IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 3335/02

In the matter between LUCKY NHLANHLA BHEMBE	APPLICANT
VERSUS	
SWAZILAND BUILDING SOCIETY	1st RESPONDENT
THE DEPUTY SHERIFF - HHOHHO	2nd RESPONDENT
CORAM	SHABANGU AJ
FOR APPLICANT	MR MNISI
FOR RESPONDENT	MR MADAU

JUDGEMENT 11th March, 2004

The applicant one Lucky Nhlanhla Bhembe seeks relief from this court as follows:

1. "1. Rescinding and or setting aside the default judgement granted by this honourable court on 23"' October, 1998
2. Staying the notice in terms of rule 45 (13) calling upon the judgement creditor (sic) or applicant to come for a financial enquiry on the 8th November, 2002 pending the outcome of this application.
3. Ordering the respondent to refund the applicant any monies in excess of the capital debt from the proceeds of the sale in execution.
4. Further and or alternative relief. "

The present application was first filed before court on 6th November, 2002 and was set down for hearing on 15th November, 2002. It appears that on 15th November, 2002 the matter came before Annandale J (as he then was) and was struck off the roll. It was apparently on the roll again on 7th February, 2003 on which date it was postponed to 14th February. 2003. On the latter date it was removed from the roll and eventually came before me on 3rd October, 2003. Inspite of the fact that the application was first served on first respondents' attorneys on 6th November, 2002 (the same date it was filed in court with the Registrar) none of the respondents have filed a notice of intention to oppose the application or any opposition papers of any kind.

On 3rd October, 2003 when the matter came before me it was set down on the uncontested roll.

On that day Mr Mnisi wished to proceed with his application on the basis that it was uncontested. Mr Madau sought a postponement of the matter for some unclear reason having regard to the fact that the application had been served on the first respondents attorneys almost a year earlier. From annexure LB4 of the applicants' affidavit filed in support of the application it is possible to form the view that the application is intended to be an interlocutory one related to case No. 1241/98. However beside the reference to High Court case No. 1241/98 in the aforementioned annexure "LB4" nothing else appears on the papers to connect the present proceedings to case number 1241/98. The present proceedings were commenced under a different case number altogether. The prayers in the Notice of Motion would in light of this be ambiguous and vague in the absence of a more fuller description of the default judgement said to have been granted by this court on 23rd October, 1998. It may well be that in order to remove any uncertainties prayer one of the notice of motion ought to have read, for

example,

"Rescinding and or setting aside the default judgement granted by the honourable court on 23'" October, 1998 under case number 1241 of 1998, "

Similarly prayer two of the said Notice of motion might have read

"Staying the Notice in terms of rule 45 13 (1) calling upon the judgement debtor in case number 1241/98 or applicant to come for a financial enquiry on the 8th November, 2002 pending the outcome of this application."

The highlighted portions of the abovequoted prayers are my additions given to illustrate how the prayers might have been formulated in such a way as to eliminate uncertainty on the identification of the judgement or proceedings which the applicant sought to have rescinded. As it is it is possible that the respondents' attorneys on receiving such a notice of motion were uncertain as to the proceedings in respect of which the rescission application applied. The other possibility for removing the uncertainty would have been to use the same case number as in the main proceedings. This factor may account for the failure by the respondents to file any opposing papers. A further reason which might have led to the confusion is the fact that the rescission application itself was initially set down on the roll of 15th November. 2002 for hearing on the short form. When the application was not moved on 15th November, 2002 but was struck of the roll the respondents might have considered that it was no longer going to serve any purpose to file any opposing papers in respect of an application which has been struck of the roll and the date on which it had been set down had passed. After the initial set down date had passed the matter was again set down on the 7th February. 2003 by notice of set down dated 6th February. 2003. There is no indication on the Notice of Set down dated 6th February, 2003 that it was served on the respondents or their attorneys if applicable. Even if that notice would have been served on the respondents' it is possible that the less than one days notice given would have been too short. The matter had not been properly set down on this date because of the failure to serve the first respondents attorneys or any of the respondents' with any such notice,

On the 7th February. 2003 the matter was apparently postponed to 14th February, 2003 by Mr Justice Maphalala. There is nothing to indicate that on this later date the respondents' were represented when the matter was called. It would be safe to accept that because of the non-service upon them the respondents did not appear and were unrepresented. The applicant could not have obtained any order adverse to the respondents having regard to the fact that the latter had no notice of such set down. It was probably because of this realisation that the applicants' attorney may have applied to have the matter postponed

from the roll of 7th February, 2003 to the roll of 14th February. 2003. However again the matter was removed from the roll of 14th February. 2003. It was again set down by the Applicant for the 3rd October, 2003 by a Notice of set down filed in court on 2nd October, 2003. This Notice of Set down was also not served on the respondents' or their attorneys. The manner by which the applicant has dealt with the matter was confusing and was calculated to embarrass the respondents' in their response to the application. In the circumstances and because of the factors mentioned above I cannot grant any relief to the applicant, at least at this stage. Having considered all the matter raised and alluded to in the applicants' affidavit in support of the application the appropriate order should give the parties directions on how the matter should proceed as from now. I make no order on the relief claimed. I however direct that the respondents are ordered as follows;

1. To file their notice of intention to oppose this application, if any, within five days from the date of service by the applicant of this order and thereafter,
2. To file their opposing affidavit, if any, within fourteen days and
3. If any of the respondents intend to raise a question of law only he or it shall deliver a notice of intention to do so within the time prescribed in paragraph (2) above.

ALEX S. SHABANGU

ACTING JUDGE