IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No. 1971/2005

In the matter between

SIPHO FERNANDEZ DLUDLU Applicant

And

1st Respondent 2nd

Respondent 3rd Respondent

J.P. ANNANDALE, ACJ

Mr. P.R. Dunseith (P.R.

Dunseith Attorneys

Mbabane)

Mr. M. Sibandze (Currie

And Sibandze Attorneys

Mbabane)

PHILANI CLINICS (PTY) LTD NQABA DLAJVQNI MASWAZI NSIBANDZE N.O.

Coram

For Applicant For 1st and 2nd Respondent For 3 rd Respondent

RULING *IN LIMINE*

21 July, 2005

[1] By way of an application brought to Court as one of averred urgency, the applicant seeks a *rule nisi* to set aside a sale in execution held on the 27th May 2005 and costs of the application. Furthermore, the applicant wants the transfer of his property, which was sold in execution, to be stayed by an interdict until the application to set aside the execution sale has been finalised.

[2] The relief that the applicant seeks from this Court is opposed by the first and second applicants. They raised two points *in limine,* contesting the urgency with which the application is brought and also alleging that the applicant cannot be heard due to his "bad faith" and coming to Court with "unclean hands."

[3] The matter was not heard by the judge on duty to deal with urgent applications due to his stated reasons and it was then heard in the contested motions Court, with the result that it precluded some other matters from being heard as the Court was informed that the desperate situation of the applicant would be irreparably harmed if he had to wait to have the Court to hear his predicament. In the event, after argument *in limine* was heard and a ruling was reserved in order to consider the authorities referred to and also to avoid delaying other contested motions to be entertained, this ruling was reserved and the respondents' attorney, Mr. Sibandze, in the magnanimous tradition of members of the bar *par excellence,* undertook to refrain from transferring the sold property until this ruling is handed down. This laudable conduct of an officer of Court is recorded with commendation.

[4] No argument on the merits of the application was to have been heard, as agreed between the attorneys, but in order to demonstratively argue the points *in limine* each was permitted by the Court to refer to the merits in so far as was necessary to elucidate their preliminary legal points, with the result that a more informed decision could be reached in order to determine whether the matter should be enrolled at all, and if so, whether it should be heard as one of urgency.

[5] The factual issues regarding the issues at hand are straightforward and relatively uncomplicated. The third respondent, a deputy sheriff of the High Court, conducted a sale in execution whereat the applicant's residential home was sold in pursuance of a judgment of the High Court. The applicant had run out of options to have the judgment overturned, stayed or otherwise removed, and concedes that he is liable to satisfy the judgment debt against him, a substantial sum of money, some E151 688 plus interest and costs.

[6] Following initial execution of his moveable assets for what he terms "virtually no value" realised at a sale, the remaining outstanding judgment debt resulted in his house being attached. It is the sale in execution that followed which is the subject matter of this application.

[7] During the execution process the applicant changed attorneys and Mr. Dunseith, who represented him at the hearing, apparently tried all

means to prevent the sale of the residential house, including efforts to settle the judgment debt in instalments. He failed to settle such arrangements with the first respondent's attorneys.

[8] The applicant sets out (in paragraphs 20 and 21) how he obtained a building society loan which could also be used to make lump sum payment, thereafter instalments. The offer to settle, as said above, was not accepted and the sale in execution whereat his house was sold took place and the second respondent's bid to purchase was accepted at a price of E634 000.

[9] Prior to the sale, the applicant tried as an alternative to settling the debt piecemeal, to have his home sold by estate agents, to obtain a better price than what he anticipated would be realised at an execution sale. In his papers, he embellishes on the features of the house, garden, kitchen etcetera, to try and show why the estate agents marketed it for El.3 million.

[10] This value has to be taken with a pinch of salt as it is well known that estate agents generally tend to inflate a selling price to some extent, creating some leeway to negotiate a "discount" and also to increase their commission. Nevertheless, what I take the applicant to try and convey is that there is a substantial discrepancy between the value obtained at the sale and the value, albeit potentially inflated to some extent, of the value that could ideally be obtained in the open market. Also, sales in execution are not generally known to result in high

values being realised for property sold, rather that it results in the "bargain basement" type of values.

The alleged low value received at the execution sale is but one leg of the application. More substantial reasons are advanced as to why the sale is sought to be set aside.

The applicant alleges a formal defect in the sale in that the conditions of sale are said to not having been submitted to the Sheriff in time, as required under Rule 49(a)(sic) and also that copies of the advertisements were not furnished prior to the sale, to the Sheriff, as required by Rule 46(8)(c).

He is mistaken to refer to the said requirement under Rule 49(a), firstly, as no such rule exists - Rule 49 deals with appeal procedures arising from taxed costs rulings, not conditions of sale, it also has no subrule (a). Presumably it is a typing error.

The second aspect is that Rule 46(8)(c) requires that copies of the advertisements of the sale, published in the Gazette and a suitable newspaper, be furnished to the Sheriff, not later than one day prior to the sale. This was allegedly not done, as it is stated that no notice of the sale was published in the Gazette at all.

A third defect is alleged to be the absence of proof that preferent creditors, the mortgage holder Swazi Bank and the local taxing and rating authority, Mbabane City Council, agreed to a reserve price of E300 000 (under Rule 46(6)(a)).

[16] Fourthly, the conditions of sale were allegedly not affixed to the Notice Board of the Hhohho Subordinate District Court (required under Rule 46(8)(e)).

[17] These allegations are admitted to a very limited extent by the first two respondents in their answering affidavit. They say that there was substantial compliance with the legal requirements of an execution sale and that any defect is either immaterial or without *mala fides.* Obviously, in the final analysis, and if the application is considered by the Court, these aspects will have to be decided on to determine the merits. Presently, it only needs to be decided, as set out above, whether this is to be done on an urgent basis or not, secondly, whether the applicant is debarred from being heard at all, since he is said to approach the court with "unclean hands."

[18] The second of the objections *in limine* can be conveniently dealt with first as it is of no substance.

[19] The applicant is accused of bad faith and unclean hands for trying to salvage his own predicament by his efforts to obtain a higher price for his house which was about to be sold on auction, by instructing an estate agent to endeavour to do so. The first two respondents state as follows in paragraph 14 of their answering affidavit:

'14. Despite being aware that the property was under attachment and that an interdict was therefore placed
upon sale of same, the applicant, by his own brazen and (sic) admission and without advising the 1st and 2nd respondents, instructed an estate agent to sell the property."

This misplaced accusation of impropriety is self destructive, in its reference to an interdict on the sale of the property. The property could not be transferred to anybody, by-passing the judgment creditor in the process. It is precisely the aim and purpose of notifying the Deeds Office of the execution process involving the property, to safeguard it from being alienated from under the nose of the deputy sheriff and the creditors waiting for the proceeds.

In the event that the applicant came forth with a willing and able purchaser in any amount above the judgment debt and costs, including execution costs up to that stage, it would be folly for the creditor(-s) to refuse acceptance and insist on an execution sale instead. Any amount between the due and owing debt plus costs and a purchase price of the property would fall to the account of the judgment debtor, "cutting his losses", so to speak. In my view, any prudent and able minded debtor would try to rather sell his property at any price below the realisable marketable value, as long as it is in excess of the amount due to his creditors. In doing so he is much more likely to walk away with at least some money, more than he reasonably could foresee his property being sold for i n an execution sale, with the reserve price (if any), being the cut off point.

[22] Precisely because the property is under attachment, the owner of the property who tries to do as the applicant did, places the judgment creditor under no prejudice at all. He cannot sell the property, or effect transfer, without the acquiescence of his creditors, which have to consent to the setting aside of the sheriffs attachment, which is noted against the title deed.

[23] What the respondents presently raise as an issue goes against the very grain of the basic right to a home, protection of his rights to own property and having it deprived as only a last resort. Free economic activity also seeks to be impugned upon - up to the time when the bid at the auction was accepted, ownership of the property in issue, burdened as it was, remained with the applicant. He was not in a position to circumvent the execution process. To hold that he was also deprived of trying to mitigate his inevitable losses and in the result of doing so is then furthermore debarred, due to "unclean hands", from approaching the court in the manner he does, flies in the face of his most basic rights. As yet, these rights are not yet constitutionally enshrined. It does not follow that it does not exist.

[24] In argument of this point, the respondents rely on an undated judgment of the Industrial Court in the (unreported) case of the **University of Swaziland versus the Association of Lecturers and Academic Personnel,** case No. 1/1998. Therein, the issue of "clean hands" was considered as a point *in limine* where the applicant was said to have come to court with unclean hands, to the extent that the court would be seen to be conniving with and condoning the conduct of a party who through his own conduct has set law and order in defiance. I quote from this judgment *in extenso* as the applicable legal principle was lucidly summarised by the learned Judge President therein. At pages 4 - 5, he said that:-

"The next question we have to answer is whether the conduct by the Applicant is so unconscionable as to entitle this court to refuse to entertain this application.

Mr. Dunseith for the respondents referred us to the case of ***Photo Agencies (Pty) Ltd*** **v** ***The Commissioner of Swaziland Royal Police and the Government of Swaziland*** *1976- 1980 S.L.R. 398 at 407E - D , wherein Nathan CJ as he then was declined to entertain an application for release of an arms consignment on the grounds that the applicant brazenly admitted that it used a false address in Swaziland in order to overcome and circumvent the sanctions imposed by the United Nations Security Council against the Republic of South Africa.*

*The learned Chief Justice stated "**I** think the matter should be approached within the existing framework of our law. The nearest analogy I have been able to find is that of the fugitive offender who in the cases of **Mulligan v Mulligan** 1925 WLD 164 AND **S v Nkosi** 1963(4) SA 8 (T) was held to have forfeited the right to seek assistance of the court.*
He proceeded to quote from Mulligans case at pp 167 -168 which was relied upon by Hill J and Veyra J in Nkosi's case as follows:

"Before a person seeks to establish his rights in a court of law, he must approach the court with clean hands; where he himself, through his own conduct makes it impossible for the processes of the court (whether criminal or civil) to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil rights and interests... were the court to entertain a suit at the instance of such a litigant it would be stultifying its own processes and it would moreover, be conniving at and condoning the conduct of a person, who through his flight from justice sets law and order in defiance. "

The learned Chief Justice went further to compare this reasoning with the defence of the exceptio doli *discussed by Tindall JA in **Zuurbekom Ltd** v **Union Corporation Ltd** 1947 (1) SA 514(A) at pp 535 - 536. As the learned Judge pointed out, at p 535, this remedy was introduced "so that a person should not by reason of the subtlety of the Civil Law, and contrary to the dictates of natural justice, derive advantage from his own bad faith. " And at page 536 he said that the defence was available "not only where the plaintiff by taking legal proceedings was acting maliciously, but also wherever, as it was said, **ipsares in se dolum habet, …** i.e. wherever the raising of the action constituted objectively a breach of good faith.""*

I cannot but support the exposition of this doctrine as set out by the learned Judge President. Also, it does not support the argument of the respondents at all. The present facts are patently distinguishable. The present applicant did not, *prima facie,* attempt to stultify the legal process in motion, adverse to himself, in any way. Nor did he connive, *prima facie*, in any manner with anybody, the estate agent included, to maliciously breach any good faith expected of him.

The applicant sought to mitigate his losses in a manner that was reasonable of any man in his position, not compromising the execution process in any manner and furthermore, not being in a position, in any event, to jeopardise and compromise the already existing rights of his creditors to execute his home. They suffered no real or even potential prejudice and cannot be upheld on their objection to bar the applicant from being heard on this fancied objection.

The second point *in limine* thus stands to fail, and I turn to deal with the first legal objection on the aspect of urgency.

From the history of the matter, which the applicant sets out in a forthright and open manner, it is clear that the applicant saw the disaster coming from a long way off. He knew, long in advance, that his house was going to be sold to cover his debts. He knew that after his moveable assets were sold at far lower value than his own expectations, that legal execution does not remotely live up to subjective or even objective values that are placed on assets. He knew that if his house was to be sold by the deputy sheriff on auction, the realisation of money to pay off his creditors could well conceivably leave him with a remaining amount to settle.

[29] He therefore tried to do whatever he could to avert the impending disaster. He dismissed the services of his erstwhile unsuccessful attorneys and instructed another. Mr. Dunseith, acting on his behalf, endeavoured to do whatever could be done to avert the sale complained of, by trying to come to an acceptable arrangement. He did not have success. The judgment creditor, first respondent, insisted on proceeding and its attorneys followed instructions.

[30] The attorney of the first two respondents argued that the applicant saw the sale coming for a long time before the event and that as such, he cannot now come to court on an urgent basis. Following the cancellation of the first date of the intended sale in April, it was rescheduled and re-advertised for the 27th May. Due to the letters of correspondence written by his attorney, he should be deemed, in the event that he did not see the advertisement, to have known of the sale by the latest on the 16th May.

It is further argued that at the time of the sale, the applicant and his attorney knew, or at least must have known, about all the alleged defects that they raise in the urgent application dated the

31st May 2005, to be heard a few days later. It was contended that issues like the alleged inferior description of the property in the notice of the same; the low reserve price; the late filing of conditions of the sale; the sheriff not having the required advertisements of the sale (in the Government Gazette and a newspaper, published at least 14 days before the sale), in hand at least a day before the sale (Rule 46(8)(c)); absence of placing the notice of sale on the Magistrate's Court's notice board; the absence of advertising in the Gazette and such problems, were of no consequence at all. These should have been known to the applicant's attorney at the time he attended the sale, and, so it was argued, the attorney should have taken issue with the auctioning deputy sheriff prior to the sale itself, to stop it on the spot.

These submissions are raised to support the contention by the respondents that the applicant seemingly relaxed in his armchair, watching the clouds fly by and being content with it all, let the sale occur, to only afterwards arise from his sleep and then cry "foul." He should have cried "foul" before it was too late.

That this is not and cannot be the correct position is quite clear. That was not the attitude of the applicant at all. He tried all means, and so did his attorney, to prevent the sale. This includes his lawful attempts to foreclose the sale in execution, as aforesaid. Furthermore, it cannot be expected of his attorney to confront a deputy sheriff at the scene of an auction, to argue there and then, insisting on a sale to be stopped. It is also not clear that all of the issues raised at present were indeed known to the applicant or his attorney at the time of the sale. Even if it was, it remains the duty of the sheriff and his instructing attorneys to comply with all essential legal requirements to ensure a valid sale, at minimum compliance with the essential elements.

The question is whether, on these facts, the applicant is to be debarred from being heard now, to follow the normal time consuming practice of an application in the usual manner, by which time the property in all likelihood could be registered in the name of the purchaser, with the resultant costs and prejudice occasioned by other remedies to place him back in his original position if he succeeds.

Mr. Sibandze referred to *inter alia* **Standard Bank of South Africa Ltd vs Prinsloo and Another (Prinsloo and Another intervening)**
2000(3) SA 576(C), a judgment of Davis J, as authority to debar the applicant from coming to court on urgency, due to alleged knowledge of the alleged defects, aforestated, imputed on the applicant vis-a-vis his attorney's presence at the sale.

The facts of the two matters are clearly distinguished. In **Prinsloo** *(supra),* it was held (see the headnote at p. 578, referring to page 589 H - J), that:-

"The respondents had been required to show that the applicant had acted in bad faith or with knowledge of the defects. At best it could have been said that the attorney acting for the applicant had been aware of the breaches of the Rules. The question which arose was whether this information could be imputed to the applicant. The general knowledge acquired by an agent and not communicated to her or his principal was imputed to the latter merely by reason of the fact that the agent had acquired such knowledge, provided that the knowledge was acquired in the course of the agent's employment and further that there had been a duty upon the agent to communicate the information obtained. Whether there was a duty depended upon the scope of the authority and the importance or materiality was whether the knowledge of the agent was considered to be of such a kind that, in the ordinary course of business, a reasonable person would have been expected to have imparted this knowledge to the person who had delegated to such agent the conduct and control of her or his affairs. "

In casu, the applicant attended the sale as observer. It cannot (presently) be found that he knew of all the defects now complained about, at the time the sale was conducted, nor that such (absence of) knowledge could be imputed on the applicant. The mere attendance at the sale and failure to bring it to an end before the event cannot now be found to bar the applicant from being heard on an urgent basis.
Mr. Sibandze further referred to **Joosub v J I Case SA (Pty) Ltd (now known as Construction & Special Equipment Co. (Pty) Ltd and Others** 1992(2) **SA** 665(N), a decision of McCall **AJ** (as he then was), which decision was also referred to by Davis J in **Prinsloo** *(supra)* at page 588.

This decision was concerned with the validity of a sale in execution vis-a-vis non-compliance with the applicable rules, an issue that is to feature when the merits of the application is to be decided, not *in limine* on the issue of urgency, instructive and helpful as it may yet prove to be.

Mr. Sibandze sought a last refuge under the wings of the often quoted case of **Gallagher v Norman's Transport Lines (Pty) Ltd,** 1992(3) **SA** 500(W) wherein Flemming DJP (as he then was) succinctly summarised the position regarding urgent applications and use of the appropriate forms. The passage that this court was referred to, the second last paragraph on page 505, is a very different picture from the present scenario.

The applicant, or by implication his attorney, cannot be held at fault for using the form and time limits they chose, unlike the distinguishable situation in **Gallagher.** Presently, the Notice served on the respondents provide adequate, albeit shortened, time to oppose the seeking of a *rule nisi.* The application was prepared *sub hasta* after the sale, yet served such that Mr. Sibandze was able to not only take instructions, but came to court in his customary well prepared and well armed manner, to vigorously oppose the hearing of the matter as one of urgency. Not only is he commended for his diligence and expeditious preparation, also, as stated above, he acted with the dignified and exemplary conduct already alluded to.

Nevertheless, his instructions, supported by the affidavits of the respondents, were conveyed to the court but fail to carry the anticipated weight. The matter, in my judgment, requires to be ventilated sooner rather than later, on the merits, before further harm, costs and prejudice arises.

In the event that the respondents were successful and the merits are only determined at a later stage, following the usual mode, and if the property has by then been registered in favour of the second respondent, the costs of doing so, in itself, would prevent fairplay, to have the registration made undone. Also, by then, the attorney and client costs of the applicant, already in a financial predicament, may well result in his inability to prosecute his case fully and properly. It is

however not the issue of costs that has the heaviest weight in the determination of the question of urgency.

Without prejudging the case of the applicant, it *prima facie* does not seem to be without merit. In **Messenger of the Magistrate's Court, Durban vs Pillay** 1952(3) SA 678(AD), it was held at page 684 C -D, with reference to the peremptory nature of the requirements of the advertisement of execution property itself, over and above where it is published (newspaper and gazette), that:-

"The answer seems to me to be that Rule 40(6) (which, like in Swaziland, requires particularity by way of a short description of the property and its situation, over and above a quote from the title deed - my insert) was conceived in the interests of the judgment debtor and the judgment creditor and the inconvenience to the purchaser, who may at most be exposed to loss of anticipated profits, never in respect of his then present patrimony, is no greater than that of any person who buys at an auction where things tainted with doubtful title may be sold."

The principle remains that a successful builder at a sale in execution, like the present second respondent, should always remain alive to the inherent risk of purchasing, as he did, a property which may be tainted, such as in the present circumstances, at a sale which is thereafter sought to be set aside on the grounds of several alleged irregularities, yet to be argued, to render it null and void.

Such a decision, as said, is yet to be considered when the parties have been heard on the merits of the application itself.

As the matter now stands, the second argument *in limine* against the urgency with which it is to be dealt with, also cannot be upheld.

Constitutionally, the basic rights of the applicant have not been brought into play. Even so, the loss of a home is not an issue to be delayed in order to comply with the ordinary delay that inevitably goes hand in hand with an application to set aside a sale, brought in the ordinary course. The applicant should, in my judgment, be enabled to be heard as soon as practically possible, founded on a basis of urgency.

It is for these reasons that the objections *in limine* fall to be dismissed.

It is therefore ordered that the matter be heard on the merits as soon as practicably possible, on a date to be arranged with the registrar, allocated on the "midweek early morning roll" if need be, should the contested motion court roll not be feasible. Filing of further papers, if need be, is to be arranged between the respective attorneys and if need be, the court may be approached for appropriate directives.

In the interim, it is ordered that transfer of the property known as Lot No. 1256, Mbabane extention No. 11, (Thembelihle Township), be held in abeyance until final determination of the application. This *interim* interdict may be registered in the Deeds Office against the property, at cost of the applicant.

Costs arising from the hearing of the interlocutory objections *in limine* are ordered against the first and second respondents, following the course of the outcome.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE