

HIGH COURT OF SWAZILAND

Held at Mbabane In the exparte

application of:

**Diamond Investments Proprietary Limited**

Civil Case No. 125/09

Coram  
For Petitioner For  
Respondent

MAPHALALA PJ MR. P.M.  
SHILUBANE MR. Z.  
MAGAGULA

JUDGMENT 14<sup>th</sup>  
AUGUST 2009

[1] In this petition the Petitioner seeks an order authorizing the Sheriff to transfer:

"CERTAIN: Portion 3 of Farm No. 113 situate in the District of Shiselweni,  
Swaziland;

MEASURING: 14,9907 (One Four Comma Nine Nine Zero Seven) hectares;

HELD: Under Deed of transfer No.99/1967 dated 7<sup>th</sup> June 1967".

and cancellation of mortgage bond registered thereon dated 7 June 1967 for the sum of E40,000.00 in favour of Swaziland Development and Savings Bank and ceded to Dwaleni Investments (Pty) Ltd by Deed of Cession dated 18<sup>th</sup> June 1997.

[2] It is common cause that the Petitioner is entitled to the transfer of the property but in order to receive transfer the bond registered thereon must first be disposed of.

[3] The Swaziland Development and Savings Bank "*the Respondent*" is opposing the petition on the basis that the cession which is signed was "*receded*" to it through correspondence between its attorneys and the attorneys of Dwaleni Investments (Pty) Ltd.

[4] First it is common cause that the Respondent voluntarily ceded Mortgage Bond No.44/1967 to Dwaleni Investments (Pty) Ltd. The Petitioner contends that in law the cession cannot be cancelled except by an Order of Court.

[5] The Respondent claims that Dwaleni Investments (Pty) Ltd reversed the cession back to it. The Petitioner contends in this regard that the so called reversal can only be effective if the recession is registered and cited the case of *Barclay's Western Bank Ltd vs Comfy Hotels Ltd 1980(4) S.A. 174 E*).

[6] The Petitioner cites Section 7 of the Deed Registry Act No.37 of 1968 which provides that:

"Save as is otherwise provided in the Act or in any other law no registered Deed of Grant, Deed of Transfer, Certificate of Registered Title, or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by the Registrar except upon an order of Court".

[7] The Petitioner contends that in the premises the allegations by the Respondent that Mr. Jacobus du Plessis is still indebted to the bank has no legal basis especially because on the 24<sup>th</sup> October 1997 the Respondent credited du Plessis' account with the sum of E431,505.63. From the papers, it is clear that the said du Plessis is entitled to be refunded most of the monies paid into his account on the ground that the amounts with which his account has been debited infringe the *in duplum rule*.

[8] The Petitioner farther contends that it has also been held that the records kept by the Registrar are conclusive. As to the identity of the mortgagee's rights in time of cession. In this regard the court was referred to the case of *Makama vs Swaziland Commercial Board SLR 1978-1981* page 335. In other words, only Dwaleni Investments (Pty) Ltd is entitled to exercise rights conferred by the mortgage bond and not the Respondent.

[9] The Petitioner argues that as matters stand the mortgage in respect of this matter is Dwaleni Investments (Pty) Ltd and that the said company correctly signed the consent to the cancellation. The fact that Swazi Bank is in possession of the original Title Deed does not give it any security to claim payment of the sum of E40,000.00 plus interest.

[10] On the other hand the Respondents contend that the Petitioner was aware that the original Title Deed and the Mortgage Bond were neither lost nor destroyed so its application for a certified copy was unfounded. That in terms of the cession the *causa* for same was "*value received*". While it is correct that the time the Respondents received value for ceding the mortgage bond to Dwaleni Investments Proprietary Limited; the transaction between the Respondent and Dwaleni Investments was reversed.

[11] That Dwaleni Investments (Pty) Ltd is aware that the transaction was reversed and as such it cannot be in a position to consent to a cancellation of the bond which must be lodged with the cancellation.

[12] When Jacobus Christofel du Plessis sold the property to the Petitioner he was aware that he had caused a Mortgage Bond to be executed in favour of the Respondent and that he could not effect transfer of the property without the Title Deed.

[13] Dwaleni Investments (Pty) Ltd was aware that the transaction had been reversed and it had received the sum of E487 407.77 being interest and it had returned the original Title Deed, Mortgage Bond and cession to Respondent through its attorneys.

[14] The Respondents contend that it is not an issue that the bond was ceded to Dwaleni Investments (Pty) Ltd nor that an out and out cession can be cancelled by an Order of Court.

[15] What is contended by the Respondent is that Dwaleni Investments (Pty) Ltd relinquished its rights and title to the bond by accepting repayment of the value paid for the cession and returning the documents; that is the Title Deed, the Mortgage Bond and cession to the Respondent.

[16] The Respondents contend that the cession was not cancelled in keeping with the requirements of the law is an inadvertence on the part of the Respondents. However that does not deprive Respondents of their right and title in the same way that a purchaser of property who has paid the purchase price but is unable to take transfer for some reason would be the owner of such property or would have the right to claim transfer and the seller could not lawfully sell such property to a third party.

[17] The Respondents further contends that the replying affidavit is riddled with hearsay evidence. Rudolph Diamond is not in a position to swear positively to the facts contained at paragraphs 5.5.1 and 5.2 at page 87-88 of the Book of Pleadings.

[18] The Respondents admit that the Deed Registry records reflect Dwaleni Investments (Pty) Ltd is as the bond holder, but Dwaleni Investments (Pty) Ltd in possession of neither the original Title Deed, original Mortgage Bond and cession.

[19] Respondents contend that this is indicative of the fact that Dwaleni Investments (Pty) Ltd is disentitled to deal with the property in any manner, whatsoever.

[20] Respondents further contend that a dogmatic application of the law in the particular circumstances of the case would lead to absurdity in that:

(1) Dwaleni Investments (Pty) Ltd was refunded the value paid for the cession of the mortgage bond to it.

(2) Dwaleni Investments (Pty) Ltd voluntarily returned the documents to Respondents.

(3) Jacobus du Plessis is indebted to Respondent and the indebtedness remains unsatisfied to date, that being the reason the bond has not been cancelled.

(4) Du Plessis ought to have first sought cancellation of the bond before selling the property to the Petitioner.

[21] The Respondents' Counsel filed additional heads of arguments where the general argument that is that the Petitioner is asking the court to order specific performance against the Respondent. That it is settled law that the grant or refusal of such an order is entirely a matter for the discretion of the


court in which the claim is made. In this regard the court was referred to the South African case of *Benson vs S.A.*

*Mutual Life Assurance Society 1986(1) S.A. 776 at 783* and the local case of *Maria Mavimbela N. O. vs Sedcom Swazi and Others Supreme Court Case No.27/08 (unreported)*.

[22] The general argument supported by the above cited cases is that in the instant case an order that the Respondent hand over the original Title Deed and the Mortgage Bond will result in an injustice and would operate unduly harshly on the Respondent which would be deprived of its security against Jacobus Christofel du Plessis.

[23] Having considered the arguments of the parties it would appear to me that the position taken by the Petitioner is correct on the facts of this matter. I say so because the allegations by Respondent that Mr. Jacobus du Plessis is still indebted to the bank has no legal basis especially because on the 24<sup>th</sup> October 1997 the Respondent credited du Plessis' account with the sum of E431,505.63. From the papers, it is clear that the said du Plessis is entitled to be refunded most of the monies paid into his account on the ground that the amounts with which his account has been debited infringe the *in duplum rule*.

[24] I further agree with the Petitioner's contention that only Dwaleni Investments (Pty) Ltd is entitled to exercise rights conferred by the Mortgage Bond and not the Respondent. As matters stand the mortgagee in respect of this matter is Dwaleni Investments (Pty) Ltd and that the said company correctly signed the consent to the cancellation. The fact that Swazi Bank is in possession of the original Title Deed does not give it any security to claim payment of the sum of E40,000.00 plus interest. In this regard I find that the authority in *Makama vs Swaziland Commercial Board 1978 SLR 1978-81* at page 335 apposite.



**S.B. MAPHALALA**  
Principal Judge

In the result, for the foregoing reasons the petition is granted with costs.