



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case 43/2015

In the matter between:

**SWAZILAND DEVELOPMENT & SAVINGS
BANK**

Appellant

And

MAURICE LAURENCE ADAMS N.O.

Respondent

Neutral citation: *Swaziland Development & Savings Bank vs Maurice Laurence Adams N.O. (43/2015) [2015] [SZSC 25] (9th December 2015)*

Coram: **S.B. MAPHALALA AJA, J.P. ANNANDALE AJA and M. DLAMINI AJA**

Heard: 18th November 2015

Delivered: 9th December 2015

Summary: **Civil Procedure – on a finding by the court a quo – that a Continuing Mortgage Bond could not cover future debts –**

Appellant's contends that it does - Respondent on the other hand contends otherwise that clause 12 is clear – court's find in favour of Respondent – appeal dismissed with costs.

JUDGMENT

MAPHALALA AJA

The appeal

[1] Before this court is an appeal lodged by the Appellant against the judgment granted in favour of the Respondent in the court **a quo** (per **Hlophe J**) amongst other things, in the following terms:

- 1.1 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 E3,400.00 (Three Thousand Four Hundred Emalangeni) and E71,000.00 (Seventy one thousand Emalangeni), registered against the latter's said property fully described herein above be and are hereby cancelled;**
- 1.2 The Second Respondent be and is hereby directed and authorised to effect the cancellation of the Mortgage Bonds referred to above from or against the later Lawrence Adams property described above;**
- 1.3 The First Respondent be and is hereby directed to forthwith release to the Applicant the Title Deed of the late Lawrence Adam's property fully described herein above against which the Mortgage Bonds to be cancelled were recorded;**
- 1.4 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 authorised and empowered to sign and execute such documents as to give to this Order;

- 1.5 The First Respondent be and is hereby ordered to pay the costs of these proceedings on the ordinary scale.**

[2] The Application appeared before **Hlophe J** who heard arguments of the parties and proceeded to issue his judgment on the 16th July, 2015 and made the following order:

Consequently I have come to the conclusion that Applicant's application succeeds and I make the following orders:

- 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 E171000.00, 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 authorised 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 authorised 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 this proceedings on the ordinary scale**

[3] It is against the above orders that the Appellant has filed an appeal before this court.

A history of the dispute

[4] The facts as gleaned at paragraph 3 to 5 of the Record of Appeal are these:

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, situated on 4th Avenue and 8th Street Nhlngano 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 11th 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 obligation 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.

The Arguments

[5] The appeal appeared before this court on 12th November 2015 where the Appellant was represented by Mr. N. Mabuza who filed Heads of Arguments. The Respondent is represented by Mr. K. Simelane who also filed Heads of Arguments.

[6] I shall in brief outline the attorneys pertinent arguments in this following paragraphs of the judgment.

(i) The Appellant's Arguments

[7] The attorney for the Appellant outlined his client’s case under various topics being “hearsay evidence”, “disputes of facts”, “**lis** inter partes”, “Covering Bond” and “Parole evidence”. In paragraph 4 thereof the attorney for the Appellant cited decided cases to support his contentions.

[8] All in all, that this court upholds the appeal with costs.

(ii) The Respondent’s Arguments

[9] The attorney for the Respondent also filed Heads of Arguments answering to the Appellant’s arguments point by point citing relevant legal authorities in support of his arguments.

[10] Finally, that this court dismisses the Appellant’s appeal with costs.

The Court’s analysis and conclusions thereof

[11] I shall address the topics as referred in the Heads of Arguments of the attorney for the Appellant **ad seriatim** in the following paragraphs:

(a) Hearsay evidence

[12] It is contended for the Appellant that the court **a quo** allowed inadmissible hearsay evidence to inform its decision. In this regard cited in South African case of **S v HOLSHAUZEN 1984 (4) S.A. 853 (e)**.

[13] The arguments in this regard is that the letters accepted by the court **a quo** were authored by the late Lawrence Adams, who is not available to testify and is not a party before this court.

[14] On the other hand the attorney for the Respondent cited the provisions of section 15 of the Civil Evidence Act of 1902 to the following:

4.1 **“It shall not be necessary for a party in a case to give evidence to prove, nor shall it be competent for any such party to give evidence to disprove any fact or facts admitted on the record of such case”.**
(The underlining is my own)

[15] The attorney for the Respondent further cited the legal authority of **Hoffman and Zefferitt, in South African Law of Evidence 4th Edition (1988) at page 624** to the following:

“statements made by non-witnesses are not always hearsay. Whether or not they are hearsay depends on the purpose for which they are tendered as evidence. If they are tendered for their testimonial value (i.e. evidence of the truth of what they assert), they are hearsay and are excluded because their truth depends of the credit of the asserter which can be tested only by his appearance in the witness-box. If, on the other hand, they are tendered for their circumstantial value to prove something other than the truth of what is asserted, then they are admissible if that they are tendered to prove is relevant to the enquiry”. (The underlining is my own)

[16] In my assessment of the arguments of the parties in this regard on the legal authority in the above texts that the averments made by the Appellant and the documents relied upon on behalf of the Respondent are not hearsay as they

were only annexed as part of the record in the dealings of the parties and most importantly are not denied by the Appellant.

[17] I therefore find in favour of Respondent in this regard.

(b) Disputes of fact

[18] It is contended for the Appellant that this matter is plagued with material disputes of fact and that these are so wide and fundamental and were foreseeable that the Application should have been dismissed with costs.

[19] The Respondent on the other hand is of the view that Court **a quo** did not err in law of fact in finding that the alleged dispute of facts by the Appellant were not material for the following reasons:

16.1 The Appellant clearly admitted and or did not deny that the amount of the Covering Bond were paid by the deceased.

16.2 In the Appellants own words, the amount alleged to be now owed and allegedly being secured by the Continuing Covering Bonds were for purposes of buying and running a bus business which such loans were sell-securing

[20] It would appear to me that such admission of facts render all other form of denials by the Appellant to be immaterial, this leave the only legal question of whether the Continuing Covering Bonds in question can be said to be covering the costs which are way in excess of what was agreed upon the terms of the Bonds. Also the loans that were secured by the bus business as per the agreement between the parties.

[21] For the above reasons the Court **a quo** was correct in this regard.

(c) The Covering Mortgage Bond

[22] According to the attorney for the Appellant a covering bond is referred as:

“A covering Mortgage Bond is defined as a “bond which purports to act as continuing cover or security in respect of any indebtedness, existing or future, which may at any time due to the mortgagee from the mortgagor, arising from any cause whatsoever, or from specified causes”.

[23] It contended for the Appellant that **in casu** it was averred and even argued that the Bond was a Covering Bond. Even **ex facie** the Bond itself it is stated explicitly that the Bond is to secure, current existing and future debts. That the Applicant was legally entitled to refuse to cancel the Bond and surrender the Title Deeds given the deceased still owes the Appellant and that is the legal basis for the claim.

[24] On the other hand it is contended for the Respondent that the Continuing Covering Bonds does not secure the debt of E507,790.04 because clause 12 of the Continuing Covering Bonds provides as follows:

“11.1.1 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 E7,000.00 in addition thereto for all and ay sums of money which shall now or may in future be owing to or claimable by the Bank from whatsoever 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 E7,000.00 originally advanced. The Bank

shall be entitled to advance further sums up to the amount of the capital and the said sum of E7,000,00 under the security of this Bond, which advances shall be secured hereunder as if same formed portion of the original advance, and shall in every respect be subject to all the terms and conditions of this Bond, save that such further advances shall be repayable with such interest and in such manner as may be stipulated at the time the advance is made or subsequent thereto; in the event of no such stipulation being made, the provisions of this Bond in relation to interest and repayment shall apply to any such further advance.” (the underlining is my own)

[25] In my reading of the above Continuing Covering Bond it is abundantly clear that such bond expressly states that it was to secure the loan of E3, 400.00 and any other future debts that shall not exceed the E3,400.00 and E21,000.00 respectively cannot in any way be said to be securing a debt of E507,790.04 and E197,396.00 or E210,000.00 for operating the bus business as such debt were self securing and Appellant have taken cause in lodging its claim against the estate at the offices of the Master of the High Court.

[26] I have considered the above arguments of the attorneys of the parties also it is clear to me that the position of the Respondent that the Continuing Covering Bond is clear in Clause 12. I agree with the arguments of the Respondent outlined above in paragraph [25] **supra**. (See the Law of South Africa, Vol. 17 at paragraph 492 thereof).

[27] In this regard I also agree with what is stated by the Judge **a quo** at paragraph [26] of its judgment that it is difficult to imagine how the sum of 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.

[28] In my view the reasoning by the Judge **a quo** cannot be faulted on these facts.

[29] As I found in paragraphs [26] to [28] I come to the considered view that it would be pointless to address the outstanding issue of the Parole evidence raised by the Appellant. I say so because the gravamen of the Appellant's case hinges on the effect of clause 12 of the Mortgage Bond.

[30] I wish to comment **en passant** that the claim by the Applicant of E507,790 has been filed before the Master of the High Court to be dealt with in the winding up of the estate Maurice Lawrence Adam N.O. Therefore, the Appellant still has a remedy were such a claim will be considered in due course by the Master of the High Court. In other words, not all is lost to the Appellant on the facts of this matter

[31] In the result, for the foregoing reasons I would dismiss the Appellant's appeal with costs.

DELIVERED IN OPEN COURT ON THE 9 DECEMBER, 2015.

S.B. MAPHALALA
ACTING JUSTICE OF APPEAL

I AGREE

J.P. ANNANDALE
ACTING JUSTICE OF APPEAL

I ALSO AGREE

M. DLAMINI
ACTING JUSTICE OF APPEAL

For the Appellant: Mr. N. Mabuza
(S.V. Mdladla Attorneys)

For the Respondent: Mr. K. Simelane
(Henwood & Company)