IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.54/2013

In the matter between

MAFA SECHABA MOLETSANE **APPELLANT**

And

'MAREEKELITSOE SETHATHI **RESPONDENT**

CORAM : SCOTT, AP
HOWIE, JA
CLEAVER, AJA

HEARD : 16 OCTOBER 2014

DELIVERED : 24 OCTOBER 2014

SUMMARY

Sale in execution of immovable property not impeachable after registration of transfer as against a purchaser in good faith and without notice of any defect – section 43 of Subordinate Courts Order 1988 – onus on party seeking to set aside the sale to prove bad faith or knowledge of a defect on the part of the purchaser.

JUDGMENT

SCOTT AP

[1] This is an appeal against the judgment of **Hlajoane J** directing the Registrar of Deeds to cancel two deeds of transfer dated 27 December 2010 in terms of which certain immovable property held under lease numbers 13274-1814 and 13274-1815 were transferred to the appellant.

[2] It is necessary to outline the events preceding the transfer. Sometime in 2003 or 2004 the Standard

Lesotho Bank took judgment in the Magistrates' Court, Maseru, against the respondent's late husband ("the deceased") for repayment of money lent and advanced to him. The latter's immovable property, being the property subsequently transferred to the appellant, was attached and on 30 July 2004 sold in execution to the appellant for M100 000 at a public auction held by the messenger of the court. The respondent denied that there had been a public auction on that day but, on the evidence to which I shall refer more fully later, there can be no doubt that the auction did in fact take place. Subsequently, sometime in 2005 the deceased instituted motion proceedings in the High Court in which he sought an order reviewing and setting aside the magistrate's judgment. In that application the bank was cited as the first respondent and the appellant as the second. The other respondents were the Commissioner of Lands, the Registrar of Deeds and the Attorney General. On 8 August 2005 the application was dismissed by reason of the deceased's non-appearance. On 7 October 2005 he applied for the rescission of the order dismissing his application which was granted on 14 November 2005. Following his death on 29 December 2006, his wife and heir, now the respondent, sought an order for her substitution as applicant in the review application and

for an order interdicting the Registrar of Deeds from finalising the transfer of the property pending the outcome of the review application. A rule nisi granted on 28 February 2007 was made final on 21 May 2007. Thereafter, in the first half of 2008 the respondent's attorneys of record entered into negotiations with the bank's attorneys, Messrs Du Preez Liebetrau & Co. These culminated in the respondent's attorneys writing to Du Preez Liebetrau & Co on 15 May 2008 enclosing a cheque in the sum of M34 259-46 *"in full and final settlement of this matter."* On 18 October 2010 the Chief Justice made an order reading: *"matter settled. Therefore permanently removed from the Dismissal Roll."* The order did not record the terms of the settlement, nor was there evidence as to its terms. It would seem that all that was settled was the debt owed to the bank.

[3] Following the settlement and removal of the matter from the roll, the bank's attorneys, Du Preez Liebetrau & Co, proceeded with the transfer of the property into the appellant's name. According to the deeds, the transfer was registered by the Registrar of Deeds on 27 December 2010.

[4] On 19 January 2011 the respondent approached the court as a matter of urgency for an order cancelling the deeds of transfer, together with certain ancillary relief. Answering and replying affidavits were filed and the matter came before **Hlajoane J** who referred the matter for evidence on two issues. The first was whether there had been a sale in execution by public auction as alleged by the appellant. The second was whether the respondent had paid the sum of M34 259-46 to Du Preez Liebetrau & Co. as she alleged.

[5] As to the first, the respondent testified that on a Friday in 2004 she was told by a lawyer friend that the latter had seen a notice at the Magistrates' Court advertising the sole in execution of the deceased's property to be held the next day, being Saturday. The respondent contacted the deceased, from whom she was estranged, who suggested she attend the sale on Saturday in the hope of saving the property by bidding for it. The respondent said that she went to the Magistrates' Court the next day, ie Saturday, and no auction took place. The auction, however, was held on 30 July 2004 which was a Friday, not a Saturday. The appellant testified that he attended the auction on 30

July 2004 and his bid of M100 000, which was the highest, was accepted. He said the person conducting the auction was a Ms Monapathi who took him to the offices of Du Preez Liebetrau & Co where he paid the M100 000 for which he was given a receipt, produced in court as an exhibit. His evidence was corroborated by Mr Mokuoane 'Mathata, a deputy sheriff of the Magistrates' Court, Maseru. He confirmed that he had been present at the auction which was conducted on Friday, 30 July 2004, by Ms Letlotlo Monapathi, a messenger of the Court, and that the property was sold to the appellant for M100 000. He produced a document setting out the conditions of sale and recording the sale in execution by public auction on 30 July 2004 which had been signed by both himself and the appellant. The Court a quo assumed, without deciding, that there had been an auction at which the appellant purchased the property. In my view the auction on Friday 30 July 2004 was clearly proved. Indeed, the respondent attended at the Magistrates' Court on the wrong day and there is no possible justification for rejecting the evidence of the appellant and 'Mathata.

[6] As to the respondent's payment of the sum of M34 259-46, much was made by the appellant's counsel of the fact that the copy of the cheque attached to the papers did not bear the date stamp of the bank or any other indication that it had been paid. The respondent's evidence, however, was that the copy of the cheque had been made before it was sent to Du Preez Liebetrau & Co. The Court a quo accepted that payment had been made on the basis of the correspondence, the respondent's own bank statement and the fact that there had been a settlement. There is no reason to interfere with this finding. In passing, it should be mentioned that there was no satisfactory evidence as to the amount of the debt owed to the bank. The respondent thought it was in the region of M27 000. An official from the bank who testified on behalf of the respondent had not consulted the bank's records and had little idea of what was owed, save that he thought that one of the loans was for about M30 000.

[7] In its judgment the Court a quo held that even if there had been a sale in execution by public auction, the whole process was a nullity by reason of non-compliance with certain legal requirements relating to sales in

execution. In this regard it noted that there was a dwelling house on the property and the judgment debt was not in respect of a bond over the house. Accordingly, so it was held, the property was protected from seizure by reason of the provisions of section 40 of the Subordinate Courts Order 1988, which reads:

> *"In respect of any process of execution issued out of any Court, the following property shall be protected from seizure and shall not be attached or sold....*
>
> *(b) a dwelling house created on a site allocated for the purposes of residence:*
>
> *Provided that this paragraph shall not apply where the dwelling house has been bonded as security for a loan and the judgment is in respect of such bond."*

[8] Reliance was also placed on the fact that the purchase price had been paid to the attorneys for the judgment creditor and not to the messenger of the court

as required by Rule 43 (14) (a) of the Subordinate Court Rules which reads:

> *"Subject to the provisions of paragraph (b) all monies in respect of the purchase shall be paid to the messenger of the court and not to the execution creditor or any other person on his behalf. The messenger shall forthwith pay such monies into court and shall not pay out the purchase money until transfer has been given to the purchaser."*

[9] Counsel for the appellant argued that section 40 (f) was not applicable as the property was let and as such used for commercial purposes. It was described in the conditions of sale as comprising *"a big building used as a supermarket and a building as a bar and a six-roomed house."* As far as the payment of the purchase price to the attorneys was concerned, he pointed out that this was on the instructions of the messenger of the Court who conducted the sale.

[10] Another ground relied upon by the Court a quo was that a *nulla bona* return was not made prior to the

attachment of the immovable property. There was, however, no evidence in this regard.

[11] But even accepting that the legal requirements in question were not observed, it does not follow that the whole process was a nullity. It would seem that the attention of the learned judge was not drawn to section 43 of the Subordinate Courts Order which reads-

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

In **Sookdeyi and Others v Sahadeo and Others 1952 (4) SA 568 (A) at 572** the Appellate Division held in relation to section 70 of the South African Magistrates' Court Act 32 of 1944 (the equivalent of section 43 of the Subordinate Courts Order) that the onus was on the party who sought to set aside a sale by the messenger of the court to allege and prove bad faith or knowledge of a

defect on the part of the purchaser at such a sale in execution. See also **Gibson NO v Iscor Housing Utility Co Ltd and Others 1963 (3) SA 783 (T) at 785 D**.

[12] Bad faith or knowledge of a defect on the part of the appellant has not been shown, nor for that matter was it alleged. The appellant was quite clearly an innocent purchaser. He attended the action as an ordinary member of the public. His bid was accepted and he paid the purchase price of M100 000 in the manner requested by the messenger of the court who conducted the auction. He would have had no knowledge of whether or not the property had been bonded or whether there had been a *nulla bona* return. Nor was it suggested to him in cross-examination that he had such knowledge. Following registration of transfer into his name the sale cannot be impeached. The appeal must therefore be upheld.

[13] As indicated above, the extent of the deceased's liability to the bank is unclear. The respondent thought it was in the region of M27 000. It appears that no less than M134 259. has been paid to the bank's attorneys,

Du Preez Liebetrau & Co. The respondent would be well advised to take the matter up with the bank and obtain a full statement of account and, if necessary, a debate of that account.

[14] The appeal is upheld with costs. The order of the Court a quo is set aside and the following is substituted:

"The application is dismissed with costs."

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D.G. SCOTT
ACTING PRESIDENT

I agree:

_____

C.T. HOWIE
JUSTICE OF APPEAL

I agree:

_____

R.B. CLEAVER

ACTING JUSTICE OF APPEAL

For the appellant : Q. Letsika

For the respondent : H. Nathane KC