

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Civil App. No.037/04
High Court Civil Case No.325/2003

In the matter between:

ESTATE CONSTRUCTION (PTY) LTD
KEGONE SEBINA
TSHEPO SEBINA
K.S. TRANSPORT & PLANT HIRE (PTY) LTD
ITSOSENK BAKERY

1ST APPELLANT
2ND APPELLANT
3RD APPELLANT
4TH APPELLANT
5TH APPELLANT

AND

NATIONAL DEVELOPMENT BANK

RESPONDENT

Mr. M. Kadye with him Ms. K. Muchawacha
for the Appellants
Mrs. M.T. Garekwe for the Respondent

J U D G M E N T

CORAM: N W ZIETSMAN J A
A M AKIWUMI J A
S A MOORE J A

MOORE J A

The 1st, 4th and 5th Appellants are companies duly incorporated in accordance with the company laws of Botswana. The 2nd Appellant is the Managing Director of the 1st, 4th and 5th Appellants. The 2nd Appellant is described simply as an adult male of full legal capacity.

The five Appellants filed Notice of Appeal against the Order or Judgement of Marumo J delivered in the High Court where the court ordered that Summary Judgment be granted against the Defendants in terms of the Draft Order as amended by the judge.

The Appellants put forth a number of Grounds of Appeal but these can be realistically described as a complaint that the Respondent was not entitled to the order for Summary Judgment made by the Court *a quo*. They also contend that they are entitled to the grant of leave to defend the action.

The learned Trial Judge considered the largely technical objections raised by the Appellants against the Respondent's application for summary judgment, noted that no substantive defence had been advanced by the appellants and had little difficulty in granting the orders for Summary Judgment prayed for by the Respondents. The question in this appeal is whether or not he was right to do so.

In the Appellant's Heads of Argument, they charge the Court *a quo* with the transgression of error under eight separate heads. Their arguments were met with a stiff repost by the Respondent in its Heads of Argument: but it is not necessary to set out the respective contentions under the separate heads relied on by the Appellants and countered by the Respondent.

DEFECTIVE AFFIDAVIT

The Appellants complain that the affidavit in support of the Application for Summary Judgment was fatally defective in so far as it purported to verify facts which were incorrect by stating under oath that the 2nd, 3rd, 4th and 5th Defendants were liable in an amount in excess of that owed by the principal debtor, when in fact they were mere sureties whose liability could not exceed that of the principal debtor. Specifically they argue Mr. Kaelo Biki Radira deposed that the 1st Appellant was liable to the Respondent in the sum of P593,616.14 in respect of claim B and that each of the 2nd, 3rd, 4th and 5th Appellants were liable to the Respondent in the sum of P600,000.00 which was totally opposed to the concept of the law of principal and surety.

In the Respondent's Heads of Argument, it counters that the affidavit of Kaelo Biki Radira verified the cause of action and the amount claimed in compliance with the second requirement of Order 34 (2) in that the Deponent had verified the cause of action on the grounds set out in the summons and then proceeded to verify the amounts claimed by tabulating them in detail.

The Respondent admitted that "it is true that the amount claimed against the principal debtor was less than the amount claimed against the sureties." That was because all sureties (2nd to 5th defendants) undertook to pay a maximum of P600,000 in the event of the default of the Appellant under the loan agreement.

Notwithstanding this explanation by the Respondent, the fact remains that the Appellants have succeeded in exposing a defect in the Affidavit on that issue. Furthermore, they had raised the legal question whether a surety could be made liable for an amount in excess of the principal debt.

JOINT AND SEVERAL LIABILITY

The application for summary judgment reflected in claim A, involved claims against the 1st Defendant, against the 2nd Defendant, against the 3rd Defendant, and against the 4th Defendant. Under claim B, the Respondent made claims against the 1st Defendant, against the 2nd Defendant, against the 3rd Defendant, against the 4th Defendant and against the 5th Defendant. Under claim A, interest and penalty interest were claimed against the 1st defendant whereas an order declaring Lot 1801, Kanye Specially Executable was sought against the 2nd Defendant. Principal sums were claimed against all four defendants under claim A.

Under claim B the Respondent sought payment of a principal sum of P593,616.14 plus interest, plus penalty interest, together with an order declaring Lot 23983, Gaborone Specially Executable. Against the 2nd Defendant, the claim was for P600,000 together with an Order declaring Lot 1801, Kanye, Specially Executable. The claims against the 3rd, 4th and 5th Defendants were for

P600,000 against each of them. There was also a claim for an Order declaring Lot 150 and 151 Kanye Specially Executable against the 5th Defendant.

Neither in the application itself, nor in the supporting affidavit, was there a claim that the liability of the Appellants should be joint and several. Thus, as the claim stood, the Respondent was seeking separate orders against each Defendant separately and severally in respect of both claims A and B. Nor was the draft order prepared in terms of joint and several liability. It was amended in the hand of a person who proceeded without further evidence by affidavit or otherwise according to the record, to alter the monetary awards against the 2nd, 3rd, 4th and 5th Appellants under claim B, and making amendments by in addition ordering joint and several liability.

The Appellants contend that the alterations in the draft order are impermissible and further, that the order for joint and several liability ought not to have been made since no such order was prayed for in the Application for Summary Judgment. This contention is unanswerable and is by itself a basis for setting aside the order of the court *a quo*.

SUMMARY JUDGMENT

The Summary judgment procedure is a useful process by which a deserving plaintiff may obtain judgment without incurring the expense and consumption of

time which a trial involves. However, according to the Civil Practice of the Supreme Court of South Africa, Fourth Edition, page 434, the courts have in innumerable decisions stressed the fact that the remedy provided by this rule is an extraordinary one which is 'very stringent' in that it closes the door to the Defendant, and which will thus be accorded only to a plaintiff who has, in effect, an unimpeachable case.

Such is the need for caution in the granting of an order for summary judgment that the courts retain a discretion to refuse the making of an order unless it is satisfied that it is fair and just to do so in all the circumstances of the case. This principle has been articulated with such clarity at page 445 of the Civil Practice of the Supreme Court of South Africa that I set out the relevant passage in full and respectfully adopt it. It reads:

"It has been said that while it is not clear in accordance with what criteria this discretion will be exercised, an important factor weighing with the court is the extraordinary and stringent nature of the remedy accorded a plaintiff by rule 32, and that it is only when there is no reasonable doubt about the plaintiff's claim that the applicant should be acceded to. On the other hand, it has been held that the discretion should be exercised, not capriciously or on the basis of mere conjecture or speculation so as to deprive a plaintiff of his remedy of summary judgment when he is entitled to it, but upon material before the court from which it appears that a reasonable possibility exists that an injustice may be done if judgment is so granted. The court's discretion to refuse summary judgment should be exercised only where there is some factual basis or some belief set out in the affidavit resisting summary judgment which enables the court to say that there is a reasonable possibility of a defence emerging at the trial."

The clarity of these principles notwithstanding, it has become noticeable of late that courts have been making orders granting summary judgment in circumstances where the justice of the case demanded that the defendant be afforded the right to defend. It is therefore incumbent upon this court to restate the need for caution in the grant of summary judgment and to repeat that it is a procedure to be applied only in the clearest of cases.

In the most recent pronouncement on this subject, in **Wayguard Security (Pty) Ltd. v Botswana Tyre Corporation (Pty) Ltd.** Akiwumi J.A. with whom Tebbutt, J.P. and Grosskopf, J.A. agreed, referred to what he described as "The well known classic and comprehensive judgment of Tebbutt J.A. as he then was, in the case of **Economy Investments (Pty) Ltd. and Others v First National Bank of Botswana Civil Appeal No. 8 of 1996.** The excerpts from the judgment of Tebbutt J.A. cited by Akiwumi J.A. in the **Wayguard Security** case bears repetition and should be restated like a mantra until it permeates into the consciousness of all litigants so that they may desist by their importunities from persuading courts to make orders for summary judgment where there is no warrant for such a course. The authoritative statement of the law to which Akiwumi J.A. drew attention at page 6 of the **Wayguard Security** case reads as follows:

"It has been repeated over and over that summary judgment is an extraordinary, stringent and drastic remedy in that it closes the door in final fashion to the defendant and permits a judgment to be given without a trial (see ... **du Setto (Sunny Side II) (Pty) Ltd and Others v Financial Services Company of Botswana Ltd Civil Appeal 19/94 (unreported)** at page 17 and cases there referred

to). It is for that reason that in a number of cases in South Africa, it was held that summary judgment would only be granted to a plaintiff who has 'an unanswerable case'. In more recent cases that test has been expressed as going too far.

In **Du Setto's** case *supra*, this court came to a similar conclusion and I repeated that view in **Fashion Enterprises (Pty) Ltd v Image Botswana (Pty) Ltd Civil Appeal 24/93 (an unreported judgment delivered on 14 July 1994 at page 12)**. As set out in **Du Setto's** case at page 17 the purpose of summary judgment is well known. It is aimed at a defendant who, although he has no **bona fide** defence to an action brought against him, nevertheless gives notice to defend solely in order to delay the grant of judgment in favour of the plaintiff. It therefore serves a socially and commercially useful purpose, frustrating an unscrupulous litigant seeking only to delay a just claim against him. However, even though the plaintiff need not have to have 'an unanswerable case', it is clear that before a court will close its doors finally to a defendant it must take care to see to it that the plaintiff's claim is unimpeachable. Because of the drastic consequences of an order granting summary judgment, the courts must be astute to ensure that the procedure is not abused by a plaintiff who may wish either to secure, by the procedure, a judgment against a defendant when he knows full well that he would ordinarily not be able to obtain such a judgment without a trial or who may use the procedure as a means of embarking upon a 'fishing expedition' to try to ascertain prematurely what a defendant's defence is and to commit him to it by having him testify to it on oath."

Launching forth from the secure base of the authority of Tebbutt J.A. in the **Economy Investments** case Akiwumi J.A. then proceeded to spread further illumination upon the subject to guide the footsteps of litigants and their legal advisers and representatives. Those shafts of enlightenment, expressed in English prose, read this way at page 7 of the judgment in the **Wayguard Security case**:

"It is for this reason that the courts have insisted on strict compliance with the Rules applicable to the obtaining of summary judgment and if there is not a sufficient compliance with the Rules or if the application is flawed in any other respect, summary

judgment should not be granted. See e.g. the judgment of the Court in the case of **Thamatlhogo Training and Conference Centre (Pty) Ltd v Botswana Development Corporation Civil Appeal No. 39 of 1998**. For that reason a defendant who is faced with an application for summary judgment, is entitled to attack the validity of the application without having to set out his defence. See **Economy Investments (Pty) Ltd and Others v First National Bank of Botswana Ltd Civil Appeal No. 8 of 1996**. This dictum was again recently applied by Zietsman J.A. in his judgment in the case of **Kegone Sebina v Gantsi Hotel (Pty) Ltd t/a Kalahari Arms Hotel Civil Appeal No. 27 of 2003**. The validity of an application for summary judgment or the verifying affidavit can also be assailed by a defendant to resist a summary judgment without even filing an affidavit. See **Economy Investment case (supra)**.

The luminous markers laid down by Akiwumi J.A. at page 7 of the **Wayguard Security** case were unerringly followed by the appellants in the case before us. Faced with the demand for summary judgment, they elected to attack the validity of the application without setting out their defence notwithstanding the hazards presented by the course they chose. They assailed the validity of the verifying affidavit of the Respondent with affidavits of their own, thus setting the stage for a determination by the court as to whether the application for summary judgement should succeed or not. The onus was thus cast upon the court to determine whether the Respondent's case was unimpeachable.

ORDERS DECLARING PROPERTIES SPECIALLY EXECUTABLE

In respect of claim A, the court *a quo* ordered and declared, against the 2nd Appellant, the property situate at Lot 1801, Kanye to be specially executable. Under claim B, the court *a quo* ordered and declared, against the 1st Appellant,

the property situate at Lot 23983, Gaborone to be specifically executable; against the 2nd Appellant, the property situate at Lot 1801, Kanye to be specially executable; and against the 5th Appellant, the property situate at Lot 150 Kanye to be specially executable.

Under clause 14 of the relevant Surety Mortgage Bonds, "a certificate signed by the Manager or Accountant of any Branch of the Mortgagee shall be sufficient evidence for the purpose of obtaining provisional sentence or judgment in any competent Court of law **for the amount owing by the Mortgagor to the Mortgagee** and secured by this Bond." [Emphasis added]. This means that the properties concerned are executable, if at all, only to the extent of the amount owing, or at the very most, up to the limits set out in the Bond.

The terms of the Bond sensibly provide for the production of a certificate evidencing the Mortgagor's indebtedness under the Bond. However, forsaking the very terms of the Bond upon which the Respondent Bank relies, it chose instead, in defiance of the rules relating to the grant of summary judgment, to produce instead, reams of computer printouts, replete with their own expressions obscure to the lay person, standing forests of figures, and ending with what appeared on the face of it, to be a zero balance. Miss Garekwe, on the eve of her marriage, gallantly succeeded in focusing her mind on the case in hand, and of assisting the court in an admirable manner. But, for all her forensic skill, she could do no more than to assure the court that if the matter reached the

trial stage, the complexity of the computer printouts could be explained by oral evidence. She had effectively conceded that the case was not a fit one for the grant of Summary Judgment.

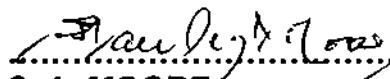
In order to present a case amenable to the grant of summary judgment, the plaintiff could simply have claimed in paragraph 13 of the particulars of claim, that the 1st Defendant was indebted to the plaintiff in the sum of P479,672.13 supporting its claim by a certificate verifying that sum to be the correct amount of indebtedness, signed by an authorised officer as provided for in clause 14 of the Bond. This would have been *prima facie* evidence of the indebtedness.

Instead the Respondent Bank elected to try to prove the correct figure by attaching the computer printouts. These tell us nothing. This is a complex matter involving a capital sum, payments made by the 1st defendant, interest charged, and in addition thereto, penalty interest. Without a certificate of indebtedness, the plaintiff was, in my opinion, obliged to give details of the payments made and the interest charges so that the claim could be checked and verified. Even if it could be accepted that the plaintiff had complied with the requirements for summary judgment, the court should have exercised its discretion and refused summary judgment because of the complicated calculations required, the fact that the plaintiff has not disclosed how the amounts claimed have been calculated, and the fact that the Appellants disputed the correctness of the amounts claimed.

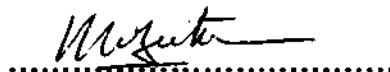
The Order of this Court accordingly is that:

- 1) The Appeal is allowed with costs
- 2) The judgment of the court a quo granting Summary Judgment be and is hereby set aside.
- 3) The costs in the Summary Judgment application be determined at the trial in the High Court.
- 4) That the Appellants be and are hereby given leave to defend the action and to file a notice of exception to the Respondent's Particulars of Claim (if so advised) within the time stipulated in the High Court Rules.

DELIVERED IN OPEN COURT AT LOBATSE THIS 27th DAY OF JULY 2005.


S. A. MOORE
JUDGE OF APPEAL

I agree


N. W. ZIETSMAN
JUDGE OF APPEAL

I agree


A. M. AKIWUMI
JUDGE OF APPEAL