

**THE HIGH COURT OF SWAZILAND**

**JOHANNES HLATSHWAYO**

**Applicant**

**And**

**SWAZILAND DEVELOPMENT & SAVINGS BANK**

**1<sup>st</sup> Respondent**

**THE REGISTRAR OF DEEDS**

**2<sup>nd</sup> Respondent**

**CECIL JOHN LITTLER NO.**

**3<sup>rd</sup> Respondent**

**SIFISO MAZIYA**

**4<sup>h</sup> Respondent**

**WILLIAM KELLY**

**5<sup>h</sup> Respondent**

**Civil Case No. I 164/99**

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

**For the Applicant : MR. S. MAGONGO**

**For the Respondent: MRS B DLAMINI**

**JUDGMENT**

**(24<sup>th</sup> March 2006)**

[1] The application before court came under a Certificate of Urgency for an order in the following terms:

- 1. Waiving the usual requirements of the Rules of Court regarding notice and service of motion proceedings in view of the urgency of the matter.**
- 2. Pending finalization of this application the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be restrained**

and/or interdicted from transferring lot No. 350 situated at Extension 3, Zakhele Township from the name of my late wife Thandi Judith Hiatshwayo born Msingwane in to the name of Sifiso Maziya, the 4<sup>th</sup> Respondent herein.

3. The 3<sup>rd</sup> Respondent be directed and/or compelled to give a full of detailed account of the liquidation and distribution account he prepared in respect of Estate Late of Thandi Judith Hiatshwayo (born Msingwane) under Estate Late File No. E42/87

4. Reversing and/or declaring null and void the notice of sale which took place on Wednesday the 14<sup>th</sup> January 2004 outside Manzini Magistrate Court at 12.00pm which was conducted by the 5<sup>th</sup> Respondent.

5. The judgment by Default granted by the above Honourable Court in favour of the 1<sup>st</sup> Respondent on the 20<sup>th</sup> September 2003, be set aside or rescinded.

6. Joining Applicant as party to the main action and thereby granting him leave to defend the main action.

7. Rules 2, 3, 4, 5 and 6 hereof operate as an interim relief with immediate effect pending finalization of this application.

8. A rule *nisi* do hereby issue calling upon both Respondents to show cause if any, on a date to be determined by this Honourable Court, why:

8.1. . Rules 2, 3, 4, 5 and 6 should not be made final;

8.2. They should not be ordered to pay costs of this application.

9. Further and/or alternative relief as this Honourable Court deem appropriate.

[2] The parties have joined issue by the exchange of the required affidavits. The history of the matter briefly put is that the 1<sup>st</sup> Respondent is a bondholder against one Thandi Judith Msingwane in respect of a loan advanced for the purchase of immovable property being Lot No. 350 situated at Extension 3, Zakhele Township in Manzini. The said Thandi Judith Msingwane died on the 9<sup>th</sup> April 1987 leaving an unpaid balance of E19, 372-56. The bank then instituted an action against the deceased's husband (the present Applicant), to recover the balance, and judgment was granted by default.

[3] The Applicant then applied for and obtained rescission on the 20 August 1999, on the basis that the action ought to have been brought against the executor *dativo* of his deceased wife's estate. The summons was then amended to cite the executor *dativo* as Defendant. Default judgment was then taken against the estate on the 20<sup>th</sup> September 2002, and the property declared executable. A Notice of Attachment was served on the Applicant, being occupier of the premises on the 27<sup>th</sup> October 2003. A sale in execution was advertised in The Times of Swaziland on the 10<sup>th</sup> December 2003, and in the Government Gazette on the 12<sup>th</sup> December 2003. On the 14<sup>th</sup> January 2004, a sale was conducted and the property was sold to an innocent purchaser who paid

for it in full. On the day of the sale the Applicant approached the court for stay of execution.

[4] From the above-related facts Applicant sought and obtained a rescission of the judgment on the basis that he was improperly cited as Defendant. He now seeks rescission on the basis that he ought to have been cited as Defendant. It remains to be seen whether this position is sustainable.

[5] The Respondents have raised points of law in *limine* at paragraphs 4.1, 4.2, 4.3, 4.3.1, 4.3.2, 4.3.3 and 4.3.4 of its opposing affidavit and also answered on the merits of the matter. However, when the matter came for arguments the points of law in *limine* were abandoned and therefore for purposes of this judgement no further mention will be made in this regard.

[6] On the merits of the matter I heard lengthy arguments from Counsel who also filed Heads of Arguments. According to the Applicant he married the deceased in terms of civil rites and in community of property. The deceased during her lifetime bought the property with the financial assistance of the 1<sup>st</sup> Respondent and the debt was being serviced through a Stop Order facility against the salary of the Applicant's deceased wife. The plot in question was therefore the matrimonial home of the Applicant, his deceased wife and children. In this regard the Applicant relied on the authorities of *Hlahlo R.H. The South African Law of Husband and Wife, 5<sup>th</sup> Edition* at page 157, *Klerk NO. vs Registrar of Deeds 1950 (1) S.A. 81*, and the case of *Naude vs Norwich Union Fire Insurance Co. Ltd 1913 WLD 207*. The court was further referred to Section 11 of the Administration of Estates Act No. 28 of 1902 and the cases of *Costain and Partners vs Goddam NO. 1960 (4) S.A. 456 SR* at 461 and the case of *York and Co. (Pty) Ltd vs Jones NO. 1962 (1) S.A. G55R*.

[7] The Respondents raised other points in *limine* from the bar as outlined in paragraphs 1, 2, 3, 4, 5, 6 and 7 of their Heads of Arguments attacking in the main the Applicant's *locus standi in judicio* on the basis, *inter alia*, that a person who is not a party to an action cannot obtain rescission unless he clearly establishes that he has a vested interest in the matter. On the merits, it was argued for the Respondents that the

Applicant cannot be granted default judgment because the Applicant has not shown a reasonable explanation for the default and neither has he advanced a *bona fide* defence.

[8] It appears to me after reading the affidavits filed in this matter that Applicant was aware of the judgment against the estate. In this regard the affidavits of the executor *dativo*, Cecil John Littler, relates at length the various discussions he had with the Applicant, as well as correspondence to Applicant's attorney, in which the judgment against the estate was addressed and Applicant's avowed intention to approach the Swaziland Building Society for funds to settle the debt.

[9] On the issue of the *bona fide* defence, it appears to me after considering the facts presented on affidavits and the submissions by Counsel that Plaintiff has failed to establish the existence of a *bona fide* defence on the facts of this case. It is not denied that the deceased owed the bank the amount claimed. The executor in the deceased estate was satisfied that the bank's debt was indisputable. The Applicant has mentioned a mortgage protection policy he believes to be in place but has not established its existence. To the contrary, there is overwhelming evidence that the policy was never executed.

[10] In view of the above-mentioned reasons the application ought to be dismissed. However, before doing so, I need to address the issue of costs where Respondent have asked for costs at the attorney-client scale as the application is a clear abuse of process. The award of costs is a matter wholly within the discretion of the court. But this is a judicial discretion and must be exercised on grounds upon which a reasonable man could have come to the conclusion arrived at. (see *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4 Edition* at page 703 and the cases cited thereat). In the circumstances of the present case, I am of the considered view that costs be on the ordinary scale.

[11] In the result, for the afore-going reasons the application is dismissed with costs on the ordinary scale.

**S.B. MAPHALALA**

**JUDGE**