IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Civil Case No. 796/2006

In the matter between:

BANZIE NOHA MASIPA 1st Applicant

ANTONIO TEBOGO MASIPA 2nd Applicant

AND

SWAZILAND BUILDING SOCIETY 1st Respondent

ADAM MTHETHWA 2nd Respondent

REGISTRAR OF DEEDS 3rd Respondent

In re:

SWAZILAND BUILDING SOCIETY Plaintiff

And

MANGALISO BASIL LESEDI CELE 1st Defendant

MICHALINE ZODWA MASIPA 2nd Defendant

Coram: Annandale, AC J

For the Applicants: Mr. L.R. Mamba of Mamba and Associates

For 1st Respondent: Mr. B. Magagula of Robinson Bertram Attorneys

For 2nd Respondent: Mr. M. Mabila of RJS Perry and Associates

JUDGMENT

14 September, 2006

[1] The present application is part of an ongoing fountain of litigation which is centred around immovable property that used to belong to the late mother (2nd Defendant) of the two Applicants. She pledged it in a surety mortgage bond to the Swaziland Building Society (1st Respondent/Plaintiff] in order to secure a loan for her grandchild (1st Defendant). The latter defaulted in his repayments and judgment by default was taken against him by the Swaziland Building Society, with a resultant sale in execution of the property to the 2nd Respondent, following unsuccessful attempts by the Applicants to stop the process from reaching that far.

[2] This application is to seek a stay of transfer of the property to the purchaser pending finalisation of an appeal, and at the same time, to interdict the Registrar of Deeds from registering transfer of the property to anyone at all. Prior to dealing with the legal points raised by the first two Respondents, it is useful to first look at the history of the matter.

[3] Before doing so, I record my regret for not handing down this judgment any sooner. It has taken inordinately long due to various factors. Initially, I wanted to research the applicable law and came to a provisional view, which then had to be set out as I do below but events took turn for the worse with an immense workload of further reserved judgments and an ongoing stream of litigation that had to be

heard day by day. With a backbreaking workload, numerous engagements in my other official duties, a phletora of problems and crisis to attend to, this matter suffered the fate of undue delay and for that I can only but apologise to the concerned parties. However, during the course of hearing the matter, I ordered that the relief which is sought in this application be recorded as a *caveat* against the title deed by the 3rd Respondent, and that the 1st and 2nd Respondents refrain from seeking transfer until the matter has been finalised. After argument was heard and a ruling reserved, this preserving order was extended until judgment is handed down, which with hindsight, was the correct approach to preserve the *status quo* for the time being.

[4] The brief history of the matter is that the Swaziland Building Society obtained a default judgment in Case Number 360/05 against the first Defendant, Cele, which included an order to execute the fixed property. By then, the second Defendant who pledged the property had already passed on, hence no judgment was sought against herself, or her estate for that matter.

[5] Thereafter, a stay of execution of the immoveable property was sought by the present two Applicants, pending the appointment of an executor dative in the estate of the late Ms. Michaline Zodwa Masipa and issue of Letters of Administration to the executor dative. That application did not also incorporate any prayer to rescind the judgment.

[6] In that application, Banzie Noha Masipa stated the

relationships between the parties to be that Michaline Zodwa Masipa, the deceased mortgagor of the fixed property, is his mother. His sister is the second applicant and she is also the mother of his nephew, Mangaliso Basil Lesedi Cele, who is the first Defendant in the initial action and it is his loan from the Swaziland Building Society which was covered by the security bond given by his grandmother, the second Defendant.

[7] He also stated that the two applicants are the only surviving children of the deceased, the second Defendant, who was a widow at the time of her death on the 19th December 2004. From a death certificate annexed to that application, it seems that *ex facie* the document, her first names were Taulethu Michaline and not Micaline Zodwa, that she died on the 12th and not the 19th December 2004 in Johannesburg and that she was never married, rather than being a widow. To further add to uncertainty, the surety mortgage bond has it that she is known as Michelin Thuledu Zodwa Masipa, married out of community of property to Vincent Jackson Masipa. At present, there is no real dispute as to these aspects.

[8] The first Applicant continued to state that he and his sister are the sole heirs of her intestate estate, that they thus have a legal interest in its protection. Finally, he states that in the main, legal proceedings against his late mother must be stayed pending the appointment of an executor.

[9] The Swaziland Building Society succeeded on a point of

law to prevent such order being issued. In their notice to raise points of law, the ground of urgency on which the application was brought was attacked. Secondly, it was said that the two applicants had no *locus standi* to approach the court, to which I revert below. A third aspect was held out to be that the court could not rescind and set aside the judgment, on various motivations.

[10] As remarked above, the application to be considered was not one for rescission of the default judgment but to stay proceedings pending appointment of an executor dative.

[11] A further point of law had it that the 1st Applicant did not state his citizenship, rendering his affidavit defective since it could not be ascertained whether he was a *peregrinus* or *incola.*

[12] According to notes on the court file, the application for a stay of the proceedings was heard on the 23rd February 2006, with judgment on the points of law being reserved. Four days later, the file is endorsed by my learned brother Judge to the effect that the "*points of limine (are) upheld and application dismissed with costs.*"

[13] Unfortunately, no reasons for the outcome are known. There is no written ruling and no transcript of it either. This court thus does not know whether one or more of legal points were upheld, or which of them, if not all. Since the present application was heard, despite an enormous delay in this judgment, no transcript or written reasons have been

filed either. I mention this since there is an overlap with similar points being raised in the present application, to some extent, and I have no desire or jurisdiction to pronounce on a point of law that has already been decided.

[14] As matters stand, there are now assertions that an appeal is yet to be noted against the ruling of the 27th February this year, but no notice of appeal nor any accompanying papers to it has been field of record in the present application. The very notion of the intended or purported noting of an appeal is also in issue.

[15] The further point of law raised by the Swaziland Building Society, which again rears its head in the present application, concerns the *locus standi* of the applicants. It was then submitted that they could not seek relief or come to court as it were, "*... in so far as the property mortgaged under surety mortgage bond No.304/2003 is concerned.*" In terms of clause 40.2 of the mortgage bon the following provision is stated:

> "*On the death of the mortgagor before the death of the principal debtor, the property shall forthwith become the property of the principal debtor regardless of the provisions of any will made by the mortgagor or of the law of intestacy and the executor in the estate of the mortgagor shall be obliged to transfer the property, into the name of the principal debtor.*"

[16] This clause is determinative in the present outcome of the matter. The Swaziland Building Society relies on it to exclude *locus standi* in respect of the applicants, but its implications go further. In effect, this clause purports to

deprive all interest and ownership in the property from the owner, the deceased, in the event that the borrower, Cele, defaults in his payments on the loan, whatever inequity it may have as result. In my view, such a clause is *contra bonos mores* and as such, unenforceable.

[17] Clause 40.2 of the Surety Mortgage Bond, on which the Building Society relies, cannot be read in isolation either. Clause 40, the preamble to clauses 40.1 and 40.2, reads that:

> "*40. In the event that the Principal Debtor and the Mortgagor are married (my emphasis), the following provisions shall apply.*"

[18] It is not so that the principal debtor and mortgagor were married to each other, as is shown above. They were relatives, but not spouses.

[19] The further contentious provision, under clause 40.1, is that on dissolution of the marriage, for whatever cause, and which in any event is not presently applicable, the "property shall be transferred by the Society to the Principal Debtor..."

[20] Again, in my view, it *prima facie* seems to be *contra bonos moros* to so unfairly discriminate and cause consequences that can be grossly unjust. Even if a minimal amount remains unpaid by the borrower, a valuable property may be lost without any recourse or any consideration.

[21] Furthermore, even if this was not the position, at the time Zodwa Masipa passed the bond in favour of the Society, she was an old woman of about eighty years when she allegedly signed the power of attorney to register the bond. It is not alleged that she understood what she did, especially so when regard is had to the recorded renunciation of legal exceptions attributed to her, as stated on page two of the bond.

[22] The object of the present application is to stop the execution against the estate, seeing that no executor was appointed. It was brought by the two children of the deceased. It remains unknown as to why the Master of the High Court did not urgently make it his business to appoint an executor who would be in the proper position to act on behalf of the estate.

[23] At minimum, these two children, the Applicants, act as *negotiorwn gestors* to preserve the integrity of the estate until such time that an executor is enabled to properly deal with the matters of the estate.

[24] Mr. Mabila, arguing on behalf of the 2nd Respodnent, referred the court to the case of KLEPMAN, NO v LAW UNION & ROCK INSURANCE CO. LTD 1957(1) SA 506 (WLD) where Williamson J held at page 513-B that:-

> "*In my view an executor or executrix testamentary has no* locus standi *as a representative of the estate unless and until he or she actually receives letters of administration.*"

[25] I respectfully agree with this dictum but the present Applicants do not endeavour to sue the estate or sue on its behalf, as stated above. Their objective is to have an asset of the estate preserved until the Master appoints an executor and issues Letters of Administration. It is only once that has been done that a proper determination can be made as to the future of the piece of land in contention. At present, the estate remains in limbo, it cannot yet sue or be sued. Klepman *(supra)* is not authority to dismiss the present application *in limine* as argued for the second Respondent.

[26] It is on this same basis that the argument, that it was incumbent and peremptory to also join the estate as a respondent, cannot be sustained.

[27] For the reasons stated above, the respondents cannot now have the application dismissed *in limine,* thereby avoiding a hearing and determination of the merits. Therefore, the points raised *in limine* by both 1st and 2nd Respondents are ordered to be dismissed, with costs to follow the event.

[28] Should the Respondents wish to pursue their opposition, their affidavits may be filed in the prescribed manner, as sought by each of them in their respective notices to raise points of law. For the time being, the interim relief as recorded by the court shall remain as measure to preserve the current status of the property.

J.P. ANNANDALE

Acting Chief Justice