Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EAST LONDON CIRCUIT LOCAL DIVISION

Case no: EL 260/2014
ECD 560/2014
Date heard: 4.9.2014
Date delivered: 16.9.2014

In the matter between:

BANDILE KASHE, in his capacity as the Executor for the Estate Late W.M. M.,
Reference No: 2114/2007 **Applicant**

vs

ABSA BANK **First Respondent**

THE SHERIFF OF THE HIGH COURT, EAST LONDON **Second Respondent**

JESCAN TRADING CC **Third Respondent**

NONTSIKELELO NTOMBIKAYISE QOMFO **Fourth Respondent**

THE REGISTRAR OF DEEDS, KING WILLIAMS TOWN **Fifth Respondent**

THE MASTER OF THE HIGH COURT, GRAHAMSTOWN **Sixth Respondent**

JUDGMENT

SUMMARY : On instructions of the first respondent the Sheriff herein sold the immovable property of the Estate contrary to the provisions of section 30 of the Administration of Estates Act 66 of 1965. The Executor was never informed of the intended sale in execution. Section 102(1)(h) of the Act also provides that any person who contravenes the provisions of section 30 is guilty of an offence and if convicted is liable to a fine or imprisonment.

On the basis of the fact, *inter alia*, that the Executor of the Estate was not aware of the sale in execution which it did not authorize, the Court set aside the sale and ordered first respondent to pay costs of the application. The actions of the first respondent and/or the Sheriff were declared null and void.

TSHIKI J:

[1] On the 3rd March 2014, the applicant herein moved an application in this Court, citing the named respondents, for an order in the following terms:

> "1. Declaring the Sale in Execution of the property known as E [.....], East London (G [.....] Town), also known as 2 […….], G [……], East London, ("the property") held on 25th January 2013, to be null and void;
>
> 2. Declaring that the Deed of Transfer of the property into the name of the Third Respondent, pursuant to the Sale in Execution is cancelled in terms of section 6 of the Deeds Registries Act 47 of 1937, in the event of transfer having been registered into the name of the Third Respondent;
>
> 3. An order that the Fifth Respondent is directed to re-register the property into the name of the Executor of the Estate late W.M. M. or W.M. M. in the event of the property having been transferred into the name of the Third Respondent;
>
> 4. The First Respondent do all things necessary to cancel its Mortgage Bond passed by the deceased and registered against the property within 30 days;

5. An Order that the First Respondent pay the costs of the application."

[2] The applicant who has deposed to the founding affidavit herein is Bandile Kashe who resides at no 8 […….], C [……], East London. He is acting in his capacity as the Executor of the deceased Estate of the late W. M. M. by virtue of the letters of Executorship issued by the Master of the High Court ("the Master"), Grahamstown on the 21st May 2007.

[3] The various respondents herein have been cited by virtue of their respective interests in the subject matter which is the sale of the immovable property, E [.....], East London, also known as no 2 [.....], G [.....], East London (hereinafter referred to as "the property").

[4] The property herein is the main asset in the Estate late W.M. M.. After the death of the late W.M. M. its heirs requested the applicant to sell the property out of the Estate with the proceeds of the sale to be dealt with in the Estate and to be distributed to the heirs in accordance with the Administration of Estates Act 66 of 1965 (the Act). The Master required the written consent of the heirs to the sale of the property from the Estate. The late W.M. M. had bequeathed her Estate to her three children, Hugh, Mtabo and Ignatius. The written consent of Ignatius and Hugh were obtained but Mtabo had since died and this required his estate to be reported and an executor appointed so as to consent to the sale of the property. This was subsequently obtained and the Master duly approved the sale of the immovable property of the Estate late W.M. M.

("the Estate"). The property was sold to the fourth respondent herein who is Nontsikelelo Ntombikayise Qomfo (hereinafter referred to as "the fourth respondent"). It transpired that the property was bonded by way of the first mortgage bond in favour of the first respondent. When approached for the cancellation requirements as well as the original Title Deed, the first respondent instructed its attorneys *Abdo and Abdo* of East London to attend to such cancellation. This required a sum of R81 960.28 together with interest at the rate of 9% per annum from 24th October 2011 to date of payment. The fourth respondent, as purchaser, also obtained finance approval for the registration of the first mortgage bond over the aforesaid property from the first respondent for R270 000.00. Registration thereof was to be attended to by attorneys *Majeke, Mjali & Co* of East London on behalf of the fourth respondent.

[5] After all the processes involving the cancellation and attempted registration of the property from one person or entity to another it transpired later that the first respondent had in fact initially obtained a warrant of attachment pursuant to a High Court judgment obtained by default against the Estate which was dated the 5th July 2012. It is the contention of the applicant that at no stage did these legal proceedings come to his attention as the Executor. By way of proof he attaches two returns of service, dated 27th January 2012 in respect of summons and the other dated 1st June 2012 in respect of the application for default judgment. The Estate property in issue in these proceedings was attached on behalf of the first respondent. The writ shows that the process was served by affixing the process onto the main entrance at 2 [.....], G [.....], East London, which is the deceased's former residence, and the sheriff found the addressee "to be absent".

Copies of the warrants of attachment have been annexed marked “F7” and “F8” and copies of the returns of service were also annexed as “F9” and “F10” respectively.

[6] On the 15th November 2012, a Power of Attorney was received by applicant from the Master. Subsequent to that and on the 17th January 2013 the Estate’s attorneys informed the cancelling attorneys that the Power of Attorney to pass transfer had been received from the Master and that payment of the balance of the purchase price had been called for. Unfortunately for the purchaser, on the 25th January 2013 the purchaser of the property informed the Estate’s attorneys that the sheriff had sold the property the previous afternoon. The cancelling attorneys informed the estate attorneys that they had reported progress to the first respondent and that the latter had not withdrawn the instructions to cancel the bond in respect of the property attached by the Sheriff.

[7] On the 31st January 2013, the second respondent was informed by the Estate Attorneys by way of a letter that the sale in execution in this matter is a nullity as the sale had been proceeded with in contravention of a section of the Administration of Estates Act. A similar letter was sent to *Velile Tinto & Associates Inc* for the first respondent by way of a letter dated the 31st January 2013. This letter also requested that the first respondent arrange for the Sheriff to remove the attachment of the property in the Deed’s Office urgently to enable the transfer to the fourth respondent to proceed. In response thereto the attorneys for the first respondent, *Velile Tinto and Associates*

Inc insisted that the said sale in execution was valid and on the basis stated by the Estate attorneys the sale could not be cancelled.

[8] In his view, the applicant insists that the peremptory provisions of the High Court rule 46 (3) regarding the notice in writing to the owner of the property has not been complied with and accordingly the sale in execution should, on that basis, be regarded as a nullity. According to the applicant the sale in execution also amounts to a contravention of the provisions of section 30 of the Administration of Estates Act 66 of 1965.

[9] On the other hand, the first respondent insists that it had instructed the Sheriff to sell the property in a public auction on behalf of the first respondent. First respondent also denies that *Abdo and Abdo* attorneys had been instructed to attend to the cancellation of the bond. It transpired later that attorneys *Abdo and Abdo* must have acted for the purchaser of the property when it was sold in execution and not for the cancellation of the bond.

[10] During argument of this matter, *Mr S.H. Cole* appeared for the applicant and *Mr S Nzuzo* represented the first respondent. The other parties were not represented during the argument of this application and neither did they oppose the order sought by the first respondent herein.

[11] When the case was argued *Mr Cole* for the applicant contended that the first respondent was advised in writing that the property was sold from the estate and

requested the first respondent's bond cancellation requirements. In response to this request the first respondent provided its attorneys *Abdo and Abdo* with the bond cancellation figures a total of R81 960.00 together with interests thereof. *Mr Cole* further submitted, *inter alia*, that despite the first respondent's knowledge that the property was sold from the estate as well as on the facts stated, the first respondent should have stopped the sale in execution. Secondly, the fact that the process of the writ being affixed to the main entrance of the property, in the circumstances it should have been clear from the Sheriff and consequently the first respondent that there was no proper service. Therefore, there could never have been a valid attachment.

[12] On the other hand, *Mr Nzuzo* who appeared for the first respondent submitted firstly that there has been compliance with section 30 of the Administration of Estate Act 66 of 1965 as well as Rule 46 (3) of the Rules of the High Court. Secondly, that Attorneys *Abdo and Abdo* are one of the firms of attorneys within the panel used by the first respondent. However, in this matter they never acted for the first respondent instead it was *Velile Tinto* Attorneys who acted for the first respondent in the matter in issue and that *Abdo and Abdo* attorneys were acting for the fourth respondent in this matter. In his view, even if *Abdo and Abdo* attorneys were acting for the first respondent and concluded the agreement claimed to have been entered into between the fourth respondent and the first respondent such agreement would have been a nullity. This is so, in view of the existence of a sale agreement concluded by the second respondent on behalf of the first respondent and pursuant to an order granted by the Court. He refers me to the judgment in ***Menqa and Another v Markom*** 2008 (2) SA 120 (SCA) at

para [24]. I must say though that the *dictum* in the ***Menqa and Another v Markom*** case *supra* is irrelevant to the issues in the case under discussion. This will be more apparent when one has regard to the *ratio decidendi* herein.

[13] In order to understand the interpretation of sections 29 and 30 of the Administration of Estates Act 66 of 1965 which are relevant in our discussion herein, I have to quote such provisions *verbatim* as follows:

> "**29. Notice by executors to lodge claims.** -
>
> (1) Every executor shall, as soon as may be after letters of executorship have been granted to him, cause a notice to be published in the *Gazette* and in one or more newspapers circulating in the district in which the deceased ordinarily resided at the time of his death and, if at any time within the period of twelve months immediately preceding the date of his death he so resided in any other district, also in one or more newspapers circulating in that other district, or if he was not ordinarily so resident in any district in the Republic, in one or more newspapers circulating in a district where the deceased owned property, calling upon all persons having claims against his estate to lodge such claims with the executor within such period (not being less than thirty days or more than three months) from the date of the latest publication of the notice as may be specified therein.
>
> (2) All claims which would be capable of proof in case of the insolvency of the estate may be lodged under subsection (1).
>
> **30. Restriction on sale in execution of property in deceased estates**
>
> No person charged with the execution of any writ or other process shall -

> (a) before the expiry of the period specified in the notice referred to in section *twenty-nine*; or
>
> (*b*) thereafter, unless, in the case of property of a value not exceeding R5 000, the Master or, in the case of any other property, the Court otherwise directs,
>
> sell any property in the estate of any deceased person which has been attached whether before or after his death under such writ or process: Provided that the foregoing provisions of this section shall not apply if such first-mentioned person could not have known of the death of the deceased person."

[14] *Mr Nzuzo* interprets section 30 of the Act to mean that the direction contemplated in this section is nothing more than a warrant of execution to which reference has been made in the papers and annexed by the applicant as annexure "F7". In his view, "the absence of the said warrant would have rendered the sale a nullity, the presence of which validates it".

[15] The fact that the writ ("F7") that was issued and executed against the said property was authorized by the High Court does not validate the action complained of by the applicant. Neither was the applicant informed of the intended action by first respondent in instructing the sheriff to sell the Estate property. The only justification proffered by first respondent for selling the Estate property is that the property no longer vests in the Estate of the deceased as the property was declared executable on the 5th July 2012 and was sold in an auction on the 23rd January 2013. Therefore, in its view, the property cannot vest in the Estate of the late W.M. M.. For the reasons that follow hereunder this cannot be correct.

[16] In my view, the provisions of section 30 quoted above are peremptory in nature and failure to comply with them renders a nullity any action taken in pursuance of the incorrect application thereof. It is only when the person charged with the execution of the writ could not have known of the death of the deceased person when selling the estate property can the failure to comply with the above provisions be excused. In the present case we have a writ which on its face shows that the Estate late Wase Millicent M. is being sued, an indication that first respondent should have known that the property belongs to a deceased person whose estate should be dealt with through the Executor and in the knowledge of the Master.

[17] The import and meaning of section 29 of the Act which is referred to in section 30 (a), demands that every Executor shall, as soon as he or she has been appointed, and given his or her powers, publish a notice in the Government Gazette and newspapers calling upon all persons having claims against the deceased estate to lodge such claims within the period specified in the section, to lodge such claims as they may prove against the estate of the deceased.

[18] Any Court proceedings which emanate from the deceased's estate shall be heard in the High Court because section 1 of the Act defines the Court as the "High Court having jurisdiction, or any Judge thereof".

[19] The first respondent herein, even if it did so through the Sheriff, had no authority to sell the property of a deceased person without the authority and/or knowledge of the

executor of the estate. This is so, because the value of the property concerned exceeded R5 000.00 as the Act provides. Whether or not the first respondent is a preferred creditor as regards the property in issue does not make the property an exception and therefore, not bound by the peremptory provisions of section 30 of the Act.

[20] There is dearth of authority on this topic as a result I have struggled to get a decided case which is relevant to the pertinent issues herein but I was invigorated when I laid hands on the decision in ***De Faria v Sheriff, High Court, Witbank*** 2005 (3) SA 372 (T) where at 376 para [21] De Vos J held:

> "The question still remains what the effect of such contravention of s 30 of the Act is upon the validity of the sale itself. The purpose of s 30 of the Act, read in the context of the Act as a whole, is clearly to prevent certain creditors from being preferred above others. This is achieved by preventing one creditor who has obtained judgment against the deceased's estate from obtaining satisfaction of his claim by selling property in the deceased's estate in execution, leaving nothing for the other creditors..."

[21] Section 30 read with section 13 of the Act provides, and expressly so, that the property of the deceased person may not be sold in execution, but is to be liquidated and distributed by the executor under the authority of letters of executorship duly issued by the Master. "Creditors in a deceased estate should prove their claims in accordance with the provisions of the Act or institute action against the executor in the case of disputed claims. Even if they also obtain judgment against the executor, however, it

remains the executor's duty to liquidate the assets in the deceased estate and to ensure the correct distribution of the proceeds thereof between creditors and heirs (***De Faria v Sheriff, High Court, Witbank*** *supra* at page 376J-377B).

[22] *Mr Nzuzo*'s submission that the issue and presence of the warrant of execution authorizes the wrongs, if any, of his client is misplaced. In addition to the provisions of section 30 of the Act the sale in execution in contravention of the provisions of section 30 of the Act is also prohibited by section 102 (1)(h) of the Act which visits it with a criminal sanction. Section 102 (1)(h) of the Act provides that "any person who contravenes or fails to comply with the provisions of section 30 (of the Act) shall be guilty of an offence and liable to a fine or to imprisonment for a period not exceeding six (6) months."

[23] It should have been clear to the first respondent who was advised by its legal representatives that the first respondent's sale of the property in issue is void and of no force and effect. This is shown by the wording of the statute which governs section 30 of the Act. The wording "no person charged with the execution of any writ or other process shall …", shows clearly that what is done contrary to the prohibition of the law is not only of no effect but must be regarded as never having been done. The mere prohibition operates to nullify the act. Therefore, the disregard of peremptory provisions in a statute is fatal to the validity of the proceeding affected. (***Schierhout v Minister of Justice*** 1926 (AD) 99 at 109; ***Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd*** 1978 (2) SA 872 (A) at 885 E-G).

[24] Section 42 (2) of the Act provides that an executor who desires to effect transfer of any immovable property in pursuance of a sale shall lodge with the registration officer, in addition to any such other deed or document, a certificate by the Master that no objection to such transfer exists. No such compliance was observed in respect of the property in issue.

[25] From reading the relevant provisions of the Act it is clear that only the Executor shall sell property that forms part of the estate and this must always be with the approval of the Master of the High Court. The contrary will mean that the Master will have no control over the liquidation and distribution process since the sale in execution will invariably take place without his knowledge and possibly against his or her wishes (***De Faria v Sheriff, High Court, Witbank*** *supra*). See also ***Wright v Westelike Provinsie Kelders Bpk*** 2001 (4) SA 1165 (C)).

[26] The mode of service which the second respondent used when serving the writ in issue was "by fixing a copy to the main entrance". This was done by the Sheriff because he or she "found the addressee to be absent". The mode of service preferred by the Sheriff herein could never have been agreed to between the first respondent or its attorneys and the applicant. Therefore, the applicant could never have been served with the writ and therefore there was no service of the writ upon the applicant herein. In any event, on the facts of this case, the service of the writ could never have been intended to be effected upon the applicant. Had that been intended it should have been done at the address of the applicant and not at the deceased's address. There was

therefore no proper service of the applicant herein more so that neither the warrant nor the notice of attachment had been served on or brought to the notice of the Executor. (***Campbell v Botha and Others*** 2009 (1) SA 238 (SCA); ***Joosub v JI Case SA (Pty) Ltd and Others*** (now known as ***Construction & Special Equipment Co (Pty) Ltd)*** 1992 (2) SA 665 (N)).

[27] Applicant has also relied on the provisions of Rule 46 (3) of the Uniform Rules of the High Court. Applicant contends, *inter alia*, that the property could never have been sold without the knowledge of the Executor and the Master of the High Court. In my view, as the attachment and sale of the property was not done through the Executor of the estate, the sale could not be said to have been done within the provisions of the Act. There is no evidence from the first respondent that both the Executor and the Master of the High Court were aware of the attachment and sale in execution of the property in issue.

[28] The Executor should also have been advised of the execution proceedings and this was never done. This, therefore, renders the whole process of execution invalid.

[29] The applicant has asked for the costs in the event of the first respondent not succeeding. This is so because there were no valid grounds for the first respondent to have opposed this application. I must say that first respondent had been let down by his attorneys. It was clear in this regard that these proceedings should not have been opposed more so that the first respondent's rights would still be protected in any event.

Having opposed the application, first respondent cannot eat its cake and still have it. It will be liable for the costs of this application.

[30] In the result, I make the following order:

[30.1] I grant the order in terms of paragraphs 1-5 of the Notice of Motion whose terms appear in paragraph 1 of this judgment.

_____

P.W. TSHIKI
JUDGE OF THE HIGH COURT

Counsel for the applicant	:	Adv S.H. Cole
Instructed by	:	Cooper Conroy Bell EAST LONDON Ref: GS Bell/bw/UM0103
Counsel for the first respondent	:	Adv S Nzuzo
Instructed by	:	Velile Tinto & Assiociates Inc PRETORIA c/o NVH Incorporated EAST LONDON Ref: N Van Huyssteen