



## IN THE HIGH COURT OF SWAZILAND

### JUDGMENT

Reportable  
Civil Case No. 1978/12

In the matter between:

THEMBEKILE CECELIA TSHABALALA	1 <sup>ST</sup> APPLICANT
YVONNE MARY TSHABALALA	2 <sup>ND</sup> APPLICANT
MPUMELELO TREVOUR TSHABALALA	3 <sup>RD</sup> APPLICANT
and	
THE MUNICIPAL COUNCIL OF MANZINI	1 <sup>ST</sup> RESPONDENT
BLACK KAMBIZI	2 <sup>ND</sup> RESPONDENT
PHINDILE NOMSA DLAMINI	3 <sup>RD</sup> RESPONDENT
THE REGISTRAR OF DEEDS	4 <sup>TH</sup> RESPONDENT
THE ATTORNEY GENERAL	5 <sup>TH</sup> RESPONDENT
THE MESSENGER OF COURT (MANZINI MAGISTRATES COURT)	6 <sup>TH</sup> RESPONDENT
MASINA NDLOVU MZIZI ATTORNEYS	7 <sup>TH</sup> RESPONDENT
NKOSINATHI SIBUSISO MANZINI	8 <sup>TH</sup> RESPONDENT

Neutral citation : Thembekile Cecelia Tshabalala & Two Others v The Municipal Council of Manzini & 7 Others (1978/12) [2014] SZHC 137 (4<sup>TH</sup> JULY 2012)

Coram : Q.M. MABUZA - JUDGE

Heard : 24/01/2014

Delivered : 04/07/2014

Summary **Civil Proceedings – Municipality – Rates – Recovery of arrear rates – Sale of immovable property by Messenger of Court – Co-owners – Each to receive notice and to be joined – Section 45 of the Magistrates’ Courts Act 1939 raised as defence to third party – Sale declared null and void and set aside – Registration of transfer set aside.**

[1] The Applicants are siblings who on the 9<sup>th</sup> February 1994 became the registered owners of immovable property described as:

Certain : Remaining extent of Farm “Carlisle” No.  
266 situate in Manzini District, Swaziland;  
Measuring : 8,1415 (Eight comma one four one five)  
hectares.

[2] The aforesaid immovable property was bequeathed to the Applicants by their grandmother Ellen Sikhunyane in terms of her last will and Testament dated the 19<sup>th</sup> March 1976. She bequeathed the aforesaid property to the Applicants in equal undivided shares.

[3] During the year 2004/2005 the Applicants fell into arrears in respect of rates in the sum of E124,349.70 which amount accrued penalty interest and collection costs bringing the total sum owed to E164,452.47.

[4] The sum of E124,349,70 as rates arrears for the year 2004/2005 is disputed on the basis that the property is a vacant piece of land.

[5] The Treasurer and or Collector of rates on behalf of the 1<sup>st</sup> Respondent subsequently filed a sworn statement to the Clerk of Court at the Magistrates Court sitting in Manzini in terms of section 32 (2) of the Rating Act on the 31<sup>st</sup> January 2007 to the effect that the Applicants owed arrear rates as stated above. The statement was filed in order to request

entry of judgment and indeed judgment was granted against the 3<sup>rd</sup> Applicant on the 31<sup>st</sup> January 2007 under case No. 384/2007.

- [6] The Court order directed that the 3<sup>rd</sup> Applicant pay the sum of E164,452.47 being in respect of the total amount owing on Remainder of Farm No. 266 Manzini for the 2004/2006 ratable year. The order further directed that such payment be made to the offices of the 7<sup>th</sup> Respondent.
- [7] The court order was ostensibly served on the 3<sup>rd</sup> Applicant by leaving a copy with Gogo Petsile Tshabalala a relative to the Applicants and who resides on the property even though she refused to sign for its receipt. The service was effected on the 31<sup>st</sup> January 2007 by the Messenger of Court Nkosingiphile Masuku who is the 6<sup>th</sup> Respondent herein.
- [8] On the 13<sup>th</sup> September 2007 a warrant of execution against the movable property of the 3<sup>rd</sup> Applicant was issued by the Clerk of Court at Manzini. The 6<sup>th</sup> Respondent subsequently filed a “*nulla bona*” return of service in which he states that on the 25<sup>th</sup> September 2007 at 12:27 hours he attempted to execute the warrant of execution and was unsuccessful because he could not find movable property to attach in order to satisfy the judgment debt.

[9] It is alleged by Goodluck Gule in his affidavit supporting the 1<sup>st</sup> Respondent's application dated 14<sup>th</sup> April 2010 to have the immovable property sold by public auction that after unsuccessfully executing against the 3<sup>rd</sup> Applicants immovable property, on the 31<sup>st</sup> January 2008 a notice was published in the Times of Swaziland by the 1<sup>st</sup> Respondent. The notice was in terms of section 32(2) of the Rating Act No. 4 of 1995 notifying the 3<sup>rd</sup> Applicant and other defaulters to make payment within 2 (two) months of such publication failing which the 1<sup>st</sup> Respondent would move an application in the Magistrates Court on the 10<sup>th</sup> May 2010 for an order that the immovable property in question be sold by public auction in order to recover the outstanding rates. It is further alleged by the Chief Executive Officer that the final letter of demand referred to above was served by Gcina Gamedze on the 4<sup>th</sup> May 2010 on Gogo Tshabalala together with the aforesaid notice of application for onward transmission to the third Applicant.

[10] Because there was no response to the notice of application by the 3<sup>rd</sup> Applicant, the application to sell the immovable property by public auction was moved and granted on the 10<sup>th</sup> May 2010. The imminent sale was advertised in the Times of Swaziland and the Government Gazette and was to the effect that the immovable property would be sold outside

the Manzini Magistrates Court building at 11:00 a.m. on Monday 21<sup>st</sup> November 2011.

[11] The sale in execution did not take place on the 21<sup>st</sup> November 2011 because there were no bidders. The sale was postponed to the 5<sup>th</sup> December 2011 and advertised for that date. The property was bought by the 2<sup>nd</sup> Respondent for the sum of E550,000.00 (Five hundred and fifty thousand Emalangeni) and registered by the 8<sup>th</sup> Respondent into the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on the 27<sup>th</sup> February 2012 under Deed of Transfer No. 144/2012.

[12] It is pertinent at this point to note that throughout the entire process the 1<sup>st</sup> and 2<sup>nd</sup> Applicants names do not feature until the registration of transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent namely that the property is being transferred from the three Applicants. It is pertinent further to note that judgment was entered into only against the 3<sup>rd</sup> Applicant and not the 1<sup>st</sup> and 2<sup>nd</sup> Applicants.

[13] The causa at page 2 of Deed of Transfer No. 144/2012 reads as follows:

“Whereas by virtue of a writ of Execution dated 2<sup>nd</sup> October 2011 and issued out of the Magistrate’s Court for the District of Manzini execution of a Judgment in an action wherein the Municipal Council of Manzini was the Applicant and MPUMELELO TREVOR TSHABALALA (Born on the 12<sup>th</sup> April 1959). YVONNE MARY TSHABALALA (Born on the 16<sup>th</sup>

January 1955) Major Spinster and THEMBEKILE CECELIA TSHABALALA (Born on the 4<sup>th</sup> October 1956) Major Spinster were the Respondents under Magistrate's Court Case No. 384/07 the undermentioned property was attached and sold by Public Auction on the 5<sup>th</sup> December 2011 to the undermentioned transferees-

AND NOW THEREFORE, he, the Appearer in his capacity aforesaid did by these presents, cede and transfer in full and free property to and on behalf of:

**BLACK KAMBIZI**

**(Born on the 17<sup>th</sup> August 1969)**

**ID No. 6908176300273**

and

**PHINDILE NOMSA DLAMINI**

**(Born on the 10<sup>th</sup> October 1972)**

**Major Spinster**

**ID NO 7210101100525**

Their heirs, executors, administrators or assigns:

CERAIN : In equal undivided share in and to Remaining  
Extent of Farm "CARLISLE" No. 266 situate in  
the Manzini District, Swaziland".

[14] The "undermentioned property" above refers to "the property"; and the "undermentioned transferees" refer to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

### **The orders sought**

- [15] The application before me is brought by the Applicants and seeks to have the sale in execution of the property declared null and void; and the transfer of the property by the 4<sup>th</sup> Respondent (Registrar of Deeds) to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to be set aside; that the 4<sup>th</sup> Respondent be directed to expunge from his records the transfer referred to above and costs on a scale between attorney and own client.
- [16] The application is supported by the founding affidavit of the 1<sup>st</sup> Applicant confirmed by the affidavits of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants. The application is opposed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. At the hearing of the matter on the 24<sup>th</sup> January 2014, Mr. Manana an attorney of this Court kept a watching brief on behalf of the 7<sup>th</sup> and 8<sup>th</sup> Respondents who did not file any papers on their behalf or that of their respective firms.
- [17] The reasons given by the Applicants for seeking the orders in paragraph 15 hereinabove is that the process laid down in the Rating Act leading up to the sale of the property was not followed; and that the causa stated supra at paragraph 13 by the conveyancer was fraudulent as there was no judgment obtained against the 1<sup>st</sup> and 2<sup>nd</sup> Applicants.
- [18] The collection of rates within the Municipality of Manzini from its residents is governed by the Rating Act No. 4 of 1995 (the Act). Rates

are collected from owners of immovable property within the Municipality. Section 2 of The Act defines “owner” in relation to immovable property as:

- (a) the person in whom the legal title to such property is vested;
- (b) ...
- (c) ...
- (d) where the person who is the owner of such property ...is absent, his agent.

[19] In *casu* the Applicants are the person(s) in whom the legal title to such property is vested in that is they are the registered owners.

[20] Section (4) of the Act states that:

“subject to this Act the local authority shall make, assess and levy a general rate each financial year upon all immovable property within the area of such local authority, if it is an area to which this act applies.”

It is common cause that the immovable property herein is ratable.

[21] The rating process begins with a valuation in terms of sections 10 and 11 of the Rating Act, and the production of a draft valuation roll in terms of section 12. The draft valuation roll prepared in accordance with section 12 contains detailed information about the property such as the description, area, situation, zoning, name and address of the owner,



nature of the use of the land and improvements, value of the land without improvements, the value of the improvements, the total improved value of the land and any other relevant matter. The basis of valuation, in accordance with section 13 of the Rating Act, is market value of such land and any improvements thereon.

[22] In terms of section 16 of the Rating Act, the draft valuation roll lies open for public inspection free of charge, after publication of such invitation by a municipality in the Gazette and one newspaper circulating in Swaziland. Such publication apprises property owners of the right to object to the valuation within 30 days of such publication and appointing a date not later than 60 days of that publication upon which a valuation court will consider and decide upon such objection.

[23] Thereafter, and not later than seven days after publication of the notice under section 16, the local authority is required to serve a notice on **every person** whose name appears in the valuation roll as owner of the immovable property, “a notice incorporating as near as may be the terms of the first-mentioned notice and the information contained in the draft valuation roll pertaining to that property”. This is done in terms of section 17 of the Rating Act. Section 17 (2) provides that non-receipt of the section 17 notice or any error thereon, does “not invalidate the

valuation roll or the proceedings of the valuation court or affect the liability of an owner to the payment of rates”.

[24] Thus, up to now, there is one notice published in the Gazette and a newspaper and one notice sent to a property owner, alerting them to the valuation placed on their property, details of the property and of the right to object to the valuation.

[25] Section 31 deals with the recovery of rates. It provides:

“31. (1) As soon as reasonably possible after the publication of the notice referred to in section 27, the collector of rates shall issue to the owner of every ratable property included in the valuation roll a notice –

- (a) Stating the amount of the rate owing and the date on which the rate is due and payable;
- (b) Setting out the description of such property and the value thereof as shown in the valuation roll; and
- (c) Drawing the attention of the owner to the provisions of section 30 relating to the penalty for late payment of rates.

(2) The collector of rates shall issue a notice, in terms of subsection (1), to every person who becomes liable to pay new or increased rates by reason of section 7 (4) or 24 (1).

- (3) If the owner of any property fails to pay the rate or any part thereof, owing in respect of the property, on or before the expiry of one month from the date on which such rate becomes due, a final demand in writing shall be made by the collector of rates and served on the owner requiring him to pay the amount stated therein within fourteen days of the service thereof.”

[26] Apart from notices published in the Gazette and newspapers, notices to owners are sent out in terms of section 37 of the Rating Act as follows:

Section 37 (1) any notices or other documents required to be served on any portion under this Act shall be served in any of the following ways -

- (a) On such person personally;
- (b) By delivering such notice or document at his place of business or his place of residence;
- (c) By posting prepaid letter containing such notice or document and addressed to the person on whom such notice or document is to be served, to his last known place of residence or his last known place of business, to his post office box number, his last known postal address notified to the local authority pursuant to sections 12 or 36 of this Act; or,
- (d) If the owner of the immovable property to which the notice or document relates is unknown to the local authority and cannot be ascertained after reasonable enquiry, the notice or document may be addressed to the owner or the occupier or be fixed in a conspicuous place on the immovable property to which it relates and as soon as possible thereafter

published once in the Gazette and in at least one newspaper circulating in Swaziland.

(2) ...

(3) Service shall be proved by affidavit sworn by the Town Clerk of the local authority before a Commissioner of Oaths that the notice or document was properly served in accordance with subsection (1) (a), or by producing an official receipt indicating that the service was effected by registered mail.

### **Agency**

[27] The 1<sup>st</sup> Respondent says that the notice was served on Gogo Petsile Tshabalala. The argument advanced on behalf of the 1<sup>st</sup> Respondent is that Gogo Tshabalala acted as agent for the 3<sup>rd</sup> Applicant and he in turn represented his co-owners (meaning the 1<sup>st</sup> and 2<sup>nd</sup> Applicants) as their agent by virtue of section 2 (d) of the Act because his co-owners did not reside on the land. The 1<sup>st</sup> Respondents assumption that the 3<sup>rd</sup> Applicant acted as agent for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants is based on the fact that it dealt with the 3<sup>rd</sup> Applicant because he has in the past been involved in the early stages of categorization of the immovable properties that are subject to differential rating, evaluation court where he appeared in person to object to new rates levied on the property in question.

[28] The 1<sup>st</sup> Respondent further states that it verily believes that for all intents and purposes the 3<sup>rd</sup> Applicant has always been the ostensible face of all

the co-owners of the property in question; registered as Tshabalala M.T. of P.O. Box 58, Mbabane; been the co-owner responsible for paying rates to the property on behalf of his co-owners (being the 1<sup>st</sup> and 2<sup>nd</sup> Applicants); and in the past dealt with him in all matters pertaining to the objections, rates payment and the issue of squatters.

[29] The 1<sup>st</sup> Respondent has cited an example of Minutes (“LD4”) a proof that the 3<sup>rd</sup> Applicant attended as agent of the other two Applicants & concludes by saying that he has therefore in law come to be considered as the “owner” of the property for all intents and purposes under the Act, including the obtaining of judgment and the sale in execution of the property in question. The 1<sup>st</sup> Respondent goes on to say that the notification on the rates due for the year 2004/2005 was good as it was posted to him to his given name and postal address stated above. The order of court issued by the Magistrates Court was served on the 3<sup>rd</sup> Applicant by leaving a copy with Gogo Phetsile Tshabalala is also deemed to be good service in law as the 1<sup>st</sup> Respondent has always communicated with her as she lived on the property.

[30] I pause here to contemplate the law relating to “Agency”. It is trite law that where an agent acts for a disclosed principal the proper person to cite is the principal and not the agent. See **Blower v Van Noorden** 1909 TS

at 890 and 899. See also W.A. Joubert: Law of South Africa p. 107 paragraph 139 where it is stated:

**“Personal Liability of the Representative**

Where one person concludes a juristic act on behalf of another with or against a third person the legal relationships which are created, altered or extinguished by the juristic act are legal relationships between the third person and the person represented and not legal relationships between the representative and the third person. The reason is that the representative and the third person intended the effects of the juristic act to accrue to the principal and not to the representative. For the intended results to materialize the representative has to have authority to conclude the juristic act on behalf of the other person. If he has no authority the principal acquires no rights and incurs no obligations and his legal relationships are not affected unless he subsequently ratifies the act done on his behalf. As between the purported principal and the third person the unauthorized and unratified act has no legal effect. The question now is whether the pretending representative is liable to the third person and, if he is liable, what the basis and extent of such liability are. On these points complete clarity does not yet exist.”

A representation of agency cannot be implied from the circumstances pleaded by the 1<sup>st</sup> Respondent. The law places the onus on the 1<sup>st</sup> Respondent to prove that the 3<sup>rd</sup> Applicant acted as an agent for the other two Applicants and that he had authority to do so. See W.A. Joubert: Law of South African (supra) page 86 paragraph 113 where it is stated:

## “AUTHORITY AND AUTHORISATION

To conclude juristic acts on behalf of another so as to affect that other’s legal relationships the representative has to have authority to do so. Where a person acts for another without authority the lack of authority may in appropriate circumstances be cured by ratification. The person on whose behalf another has acted may also be estopped from denying that the latter had authority to conclude the juristic act on his behalf. As one person is not by nature endowed with the power of concluding juristic acts on behalf of another the existence of authority to do so will have to be proved by the person who alleges that the person concluding a juristic act for another has authority to do so.”

The 1<sup>st</sup> Respondent has not disclosed this onus and its defence on the basis of agency is rejected.

[31] Section 32 sets out the legal proceedings for the recovery of rates. It states as follows:

“32 (1) As soon as is reasonably possible after the expiry of two months from the date on which the rate became due and payable, the collector of rates shall render a return to the local authority setting forth the names of all owners of property in **default** and the amounts of rates owing by each; and thereupon such local authority may cause legal proceedings to be instituted for the recovery of the amounts of the rates owing and any penalties accruing thereon, together with a charge at the rate of fifteen per centum of the amount owing at the commencement of proceedings to cover the cost of collection in addition to costs allowed in such proceedings:

Provided that such proceedings shall be instituted within two years of the date on which such rate became due and payable, unless the Minister, at the request of the local authority, authorises it to defer the institution of the proceedings generally or in particular cases for such period as he may determine.

(2) The proceedings for the recovery of rates shall comply with the following-

(a) the local authority shall file with the clerk of the court a statement certified by the treasurer, on oath, setting forth the amount of rates payable by the owner;

(b) a copy of such statement shall be posted by the treasurer to the owner on the same day as the statement is filed with the clerk of such court;

(c) the statement referred to in paragraphs (a) and (b) shall contain a copy of the provisions of this subsection and sections 29, 30 and 31; and

(d) upon receipt of such statement, the clerk of such court shall enter judgment in the records of such court in favour of the local authority against the owner.

(3) If any rate, or part of any rate, remains unpaid after the end of the financial year for which it was levied, and for the satisfaction of which no sufficient execution can be made.

(a) after the expiry of such financial year, the local authority shall cause to be inserted, in the Gazette and in at least one newspaper circulating in Swaziland, particulars of every such property and of the rates payable together



with a notice requiring the owner, by name, if known or otherwise whom it may concern, to make payment of such amount, and any accruing penalties thereon, within two months from the date of publication of such notice in the Gazette, or newspaper and stating that, in default thereof, application will be made to court to order such property to be sold at public auction (subject to such further notice, if any, as the court deems necessary) in satisfaction of the rates which will be due in respect of such property up to and at the time of such property up to and at the time of such application and of all rates that may accrue between the date of such application and such sale; and

(b) where the default continues upon the expiry of the notice in terms of paragraph (a) such local authority shall ascertain from the Registrar of Deeds the names of the registered owner of such property, the name of the holder of a mortgage bond or interest registered over the property and the nature of the interest registered over the property and shall make application to the court and prosecute the proceedings to their conclusion without further delay; and the court may, upon certification of the rates payable in the manner provided in subsection (2) and that the conditions in this section prescribed have been fulfilled, summarily order such property, or so much of it as is sufficient to satisfy the rates payable and accruing, to be sold by public auction and the proceeds paid into court, and direct payment out of those proceeds,

of the rates payable to the local authority, together with the costs of such application and all expenses of sale, in preference to any mortgage, security or claim whatsoever, affecting the property so sold:

Provided that proceedings in terms of this subsection shall, in any case, be instituted within three years of the date on which the judgment was entered, unless the Minister if so requested by the local authority, authorizes it to defer, for such period as he may determine, the institution of the proceedings generally, or in particular cases; and

Provided further that the local authority shall notify all parties to have a registered interest in the subject property, of the sale, at least 30 days prior to the date of public auction of such property.

- (4) For the purposes of this section, “court” means a magistrate’s court of the first class and such court shall have jurisdiction notwithstanding that the amount claimed by the local authority of the value of the property involved exceeds the limits of its jurisdiction.
- (5) A judgment issued by the court under subsection 32(3) (b) shall, notwithstanding anything to the contrary, be acceptable to effect registration of immovable property under the Deeds Registry Act of 1969.

### **Joinder of Co-owners of Immovable property**

- [32] The submission is made on behalf of the Applicants that they should have been joined as co-owners of the immovable property in the proceedings that were instituted in the Manzini Magistrates Court. Section 32 (b) provides that where the default of non-payment of rates continues, the local authority shall ascertain from the Registrar of Deeds the names of the registered owner of such property ... and shall make application to the court and prosecute the proceedings to their conclusion without further delay.
- [33] In *casu* the 1<sup>st</sup> Respondent did not ascertain the names of the co-owners of the immovable property from the Registrar of Deeds before embarking on the court proceedings. It is not enough to say that the Applicants are closely related and that every dictate of common sense suggests that brothers and sisters who are joint owners of a property would inform each other when one of their number receives a demand to pay municipal rates. The requirements to conduct a search in the Deeds office is mandatory. Had the required search been made the 1<sup>st</sup> Respondent would have been obliged to cite the co-owners, being the 1<sup>st</sup> and 2<sup>nd</sup> Applicants in the court proceedings.
- [34] In the case of **Exparte Durban City Council** 1963 NPD 621 it was held that where an application is made ... authorizing the Sheriff to sell or

cause to be sold, by public auction certain immovable properties in satisfaction of rates, penalties and other items due thereon and it appears that there are a number of co-owners, then, in order to comply with the requirements of the section, notice must be posted to each individual co-owner.

[35] In *casu*, no notices of owing rates nor of the court application were sent to the co-owners and it seems to me and I so hold that there was no compliance with the provisions of the Act.

[36] In the case of **Morgan and Another v Salisbury Municipality** 1935 AD 167 the headnote states that the only cases in which a defendant has been allowed in the past to demand a joinder of a party as of right are the cases of **joint owners** and joint contractors and partners, in all of which cases there exists a joint financial or proprietary interest; in other cases a defendant, as a general rule has not been allowed to demand such joinder.

#### **Direct and substantial interest in the proceedings**

[37] In **Amalgamated Engineering Union v Minister of Labour** 1949 (3) SA 637 the headnote states that if a party has a direct and substantial interest in any order the court might make in proceedings or if such order could not be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings,

unless the court is satisfied that he has waived his right to be joined. The court may *mero motu* raise the issue of non-joinder even on appeal.

- [38] Clearly and in view of the authorities cited above, the 1<sup>st</sup> & 2<sup>nd</sup> Applicants have a direct and substantial interest in this issue and this fact is common cause between the parties. The argument advanced on behalf of the 1<sup>st</sup> Respondent that the judgment obtained against the 3<sup>rd</sup> Applicant extends to and is valid against them cannot be sustained and fails.

### **Validity or otherwise of judgment against the 3<sup>rd</sup> Applicant**

- [39] Can it be said that the judgment in *casu* is valid against the 3<sup>rd</sup> Applicant? An examination of the evidence reveals that according to the 1<sup>st</sup> Respondent a notification of rates due for the year 2004/5 was posted by registered post to the 3<sup>rd</sup> Applicant at P.O. Box 58, Mbabane. However, no proof per registered slip was filed to support that fact. The order obtained against him was served on Gogo Phetsile Tshabalala but there is no proof that the order reached the 3<sup>rd</sup> Applicant. The final demand referred to in paragraph 10.1 of the 1<sup>st</sup> Respondent's answering affidavit was posted by registered mail to the 3<sup>rd</sup> Applicant. There is no proof furnished to this court that indeed such a letter was posted to the Applicant. Another such letter formed part of the annexed documents to the notice of application served on Gogo Tshabalala by the messenger, Nkosingiphile Masuku. The supporting affidavit and return of service

filed by Mr. Masuku do not state that such a letter was attached to the court order. Consequently there is no proof that such a letter nor the court order reached the 3<sup>rd</sup> Applicant. In the event there was no compliance with the Act with regard to service of notices as well as the court order on the 3<sup>rd</sup> Applicant and I so hold.

### **Advertisement of Sale in Execution**

[40] The sale in execution was advertised for sale on Monday 21<sup>st</sup> November 2011 per notice published in the Government Gazette dated 21<sup>st</sup> October 2011 and a local newspaper for notice dated 18<sup>th</sup> September 2011. These two notices apparently complied with the relevant law. However, there were no bidders on the 21<sup>st</sup> November 2011 and the sale was postponed to the 5<sup>th</sup> December 2011. The sale was advertised for the 5<sup>th</sup> December 2011. There was no compliance with the required 21 days. The 1<sup>st</sup> Respondent says that there was no need to allow another 21 days before the postponed sale as it had complied with the first advertisement and that the owner of the property had accordingly been given the protection afforded by law. I am in agreement with Mr. Mamba that the 1<sup>st</sup> Respondent was ill-advised by its attorneys as it is trite that each advertisement must comply with the law and the shortcut taken by the 1<sup>st</sup> Respondent cannot be countenanced by this court as it obviously creates a defect in the process of sale.

## **The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents defence**

[41] After the sale of the property, it was registered in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Their defence is that they are bona fide purchasers having purchased the property in good faith. They say that they are not privy to what happened prior to the auction and are therefore not in a position to admit or deny any of the averments relating to the events antecedent to the purchase of the property.

[42] To fortify their argument, they have cited section 45 of the Magistrate's Court Act, 1939 which provides that:

“A sale in execution by the Messenger shall not, in the case of movable property after the delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against the purchaser in good faith and without notice of any defect”.

[43] Their contention is that after transfer, the sale is unassailable in the absence of proof of prior notice or knowledge of defect. To that end they have filed several South African authorities to buttress their argument. The said authorities deal with a South African provision (section 70 of Act 32 of 1944) whose wording is identical to the Swaziland one. The first of the authorities cited is that of **Messenger of the Magistrates' Court Durban v Pillay** 1952 (3) SA 678 at 683.

In this case the Respondent a judgment debtor successfully claimed as against Appellant and five others an order setting aside before transfer a sale in execution of immovable property. In dismissing the appeal it was held that the Respondent was entitled to the order setting aside the sale. The Appellant in his plea had admitted that the advertisement for the sale in execution was insufficient and invalid and that it did not satisfy the requirement of Rule 40 (6) of Act 32 of 1944.

- [44] The second case is that of **Gibson N.O. v Iscor Housing Utility Co. Ltd**, 1963 (3) SA 783 at 786 (A) wherein the court held that section 70 of Act 32 of 1944 applied to this transaction which could not, in terms of the section, be impeached in the absence of an allegation of bad faith or knowledge of the defect. The facts were that an insolvent's property was attached and sold in execution and transferred to the purchaser despite notice to the messenger and the Registrar of Deeds of the sequestration. The third case is that of **Sookdeyi v Sahadeo** 1952 (4) SA 568 (A) where it is stated in the headnote that when it is sought in terms of section 70 of Act 32 of 1944 to impeach a sale in execution the onus is on the person impeaching such sale to allege and prove bad faith or knowledge of any defect on the part of the purchaser when he bought the property at such sale.



[45] Mr. Mlangeni arguing for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is of the view that the effect of the cases cited on behalf of his clients is that the position of a bona fide purchaser is well secured and their purchase of the property unassailable.

[46] That cannot be true because as I have already pointed out there is no judgment at all against the 1<sup>st</sup> and 2<sup>nd</sup> Applicants. Even though there was a sale such sale was in my view illegal and invalid because it was conducted on the basis of no judgment against them. I am supported in this regard by the dicta of Ota J in the case of **Malwane v Tru Reality Company (Pty) Ltd and Others** High Court civil case No. 2217/2010 (unreported) which case is on all fours with the case of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants in casu.

[47] Perhaps Mr. Mlangeni's arguments would hold true in the case of the 3<sup>rd</sup> Applicant but I have already stated that the process leading to the judgment against him is equally tainted. And in any event even if I were to agree with Mr. Mlangeni's argument which I do not the property is owned by the Applicants in equal undivided shares which would make any sale to satisfy the 1<sup>st</sup> Respondent's judgment against the 3<sup>rd</sup> Applicant alone equally difficult when there are the other two remaining undivided shares.

[48] In the same vein the registration of the property in the name of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents which is based on the void sale is also void and invalid and ought to be set aside. The court in the case of Malwane supra quoted with approval Lord Denning M. R in the case of **Macfoy v Vac** (1961) 3 A11 ER 11 69:

“If an act 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”.

[49] Finally I must express my disapproval in the way this matter was handled on behalf of the 1<sup>st</sup> Respondent by its attorneys of record as well as by the conveyancer who is an attorney of this court. I have not been requested to order costs *de bonis propriis* against any or all the attorneys involved herein but have been asked to order costs on an attorney client scale against the 1<sup>st</sup> Respondent. It is however, my considered opinion that the 1<sup>st</sup> Respondent was heavily reliant on its attorneys and in my view is not at fault for advise that was detrimental to its interests. Because of this I shall order costs on the ordinary scale and hope that in future the 1<sup>st</sup> Respondent will exercise due diligence in any matter such as the one before me.

[50] In the result the following order is made:

- (a) The sale in execution of immovable property described as Remaining Extent of Farm “Carlisle” No. 266 situate in the Manzini district is hereby declared null and void and is accordingly set aside.
- (b) The transfer of immovable property to wit Remaining Extent of Farm “Carlisle” No. 266 situate in the Manzini District by the 4<sup>th</sup> Respondent to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents under Deed of Transfer No. 144/2012 is hereby set aside.
- (c) The 4<sup>th</sup> Respondent is hereby ordered to expunge from his records the transfer referred to above and is ordered to restore the former status to the Applicants.
- (d) The 1<sup>st</sup> Respondent is ordered to pay the costs hereof on the ordinary scale.

**Q.M. MABUZA -J**

**JUDGE OF THE HIGH COURT**

For the Applicants : Mr. L.R. Mamba  
assisted by Mr. Motsa

For the 1<sup>st</sup> Respondents : Advocate B.S.M. Bedderson  
Instructed by Mr. S. Masuku

For the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents : Mr. Mlangeni

For the 7<sup>th</sup> & 8<sup>th</sup> Respondent : Mr. Manana