



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Case No. 66/2012

HELD AT MBABANE

In the matter between:

**ROGERS BHOYANA DU PONT**

**APPELLANT**

And

**SWAZILAND BUILDING SOCIETY  
ROBERT NKAMBULE  
REGISTRAR OF DEEDS  
ATTORNEY GENERAL**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT  
4<sup>TH</sup> RESPONDENT**

Neutral Citation : Rogers Bhozana Du Pont and Swaziland Building Society  
and 3 Others (66/2012) [2013] SZSC 35 (31 MAY 2013)

Coram : M.M. RAMODIBEDI C.J., S.A. MOORE J.A., and  
B.J. ODOKI J.A.

Heard : 15 MAY 2013

Delivered : 31 MAY 2013

**Summary:** Lender took loans from the Swaziland Building Society  
- Lender fell into arrears – Property sold at public  
Auction –Application seeking to interdict and restrain  
Registrar from transferring property to purchaser  
refused - Application for rescission of default judgment  
in terms of order 42 (1) Dismissed. Costs to the  
Respondent.

## JUDGMENT

**MOORE JA**

OPENING

[1] This appeal has been brought by Mr. Rogers Bhoyana Du Pont (Mr. Du Pont) against the decision of Hlophe J upon the grounds set out in his Notice of Appeal which are:

- “1. The Learned Judge in the court **a quo** erred in law and in fact in coming to the conclusion that there was no agreement entered into between the parties.*
- 2. The Learned Judge in the court **a quo** erred in law and in fact in relying on the internal Memorandum or Communiqué of the Respondent to which the Appellant was not privy.*
- 3. The Learned Judge in the Court **a quo** erred in law in (sic) fact in failing to take into consideration the conduct of the parties as between each after the issue of Summons to date.”*

BACKGROUND

[2] The 1<sup>st</sup> Respondent is the Swaziland Building Society (the lender) which is incorporated in terms of the Building Society’s Act and trading as a

Building society in Swaziland. It functions as a financial institution which makes loans upon certain terms and conditions.

- [3] It is not in dispute that Mr. Du Pont who appeared to be a businessman of some urbanity and experience entered into two loan agreements with the lender under the terms of which he was required to make monthly payments of E4,333.00 and E3,458.00, a total of E7,791.00 to the lender.
- [4] As so often happens in these cases Mr. Du Pont, unfortunately, fell into arrears with his payments. The lender, which is a commercial and not a charitable institution, foreclosed on the mortgage bonds which had been duly entered into by Mr. Du Pont and demanded payment, as it was entitled to do, of the full balances of all monies then remaining outstanding and sought an order declaring the mortgaged property to be executable.
- [5] Mr. Du Pont, who seems to have a penchant for changing his lawyers – a proclivity which he exhibited when he fired his attorney and argued his case in person during the hearing of this appeal – for reasons which only he could adequately explain, allowed judgment to be entered against him by default on the 16<sup>th</sup> March 2012.

[6] The lender's case, which Mr. Du Pont sought in vain to refute, was that the property was duly auctioned and bought by the 2<sup>nd</sup> Respondent (Mr. Nkambule). Notice had been duly given that the sale would take place 'outside the Manzini Regional Administration' at 2.30 p.m. on Friday the 1<sup>st</sup> day of June, 2012.

[7] By Notice of Motion 1235/12 on the 17<sup>th</sup> July 2012, Mr. Du Pont sought inter alia the following orders:

*"3. a) That the 3<sup>rd</sup> Respondent be and is hereby interdicted and restrained from registering a transfer of Farm No. 769 situate in Manzini Swaziland into the name of the 2<sup>nd</sup> Respondent pending finalization of this matter.*

*b) That the said paragraph 3 (a) supra shall operate with immediate interim relief pending finalization of this matter.*

*c) That the above Honourable Court hereby rescind and/or set aside the judgment by default granted by the above Honourable Court on the 16<sup>th</sup> day of March 2012 as having been granted in error.*

*4. Costs of suit."*

[8] That application was heard by Hlophe J on the 27<sup>th</sup> July 2012. His judgment was delivered in good time on the 12<sup>th</sup> September 2012. Paragraph [29] of that judgment is clear and explicit. It reads:

*“Consequently I have therefore come to the conclusion that the Applicant’s application for rescission in terms of rule 42 (1) cannot succeed and I make the following order:-*

- 1. The Applicant’s application be and is hereby dismissed.*
- 2. The Applicant be and is hereby directed to pay the costs of this application at the ordinary scale.”*

[9] Mr. Du Pont was disappointed. He appealed upon the grounds set out in paragraph [1] above. It is to these grounds that attention must now be turned. Before doing so however, it is germane to point out that Mr. Du Pont and his legal advisers helped themselves liberally from the barrel of red herrings which they then spread profusely across the path of relevant issues leading to this Court for its determination. This Court found little difficulty in accepting the submissions of Adv. Flynn, who conducted the lender’s case with consummate written and forensic skill, that we should address our

minds only to the issues raised in the grounds of appeal, and should eschew diversions into the byways of irrelevance into which Mr. Du Pont and his advisers sought to lure us.

[10] The three grounds of appeal can be condensed as being:

- i. No Agreement between the parties.
- ii. Reliance on the Lender's Internal Memorandum.
- iii. Failure to take conduct of the parties into consideration.

It will be convenient to examine the contending arguments of the parties under the above headings.

#### NO AGREEMENT BETWEEN PARTIES

[11] The appellant filed heads of argument on the 21<sup>st</sup> March 2013 and what he called Supplemented heads of argument on the 10<sup>th</sup> May 2013. The heads of argument recite that:

- *“Around early March and (sic) agreement reached on what is required of the Appellant.”* – No details of this ‘agreement’ have been produced by the appellant.

- “1. a) *The agreement was a verbal agreement.*” – Presumably, the appellant means that the alleged agreement was oral. It is inconceivable that a commercial entity such as the lender, owing public accountability for its business dealings, would enter into an oral agreement as alleged with a delinquent borrower such as the appellant.
- “b) *By early March agreement had been reached.*” No details of the agreement produced.
- “*All the payments were made in terms of the agreement and 1<sup>st</sup> Respondent would have rejected them if they were not in terms of the agreement.*” No particulars of the alleged agreement produced.
- “*1<sup>st</sup> Respondents continue to accept payments of installments from tenants as collecting agents in terms of the agreement even today.*” The lender’s contention, which the trial judge rightly accepted, is that all payments made by Mr. Du Pont were in terms of his obligations under the original loan agreements entered into between the parties and NOT under the oral settlement agreement – the so-called ‘new agreement’ alleged by him.
- “*1<sup>st</sup> Respondents cannot probate (sic) and reprobate, i.e. they cannot foreclose and continue to accept payments in terms of new agreement.*” No details and particulars of the ‘new agreement’ produced.
- “*By agreeing to settle out of court 1<sup>st</sup> Respondent waived its rights of foreclosure and should show a new breach of the new agreement as*

*well as show the notice to take legal action before it can proceed to sue the Appellant.*” No details or particulars of the ‘new agreement’ produced. The judge rightly rejected Mr. Du Pont’s contention that the lender had waived any of its rights.

- *“It is humbly submitted that the learned judge in the court a quo erred in failing to take into consideration the conduct of the parties as between each other after the issue of summons as he would have clearly concluded that the parties had since come to a new agreement as submitted in paragraph 1 **supra**”.* See paragraph [15] below.

#### RELIANCE ON LENDER’S INTERNAL MEMORANDUM

[12] Mr. Du Pont’s complaint under this head is, in all probability, based upon paragraph [14] of the trial Court’s judgment which reads:

*“The settlement proposal is shown as having failed on the 9<sup>th</sup> March 2012, with the highest echelons of the Bank taking the decision that the proposal was unsuccessful and that the legal process as commenced with the summons be continued with. To this end there is annexed to the answering affidavit an internal communique of the first Respondent spelling out the proposal by the Applicant and the decision there upon by the first Respondent.”*

As the last sentence of the above passage indicates, the internal memorandum complained of was simply one item of evidence which the



Court was entitled to consider in its overall evaluation of the evidence adduced by both parties. The *court a quo* correctly applied that evidence in this way at paragraph [19] of its judgment:

*“The applicant’s proposal was not successful as recorded in the Bank’s own internal documents dated the 9<sup>th</sup> march 2012. In fact it was categorically stated therein that the request by the Applicant was not successful and that the legal process had to continue.”*

[13] That evidence was supportive of the assertions made in the lender’s affidavit. It demonstrated that those assertions were not a figment of the affiant’s imagination: but were rather statements of fact ascertainable from the lender’s records. It is ironic that Mr. Du Pont should make the complaint he makes under the above head. This is because his principal assertion of a ‘new agreement’ is not supported by a single scrap of paper. It rests solely upon the fragile foundation of his unsupported *ipse dixit*.

[14] It follows therefore that there is no merit whatever in this ground of appeal which accordingly fails.

#### CONDUCT OF THE PARTIES

[15] The Appellant’s complaint under this head has already been set out against the last bullet in paragraph [11] above. There are no particulars in the Notice of Appeal or in the Appellant’s heads of argument of the conduct which should have been taken into consideration and which, allegedly, was not.

However, in the supplemented heads of argument, Mr. Du Pont submitted that:

*“by its mere conduct of accepting payment of the amount of E 40 000.00 in march 2012 from the appellant, the 1<sup>st</sup> Respondent clearly led the appellant to believe that the issue had been settled and that proceedings against him had been halted.”*

[16] The lender’s predictable response, as articulated in the First Respondent’s Main heads of argument in reply to Appellant’s Supplemented Heads, is set out in paragraphs 4-5 of those heads which reads:

- “4. The fact that there were negotiations and payments did not amount to an agreement and did not detract from the First Respondent’s right to seek default judgment. The appellant acknowledges that he did not defend the action. (See: **Record**, Page 84, paragraph 9).*
- 5. The Notice of Attachment and Writ of Attachment dated the 18<sup>th</sup> April were served on the Appellant personally on the 3<sup>rd</sup> May 2012. The appellant also admits knowledge of the advertisement of the sale. He vaguely alleges assurances by unidentified officers of the First Respondent that “nothing would happen”. It is submitted that it is inconceivable that*

*appellant did not know, as at 3<sup>rd</sup> May 2012, that judgment had been granted and that the First Respondent was intent on selling the property in execution and that there was clearly no agreement. The First Respondent alleges that the property was duly auctioned with the knowledge of the appellant. The notices were served on the applicant personally on the 3<sup>rd</sup> May 2013 and this is admitted by appellant.*

*See: Record, page 118, paragraphs 19.1 & 19.2; page 132, paragraph 2; page 168, paragraphs 19.1.2 & 19.1.3.”*

- [17] The irresistible force of the respondent’s riposte on this issue torpedoes the appeal on this ground which accordingly fails.

#### EPILOGUE

- [18] It is unfortunately necessary to record an occurrence which took place at the commencement of the hearing of this appeal which was unusual, unprecedented and unprofessional. As these events played out, it became clear that the appellant was, with the concurrence, nay connivance of two experienced lawyers who should not have allowed themselves to be manipulated by such an artful litigant, making a last desperate pitch of the

dice in a reckless attempt to stymie the processes of this Court by seeking to put off the day of adjudication by obtaining an undeserved adjournment.

[19] As has been foreshadowed in paragraph [5] above, the appellant's strategy of rotating lawyers was to be repeated at the 11<sup>th</sup> hour before this Court. Upon the case being called by the Registrar, Mr. Nkosi rose to his feet to declare that he was representing the appellant. Mr. Ndlovu who was present at the Bar remained mute at that stage.

[20] Mr. Nkosi's purpose soon became clear. It was the opening play in a preconceived design by the appellant to secure an adjournment at all costs by a number of cynically worked out methodologies. Plan A was for Mr. Nkosi to report his recent involvement in the case and to seek an adjournment on that basis so that he could bring himself up to speed so to speak. Plan B was to invoke the Court's indulgence upon his oral plea from the Bar that the Court should grant leave to the appellant to lead fresh evidence.

[21] Whilst this farce was unfolding, Adv. Flynn drew the Court's attention to three pertinent facts: First that he had heard of the appellant's intention to

seek an adjournment some 10 minutes before the rising of the court, secondly, that Mr. Nkosi's firm was not on record as attorney for the appellant, and thirdly that Mr. Nkosi was not entitled to be heard by this Court for that reason.

[22] At this point I digress to note that this Court requested Messrs Flynn and Ndlovu for their assistance by submitting a short note of the events which had taken place in Court that morning. Adv. Flynn duly obliged. He also set out valid objections to Mr. Nkosi's appearance, the belated requests for an adjournment, and the leading of further evidence.

[23] Returning to the narrative, Mr. Nkosi who was described by Mr. Ndlovu in his written "Statement of Explanation as per order of Court" as possessing the attributes of seniority, expertise and experience, was evidently crestfallen when he could find no effective response to Adv. Flynn's submission that the essential pre-requisites to his representation of the appellant in court had not been put in place. Salvaging an un-substantial plank in the shipwreck about him, Mr. Nkosi tendered his apologies to the court for his oversight in not placing his firm on record, sought leave to be excused, and departed from the court completely: never to be seen again that day.

[24] I turn now to Mr. Ndlovu's contribution to overall plan to thwart the hearing of the appeal. He sat at the Bar stoically as Mr. Nkosi made his applications. To Mr. Nkosi's credit, there was no demur from him when the hopelessness of his position was pointed out. Mr. Ndlovu however, saw the situation in a different light. He virtually accused this Court in essence of improperly preventing Mr. Nkosi from representing the appellant. This is how he put it in his written statement to this Court:

- 'c) *On or about Friday the 13<sup>th</sup> May 2013, the Appellant instructed that it desired for Mr. Nkosi of Siphonkosi Attorneys to be Appointed as **Co-Attorneys of Record-working alongside our offices**- in the matter and that both Attorneys "fight" his legal battle on his behalf side by side and with the further natural expectation that Mr. Nkosi, given his seniority, expertise and experience, lead Oral Arguments in Court when the matter came before court on the 15<sup>th</sup> May 2013;*
  
- d) *Out of pure human error and oversight, and with no intention of disrespect to their Lordships, Mr. Nkosi forgot to file his formal **Notice of Co-Appointment as Co-Attorneys of Record(alongside our offices)**. This led the Court to halt him, while in mid-submission, from making any further submissions on the appellant's behalf, a situation which left the Appellant –*

*who was presently in court – rather unsettled as Mr. Nkosi was his preferred Attorney to make and lead Oral Submissions.’*

Employing mildly appropriate language, Mr. Ndlovu’s strictures notwithstanding, this Court must nevertheless point out that it is inexcusable that Mr. Nkosi should fail to file the required Notices, and that Mr. Ndlovu should neglect to ensure that he had done so. That failure and that neglect were as elemental as the failure of an attorney or advocate to appear in court properly robed. “Pure human error and oversight” simply do not cut any ice. They are inadequate explanations for that failure and that neglect.

[25] But the appellant’s dexterity for ingenious maneuvering had not yet deserted him. Upon Mr. Nkosi’s departure from court, Mr. Ndlovu sprang into action. He “humbly sought an adjournment of 15 minutes.” In this narrow window of time, the appellant seized the opportunity to relieve Mr. Ndlovu’s firm of its instructions and thus lay the foundation for the now unrepresented appellant’s application, in person, for an adjournment on the footing that he was suddenly without a lawyer, and needed time to issue fresh instructions to yet another firm of attorneys who would need further time to be properly briefed.

[26] This Court, undoubtedly to Mr. Du Pont's chagrin, is not as pliable as that appellant clearly believes. It is fully justified in refusing to allow itself to be exploited by the stratagems employed by him in this case. Enough has already been said about the roles played by the lawyers concerned.

CONCLUSION

[27] In the event, the appeal is wholly lacking in merit and should be dismissed with costs to the respondent.

ORDER

[28] It is the order of this court that:

- i. The appeal be and is hereby dismissed.
- ii. That the appellant do pay costs including the certified costs of Counsel.

**S. A. MOORE**  
**JUSTICE OF APPEAL**

I agree

**M.M. RAMODIBEDI**  
**CHIEF JUSTICE**



I agree

**B.J. ODOKI**  
**JUSTICE OF APPEAL**

For Appellant : Mr. In person

For Respondents : Mr. Advocate P.E. Flynn