IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE NO. 71/2022**

In the matter between:

The Trustees for the time being: Bhubhudla Family Trust	**1st Appellant**
Ntombifuthi Dlamini	**2nd Appellant**
Busisiwe Sphiwe Ngcamphalala	**3rd Appellant**

Versus

Swaziland Building Society	**First Respondent**
ESwatini Royal Insurance Corporation	**Second Respondent**

Neutral Citation: *The Trustees for The Time being of Bhubhudla Family Trust and 2 Others v Swaziland Building Society and ESwatini Royal Insurance Corporation (71/2022) [2022] SZSC12 (10th May, 2023)*

Coram: RJ Cloete JA, JP Annandale JA, and NJ Hlophe JA.

Heard: 17th April 2023

Delivered: 10th May 2023

CASE SUMMARY

Late trustee obtained a loan from Building Society in favour of a trust, which is bound by terms and conditions of loan. Default in mortgage payments by trust subsequent to death of former trustee. Trustee declined medical examination prior to potential increase of life insurance limits, far less than registered bond accounts. Building Society to foreclose the bond and execute the property.

High Court ordered in favour of first Respondent for the full claimed amount, execution of bonded property, costs on the agreed scale of attorney and client, plus interest at a conciliated rate. Counterclaim dismissed, with costs.

On appeal, held that the High Court did not err. Comprehensive and well-reasoned judgment confirmed. Late renderings of purported grounds of appeal falling outside the ambit of both pleadings and evidence, objected to by opposing litigants and questioned by Court, resulting in non-pursuit of same by counsel. Ditto with certain sets of legislation.

Essence of appeal contentiously asserting that two separate contracts of insurance applied to two separate loan accounts, with premiums for one account already factored into applicable repayments and bond balance of the other account, to be secured by insurance cover. Also, that first respondent's omission to procure full cover causes it to be liable for the shortfall. Alternatively, that despite the insured life declining medical screening as prerequisite for full cover, it resulted in the Building Society being liable for payment of judgment debt.

Appeal dismissed, with costs on attorney-client scale.

JUDGMENT

Annandale JA

[1] The real question which is to be decided in this appeal is akin to the proverbial "free lunch" or to "have your cake and eat it too". Or, can a contractual party in a mortgage bond situation successfully claim that the judgment debt, interest and huge legal costs must be paid by the Building Society vis-à-vis ESwatini Royal Insurance Company instead of by itself.

[2] The contractual parties are the Bhubhudla Family Trust, represented at the relevant time by its trustee, the late Mr Nqaba Dlamini, and the ESwatini (Swaziland) Building Society. An application for a loan was favourably considered and it resulted in the registration of a first mortgage bond of E2 550 000 (plus a further sum of E 1 275 000 to cover potential losses) over the property registered in the name of the Trust. The following year, a second mortgage bond in the amount of E 2 000 000 (plus a further sum of E1 000 000 to cover potential losses) was also registered.

[3] It is common cause that insurance cover over the life of the late Dlamini was obtained through ESwatini Royal Insurance Corporation – the second respondent- with the insurance premium over the life of the late trustee, Nqaba Dlamini paid by the Trust. Both he and the third Appellant were also sureties and co-principal debtors of the Bhubhudla Family Trust - the Trust.

[4] It is also common cause that the Trust essentially serviced its obligations until such time that the insured person passed on. Eventually the Building Society decided to activate the legal recovery process and obtained judgment in its favour, with the counterclaim dismissed.

[5] From the onset, it is clear that the assailed judgment of the High Court, per T. Mlangeni J, comprehensively dealt with both facts and law admirably. The legal analysis of issues at stake are comprehensively and painstakingly set out and decided in accordance with legal precedent and other sources of law. As it eventually materialised at the time when the appeal was argued before us, the Appellants conceded that most of their stated grounds of appeal as well as additional grounds as was sought to be set out in their heads of argument, could not properly be motivated and substantiated in order to successfully appeal the judgment under consideration. This is especially so with most of these were not raised or decided in the Court *a quo*.

[6] For instance, that elements of statutory provisions which would have been relied upon to justify alleged serious irregularities have been repealed, or are not applicable to Building Societies. Especially, that the Court was said to have erred in assuming jurisdiction over the matter whilst there was no prior debt counselling or with a dispute taken before the Ombudsman for adjudication of the disagreement.

[7] This averred legal position was not brought for adjudication in the Court below. It was to be sought that this Court decides the issues, sitting as a court of first instance with original jurisdiction. Also, there is no

application for a review. As said, Mr Msibi readily and wisely decided to not pursue this point *in limine*.

[8] This position in our law, that a court of appeal will not readily entertain a ground of appeal which was not raised in the lower court, is trite. The Supreme Court does not sit as court of first instance to decide new matters which are first raised on appeal raised without having been ventilated in the Court *a quo*. See for instance Muzi P. Simelane v The Chief Justice of ESwatini &Two Others, Supreme Court of ESwatini Case No.82/2020. Para 26 and Debbie Sellstrohm v Ministry of Housing and Urban Development and Others (25/2014) [2018] SZSC 02 (27th February, 2017) para 27.

[9] Another point raised in heads of argument by the Appellants was the non-joinder as party in the litigation of the Estate of the late Nqaba Dlamini. This was to have been argued to be based on his personal capacity as co-surety and principal debtor, not as representative of the trust or *post – mortem*. The Deeds of suretyship contains a provision (clause 24, page 47 and page 339, volume 3 of the Record) wherein the surety waived and renounced the legal benefits of excussion and divisions. Also, that referral to the Ombudsman would have been touted as the best solution if the parties were referred back to "conciliate and negotiate the new payment terms and determination of the precise outstanding debt". Again, this point raised *in limine* was also not pursued at the hearing. Needless to say, is that the assertion to the effect that such intervention of the Ombudsman is no legal requirement for the High Court to have jurisdiction only once such processes were first traversed by the litigants.

[10] The pleadings which were before the Court *a quo* sought to raise a dispute of the amount of the claim. It was to have been argued that the claimed sum E 3 219 441 .85 was incorrectly calculated in violation of The Money Lending and Credit Financing Act as well as the Financial Services Regulatory Act and Inspection Circular No.8 issued under the Central Bank Order. The Appellants did not deem it necessary to elaborate on any details to support their allegations of contravening the legislation. No sections of any of the statutes have been referred to, nor to the extent of such contraventions. In addition, the Money Lending and Credit Financing Act was repealed by Section 114 of the Consumer Credit Act of No.7 of 2016. The Building Society Act No.1 of 1962 is administered by the Registrar, being the Governor of the Central Bank. It is a generalised and all-encompassing shotgun approach. To say that the claimed amount is in contravention of legislation is one thing, but to avoid any specifics as to just how it could affect the amount does not assist this wildcat statement. It merely serves to underscore the futility of claiming that the court could not have "assumed jurisdiction" in the matter. Absolutely no evidence was adduced to support this. No witness demonstrated any relevancy to the legislation insofar as it would apply to the matter at hand. Also, no evidence was heard to the effect that the interest rates used by the second respondent was *ultra vires*, different from either the allowed or agreed rates of interest. The two loans were subject to different agreed rates at interest. Ultimately the trial court awarded interest at a flat rate of 11%per annum, not at 11% and 12.5% respective to the two loans. This he did in the interests of fairness, readily calculable amounts and with the *contra preferentem* rule in mind. The figure of 11% is a median equitable compromise solution to meet the potential of errors in calculation of different rates of interest which apply to different amounts which together

form the judgment debt. I cannot fault the learned trial Judge for having done so *ex abundanti cautela*.

[11] Ultimately, this point or ground of appeal was not pursued in argument by counsel. Further points which were also not pursued relate to the election between different insurance companies, said to have been omitted from explicit disclosure to Mr Nqaba Dlamini, verbally or in writing. The allegation that all relevant legal exceptions were never explained to the other sureties and co-principal debtor was also not raised before this Court when the appeal was argued before us.

[12] The Appellants also intended to assail the adverse judgment by "exposing" alleged incompetency and lack of due diligence by both the Building Society *qua* banking institution and Insurer. Again, this was not pursued by Mr Msibi. He would have had the unenviable task of being unable to refer to any evidence to sustain these assertions. Nowhere in the transcript of evidence, running to some 1000 pages, nor in the voluminous bundle of documents, is there any indication that either institution's officials displayed incompetence or lack of due diligence. The expert witness of the first respondent, Zola Tsabedze, was not contradicted nor challenged with a different scenario which could have influenced the learned judge in any other way than to dismiss any claim of negligence.

[13] The plaintiff was enjoined to plead and prove insofar as is applicable, that there is (A) A contract of loan; (B) That the money was advanced in terms of the loan and (C) That the loan is repayable – see Damont NO v Van Zyl, 1962 (4) SA 47 (C). The Court below did consider each of these,

meticulously so. It is common cause that the contracts of loan, mortgage, and so on were duly proven. Payment of the money in terms of the loan was also duly proven, and is clearly reflected in the copious volumes of statements etcetera. That the loan repayable is equally so proven in the documentary evidence, and especially through *viva voce* confirmation of the certificate of outstanding balance, and as agreed upon in the mortgage bond clauses.

[14] Yet another point which was initially intended to be argued on appeal is an alleged non-joinder of the Estate of the late Nqaba Dlamini. This belated contention was not decided in the court *a quo* and also not part of the *ratio decidendi*. In any event, even if it was so pleaded, the learned trial judge would have had to be very hard pressed to uphold it. It must be noted that Nqaba Dlamini entered the arena as representative of the Bhubhudla Family Trust, which also enjoined him to be a co-principal debtor and surety. The Family Trust is now represented by "The Trustees for the time being" and any interest that the late trustee might have had is now incorporated in the body corporate of the first Appellant.

[15] Furthermore, the Notarial Deed of Trust of the Bhubhudla Family Trust stipulates in clause 6.5 thereof that:

> "In the event of the death... of any Trustee... the surviving Trustees shall be empowered to continue to act...".

[16] The role of the late trustee is quite clear and without controversy. Nqaba Dlamini, when signing the loan agreement and Mortgage bond papers, was

acting and clearly doing so in his capacity as trustee of the trust. Similar facts in Standard Bank of South Africa Ltd v Gerhardus Joshua Swanepoel NO (20062/2014) [2015] ZASCA 71 (22 May 2015) caused the full Supreme Court of Appeal to hold that there is no privity of contract between the person who signed the papers and the bank. Instead, the contract lies between the trust and the banker. The trust, which has no legal *persona* of its own, was represented by its trustee.

[17] It was therefore no surprise when the Appellants chose not to pursue this ill- conceived legal point, further amplified by the fact that it would have required of this Court to sit as court of first instance to decide this point.

[18] This argument, as well as is applicable to the aforementioned intended but abandoned issues, all suffer from the same malady: they were neither raised in nor determined by the trial court. In Thabsile Thandeka Khoza v Khanyisile Bonisiwe Makhanya and Others (11/2018) [2018] SZSC 57 (dd 30/11/2018), this Court referred to BBX (Pty) Ltd vs Muzi Wandile Leander Hlatjwayo NO. and 3 Others (61/2018) [2015] SZSC 32 (dd 9/12/2015) where some of the requirements for raising new issues or points of law for the first time an appeal were set out as:

> "These requirements are underpinned by the general rule that the duty of an appellate court is to ascertain whether the court below came to correct conclusion on the case submitted to it. Thus, if a legal point or issue was neither raised nor argued in the court below, nor raised in the pleadings, to allow argument on it for the first time on appeal, in all probability, translates into unfairness to the opposing party."

[19] Turning to the appeal itself, it has become apparent that the real thorn in the flesh of the Appellants relates to the amount of life insurance cover over the insured life of the late Nqaba Dlamini, and the associated premiums levied for it. This much is reflected in the ground of appeal which was spiritedly argued by the Appellant's counsel. It is set out as follows:

> "The court *a quo* erred in law and in fact in not upholding (as between the First Appellant and Second Defendant) that a separate contract of insurance (Mortgage Protection Policy) under the second Loan Account, number 136332 – 02, where a separate premium was payable by the First Appellant. The existence of such a separate insurance premium entitled the First Appellant to payment of the liability arising there from even if the free cover limit was applied."

[20] From the onset of this saga, it was commonality between the parties that the late Nqaba Dlamini represented the Family Trust when he applied for a loan. Part of the deal was that he would have his own life insured in order to cover the diminishing outstanding amount owed to the lender. However, and this was indeed brought to his attention, if the amount exceeded the standard "free" limit, proof of insurability had to be provided to support the excess. There is ample evidentiary proof that it was necessary for him to undergo a medical examination, but that he steadfastly refrained from doing so.

[21] In consequence, the first loan amount only had the limited life insurance cover, leaving an uninsured balance. Premiums for the insured life were paid by the Trust.

[22] The same happened in the case of a second loan, with the same parties and same circumstances present. Again, an uninsured balance of the loan amount remained. Again, the insured person declined a medical health check in order to increase the insured amount to the same level as the outstanding debt.

[23] An important distinction that has to be made is that there is only one insured life. His liability is set out the agreements, documents, terms and conditions as applicable. The Trust was indebted as set out in the two separate applications, bonds and agreements. The amounts were E2 550 000 and E2 0000 000 respectively. Each of these two sub-accounts are subjected to a two million "free" insurance cover limit. "Free" equates to the insurable amount over the life of a lender without proof of health. Since only one life was insured, the limitation applied to both the sub- and loan accounts combined.

[24] Initially, the limit was E1 500,000, then it was raised to E2 000 000. Notably, the Appellants argue otherwise.

[25] They want it to be held that there is second or separate contract of life insurance under the second loan account number with a second separate insurance premium.

[26] The learned judge *a quo* held that: "Nqaba [Dlamini – late trustee] was repeatedly informed orally, at least once in writing, to undergo medical tests. He was reluctant to do so and did not do so. Hence there was no

MPP cover [credit life insurance] for the amount in excess of the free cover limit of E 2 000 000" (at para [94] of the impugned judgment).

[27] I cannot fault these findings of fact which were well founded in evidentiary material before the learned Mlangeni J. This serves to dispel any notion, as argued by the Appellants, that there existed two separate contracts of insurance and two separate limits of "free" insurance cover to the same level of the total outstanding balance due to the lender. It also would have resulted in increased insurance premiums and it only could have happened if medical health examinations were done and if the insurer accepted liability for the addition cover. The fallacy of this argument would result in absurdities. For instance, if a lender splits a E6 000 000 loan into three different accounts with each entitled to the E2 000 000 "free" insurance cover levels, without medical checks or any further ado, the lender would now have an insured life of E 6 000 00! So, no proof of insurability is thus required if the Appellants were to be correct in this regard.

[28] Therefore, I cannot find any justification to uphold the appeal on this remaining ground.

[29] One aspect on which Mr Msibi presented protracted argument is the issue of purported double payments for insurance premiums, entitling a full pay-out for each loan account. His starting point is a letter by the Mortgage Manager, dated the 18th November 2014 (page 53 of the record). Therein, the Trustees are advised of the monthly repayments of E36 796. It includes E1807 for the life insurance cover. This confirms that the Trust, now the First Appellant, paid the premiums.

[30] The second loan is likewise advised, on the 25th May 2015. Repayments were now E53 256 per month, inclusive of payments to sub-accountant 2 of E23 074 and insurance of E 1020. The Senior Insurance officer of the Building Society testified (page 86 of the transcript) that initially, insurance premiums were calculated on the full outstanding amount of 2.5 million. It was then reduced to the "free" insurance amount, resulting in a reduction from E 1 780.34 in June to E 1 020 from September 2014. This was before the second loan came into existence.

[31] The Appellants argue that the letter of the 25th May 2015 (page 224 Vol III) (*supra*) states that Mortgage Repayments (on the sub-account) was E28 361, which already includes the insurance premium of E 1 807 for that account. Payments as at the 18th November 2014 were to be E 26 796 per month. The difference between this amount and the E 28 361 as of the 25th May was argued to have included a voluntary additional payment of E 2000 by the Trust.

[32] Firstly, the arithmetic does not add up. Moreover, the assertion that two separate insurance premiums have been incorporated in the latter total monthly repayments are innovative but speculative assumptions. The evidence is clearly to the effect that the Appellant's conjecture is untenable. Premiums were reduced to the "free" level when medical health checks were not undergone and submitted. The full exposure to risk that would have been covered was reduced, with a concurrent decrease in premiums.

[33] Additionally, it was agreed between the parties that certification by a manager of the Building Society shall suffice as proof of outstanding

amounts, disbursements, interest, costs, etcetera. Proof to show that any such amount is either not owing or factually incorrect, lies on the shoulders of the mortgage account holder. The record and evidence speak for itself. This averred double receipt of insurance premiums, for less than the registered bond accounts cannot be elevated to the level of being upheld on appeal. The Building Society justifiably sought to foreclose the bond and execute the property.

[34] The High Court ordered in favour of first Respondent for the full claimed amount, execution of bonded property, costs on the agreed scale of attorney and client, plus interest at a single rate, a compromise favourable to the Appellants. Otherwise, interest would have been at two different rates, applicable to the two different amounts.

[35] On appeal, it cannot be held otherwise than that the High Court did not err. It follows that its comprehensive and well-reasoned judgment stands to be confirmed. Late renderings of purported grounds of appeal falling outside the ambit of both the pleadings and the evidence, objected to by opposing litigants and questioned by the Court itself, resulted in non-pursuit of same by counsel. Ditto with certain sets of legislation.

[36] Counsel for the Appellants initially sought to argue that the third Appellant should have been let off by the trial court. She was cited as surety and co-principal debtor. In her plea, she sought to deny that she would have signed a deed of suretyship. This was shown to be otherwise when the Deed was presented as evidence and she admitted her signature. However, she claimed to have been "unduly influenced" by the First Respondent. This

was alleged to be an absence of explanation as to just what she was to sign for, including legal exceptions. This bald statement remained without any substance and no evidence to support her contentions was adduced. In Absa Bank Ltd v Paul Deneys Trzebiatowsky and Four Others , Case 2240/2010 (EC) at para [13], following Tesoviero v Bhyjo Investments Share Block (Pty) Ltd, 2001 (1) SA 167 (W) at175 F-H, it was said that in order to succeed in the defence of *iustus error,* a person in the position of the third Appellant must have had to show that she was misled as to the nature of the deeds of suretyship or as to the terms which they contained, or by some act or omission on the part of the Building Society, if there was a duty on it to inform the Appellants, in particular the third Appellant, of the consequences of signing personal sureties. Such duty would only arise where the document departed from prior representations as to the nature or contents thereof.

[37] The essence of the appeal is contentiously aimed at holding that two separate contracts of insurance applied to the two separate loan accounts, with premiums for one account already factored into applicable repayments and bond balances, to be secured by way of insurance cover over the life of the erstwhile trustee, and mortgage bonds over the property. Alternatively, that the First Respondent's omission to procure full life cover, despite the insured life declining medical screening as pre requisite for full cover, was to have resulted in Building Society being liable to pay the insurance premiums. This was never proven at the trial. It also cannot now be elevated to a basis on which this appeal could be upheld. The Appellants cannot deny liability because some obscure premium was "hidden" somewhere in the accounting statements. The amounts referred to were included in the total monthly bond repayments.

[38] In final consideration of the assailed judgment and the reasons why the learned judge held as he did, it is obvious that he correctly and meticulously applied his mind to the matter. The pleadings were based on two written agreements as taken up by the Trust. It was agreed that it be redeemed in monthly instalments at different interest rates. Payments were stopped and the inevitable consequences followed. Summons was issued and interactions failed to resolve the matter. Following a lengthy trial of some 20 days, criticized and characterised by the trial court as "Stalingrad litigation", with the counterclaim rejected and with meticulous verification of amounts, interest rates, costs issues which were agreed upon to be on the attorney-client scale, relevant law and procedure, judgment was then entered as claimed.

[39] One aspect of the interest component of the judgment was highlighted by Mr Msibi. It was sought to be argued that the former trustee has his own, separate and individual deceased estate. Obviously, he could not continue being a trustee, but insofar as his Family Trust goes, it was foreseen and provided for that upon his death, the Trust was to continue. Clause 6.5 of the Notarial Deed of Trust of the Bhubhudla Family Trust (page 325 vol.3 of the record) records it that if one of the trustees passes on, the remaining trustees will carry on with the business of the Trust. If an executor has been appointed in the deceased estate, he might or might not be interested in the affairs of the Family Trust. It certainly does not lay down a foundation for the averred requirement of joinder of the deceased estate in this matter. The Building Society allegedly improperly continued to debit the loans after the death of the insured life. As already stated above, the insured life is not the same entity as the Family Trust. It is the Trust who is primarily enjoined to repay the now foreclosed loan. The property which

was built and developed is to be executed upon, with the proceeds destined to satisfy the judgment debt. If any funds are then left over, it shall divert to the Trust. In the event that the appeal was to have been upheld, the arguments of the Appellants would ultimately have resulted in the Respondents being required to foot the bill and satisfy the judgment debt. It would be absurd. There simply is no "free lunch" to be had.

[40] Summons was issued on the 27th August 2018. The claimed amount was E3 219 441 .85. This amount was certified on the 25th July 2018. In order to assist the Court with assessing the claim of improper interest accrual, counsel agreed to have it clarified. Having been served all around, the collection Manager of Building Society certifies that on the 18th April 2023 (one day after the hearing)the outstanding balance is E 5 309 398.20, inclusive of E 403 961.38 accrued interest.

[41] It is *prima facie* clear that the debt as certified on the 25th July 2018, E 3 219 441-85 is less than the E3 233 113 – 75 it would have been on the 31st July 2018. By the 31st April 2023 (presently), it would have amounted to E5 309 398-20. The interest calculation is interesting. It trumps the alleged assertion by the Appellants. For these reasons, I also conclude that the judgment of the Court *a quo* cannot be assailed on appeal on the basis of an *error in calculi*. There was some undertaking given by Motsa relating to the period between the debt being called up and institution of proceedings.

[42] The final aspect is that of the scale of costs, awarded on the scale of attorney and client. This scale was specifically incorporated into all of the relevant

agreements, bonds and deeds. It was not imposed as sanction by the Court, nor in anger, malice or out of spite. The trial court would not have been properly enabled to deviate from the agreed scale of costs unless fully persuaded that it was necessary and prudent under the prevailing circumstances. No such factors availed themselves for a departure from the agreed scale of costs. It is my considered view that insofar as it is applicable to this matter, there exists no reason as to why the costs order, or especially the scale on which it is to be satisfied, should be interfered with on appeal. This ground of appeal must therefore also fail to succeed.

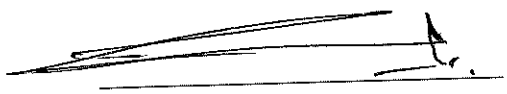
[43] Logically, it would by necessity follow that the prayer to set aside the order to execute the mortgaged property shall also be dismissed. It has been agreed that in the event it became necessary, as it has now become, the bonded property may be executed upon, once legal sanctioning has been obtained. This order cannot be rescinded without a successful outcome of the appeal.

[44] What I do find to be rather conspicuous in its absence is the pointing out of any adverse findings and conclusions by the Court below with regard to any of the initial or remaining grounds appeal on which the judgment is sought to be assailed on appeal. We have not been referred to any authorities or legal precedents which adversely dealt with comparable findings and conclusions as was done *a quo*. We have not been made aware of any legal obstacle or principle which would have tended to erode the *ratio decidendi*, factual findings or conclusions of law in which the High Court would have erred or misdirected itself which could have justified a different outcome on appeal. Not even the dismissal of the counterclaim

was under any legal challenge. Instead, the "Stalingrad strategy", as typified by the learned trial judge, has shown itself to be devoid of any merit. The same applies to the numerous but unmeritorious legal points which were initially sought to be canvassed by the appellants. The trial was protracted to some 20 days, with much of the evidence called for by the Appellants to be superfluous. It resulted in additional costs, ultimately to be paid by hapless litigants.

[45] Each of the three attorneys herein found themselves short of time to comply with the Rules of Court. Each filed well motivated and explanatory applications for condonation of their late filing heads and authorities. We found each one to be meritorious. At commencement of the hearing, the Court condoned the late filing and ordered no costs in the unopposed applications.

[46] It is for the reasons as stated above that this appeal is to be dismissed, with costs on the attorney-client scale. The orders of the Court *a quo* are confirmed.



JP ANNANDALE

Justice of Appeal

I agree

RJ Cloete JA
Justice of Appeal

I agree

NJ Hlophe JA
Justice of Appeal

For the Appellants: Mr TK Msibi

For the First Respondent: Mr K Motsa

For the Second Respondent: Mr M Magagula