IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 1164/99

In the matter between:

JOHANNES HLATSHWAYO 1st APPLICANT

CECIL JOHN LITTLER N.O. 2nd APPLICANT

And

SWAZILAND DEVELOPMENT AND

SAVINGS BANK RESPONDENT

IN RE:

SWAZILAND DEVELOPMENT AND

SAVINGS BANK PLAINTIFF

And

JOHANNES HLATSHWAYO N.O. DEFENDANT

CORAM K.P. NKAMBULE – J

FOR APPLICANT MR. S. MAGONGO

FOR RESPONDENT MR. LITTLER

RULING 10/9/04

The applicant has brought an application under a certificate of urgency in the following terms

1. Waiving the usual requirements of the rules of court regarding Notice and Service of Motion proceedings in view of the urgency of the matter.
2. Pending flnalisation of this application the first and second respondent be restrained and/or interdicted from transferring Lot No. 350 situated at Extension Three, Zakhele Township from the name of my late wife Thandi Judith Hlatshwayo born Nsingwane into the name of Sifiso Maziya the Fourth respondent herein.
3. The Third respondent be directed and/or compelled to give a full or detailed account of the Liquidation and Distribution Account he prepared in respect of Estate late Thandi Judith Hlatshwayo (born Nsingwane) under Estate Late file No. 42/87.
4. Reversing and/or declaring null and void the Notice of Sale which took place on Wednesday the 14th January 2004 outside Manzini Magistrate Court at 12.00 p.m. which was conducted by the Fifth respondent.
5. The judgement by default granted by the above honourable court in favour of the First respondent on the 20th September 2003 be set aside or rescinded.
6. Joining applicant as party to the main action and thereby granting his leave to defend the main action.

7. Rule 2,3,4,5 and 6 operate as an interim relief with immediate effect pending finalisation of this application.

8. A Rule nisi do hereby issue calling upon both respondents to show cause if any, on a date to be determined by the court, why,

8. (a) Rules 2. 3, 4, 5 and 6 should not be made final;

8. (b) They should not be ordered to pay costs of this Application.

There is filed of record a launching affidavit deposed to by the applicant Johannes Thamsanqa Hlatshwayo.

In their opposing affidavit the respondents have raised the following preliminary points of law; that,

1. The applicant has failed to cite and/or serve the Attorney General having cited the Registrar of Deeds; in his capacity as the representative of all government offices.

2. The applicant has failed to cite and/or serve the registrar of the High Court in his capacity as the Sheriff of Swaziland him being necessary during the transfer of the said property.

3. The applicant cannot rely on urgency for the following reasons;

3.1. The order that he seeks to rescind was obtained on the 20th September 2002 and applicant was perfectly aware

of the said order against him as he was represented by an attorney at that time.

3.2, A warrant of execution of movable goods was served on, him by the deputy sheriff William Kelly on two occasions in his capacity as the occupant of the house but he did not bother to approach this court for relief.

3.3. It was only after the property had been sold to an innocent buyer that he decided to approach the court.

4. The applicant has not complied with all the requirements of an interdict.

In its replying affidavit the applicant has filed preliminary points and these are the points of law which were placed before court for determination. They are as follows:

1. The Deponent Babhekile Gugu Dlamini, who is an attorney of the High Court of Swaziland has not attempted to aver that she is duly authorised to depose to the affidavit on behalf of the first, fourth and fifth respondents; nor has she attached any document or resolution of the board of directors authorising her to attest and depose to the opposing affidavit especially on behalf of the first respondent which is a corporate body.

2. Similarly Japp Motsa who deposed to the confirmatory affidavit has not annexed.any resolution authorising him to do so on behalf of the first respondent.

The bone of contention emanates from the statement by Babhekile Gugu Dlamini that "I am well

versed with the facts of the matter". The question which remains unanswered is how did she come to acquire such facts? Was it through the instructions she received from the respondents or through her handling of the matter.

In this case we are dealing with a respondent who is an artificial person. In such a case there is judicial precedent for holding that objection may be taken if there is nothing before the court to show that the applicant has duly authorised the institution of Notice of Motion proceedings. See the case of ROYAL WARCESTOR CORCEL V KESLER STORES 1927 C.P.D. 143.

Unlike an individual, an artificial person can only function through its agents and it can only take its decisions by the passing of a resolution in the manner provided by its constitution. An attorney instructed to commence notice of motion proceedings by, say, the secretary of a company would not necessarily know whether the company had resolved to do so, nor whether the necessary formalities had been complied with in regard to the passing of a resolution. It is clear therefore that in the case of an artificial person there is more room for mistakes to occur and less reason to presume that it is properly before court or that proceedings which pinpoint to be brought in its name have in fact been authorised by it.

The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution. I however, do not consider such proof to be necessary in every case. Each case must be considered on its merit. The court must decide whether enough has been placed before it

to warrant the conclusion that it is the company which is litigating and not some unauthorised person on its behalf.

Returning now to paragraph 2.1 of the applicant's replying affidavit, he states that:

"The deponent has not attempted to aver that she is duly authorised to depose to the affidavit..."

By this the applicant means that Babhekile Gugu Dlamini has not shown or provided the basis of her authority to depose to the affidavit.

The question for determination is whether an ordinary witness needs authority to give evidence on behalf of a litigant. It is my opinion that no authority from the company litigant is needed for a deponent to depose to an affidavit. If this was so, it would be very absurd because it would mean that each time you bring a witness in court to give evidence on behalf of a company such witness needed to produce authority allowing him to give such evidence.

Likewise Japp Motsa need not produce any proof that he is authorised to depose to the affidavit. He is the witness for the respondent he does not need authority from the respondent to depose to an affidavit.

As already mentioned, it is the attorney of record who needs a power of attorney to act on behalf of a company. I must however, mention that in this instant case Miss Babhekile Gugu Dlamini has been acting for the respondent since the beginning of this matter. I have no doubt that in this particular matter it is the respondent company which is litigating and that Babhekile Gugu Dlamini has been duly instructed by the company.

For the foregoing reasons and conclusions the points in limine fail.

K.P. NKAMBULE

JUDGE