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# IN THE HIGH COURT OF SWAZILAND

**CASE NO. 1453/2010**

**HELD AT MBABANE**

BETWEEN

**JNA CONSULTING**
**(PTY) LIMITED... APPLICANT**

**IN RE:**

**JNA CONSULTING**
**(PTY) LIMITED... APPLICANT**

**AND**

**SWAZI OXYGEN**
**(PTY) LIMITED... FIRST RESPONDENT**
**MARTIN AKKER (N.O.) SECOND RESPONDENT**

**CORAM**
**AGYEMANG J**
**FOR THE APPLICANT: K.**
**MOTSA ESQ.**

**FOR THE RESPONDENT:**
**N.S. THWALA ESQ.**

**DATED THE 9TH DAY OF JUNE 2010**

## JUDGMENT

On 30th April 2010 the applicant herein on an urgent application, sought the following interim orders: an order staying the sale of Lot No 781 Matsapha Town, Manzini District which was to take place at 2.30 pm of that day; an order interdicting/restraining the respondents and their privies from conducting a sale in execution by public auction of the said property pending the final determination of the suit, and a further order declaring it the lawful and rightful owner of the said property.

Because neither the court nor the respondents had had the opportunity of going through the papers filed in support of the application, and having regard to the circumstances of the matter, this court with the consent of counsel on both sides, granted the interim order staying the proceedings and made orders for the filing of full and final submissions for the determination of the issues in the application.

The applicant and the first respondent are limited liability companies incorporated and duly registered under the laws of Swaziland, the second respondent is a Deputy Sheriff of the Manzini District whose involvement in the case is by reason of a mandate he holds to conduct a judicial sale in execution of property the subject of this application.

The matters giving rise to the instant application are these:

On or about the 1st day of October 2009, the applicant herein, acting per its Managing Director Alain Fula, executed a deed of sale with a company: General Sales and Distribution (Pty) Ltd (the judgment debtor/seller) acting per its agent and Director Shanilla Narayadoo. It was for the sale of immovable property described as Lot 781 Matsapha Town, District of Manzini (referred to alternately as "the property"). The deed of sale was duly witnessed by Attorney Mr. Wellie Mabuza and Gordon Charles Narayadoo, a co-Director and agent of the judgment debtor/seller: General Sales and Distribution (Pty) Ltd.

Prior to the execution of the deed, the purchase price of E350,000 had been paid in seven instalments upon an agreement of sale and full payment had been made. The transfer of the property which was to be made by the seller's conveyancers at cost to the purchaser was however not effected.

On 7th July 2009, the first respondent obtained judgment against General Sales and Distribution (Pty) Ltd for the payment of E1,006,593.85. The first respondent on 8th July 2009, issued two writs of execution, one for the attachment of movable properties belonging to the judgment debtor, the other for the attachment of immovable property. On 9th July 2009, the Deputy Sheriff made returns regarding his attachment of movable and immovable properties of the judgment debtor. The immovable property so attached was Lot 781 Matsapha Town, District of Manzini, the subject matter of this suit.

The execution creditor and/or the Deputy Sheriff then posted advertisements for the sale of the attached property by public auction. One such advertisement dated 28th April 2010, notified the public that the auction sale would take place on the 30th of April 2010.

It was the applicant's case that by the terms of the sale agreement, it became entitled to the property Lot 781 Matsapha Town as owner thereof by agreement and at common law when it paid the full purchase price of the property. It contended by this application, that this was so despite the fact that a transfer/registration of the property by reason of the sale to it was not effected. In its founding affidavit sworn to by one Mr. Alain Fula, the applicant, deposed that by reason of its alleged ownership of the property, the applicant had a clear right to the interdict sought and furthermore that the balance of convenience lay in its favour as a sale in execution would create third party rights in the property.

In argument, learned counsel for the applicant shed more light on matters set out in the founding and replying affidavits: first of these was that the writ of execution attaching the immovable property Lot 781 Matsapha Town, was irregular;

The alleged irregularity canvassed was with regard to two matters: first, that the fact that the two writs exhibited by the applicant as annexure 'G' for the attachment of movables, and annexure 'H' for the attachment of the immovable property of the judgment debtor were issued on the same day: 8th July 2009. The irregularity it was contended, was that contrary to the requirement contained in Rule 45 (1) of the High Court Rules, the Deputy Sheriff failed to make a return of the attachment of movables for the information of the Registrar of the High Court who would thereupon determine the insufficiency of the movable property of the judgment debtor before execution could be levied against the judgment debtor's immovable property. Learned counsel averred that the return of movables indicated that

the writ of attachment of movables was executed on 9th July 2009 at 16.30 hrs and that the writ against the immovable property was executed on the same day. He contended that it was impossible for the Registrar to make the said determination of insufficiency of movables before the immovables property herein was attached on the same day.

Citing the case of ***Tobacco Exporters & Manufactures Ltd v. Bradbury Road Properties (Pty) Ltd 1990 (2) SA 420 at 426 (H-I),*** learned counsel contended that when the Deputy Sheriff failed to file a return of the attachment of movables upon which a determination of insufficiency of movables could be made by the Registrar and proceeded to attach the immovable property, the attachment of the immovable property herein, was irregular and ought to be set aside.

In its replying affidavit, the applicant set out its second ground of complaint regarding the alleged irregularity of the attachment thus: that Lot 781 Matsapha Town was never attached, or at best, was improperly attached. The reason the applicant gave for this assertion was that the return of service of the Deputy Registrar (exhibited as S4) merely indicated that service was made upon the occupant of the premises. This, the applicant submitted was deficient as there was no indication as to whether the service was upon a natural person, that such person was above eighteen years, or that he was in charge of the immovable property in question. The applicant contended further that even if the return of service had been true, this was contrary to the express provisions of Rule 46 (3) of the High Court Rules which required service by the Deputy Registrar of a notice in writing upon the owner of the property and the Registrar of Deeds and upon the occupier only if the

property was in the hands of one other that the owner thereof. The applicant contended that the return was in any case not true, as there was no occupier on Lot 781 Matsapha besides the fact that the Deputy Sheriff did not know whether the property was situate until 28th April 2010 when in a chance encounter between the Deputy Sheriff and Director Gordon Nayaradoo of the judgment debtor, the Deputy on 28th April 2010, was directed to the location of the property by the latter. The applicant alleged that as the Deputy Sheriff failed to deliver the notice of attachment to the judgment debtor or its agent, the judgment debtor thus had no knowledge of the attachment. For this reason, the applicant contended that the property was either never attached, or the mode of attachment was so irregular that the attachment must be set aside.

The applicant also submitted that its alleged ownership of Lot 781 Matsapha Town, Manzini District, per the deed of sale and the payment of the purchase price therefor, had given it a "direct and substantial interest" in the subject matter of the alleged attachment, clothing it with the requisite locus standi to seek a stay and or/interdiction of the scheduled judicial sale.

Canvassing the validity of the sale agreement between the applicant and the judgment debtor, the applicant contended that not only was the oral agreement that preceded the deed of sale entered into and the purchase price, paid before the 1st of October 2009 the date of the deed of sale, but that when the judgment debtor was placed in provisional liquidation, the liquidator did not repudiate the sale agreement between the applicant and the judgment debtor. It was the applicant's contention therefore, citing cases such ***as AMS Marketing Co. (Pty) Ltd v. Holzman and Anor 1983 (3) SA***

***263 (W),*** that when the interim order lapsed, the status quo ante was reverted to, and the sale to the applicant which was not repudiated, remained unaffected and the sale agreement, valid.

The respondent raised points of law in limine which among other things, challenged the capacity of the applicant to bring the suit.

The respondent contended that the applicant was not the owner of the property as same was registered under the name of General Sales and Distribution (Pty) Ltd per Crown Grant No.17/2007. The first respondent contended that no matter that a deed of sale was executed between the applicant and the judgment debtor, by reason of the lack of registration of a deed of transfer, the applicant's alleged right was not effectual against creditors and third parties. Nor, the respondent contended, was the applicant to whom no transfer of the property had been made, the owner of the property under an agreement which contained a suspensive condition that prescribed the passing of ownership only after the property was transferred. Thus did the first respondent contend that the applicant had no locus standi to bring the present proceedings.

The first respondent also contended that in any case, the deed of sale was void and incapable of vesting ownership of the attached immovable property in the applicant. This was because the judgment debtor which had been put in provisional liquidation on 18th September 2009, did not have the right or capacity to alienate its immovable property such as the subject matter of this suit on 1st October 2009, when its Director executed the deed of sale. The first respondent added that in any case the purported alienation of the

property by General Sales and Distribution (Pty) Ltd during the time of provisional liquidation constituted a fraudulent alienation and undue preference of one person to the other creditors and was thus voidable.

I do not intend to go into the arguments and counter-arguments canvassed regarding the bringing this application on urgency simply because the interim consent order took cognisance of the said matters thus relieving me of any duty to pronounce on it. The arguments have clearly been overtaken by events.

In its answering affidavit, the General Manager of the first respondent deposed, responding to the merits of the application, relied on the provisions of S. 15 of the Deeds Registry Act to contend that in the absence of transfer of the property by registration, the applicant was not the owner of the property Lot 781, Matsapha Town, Manzini District.

Giving a background to the events, the deponent averred that following judgment that the first respondent took against General Sales and Distribution (Pty) Ltd for the sum of E1,006,593.85, the first respondent issued two writs of execution on 8th July 2009. The writs, marked as annexures G and H, were for the attachment of movable property and of immovable property of the judgment debtor respectively.

In answer to the charge of the applicant that there was irregularity in the execution in that no *nulla bona* return was made to demonstrate that there were insufficient movables to satisfy the judgment debt before the immovable property herein was attached, the deponent averred that on the 9th of July 2009, the writ of execution for immovable property was executed and a return of service made only after the Deputy Sheriff had formed the opinion that

movables he had attached, would not be sufficient to satisfy the judgment debt. Deposing to the answering affidavit on behalf of the first respondent, one Tony Coster its General Manager averred, that the sale in execution was stalled when on 18th September 2009, the judgment debtor was put into provisional liquidation and the respondent was advised that by reason thereof, the judgment debtor had been divested of all its property, same having been placed in the hands of the provisional liquidator Mr. Lucky Howe. He deposed that the process of execution was continued only after the respondent was advised by letter marked annexure S 6.2 written in reply to the respondent's letter S6.1 that the interim order of liquidation had lapsed. The notice of sale of the judgment debtor's immovable property in execution was then put up by the Deputy Sheriff in the news paper and in the gazette on 11th and 12th of March 2010.

In sum, the respondent's arguments against the grant of this application were the following: in limine:

1. That the applicant lacked the locus standi to bring this application, as:

(a) The applicant was not the owner of the property in question, the judgment debtor being the registered owner thereof;

(b) That the ownership of the property did not vest in the applicant in spite of a deed of sale executed in his favour by reason of the lack of conveyance to the applicant herein through transfer by registration;

(c) That in any case, the deed of sale was void and incapable of conferring ownership on the applicant thus granting him the locus standi *in judicio* in the present instance. This was because it was executed by the judgment

debtor during the term of provisional liquidation when it had no right to alienate property;

(d) That the deed of sale was voidable at the instance of creditors as it was executed in fraud of other creditors and gave preference to the applicant.

On the merits:

2. That the applicant, had not demonstrated a clear or prima facie right entitling it to the grant of an interdict;
3. That the applicant did not have to come by urgent application as it had a right of suit for damages against the judgment debtor/seller regarding a void or voidable alienation.

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At the close of the arguments the following stood out as issues to be determined:

1. Whether or not the applicant has the locus standi to bring this suit;
2. Whether or not the attachment of Lot 781 Matsapha Town was irregular;
3. Whether or not the applicant is entitled to the prayers sought.

Although in view of the peculiar matters raised by this application, it would have been preferable to determine the matter of the status of the attached property before all other issues obtaining, I am constrained to deal with the capacity of the applicant raised as a point of law in limine and I do so accordingly.

Does the applicant have the locus standi to bring the present application which first sought to stay the sale (already granted as a consent order), and also an interdict restraining the sale in execution?

The applicant relies on an agreement of sale which was entered into between itself and the judgment debtor by which the said immovable property was sold to it. Relying on the deed of sale executed between it and the judgment debtor and the performance of its obligation per the full payment of the purchase price, the applicant claims itself to be the owner of the property at common law, for which reason, execution may not be levied against the said property for the debt of the judgment debtor General Sales and Distribution (Pty) Ltd.

What is the common law position? There appears to be a dearth of authorities regarding the common law position of ownership by a person who has executed a deed of sale but has not had property conveyed to him. Even so, what little I could find has persuaded me that at common law, ownership is acquired through publicity, which requirement has been satisfied in the statutory requirement of transfer by registration. It can be said with confidence then that unlike obtains under English law, the execution of a deed of sale is insufficient to vest ownership in a purchaser/donee. The deed of sale while enforceable *per se* between the parties *in personam*, does not appear to confer ownership against the whole world and may not defeat the rights of prior creditors.

*In casu*, the parties in paragraph (3) of their deed of sale set out their intention thus: that possession and ownership of the property would be given to the applicant/purchaser upon the signature of the parties. The signatures

were appended on the deed on October 1, 2009. It is apparent then, were there no legislation providing for a contrary position, that the applicant would ex facie the deed of sale, become entitled to the possession and ownership of the property on October 1, 2009.

It seems to me however that the express and clear wording of S. 15 of the Deeds Registry Act No. 37 of 1968 which stipulates that the conveyance of land shall be by deed of transfer only, duly registered before the Registrar of Deeds, leaves no room for parties desirous of effecting the transfer of land to do so otherwise than through the process of transfer by registration. In that regard, no matter the expressed intention of the parties for ownership to pass after the execution of the deed of sale, such intention would not be given effect to as the parties would thereby contract out of the statute.

In the light of this and the unchallenged evidence exhibited regarding the judgment debtor's ownership per Crown Grant 17/2007, it seems to me that the applicant cannot be described as the owner of the attached property: Lot 781 Matsapha Town

Even so, I have no doubt that in the circumstances of this case where the applicant has fully paid the purchase price of the attached property, it has acquired some interest in the property such as will give it a right of suit against the judgment debtor/seller. This right/interest in the property by a third party may not be ignored in a suit such as the present one which seeks to protect the interest of the third party in the property sold to it. Per *Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa 4th Ed. 773 (2)* when a judgemnt creditor: "*Where the property though registered in the debtor's name has in fact been donated or sold by him to a third party,*

*the court will as far as possible protect the donee or purchaser against the creditor and will not treat the latter as if he were the debtor's trustee in insolvency entitled to the property solely because it stands registered in the debtor's name"*

If the respondent's point of law in limine regarding the *locus standi* had been limited to the fact that the registered document of ownership remains in the name of the judgment debtor, and the lack of transfer by registration alone, I daresay that in the exercise of my inherent jurisdiction to protect even imperfect rights, I may not have given his arguments the time of day.

It seems to me however, that the second and last arguments (set out before now) regarding the position of the judgment debtor/seller with regard to the property it purported to sell to the applicant per the deed of sale deserves weighty consideration. The first matter is the contention of the first respondent that the judgment debtor did not have the right or capacity to alienate the property when it purported to do so. This is having regard to a provisional liquidation order that was subsisting at the time of the execution of the deed of sale: October 1, 2010. In the first respondent's submission, the said property during the period of the interim order, vested in the provisional liquidator and so it remained until that interim order lapsed.

In my view the position of the first respondent is tenable for it seems to me that if during the period of the interim order which ended on 26th February 2010, the property vested in one other than the judgment debtor upon the application of the principle *nemo dat quod non habet*, the judgment debtor had nothing to alienate. And indeed, on the application of S. 20 (1) of the Insolvency Act No. 81 of 1955 (which is made applicable to companies during

a winding-up by order of the court, per Ss. 282 and 283 of the Companies Act 2009), the property of the judgment debtor during the period of the interim order of liquidation vested in the provisional liquidator who was in the placed in a fiduciary position in relation to the assets of the judgment debtor herein. Regarding this, ***AMS Marketing Co. (Pty) Ltd's case (supra)*** cited for my persuasion which was decided under the laws of South Africa echoes the position in this country. S. 283 of the Companies Act (supra) also provides that a disposition of property, during a winding up by the court is voidable; it seems to me that an execution creditor such as the first respondent herein may successfully obtain an order setting aside the sale.

What occurred when the provisional liquidation order lapsed was that the judgment debtor's property re-vested in its shareholders, see: ***Nyathi v. Tagarira Brothers (Pty) Ltd and Ors (68/03) ZWSC 66 SC74/05.***

Contrary to the submission of learned counsel for the applicant, that circumstance which revived the judgment debtor's right of alienation of its property did not operate to give validity to a purported alienation done by it when it had no authority, power or indeed, right to deal therewith.

There is no controversy over the fact that at the time the deed of sale was prepared, the full purchase price had been paid (paragraph 2 of the deed of sale). In the applicant's submission, there existed an agreement of sale upon which the said payment of the purchase price was made and that the said agreement and the instalment payments of the purchase price were made outside the period of the provisional liquidation. It was the further contention of learned counsel for the applicant that when the provisional order lapsed, the status quo ante in relation to the sale agreement was restored so that the

provisional liquidation order must be held to have had no effect on the sale agreement and indeed that it never took place. The effect the applicant submitted, was that its ownership of the property by reason of the payment of the purchase price upon the agreement was unaffected.

I am unable to agree with this position for untenable as the argument is, it seems to me that the applicant continually shifted the post in order to accommodate its own changing positions. It seems to me that the significance of the said argument would be that the applicant's claim of ownership was not predicated upon the deed of sale at all, but upon an oral agreement upon which the purchase price was paid. I am unable to agree with this position having regard to the provision contained in paragraph 3 of the deed of sale by which the parties thereto agreed that the transfer of possession and ownership of the attached property upon the applicant would only take place after due execution thereof. By their expressed intention therefore, no matter what had been agreed upon between the parties before the preparation of the deed of sale, the sale transaction would not be effectual to alienate the property until due execution of the deed. The execution of the deed of sale took place on October 1, 2009. If there was a mere suspension of the judgment debtor's right of alienation during the period of provisional liquidation and a revival thereof when the interim order lapsed (as canvassed by the applicant), what was revived regarding the transaction *in casu* when the provisional liquidation lapsed on 26th February 2010 (going by the applicant's argument), was an oral sale transaction unconcluded and ineffective to vest right or interest in the applicant who signed the deed of sale not before, but after the provisional liquidation order was made. In the

premises, applicant's right to the property, which it maintained was its ownership thereof, and which has been called into question cannot be said to have been established for the following reasons: the applicant although clearly having an interest in the property which interest is enforceable against the judgment debtor (although not against the whole world being unregistered), cannot be said to be the owner thereof, as the property was never conveyed to it by the process of transfer by registration as required by law. Secondly, the deed of sale which the applicant exhibited in the application as evidence of its right to ownership was apparently executed at the time when the liquidation order of the court had divested the judgment debtor/seller of its right of alienation. Besides these, (and I give consideration to the last argument canvassed in limine), even if the said transaction had been complete and effectual before the order of provisional liquidation, it was in any case voidable at the instance of the provisional liquidator see: ***Syfrets Bank Ltd and Ors. v. Sheriff of the Supreme Court, Durban Central and Anor 1997 (1) SA 764*** where a liquidator who, stepping into the shoes of company, may repudiate judicial sale of company assets concluded before liquidation. Such creditors as the first respondent herein, may also avoid the transaction in these circumstances, see: ***S. 283 of the Companies Act*** as read with ***S. 20 (2)*** of the ***Insolvency Act*** (supra).

I am not persuaded that the applicant in face of the challenge regarding its locus standi, has demonstrated the possession of a real right or substantial interest in the property to clothe it with the capacity to bring an action against any person other than the judgment debtor herein with which it undoubtedly had an enforceable transaction.

It is for these reasons that I must uphold the points raised in limine by the first respondent, on the ground that the applicant lacks the *locus standi* to bring the present application.

I would be remiss in my duty however if I did not go into the merits of the matter even if in a cursory fashion, in order that the vexed issues arising from the instant application may be given due consideration.

First to be considered outside the matters of legal standing is: whether the applicant established that it had a prima facie right or a clear right to seek the stay and the grant of the interdict, a *sine qua non* for the grant of an interdict such as is being sought in the instant application, see: ***Sanachem Pty Ltd v. Farmers Agricare Pty Ltd and Ors 1995 2 SA 78.*** It seems to me that if the deed of sale although by itself incapable of transferring ownership, had been executed outside the period of the provisional liquidation, the applicant who had paid the full purchase price of the property would have demonstrated that it had a right/interest in the property entitling it to the court's protection, see: *Herbstein and Van Winsen* (supra).

The same circumstance would have sufficed in the demonstration that the balance of convenience was in the applicant's favour. This is because a properly executed deed of sale would have argued for the grant of an interdict as the creation of third party rights at a judicial sale would create untold inconvenience for a purchaser who was on the verge of becoming owner of the property.

But holding that the applicant has no locus standi in the present proceedings is not to say that the sale in execution must proceed. This is because I find from a consideration of the matters placed before this court, that the

attachment of Lot 781 Matsapha was irregular which irregularity may not be overlooked by this court should it be called upon to set aside the sale by a person competent to seek such an order.

The matter of grave irregularity is that two writs of execution were issued on the same day: 8th July 2009, one for the attachment of the movable property of the judgment debtor, and one for its immovable property. In fact, two returns were also filed on the same day 9th July 2009 one for the attachment of the movable property of the judgment debtor, the other for immovable property. The explanation given by the first respondent in its affidavit: that the immovable property was proceeded against after movables were found to be insufficient by the Deputy Registrar (even if it were his place to do so and it is not), is not borne out by the evidence so far before the court.

This is because there is no evidence before the court that a *nulla bona* return was sent to the Registrar regarding the matter of insufficient movables. This was contrary to the express requirement in ***Rule 45(1) of the High Court Rules.*** The Registrar was never given the opportunity of making the determination of the insufficiency of movables as required under the rules of the court, before the attachment of the immovable property Lot 781 Matsapha Town was effected. The duty to exhaust movables before immovable property is not optional. Nor is the Registrar's duty to pronounce on the insufficiency of movables to be usurped by even the well meaning Deputy Sheriff see: ***Rule 45(1) of the High Court Rules***.

Rule 45 (1) of the Rules of Court reads: "*The party in whose favour any judgment of the court has been pronounced may at his own risk sue out of the office of the Registrar one or more writs for execution thereof...Provided*

*that except where by judgment of the court immovable property has been specially declared executable, no such process shall issue against the immovable property of any person until a return has been made of any process which may have been issued against his movable property, and* ***the Registrar perceives*** *therefrom that such person has not sufficient movable property to satisfy the writ".* (my emphasis).

I find that the issuance of the two writs and the concurrent attachment of both movable and immovable property amounted to an irregularity entitling one clothed with the requisite locus standi to have same set aside.

Beyond the factual inconsistencies regarding the execution of the writs of attachment, including the assertion that a return of attachment of movables made at 16.30 pm on 9th July 2009 preceded the attachment of the immovable property, I am faced with inexplicable circumstances of grave implications being the service of the notice of attachment of immovable property on an alleged occupier thereof when it is apparent that no attempt was made to serve the notice on the owner of the property: the judgment debtor as was required by Rule 46 (3) of the High Court Rules. The said rule reads: "*The mode of attachment of immovable property shall be by notice in writing prepared by the deputy-sheriff and served upon the owner thereof, and upon the registrar of deeds or other officer charged with the registration of such immovable property and if the property is in the occupation of some person other than the owner, also upon such occupier..."*

Having regard to these matters that amount to a grave irregularity in the mode of attachment, I should consider it an abdication of my responsibility if I held my peace regarding the attachment only because this applicant has

been held to not possess the requisite legal standing to bring an application to stay and restrain the sale in execution.

The point in limine raised by the first respondent regarding legal standing is hereby upheld and the application is dismissed accordingly.

The applicant will pay the first respondent's costs.

MABEL AGYEMANG (MRS.)

HIGH COURT JUDGE