IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CIVIL CASE NO. 348/07

In the matter between:

SWAZILAND DEVELOPMENT FINANCE CORPORATION APPLICANT

and

LONG RUN INVESTMENTS (PTY) LTD RESPONDENTS

CORAM

FOR THE APPLICANT : MR. Z. JELE OF ROBINSON BERTRAM

FOR THE RESPONDENTS : ADV. L. MAZIYA INSTRUCTED BY T.L. DLAMINI ATTORNEYS.

JUDGMENT 1/2/08

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[1] This matter comes before Court for the confirmation of an interim order which was obtained on the 6/2/07. The relief claimed was set out in the prayers of the notice of application.

[2] Mr. Jele for the Applicant has raised a point in limine emanating from the Respondent's affidavit deposed to by one Masotsha Dlamini. The point

in limine is to the effect that the Respondent is a company and the said Masotsha has no authority without a company resolution to either represent the company in the legal proceedings or to depose to an affidavit on its behalf.

[3] Mr. Maziya for the Respondent has submitted that it is not necessary for Mr. Dlamini to file a resolution herein to show that he has been authorised to represent the company or to depose to an affidavit on its behalf. He has filed local authorities in this regard in particular Kingsburg Exports Ltd & Seven Others v Commissioner of Customs and Excise & Another (Civil Case No. 2167/97: unreported).

[4] On the issue of representation Sapire, ACJ at p. 4 had the following to say:

"… It was further argued that the Applicant's papers were not in order as there was no allegation in the founding affidavit to the effect that the Applicants had resolved and determined to institute the present proceedings

for which purposes they had authorised and appointed the deponent to act on their behalf. ***A body corporate cannot be represented in court by an individual other than an attorney or advocate admitted to practice in the court. Proceedings of the present nature are instituted on behalf of the Applicant by the attorney who signs the notice of motion and not by the deponent to the founding affidavit. The question of the attorney's authority is dealt with in the rules of court. Any challenge to that authority must be made in accordance with the provisions of Rule 7 (1). This has not been done. There is no reason therefore to question the authority of Applicant's attorney to act on their behalf and to bring these proceedings …"***

[5] On the issue of authority to depose to an affidavit the learned judge had this to say at page 3:

> ***"…This point had to fail however as no one requires authority to give evidence in any matter whether it be an action or an***

application. The giving of evidence is a personal act of the witness whether the evidence is given viva voce or on affidavit. No individual can be prevented from giving evidence by any party withholding authority to do so. No individual requires the authority of any party to give evidence for or against that party in any proceedings. The formula I have quoted, i.e. 'I am authorised to swear to this affidavit' appearing in the affidavit is therefore meaningless and should henceforth be omitted from affidavits intended for use in this court…"

See also Eskom v Soweto City Council 1992 (2) S.A. 703 (WLD).

[6] I agree. I need not take the matter any further. Mr. Jele's submissions are misplaced. The point

in limine is dismissed with costs including Counsel's fees certified in terms of Rule 68 (2) of the Rules of Court.

[7] Turning now to the merits. In terms of the lease agreement between the parties cancellation is provided for in clause 10 thereof which reads as follows:

> ***"10 Breach***
>
> ***10.1 Should the lessee***
>
> ***- default in the punctual payment of any rental or any amount falling due or***
>
> ***- fail to observe and perform any other of the terms and conditions and/or obligations of this agreement.***
>
> Then and upon the happening of any of these events, the lessor shall be entitled in its election and without prejudice to any other rights, to
>
> ***10.1.1 claim immediate payment of all amounts then due to it under this agreement***

together with the rentals for the unexpired term of the lease, all of which shall be deemed to be due and payable immediately, upon payment of which the lessee shall be entitled to the use of the goods for the unexpired period; or

10.1.2 cancel this agreement whereupon the lessee shall forthwith return the goods to the lessor and the lessor shall be entitled to recover liquidated damages, being the difference between total amounts paid and the value of the goods as at the date on which the lessor obtained possession of same.

- ***[8] In my view the applicant's can elect to activate clause 10.1.1 or Clause 10.1.2.***

- [9] Applicant's attorney has submitted that the lease agreement does not provide for explicit cancellation such as sending notice thereof to the Respondents. He has further submitted that the Applicant went a step further by writing to the Respondents and thereafter went to Court for cancellation.

- ***[10]*** ***The Respondents deny the above submission. They have submitted that the Applicants rely on annexures VM "6" on pages 64, 65 and 66 of the Book of Pleadings. Respondents further submit that these annexures do not amount to written notice envisaged by the legal authorities. I agree. In my view these annexures amount to ordinary correspondence between the parties in the ordinary course of business. The annexures merely indicate that should the Respondents fail to pay their instalment on or before due date they will be subject to a penalty fee of 2% p.a. There is no clear and unambiguous reference that the agreement is cancelled.***

- [11] Clause 10.1.2 states clearly what should happen at cancellation. It states:

"Or cancel this agreement …"

Whereupon

"the lesee shall forthwith return the goods to the lessor"

- ***[12] On a literal interpretation of these words or sentences the lessee is enjoined to return the goods itself not through process of court. It follows therefor that the cancellation is also not by process of court if immediately thereafter the lesee of its own accord "shall forthwith return the goods and the lessor shall be entitled to recover liquidated damages …"***

- ***[13] In my view the lease agreement is awkwardly crafted and excludes essential clauses and its operation must therefor be interpreted in the Respondent's favour. It is also possible that the Applicant in view of the objectives to empower Swazis deliberately crafted the aforesaid clauses to provide a soft approach towards ailing businesses. This would enable such a business to arrange refinancing when business is thin on the ground or to relax payments of arrears.***

- ***[14] I agree with Respondent's Counsel's submission that when considering this contract in its entirety the conclusion is inexcapable that the parties had prescribed written notification of***

intention to cancel as the exclusive mode of communication.

a) ***The parties chose as their domicilium citandi et executandi their respective addresses … for all purposes arising out of this agreement.***

b) ***"a party may change its docmicilium address upon 30 (thirty) days written notice to the other party …"***

c) ***In terms of clause 13.2 of the agreement the lessee has the right to cede its rights and obligations to a third party but must first obtain prior written consent of the lessor. This presupposes that the lessee would first have to notify the lessor in writing about the decision to exercise its right under clause 13.2***

- ***[15] It is common cause that after obtaining the interim order the applicant demanded payment of the outstanding arrears, costs of the interim***

order as well as collection commission. The Respondents complied therewith and in addition paid the instalment for March 2007. This conduct by the Applicant amounted to enforcement of the contract and condonation of any breach that may have occurred. The Applicant thereby waived its right to cancel the agreement even assuming that it had followed the correct cancellation procedure.

[16] "2.3.1 At common law once a party's right to cancel has accrued to it by virtue of the other party's breach, the victim must elect whether or not it will avail itself of it. Having made its election it must abide by it. (See WILLE and MILLIN (Supra) at p. 109"

"2.3.2 In the 2nd edition of "THE LAW OF CONTRACT IN SOUTH AFRICA, RH CHRISTIE puts it this way at p. 636:

"…The innocent party's choice is subject to what is usually known as the doctrine of election. Enforcement and cancellation being inconsistent with each other or mutually exclusive the

innocent party must make his election between them; he cannot both approbate and reprobate the contract; he cannot blow both hot and cold.””

I agree with the above submissions and or authorities.

[17] The order of the Court is as follows:

(a) ***The point in limine raised by the Applicant is dismissed.***

(b) The application is dismissed.

(c) ***The Rule is hereby discharged.***

(d) ***The Applicant is hereby ordered to pay the costs including Counsel’s certified fees in terms of Rule 68 (2).***

(e) ***The application to rectify the court order dated 6/2/07 in Case 448/07 falls away and is hereby dismissed.***

(f) The application to condone premature issue of summons in case 448/07 is hereby dismissed.

(g) ***The Applicant/Plaintiff is hereby ordered to pay the costs in case 448/07 as well as the certifiified costs of Counsel in terms of Rule 68 (2).***

Q.M. MABUZA -J

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