one situated next to the Manzini Magistrates Court. The Regional Administrator's current Offices are situated there. It was also not in dispute that before the Regional Administrator's Offices were moved to their current place as described in the foregoing sentences they used to be situated at a place in Central Manzini, next to the post office or adjacent to the place called Jubilee Park.

[7] It is common cause that the sale in Execution advertised to be held outside the Regional Administrator's (Offices) was actually held outside what can now be termed as the former or old Regional Administrator's Offices, next to the Jubilee Park or post office, along the Nkoseluhlaza Street (Central Manzini) and not at the place where the Regional Administrator's offices are currently situated which is the office park next to the Manzini Magistrate's Court. It is crucial to note that the two places are far apart from each other and are separated by several streets in between them, with the result that a person in front of the current Regional administrator`s offices cannot see the front of the other offices known as the old Regional administrator`s offices. No details are available on how the sale was handled except that it went ahead and the property was sold to the 3rd Respondent – Taga Investments at a sum of E3, 000, 000.00 on the 7th August 2016.

[8] After the sale in question, the Applicant's attorney wrote to the first Respondent's attorneys informing them that their client had intended to participate in the sale in execution but could not do so because the property was not sold outside the Regional Administrator's Offices as advertised but next to the Post Office. He also notified the said attorneys of his having annexed a cheque for the outstanding balance. The cheque in question bore the date of the 6th August 2015 and was for the entire

sum as borne by the revived judgment. It further called for the cancellation of the sale by the Deputy Sheriff, claiming he had power to do so in terms of the Rules. This letter was actually written some three days after the sale in execution of the property, as it is dated the 10th August 2015 yet the property was sold on the 7th August 2015.

[9] There having been no agreement on this issue, Applicant instituted the current proceedings challenging the sale in execution. The Applicant sought an order interdicting and restraining the 3rd & 4th Respondents from proceeding with the Registration of the title of the property sold in execution in the name of the purchaser. There was also sought an order setting aside the sale in execution of the property referred to above together with costs.

[10] The basis for seeking the reliefs sought was mainly that the property had been sold subject to a reserve price of E3 Million when in reality there was no preferent creditor other than the first Respondent itself. This the Applicant claimed had prejudised it in that it restricted bidders who could have bid for the property starting from the highest possible price and up inflating the purchase price at an even higher amount than that it was sold for. The other ground, said to be the main one, was that the sale in execution was null and void *ab initio* because it had not complied with

the Notice of Sale as it was sold at a different place than that disclosed thereon, given that it was allegedly sold next to the Post Office as opposed to outside the Regional Administrator's Offices, situate next to the Manzini Magistrates Court. There were otherwise other alleged irregularities which were admittedly minor as they were not maintained during the hearing of the matter, save for the above stated two.

[11] Otherwise the crux of the Applicant's case is that whereas the fixing of the reserve price at the amount it was fixed at was an irregularity, it did not go to the root of the matter so as to result in the setting aside of the sale in execution. However, the holding of the sale in execution otherwise than at the place notified in terms of the notice of sale, was a violation of a peremptory rule of the High Court in Rule 46 8 (a) and (b). It was contended a violation of an equivalent rule in the Republic of South Africa, had resulted in the setting aside of a sale in execution under similar circumstances as this one. This, it was contended was because a sale in execution which took place now at a different place to the one advertised in the notice of sale was void, such that no proper transaction could arise from such.

[12] On the other hand the application was opposed by both first and second Respondents (that is Swazi Bank and the deputy sheriff involved) as well

as by the third Respondent, one Taga Investments (PTY) LTD. Whilst confirming the facts to be essentially those disclosed above, the first Respondent denied that there was any merit in Applicant's case and contended that as for fixing the reserve price at the sum of E3 Million Emalangeni, when the amount for collection was 1.2Million Emalangeni odd, the Applicant ought to be appreciative because same accrued to his favour as it would secure the payment of the outstanding debt and other incidental expenses whilst ensuring as well that there was some residue payable to the judgment debtor. As regards the propriety of the sale, it was contended that it was held at the same place as advertised which was outside the old Manzini Regional Administrator's offices. It was argued this is the place where all sales in execution have always been held.

[13] Further still, it was argued there was no prejudice suffered by the Applicant with regards the sale in execution when considering that the people who there is evidence could not bid were those either sent by the Applicant to a specific place to conduct their bid or those who had arranged with him to do so. There was otherwise no evidence of any independent person who could not bid because of the contended ambiguity as regards the place for the auction sale. It was contended further, a party needed to establish the prejudice suffered by him otherwise there was just an irregularity which did not go to the root of the

matter and therefore not justifying the setting aside of the sale in execution.

[14] The hearing of the matter was awaited when the transfer of the property into the name of the Third respondent - Taga Investments (PTY) LTD - was effected. It has to be pointed out that no interim order to maintain the status quo pending the finalization of the earlier matter challenging the sale in execution had been sought and granted. It transpired that the properties sold in execution and forming the subject matter of these proceedings were developed, with several entities in the form of the first to fifth Respondents occupying some premises thereon on the basis of certain leases.

[15] Armed with the Deed of Transfer of the properties sold in execution to it, the third Respondent instituted proceedings seeking inter alia an order interdicting and restraining the 1st and 5th Respondents in case Number 524/2016, that is Phangoti investments (PTY) LTD and Guard Alert Services (PTY) LTD from locking out Taga Investments (PTY) LTD (Taga) from the properties purchased by it at the sale in execution and transferred to it`s name as referred to above. There was further sought an order evicting or ejecting the respondents from the premises in question. Taga Investments (PTY) LTD further sought an order cancelling any

lease signed by the Respondents herein or declaring such leases null and void. There was sought in the alternative an order directing that the Respondents in the latter application, pay the rentals to an independent estate agent for it to hold same in an interest bearing account pending finalization of the matter, together with costs. This application was during the hearing of the matter and for purposes of convenience, referred to as the interlocutory application. This description shall be maintained herein.

[16] As a basis for this application, Taga contended that it was the owner of the properties who was entitled to the enjoyment of same particularly because it was required to pay monthly instalments towards the loan obtained from the First National Bank to purchase the properties in question. It contended it had innocently purchased same without colluding with any of the parties. It was, it contended, a *bona fide* purchaser of the properties concerned and was by extension an innocent third party or purchaser who was entitled to protection by law. Notwithstanding its being a registered owner in the property, it was argued it was being prevented by PI's director Mr. Magongo, from going into the property it claimed it owned. It was further that whilst it had no lease agreement with anyone, it noted that the Respondents in the

interlocutory application, were claiming to be having leases to the premises they occupied and sought to have them ejected therefrom.

[17] This application was opposed only by the Applicant in the main one – Phangothi Investments (PTY) LTD (PI). The latter raised several points *in limine* in opposition. These related to urgency, *lis pendens* and a failure to meet the requirements of an interdict. All these points in limine were however not pursued at the hearing of the matter, with all the parties having agreed that the real issue before court was the propriety of the sale in execution and particularly that whether or not to grant the reliefs prayed for in the interlocutory application would be dependent on whether or not the sale in execution was found to be void. The factual contentions on the propriety or otherwise of bringing the interlocutory application, it was argued were no longer of any significance because at the time the matters were heard, they were to be heard jointly following their consolidation.

[18] These were the facts when the matter was mentioned before me for hearing. I agree with Miss Vander Walt for the Applicant in the main application that the issue in both applications is the validity or otherwise of the sale in execution. This validity should in my view be determined from the point whether there was compliance with the Rules of Court

governing sales in execution. If there was non-compliance, whether such non-compliance was material or put differently what the effect of such non-compliance was in law. This would affect the first application as it would the second one, in my view.

[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 46 (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.

[20] There can be no doubt from the language used in Rule 46 (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 46 (8) (a), the Deputy Sheriff in consultation with the Execution Creditor, at best gives an ambigous place and at worst a different one altogether from that where the sale is eventually held, he clearly would not be complying with Rule 46 (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 it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it 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 Cecelia 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.***

[24] I cannot agree with Mr. Mdladla for Swazi bank and the deputy sheriff responsible for the sale that the sale in execution of the property was properly advertised and that it was sold at the place advertised. It is not in dispute that in reality the sale in execution did not take place outside the

regional administrator's offices as it is common knowledge that if anyone today refers to the regional administrator's offices, he would ordinarily be referring to the current regional administrator's offices in Manzini, being the government office park adjacent to the Manzini Magistrate's court. I in fact noted during the hearing of this matter that the description of the place where the sale in execution ended up taking place had to be qualified by referring to it as the 'old' Regional Administrator's offices or the Regional Administrator's offices next to the Manzini Post Office or next to the Jubilee Park. I have no hesitation that in the present matter, the unexplained failure to precisely describe the place where the sale was to take place possibly resulted in the failure to allow as much interested purchasers as possible who through their participation would have possibly influenced the realization of an even higher purchase price while at the same curbing collusive dealing in the sale of properties in execution.

[25] I do not think it can help the respondent's to say that the place where the sale in execution took place was the traditional one where such sales take place, as that would introduce ambiguity with a huge potential to defeat the purpose of the sale being by means of an auction. In any event, it is still unexplained why the place for the sale would not be set out with certainty in the notice of sale at least in the manner used in court when

distinguishing it from the other place; that is describing it as the place 'outside the old Regional Administrator's office, next to the Manzini Post Office or next to the Jubilee Park' as was done during the hearing of the matter in court.

[26] I have no doubt that the significance of creating certainty in the description of the place where the sale in execution is to take place is not only for the comfort of the judgment debtor and the judgment creditor so as to say the property was sold for a comfortable price such that it enabled the judgment debtor to be paid a handsome residue. Instead it is also meant to ensure that the property is sold for the highest possible price in an open and fair market so as to eliminate the possibility of a collusion to eliminate other bidders between any of the roll players particularly the Deputy Sheriff conducting the sale and the eventual buyer by either ambiguously advertising the place of the sale or improperly describing the property. The practice of ambiguously and inaccurately describing the place where the sale eventually takes place should in my view be discouraged for this obvious reason as well.

[27] I disagree with Mr. Mdladla's contention that for the sale in execution to be set aside or declared invalid it is not enough that the sale was held at a place different from where it was eventually sold but that there should be

proof that there was an intending purchaser who whilst intending to buy went to a different place other than where the property was sold and that such a person had the resources with which to bid effectively. He submitted the people referred to by the applicant as having gone to a wrong place should not be taken seriously. I cannot agree with this contention because the rule in question places the duty to accurately describe the place where the sale is to be conducted upon the Deputy Sheriff in consultation with the Judgment Creditor. This would obviously eliminate the case of an intending purchaser who whilst intending to bid ended up not doing so when he had the resources to positively influence the bid but was prevented from playing a part by the wrong place advertised.

[28] In support of his argument, Mr. Mdladla relied on the celebrated case of ***A.H. Noorbhai Investments (PTY)LTD and others vs New Republic Bank LTD and others 1998 (2) SA 575 (W)*** where the principle was expressed as follows**:**

> **"where a judgment sought to attack a sale in execution prior to delivery or transfer of his property sold at such a sale on the grounds of post-attachment formalities, he had to show at the very least a reasonable possibility that such non- compliance would have caused him prejudice".**

[29] Whereas I agree with the principle enunciated in the said case, I think that one should take caution not to read it out of context. I say this because the principle as cited emphasises no more than that a reasonable possibility of prejudice has to be shown as opposed to proving actual prejudice which is what I heard Mr. Mdladla to be saying in his submissions in the matter concerned. The facts were that a sale was challenged because its advertisement was one day short from the number of days stipulated by the Rules. Clearly no reasonable possibility of prejudice could be shown in such a case. This is unlike in the present case where business premises in an industrial area which would obviously be highly sought after are sold at a place other than the one disclosed in the notice of sale. In my view a reasonable possibility of prejudice to the Judgment Creditor is obvious in the latter case. This aspect of the current matter distinguishes it from the facts in the *A.H Noorbhai Investments* Judgment referred to above.

[30] In fact the principle referred to by Mr. Mdladla was expressed in different words, which are similar in effect, in ***Elizora Oliver Todd vs First Rand Bank LTD and 6 others, CA case 467/12*** also cited as [2013] ZASCA 61.The principle was laid in the following words, which I fully agree with:

"**where non-compliance with a requirement of Rule 46 of the uniform rules of court 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".**

[31] In my view, and as already hinted above circumstances surrounding the sale in this matter particularly the failure to comply with Rule 46 (8)(a) is material, defeats the purpose of the requirement and was prejudicial to the Judgment Debtor.

[32] This now leads me to the other inquiry whether property purchased under the foregoing circumstances so as to result in the registration of transfer of ownership of the property to the purchaser can be set aside. In the present matter, the purchaser of the property from the sale in execution who got it transferred into his name claims firstly that he innocently purchased it and that he innocently accepted transfer.

[33] It perhaps would be arguable whether in the circumstances of the matter the purchaser can be said to be innocent given his accepting transfer of the property whose sale is being challenged in court before that question is determined. Whereas it would perhaps be too strong in the

circumstances to say that the entity to which the property was transferred colluded with the Sheriff or the execution creditor so as to secure the transfer into its name, there can be no doubt that it took a risk by allowing the registration of the transfer into its name when it was aware the transfer was being challenged.

[34] It is not enough for such a party to claim that the property has already been transferred into its name. This I say because it has been said in numerous judgments both in this jurisdiction and beyond that there is no magic power contained in a Deed of Transfer because it was, like any other document open to challenge as to its validity. It has been said where the sale was invalid, then the transfer was void. This was stated in such cases as ***Jeke (PTY) LTD vs Solomon Nkabinde Civil Appeal Case No. 54/2013, and Boyboy Nyembe t/a Mr. Trailer and One Stop Tyre Service and Another vs VMB Investments (PTY) LTD Civil Appeal Case No. 22/2014.*** See also ***Knox David Boyd N. O. vs Mofokeng Meshack Mohambi and Others Case No. 2011/33437 (SAHC)*** as well as ***Menqa and Others vs Markam and Others 2008 (2) SA 120 (SCA).***

[35] The parties having agreed during the hearing of the matter that the determination of both parties lied on whether or not the sale was valid, it should follow that having come to the conclusion that it was not valid and

that there was nothing in law stopping the cancellation of the transfer, it should follow that the sale in execution should be set aside with the resultant effect that the transfer is cancelled. The principle extracted from the ***Macfoy vs Vac*** **Case (Supra)** as cited in paragraph 22 hereinabove should apply here.

[36] In his argument, Mr. Mabila for the Applicant in the interlocutory application argued that a cancellation would not be an appropriate relief in the circumstances because it was not prayed for. I cannot agree with this contention. Whilst it may be true same was not specifically prayed for, it cannot be disputed that instead of awaiting determination of a prayer seeking to interdict the transfer of the property into the Applicant's name because of an alleged invalid sale, the latter filed its own application seeking to affirm its ownership of the property transferred under very risky circumstances. Had the Applicant awaited the outcome of the main application the issue of the absence or otherwise of the prayer for cancellation would not have arisen. In any event there is not much difference in effect between an order setting aside the sale in execution on account of its invalidity and one granting a cancellation arising from the same invalid sale. There is clearly no prejudice suffered by any of the parties in the circumstances of the matter in this regard.

[37] The parties were also agreed during the hearing of the matter that the need or otherwise to determine the other prayers in the interlocutory application was dependent on the validity of the sale as well. I confirm that having come to the conclusion I have vis-à-vis the validity of the sale in execution I should grant the main application to the extent set out in the order herein below while I dismiss the interlocutory application.

[38] To that end I make following orders:-

38.1. The sale in execution of the property forming the subject matter of these proceedings be and is hereby set aside.

38.2. The transfer of the property in question into the name of the Applicant in the interlocutory application be and is hereby cancelled.

38.3. The interlocutory application be and is hereby dismissed.

38.4. The 1st and 2nd Respondents in the main application be and are hereby ordered to pay the costs of this application with there being no order as to costs with regards the interlocutory application.

N. J. HLOPHE J.
JUDGE - HIGH COURT