IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 3/08**

In the matter between:

SWAZILAND DEVELOPMENT FINANCE

CORPORATION APPELLANT

And

LONG RUN INVESTMENTS (PTY) LTD RESPONDENT

CASE NO. 2/08

In the matter between:

SWAZILAND DEVELOPMENT FINANCE
CORPORATION APPELLANT

And

LONG RUN INVESTMENTS (PTY) LTD 1ST RESPONDENT

MASOTJA PETER DLAMINI 2nd RESPONDENT
MAMPONDO MAGAGULA 3rd RESPONDENT
NDUMISO M. LUKHELE 4™ RESPONDENT
SIMON MAKHEPHA MAGAGULA 5™ RESPONDENT
SIPHO AMOS DLAMINI 6th RESPONDENT
DUMA DLAMINI 7™ RESPONDENT
MARWICK T. KHUMALO 8™ RESPONDENT

JUDGMENT

[1] Under case No. 348/07, the appellant applied *ex parte* for an interim attachment order in respect of certain three motor vehicles. On 6 February 2007, that interim order was granted in the court **a *quo*** in the following terms:

> 2.1 *Declaring that the lease agreement concluded between the Applicant and the Respondent he and is hereby cancelled (a copy of same is annexed hereto marked "A").*
>
> 2.2 *That Melusi Qwabe or any deputy sheriff for the District of Manzini or any other authorised person should not be authorised and empowered to seize and attach from the Respondent or from whoever is in possession of the under*

mentioned properties, (hereinafter referred to as "items"), whenever they may be found;

(a) *Description:* *2005 Mercedes Benz Actros 3348/33 SKD 2 (Horse)*
Engine No. *54292100389449*
Chasis No. *WDB9341616L015806*

(b) *SA Truck Bodies Rear Link Chasis No. AHBDSB 2RF5B013562*

(c) *SA Truck Bodies Front Link Chasis No. AHBDSB 2FFB013561*

(d) *Toyota Hilux 2006 LDV Engine No. 2KD7087371 Chassis No. AHTC512G807505608 Registration No. SD553UL*

2.3 *That the items as set out above should not be kept in the Applicant's custody pending the finalisation of this application.*

2.4 *That the Applicant be and is hereby entitled to dispose the items referred to in prayer 2.2 above, either by public auction or private treaty.*

2.5 That the Applicant be ordered to serve this notice of motion and the supporting documents when executing the Court order.

2.6 Costs of suit on the Attorney and own client scale should not be granted against the Respondent.

ALTERNATIVELY

2.7 That the Respondent should pay the amount of El 739 971-94 being the current outstanding balance due plus interest thereon at the prime rate per annum;

3. *Directing the Respondent to deliver or to surrender to the Applicant the Registration papers of the items listed above at prayer 2.2 being (the blue books) forthwith, failing which the central motor registry be and is hereby authorised to issue to the Applicant with the duplicates of the blue book.*

4. *Directing that prayers 2.1 - 2.2 operate with immediate and interim effect pending the return date of this application.*

I mention in passing that paragraph 4 of the order insofar as it directs that the cancellation of the agreements between the parties should "operate with immediate ... effect" is plainly improper because it constitutes the granting of final relief ***ex parte.*** As will be seen nothing turns on this defect in the proceedings.

[2] The appellant's claim to be entitled to the relief sought was based on three documents, copies whereof were put up as Annexures VM1, VM2, and VM3. They were all described in paragraph 5 of the founding affidavit as "lease agreements". Each of the documents was headed "LEASE AGREEMENT", and the Appellant was described therein as "the Lessor" and the Respondent as "the Lessee". Strangely enough, however, the agreements proceed to recite that "the Seller sells and the Buyer buys the goods" which are described in the relevant schedule. Quite plainly a lease and a sale are not the same thing.

[3] The confusion becomes worse confounded. There were, I gather, certain negotiations to settle the matter which were only partially successful, whereafter the Respondent, represented by one Masotsha P. Dlamini, delivered an opposing affidavit whose contents are irrelevant for the purposes of this judgment. In response thereto the Appellant delivered a replying affidavit whose deponent said in paragraph 2.2 thereof:

> "2.2 The course of action in this matter arises from a loan which was concluded between the Applicant and the Respondent, in which agreement, the Respondent was represented by five of its seven Directors."

The phrase "course of action" should, of course, have read "cause of action". In paragraph 2.3 of the replying affidavit the deponent repeats the reference to "a loan agreement".

[4] Immediately we pointed out to Mr. Jele, who appeared for the Appellant, that the Appellant had not been entitled to any relief in the light of the confusion as to the nature of its agreements with the respondent, he submitted that this court could and should make an order rectifying the agreements in order to eliminate the

confusion. Even though the Respondent admitted the allegations in paragraph 5 of the founding affidavit and thereby must be taken to have admitted that Annexures VM1, VM2, and VM3, were in fact lease agreements notwithstanding the references therein to sale, that admission would not

solve all the Appellant's problems. Moreover, there was no room for us make an order for rectification simply in response to an informal oral request from the Bar. In any event, it is not possible to amend a statement in an affidavit.

[5] In my view, the Appellant's cause of action was so defective that we could not even consider upholding the appeal. It is therefore unnecessary to consider the other procedural and factual issues which were decided in the court ***a quo*** and were the only matters dealt with by counsel on both sides in their Heads of Argument.

[6] Mr. Jele contended that as the appeal failed on grounds which were not advanced, or even considered, by the Respondent, the Respondent was not entitled to all its costs. Mr. Maziya, for the

Respondent, contended that it would not be a proper exercise of our discretion if we were to deprive the Respondent of all its costs of the appeal and I agree with both counsel. In my judgment it would be appropriate if we were to order the Appellant to pay one-half of the Respondent's costs.

The appeal under case No. 2/2008 arises in rather strange circumstances. Paragraph 5 of the order referred to in paragraph 1, supra, reads as follows:

> "That the Applicant is ordered to institute action proceedings against the Respondent for the outstanding balance due and for damages for the breach within seven (7) days of the confirmation of the rule."

On 9 February 2007, the Appellant's attorney caused a summons to be issued under case No. 448/2007 purportedly in terms of that order. I mention in passing that the summons was as defective as the application in relation to its descriptions of the agreements on which it relied. And it is at best doubtful whether the suretyships on which the

appellant relied in case no. 448/2007 are, without more, enforceable in the light of the defects

therein which we pointed out to Mr. Jele. But nothing turns on those defects in the light of our decision in this appeal.

[9] It appears that in the various debates that took place between the parties in regard to the application proceedings under case No. 348/07, the Respondent's legal representatives contended that the summons had been issued prematurely. In consequence of that contention, the appellant launched an application for amendment of paragraph 5 of the order, quoted in paragraph 7, supra, to substitute the words "granting of the interim order" for the words "confirmation of the rule", and, in the alternative, for condonation of its having issued the summons prematurely on 9 February, 2007.

[10] In her judgment in dismissing the application in case no. 348/07 Mabuza J made the following orders in relation

to the interlocutory application in case no. 448/07, namely:

(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 certified costs of Counsel in terms of Rule 68 (2).

[11] The Appellant then purported to note an appeal in case No. 448/07 against the order made by the learned Judge in the following terms:

"1. The court *a quo* erred in holding that there were insufficient or inadequate grounds to the premature issue of summons.

2. The court *a quo* erred in holding that the Respondents were prejudiced by the premature issuance of the summons."

[12] In fact, as appears from the extract from the order set out in paragraph 10 above, the learned Judge made no final order in relation to the alleged premature issue of the summons. The application fell away because of the decision on the merits. It is

my view that no order for condonation was required. The order relating to the institution of an action was made to protect the Respondent against delay on the part of the Appellant. It follows that the action could be instituted at any time prior to the expiry of seven days after the confirmation of the rule.

[13] The appeal in case no. 2/2008 must therefore be struck off the roll and in this case Mr. Jele, for the Appellant, tendered the costs of the appeal.

[14] We therefore make the following orders: A. Case No. 3/2008

1. The appeal is dismissed.

2. The appellant is directed to pay one-half of the respondent's costs.

B. Case No. 2/2008

1. The appeal is struck off the roll.

2. The appellant is directed to pay the respondent's costs.

P.A.1VLMAGID
ACTING JUSTICE OF APPEAL

I agree

N.W. ZIETSMAN
JUSTICE OF APPEAL

I agree

M.M. RAMC5BIBEDI
JUSTICE OF APPEAL

Dated this **2_£7** day of November, 2008