THE SUPREME COURT OF APPEAL OF SWAZILAND

CIVIL APPEAL CASE NO. 13/2007

In the matter between

MINISTER OF FINANCE **1 APPELLANT**

ACCOUNTANT GENERAL **2nd APPELLANT**

ATTORNEY GENERAL **3rd RESPONDENT**

And

NQABA DLAMINI **RESPONDENT**

Coram **BANDA CJ**

STEYN JA

ZIETSMAN JA

For the Appellants: MR. V. KUNENE

For the Respondent: MR.S.V. MDLADLA

JUDGMENT

ZIETSMAN JA

The common cause and undisputed allegations of fact in this matter paint a somewhat bizarre picture. They can be stated as follows:

On 25 July 2005 the respondent (as applicant) brought an application against the Central Bank of Swaziland, the First National Bank, the Minister of Finance and the Attorney General in which he claimed the following relief:

1. That the 2nd Respondent (the First National Bank) be directed to forthwith produce a detailed statement and or breakdown of the applicant's account and that there be debatement of same;

2. That the 1st Respondent (the Central Bank of Swaziland) pays the sum of E59, 345-00 (Fifty Nine Thousand Three Hundred and Forty Five Emalangeni) to applicant, currently held by 1st Respondent on behalf of the 3rd Respondent (the Minister of Finance) or whatever may be held to be due to applicant;

3. Interest on the said amount at the rate of 9% per annum from date of receipt by the 1st Respondent to date of payment;

4. Costs of this application against the Respondents in the event that the application is opposed;

5. Further and/or alternative relief.

In his founding affidavit the respondent proceeded to set out his cause of action. It is difficult to understand fully the allegations made by him. He alleges a loan obtained by him from the Bank of Credit and Commerce International which money was used to repair and renovate his house on Lot 506, End Street,

Mbabane. He also alleges a lease agreement entered into between his wife and the said Bank in terms of which the Bank "and its assessors" would occupy his house. He states that the rent payable in respect of the lease was to be appropriated to the repayment of the loan, and he alleges that the loan was in this way fully paid. First National Bank, he alleges, is the former Meridian Bank which prior thereto had been the Bank of Credit and Commerce International.

The respondent stated that during the year 2004 he decided to sell his house to M & D Properties but was told that his property was bonded to the Bank of Credit and Commerce International and that he would have to pay the sum of E59, 345-00 to the Bank before he could transfer his property to M & D Properties. This money, he alleged, was then paid by him but he made it clear that he was reserving his legal rights and would reclaim the money which he said he did not owe. He alleged that the First National Bank had failed to account to him for the rental money. He alleged further that the E59, 345-00 paid by him was held by the Central Bank of Swaziland as agent for the Minister of Finance.

The respondent's application was apparently not opposed, and judgment was granted in his favour. Somehow or other the respondent then managed to obtain a court order dated 7 October 2005 in the following terms:

"IT IS ORDERED,

1. That the 3 rd Respondent (the Minister of Finance) pay the sum of E59, 345-00 (Fifty Nine Thousand Three Hundred and Forty Five Emalangeni) to applicant, currently held by 1st Respondent (the Central Bank of Swaziland) on behalf of the 3rd Respondent (the Minister of Finance) or whatever may be held to be due to applicant.

2. Interest on the said amount at the rate of 9% per annum from date of receipt by the 1st Respondent to date of Payment".

Two comments can be made in respect of this court order. In the first place, the order that was sought by the present respondent was an order against the Central Bank of Swaziland and not an order against the Minister of Finance. Secondly, the order is an indefinite order, ordering the payment of E59, 345-00 "or whatever may be held to be due to applicant". Apparently no order was made in respect of prayer 1 of the respondent's Notice of Motion which sought a statement of account in order to determine the correct amount of the alleged indebtedness owed to the respondent.

The next chapter in this bizarre episode involved a further application being brought by the present respondent against the Minister of Finance and the Attorney General for an order that they comply with the 7 October 2005 order

within 7 days failing which they be held in contempt of court. A ***rule nisi*** was issued returnable on 9 December 2005. On the return date this application was not opposed and on 20 January 2006 the following order was granted:

"IT IS ORDERED

1. That the 3 rd and 4th Respondent (the Minister of Finance and the Attorney General) are hereby ordered to comply with the order of the above Honourable Court of the 7th day of October 2005 within 7 (seven) days hereof, failing which they be held to be in contempt.

2. Costs of suit at an attorney and own client scale".

It appears that this order was not only opposed, it was granted by consent.

On 6 February 2006 the present application was launched by the Minister of Finance, the Accountant General and the Attorney General against the present respondent. In their application the applicants allege that the order granted on 7 October 2005 was incorrectly granted in view of the fact that what was sought was an order for payment by the Central Bank of Swaziland of the sum of E59, 345-00 and not an order that this sum be paid by the Minister of Finance. What the applicants (the present appellants) sought was a ***rule nisi*** calling up the respondent to show cause why an order should not be granted staying the

execution of, and rescinding, the order granted on 20 January 2006 which, they allege, was erroneously granted.

As can be seen from what is stated above, the appellants applied not for the setting aside of the 7 October 2005 order, which they say was an incorrect order, but for the setting aside of the 20 January order which was granted with their consent. They make the somewhat startling allegation that they consented to the confirmation of the ***rule nisi*** on 20 January 2006 so that it would become a final order which they could then attack and have rescinded.

The Judge in the court ***a quo*** dismissed the application with costs. He pointed to the fact that the applicants (the present appellants) had acquiesced in the judgment they now sought to have rescinded. He found that the applicants were the authors of their own problems and that for this reason rescission of the order should not be granted. In this connection he referred to the case of **De Wet and Others v. Western Bank Ltd. 1979 (3)** S.A. **1031** (A) where it is stated at page **1044 D** that an application for rescission of a default judgment should not be granted where the defendants are:

"the authors of their own problems and it would be inequitable to visit the other party to the action with the prejudice and inconvenience flowing from such conduct".

In the present case we are faced with the following difficulties:

1. The present respondent initially sought an order against the Central Bank of Swaziland and not directly against the Minister of Finance.

2. Despite this an order was granted only against the Minister of Finance.

3. When the respondent applied for a further order to compel payment of the money he claimed, he sought and obtained an order against the Minister of Finance and against the Attorney General.

1. In this last-mentioned application the respondent cited the Minister of Finance "in his nominal capacity as the Minister and representing Swaziland in collecting monies on behalf of the Swaziland Government". He cited the Attorney General "as the legal representative of the 3rd respondent (the Minister)". Yet he sought and obtained an order to the effect that if the money was not paid the Minister and the Attorney General would be held to be in contempt.

4. The appellants did not apply to have the original order granted on 7 October 2005 set aside, despite their allegation that this order was wrongly granted. However that order is an unenforceable order as it orders payment of

the sum of E59, 345-00 "or whatever may be held to be due to applicant". The order is for payment of an indefinite amount.

It seems that the 2005 order was granted against the wrong party, and it is also an indefinite and unenforceable order. The subsequent order granted on 20 January 2006 follows upon the 2005 order. This being the case it cannot stand and must be set aside. This is the order that the appellants now seek.

On the question of costs, it is clear that the appellants were largely responsible for the predicament in which they found themselves. A fair order in the circumstance will be that each party pay their own costs incurred in both in both the court ***a quo*** and in this Court.

In the result the appeal succeeds, and the following order is made:

1. The order granted in the court ***a quo*** is set aside and is replaced by the following order;

"The application succeeds and the order granted on 20 January 2006 is rescinded".

2. No order is made in respect of the costs incurred in the court ***a quo*** and in respect of the costs incurred in this Court.

N.W. ZIETSMAN

JUDGE OF APPEAL

I AGREE

R.A. BANDA
CHIEF JUSTICE

I AGREE

J.H. STEYN
JUDGE OF APPEAL