



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No.1057/2016

In the matter between:

NORMAN JABULANI MASEKO

Applicant

and

MUNICIPAL COUNCIL OF MBABANE

First Respondent

PATSON DLAMINI

Second Respondent

CHRIS NCONGWANE

Third Respondent

PATSON MCOLISI DLAMINI TRUST FUND

Fourth Respondent

Neutral citation: Norman Jabulani Maseko v Municipal Council of Mbabane & 3 Others (1057/2016) [2017] SZHC 281 (14thDecember 2017)

Coram: M. Dlamini J

Heard: 5th October 2017

Delivered: 14thDecember 2017

Civil law - sale of immovable following default judgment in favour of judgment creditor

- **Judgment debtor subsequently obtaining rescission of default judgment after transfer of immovable – effect of transfer thereon – golden rule – on passing of right – one cannot pass or transfer a better right or title than what he holds**
- **bona fide purchaser – where he is aware of the irregularities by or at the instance of the judgment creditor, such defence cannot avail him**
- **property purchased at a value far below its fair value inconsistent with a bona fide purchaser**

Summary: The applicant, distressed by a letter of eviction from second respondent, lodged under a certificate of urgency the present application. His immovable property had been transferred to the second respondent pursuant to a default judgment by the Magistrates Court at the instance of first respondent for arrear rates of E6 008.40. Applicant asserts that he has movables far exceeding the sum of E6 008.40 and therefore third respondent ought to have attached the same upon failing service of all the court processes upon himself. Second respondent contends that he is a *bona fide* purchaser. First and third respondents are not opposed to the applicant's application.

[1] The parties

The applicant (Norman Maseko) is a rate payer under Mbabane Municipal Council. His family was allocated the immovable property under issue by Swaziland Government following relocation owing to the construction of Mbabane Oshoek Highway. Upon the death of his mother, he inherited the said piece of land by virtue of being an older son of the family.

[2] The first respondent (Municipality) is a local government with its principal offices at Mbabane.

[3] The second respondent (Patson Dlamini) is a purchaser of Norman Maseko's immovable property pursuant to a sale in execution following a default judgment granted in favour of Municipality.

[4] The third respondent (Chris Ncongwane) is the Messenger of Court seized with the duty of serving a number of court processes in this matter.

[5] The fourth respondent is a trust registered by Patson Dlamini wherein the immovable property under issue was eventually registered. It joined issue during the present proceedings.

[6] Norman Maseko's case

Norman Maseko deposed that on 9th June 2016, he received a call from Zanele Dlamini, his sister advising him that there was a court document served upon her citing his name. He attached a notice of attachment of immovable property. I shall revert to this document later herein.

[7] On 10th June 2016, he received another call stating that there was a man with a letter from Attorneys addressed to him. He attached a letter of eviction. I shall refer to its contents later. Norman Maseko then averred:

“14. The basis of the present application is that I was never served with the summons instituting the action against me nor was I served with a court order notifying me that default judgment had been entered against me. I reside at Luhleko area in the District of Lubombo and the court papers currently in my

possession were served at my parental homestead at Qobonga. Be that as it may, the summons instituting the action were not even served at Qobonga, nor was the Court order served.

15. *I am willing to pay the sum of E6,008.00 (Six Thousand and Eight Emalangi) currently owed to the 1st respondent*

16. *Further, I am advised and verily believe that in terms of Rule 45 of the High Court Rules, no 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 there from that such person has not sufficient movable property to satisfy the writ.”¹*

[8] He also contended:

“18. *I am not aware when the sale of the property was done but I have reasonable belief that the said property has not been transferred into the name of the 2nd Respondent. I am humbly requesting the above Honourable Court to order that the said transfer of the property be stayed pending finalisation of these proceedings.*²

Patson Dlamini’s answer

¹ see page 10 paras 14, 15 and 16 of the book of pleadings

² see page 11 of n²

[9]

Patson Dlamini raised *points in limine* as follows:

“3.1 *The Applicant cannot seek to have the sale reversed or set aside as against the Trust which was a purchaser for value and in good faith, having bought at a duly advertised sale in execution.*

3.2 *The remedy of the applicant lies against the Judgment Creditor in damages and not to follow the property as it were.*

3.2.1 *The allegations by the Applicant are that the 1st Respondent should have not sold the property prior to disposing off movable assets of his and lack of service of Court process.*

3.2.2 *The application contains no allegations of wrong doing by the Trust or 2nd Respondent, other than being a purchaser at a properly constituted public auction.*

3.2.3 *Any defects attended upon the execution of the judgment cannot be attributable to the 2nd Respondent and / or the Trust.*

4. *The original jurisdiction of this Honourable Court does not extend to sales in execution emanating from the Magistrates Court. The Application should have been instituted at the Magistrates Court which sanctioned the sale in execution, as the Court of first instance.*

5. *Prayer 3.2 cannot be granted (for the stay / interdict of the registration of transfer) in that the same has already taken place as of 2nd June 2016. The Application having been moved on 16th June 2016. (see annexure “A”)*
6. *There are no allegations set out in the affidavit for the grant of an interdict.”³*

[10] On the merits he contended:

“13. The allegation herein are denied. The sale was conducted on 8th January 2016 and the Trust paid the purchase price demanded by the Messenger and has incurred further costs with the Registration of the property to the tune of E370,000.00 in total.”⁴

[11] Patson attached a title deed to his answering affidavit as proof of transfer.

Synopsis

[12] It is always apposit in such matters where a defence of purchaser in good faith is raised to consider the background leading to the purchase with a view to ascertaining whether the defence holds water. I intend to highlight the history of the matter leading to the transfer of Norman Maseko’s property under three sub-titles, viz., (i) proceedings at the court *a quo*

³ see pages 19 to 20 of *n*²

⁴ see page 22 of *n*²

leading to transfer of property; and (ii) Rescission application at court *a quo*.

(i) Proceedings at the court *a quo*.

[13] On the 3rd February 2015 the Municipality lodged a notice of application before the Magistrates Court of Mbabane.⁵ The notice reflected a hearing date of Wednesday, 4th March 2015 for orders as follows:

- “1. *An order directing the Respondent to pay the sum of E6,008.00 being arrear rates and other charges;*
2. *Cost of suit only in the event of opposition;*
3. *Such further and/or any other alternative relief.”*

[14] The affidavit of Nhlanhla Vilakati was used in support of the application. I shall refer to its contents under adjudication hereof.

[15] This notice of application does not bear Norman Maseko’s or anyone’s signature indicating service upon him.⁶ There was however a return of service⁷ filed by the Messenger of court cited in this application. It reflects that the application by the Municipality was served upon one Lindelwa Dlamini at Plot No. 76, Somhlolo Avenue, Sidwashini South, Mbabane at 0910 hours.

⁵ See page 40 of the book of pleadings

⁶ See page 41 of *n*²

⁷ See page 48 of *n*²

- [16] It is common cause that a default judgment was entered against Norman Maseko on the same date 4th March 2015. On 6th March 2015, a warrant of execution against movables was sued out of the office of the Clerk of Court. On 24th April 2015 the Messenger of Court in this matter served a *nulla bona* return of service upon Lindelwa at Norman Maseko's property as per his return of service.⁸
- [17] On 29th May 2015, the Municipality published in the gazette a notice in terms of section 32(3)(a) of the Rating Act calling upon judgment defaulters to make payment within two months failing which application would be lodged in court for the sale of their respective immovable. Norman Maseko is listed therein.
- [18] Pursuant to the notice in the Government gazette, the Municipality filed an application before the Magistrate Court for Norman Maseko's immovable property to be sold by public auction together with costs of suit. Although service was effected on the Clerk of Court as evident by his signature and Court's stamp on the space provided, there is no indication of the same with regards to Norman Maseko. The space provided for his signature is blank.
- [19] However, the Messenger of Court filed a return of service indicating that the same was served upon Lindelani Dlamini (note: not Lindelwa) at Norman Maseko's immovable property. The service was as per the return of service on 12th September 2015.⁹ Annexed in the pleading is a court order following the application to sell by public auction Norman Maseko's immovable property.¹⁰ This order was obtained on 30th September 2015.

⁸See page 51 of *n*²

⁹See page 62 of *n*²

¹⁰See page 63 of *n*²

[20] A notice of attachment of immovable property Lot No.76, Sidwashini South, Hhohho district for Norman Maseko was sued out in the office of the Clerk of Court on 27th November 2015. Neither the Registrar of Deeds nor Norman Maseko was served with it as evident by the absence of their signatures from the space provided in the said notice of attachment. There is no return of service attached by the Messenger of Court.

[21] There is however a notice of sale in execution posted by the Clerk of Court in the premises of the Magistrates Court inviting the public to an auction sale. The property was sold on 8th January 2016. On 2nd June 2016, Patson Dlamini received transfer of ownership of Norman Maseko's property. The purchase price reflected in the title deed of Patson Dlamini is E6 008.00.

(ii) Rescission application

[22] The applicant having filed the present application, applied that the matter be stayed pending a rescission application at the Magistrates' Court of the default judgment. The court granted the application after the respondents had made an undertaking not to evict the applicant. After all they did not have an eviction order except a letter from their attorneys.

[23] It is common cause that at the Magistrate' Court, the Municipality together with Patson Dlamini opposed the rescission application when it was first lodged. Norman Maseko insisted that he was never served with any of the court processes bearing returns of services at the hand of the Messenger of Court and that although Norman Maseko's children and his siblings occupy the property, there were no persons by the names of Lindelani and Lindelwa Dlamini who are reflected in the various return of services. Norman Maseko's attorney applied to call the Messenger of Court (third

respondent) to give evidence and test his evidence. It is upon this stage as submitted by Ms N. Ndlangamandla from the bar and Ms Mkhonta confirming the same that the Municipality and Patson Dlamini abandoned their opposition.

[24] The Magistrate entered a rescission order following a no opposition from the Municipality and Patson Dlamini and the Messenger of Court who joined in the rescission application on behalf of Norman Maseko. In this regard, the default judgment leading to the sale in execution and transfer of Norman Maseko's property to Patson Dlamini fell away by consent of both Patson Dlamini and the Municipality. One wonders therefore, on what ground can Patson Dlamini cling on the property as he consented to the rescission application by Norman Maseko. **S. B. Maphalala JA**¹¹ faced with a similar question on rescission of an order granted in absence of the co-owner of an immovable property considered:

“The transfer of the property to fourth and fifth respondents was occasioned by the said court orders (court orders granted in the absence of appellant) and the eviction notice served on the first applicant was based on the effect of such court orders and subsequent Deed (s) of transfer.”

[25] **L. J. Van der Merwe AJ**¹² eloquently wrote on the position of the law in this regard:

“It has further also been accepted in the case law that where a default judgment has been rescinded subsequent to the sale in

¹¹ In **Fred Leibrandt and Another v Steven Philip Leibrandt and 4 Others** [27/2016]SZSC 57 [2017] (10th November, 2017)

¹² **Knox v Mofokeng and Others** (2011/33437) [2012] ZAGP JHC 23; 2013(4) SA 46 (GSJ) (30th January 2012)

execution, both the default judgment and the warrant of execution issued in terms of the judgment become null and void and of no effect, as between the judgment creditor and the judgment debtor. In such event, the judgment debtor is entitled to have the status quo ante restored as against the judgment creditor. The warrant of execution and the sale of execution were all dependent on the existence of the default judgment. Once the default judgment has been rescinded the warrant of execution and the sale in execution has no legal basis as between the parties to the litigation. See Lottering v SA Motor Acceptance Corporation Ltd 1962 (4) SA 1 (E) at 3H-4B; Jasmat v Bhana 1951 (2) SA 496 (D); Maisels v Camberleigh Court (Pty) Ltd 1053 (4) SA 371 (C).

Analysis of the Rating Act No.4 of 1995 (the Act)

[26] Section 31 (1) and (3) of the Act reads:

- “(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 rateable property included in the valuation roll a notice –***
- (a) stating the amount of 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 rate:*
- (3) **If the owner of any property fails to pay the rate** or any part thereof, owing in respect of 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.***” My emphasis)

[27] Section 32(2)(b) stipulates:

“2. *The proceedings for the recovery of rates **shall comply with the following:***

(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.***”

[28] It is against this background calling upon the Municipality to serve Norman Maseko with notice for the rates due that Norman Maseko attested in his founding affidavit:

“15. *I am willing to pay the sum of E6,008.00 (Six Thousand and Eight Emalangeni) currently owed to the 1st respondent.*¹³

[29] I must point out that the Municipality filed an opposing affidavit to the present application. It did not state that it complied with the provisions of section 31 and 32 of its enabling Act. On the contrary it attested under the hand of the collector:

“11.6 *Further, in terms of Section 32(3) if any rates remains unpaid and no sufficient execution can be made, the 1st respondent shall issue a **Notice in the Gazette and in one Newspaper requiring the owner to make payment within two months of such rates becoming due and accruing penalties, stating that***

¹³ see page 10 para 15 of *n*²

on default, an application will be made to Court for the property to be sold by public auction. Copies of such notices are attached hereto marked “ANNEXURE 5” and “ANNEXURE 6”. The notice in the local newspaper was made on the 21st May 2015 in the Times of Swaziland and the publication in the Gazette on the 29th May 2015.

I submit that upon expiry of the notice, the default by the Applicant continued and the provisions of Section 32 (3) (b) were fully complied with.”¹⁴

[30] The collector failed to show to this court that it complied with section 32(2) (b) as 32(3) presupposes that the owner who is stated as a defaulter must have been served or posted to him a notice reflecting the amount of rates. Correctly so, otherwise he cannot in the eyes of the law, be referred as a defaulter if he had not been given notice which acts as a demand for him to pay the sum reflected therein. The returns of service at the instance of the Messenger of Court cannot substantiate the Municipality’s case as they fell away at the Magistrates Court even before Norman Maseko’s Counsel could challenge them.

[31] In brief, the provisions of the Act with regards to the right of notices to Norman Maseko were infringed at the instance of the Municipality. Maybe that was the reason they decided to withdraw their opposition both at the Magistrates Court during the rescission proceedings and even in these proceedings. They were well advised.

Bona fide purchaser

[32] Is Patson a *bona fide* purchaser? This question stands to be determined despite the above.

¹⁴ see page 35 para 11.6 of *n*²

Legal principles

- [33] It is meet that before I embark on the question in issue, I reflect on the legal principles on purchaser in good faith. The position of the law on *bona fide* purchasers turns firstly on the general principle “*nemo dat qui non habet* - nobody can transfer more rights to another than he himself has. This has been described by **Silberbeg and Schoeman** as the golden rule.¹⁵
- [34] **L. J. Van der Merwe AJ** faced with a similar case of a *bona fide* purchaser who received transfer of property and yet rescission of judgment was ordered refers to three factual scenarios. He states:

“5. *It appears from the analysis of the case law and the relevant common law principles dealt with below that the judgment debtor’s entitlement to claim restoration of the property once the judgment, in terms whereof the property had been sold in execution, has been rescinded, depends on the factual circumstances present at the time of rescision. At least three factual scenarios can in general be envisaged, although other factual permutations are possible. The first scenario is where the sale in execution had not been perfected by delivery in the case of movables and registration of transfer in the case of immovables. As indicated above, in such event, the owner is in principle entitled to claim recovery of the property in question following the rescision of the judgment. See **Vosal Investments (Pty) Ltd v City of Johannesburg 2010 (1) SA 595 (GSJ); Jubb v Sheriff, Magistrate’s Court, Inanda District: Gottschalk v Sheriff, Magistrate’s Court Inanda District 1999 (4) SA 596 (D) at 605F-G. The second scenario is where the sale in execution had been perfected by delivery in the case of movables or registration of transfer in***

¹⁵Law of Property at page 73

*the case of immovables, but the purchaser had knowledge of the proceedings instituted by the judgment debtor for the rescission of the judgment in question prior to delivery or registration of transfer. In such event, the owner is also in principle entitled to recovery of the property in question, even where transfer had already been effected. See the **Vosal Investments** judgment, above, at paragraph 16. In third scenario is where the sale in execution has been perfected by delivery in the case of movables or by registration of transfer in the case of immovables to a bona fide purchaser who had no knowledge of the judgment debtor's proceedings for the rescission of the judgment or where transfer of ownership has been effected prior to the institution of the rescission proceedings. The conclusion reached in the analysis below is that where transfer of ownership had been effected pursuant to the sale in execution by the time the judgment has been rescinded, the judgment debtor is not entitled to recover possession of the property in question, unless it can be established that the judgment and/or sale in execution constituted a nullity."¹⁶*

[35] In the case at hand, rescission order was obtained after transfer. Patson Dlamini alleges that he is a *bona fide* purchaser. Suppose for a second I accept his submission that he is a purchaser in good faith. I have already demonstrated above that from the golden rule principle abstract theory, the sale in execution was a nullity. At paragraphs 25 and 26, I have demonstrated the position of the law as regards the effect of rescission against the right of the true owner. The case by Patson Dlamini stands to fall on these grounds alone.

[36] However, let me interrogate the circumstance of this case to ascertain if Patson Dlamini was a purchaser in good faith. Firstly, as evident in the

¹⁶See Knox, David Boyd NO in his capacity as executor of the late estate Knox, number 3911/04 v Mofokeng, Mishack Mhambi and Others Case No.2011/33437 at para 5

pleadings, the Municipality, Patson Dlamini and the Messenger of Court all shared one attorney in the proceedings at the court *a quo*. In the analysis, Patson Dlamini by virtue of being represented by the same legal Counsel of the Municipality and the Messenger of Court knew of the defects in the legal processes leading to the default judgment. He also knew of the subsequent defects of the notices of attachments. He is fully aware that the default judgment leading to him and the trust acquiring the property was set aside. He was afterwards joined in the rescission application in the court *a quo* and he did not oppose it.

[37] Secondly, and foremost, the immovable property which has a structure as Norman Maseko pointed out that his children and siblings reside in it and is worth a value far exceeding E6 008.40 was sold at a meagre price of E6 008.40. A reasonable purchaser would have suspected that the sale in execution was tainted with illegality and avoided it. In **Du Pont and Another v Nkambule and Others (07/2015) [2015] SZSC 20 (04 November 2016)** the full bench, sitting as a Constitutional Court held that property sold at a price below its fair value defeats a defence of *bona fide* purchaser. I do not see why Patson Dlamini and the Trust should be treated differently in this regard.

[38] Patson Dlamini deposed in answer:

“13. The allegation herein are denied. The sale was conducted on 8th January 2016 and the Trust paid the purchase price demanded by the Messenger and has incurred further costs with the Registration of the property to the tune of E370,000.00 in total.”¹⁷

¹⁷ see page 22 para 13 of *n*²

[39] However, this averment flies in the face of the deed of transfer document which reads:

“AND FNALLY declaring that the property was sold for an amount of E6,008.00 (six Thousand and Eight Emalangeneni).

in my presence,

q.q.

REGISTRAR OF DEEDS FOR SWAZILAND”¹⁸

[40] This declaration by the Registrar of Deeds shows clearly that Norman Maseko’s property was sold at a peppercorn price. There is only one inescapable conclusion therefore and it is that the sale was a sham.

[41] There is another aspect of this case which renders the whole transaction suspicious or rather defeating *bona fides* in the parties that are involved. Norman Maseko deposed that on the 9th June, 2016, he received a call from his sister advising him that there was a court process bearing his name. He attached the said court process. This was a notice of attachment of his immovable property. It is not clear why this process was served upon Norman Maseko so late in the day after Patson Dlamini took transfer of the property. Is it because indeed Norman Maseko had not been served with this process before the sale and transfer of his property? Even then what purpose did service at that late stage serve as the property had been transferred on the 2nd of June, 2016? Then the following day (10th of June, 2016) Norman Maseko is served with a letter of eviction. Is this a coincidence? Patson Dlamini knows the true position as he shared the same lawyer with the same Messenger of Court and the Municipality in the entire proceeding of this matter. In the eyes of the law, the purchase and

¹⁸ at page 27 of n²

transfer transactions were tainted and therefore there was lack of *bona fides* on the part of the purchaser.

Prayers

[42] Norman Maseko prayed that:

“3,2 Pending finalisation of prayer 3.1 above, that the transfer of the property to the 2nd Respondent be prayed.”¹⁹

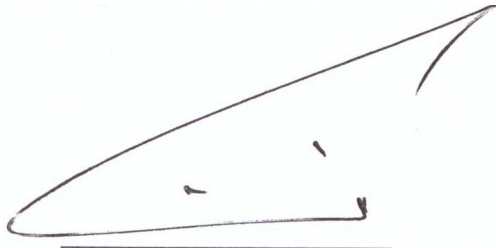
[43] During submission it was explained that at the time of the application, Norman Maseko was not aware that the property had already been transferred. After all he had been served with the notice of attachment of his immovable on the 9th June, 2016. Nothing informed him as even the letter served on him on the 10th June, 2016 merely pointed out that Patson Dlamini was the owner on the basis of a sell by public auction. He was not served with an eviction order as I pointed out earlier. In the result the justice of the matter is that the appropriate order would be reversal of the transfer from Patson Dlamini or Patson Mxolisi Dlamini Trust to Norman Maseko.

[44] In the final analysis, I enter the following orders:

1. The applicant’s application succeeds;
2. The Registrar of Deeds is hereby ordered to reverse transfer of Lot No.76, Sidwashini South, District of Hhohho executed on 2nd June 2016.

¹⁹ at page 6 para 3.2 of *n*²

3. Second and fourth respondents are hereby jointly and severally ordered to pay applicant costs of suit, each paying the other to be absolved.

A handwritten signature in black ink, appearing to be 'M. Dlamini J', written over a horizontal line. The signature is stylized with a large loop on the left and a sharp upward stroke on the right.

M. DLAMINI J

**For the Applicant: N. Ndlangamandla of Mabila Attorneys in Association
with N. Ndlangamandla & S. Jele**

For the Respondents: Z. Mkhonta of M. P. Simelane Attorneys