

**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 4005/2005**

**In the matter between;**

**JABULANI NXUMALO**

**APPLICANT**

**VS**

**SWAZILAND BUILDING SOCIETY**

**1<sup>st</sup> RESPONDENT**

**O.E. ROWBERRY N.O.**

**2<sup>nd</sup> RESPONDENT**

**CORAM: MAMBA AJ**

**FOR APPLICANT: MR. B. MTSHALI**

**FOR RESPONDENTS: MR. B. MAGAGULA**

**JUDGEMENT**

**20/01/06**

On the 5<sup>th</sup> day of October, 2005 the applicant was served by the 2<sup>nd</sup> Respondent with a writ of attachment and the applicant's immovable property was put under attachment. This was apparently pursuant to an order of this court granted in favour of the 1<sup>st</sup> Respondent against the Applicant under case number 2477/2005. Following that attachment, the sheriff of this Court

gave notice in the Swaziland Government Gazette that the property would be sold by public auction on the 4<sup>th</sup> day of November 2005 at 1130 a.m.

It would appear that on the 17 day of October, 2005 the applicant met with the Chief Executive Officer of the 1<sup>st</sup> Respondent and the Applicant's debt with the 1<sup>st</sup> Respondent and the pending sale of the former's property was discussed. According to the 1<sup>st</sup> Respondent, the Applicant was told *"that the only other option was for him to find a buyer for his property who would pay up the judgement debt, costs and fees by bank guaranteed cheque or cash"* He was told further that if the 1<sup>st</sup> respondent *"did not receive the money by the date on which the auction was scheduled, which was the 4<sup>th</sup> November, 2005, the sale"* would proceed as advertised.

The Applicant confirms that he was advised by the Chief Executive Officer that he had to find a buyer to purchase the property attached and he, the Applicant set out to find such purchaser as advised.

At 5.30 p.m. on the 3<sup>rd</sup> day of November, 2005 the Applicant filed with the Registrar of this Court and served the P' Respondent with this urgent application wherein he claims for;

1. Condoning any non-compliance with the rules of Court with in respect of form of notice, time limits and service of applications in view of the urgency of the matter.
2. A rule nisi with interim and immediate effect returnable on a date to be fixed by this Honourable Court calling upon the Respondents to show cause why a final order should not be granted:-

2.1. Staying the sale in execution of the writ dated 24<sup>th</sup> August, 2005, pending the determination of this application;

2.2. Costs of this application.

This application was set down for hearing at 8.30 a.m. on the next day. The applicant stated and submitted that the application was urgent because of the following reasons:

"The matter is urgent because the sale in execution is set to proceed at 11:30 a.m. on the 4<sup>th</sup>

November 2005, and if it proceeds, I will suffer irreparable harm in that once it is sold to an innocent third party, the costs involved in reversing the sale and the inconvenience to all the parties involved would be astronomical." and that, rather hesitantly, "the delay was also occasioned by the fact that the I<sup>s</sup> Respondent's Chief Executive Officer had been in constant contact with me about the property and that KC also agreed to let a third party, to wit, Turns du Pont, take over the bond over the property." The Chief Executive Officer denies that he ever had any discussion, let alone an agreement with Mr Turns du Pont with regards to the matter. This court has heard nothing from Mr Du Pont. One would have expected that if such an agreement had been reached between the Chief Executive Officer and Mr du Pont, the applicant would have filed such confirmation by Mr du Pont. I note further that according to the applicant the Chief Executive Officer told him that there was only one way of stopping the sale : The applicant had to find a buyer for his property who would pay up the judgement debt, costs and fees by bank guaranteed cheque or cash. There was no option of getting a third party to take over the bond or applicants' loan account.

At page 14 the applicant rather plaintively states that notwithstanding "all my efforts I have come to realise that the sale in execution of my property scheduled for the 4\* November 2005 at 11:30 a.m. is set to proceed since I have failed to come up with the entire judgement debt against me. I now seek the Honourable Court's assistance to stay the sale of my immovable property since it is clear that I have actively sought to rectify my default in payments by firstly, seeking and finding somebody to take over the bond and secondly, in trying to obtain assistance from Swazi Bank to take over the loan from the P<sup>l</sup> Respondent".

### **URGENCY**

The applicant states in his founding affidavit that the matter is urgent because if the sale goes ahead and the property is bought by a third party, "the costs involved in reversing the sale and the inconvenience to all the parties involved would be astronomical". This is in my judgement an admission that in the event the sale in execution proceeds as scheduled, the applicant would be afforded substantial relief at a hearing in due course. He merely complains that such relief would be costly and an inconvenience to all parties concerned. He admits that the sale would be reversible.

The applicant further states in his papers that the application is urgent in view of the fact that the sale in execution was due to take place before the return of his prospective financier Mr Tunis du Pont from Johannesburg and before his request for financial assistance could be considered by the Swazi bank. He expected his application for finance to be considered by the bank within a week.

The attitude of the 1<sup>st</sup> Respondent was this : Whether your would be financier has gone to Johannesburg on an urgent business trip or gone to Honolulu on a holiday; you have at this stage not paid your debt or given us any suitable alternative arrangement on how you would liquidate your debt. We are therefore going ahead with the sale in execution. The 1<sup>st</sup> Respondent, was, I think, perfectly entitled to take this view.

In essence, the applicant pleads with the 1<sup>st</sup> Respondent that " Do not sell my property, I will, God willing repay you". This, to my mind, is not a good ground either to stay the sale or to found urgency.

Lastly and perhaps rather belatedly, the applicant states that the application is urgent because the notice of sale in execution is fatally defective, defective because the description of the property therein does not mention the fixed improvements on the property. The answer to this is, I think, this : If the notice is defective as argued, in law it is a nullity and no sale may result therefrom. In the event a purported sale is concluded , the applicant's remedy lies in vindicatio and not in urgency. As stated above, it would also appear that the notice of sale was published in the Swaziland Government Gazette on the 14<sup>th</sup> October, 2005. The applicant apparently did not find it urgent then to attack its validity until on the 3<sup>rd</sup> day of November, 2005, just a day before the scheduled sale in execution.

For the foregoing reasons, I am not satisfied that these are factors that are sufficient to justify or warrant that this application be heard on an urgent basis as provide in rule 6 (25) of the rules of this court.

The order issued by this court on the 4<sup>h</sup> December, 2005 herein is hereby discharged with costs, such costs to include the costs of re-advertising for the auction sale, should such re-advertising be necessary.

In view of this conclusion, it is not necessary for me to consider the other points raised by the applicant on the merits of the application; for instance, that the intended auction sale should be stayed or set aside because the notice of sale falls short of the requirements of rule 46 (8) (b) of the rules of this court by failing to mention the immovable improvements on the property.

Mr Magagula for the Respondent urged the court that in view of the delay in concluding the sale which has been caused by this application I should abridge the period within which the notice of sale and such sale in execution should take place. I am not persuaded that there are sufficient grounds in this case for me to grant such an order.

MAMBA AJ