



## IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.: 3165/10

In the matter between

MAURICE LAURENCE ADAMS N. O.

**Applicant**

Vs

SWAZILAND DEVELOPMENT AND SAVINGS  
BANK (SWAZI BANK)

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

THE REGISTRAR OF DEEDS FOR THE KINGDOM  
OF SWAZILAND **2<sup>nd</sup> Respondent**

**Neutral Citation:** *Maurice Laurence Adams N. O. Vs Swaziland  
Development And Savings Bank (Swazi Bank) & Another  
(3165/10) [2015] SZHC 129 (16<sup>th</sup> July 2015)*

**Coram:** Hlophe J.

**For Applicant:** Mr. K. Simelane

**For Respondent:** Mr. N. Mabuza

**Date Heard:** 03<sup>rd</sup> July 2015

**Date Delivered:** 16<sup>th</sup> July 2015

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## **JUDGMENT**

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[1] The Applicant instituted application proceedings seeking the specific orders set out herein below:-

1. Ordering the 1<sup>st</sup> Respondent to deliver to the 2<sup>nd</sup> Respondent Crown Grant No. 20/1970, Mortgage Bonds Nos. 168/1974 and 329/1979 for cancellation of the said Mortgage Bond over the immovable property.
  
2. Ordering the 1<sup>st</sup> Respondent and authorizing the 2<sup>nd</sup> Respondent to effect cancellation of Mortgage Bonds No. 168/1974 and 329/1979 over the property described as:

**Certain:** Lot 335, situate on 4<sup>th</sup> Avenue and 8<sup>th</sup> Street in the Township of Nhlangano, Extension No. 1, Shiselweni District Swaziland

**Held By:** Andrew Laurence Adams

**Under:** Crown Grant No. 20/1970

3. Authorising the 2<sup>nd</sup> Respondent to deliver Crown Grant No. 20/1970, duly released from Mortgage Bonds No. 168/1974 and 329/1979 to the Applicant or his appointed nominee.
4. Ordering the 1<sup>st</sup> Respondent to pay the cost of this application on the scale as between attorney and own client.
5. In the event of the 1<sup>st</sup> Respondent failing to sign, execute or endorse any document to give effect to this order, the Registrar of this Honourable court is hereby empowered to sign any and all documents (to give such effect).
6. Granting the Applicant such further and/or alternative relief.

[2] Although expressed in somewhat confusing language, it is clear that the orders primarily sought are that releasing from its custody, the Title Deed of the property belonging to the Estate of the Late Maurice Adams so that the Mortgage Bonds registered against it in, 1974 and 1979 respectively, can be cancelled. There is also sought an order authorizing the 2<sup>nd</sup> Respondent to cancel the Mortgage Bonds registered against the same property in 1974 and 1979 respectively. The other order seeks to empower the Registrar of this court to sign and execute all documents necessary to give effect to this court

order, in the event of the first Respondent's officers failing to do so. The Applicant further seeks a special order as to costs on the scale as between attorney and client against the first Respondent. These are the simplified prayers by the Applicant and the matter was dealt with from that stand point.

- [3] The facts, which are by and large not in dispute, reveal that sometime in the 1970's (precisely 1974 and 1979 respectively) the Applicant's late brother Lawrence Adams obtained loans of E3400.00 and E71000.00 respectively from the Respondent Bank. Two Mortgage Bonds aimed at securing the said loans were registered against the Title Deed of a certain property owned by the said Lawrence Adams, namely Lot 335, situate on 4<sup>th</sup> Avenue and 8<sup>th</sup> Street, Nhlanguano Township, Extension 1, Shiselweni District in the said years respectively, 1974 and 1979. Notwithstanding the obvious passage of time, the said Mortgage Bonds remain registered against the said property and the Applicant, an executor in the estate of the owner of the property, now seeks an order compelling first Respondent to release the Title Deed of the property from its custody and for the said Mortgage Bonds to be cancelled.

[4] Although not necessarily common cause between the parties, it is contended by the Applicant that the two loans referred to above were not the only ones taken or obtained from the first Respondent Bank by the late Mr. Adams. There were several other such loans which according to Applicant, were used by the deceased to run the transport business he had. These other loans Applicant alleges the late Lawrence paid back to the first Respondent. It is contended by the Applicant that even the loans of E3400.00 and E71000.00 referred to above, were themselves fully paid up at some stage even though the Mortgage Bonds remained uncanceled, a position that prevails today.

[5] Before his death in 2005, the late Lawrence Adams wrote a letter to the first Respondent, on or about the 11<sup>th</sup> April 2005 and thereon recorded that the first Respondent was still holding to his Title Deed of the above described property for a loan of E71000.00 obtained in 1979. It was recorded further that notwithstanding that the duration of the loan was 5 years and that he had met his obligations in terms thereof, he was noting that 20 years later his Title Deed was still being kept by the Bank with the Mortgage Bond over it still uncanceled. He then requested that his said Title Deed be released as allegedly agreed in some discussion the parties had had a few days earlier. A copy of the said letter was annexed to the papers of this application and

was marked as annexure “C”. Annexures “A” and “B” to the papers were copies of the title Deed and the Mortgage Bonds referred to above.

- [6] The letter in question had been responded to in writing by means of a letter dated the 5<sup>th</sup> July 2005, addressed to the Late Lawrence Adams, which is couched in the following terms excluding the usual salutations:-

*“Re: Request To Release Your Title Deed*

*We refer to the above matter and advise that we are unable to release your Title Deed Number 20/1970 as it is security for your Account Number 301100017 that is overdrawn to the tune of E507, 790.04 or (Emalangeneni Five Hundred and Seven Thousand Seven Hundred and Ninety and Four Cents Only).*

*Kindly liase with our recoveries department at our Head Office in Mbabane to make a proposal how you intend to liquidate the overdrawn position so that we may release your Title Deed.*

*Your Cooperation will be appreciated.*

*Yours Faithfully*

***C Z Dlamini***

*Branch Manager”*

[7] Although it speaks for itself, the first Respondent’s response to the late deceased’s request for the release of his property from the Mortgage Bond was not a denial that the bond in question was not paid out, but that the bonds in question was now used to secure certain overdrawn funds by the said deceased from the first Respondent amounting in all to a sum of allegedly over E507, 790.04. In fact the Mortgage Bonds would be released if the deceased made arrangements on how he was going to pay the outstanding debt.

[8] A simple reading of the first Respondent’s response to the request for the release of Lawrence Adams’ property from the said bond was that it was now securing another debt arising from an overdraft facility the late Lawrence Adams had obtained from the first Respondent Bank.

[9] It was against this background therefore, that the Applicant, in his aforesaid capacity as an executor in the estate of the late Lawrence Andrew Adams, , instituted the current proceedings seeking the reliefs set out in the Notice of Motion and recited hereinabove.

[10] The application was opposed by the Respondent who in doing so reiterated the position as captured in the above cited letter of the 5<sup>th</sup> July 2005. The first Respondent stated that the Applicant as the person with whom it had had no dealings was merely stating hearsay evidence and relying on it which is not proper, legally speaking. Furthermore it was denied that the first Respondent had no lawful right to refuse to have the Mortgage Bond in question cancelled. It was said that the dispute leading to the non-cancellation of the bonds concerned, was that referred to in annexure “C” which is the letter of the 5<sup>th</sup> July 2005, cited in full above. In other words it was being emphasized per the first Respondent’s papers that the bonds in question were not going to be cancelled because they were now securing a sum of over E507, 790.04 overdrawn by the late Lawrence Adams. The basis on how the said bonds came to cover the sum of E507, 790.04 was however not disclosed and to date remain a subject of speculation.



[11] It was further contended that the application proceedings instituted by the Applicant were not suited given that the latter was aware of the disputes of fact characterizing the matter particularly because, whereas the deceased had been told that he was owing a sum of E197, 396.00 which he had agreed to pay, the Applicant still found it proper to institute application proceedings instead of action proceedings which would be more suited in view of the apparent disputes of fact.

[12] It was contended in the Answering Affidavit that at some stage the deceased had been advanced or granted a further facility in the sum of E210, 000.00, following an agreement that the Bonds would remain registered to secure this debt.

[13] In his Replying Affidavit, the Applicant disputed the case put forth by the first Respondent, noting that the latter was not able to come out and say how the amounts it said were due by the late Lawrence Adams were linked with the Mortgage Bonds in question. It was contended in the said papers that whether or not as a matter of fact there were any amounts still owed by the late Lawrence Adams to the first Respondent, were not an issue for

consideration by this court. Instead, the real issue, it was contended, was whether there is still any outstanding debt in respect of the initial loan secured by the Mortgage Bonds concerned, which first Respondent, it was argued, had not proved, except alleging a subsequent debt which however did not have a bond covering it specifically registered against the Title Deed of Applicant's property in question as was the apparent norm when considering the previous bonds recorded on the copy of the said Title Deed annexed to the application.

[14] When the matter was mentioned for argument, it was indicated by the Respondent's Counsel that there were certain points in limine he had raised which necessitated that he addresses the court first. These points he alleged were that the Applicant was relying on hearsay evidence, which he contended ought to be struck out. The other point, he argued was that the matter was attended by disputes of fact which he submitted necessitated that the application be dismissed.

[15] The hearsay, he submitted, was apparent from the letter of the 11<sup>th</sup> April 2005, relied upon by the Applicant, in that he could not vouch as to the accuracy of the content thereof. It was submitted further, that Applicant was not in a position to deny the verbal agreement allegedly reached that the monies the deceased owed were to be secured against the same bonds. Furthermore it was contended that it did not lie with Applicant to say what he does at paragraph 15 of the Affidavit, that the late Adams had said that the loans covered in terms of the Mortgage Bonds concerned were fully paid.

[16] It is not deniable that the letters in question, labelled annexures “C” and “D” were indeed exchanged between the parties and that they were part of the record in the matters of the bonds between the parties herein. As the situation stood, it appeared that there was no dispute that the issue was more legal between the parties, namely whether a bond can be used to secure any other debt or loan than that for which it was registered. This is a position amply covered on the record and cannot be said to be hearsay, in my findings.

[17] As for the contents of paragraph 15 of the Founding Affidavit, it did not appear anywhere that the Applicant was ever challenged to clarify where he got the information stated thereat from and it is not for this court to assume that could have only been told to the Applicant by someone else and this is not even the only inference to draw from such facts. Had Applicant wanted to infer that the information contained therein was hearsay, it was incumbent on the Applicant to be challenged to disclose his source so that he would do so by means of the Replying Affidavit. It would be difficult for this court to infer that the Applicant would have been told by Lawrence as opposed to him having his first-hand knowledge either because he was there, when the deceased talked to the Respondent's representative or because he had obtained it from the Respondents themselves which would not amount to hearsay. I therefore cannot agree that it has been shown that the Applicant's case was founded on hearsay. I see no reason of second guessing what the Applicant said. He said it as a fact that the deceased paid the debt for which the bond was registered and he was not challenged on that to expatiate and give in sight on how he gained such knowledge, which means that this court should accept such as a fact.

[18] In my understanding the material question in this matter is whether a debt not secured in terms of a registered bond can be covered under an existing bond between the parties in law or even because of a verbal agreement between the parties. This seems to be a question of law and not one requiring facts or additional facts to those already stated.

[19] The exposition on what the central question in this matter is, including the fact that same is a question of law, has put paid the question whether there are any disputes of fact. In my view whatever disputes there appear to be in the matter, they are not material when considering what I have just said, namely that the essence of the matter is a legal one, as referred to in the foregoing paragraphs.

[20] It was argued, in an attempt to answer the main question, that the Bonds registered in 1974 and 1979 respectively against the deceased's property were both what is known as "a continuing covering security" as covered in paragraph 12 of each such bond. This type of bond it was argued is used to cover both current and future debts. In support of this argument, this court was referred to what is stated in the following words at the said paragraph 12

of the bonds in question (their language and wording is similar it shall be noted :)

*“It is distinctly understood and agreed upon that this bond shall be a continuing covering security to an amount not exceeding the amount of the said capital and the said sum of E7000.00 (in the other one is E340.00) in addition thereto for all and any sums of money which shall now or may in future be owing to or claimable by the Bank from whatever cause arising, and notwithstanding the payment of any amounts appropriated in repayment of the whole or any portion of the capital and the said sum of E7000.00 (or E340.00) originally advanced, the Bank shall be entitled to advance further sums up to the amount of the capital and the said sum of E7000.00 (or (340.00) under the security of this Bond, which advances shall be secured hereunder as if same formed a portion of the original advance and shall in every respect be subject to all the terms and conditions of this Bond...”*

[21] It was argued by the first Respondent that the amounts shown as outstanding by the Applicant herein were covered by the same bond as future debts and should be covered under the security of the bonds in question. Respondent argued the application had to be dismissed on this ground. I must however

indicate that despite a specific request that the first Respondent's Counsel provides the court with authority either in the form of an existing judgment, commentaries or text books, he could not do so. I myself did not find any authority supporting the Respondent on this point.

[22] At page 15 of the Book of Pleadings, there is contained a copy of the Title Deed for the property used as security for the two loans in question. In the following page of the said Book of Pleadings appear six rubber stampings five of which it was common cause between the parties indicated the recordings of the registration of certain Mortgage Bonds against the property in question. Three of these stamps bare across their faces cancellation by means of another rubber stamp which it was agreed indicated that the said Mortgage Bonds were cancelled after the debt secured was paid off. The remaining two un-cancelled rubber stamps are those forming the subject matter of these proceedings. What is of interest is that these cancelled bonds were apparently much newer than those covering the 1974 and 1979 debts. If there was any merit in the Respondent's contention that the 1974 and 1979 bonds would also cover new debts, the question is why were bonds created for the debts covered in terms of their own bonds which have since been

cancelled, instead of it being accepted were covered by the hitherto existing bonds and contended by the Respondent.

[23] It was argued on behalf of the Applicant that if the Respondent's argument had any merit in it, there would have been entered the proof of registration of the debts as secured by the Applicants concerned. It could not be possible for a certain bond to be registered and not be reflected on the Title Deed of the property it is meant to secure.

[24] In so far as it is clear from the correspondence exchanged between the parties, found at pages 31 and 32 of the Book of Pleadings, that the debt now purported to be secured through the Mortgage Bonds meant to secure the sums of E3400.00 and E71000.00 loaned Applicant in 1974 and 1979 respectively, is a separate one from those debts which it could not be denied were by now fully paid up, and in so far as the Bond securing the new debt had not been registered against the property in question, it is clear that there is clearly no legal basis for not canceling the Mortgage Bonds securing the debts referred to above as having been obtained by Applicant in the 1970's and were fully paid up.



[25] I agree with the submission by Mr. Simelane that a bond covers property it is registered against. This is obviously based on the definition of a Mortgage Bond which is expressed in the following words in **Silberberg and Schoeman's; The Law of Property, Second Edition, Durban Butterworths, 1983 at page 427**

*“The term “mortgage” is used in two senses. As a generic term it covers every form of hypothecation of property and in this sense it includes every real right which one person has in and over another person’s property for the purpose of securing the payment of a debt or generally the performance of an obligation”*

[26] It is therefore difficult to imagine how the sum of allegedly E507, 794.04 can be said to be covered by a mortgage bond if there is no proof of such a bond or agreement nor of its recording on the face of the Title Deed in keeping with the normal procedure.

[27] The Applicant argued further that if there was merit to the contention by the Respondent that the alleged outstanding debt between the two of them was emanating from either the 1974 or 1979 loans, then it should be found that same had prescribed in terms of the common law as 33 years had long expired. I was in that regard referred to ***Standard Bank of South Africa LTD vs Neethling N. O. 1958 (2) SA 26*** at page 30A.

[28] I have refrained from deciding this issue because in my view it does not arise from the facts of this matter, because I have found specifically that the letters of the 11<sup>th</sup> April 2005 and 5<sup>th</sup> July 2005 read together with paragraph 15 of the Answering Affidavit are very clear that the debt said to be outstanding between the parties is independent of the 1974 and 1979 debt respectively. In that case the question of prescription does not arise. It was in my view only a mistake by the Respondent to believe it would benefit from an old bond it had with the Applicant to cover the current debt it claims to be having with the deceased.

[29] I must also say I further fail to understand how the grant of the reliefs sought will prejudice first Respondent's claim against the Applicant or the deceased's estate given that its success or otherwise will be a matter of evidence and records. It may only not be a preferred creditor and it will not lie with this court to make it one at this stage, if the parties to the facility allegedly granted the deceased did not find it appropriate to have it recorded like all normal bonds.

[30] Consequently I have come to the conclusion that Applicant's application succeeds and I make the following order:-

1. The Mortgage Bonds fully described in the Notice of Motion, covering loans allegedly obtained in 1974 and 1979 respectively by the late Lawrence Adams in the sums of E3400.00 and E71000.00, registered against the latter's said property fully described herein above be and are hereby cancelled.

2. The Second Respondent be and is hereby directed and authorized to effect the cancellation of the Mortgage Bonds referred to above from or against the late Lawrence Adams property described above.
  
3. The first Respondent be and is hereby directed to forthwith release to the Applicant the Title Deed of the late Lawrence Adams' property fully described herein-above against which the Mortgage Bonds to be cancelled were recorded.
  
4. Should the first Respondent fail or refuse to sign or execute any documents aimed at giving effect to this court order, then the Registrar of this court or her Deputy be and are hereby authorized and empowered to sign and execute such documents so as to give effect to this order.
  
5. The first Respondent be and is hereby ordered to pay the costs of these proceedings on the ordinary scale.

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**N. J. HLOPHE**  
**JUDGE – HIGH COURT**