

THE HIGH COURT OF SWAZILAND

SWAZILAND DEVELOPMENT AND SAVINGS BANK

Applicant

And

GEORGE HOTEL PROPERTIES (PTY) LTD

1st Respondent

THE SHERIFF OF THE HIGH COURT

2nd Respondent

THE REGISTRAR OF DEEDS

3rd Respondent

Civil Case No. 2932/2002

Coram

S .B. MAPHALALA - J

For the Applicant

Advocate P. Flynn (Instructed by

Robinson Bertram)

For the Respondent

Mr. L. Mamba

JUDGEMENT

(04/09/2003)

Serving before the court is an application brought under a certificate of urgency for an order as follows:

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1. Dispensing with the normal provisions of the rules of this Honourable Court as relate to form, service and time limits and hearing this matter as an urgent one at Common Law.
2. That the execution of the judgment as given by His Lordship the Honourable Mr. Justice Maphalala on the 18th of May 2003, temporarily be suspended pending the outcome of the application for condonation and appeal launched in the High Court of Appeal in Swaziland.
3. Interdicting and restraining the second respondent temporarily from executing the order issued in accordance with the judgement as given on the 18th day of March 2003, pending the outcome of the application for condonation and appeal launched in the High Court of Appeal of Swaziland.
4. Interdicting and restraining the third Respondent temporarily from cancelling the mortgage bonds nos. 133/1980, 485/1987 and 447/1987 registered over lots 152, 159 and 370 in the township of Manzini, district of Manzini, held under Deed of Transfer No. 99/1980 pending the outcome of the application for condonation and appeal launched in the High Court of Appeal of Swaziland.

5. Further and/or alternative relief.

The founding affidavit of Bonginkosi W. Magagula is filed in support thereto. Mr. Magagula is an attorney under the employ of Robinson Bertram. Various annexures are also filed viz annexure "A" being a judgment by this court delivered on the 18th March 2003, annexure "B" being a Notice of Appeal against that judgment; and annexure "C" being a notice of motion for condonation for the failure to lodge the record within the time periods as prescribed in terms of Rule 30 (1) of the rules of the Court of Appeal.

Per contra the 1st Respondent opposes the application and the founding affidavit of its attorney Lindifa Ronald Mamba is filed thereto. Various annexures are filed being "LM1 - 3" mortgage bonds in respect of the properties in issue; "LM4" being a deed of transfer in respect of the 1st Respondent. A confirmatory affidavit of the Registrar of Deeds Juba Samuel Dlamini.

The facts of this matter as gleaned from the founding affidavit of the Applicant is that a judgment was given in this matter on the 18th March 2003 by this court. The Applicant was dissatisfied with the judgment of the court and appealed against the judgment given.

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On the 28th March 2003, a Notice of Appeal was served on the attorneys for the 1st Respondent. The Notice of Appeal was lodged with the Registrar of this court on the 31st March 2003. According to Mr. Magagula due to circumstances set out more clearly in the notice of motion for condonation for the late filing of the record, an application has been brought to condone the late filing of the record, which was due to an error in their offices and not as a result of any action taken by the Applicant in this matter.

He further deposes that he is firmly of the belief that should the matter be heard by the Court of Appeal, it will come to a different finding to which was found in the court a quo. The late filing of the record was a bona fide error on his side and that there was no intention to abandon the appeal, but that the appellant is still interested in continuing with the appeal. Furthermore, it has however come to his attention that the 1st Respondent intends to enforce the judgement given on the 18th March 2003. In fact, he has recently had a telephone conversation with Mr. Mamba for the 1st Respondent who has said he has already executed the order. However his search at the Registrar of Deeds shows that the bonds have not been cancelled yet. It is imperative that the court grants the relief they seek in the notice of motion before the 3rd Respondent cancels the bonds.

He avers at paragraph 13 that should the Respondent be allowed to execute on the judgment unnecessary hardship will be caused to the Applicant should it be successful in its appeal. It would be impossible for the status quo ante to be restored subsequently to the properties having been executed upon the mortgage bonds cancelled without the Applicant suffering irreparable damages both monetary and otherwise. At paragraph 15 he avers that there would, be no prejudice to the Respondent if the mortgage bonds over the properties are not cancelled immediately but that the writ of execution is stayed temporarily the same however cannot be said for the Applicant. The Applicant would be severely prejudiced; if the mortgage bonds are cancelled. At paragraph 16 the Applicant avers that it has a reasonable prospect of success in the appeal. Real and substantial justice requires that the cancellation of the mortgage bonds and any subsequent sale in execution be stayed as an injustice will otherwise be done as the underlying causa of the judgment is being disputed.

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The opposition to the application is found in the affidavit of 1st Respondent's attorney Mr. Mamba. It is contended that the Applicant has failed to inform the court that the application for condonation is being opposed. Furthermore, the intended application is bound to fail in that nowhere is it even alluded in the affidavit of the Applicant what the nature of the defence to the claim is. According to Mr. Mamba it is clear, if one considers the attitude of the present Applicant both in the main action in this court and in the Court of Appeal and in this application that there is no defence to the main action.

Mr. Mamba avers that he is prepared to concede that the error in filing the record timeously by the Applicant's attorney is understandable and excusable, however it would have to show prospects of success in the main action. They have failed to do so.

Further, Mr. Mamba admits that he informed Mr. Magagula that the order had been executed. He denies, however that Mr. Magagula did any search at the Deeds office because if he had done so that search would have revealed that the bonds were cancelled on the, 5th June 2003. The court is now. not in position to assist the Applicant because what the Applicant seeks to interdict has already taken place. Had Mr. Magagula done a search it would have revealed that an attachment was subsequently placed on the said title deed pursuant to an order of court under Case No. 1449/2003 in which the present Applicant is not a party.

Lastly, Mr. Mamba commented on the manner in which this application has been brought. Mr. Magagula conveniently does not state the date of their conversation which was over three weeks ago. He does not state the date he conducted his search. He now seeks to bring the application giving the Respondent half an hour to file opposing papers and three hours to file; affidavits. He does not explain the delay. According to 1st Respondent this is essentially an attempt to. have an opposed matter heard ex parte without giving the other side a hearing and is an abuse of the process of the court. This is an appropriate matter where punitive costs on an attorney and own client basis ought to be awarded.

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When the matter came for arguments Mr. Flynn for the Applicant contended that in view of the fact that the bonds have been cancelled they are now seeking a remedy under further and/or alternative relief for an order interdicting the Registrar of Deeds from transferring the properties in question. He argued that it would seem that the cancellation of the bonds in view of the notice of appeal having been filed was too hasty on the part of the Respondent. The Respondent acted with undue haste in proceeding to the Registrar 5 days after. I must say that this argument has no merit because the 1st Respondent was perfectly entitled to assume that the appeal had been abandoned in terms of the rules of court. In my view this criticism directed at the 1st Respondent is unwarranted and is of no consequence.

Mr. Mamba advanced contrary submissions in line with his averments in the opposing affidavit.

It would appear to me that the Applicant concedes that the court cannot grant the orders prayed for in the notice of motion. It is now common cause that the bonds were cancelled on the 5th June 2003. This is reflected in the bonds themselves marked annexures "LM1" and "LM3" and a copy of the holding title marked "LM4" as well as an affidavit by the Registrar of Deeds marked "LM5". It is trite law that the court will not grant an interdict restraining an act already committed for the object of an interdict is the protection of an existing right (see Conde Nast Publications Ltd vs Taffe 1951 (1) S.A. 81 (c) and Greyhound Racing International. (Pty) Ltd vs Game Supermarket (Pty) Ltd Civil Case No. 2714/96 (unreported)).

Clearly in the present case the court cannot grant the order sought in the notice of motion. However, Mr. Flynn urged the court to grant an order under further and/or alternative relief restraining the Registrar of Deeds from transferring the properties.

It would appear to me that the Applicant's papers do not support such a prayer and further the rights of a third party are now involved in this dispute. In this regard the Registrar of Deeds deposes as follows in his confirmatory affidavit:

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"Furthermore pursuant to a judgment under Case No. 1449/2003 a writ of attachment was placed on the properties and no further transactions can now take place on the title without uplifting the said attachment".

The general rule which has been laid down repeatedly is that an Applicant must stand or fall by his founding affidavit and the facts alleged in it, the main foundation of the application is the allegations of facts stated there, because those are the facts that the Respondent is called upon to affirm or deny (see Pountas' Trustee vs Lahanas 1924 WLD 67 at 68).

In the result, the application is dismissed with costs.

S.B. MAPHALALA

JUDGE