IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **APPEAL CASE NO. 37/09**

In the matter between:

MMELELI INVESTMENT CORPORATION (PTY) LIMITED	**1ST APPELLANT**
MMELELI MMISO PAYII DLAMINI	**2ND APPELLANT**
NTOMBI NOMPUMELELO VICTORY DLAMINI	**3RD APPELLANT**

and

STANDARD BANK SWAZILAND LIMITED	**RESPONDENT**

CORAM	FOXCROFT, JA MAGID, AJA MAPHALALA, AJA
FOR THE APPELLANT FOR THE RESPONDENT	MR. M. SIMELANE MR. K. MOTSA

JUDGMENT

FOXCROFT, JA

[1] The respondent on appeal applied for summary judgment in the Court ***a quo*** and, shortly before the hearing on 3 April 2009, was furnished with an affidavit resisting summary judgment. The attorney representing the respondent bank then applied for leave to file a replying affidavit in terms of High Court Rule *dM* (5) (a), and such leave was granted in the Court ***a quo.***

The appellant now appeals against the "Reasons for Ruling" delivered by Masuku J on 10 June, 2009.

[2] Mr. Motsa, who appears for the respondent, submits in his Heads of Argument that

> **"Although the ruling is *per se* not appealable (as it is an interlocutory application) without the leave of court, the respondent has agreed with the appellant that due to the importance of this matter it will not raise such a preliminary point of law."**

This is to put the cart before the horse. The question whether any matter is properly before this Court is obviously one for this Court to determine, and an appeal cannot, be heard just because the parties wish to argue it.

[3] The Court of Appeal Act, No. 74 of 1954, section 14 is quite clear:-

> **"(1) An appeal shall lie to the Court of Appeal -**
> (a) **from all final judgments of the High Court; and**
> (b) **by leave of the Court of Appeal from an interlocutory order, an order made *ex parte* or an order as to costs only."**

The discretionary ruling by the learned Judge a quo was certainly not a final judgment or order. Accordingly, leave to appeal was a necessary requirement for a hearing in this Court. In a number of judgments of this Court, it has

been stated that interlocutory orders having no final or definitive effect are not appealable without leave. What is also clear is that where a simple interlocutory order or ruling is challenged, leave to appeal will not be granted since the order is not appealable at all.

[4] Mr. Simelane, who appeared for the appellant submitted that this appeal centres around the interpretation of Rule 32 (5) (a) of the High court which permits a plaintiff in summary judgment proceedings "with the leave of the court" to deliver an affidavit in reply to a defendant's affidavit opposing summary judgement. It is also said that the parties have agreed that the

> **"Ruling by His Lordship Masuku J is of special importance because judges of the High Court are divided upon the issue of the replying affidavit whereat (sic) some demand a written application despite the attorneys agreeing orally to file a replying affidavit.**

[5] Mr. Simelane also maintained that the Ruling in issue is an order with

> **"a final and definitive effect on the main action as it introduces new evidence.",**

is not susceptible to alteration in the Court ***a quo,*** and goes beyond procedural direction. The ruling

made was that Plaintiff, upon oral application, was permitted to file a replying affidavit. There was nothing final or definitive in such a ruling, and the new evidence introduced is permitted by the Rule. I need not deal with the remaining submissions.

[6] It is clear from Mr. Simelane's argument that he seeks an amendment of the Rule, and a direction that a substantial written application should be made in

support of an application to file a replying affidavit in summary judgment proceedings. That is not the function of this Court. What has happened in this case is that the Judge ***a quo,*** in his discretion, granted leave to the respondent to file an answering affidavit in terms of High Court Rule 32 (5) (a). Such a ruling is not appealable without leave in terms of section 14 of the Appeal Court Act.

The appeal is therefore struck off the roll of this Court with no order as to costs since the parties agreed that neither party would seek any costs against the other, and in any event, both contributed to a fruitless hearing.

J.G. FOXCROFT

JUDGE OF APPEAL

I agree

P.A.M MAGID

ACTING JUDGE OF APPEAL

I agree

S.B. MAPHALALA

ACTING JUDGE OF APPEAL

DELIVERED IN OPEN COURT ON THE 20™ NOVEMBER, 2009