IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CIVIL APPEAL NO. 039 OF 2004
HIGH COURT CIVIL CASE NO. 171 OF 2004

In the matter between:

FIRST NATIONAL BANK OF BOTSWANA LIMITED t/a WESBANK **APPELLANT**

and

DESMOND MAGARE MASILONYANE **RESPONDENT**

For the Appellant: **Mr. T. Dambe**

No appearance for the Respondent

CORAM: P.H. TEBBUTT J.P.
A.M. AKIWUMI J.A.
S.A. MOORE J.A.

JUDGMENT

TEBBUTT J.P.

This appeal concerns an application for the rescission of an order for summary judgment.

On 14 April 1997 the respondent bought a car, on hire purchase, from the appellant, a 1997 Ford Bantam 1.3 model, for a total purchase price, including finance charges, of P41 256.00. He had to pay to appellant monthly instalments of P1146.00. The agreement between the parties was that if the respondent failed to make punctual payment of any instalment, the full balance of the purchase price would become due and payable. Alternatively, the appellant was entitled to terminate the agreement, repossess the car and claim damages for breach of contract. It could also claim interest on any amounts falling due to it and recover any costs incurred by it in repossessing the car and recovering any monies owing to it, including legal costs, on an attorney and client basis.

The respondent fell badly into arrears with his payments and on 4 July 2002, the appellant terminated the contract and the respondent, on demand by the appellant, surrendered the vehicle to it. The appellant then sold the vehicle for P19 566.00. As a result the appellant alleged it had suffered damages in a sum of P23 977.97, that figure being calculated and set out in a certificate of indebtedness by a manager of the appellant.

On 3 February 2004 the appellant issued summons in the High Court against the respondent claiming payment of the said sum of P23 977.97, together with interest and costs on an attorney and client scale.

The respondent on 23 April 2004 entered appearance to defend the action, giving as his address for service in the matter "Box 404317, Gaborone, and/or Mathiba Ward, Mmathethe".

On 3 May 2004 the appellant applied for summary judgment on its claims, making the customary averment in such applications, through its senior credit manager, that the respondent had no *bona fide* defence to the action and had entered appearance to defend solely for the purpose of delay. The notice of application was served by sending it by registered post to the postal address chosen for service by the respondent.

The respondent filed a request for further particulars from the appellant on 12 May 2004.

On 14 May 2004 the appellant applied for, and obtained from the High Court, an order granting the appellant summary judgment as prayed. There was no appearance by or for the respondent on that day.

On 19 May 2004 the respondent applied by way of notice of motion for an order rescinding the order for summary judgment. In his founding affidavit to his application the respondent averred that the latter order had been "erroneously sought or erroneously granted" in that the notice of application for summary judgment had never been served on him. He said that while he could not deny the fact of the posting of the application he had "not received from the Post Office the documents relating thereto". He was surprised that the appellant had chosen to attempt service on him by registered post when it had previously served other documents in the matter on him personally.

The respondent averred further that he had a *bona fide* defence to the action. I shall deal with this presently.

He accordingly applied, in terms of Order 48(1))a) of the High Court Rules, that the judgment against him be rescinded.

It is to be noted that in his notice of motion the respondent again chose his same postal address as his address for service.

Dow J., before whom that application came, granted it ordering that the order for summary judgment be set aside and giving leave to the respondent to defend the action. She also ordered him to provide a physical address for service of the process in the matter. She awarded costs to the respondent.

In her judgment Dow J. concluded that the respondent's claim that he did not receive the application for summary judgment had merit. She stated that FNB was entitled to serve by registered post because the respondent had chosen, both in his appearance to defend and his notice of motion, a postal address as his address for service. The question, though, she said, was whether he did receive service – he had said he did not and she believed him.

As to the question of his defence she felt the matters raised by him were important enough for the matter to go to trial.

It is clear that the alternative address for service given by the respondent as "Mathiba Ward in Mmathethe," was not a proper address, the ward consisting of many residences therein. However, the postal address supplied was a proper address for service. Unlike South Africa where such an address is precluded by that country's rules of court, the rules of the High Court in Botswana do not preclude the use of such address. Indeed, Order 9(1)(4) provides that an entry of appearance to defend may be delivered by post. Having chosen the postal address as the respondent did as his *domicilium citandi* the appellant was fully entitled to serve the application for summary judgment there and that being good service, the application for rescission should not have been granted unless the Court *a quo* was satisfied that the respondent wished to defend the action but by reason of non-receipt of the process he was precluded from doing so. Dow J. said that she was so satisfied.

That, however, is not the end of the matter.

The High Court has held that a summary judgment cannot be set aside in the same way as a default judgment (see ***Raditsebe v. Nash and Co. (Pty) Ltd*** 1988 BLR 305). It held that although the applicant in that case claimed that summary judgment had been given in his absence and erroneously, summary judgment can only be set aside under the common law on any of the grounds on which *restitutio in intergrum* would be granted such as fraud or some other cause e.g. in rare cases, *justus error*).

In my view this approach is too narrow. It has repeatedly been held by this Court that summary judgment in an extraordinary, stringent and drastic remedy closing the door as it does in final fashion to a defendant (see e.g. ***Thamatlhogo Training and Conference Centre v. Botswana Development Corporation*** 1999[1] BLR 94 (C.A.) at 99 G and cases there cited).

To confine an application for rescission of a summary judgment only to the grounds suggested in the ***Raditsebe*** matter is therefore, in my view, too restrictive. I am of the view that the correct approach to such an application, as indeed also to applications for rescission of default judgments, is that set out by White J. in the South African case of ***Nyingwa v. Moolman NO*** 1993[2] S.A. 508 (TKGD), in which he followed the judgment of the South African Appellate Division in ***de Wet and Others v. Western Bank Ltd*** 1979 S.A. 1031 (A.D.).

He dealt with two scenarios: (i) where the applicant contends that the judgment was "erroneously granted" as provided for in Order 48(1)(a) of the High Court Rules; and (ii) where the application may succeed under the common law.

In the present case it cannot be found that the judgment was erroneously granted. The respondent chose as his *domicilium citandi* a postal address. The application was properly served there by registered post. The Court therefore correctly granted judgment and not "erroneously", as set out in Order 48(1)(a), when the respondent was in default. There was nothing wrong in its doing so.

In ***de Wet's*** case the Court stated that under the common law the Courts of Holland were empowered to rescind judgments obtained on default of appearance on sufficient cause shown. No rigid limits were set as to what constituted sufficient cause. It was a matter for the court's discretion but the courts were guided by considerations of fairness and justice. The onus of showing sufficient cause was on the applicant in each case. The court's "discretion under the common law was not limited to considerations such as those set out in provisions like Order 48(1)(a) nor only to grounds like fraud or, in rare cases, justus error". Applying these dicta **White J.** held that any judgment can be rescinded under the common law. The court must consider if the applicant for rescission has discharged the onus of showing sufficient cause i.e. he must (a) present a reasonable and acceptable explanation for his default and (b) establish that on the merits he has a *bona fide* defence which *prima facie* carries some prospect of success (see *Chetty v. Law Society, Transvaal* 1985[2] S.A. 756 (A.D.) at 765 A – C).

The respondent has, in my view, not discharged that onus.

It is, I think, necessary at this stage to refer briefly to the history of this matter.

The notice of appeal was filed in November 2004 and the appeal set down for hearing in the January 2005 session of this Court. The appellant had, however, not obtained leave of the High Court as it was obliged to do, the judgment of Dow J. being in respect of an interlocutory matter. The case was then postponed by this Court to its session of July 2005 to allow the appellant to obtain such leave. The respondent did not contest that. That leave was granted by Tafa AJ. on 26 August 2005. The respondent did not seek to oppose it. The matter was then enrolled again for the present, i.e. January 2006, session of this Court.

The appeal was set down for 16 January 2006. On that day the respondent did not appear. He informed Mr. Dambe for the appellant, who tried to find out why the respondent had not been present that he was busy in the Magistrate's Court and could not come to the Court of Appeal. The appeal was then postponed to 23 January 2006. In order to ensure that the respondent would be present then, the appellant made strenuous efforts to trace the respondent, enlisting the assistance of the Deputy Sheriff. The latter, in an affidavit filed with this Court, stated that he had telephonically communicated with the respondent who had taken up, what I may describe as, a completely "devil-may-care" attitude to the Deputy Sheriff's admonition that he should ensure that he was present at the Court of Appeal on 23 January 2006. The Deputy Sheriff said that the respondent was fully aware of the hearing of the appeal on 23 January 2006 but "appears to be intentionally avoiding receiving formal service of the notice of set down."

The respondent did not appear, either in person or by a representative, when the appeal was called on 23 January 2006.

In his explanation for his default of appearance when summary judgment was granted the respondent baldly asserted that he never got notice of the application for summary judgment. Despite the finding of

Dow J. that she believed the respondent in this, I have grave doubts as to his veracity in the light of all the events tending to show that he is delaying the evil moment in this matter. Moreover, I find it extremely unlikely that, the process having been sent by registered post to his postal address, he did not receive it from the post office. His explanation is in my view fraught with suspicion.

More importantly, however, the respondent, in my view, has not shown that he has a *bona fide* defence and that he has *prima facie* prospects of it succeeding. The respondent does not contest the amount of the appellant's claim or say that it is incorrect or that he has paid any amounts over and above those set out in the certificate mentioned. He merely says that the appellant "has failed to show a breakdown or statement in respect of the alleged debt of P23,977.97." This is blatantly false. The certificate of indebtedness setting out the amount of the debt (and which was attached to the appellant's particulars of claim) contains a detailed breakdown of how the amount is calculated and arrived at.

The main, and only other, defence put up by the respondent in his application for rescission is that the appellant's claim was prescribed. He said the cause of action arose at the time of – and I quote – "the unlawful repossession of the motor vehicle in 1997", elapsing in 2000.

This, again, is spurious and blatantly false. The hire purchase agreement was entered into by the respondent in 1997 and from the amount of repayments made by him of P28 978.82, as reflected in the Certificate of Indebtedness, which amount the respondent has not challenged, it is clear that the respondent paid the monthly instalments of P1146.00 over a period of 25 months during which he obviously had the use of the car. The car could therefore not have been repossessed in 1997. The appellant says that only occurred in July 2002, and its claims as contained in the summons and particulars of claim of February 2004 were therefore by no means prescribed.

The respondent has not shown any *bona fide* defence whatsoever.

The application for rescission of summary judgment should therefore not have succeeded in the High Court.

The appeal, therefore, succeeds and the order dated 14 May 2004 for summary judgment is restored.

The costs of the appeal, to which the appellant is entitled, are to be paid by the respondent on the attorney and client scale, as provided for in the hire purchase agreement between the parties.

DELIVERED IN OPEN COURT AT LOBATSE THIS 27TH DAY OF JANUARY, 2006.

P.H. TEBBUTT
JUDGE PRESIDENT

I agree

A.M. AKIWUMI
JUDGE OF APPEAL

I agree

S.A. MOORE
JUDGE OF APPEAL