

THE HIGH COURT OF SWAZILAND

Dabuka Properties (Pty) Ltd

Plaintiff

V

Swaziland Building Society

Defendant

Civ. Trial No. 1862/99

Coram

S. W, Sapire, CJ

For Plaintiff

Mr. J. Hlophe

For Defendant

Mr. J. Henwood

JUDGMENT

(29/10/99)

The Applicant seeks a declaration that he is entitled to have the mortgage bond over his property Registered in favour of the Respondent cancelled against payment of an amount of E169,582.30. There further relief in the form of an order compelling the respondent to cancel the bond is sought, but need not be considered at this stage.

The applicant has set out the basis of his claim in his founding affidavit. After describing and citing the parties he explained that he obtained a loan from the

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respondent for the sum of E1 54 277. As security for the loan mortgaged his property which is lot 1256 in Mbabane Township Ext. 19. The mortgage bond was registered in 1995. A second mortgage bond was passed over the property to secure a loan by Swaziland Development and Savings Bank to one of the directors, Tobhi Dlamini, for an amount of E46.000.00.

The applicant continued to service its loan with the respondent by making the stipulated monthly instalments in terms of the Bond. During the month of May, 1998, so it is recited in the founding affidavit, Tobhi Dlamini the other Director of the applicant, and after having resolved to do so, obtained a loan from the Swaziland Development and Savings Bank for purposes of redeeming applicant's Mortgage Bond with the respondent. The Swaziland Development & Savings Bank required a redemption figure for the bond from the respondent, Such a figure was quoted.

On the 28th May 1998 the respondent through its Mortgage Manager Mr. Msibi wrote a letter to the Manager of the Swaziland Development and Savings Bank advising that the amount required to redeem the bond was a sum of E169,582.30 This figure was to remain valid and operative from the 28th May 1998 to the 26th August, 1998 after which date interest was to accrue at 17% per annum. A copy of the letter is annexed to the founding affidavit.

The applicant through the Savings Bank tendered a guarantee in the amount quoted a few days or sometime after the closing date but having in the meantime paid a third instalment which according to the applicant covered the additional interest. The respondent on receipt of the guarantee declined to the cancellation of the bond and informed the Applicant, that the property had already been sold in execution pursuant to a judgment obtained in 1996, to Zacheus Zulu who happened to be an

employee of the respondent. The significance of this is not apparent.

As a result of this an impasse had been reached which has persisted to this day .The applicant has sought and obtained an order from this court rescinding the judgment. What the applicant seeks is a declaration that he is entitled at this stage to cancel the bond against payment of the amount of E169,582.30

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The applicant has failed to deal with the situation which has obtained since the tender was rejected and which has persisted since the tender. As the tender was rejected the applicant has continued to enjoy the loan until today and has not said that it is paying interest or any amounts to the bank from which it obtained the loan in order to redeem the bond. It is difficult to understand why the applicant is entitled to cancel the bond at the quoted figure after the elapse of so long a time.

The matter does not seem capable of a solution on these papers. It appears from the papers that litigation is presently pending between the parties in terms of which the respondent is suing the applicant for the balance of the bond and it is in my view more appropriate that this whole question should be dealt with in that litigation where the matter can be properly canvassed. In terms of the rules of the court

I therefore make no order on this application and direct that the costs shall be determined by the court which finally determines the other pending litigation.

S.W. Sapire, CJ