



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil case No: 10/2014

In the matter between:

LENA NDLOVU

AND

SWAZILAND DEVELOPMENT FINANCE

CORPORATION

FIRST RESPONDENT

THEMBI NDLOVU

SECOND RESPONDENT

MXOLISI NDLOVU

THIRD RESPONDENT

REGISTRAR OF DEEDS

FOURTH RESPONDENT

ATTORNEY GENERAL

FIFTH RESPONDENT

Neutral citation:

Lena Ndlovu And Swaziland Development Finance Corporation & 4 Others (10/2014) [2014] SZSC50 (03 December 2014)

Coram:

**S.A. MOORE JA
M.C.B. MAPHALALA JA
P. LEVINSOHN JA**

HEARD : **07 NOVEMBER 2014**
DELIVERED : **03 DECEMBER 2014**

Summary

Civil Appeal – Surety mortgage bond – application to cancel mortgage bond on the basis of misrepresentation and declaring same to be null and void – court a quo dismissed application in the absence of evidence of misrepresentation – held that the mortgage bond executed by appellant is valid and enforceable – held further that the mortgage bond was executed as security for a debt which has not yet been discharged – appeal accordingly dismissed – no order as to costs.

JUDGMENT

M.C.B. MAPHALALA JA

[1] The appellant brought an application in the court *a quo* seeking an order directing and/or authorising the fourth respondent to cancel the registration of the surety mortgage bond No. 102/2010. The appellant further sought an order declaring the surety mortgage bond No. 102/2010 null and *void ab initio*. The first respondent opposed the application on the basis that the mortgage bond executed by the appellant was valid and legally enforceable; and, that the mortgage bond was executed as security for a debt that had not been extinguished.

[2] The court *a quo* dismissed the application on the 28th February 2014 on the basis that there was no misrepresentation as alleged by the appellant. The

court *a quo* further held that the appellant had not established the circumstances necessary for the cancellation of the mortgage bond.

[3] The facts in this matter are generally not in dispute. The appellant is a widow, and, she owns immovable property being Farm No. 220 situate in the Shiselweni District measuring 146,0358 (One four six comma zero three five eight) hectares. The second applicant was until recently the daughter in-law of the appellant, and, the third respondent is the son of the appellant.

[4] It is common cause that in August 2009, the first respondent lent and advanced an amount of E560 000.00 (five hundred and sixty thousand emalangeni) to the second respondent to purchase a truck for a timber haulage business. The third respondent signed a personal suretyship as security for the loan. Again in February 2010, the first respondent lent and advanced E1.5 million to the second respondent to purchase an additional fleet of trucks for their business of timber haulage. At the time the marriage relationship between the second and third respondents was good.

[5] Before the second loan was approved, the first respondent required that there should be a registered mortgage bond over immovable property as security for the loan. The appellant concedes to this fact in her founding

affidavit, and, further admits that she was approached by the second and third respondents to put her farm as security for the loan, and, she agreed after consulting her family.

[6] What is not supported by the evidence is her allegation that as a condition for putting her farm as security the second and third respondents had to register a company in which they were to be co-directors; and, that she would have equal shares with the two respondents in the company to be formed. The totality of the evidence shows that the appellant was aware that the second respondent was the principal debtor on the basis that she had discussed the matter with the respondents. She argued that she did not agree to stand surety to a personal debt of the second respondent. In the circumstances the contention by the appellant that she was induced by a misrepresentation made by the second and third respondents that they were to register and incorporate a company as a condition of putting her farm as security in which she would be a shareholder is misleading.

[7] The issue of incorporating a company was only raised by the appellant after it became apparent that the marriage relationship between the second and third respondents had disintegrated; at that stage, it became evident that the respondents couldn't work harmoniously in the business. Furthermore, they couldn't comply with the monthly repayments of the loan to the first

respondent despite repeated reminders to do so by the first respondent. The appellant was apprehensive that she would lose the farm which was mortgaged as security for the loan; she wanted her farm to be released from being a security to the loan.

- [8] On the 22nd January 2010, the appellant deposed to an affidavit before the Commissioner of Oaths in the following respect:

AFFIDAVIT

I, Lena Ndlovu, the owner of Farm 220 situate in the Shiselweni District Swaziland hereby give permission to my son Mxolisi John Ndlovu and his wife Thembie Ndlovu to use the Title Deed of Farm 220 situate in the Shiselweni District Swaziland as security for the loan they have applied with Fincorp to purchase trucks. . . .

- [9] On the 11th February 2010, the appellant executed a surety mortgage bond before the Conveyancer and Notary Public Attorney Stanley Mnisi. The Conveyancer has deposed to a confirmatory affidavit to the Answering Affidavit of the first respondent's Managing Director Dumsani Mnisi. He states that the appellant appeared before him on the said date in the company of the third respondent. The nature and purpose of a surety mortgage bond and effect thereof was explained to the appellant. The

appellant had confirmed that she understood the contents of the mortgage bond. Thereafter, she affixed her right thumb to the documents as a signature thereof; hence, the conveyancer issued the Notarial Certificate signifying that the bond was lawfully executed.

[10] It is not in dispute that when the appellant appeared before the Conveyancer, she also signed a power of Attorney to pass the surety mortgage bond. Attorney Knox Mshumayeli Nxumalo and Attorney Stanley Bongani Mnisi were appointed to appear before the Registrar of Deeds to pass and execute the surety mortgage bond for the sum of E1.5 million in favour of the first respondent. She also waived and renounced the benefit of the legal exceptions contained in the bond being “*non senatusconsultum velleianum*” and “*de authentica si qua mulier*” *numeratae pecuniae, non causa debiti, error calculi, revision of accounts, no value received, ordinis seu excussionis et divisionis and de duobus vel pluribus reis debendi*”.

[11] It is apparent from the surety mortgage bond, the Loan Agreement as well as the Power of Attorney that the second respondent is the Principal Debtor who is lawfully indebted to the first respondent for the Loan inclusive of costs and charges, and, that the mortgagor being the appellant did bind herself as surety and co-principal debtor to the Principal Debtor. It is

further apparent that the appellant's farm is the lawful security for the due and proper payment of the loan by the Principal Debtor. The appellant lawfully executed the surety mortgage bond No. 102/2010 as security for the loan; hence, the surety mortgage bond cannot legally be cancelled before the principal debt and ancillary costs and charges have been settled.

[12] Cameron and Nugent JJA in *Standard Bank of South Africa Limited v Rudiger Marshall Saunderson and Two Others*, South African Supreme Court case No. 358/2005, para 2 and 3, delivered a majority judgment of five judges:

“[2] A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property, that upon default, the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect is that the borrower, by his or her own volition, either on acquiring a house or later when wishing to raise further capital, compromises his or her rights of ownership until the debt is repaid. The right to continued ownership, and hence occupation, depends on repayment. The mortgage bond thus curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself.

[3] The value of a mortgage bond as an instrument of security lies in confidence that the law will give effect to its terms”

[13] Williamson JA in the case of *Thienhans NO v Metje & Ziegler Ltd and Another* 1965 (3) SA 25 (A) at 31 said the following:

“Clearly a mortgage bond can be utilised both as an instrument of hypothecation and as a record of the terms and conditions of the obligation in respect of which the hypothecation is to create a security; in addition it is a matter of common and usual custom in the drafting of bonds to incorporate therein an unqualified admission of liability by the mortgagor. The reason therefore is, however, certainly not that such an acknowledgement is required for the validity of the bond as a means of creating a real right by hypothecation in favour of the creditor. The origin and the prime purpose of the custom is the facilitation of the obtaining of a quick and easy remedy, such as provisional sentence, against the mortgagor in case of his default.”

[14] Justice Van Wyk JA in *Lief, NO v Dettman* 1964 (2) SA 252 (AD) at 259 defined a mortgage bond as follows:

“For the purpose of this case, a mortgage bond may be defined as an instrument hypothecating landed property to secure an existing or a future debt or both existing and future debt. . . . Where a bond is intended to secure an existing debt, it is inevitable that the amount of such debt should be acknowledged in the bond, and it is also essential that the maximum amount of future debts secured by the bond should be indicated. The bond is registered in the Deeds Office so that the world should have knowledge of the fact that there is a charge against the mortgagor’s property; the object is not to notify the world that the

mortgagor owes the mortgagee a specific sum of money. Creditors of the mortgagee cannot rely on the acknowledgement of indebtedness in the bond as correctly reflecting the debt owed to the mortgagee by the mortgagor at any particular time subsequent to registration. The only real rights in favour of the mortgagee created by the registration of the bond are rights in respect of the mortgaged property, e.g. the right to restrain its alienation and the right to claim a preference in respect of its proceeds on insolvency of the mortgagor. These real rights, however, can only exist in respect of a debt, existing or future, and it follows that they cannot be divorced from the debt secured by them.”

See also, the Principles of the Law of Mortgage, Pledge & Lien: by Konrad Kritzing, Juta & Co. Ltd 1999 at pp 19-21, 27-31.

Farlam AJ, as he then was, in *Zietsman v. Allied Building Society* 1989 (3) SA 166 OPD at 168 held that a surety mortgage bond should fulfil three functions. Firstly, as an instrument of hypothecation. Secondly, a record of the terms and conditions of the obligations in respect of which the hypothecation was to create a security. Thirdly, as an acknowledgement of debt or a promise to pay, which in itself could be relied upon by the mortgagee to obtain judgment against the principal debtor as well as the mortgagor.

[15] The essence of the present appeal is that the security mortgage bond should be cancelled on the following basis: firstly, misrepresentation regarding the identity of the person to be provided with security. Secondly, that the bond had been erroneously registered as there was no suretyship agreement between the appellant and the first respondent. Thirdly, that the bond was liable to be cancelled on grounds of public policy as appellant had not been afforded independent legal advice. Fourthly, that no suretyship could be implied *in casu*, and if so implied, the appellant had cancelled same; hence, the bond had to be cancelled as well.

[16] It is well-settled that this court may only interfere with the judgment of the High Court if the trial judge has misdirected himself resulting in a failure of justice. The appellant has failed to establish such a misdirection to the extent that this appeal has no merit and ought to be dismissed. It is apparent from the evidence that the security mortgage bond was lawfully executed and registered with the full authority of the appellant. In the circumstances the bond is legally valid and enforceable in law, and, the bond cannot be cancelled unless the debt has been discharged in full. As stated in the preceding paragraphs, the appellant was aware of the identity of the principal debtor being her daughter in-law at the time. It is common cause that the appellant deposed to an affidavit giving permission to the second and third respondents to use the farm as security for the loan. The

appellant further signed a Power of Attorney to pass a surety mortgage bond which was followed by the execution and registration of the surety mortgage bond.

[17] It is not in dispute that the principal obligation has not yet been discharged pending the repayment of the loan in full. The first respondent as both creditor and mortgagee has not waived its legal right to enforce the mortgage. The first respondent in a letter dated 1st February 2013 and addressed to the second respondent as the Principal Debtor, threatened to issue summons against her for failure to pay monthly instalments in respect of the loan. The letter was copied to the appellant as the mortgagor.

[18] Similarly, there has not been a novation in which the principal obligation is replaced with a new agreement; hence, the principal obligation remains legally valid and enforceable. Lastly, the farm which forms the security of the debt has not been destroyed or extinguished; hence, the mortgage bond has not been terminated.

[19] From the foregoing there is no legal basis for this court to cancel the security mortgage bond; and, the trial judge was entitled to dismiss the application.

[20] Accordingly, the appeal is dismissed with costs.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree:

S.A. MOORE
JUSTICE OF APPEAL

I agree:

P. LEVINSOHN
JUSTICE OF APPEAL

FOR APPELLANT: Attorney N.E. Ginindza

FOR RESPONDENTS: Attorney Zweli Jele

DELIVERED IN OPEN COURT ON 3 DECEMBER 2014