IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIV. CASE No. 1562/97

IN THE MATTER BETWEEN

EVELYN B. MATSEBULA APPLICANT

And

SWAZILAND DEVELOPMENT AND SAVINGS BANK RESPONDENT

CORAM : DUNN J.

FOR THE APPLICANT : MR. FINE

FOR THE RESPONDENT : MR. FLYNN

JUDGMENT

15TH AUGUST 1997

In this application which was brought under a certificate of urgency, the applicant seeks an order –

Directing the respondent to pay the applicant the full terminal benefit.

It is necessary that I briefly set out the background of the relationship between the parties .

It is common cause that the applicant was employed by the respondent up until the end of April 1997, when she accepted a voluntary retirement package offered by the respondent . It is common cause that the applicant was indebted to the

respondent by way of certain outstanding loans that had been advanced to her during her employment with the respondent. Details of the applicant's entitlements on retirement together with details of seven outstanding loans were communicated to the applicant in a letter dated 30th April 1997.

The applicant, in a letter addressed to the respondent, denied her indebtedness in respect of one loan in the sum of E2 633.68 She admitted three of the loans totalling E39 859.46 and had no objection to this amount being offset against her entitlement. With regard to the remaining three loans, the applicant indicated that these loans were the subject of a Deed of Settlement which the parties had entered into on the 1st April 1997, following the institution of an action under CIV. CASE No. 2813/96 by the respondent (as plaintiff) against the applicant (as defendant) for the repayment of those loans.

In terms of the Deed of Settlement the applicant acknowledged her indebtedness to the respondent -

1. In the agreed sum of E 173 832.00
2. In respect of interest on the balance outstanding from time to time at the rate of 25.5% p.a. from the 13th November 1996 to date of final payment.

3. In respect of legal costs in Case No. 2813/96 in an agreed amount of El650.00
4. In respect of costs of the negotiation and preparation of the Deed of Settlement in an agreed amount of E120.00
5. In respect of collection commission calculated on each instalment to be paid in terms of the agreement at the rate of 10%.
6. In respect of Sales Tax on collection commission at the rate of 5%

In terms of paragraph 3 of the Settlement, the applicant undertook to liquidate the the amount agreed upon by way of monthly instalments of E5 000.00 per month commencing on or before the 3rd April 1997 .

In the case of default on the part of the applicant provision was made under paragraph 4 that -

4.1 The full balance outstanding in terms hereof will immediately become due and payable.

4.2 The plaintiff shall in addition to any other rights which he may have in law, be entitled to enforce the provisions of this agreement

of settlement as if it were judgment of the court.

4.3 The plaintiff shall be entitled to recover, in addition to all the aforegoing amounts all costs incurred by itself to its attorneys in securing the defendant's compliance with provisions hereof which costs may be taxed and recovered on the scale as between an attorney and his own client and shall include the costs of all necessary attendances tracing and opinion given.

Paragraph 5 which is headed Novation reads as follows –

Neither this agreement of settlement nor any payment in terms hereof shall constitute a novation of the present obligation of the defendants to the plaintiff.

In terms of paragraph 10 of the agreement, the respondent was entitled to make the Deed of Settlement an order of the court without notice to the applicant. The respondent in fact applied for and was granted such an order on the 30th May 1997. That application also had a prayer for judgment against the applicant in terms of the acknowledgement of debt contained in the Deed of Settlement.

There were no supporting documents to the notice of set down to explain the basis for the judgment against the applicant. Such explanation would have had to deal either with a breach of the agreement by the applicant or a contention that the respondent was entitled to seek such judgment on the basis of the novation clause of the agreement . This would have enabled the applicant to respond to the application. The question as to whether proceedings by way of application were appropriate for such relief would of course have had to be decided. That prayer was, however, not proceeded with. The present position between the parties is that the Deed of Settlement is an order of the court and that it is open to the respondent to proceed against the applicant in terms of the Settlement as the respondent may be advised.

I return now to the present application in which as I have already set out the applicant seeks an order for the payment by the respondent of "the full terminal benefit. " The applicant does not indicate in the founding affidavit what the full terminal benefit is. She refers in paragraph 4 of the affidavit to the respondent's letter of the 30th April 1997 which indicated that her benefits totalling E230 302.86 had been applied to offset her loans totalling an equal sum. The applicant challenges the accuracy of the amount of one of the loans without indicating what she alleges to be the correct amount . As indicated

earlier the applicant also challenges the respondent's right to deduct three of the loans from her benefits as these loans were made the subject of the Deed of Settlement. Here again, the applicant has made no attempt to indicate what the resultant benefit should be.

It is clear from the applicant's correspondence with the respondent and the respondent's application of the 30th May 1997, that the applicant was aware of

a real and substantial dispute of fact between the parties on both the question of the extent of the applicant's retirement package and the interpretation which the respondent sought to place on the novation clause of the Deed of Settlement. The proper procedure was for the applicant to formulate her claim and to proceed against the respondent by way of action. An applicant who deliberately initiates proceedings by way of application when he knows that a real dispute of facts must inevitably arise, and for which an action is the appropriate procedure, does so at his own peril. See MAGAGULA v TOWN COUNCIL OF MANZINI AND OTHERS 1979-1981 SLR 291 and the authorities there referred to .

The arguments that were advanced on the question of the proper interpretation to be placed on the novation clause were clearly premature.

The application is dismissed with costs.

B. DUNN

JUDGE