IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE CRI. APPEAL NO. 11/08

In the matter between:

LONGRUN INVESTMENTS (PTY) LTD APPELLANT

and

INGULA COMMERCIAL FINANCE (PTY) LTD RESPONDENT

CORAM : ZIETSMAN JA
RAMODIBEDI JA
MAGID AJA

JUDGMENT

20/11/2008

[1] In terms of a document headed "**ACKNOWLEDGEMENT OF DEBT/AGREEMENT OF SETTLEMENT**" dated 5 March 2007, in which the appellant was described as "the Client" and the respondent was described as "the Lender", **MASOTJA DLAMINI, MAMPONDO MAGAGULA** and the appellant acknowledged that they were "jointly indebted to" the respondent in the sum of E77000.00 in "respect of amounts loaned in advance (*sic*) including administration fees".

[2] The document bears three illegible signatures above the words "**FOR LENDER", "FOR CLIENT"** and **"WITNESS"** respectively. On the assumption that the first two signatures were indeed those of the respondent and the appellant respectively, it is strange indeed that the document was not signed by Dlamini and Magagula who purported to acknowledge their joint indebtedness to the respondent.

[3] Clause 4.2 of the document reads as follows:

> "The Lender shall in addition to any rights which it may have in Law, be entitled to enforce the provisions of this Agreement of Settlement as if it were a Judgment of the Court".

[4] Relying on this clause the respondent brought an application in the court *a quo* for an order:

> "That the agreement attached hereto be made an order of court"

The supporting affidavit contended that the document contained a provision "allowing the parties to make same an order of court". Before us, Mr. Mdladla for the respondent contended that Clause 4.2 quoted above was the provision in question. In my view, the clause in question does not, on a proper interpretation thereof, contain such a right. On the contrary, it purports to allow enforcement "as if it were a Judgment of the Court." That can only mean that its provisions can be executed upon without an order of court. In that event, it purports to authorise extra-judicial self-help, which by definition is illegal and unenforceable.

[5] However that may be, the respondent's application was not served upon the appellant and on 25 January 2008, the order sought by the respondent was granted. The appellant appeals against that order, *inter alia* on the ground of the non-joinder of Dlamini and Magagula, but not, surprisingly enough, on the respondent's failure to serve the application papers on the appellant.

[6] In argument, Mr. Mdladla informed us that it is a local practice to have agreements, such as the document in this case, made orders of court. Where litigation is settled that often happens, but in the absence of pre-existing litigation, the only case I can think of in which a document is made an order of court is where an award in an arbitration is made an order of court to enable the successful party to execute thereon. Moreover, in a case like the present, making the agreement an order of court would seem to be pointless because the respondent could well sue for payment of whatever amount may be due and owing. I do not think that if a document such as that in the instant case were, contrary to the view I have expressed above, to be "made an order of the court" it would, without more, justify the issue of a Writ of Execution as happened in this matter. I therefore consider that if, indeed, there is such a local practice, it ought to cease.

[7] Mr. Mdladla conceded that the order was bad for the non-joinder of Dlamini and Magagula and because of the respondent's failure to serve the applicant with the application papers. Those concessions were correctly made even though the fact of non-service was not relied upon in the Notice of Appeal or in Mr. Maziya's Heads of Argument.

[8] Mr. Mdladla submitted that, as the order was made in the absence of the appellant, it could and

should have sought the rescission of the order rather than taking the more expensive route of an appeal. The argument has no merit. In the first place, the respondent could (and should, if it was concerned about the matter of costs) have simply abandoned its judgement, or conceded the appeal. Secondly, there is no indication that, if the appellant had applied to rescind the judgment, the respondent would not have opposed that application, just as it was represented at the appeal.

[9] In the result the appeal must succeed and the order I propose is the following:

1. The appeal is upheld with costs, including, so far as is necessary, the costs of Counsel.

2. The order of court dated 25 January 2008 under case No. 190/08 is set aside as is the Writ of Execution issued on 29 January 2008 pursuant thereto.

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P.A.M. MAGID

ACTING JUSTICE OF APPEAL

I agree

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N.W. ZIETSMAN

JUSTICE OF APPEAL

I agree

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M.M. RAMODIBEDI

JUSTICE OF APPEAL