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IN THE SUPREME COURT OF APPEAL OF SWAZILAND

JUDGMENT

Appeal Case No.4/2013

In the matter between:-

TERENCE MANDLENKOSI MABILA	**1st Appellant**
ZANELE PRECIOUS MABILA	**2nd Appellant**

and

STANDARD BANK OF SWAZILAND	**1st Respondent**
THE COMMISSIONER OF POLICE SWAZILAND POLICE	**2nd Respondent**
THE ATTORNEY GENERAL	**3rd Respondent**

Neutral citation: *Terence Mandlenkosi Mabila and another v Standard Bank of Swaziland Limited and two others* (4/2013) [2013] SZSC 30 (31 May 2013)

Coram: **A. M. EBRAHIM JA, P. LEVINSOHN JA, and B. J. ODOKI JA**

Heard: **20 May 2013**

Delivered: **31 May 2013**

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Summary: **Civil procedure – Execution proceedings – Attachment and sale carried out by Deputy Sheriff and property bought by 1st respondent at public auction – Grounds for setting aside and attachment and sale not established – Application by 1st respondent for ejectment of the appellants from the property transferred to 1st respondent granted – Counter – application by appellants for stay of proceedings dismissed.**

JUDGMENT

ODOKI J.A.

[1] This is an appeal against the judgment of the High Court (M. Dlamini J) allowing the 1st respondentøs application for ejectment of the appellants from property registered in the name of the 1st respondent and dismissing the appellants counter ó application for stay of proceedings.

[2] The background to the appeal is that the 1st respondent bank advanced an overdraft facility of E2 500 000.00 to a company called Prime Trucking and Logistic (PTY) Limited in May 2007. The 1st and 2nd appellants were the directors of the said company and they stood surety

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s of the said overdraft facility. The company breached the terms of the overdraft facility which led to the 1st respondent to institute proceedings under case No. 2011/2009. A settlement agreement was reached and signed by both parties and was reduced into a court order on the 16th July 2010.

[3] The appellants failed to honour the agreement and the agreement was cancelled and various writs of execution were issued. These culminated into the writ of attachment against the property which had been mortgaged by the 1st appellant to the bank being attached. The property in question is portion 45 (a portion of Portion 19) of farm No. 11, situate in the District of Manzini.

[4] The writ was served on the 1st appellant by the Deputy Sheriff, Mr. Sandile Dlamini on 30th May 2011, and on the Registration of Deeds by another Deputy Sheriff, Mr. Menzi Dlamini, on 31st May 2011.

[5] After the writ of attachment had been served, attempts were made through the court by the 1st appellant to stop the sale. When a notice of sale was issued and published on the 13th December 2011 for sale of Portion 45, the first appellant and Prime Trucking Company brought on urgent application on 25th January 2012 to stop the sale. The sale was stopped pending the argument of the matter. The matter was argued on 20th February 2012 and a judgment was delivered by Ota J, on 6th March 2012, dismissing the application.

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al of the urgent application, the 1st respondent published another notice of sale on 23rd March 2012 and scheduled the sale on the 18th May 2012. Again four days before the sale the first appellant and Prime Trucking Company brought another application to try and stop the sale. The matter was heard by Dlamini J, and was dismissed on 18th May 2012.

[7] After the dismissal of the urgent application, the sale occurred on 18th May 2012 where a number of people including the 1st respondent bid for the property. The 1st respondent was the eventual successful bidder and the property was sold to it for E 3 600 000.00.

[8] Following sale of the property, the 1st respondent obtained the necessary approval from the regulatory authority and paid the Deputy Sheriff his commission of E131 500.00. Part of the price was paid to the Prime Trucking Company. Portion 45 was eventually transferred to the appellant on 27th November 2012.

[9] On 28th November 2012, the 1st respondentsø attorneys wrote a letter to the appellantsø attorneys advising them of the registration of the property and requesting them to vacate Portion 45 by 1st December 2012. The respondent failed to comply with the notice to vacate. On 3rd December the 1st respondentsø attorney called the appellantsø attorney to discuss the matter. The appellantsø attorney called the respondentsø attorney informing him that his clients were non ó committal.

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December 2012 the 1st respondent brought an application for ejectment of the appellants from portion 45, and an order directing the Deputy Sheriff of the District of Manzini and the Swaziland Royal Police, to execute the order. The appellants reacted by filing a counter ó application for the stay of execution.

[11] However on 13th December 2012, the 1st appellant and 2nd appellant filed an action under Case No. 2132/2012 claiming the following relief:

> *"1. Declaring the attachment, sale in execution and transfer of title of Portion 45 (a portion of Portion 9) Farm 11, Manzini pursuant to a Writ of Executive issued under High Court Civil Case no. 2110/2009 to be invalid, void ab initio and of no effect.*
>
> *2. Compelling and ordering the 4th Defendant to cancel the Deed of Transfer No.942/2012 transferring title over Portion 45 (a portion of Portion 9) Farm 11, Manzini from the Plaintiff to the 1st Defendant.*
>
> *3. Costs of suit against the 1st Defendant or any party who unsuccessfully defends this action.*
>
> *4. Further and or alternative relief."*

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argued together before Dlamini J, who granted the application for ejectment and dismissed the counter ó application. The learned judge in the court **a quo** made the following orders:

õ1. *1st and 2nd respondents are hereby ordered to vacate Portion 45 (a portion of Portion 19) of Farm No.11 situate in Manzini District forthwith;*

2. *The Deputy Sheriff of Manzini District is hereby authorized to effect order 1) hereof, failing which the Swaziland Royal Police;*

3. *1st respondent is hereby ordered to pay costs of this application and the counter – application."*

[13] The appellants being dissatisfied with the judgment of the court **a quo** have appealed to this court on 13 grounds of appeal challenging the judgment.

[14] This appeal raises two main issues. The first issue is whether the court **a quo** erred in refusing to grant stay of proceedings in the counter - application for postponement of the hearing of the main application pending determination of the validity of title of the 1st respondent which the appellants were challenging in Civil Case No. 2132/2012. The second issue is whether the court **a quo** erred in allowing the

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...it of the appellants from the property registered in the name of the 1st respondent.

[15] It is convenient to consider first the dismissal of the counter óapplication to postpone the hearing of the main application pending the determination of the action challenging the title of the 1st respondent.

[16] In her judgment, the learned judge in the court **a quo,** after referring to several authorities, held that in an application for stay of proceedings it must be established that the proceedings are frivolous or vexatious or an abuse of the court process. The learned judge cited the case of **West Assurance Co. v Caldwell S. Trustee 1918 AD 262 at page 274**. Where Solomon J. A. said,

> *"Now it is needless to say that strong grounds must be shown to justify a court of justice in staying the hearing of an action. The courts of law are open to all and it is only in very exceptional circumstances that the doors will be closed upon anyone who decides to prosecute an action".*

[17] A similar opinion on the law was expressed in the case of **Hudson v Hudson and another 1927 A.D 259 at page 267** where De Villiers J.A. observed,

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has inherent power to prevent an abuse of the machinery provided for the purpose of expediting the business of the court admits no doubt."

[18] Likewise in the case of **<u>Fisheries Development Corporation v AWJ Investment 1929 (3) SA 1331</u> at page 1338** Nicholas J stated,

> *"It is well established that the court has an inherent right to prevent the abuse of its process in the form of frivolous or vexatious litigation."*

[19] In the <u>Fisheries Development Corporation case</u> (supra), the court defined the word õvexatiousö as õ*frivolous, improper, instituted intent sufficient ground, to serve surely as an annoyance to the defendant*.ö Abuse was said to connote a misuse, and improper use or use for an ulterior motive.

[20] In his affidavit the 1st appellant deposed as follows,

> *"The reason why I contend for and humbly pray the court grants the stay of the main application is that should the court proceed to hear the main application, any decision the court would reach in respect thereto will in essence be preempting the court's decision in the action under Civil Case No. 2132/2012. This will create and undesirable and embarrassing situation where the court may find itself making contradictory and different findings*

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such it is prudent to first determine the title to the property then deal with the issue of ejectment.”

[21] It is clear that the appellants did not allege that the main application was frivolous, vexatious and an abuse of the court process. They were merely pleading what was convenient to them. They were in fact pleading a defence of **lis pendens**.

[22] As the court **a quo** observed, there were no proceedings pending at the time on the 4th December 2012 where the main application was filed. The action in Civil Case No. 2132/2012 was filed after the application was lodged on 13th December 2012. It is the appellants who chose to bring their action after receiving the papers in the main application. They chose not to challenge the title of the 1st respondent in the application for ejectment.

[23] The appellants, therefore, delayed in challenging the title of the 1st respondent which they should have done as soon as they were served with the notice to vacate the house on 27th November 2012. I agree with the learned judge in the court **a quo** that the 1st appellantøs failure to challenge the title at the opportune time, that is when given notice to vacate or being aware of the irregularities which tainted the 1st respondentøs title could not turn the 1st respondent application to be vexatious, frivolous or an abuse of the courts process.

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hat it was an abuse of court process by the 1st respondent in filing ejectment proceedings when they were aware that the authority of the Deputy Sheriff who conducted the sale was being challenged. It was their contention that Mr. Sandile Dlamini was not duly appointed the Deputy Sheriff for Manzini region. The appellants further submitted that the writ attachment was not served upon the Registrar of Deeds, and that there was no competitive bidding. According to the appellants since the 1st respondent was aware of all these irregularities on the attachment and sale, it was an abuse of the court process to make an application for ejectment of the appellants from the property purchased by the 1st respondent and registered into its name. Therefore they submitted, the 1st respondentøs title to the property is invalid.

[25] The learned judge in the court **a quo** considered these submissions and rejected them. In my view for the reasons which follow in this judgment, the learned judge was entitled to come to that conclusion.

[26] In the first place, the appellants were unable to prove the alleged irregularities in the process of attachment sale and transfer of the property. The evidence on record showed that Sandile Dlamini had been duly appointed Deputy Sheriff of Manzini Region by the Acting Chief Sheriff of Swaziland on 8 September 2006. There is also evidence from the Deputy Sheriff that the Registrar of Deeds had been duly served with the writ of attachment on 31st May 2011. There was evidence which was accepted by the court **a quo** that there were several

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auction, and the evidence of the Deputy Sheriff that there was bidding, was not convincingly challenged by the 1st appellant's brother who attended the auction on his behalf. The claim that there was competitive bidding was supported by the evidence adduced by the 1st respondent that the purchase price was the E3 600 000.00 which was higher than the reserve price which was E3 000 000.00.

[27] It was also submitted that the 1st respondent as the bond holder or creditor had acted in bad faith by bidding at the auction, purchasing the property and having it transferred into its name. In my view, the learned judge in the court **a quo** came to the correct conclusion when she stated,

> *"I do accept that judgment creditors may participate in public auction as appears in Graham v Ridley 1931 T.P.D. 47 and many other judgments. However when the judgment creditor takes part as a purchaser he does so not as a judgment creditor but as a member of the public in accordance with the published notice of sale, which is an information to the public. In that way, any person challenging title to such a person on the basis of non – compliance with formalities is liable to satisfy the requirements thereof."*

[28] The learned judge in the court **a quo** also rightly held that the appellants failed to show any prejudice that would be caused to them by the

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…ne relied on the authority of **A. T. T. Noorbhai Investment (PTY) and others v New Republic Bank Ltd and others 1998 (2) SA 575**.

[29] The appellant could not show any prejudice in view of the fact they had consented to a judgment which had not been satisfied or executed. The attempts by the appellants to set aside the judgment had failed. As the 1st respondent submitted it a trite principle under the common law that if the **causa** or debt can still be justified by a writ of sale of immovable property it cannot be set aside. Therefore in order to set aside the sale the judgment must be attached first. See **Hachmann v Standard Bank Suid Africa Bpk en andere 2002 1 ALL 558 T**.

[30] As it was stated in **Graham v Ridley 1931 T.P.D 476 at page 479**,

> *"One of the rights arising out of ownership is the right to possession. Prima facie, therefore proof that the appellant is the owner and that the respondent is in possession entitles the appellant to an order giving him possession to an order for ejectment."*

[31] In the present case, the 1st respondent is the registered owner of the property being occupied by the appellants who were party to the judgment being executed. They have made various fruitless efforts to delay the execution of the judgment. The court **a quo** in a well reasoned judgment rejected their claims and dismissed their counter ó application

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e proceedings, and granted the application for ejectment of the appellants from the property of the 1st respondent. For the reasons I have given, I find that the judgment of the court **a quo** cannot be faulted.

[32] In the result I dismiss this appeal with costs on the attorney client scale.

B. J.ODOKI
JUSTICE OF APPEAL

I agree:

A. M. EBRAHIM
JUSTICE OF APPEAL

I agree:

P. LEVINSOHN
JUSTICE OF APPEAL

For the Appellant: Mr. M. Nkomondze

For the Respondent: Mr. K. J. Motsa