

THE HIGH COURT OF SWAZILAND

ZULEKA MANSOOR

Applicant

And

FIRST NATIONAL BANK OF SWAZILAND

Respondent

Civil Case No. 1144/2001

Coram

S.B. MAPHALALA – J

For the Applicant

MR. P. R. DUNSEITH

For the Respondent Advocate

J.M. Van Der

Walt (Instructed by Robinson Bertram)

JUDGMENT

(04/02/2004)

Before court is an application for cancellation of a surety mortgage bond and delivery of title deeds and costs.

The Applicant seeks an order for the following prayers:

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- a) "a) That the Respondent shall forthwith take such steps as are necessary to cancel Surety Mortgage Bond No. 136/1987 dated 23rd March 1987;
- b) That the Respondent shall immediately after the cancellation of the said surety mortgage bond deliver Deed of Transfer No. 355/1971 dated 29th November 1971 to the Applicant's attorney,
- c) Costs
- d) Further or alternative relief.

The application is supported by the founding affidavit of the Applicant himself. A number of pertinent annexures are filed thereto. These being annexure "A" (Surety Mortgage Bond); annexure "B" (Cession of Surety Mortgage Bond) annexures "C" and "D" being copies of various cheques; and annexure "F" being a letter from P.R. Dunseith dated 23rd June 2000 addressed to the Applicant.

The Respondent opposes the application and the affidavit of its Managing Director Mr. Robert Alan Dawson is filed in opposition thereto. Various annexures are filed viz annexure "SH1" (bank statement of a company called A.K. Import & Export); annexure "SH2" being a letter from Ntiwane, Mamba and Partners dated the 22nd may 2001 addressed to the offices of Robinson Bertram; annexure "SH3" a letter from Robinson Bertram to Ntiwane, Mamba and Partners dated the 18th May 2001; annexure "SH4" (letter from Robinson Bertram to Ntiwane, Mamba and Partners dated 20th June 2001); annexure "SH5" a letter from the Applicant to the Respondent dated the 7th August 1996; annexure "SH6" a letter dated the 1st November 1995 from the Respondent to the Directors of A.K. Import & Export; annexure "SH7" a letter from the Applicant to the Respondent dated the 13th September 1996

and a further letter from Applicant to Respondent dated the 26th September 1996 marked "SH8".

The substantial facts of this case are that a surety mortgage bond was registered over the property of the Applicant being ERF No. 336, Manzini Extension No. 2 District of Manzini, Swaziland in favour of the Bank of Credit and Commerce International (Swaziland) Limited (hereinafter called "BCCI") for an amount of E300, 000-00.

BCCI changed its name to Meridian Recoveries (Pty) Limited.

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On the 23rd February 1996, Meridian Recoveries (Pty) Limited ceded, assigned and transferred all its right, title and interest in and to the said bond to the Respondent for value received and without recourse. As reflected in annexure "B" being the cession of Surety Mortgage Bond.

The applicant avers at paragraph 7 onwards that as required by law, the conveyancer attending to the registration of the cession of the bond certified that the amount remaining due in respect of the bond is E32, 500-00. The said certificate is annexed marked "C". Consequently the Applicant contends that she has duly paid to the Respondent the full balance owing under the bond as certified by the conveyancer. She has filled annexure "D" being copies of paid cheques amounting to E32, 500-00.

On 23rd June 2000, her attorney wrote to the Respondent requesting cancellation of the bond and that her title deeds be forwarded to his office. However, the Respondent has failed and/or refused to cancel the bond to date, and it has now become necessary for the Applicant to approach the court for the necessary order compelling cancellation of the bond and delivery of the title deeds.

The defence put forth is that the Applicant has not liquidated the principal debt to be entitled to the relief sought. The arguments advanced in this regard is that the conveyancer's certificate cannot be correct as to the amount E32, 500-00 because the bank statement for the same month (February 1996) shows an outstanding balance of E317, 063-01.

It is contended that in this regard, the conveyancer by letter was unable to explain whence he got the information, and concedes that he may have made an error. Further in this regard the conveyancer made no affidavit in support of the Applicant's version. As such, his certificate all the more constitutes inadmissible hearsay evidence. Furthermore, if only E32, 500-00 was outstanding, there would have been no need for the Applicant to pay cheques totalling E32, 500-00.

The legal arguments advanced by Mr. Dunseith for the Applicant are that in terms of Section 15 of the Deeds Registry Act 37/1968, real rights in land may be conveyed

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from one person to another only by means of a deed of cession registered by the Registrar of Deeds.

In terms of Regulation 26 of the Deeds Registry Regulation, 1973 "no cession of the balance due under any bond shall be registered until the amount paid in reduction thereof shall have been noted ..."

According to the Applicant the Respondent's conveyancer certified, in accordance with Regulation 26, that the amount remaining due in respect of the bond is E32,500-00. The effect of the certificate in terms of the law is that the Respondent took cession of a bond which the balance due was E32, 500-00.

It appears to me that Mr. Dunseith for the Applicant is correct in his submission that in casu the Respondent is precluded from denying (as it purports to do) that the balance certified by its own conveyancer are due at the date of cession was E32, 500-00, because it would effectively invalidate the registration of the cession of the bond.

Mr. Dunseith is further correct that the Respondent has produced evidence that the amount outstanding on the loan account was E310, 157-57, The Respondent appears to overlook the fact that it is A.K. Import and Export (Pty) Limited that is indebted to it on the loan account, not the Applicant. The Applicant is only bound to the extent of the amount of the bond ceded to the Respondent, namely E32, 500-00.

It is common cause that the Applicant has paid an amount excess of the sum of E32, 500-00. In the result, the Applicant is entitled to an order in terms of prayers (a), (b) and (c) of the notice of application, and it is so ordered.

S.B.MAPHALALA

JUDGE