



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 83/12

In the matter between

**SWAZILAND INDUSTRIAL DEVELOPMENT
COMPANY LIMITED**

Appellant

and

MBUSI ANANIAS DLAMINI

Respondent

Neutral citation: Swaziland Industrial Development Company
Limited v Mbusi Ananias Dlamini (83/2012)
[2013] SZSC 29 (31 May 2013)

Coram: RAMODIBEDI CJ, MOORE JA, and OTA JA

Heard: 23 MAY 2013

Delivered: 31 MAY 2013

Summary: Appeal – The appellant, as plaintiff obtained summary judgment against the respondent as defendant for payment of the sum of E318,059.09 – Thereafter, the parties entered into a written agreement in terms of which the respondent acknowledged his indebtedness to the appellant in the sum reflected in the summary judgment – The respondent undertook to liquidate the amount owing by way of monthly installments – Common cause that the respondent defaulted on his monthly payments in breach of the agreement – Hence the appellant proceeded to execute the judgment – The respondent in turn filed an application seeking an order staying the sale in execution, the return of his cattle which had been attached in the process and other ancillary relief – The Court *a quo* wrongly of the view that the execution was made in the absence of a court order and that the appellant took the law into its own hands – Hence the court granted the respondent’s application as prayed – On appeal held that the appellant was merely executing the summary judgment which had not been set aside – Accordingly, the appeal upheld with costs.

JUDGMENT

RAMODIBEDI CJ

- [1] On an unspecified date in April 2011, the appellant, whom I shall henceforth refer to as plaintiff, obtained summary judgment against the respondent (“the defendant”) in the High Court under Case No. 919/2010 for payment of the sum of E 318,059.09.
- [2] Subsequent to the summary judgment in question, and on 11 May 2011, the parties entered into a written agreement in terms of which the defendant acknowledged his indebtedness to the plaintiff in the sum reflected in the summary judgment. He undertook to liquidate the amount owing to the plaintiff by way of monthly instalments.
- [3] The parties are on common ground that, despite his written undertaking, the defendant defaulted on his monthly payments in breach of the agreement subsisting between them. Indeed, in paragraphs [15], [16] and [18] of its judgment the Court *a quo* correctly, in my view, found as a fact that the defendant breached the agreement. The court’s main objection was that the agreement was unlawfully enforced without a court order. As

will become apparent shortly, the court was, with respect, in error in holding that view.

[4] Properly construed, it is the plaintiff's case that consequent on defendant's breach of the agreement between the parties, it cancelled the agreement and proceeded to execute the summary judgment in question.

[5] The defendant's case, on the other hand, is diametrically opposed to that of the plaintiff. His version, which was accepted by the court *a quo*, was that the plaintiff novated its rights to execute the summary judgment in question by entering into the acknowledgement of debt agreement with him. Hence, he responded to the plaintiff's execution of the summary judgment by launching an application against the plaintiff and the Deputy Sheriff for an order in the following terms:-

“(a) The sale in execution of Applicant’s livestock (described in 2nd Respondent’s inventory annexure “A”) should not be stayed and or set aside.

(b) The Respondents should not be ordered to return the cattle, attached by the 2nd Respondent, to the Applicant.

(c) The Respondent’s (sic) should not be ordered to pay the costs of transporting the cattle back to the Applicant and the costs of maintaining them whilst under the unlawful attachment, if any.

(d) They should not be ordered to pay the costs of this Application.”

[6] The Court *a quo* granted the application as prayed. Hence, this appeal.

[7] Doing the best I can in balancing the probabilities in this case, I am of the considered view that the following factors tip the scale in favour of the plaintiff’s version: -

(1) By letter dated 22 June 2011, annexure “SDCI”, the plaintiff’s attorneys wrote to the defendant’s attorneys referring to the parties as well as the summary judgment Case No. 919/2010. They advised as follows:-

“Be advised that we are proceeding with attachment herein as there has been no payment.”

That letter solicited no response from the defendant’s attorneys. Nor do I think that there could have been any doubt that the plaintiff was referring to the summary judgment in question since the case number itself was specifically quoted.

(2) Similarly, on 6 July 2012 the plaintiff’s attorneys wrote another letter, annexure, “SIDC5”, as follows:-

*“Justice Mavuso and Company
Campus Crusade Building
Warner Street
MBABANE*

Dear Sir

*RE: SWAZILAND INDUSTRIAL DEVELOPMENT
COMPANY LIMITED/MBUSI ANNANIAS
DLAMINI – HIGH COURT CASE NO.*

919/2010

- 1. The above matter refers.*
- 2. Your client has failed to pay timeously and every month as required by the acknowledgement of debt.*
- 3. Client has thereafter decided to cancel agreement and instructed us to advise your office.*
- 4. Client has decided to instruct us to execute to writ to recover the full balance owing.*

Yours faithfully

ROBINSON BERTRAM”.

Once again there was no response to that letter which informed the defendant’s attorneys in no uncertain terms that the agreement had been cancelled for non-payment and that the

plaintiff was proceeding to execute the writ “to recover the balance owing.”

(3) On 1 August 2012, the Deputy Sheriff served a writ of execution, annexure (“SIDC 6”), on the defendant for payment of the judgment. Once again reference was made to the parties as well as Case No. 919/2010.

(4) On 2 August 2012 the plaintiff issued a “NOTICE OF ATTACHMENT (MOVABLE PROPERTY)”. Once again it referred to the parties as well as the Case No. 919/2010. Importantly, the notice indicated the amount of the “JUDGMENT DEBT” owing. This could only have been the summary judgment in question.

(5) On 17 September 2012, the plaintiff duly advertised the “NOTICE OF SALE IN EXECUTION (LIVESTOCK),” annexure “AZ”, in a newspaper. Once again there was proper reference to the parties as well as Case No. 919/2010.

(7) As a matter of overwhelming probabilities, I am satisfied from the foregoing factors that the court a quo

wrongly came to the view that the execution in question was made in the absence of a court order. On the contrary, it was made on the basis, and in pursuance, of the summary judgment in question. I should stress that that summary judgment was never set aside. Indeed, as can be seen from paragraph [5] above, in his application giving rise to this appeal the defendant did not seek to set aside the summary judgment in question. This is hardly surprising because he simply had no answer to that judgment.

- [8] An attempt was made on the defendant's behalf to rely on novation. That defence, however, cannot avail the defendant in the circumstances of this case. Firstly, it was a specific term of the agreement between the parties as appears in clause 5 that:-

“Neither this Acknowledgement of Debt and Agreement to Pay nor any payment in terms hereof shall constitute a novation of the present obligations of the Defendant to the Plaintiff, nor shall they prevent the Plaintiff from proceeding against the Defendant for the recovery of any balance which may be due from time to time”.

Secondly, in its ordinary meaning novation simply means terminating an earlier obligation and replacing it with a new one. This is not such a case. As authorities have repeatedly stated, novation is essentially a matter of intention and consensus. See, for example, **French v Sterling Finance Corporation (Pty) Ltd 1961 (4) SA 732 (A)** at 736; **Adams v SA Motor Industry Employers Association 1981 (3) SA 1189 (A)** at 1199. By not seeking to set aside the summary judgment subsisting between them, the parties must be presumed to have intended the judgment to remain valid and enforceable. In the present case there is no evidence that the parties agreed to replace the summary judgment in question. Viewed in this way, the acknowledgement of debt and agreement to pay merely served to strengthen rather than novate the judgment. Similarly, waiver does not arise in these circumstances.

- [9] In fairness to Mr Mavuso for the respondent, he very fairly and properly conceded in this Court that the judgment *a quo* is unsupportable in light of the foregoing circumstances.

[10] In the result it follows that the appeal succeeds. Accordingly, the following order is made:-

(1) The appellant's appeal is upheld with costs.

(2) The judgment *a quo* is set aside and replaced with the following order:-

“The application is dismissed with costs”.

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

S.A. MOORE
JUSTICE OF APPEAL

I agree

E.A.OTA
JUSTICE OF APPEAL

For Applicant : Mr B. Ngcamphalala

For Respondent : Mr Justice M. Mavuso