IN THE HIGH COURT OF SWAZILAND

CASE NO.4165/07

In the matter between:

YONGE NAWE ENVIRONMENT ACTION GROUP	**APPLICANT**
AND	
NEDBANK (SWAZILAND) LIMITED	**1st RESPONDENT**
SAKHILE NDZIMANDZE DEPUTY SHERIFF IN THE HIGH COURT OF SWAZILAND (HHOHHO DISTRICT)	**2nd RESPONDENT**
SWAZILAND PAVING (PTY) LIMITED	**3rd RESPONDENT**
REGISTRAR OF DEEDS SWAZILAND	**4th RESPONDENT**
THE ATTORNEY GENERAL	5th **RESPONDENT**

CORAM: MAMBA J

FOR THE APPLICANT: Adv. N. KADES SC (Instructed by Mkhwanazi Attorneys in Association with S.M. Mngomezulu)

FOR 1st - 3rd RESPONDENTS: E.J. HENWOOD

JUDGEMENT

24th October, 2008

[1] The Applicant, who is the judgement debtor in the action herein, has filed this application on an urgent basis seeking an order-

> "2.1 That the sale in execution conducted by second Respondent on the 8th August 2008 be declared invalid and set aside.
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> 2.2. That the first, second and fourth Respondents be interdicted and restrained from effecting transfer of the immovable property known as Lot 274 situate in JSM Matsebula Street (off the corner of the Madlenya Street), Mbabane District of Hhohho, Swaziland measuring 2231 square metres and held under Deed of transfer No. 501/2006 dated 11th July 2005 to Third Respondent or to any other person."
>
> 2.3. That the Third Respondent, alternatively second Respondents jointly and severally pay the costs of this application."

[2] In the certificate of urgency accompanying the application,
Applicant's attorney states that;

> "...the matter is urgent particularly because the 1st Respondent's attorneys are seized with the instruction of passing transfer of the property into the name of the 3rd Respondent. The said transfer is imminent hence the Applicant stands to suffer substantial an (sic) irreparable harm in the event this matter were not to be enrolled and heard as one of urgency."

The point is also made in the certificate that the order sought is an interim one and this shall occasion no prejudice to the Respondents as "they will be afforded an opportunity to file their opposing papers, if any, on dates to be determined and fixed by the court."

[3] The Application was filed and served on all the relevant parties on the 28th August, 2008. It was set down for hearing and heard at 3.00 pm on that date and the court ordered, inter alia, that the Respondents be restrained and interdicted from transferring the property in question to anyone, pending finalization of this Application. The Respondents were also ordered to file their respective opposing papers if any, by the 05th

September 2008 whilst the Applicant was enjoined to file its Replying affidavit not later than the 10th September, 2008. The Application was then postponed to be heard on the 12th of that month.

[4] All the parties complied with the above order and the matter was placed before me as duty judge on the appointed day together with other matters brought on certificates of urgency. These were heard after motion court.

[5] I mention here that Applicant's Counsel, who had prepared his heads of argument insisted on the matter proceeding as scheduled in view of the urgency that the Applicant attached to it. Respondent's Attorney had not prepared its heads and no Book of Pleadings had been compiled.

[6] In their opposing affidavit the Respondents have objected in limine that the matter is not urgent and "the Applicant has failed to comply with the peremptory provisions of Rule 6 (25) of The Rules of this Honourable Court which requires the Applicant to state explicitly the circumstances which makes the matter urgent and why it cannot be afforded substantial redress at a hearing in due course."

[7] The Applicant deals with the issue of urgency in paragraph 35 of its founding affidavit deposed to by THULI BRILLIANCE MAKAMA, its director. This is dealt with in two sentences. She submits that;

> "...the granting of the relief prayed for in the notice of motion is a matter of the greatest urgency more particularly as first Respondent's Attorneys and Conveyancers are seized with the matter of passing transfer of the property into the name of the third Respondent and insofar as Applicant is aware the aforesaid transfer might well be imminent.
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> Applicant's attorney has enquired of 4th Respondent and has ascertained that the transfer has not yet been registered into the name of Third Respondent."

Later in her Replying Affidavit Thuli Makama states that;

> "In the very nature of things I have no information concerning when the transfer would be registered and as such I am obliged to act on the assumption that transfer may well be imminent. It is quite clear that Applicant could not be afforded substantial redress at a hearing in due course as in the event of transfer being passed Applicant's rights might well be lost.
>
> In any event it is submitted that the question of urgency is no longer in issue in this

matter, the court having granted the order by consent on 26 August 2008."

(The interim order restraining the respondents from passing transfer of the property was of course granted on the 25th and not the 26th August 2008).

[8] In granting the interim order referred to above, the court did not finally decide or rule on the issue of urgency. It left the door still open to the Respondents to be heard on the issue. In her founding affidavit Thuli Makama says absolutely nothing on the issue of whether or not the Applicant can not be afforded sufficient redress in due course. Similarly Applicant's attorney said nothing of the sort in his certificate of urgency. He ought to have stated the reason or reasons why he thinks the Applicant will not be afforded adequate relief in due course if the matter is not urgently heard. In the matter of **NHLAVANA MASEKO AND 2 OTHERS v GEORGE MBATHA AND ANOTHER APPEAL CASE 7/2005,** the Court of Appeal stated as follows:

> "There has been a tendency to bring matters to court as being so urgent as to justify a departure from the time constraints imposed by the Rules of Court. There can be no doubt that the need exists to cater for the facilitated and speedy access to the court where the delays of the law might cause harm to a litigant and effectively frustrate his chances of obtaining a just resolution of his dispute. Such cases are however, clearly exceptional and our courts must be on their guard to protect parties against the abuse of these special powers. Our Rules of Court have been framed in order to ensure that the legal processes will be orderly and that parties are given a fair opportunity to prepare and present their case. Rule 6 has been designed to achieve this objective and a departure from its provisions will only be sanctioned in cases which fall within the purview of sub-rule 6[25]. ...
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> In several cases before us and in this current matter also, the High Court has allowed applications to proceed as matters of urgency where the facts do not justify such a departure from the Rules. Moreover, the certificates of urgency submitted by counsel - as in this case - are bland and do not comply with the requirements of sub-rule 6 [25] (b)....
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> As is evident from the contents of this affidavit no attempt has been made by the deponent to "set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course." (See also the PRACTICE DIRECTIVE issued by SAPIRE CJ (as he

then was) in this regard).

[9] The Requirements of rule 6 (25) (a) and (b) of the Rules of this Court have been the subject of many decisions of this court, including the following: **HUMPHREY H. HENWOOD v MALOMA COLLIERY AND ANOTHER CASE NO. 1623/93, H.P. ENTERPRISES (PTY) LTD v NEDBANK (SWAZILAND) LTD, CASE NO. 788/99, MEGALITH HOLDINGS v RMS TIBIYO (PTY) LTD AND ANOTHER CASE 199/2000 & BEN ZWANE v THE DEPUTY PRIME MINISTER AND ANOTHER, CASE NO. 624/00** and **NHLAVANA MASEKO (supra).**

[10] In the **Ben Zwane case (supra)** MASUKU J referred to the earlier judgements and stated as follows:

> "Clearly, there was not even a feeble attempt by the Applicant herein to address the requirements of Rule [6] (25) (b), particularly regarding why he claims that he cannot be afforded substantial relief at a hearing in due course. I had occasion to deal with a similar point in the case of MEGALITH HOLDINGS v RMS TIBIYO (PTY) LTD & ANOTHER CASE NO. 199/2000. At page 5, I stated as follows:-
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> > *"The provisions of Rule 6 (25) (b) above exact two obligations on any Applicant in an urgent matter. Firstly, that the Applicant shall in affidavit or petition set forth explicitly the circumstances which he avers render the matter urgent. Secondly, the Applicant is enjoined, in the same affidavit or petition to state the reasons why he claims he could not be afforded substantial redress at a hearing in due course. These must appear* ***ex facie*** *the papers and may not be gleaned from surrounding circumstances brought to the Court's attention from the bar in an embellishing address by the Applicant's counsel."*
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> I reiterate this view. In H.P. ENTERPRISES (PTY) LTD v NEDBANK (SWAZILAND) LTD CASE NO. 788/99 (unreported), Sapire C.J. stated the requirements of the above Rule with absolute clarity, as follows:-
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> > *"A litigant seeking to invoke the urgency procedures must make specific allegations of fact which demonstrate the observance of the normal procedures and time limits prescribed by the Rules will result in irreparable loss or irreversible deterioration to his prejudice in the situation giving rise to the litigation. The facts alleged must not be contrived or fanciful but give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow."*
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> As I have stated, no attempt to address this requirement in his affidavit was made by the Applicant in *casu.* No facts or allegations are made from which it is demonstrated that irreparable loss or irreversible deterioration to this prejudice will ensue. The Applicant attempted to raise some of the facts and allegations in the heads of argument and this is not what is required or contemplated by the Rules. These allegations must be included in

the Founding Affidavit which is deposed to under oath. An applicant must stand or fall on his Founding Affidavit.

In the present application, the Applicant has failed to comply with the requirements of rule 6 (25) (b) and the application must fail and it is dismissed with costs.

[11] There is another issue to which I must refer. In the event that the property in question is transferred into the name of the Third Respondent and thereafter the Applicant is successful in establishing that the sale was invalid, the Applicant would not have an empty judgement as it would be in a position to have the property retransferred to it. Transfer by registration is not irreversible. If after transfer or registration of the property into the name of the third Respondent, the sale is declared or held to have been invalid, the registration ipso facto becomes invalid and reversible. One suspects that it was with this point in mind that the Applicant was unable to state that it can not, if the application is refused, be granted substantial relief in due course. **I** am in respectful agreement with the views of **SAPIRE CJ** in the case of **SIMON MUSA MATSEBULA v SWAZILAND BUILDING SOCIETY (case 66/96B),** judgement delivered on 18th may, 1998 where the learned CJ stated that:

"It appears to be agreed that should transfer to the purchaser take place, the transaction could not be reversed should the Court of Appeal uphold the appeal and hold that the sale was invalid. This view shared by Counsel appearing for the contending parties find support in the decision of a South African court; See **GIBSON, NO v ISCOR HOUSING UTILITY CO. LTD AND OTHERS, 1963 (3) SA 783(T).**

It must, however, be born in mind that decision turned on the wording of Act 32 of 1944, (the Magistrates Court Act (SA)) sec 70 which reads

'A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect.'

No corresponding legislative enactment affecting sales in execution of immovable property by the Sheriff in Swaziland has been brought to my attention, nor have my own researches in this connection revealed any relevant provisions. In the absence of such provisions there seems to be no reason why a transfer effected pursuant to an invalid sale in execution should not be set aside even after registration.

> In principle there seem no reason to me why in the absence of such legislation, a transfer or immovable property, pursuant to an invalid sale in execution should not be reversed together with the setting aside of the whole execution process. There are of course a number of factors, including the rights of the purchaser and his financing institution, which may make it extremely difficult if not impossible practically to unscramble the egg. In this case the Applicant could be left with an action for damages against the sheriff and the respondent to the applicant building society. The balance of convenience could lie with the applicant in favour of granting an interdict if this were the only aspect of the matter to be taken into consideration. But it is not."

[12] In casu, the third Respondent has also indicated in its opposing affidavit that it has expended certain monies in purchasing the property in question. Nothing turns on this aspect of the matter though in this judgement. The applicant has simply failed to make out a case for urgency.

MAMBA J