IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 3014/1995

In the matter between:

Swaziland Development & Savings Bank Plaintiff

vs

D& S Trading Co. (Pty) Ltd Defendant

CORAM S.W. Sapire, A C J

Judgment

(21.2.97)

This is an application for summary judgment. The Plaintiff has claimed payment of an amount of E544 461,12, costs on an attorney and client scale and an order declaring property hypothecated in terms of a mortgage bond executable. The summons issued and Declaration served contain full allegations as to how the debt arose .Accounts as well as a copy of the bond are attached.

The particulars of the declaration recite how the defendant became indebted to the Plaintiff. The Defendant itself had operated a banking loan account while Nkosi, a director of the Defendant, had operated two accounts, one of which was a current account and the other a loan account. These accounts were at all times in debit in substantial amounts.

When the defendant was incorporated and registered, and took over the businesses formerly conducted by Nkosi, by agreement between the Plaintiff, the Defendant, and Nkosi, the debit balances on Nkosi's accounts were transferred to the defendant's account. In this way the Defendant assumed liability for the aggregate borrowings of both Nkosi and the

Defendants own obligations. The terms governing the various advances made by the Plaintiff do not seem to have been expressly or impliedly altered in any way.

In January 1994 the Defendant caused a second mortgage bond to be registered over its fixed property to secure its obligations to the Plaintiff " arising from money, lent and advanced and to be lent and advanced from furnishing banking facilities" The Security constituted a continuing covering guarantee for amounts up to E6000 000,00. It is alleged in the Declaration, and on a proper reading of the relevant documents, it would appear to be so, that each of the different advances was governed by the terms upon which the loan was originally made. It is alleged in the Declaration that as at 13th June 1996 the balance due and payable by the defendant in respect of the consolidated accounts was in the sum of E544 461.12 and that despite demand the amount remains unpaid.

The Defendant after service of the summons, gave notice of intention to defend to which the Plaintiff responded with this application for summary judgment supported by an affidavit attested to by Richard John Lynton Tucker who described himself therein as the Acting Managing Director of the Plaintiff, and who claimed personal knowledge of the facts which he swore were true.

The Defendant responded with an Answering Affidavit, attested by David Theo Nkosi, who described himself as the Managing Director of the Defendant and in which he deposed that the Defendant was not defending the matter solely for the purpose of delay, and in the first instance claimed that the Application was defective because Tucker did not have personal knowledge " of this matter" because he had only recently in 1995 became employed by the plaintiff. There is little substance in this contention as one would expect the managing director of a bank to have personal knowledge of the state of the accounts of the customers of that bank, even if he was not the person who originally negotiated any particular contract. In this case t2he documents of which the Deponent had control, to which he had access, and copies of which were attached to the Declaration speak for themselves.

There is accordingly no merit or substance in this first point taken by the Defendant.

The second, point raised by the Defendant is that the amount claimed by the Plaintiff even if owing, is not claimable without formal demand having been made. This contention is based on what was argued to be the terms of the bond. The essence of the submission was that when the bond was passed its terms superseded those of the individual contracts from which the Defendant's obligations arose. The bond provides

"The Mortgagor(s) does declare that in the event of any default by the Mortgagor(s) in the observance or performance of any of the conditions of this Bond or of the failure of the Mortgagor(s) to discharge any obligation or liability to the Bank on due date thereof or to pay on demand any sum which may be legally claimable by the bank, then in such case the Bank shall at its sole option be entitled forthwith to consider the amount of the indebtedness of the Mortgagor(s) to be legally claimable and due without notice and the bank may forthwith proceed for the recovery thereof, and of such other

moneys which may be due under and by virtue of this bond, and to have the property declared executable for the full amount of this bond of for such sum as may be due and the interest to accrue thereon and this may be done without notice to the Mortgagor(s)(any condition to the contrary herein contained notwithstanding)."

The defendant's contention is answered in three ways.

Firstly, the term of the bond relied on, which I have quoted, does not provide what the Defendant say it does. It does not override the provisions which govern the indebtedness which are set out in the documents copies of which are attached as " A"" C" and "F" to the Declaration. Secondly the forfeiture clause becomes operative immediately the Mortgagor is in default in the observance or performance of any of the conditions of the bond or on the failure of the Mortgagor to discharge any obligation due to the Bank. It is alleged in the Declaration that the Defendant did not make payment of obligations stipulated in "A" "C" and " F". This is not denied. No demand was therefore a condition precedent to the full amount owing becoming due.

Secondly this is a case where the service of summons can be regarded as a demand. Thirdly the Plaintiff has , in a replying affidavit demonstrated that demand was in fact made and has remained unanswered. The Defence that summons was premature cannot avail the Defendant in its opposition to summary Judgment.

The defendant also argued in relation to the claim made by the plaintiff to have the hypothecated property declared executable, that as the Plaintiffs was a second bond ranking after the prior first

bond execution could not take place without the knowledge and consent of the first bondholder.

Without an allegation that such consent had bee obtained no order could be made declaring the property executable.

This argument loses sight of several important and distinguishing features in this case. The term of the bond which I have quoted in another connection, provides that on the mortgagor's default the property may be declared executable. The registration of the second bond could not have taken place without the consent of the first bondholder first having been obtained. The first bond holder must have been aware of the provision relating to the declaration of the property executable. In not objecting to the registration of the Second bond containing this term the prior bond holder must be taken to have consented to the granting of an order base thereon. There is no clause in this bond reserving the rights of prior bondholders of IMPENDLE PROPERTIES CC v COMRIE AND ANOTHER 1993 (3) SA 706 (N)

The applicant sought first, an order rescinding a default judgment on a mortgage bond ('the second bond'), and, second, an order setting aside the sale in execution of the mortgaged property. It appeared that the applicant was the registered owner of certain land situated in the 1 magisterial district and that he had granted the second bond over the property to the first respondent. There was also a first

mortgage bond over the property, which was held by the T bank and which secured an indebtedness to it of some R200 000. Clause 24 of the second bond provided that the 'mortgaged property may not be declared executable or sold in execution at the instance of any holder of this bond unless the consent in writing of the (T bank) has first been had and obtained'. Some time later default judgment was granted against the applicant on the second bond. However, the summons on which the judgment was granted contained no averment that T bank's written consent to having the property declared executable or to having it sold in execution had been obtained, nor were the provisions of clause 24 brought to the attention of the Court. The applicant contended that, in the light of the above, the default judgment fell to be set aside in terms of Rule 42(1)(a) of the Uniform Rules of Court as having been erroneously sought and granted. As to the second order sought, it appeared that in the notice in terms of Rule 46(7)(c), published in a newspaper and in the Government Gazette, the sale was advertised as a sale without reserve, and that the advertisement was in this respect incorrect, inasmuch as the T bank as first bondholder (and therefore a preferent creditor) had stipulated a reserve price of R50 000. It was furthermore common cause that the property in question was a rateable property within the meaning of Rule 46(5) and that notice in writing in terms of that subrule should have been served on the local authority concerned (the local town council), calling upon it to stipulate, within 10 days of a date to be stated in the notice, a reasonable reserve price or to agree to a sale without reserve. Such a notice was not served, and consequently the town council did not fix a reserve price or agree to a sale without reserve. The property was sold in execution to the first respondent, as the highest bidder, for R100 000. The applicant contended that the failure to comply with the provisions of Rule 46(5) rendered the sale invalid and liable to be set aside.

The Defendant has not raised any arguable defence in the affidavit filed by it. And the plaintiff is entitled to judgment.

Held, as to the first order sought, that it was obvious that the T bank had agreed to the registration of the second bond only on condition that the mortgaged property would not be declared executable or sold in execution at the instance of the second bondholder without the written consent of the bank so as to safe-guard its position as first bondholder; clause 24 did not form part of the agreement between

the first respondent as second bondholder and the applicant as mortgagor: the applicant did not derive any benefit from it nor had it been inserted in the bond for his benefit; it was therefore not a term of the contract on which he could rely to ward off the second bondholder's claim.

Held, accordingly, that the applicant did not have locus standi to claim that the judgment be set aside because of non-compliance with the provisions of clause 24.

A distinguishing feature between that case and the present is that in the former, a term of the Second bond specifically preserved the rights of the prior Bondholder. Despite this it was held that it was not for the Mortgagor to rely thereon. How much more so is

this not a point on which the Defendant can rely?

There being no maintainable Defence advanced to the Plaintiffs claim there will be judgment as follows.

Summary Judgement is entered against the Defendant as prayed in the Notice of Application for,

a) Payment of E544 461.12
b) Cost of the suit to be taxed on the scale between attorney and own client including collection commission to the extent that such may be chargeable
c) The immovable property mortgaged by the Defendant to the plaintiff in terms of Mortgage Bond No 104/1994 is declared executable

S. W. Sapire

ACTING CHIEF JUSTICE