

**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

Civil Case No. 876/2001

**DUMSANE H. MKHONTA** 1<sup>st</sup> Applicant

**EMAHLUNGWANE (PTY) LTD** 2<sup>nd</sup> Applicant

**And**

**SWAZILAND DEVELOPMENT & SAVINGS BANK** 1<sup>st</sup> Respondent

**FLORA DUBE N.O.** 2<sup>nd</sup> Respondent

**In Re:**

**SWAZILAND DEVELOPMENT & SAVINGS BANK** Plaintiff

**And**

**DUMSANE HARRINGTON MKHONTA  
t/a EMAHLUNGWANE (PTY) LTD** Defendant

**Coram: S.B. MAPHALALA - J**

**For the Applicant: MR. O. NDZIMA**

**For the Respondent: MISS VAN DER WALT (Instructed by the office of Currie & Sibandze)**

**JUDGMENT**  
7<sup>th</sup> March 2008

[1] The 1<sup>st</sup> Applicant, Dumisane H. Mkhonta filed an urgent application against the Respondent for an order in the following terms:

1. Dispensing with normal provisions of the rules of this Honourable Court relating to form, service and time limits and hearing this matter urgently.

2. Condoning Applicant's non-compliance with the rules of his Honourable Court.
3. Condoning Applicant's late filing of this application.
4. That the Respondent be and is hereby directed and ordered to produce loan agreement(s) entered into by and between Applicants and Respondent under Account Numbers 5L569603, 11615690, 116168343, 111202206 or any other account.
5. That the respondent be and is hereby directed and ordered to produce a reconciled statement of account under account numbers 5L569603, 11615690, 116168343, 111202206 or any other account showing amounts paid by Applicants to Respondent and vice-versa.
6. That the Respondent be and is hereby ordered and directed to produce a certificate of indebtedness under account number 5L569603, 11615690, 116168343, 111202206 or any other account relating to Applicants.
7. That the judgment of the above Honourable Court under case Number 876/2001 be and is hereby stayed pending finalization of this matter.
8. That the sale in execution of Lot No. 377, Piggs Peak Township, be and is hereby stayed and/or suspended pending finalization of this matter.
9. That the order of this Honourable Court granted on the 27<sup>th</sup> may 2001 under case Number 876/2001 be and is hereby varied, set aside and/or rescinded.
10. That prayers 1,2,3,4,5,6,7, 8 and 9 operate with immediate effect as an interim relief pending finalization of this matter on a date to be determined by this Honourable Court.
11. Costs of suit at the scale of attorney and own client.
12. Any further and/or alternative relief.

[2] The Founding affidavit of the 1<sup>st</sup> Applicant is filed in support of the application where the history of the matter is canvassed. Pertinent annexures are also filed including annexure "DM1" being provisional sentence summons under Rule 8 (1). A letter dated 6<sup>th</sup> October 2004, from

Senior Manager Recoveries to Attorneys Ntiwane & Associates as annexures "DM2", "DM3" and "DM4" being loan statements from the Swazi Bank. Further annexures "DM5", "DM6", and "DM7" being letters of correspondence between the parties. Annexure "DM8" being a writ of execution under Rule 46. Annexure "DM9", "DM10 and "DM11" are also filed in support of the Applicant's case.

[3] The 1<sup>st</sup> Respondent opposed the application and has filed an answering affidavit of one Sabelo Peleowa who is a Manager of Business and Corporate of the 1<sup>st</sup> Respondent. It is averred in the said affidavit that prior to dealing with the merits of the application, the court should dismiss the Applicants' application with an appropriate punitive costs order, including the certified costs of Counsel on a number of grounds *in limine*.

[4] The first point is that of urgency that the matter is not urgent and Applicant has not set out sufficient allegations to support an application brought on an urgent basis.

Secondly, that Applicants have not shown good cause i.e. a reasonable explanation for delay.

The third point *in limine* is that there are material disputes of fact. The fourth point *in limine* is that there are insufficient allegations to establish a cause of action.

[5] The court heard submissions during the court recess in December 2007, and reserved its judgment to a future date. Following is the said judgment and I wish to apologize profusely of the delay in issuing the judgment as the file involving this was misplaced in my chambers. That as it may, I shall address *ad seriatim* the points of law cited above.

**(i) Urgency**

[6] The argument by the Respondents in this regard is that the Applicant elected not to take the court into its confidence by disclosing when they learnt of the proposed sale. The instant application was only filed on the 5<sup>th</sup> December 2007 and there is no explanation whatsoever for the Applicants' failure to file same sooner. The 1<sup>st</sup> Respondent believes that Rule 46 (8) (c) requires a notice of sale of immovable property to be published not later than 14 days (being court days) before the date of sale, which means that there is a time window of almost 3 weeks. There has been a new notice of sale and therefore there is no urgency.

[7] It would appear to me in view of the passage of time and the fact that the matter came before me during the vacation that it would be pointless for this court to consider the point concerning urgency. In view of these circumstances I will proceed to consider the matter as if it had commenced in the long form. Therefore I will not make any decision either way on the issue of urgency.

**(ii) Condonation.**

[8] The argument for the Respondent in this regard is that as regards the prayers for stay and/or variation, setting aside or rescission of the relevant judgment (prayer 7 and 9). That no attempt had been made to rescind the judgment prior to the instant application being filed. The Applicants were fully aware of the execution sale scheduled for the 16<sup>th</sup> November 2007, and there is no explanation, reasonable or otherwise, as to why they waited until the 5<sup>th</sup> December 2007 to address the issue. In the premises, the Applicants have failed to clear the first hurdle of a reasonable explanation for the delay, and the relief sought in these prayers stand to be dismissed outrightly with costs, including the certified costs of Counsel.

[9] Further on, Respondents contended that in so far as it may at all be necessary to address the other requirements for condonation the inference that the Applicants are not *bona fide* and are attempting to delay the 1<sup>st</sup> Respondent's claim, is inescapable. For years and years they have made no serious or genuine attempt to settle the indebtedness to the 1<sup>st</sup> Respondent. Even if the Applicants could be said to have a *bona fide* defence of sorts, the severe prejudice to the 1<sup>st</sup> Respondent should the application be granted is self-evident and manifest and this prejudice cannot be cured by an order as to costs.

[10] As regards the prayer for staying the sale in execution (prayer 8) and for production of documents (prayer 4 and 5) there is again no explanation, reasonable or otherwise for the delay in bringing their application, and what is stated above, is repeated. The relief sought in these prayers therefore also stand to be dismissed outright.

[11] The simply answer by the Applicant to the above arguments is that his default of appearance in court was not due to disregard of the Rules of court but due to non-receipt or service of summons. After considering the arguments of the parties in this regard I have come to the considered view that the explanation given by the Applicant is reasonable on the facts of this case. I therefore grant the Applicant the required condonation. This point of law *in limine* is accordingly dismissed.

**(iii) Material disputes of facts.**

[12] According to the Respondents the Applicant do not deny that they are indebted to the 1<sup>st</sup> Respondent, but challenged the exact monetary extent of the indebtedness. As it is clear from the

correspondence attached to the Founding affidavit (notably annexure "DM6" and "DM10") there are material disputes of fact in this regard. Not only were these disputes forceable, but the Applicants were advised as early as June 2005 by their then attorneys of record, Messrs Maseko, Dlamini & Associates that in **"any action that may be instituted, the prospect of success, if any, are very limited and also that there is no quick relief available to you. The matter may take years before it is finalized"**.

[13] On the other hand Applicant replied to the above averments by the Respondent in his replying affidavit saying there are no material disputes of fact in this matter. That Respondent themselves have failed to indicate to this court the said material disputes of fact. The contents of annexure "DM7" does not relate to this application.

[14] After assessing the arguments of the parties and the affidavits filed of record as regards this issue of the disputes of fact I have come to the considered view that Applicants argument is preferable to that of the Respondent because annexure "DM7" does not relate to this application and therefore it cannot be said to be in contrast to annexures "DM6" and "DM10".

**(iv) Insufficient allegation to establish a cause of action.**

[15] The argument in this regard is that the Applicants only apparent explanation for the delay (in paragraph 12 of the Founding affidavit) is a "submission" and not an allegation of fact. That the parties **"be engaged in talks to sort out the matter because it was apparent the 1<sup>st</sup> Respondent was in error in their calculations"**. This is a bald statement without reference to the date, time, place or person(s) allegedly involved. What is glaringly lacking is any allegation that the 1<sup>st</sup> Respondent agreed or had undertaken not to execute on the judgment.

[16] In answer to the above-cited argument Respondent state in his replying affidavit in paragraph 3.4.1 to 3.4.4 as follows:

3.4.1. I wish to state that sufficient allegations have been made in the application for this Honourable Court to issue an order. I have stated and it also appears in the correspondence between the parties that the parties were actually in talks and thus the process was stalled from March 2001 until now in 2007. It does not need an explanation that the parties were engaged in talks but the facts speaks for themselves in the premises. The time, date, place and persons involved appears in the annexures in my founding affidavit. The annexures and the negotiations or talks between the parties have not been denied.

3.4.2. It is also clear that execution was held in abeyance because the parties were in talks. This is mentioned because judgment was granted in 2001 and in the interim it is clear the parties were engaged with each other until 2007 as per the annexures in my founding affidavit.

3.4.3. I wish to state further that I could not file a confirmatory affidavit of my wife because she is so sickly that she cannot even be able to write. The sickness is such that my wife seems like she has lost her senses now. Otherwise, the fact that she did not receive the summons was made known to me a long time ago when she was still capable of appreciating life.

3.4.4. All in all, I wish to state that the point of law raised are not good enough and ought to fail in the circumstances. I therefore pray that the points of law be dismissed with costs.

[17] In this regard I am inclined to agree with the Applicant that this point *in limine* ought to

fail.

[18] In the result, for the afore-going reasons the points of law *in limine* are dismissed with costs and an interim order is issued forthwith. I further order that the matter proceeds on the merits of the application.

**SB MAPHALALA  
JUDGE**