IN THE HIGH COURT OF SWAZILAND

CIV. CASE No.141/87

In the matter of

JOSEPH NGCUBA NXUMALO	Applicant
and	
SWAZILAND BUILDING SOCIETY	1st Respondent
TOMMY KIRK	2nd Respondent
DEPUTY SHERIFF - DISTRICT OF WANZINI	3rd Respondent
REGISTRAR OF DEEDS, SWAZILAND	4th Respondent
CORAM:	HANNAH, C.J.
FOR APPLICANT:	MR. FLYNN
FOR 1ST RESPONDENT:	MR. BERTRAM
FOR 2ND RESPONDENT:	MR. DUNSEITH

JUDGMENT

(29/5/87)

Hannah, C.J.

I have before me a motion in which the applicant seeks an order setting aside the sale on 6th December, 1986 by the Deputy Sheriff of Lot 78, Herogate, Fairview Township, Manzini ("the property") to the second respondent.

The history of events leading to the application is as follows. The applicant was the owner of the property and mortgaged it to the first respondent to secure certain loans amounting to E69,000. He fell into arrears with the mortgage repayments and on 17th April 1985 the first respondent obtained judgment against him for E73,206.02 being the full amount then outstanding and the property was declared executable. In June 1985 the applicant spoke to Mr. Bertram of the

first respondent's attorneys and according to the applicant it was agreed that he would settle the arrears due under the mortgage bond at the rate of E1,200 per month but the applicant failed to adhere to this agreement. On 11th November 1986 the Deputy Sheriff, at the instance of the first respondent, gave notice that the property would be sold in execution on 6th December 1986 and when this notice came to the applicant's attention it spurred him into activity once again. On 29th November 1986 he paid E2,000 to the first respondent and then telephoned Mr. Nxumalo of the first respondent's attorneys informing him of such payment. According to the applicant, Mr. Nxumalo told him that he should pay a further amount of E7,500 to the first respondent before the date set for the sale and if such payment was not made the sale would proceed. I should mention here that Mr. Nxumalo's recollection of this conversation is somewhat different. He maintains that he must have told the applicant that should he clear the arrears he would then contact the first respondent and enquire whether it would be prepared to postpone the sale. Whichever version be correct the applicant did pay E7,500 to the first respondent before the sale, the final payment

of E3,500 being made on 5th December 1986. According to the applicant this cleared the arrears though there is again some dispute as to whether this is correct.

However, on 6th December the sale went ahead. The second respondent's bid of E65,000 was accepted and thereafter he took all necessary steps to have transfer affected including obtaining a power of attorney from the Sheriff for the purpose of transferring the property into his name. The applicant says he learnt of the sale about a week after it had taken place but it was not until some time later that he approached the second respondent with a request that he should agree to it being cancelled. The second respondent refused this request.

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As I have said, the question whether the first respondent, through its attorneys, did in fact agree to postpone the sale on payment of E7,500 is disputed: it cannot be decided on the affidavit evidence. However, the second respondent contends that even assuming there were such an agreement as is alleged by the applicant, having regard to the circumstances of the case the court has no power to set aside a sale in execution entered into by a bona fide and innocent purchaser for value, and accordingly invites the court to dismiss the application without further consideration of the evidence.

Mr. Flynn, who appears for the applicant, has argued the case on two footings. The first is that the agreement alleged by the applicant had the effect of novating the judgment and accordingly the judgment creditor i.e. the first respondent, was no longer entitled to proceed with the execution in order to recover the judgment debt. I have considered counsel's submissions in support of this argument but having regard to the circumstances of the case, I am of the view that they contain no merit. In my opinion, the present case is covered by the following passage from the judgment of Trengove AJA in Swadif (Pty) Ltd v Dyke N.O.1978 (1) S.A. 928 at page 944:

"In a case like the present, where the only purpose of taking judgment was to enable the judgment creditor to enforce his right to payment of the debt under the mortgage bond, by means of execution, if need be, it seems realistic, and in accordance with the views of the Roman-Dutch writers, to regard the judgment not as novating the obligation under the bond, but rather as strengthening

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or reinforcing it. The right of action, as Fannin, J., puts it, is replaced by the right to execute, but the enforceable right remains the same."

It must follow, therefore, that immediately prior to the making of the alleged agreement of 29th November 1986 the legal rights and duties of the applicant and first respondent still included all those created by the mortgage bond but reinforced by the judgment. What then was the effect of the alleged agreement that if arrears amounting to E7,500 were paid by the applicant before the date set for the sale in execution the sale would not proceed? In my view the effect was no more than to postpone or suspend the execution process and certainly not to novate the judgment. The judgment, together with the obligations under the mortgage bond, remained in force and therefore no ground exists on the basis of novation for holding that the writ of execution became discharged or should be set aside.

Mr. Flynn's other submission starts from the general proposition that execution, being a process of the Court, the Court has an inherent power to control it. And, says Mr. Flynn, this will necessarily involve a wide discretion in the Court to ensure that real and substantial justice is done in any given set of circum-stances. I have no difficulty with the general proposition itself. It is well-established by the authorities that the Court may stay a writ of execution where the judgment upon which it is based is under attack and that the Court will set aside such a writ altogether where its substratum has disappeared. The power may also be exercised even in cases where the writ has actually been executed (see Swanepoel v Roeloft and Others 1953 (2) S.A. 524) but much will turn on the circumstances of individual cases. In the Swanepoel case, for example, the first respondent obtained judgment by default against the applicant, a writ of execution was issued

and certain immovable property belonging to the applicant was sold to the second respondent at a sale in execution. Despite this, however, the applicant was granted a temporary interdict restraining the passing of transfer to the second respondent pending the determination of an action to be commenced by the applicant seeking to set aside the sale in execution on the ground that it was based on a void judgment in that the judgment had been obtained fraudulently. In that case, therefore, the court envisaged a sale of execution being set aside despite the rights which had vested in a third party but the circumstances were those of alleged fraud which, if made out, would strike at the very heart of the judgment upon which the sale was based.

In the instant case the applicant is not attacking the causa on which the writ was issued. Save for the novation point, in respect of which I have found against the applicant, there is no suggestion that the judgment debt is not owing or that the judgment was irregularly obtained. It seems to me, therefore, that Mr. Flynn is inviting this Court to extend the limits thus far recognised by the courts/and to hold that when dealing with an application for a stay or setting aside of execution the Court has an unfettered discretion to do what it considers to be just even to the point of divesting an innocent third party of rights bona fide acquired. This was essentially the argument addressed to Ackerman J. in Le Roux v Yskor Landgoed (Edms) Bpk and Another 1984 (4) S.A. 252 but it found little favour with the learned judge. I have been provided with an unofficial translation of the Africaans judgment in that case and it would appear therefrom that the learned judge saw no good reason to extend the limits of the Court's discretion in the manner suggested and indeed considered there to be some authority disapproving such an extension. See Andrew v Muscott 1923 EDL 434.

I respectfully share the learned judge's view of the matter. I do not propose to lengthen this judgment by reference to the many cases considered by him in his judgment but will content myself with saying that none appears to support the bold proposition now advanced and that in one way or another they are all distinguishable.

In my judgment, the applicant is unable to bring himself within any of the recognised principles governing the setting aside of writs of execution or sales in execution and as I see no good reason for extending those principles beyond the existing limits the application must fail. I would only add, although it is not strictly necessary to do so, that even had I been persuaded that the Court's discretion is as wide as that contended for by Mr. Flynn, I would nonetheless hesitate long before granting the relief sought having regard to the rights which were acquired by a bona fide purchaser. If obliged to apply equitable principles the Court would not be able to ignore the fact that the purchaser was wholly blameless in the transaction which took place and would lose rights which may be valuable should it be set aside. The applicant, on the other hand, cannot claim to be free of blame. It was he who left matters to the eleventh hour and, having complied with the alleged agreement on the day preceding the sale, did not even trouble to contact the Deputy Sheriff or appear at the sale himself. If the equities had to be weighed it seems to me that they would come down on the side of the purchaser and not the applicant and the applicant would simply be left to pursue any remedy he might have against the judgment creditor.

The application is accordingly refused and the rule is discharged with costs.

R.N. HANNAH

CHIEF JUSTICE