



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.822/2013

In the matter between:

LENA NDLOVU

Applicant

vs

**SWAZILAND DEVELOPMENT FINANCE
CORPORATION**

1st Respondent

THEMBA NDLOVU

2nd Respondent

MXOLISI NDLOVU

3rd Respondent

REGISTRAR OF DEEDS

4th Respondent

ATTORNEY GENERAL

5th Respondent

Neutral citation: *Lena Ndlovu vs Swaziland Development Finance Corporation & 4 Others (822/2013)[2014] SZHC 24 (28th February 2014)*

Coram: **MAPHALALA PJ**

Heard: 17th February 2014

Delivered: 28th February 2014

For Applicant: Mr. N. Ginindza

For Respondents: Mr. Z. Jele

- Summary:
- (i) *Application brought in the long form directing 4th Respondent to cancel the registration of the surety mortgage bond No.102/2010 and declaring the said mortgage bond null and void ab initio.*
 - (ii) *The Applicant contends, inter alia that the said mortgage bond was executed by the Respondent under misrepresentation.*
 - (iii) *Respondent has advanced au contraire arguments against the Applicant's contention.*
 - (iv) *In the result, this court finds that there was no misrepresentation as contended by the Applicant and also that Applicant has not advanced any of the circumstances to terminate a bond therefore, the Application is dismissed with costs.*

JUDGMENT

The Application

[1] The Applicant Lena Ndlovu filed an Application in the long form against the 1st Respondent and four others for an order in the following terms:

- “1. *Directing and/or authorising the 4th Respondent to cancel the registration of the Surety Mortgage Bond No:102/2010;*
- 2. *Directing the 1st Respondent to issue a letter authorising the cancellation of Surety Mortgage Bond No:102/2010;*
- 3. *Declaring the Surety Mortgage Bond No:102/2010 to be null and void ab initio;*

4. *Costs of suit;*
5. *Further and/or alternative relief.”*

[2] The Founding Affidavit of the Applicant is filed outlining the issues in the dispute between the parties. Various annexures are filed including the Surety Mortgage Bond as annexures “LN1” which is at the centre of the dispute between the parties.

[3] The Respondents oppose the above cited orders and have filed an Answering Affidavit of one Dumsani Msibi who is the Managing Director of the 1st Respondent. Further a Supporting Affidavit of Mr. Stanley Bongani Mnisi who is a conveyancer has been filed thereto.

[4] The Applicant then filed a Replying Affidavit in accordance with the Rules of this case.

Background

[5] The factual background of the matter is outlined in the Heads of Arguments of the Respondents as follows:

“3.1 The Applicant is a widow who owns immovable property. The 2nd Respondent is the Applicant’s daughter in law whilst the 3rd Respondent is the Applicant’s son.

- 3.2. *In August 2013, the 1st Respondent lent and advanced a sum of E560,000.00 to the 2nd Respondent, in order to enable her to acquire a truck for a timber haulage business. The 3rd Respondent signed a personal surety as security for this loan.*
- 3.3. *In February 2010, the 1st Respondent lent and advanced the 2nd and 3rd Respondents a sum of E1.5 million to enable them to acquire an additional fleet of trucks for the timber haulage business.*
- 3.4. *As security for the loans, the 1st Respondent required that there be registered a mortgage bond over immovable property as security for the debt. In other words, in the absence of the security, the 1st Respondent would not advance the sum of E1.5 million.*
- 3.5. *The Applicant agreed to provide her immovable property being farm No.229, situate in the Shiselweni District, Swaziland as the property to be mortgaged as security for the payment of the debt. See paragraph 8 (e), (f), (i) and (j) of the Founding Affidavit at pages 6 and 7. The immovable property was required as security for the grant of the loan by the 1st Respondent.*
- 3.6. *At all material times, the Applicant was aware that the 2nd and 3rd Respondents were the principal debtors.*
- 3.7. *On 11th February 2010, the Applicant duly executed the mortgage bond before Mr. Stanley Bongani Mnisi and the bond was accordingly registered with the Registrar of Deeds.”*

[6] The matter appeared before me on 17th February 2014 where I heard arguments of the attorneys of the parties.

[7] Mr. Z. Jele for the 1st Respondent also advanced useful arguments and filed Heads of Arguments for which I am grateful.

(i) Applicant's arguments

[8] Mr. Ginindza filed two sets of arguments but relied heavily on what is contained in what is addressed as "Applicant's brief Heads of Argument."

In the said Heads of Arguments at paragraph 2 the following is stated:

"The gist of the Application is that the Applicant wishes and applies to free the property held by her under the Title Deed from the encumbrance that it placed thereupon by the surety bond."

[9] The Applicant in the main contends in paragraph 5 of her Founding Affidavit that she was advised that the property was being put up as security for a loan to be given to a company in which she also have shares. That at no point in time did she agree to stand surety to a personal debt of the 2nd Respondent standing alone. That has she known that the loan in issue was solely that of the 2nd Respondent she would not have agreed to provide any for the surety.

[10] That this is denied by the 1st Respondent which alleges that the Applicant was always aware that providing security for a personal debt, that, however that this denial cannot be upheld in view of the inconveniences found in the Answering Affidavit.

[11] It is contended for the Applicant that first and foremost, according to the averments contained in the Answering Affidavit, the Applicant only agreed to provide the farm as security but gave no personal suretyship in respect of the debt. That this contention is oblivious to the fact that the property could not be put up as security unless the Applicant had bonded himself as security for the loan in issue. That this is the obligation to provide security that does not attach to the property but attaches to the Applicant in person.

[12] Another string to the Applicant's bond is that the averments canvassed in the Answering Affidavit, in particular clause 26-29 thereof shows that indeed the full force and effect and legal implications of the surety mortgage bond was never explained to the Applicant, hence the discrepancy between the Notarial Certificate signed by Mr. Mnisi and the contents of the bond.

[13] In this regard the court was referred to the case of *Union Government vs Chat Win 1991 TPP* at page 312 and a *plethora* of other legal authorities on the subject including the legal textbooks of *Wille, The Law of Mortgage and Pledges in South Africa, 2nd Edition* at page 5 and the legal

authority in *Silberberg and Schoeman, The Law of Property, 2nd Edition* at page 439.

[14] In the main the Applicant relied heavily in the South African case of *Ecrste Nasionale Bank van Swidelike Afrika (Bkp) vs Saayman NO 1997(4) SA 302 (SCA)*.

[15] Finally, the Applicant contends that a proper case has been made for the grant of the relief sought in terms of the Notice of Motion.

(ii) The Respondent's arguments

[16] The attorney for the Respondents also filed comprehensive arguments for which I am grateful. In the said Heads of Arguments various topics are covered including the interpretation which has been adopted by this court in paragraph 5 of this judgment. The law relating to surety mortgage bonds in paragraph 4, 5, 6, 7, 8, 9, and 10 of Mr. Jele's Heads of Arguments. The cases of *Goodricke and Sons (Pty) Ltd vs Registrar of Deeds, Natal 1974(4) SA 404* has been cited. The local authority in the textbook Caney's *The Law of Surety, 6th Edition* at page 29 is also filed in support of the submissions in these paragraphs.

[17] The attorney for the Respondents then dealt at paragraph 11 of his Heads of Arguments with the Application of the law to the facts to the following proposition.

- “11.1 The Applicant contends that she was induced by a misrepresentation made by the second and third Respondents to the effect that they (second and third Respondents) were to incorporate a company where she was to be a shareholder.*
- 11.2 It is telling that there is no confirmation affidavit by either the second or third Respondents in support of this allegation.*
- 11.3 The 1st Respondent denies that this was a condition precedent for the execution of the mortgage bond. The issue of incorporating a company only arose after differences between the second and third Respondents had surfaced.*
- 11.4 It is apparent that the first Respondent did advance the sum of E1.5 million to the second and third respondents (principal obligation), which is the causa.*
- 11.5 As security for the loan, the Applicant offered her immovable property to be mortgaged.*
- 11.6 The Applicant gave her written consent, to the second and third Respondents to use the property as security. See affidavit at page 48. The consent was not given to a company.”*

[18] The final paragraph of the Respondents argument is concerned with the issue of termination of a mortgage bond surety that it can be terminated only under the following circumstances:

- “12.1 ‘Discharge’ this takes place when the principal obligation has been fulfilled and/or discharged. In the present matter, a discharge will take place once the loan amounts have been repaid in full.
- 12.2 ‘Waiver’ where the creditor renounces his right in terms of the mortgage. In the present matter, the 1st Respondent would have to renounce its right to enforce the mortgage.
- 12.3 ‘Novation’ where the principal obligation is replaced with a new agreement. In this case, the principal agreement being the loan agreements in respect of the financing of the vehicles, and if those agreements were to be replaced with new agreements.
- 12.4 ‘Destruction of security’ where the property which forms the security for the debt has been destroyed.”

[19] It is contended for the Respondents that none of the above requirements for the valid termination of a mortgage bond obligation exists and as such there is no basis for the 1st Respondent to consent to the cancellation of the bond. That the Applicant has failed to make out a case for the cancellation of the mortgage bond as it is clear that she understood the implications of offering the farm in question as security when she did, she was explained to, the nature of the security and she gave consent having understood what the security was in spite of being illiterate.

[20] That therefore, this Application ought to be dismissed forthwith.

The court’s analysis and conclusion thereon

[21] Having considered the arguments of the parties and the affidavits of both sides I have come to the view that the position of the Respondents is correct on all accounts.

[22] Firstly, the nub of the whole case is the affidavit deposed to by the Applicant wherein she deposed that gave her consent for the farm to be used as security for the facility that they were seeking from the 1st Respondent. A copy of the affidavit is annexed marked “DM1”.

[23] In my assessment of the competing version on this aspect of the matter I am inclined to agree with what is stated by the Respondents in this regard. That in order to give effect to this consent, the Applicant was then requested to personally attend to the 1st Respondent’s offices. That again having satisfied itself that the thumb print on the affidavit was that of the Applicant and that she understood the implications of the consent. The Applicant was then requested to attend upon the offices of Robinson Bertram in order to execute the relevant instruments for the registration of surety mortgage bond. At the offices of Robinson Bertram the Applicant was attended to by Mr. Stanley Mnisi who is a conveyancer in this matter.

[24] The Supporting Affidavit of Mr. Stanley Mnisi deposed at paragraph 5 to 6 to the following:

- “5. *After having explained the nature and purpose of a surety mortgage bond, I then proceeded to explain the meaning and effect of the legal exceptions contained in the bond. I annex hereto marked “SB1” a copy of the Notarial Certificate that I signed after the explanations.*
6. *The Applicant confirmed to me that she understood the contents of the surety mortgage bond and proceeded to affix her right thumb as signature. At all material times, the principal debtor in this transaction was identified as Thembi Ndlovu.”*

[25] In my mind I cannot detect any misrepresentation on the part of the Respondents in the present case. It appears to me that all the officers who attended to the Applicant were alive to the fact that Applicant was an elderly, rural folk and had no reason to pull a fast one on her.

[26] In my assessment of the facts, I find that the mortgage was lawfully executed and the Applicant had the requisite authority to execute the bond.

[27] In this regard I cite the case of *Nedbank Limited vs Tibuke Investments (Pty) Ltd and Another High Court Case No.920/2009* at page 10 stated the following:

“Accordingly, where, the mortgagor and mortgage were fully ad idem in regard to the essential of a bond, it was registered in respect of the correct suretyship obligation of the mortgagor, rightly stating the total amount, it was registered against the title of the correct property of the surety company, and its set out the correct type of debt due by the person whose liabilities to the mortgage were being so guaranteed...the mortgage bond is valid.”

[28] Secondly, coming to the argument of the Applicant that she was induced by a misrepresentation made by the 2nd and 3rd Respondent to the effect that they (2nd and 3rd Respondents) were to incorporate a company where she was to be a shareholder to be without merit. In this regard I agree with what is stated by the 1st Respondent that it cannot be that this was a condition precedent for the execution of a mortgage bond. It is because on the evidence the issue of incorporating a company only arose after differences between the 2nd and 3rd Respondents had surfaced. There are no Confirmatory Affidavits of either the 2nd or 3rd Respondent in support of this allegation.

[29] Thirdly, it appears to me that the Applicant has not advanced any of the circumstances outlined at paragraph [17] of this judgment and therefore the Application ought to be dismissed even on this ground alone.

[30] In the result, for the foregoing reasons the Application is dismissed with costs.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE