

## IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 490/06

In the matter between:

**BRIDGES MUNRO**

**1<sup>st</sup> APPLICANT**

**ANDRIES STEPHENUS DUPLESSIS**

**2<sup>nd</sup> APPLICANT**

and

**BERNARD MSWELI KUNENE**

**RESPONDENT**

CORAM

: Q.M. MABUZA -AJ

FOR 1<sup>st</sup> APPLICANT

: MR. MSIBI

FOR 2<sup>nd</sup> APPLICANT

: MR. MAGAGULA

FOR RESPONDENT : ADVOCATE LUCAS MAZIYA

INSTRUCTED BY VILAKAZI & CO.

### **RULING 7/12/06**

[1] In this matter the Applicants seek ejectment of the Respondent together with all those under his authority from Portion 26 of Farm Notclieffee No. 674, Siteki in the Lubombo Region

[2] The 1<sup>st</sup> Applicant has stated on affidavit that he purchased certain immovable property described as Portion 26 of the Farm "Notclieffe" No. 674 Siteki in the Lubombo District (hereinafter referred to as the property). The 1<sup>st</sup> Applicant states that he purchased this property pursuant to a sale in execution on the 26/10/2001. The sale in execution came about in a matter between the Swaziland Development and Savings Bank (hereinafter called the Swazi Bank) and the Respondent in High Court Case No. 2936/1995.

[3] The 1<sup>st</sup> Applicant does not state in his affidavit how much he purchased the property for but a Deed of Transfer No. 395/2002 annexed and in his favour thereto discloses that the purchase price was the amount of E80,000.00. Registration of Transfer was effected into the name of the 1<sup>st</sup> Applicant on the 8<sup>th</sup> August 2002.

[4] The 2<sup>nd</sup> Applicant who intervened as a 2<sup>nd</sup> Applicant later in the proceedings seeks a similar order as that of the 1<sup>st</sup> Applicant against the Respondent.

[5] His reasons for doing so are that he has purchased the property from the 1<sup>st</sup> Applicant for the amount of E320,000.00 and has paid a deposit of E150,000.00.

[6] The Respondent has filed an answering affidavit resisting his ejectment and claims ownership of the property. In actual fact he claims that certain irregularities occurred in the sale of this property which must be dealt with before ownership by the 1<sup>st</sup> Applicant can be acknowledged.

[7] Counsel for the Respondent raises what are legitimate queries in my opinion.

[8] The first issue he raised was that it was a condition of their agreement that the property would be sold at a reserve price of E100,000.00 but was instead sold for E80,000.00. In my view the Swazi Bank had a duty to inform the Respondent if there had been a change in condition and why they would not be selling at the **agreed** reserve price especially as they were selling the property for less than the reserve price.

[9] The Swazi Bank could not unilaterally change the conditions without the

Respondent's knowledge/input. In terms of the audi principle the Respondent had a right to be heard in this regard. In this respect the rules of natural justice have been breached and so have the Respondent's rights.

[10] Before the ***audi alterem partem*** principle is engaged a person must be prejudicially affected in his existing rights, liberty or property. In ***casu*** the Respondent was entitled to a hearing because the sale of his property for an amount less than the reserved price caused an economic loss to him.

[11] On the other hand if there was no change of condition, then the sale is invalid. It is of utmost importance therefore for oral evidence to be led to enable the court to decide whether there was a valid sale or not.

[12] I have difficulty in following Mr. Maziya's submission with regard to Section 55 and 56 of the Deeds Registry Act. My understanding of the aforesaid Sections is that even though Section 55 says that there can be no registration until the bond has been cancelled Section 56 validates such registration if is made in execution of a judgment of any court. In the papers before me it is apparent that the 1<sup>st</sup> Applicant's registration of transfer was pursuant to a sale in execution which presupposes that there was an order of court.

[13] I do however take the point that the account of the respondent was not credited with the proceeds of the sale and wonder where that money went to. Only oral evidence can explain that to this court. I agree with Counsel for the Respondent that until these issues are cleared up the Respondent has a right of retention. It is not just a question of having a Title Deed. A man's home is his castle and the Respondent has a right to shelter and if there is a legal basis to that right then it is incumbent upon this Court to protect it.

[14] I also take note of the submission that there were improvements on the property worth E320,000.00. The valuation was carried out on the 3/10/2005. The property was sold after these improvements were effected. The question on the court's mind is why were these effected instead of his son assisting the father pay off the debt. Another question in the court's mind is: does the Respondent have a legitimate expectation to be re-imbursed with this money and if so what is the basis thereof.

[15] The Swazi Bank is a public enterprise created by statute, the Swaziland Development and Savings Bank order No. 49 of 1973. It is subvented by the Swaziland Government with taxpayers money. Its CEO is appointed by His Majesty, the King. It is therefore no ordinary bank. Implied in the Act setting it up is the economic empowerment of Swazi citizens and not their impoverishment as is the case herein.

{16] The officials of the Swazi Bank are public officers who when executing their duties and take decisions which affect others ought to engage the principles of natural justice. A salutary application of this principle is to be found in the case of **Administrator, Transvaal v Traub 1989 (4) SA 731** where the audi principle was broadened and developed to include legitimate expectation.

[17] The failure to credit the Respondent's account with the proceeds of the sale constituted a unilateral decision taken by the Bank. The Respondent had an interest in eliminating his debt and that interest was prejudicially affected by the Banks decision. The Respondent should have had an input in this decision.

[18] I am also mindful of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants' rights herein but the old adage of "**buyer be aware**" should never be lost sight of, no matter how attractive a proposition may seem. Once evidence has been led to clear the above issues the rights of both applicants should be able to fall into place easily.

[19] In the event I order that the issues raised above be referred to oral evidence. Some disputes of fact are very technical as is the case herein and may not be apparent to a litigant when he first launches an application. For this reason costs will be costs in the cause including certified costs of Counsel.

**Q.M. MABUZA J**