



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

Court of Appeal Criminal Appeal No.CACLB-041-08
High Court Civil Case No.CVHLB-002200-06

In the matter between:

FIRST NATIONAL BANK OF BOTSWANA LTD

APPELLANT

and

PHINEAS FRED TAU

RESPONDENT

Mr Osei-Ofei for the Appellantⁱ
Ms Nyangari for the Respondentⁱⁱ

JUDGMENT

CORAM:

TEBBUTT JP
LORD COULSFIELD JA
FOXCROFT JA

TEBBUTT J.P.

1. An action by the appellant, the First National Bank, against the respondent in the High Court was dismissed by Lesetedi J for want of prosecution in terms of the amended Order 23 of the Rules of the High Court. The appellant contends that it should not have been. Hence this appeal.

2. The appellant issued and served summons against the respondent on 16 November 2006 claiming payment of the sum of P97,303.23, interest thereon, collection commission and costs, which it alleged the respondent owed it under an agreement of purchase and sale by it to the respondent of a 4 x 4 motor vehicle. The pleadings in the action were completed and on 13 November 2007 the appellant applied to the High Court to have the action entered for trial and for the allocation of trial dates. Thereafter two further steps were taken in the action. On 10 January 2008 the respondent filed his discovery affidavit and on 29 and 30 January 2008 each party served on the other notice to produce certain documents referred to in their respective discovery affidavits.

3. By 6 August 2008 the appellant was still waiting for the Registrar of the High Court to allocate dates for the trial. However, on that day the Registrar issued a notice to the parties in terms of Order 23 that he had listed the action in the court roll for 25 August 2008 for its dismissal for want of prosecution.

4. Order 23(1) of High Court Rules, prior to its amendment, which came into effect on 19 May 2008, read as follows:

“1 Where an action has not been entered for trial and no step has been taken by either party for a year or more, the Registrar shall fix a date when the case shall be called in court and shall list it for dismissal for want of prosecution and serve notice thereof on all parties thereto.”

The Rule, as amended, now reads as follows (I quote it in full):

- “1. *Where in any action no step has been taken by either party for six months or more, a party may apply for the dismissal of the action or, failing such application by a party, the Registrar shall list it before the judge on a motion day for dismissal for want of prosecution on that date and serve notice thereof on all parties thereto.*
2. *On the action being called the judge shall dismiss the action with costs unless sufficient reason is shown to the contrary.*
3. *If the judge decides not to dismiss the case, he shall impose conditions for the future conduct of the proceedings and give directions for the expeditious disposal of the case.”*
5. The amendment to the Rule accordingly provided that the period in which no step had been taken in an action, was reduced from a year to 6 months.
6. The last steps in the present action having been taken in January 2008 it is clear that if the provisions of the previous rule applied, by 25 August 2008 the period of a year had not expired and the action could not be dismissed for want of prosecution under the Rule, particularly as the action had been entered for trial.

Such dismissal could only apply if the amended Rule applied retrospectively, the application for trial dates having been made under the old Rules.

7. It is well-settled that in the interpretation of statutes no legislation, including subordinate legislation, as the High Court Rules are, is presumed to operate retrospectively (see eg. *Mohammed NO v. Union Government 1911 AD 1*; *Von Wieligh v. Land and Agricultural Bank of SA Ltd 1924 TPD 62*; *Meuman and Heyneke v. Joint Municipal Pension Fund 1978 (4) SA 652 (W) at 655*) In Mohammed's case, Innes C.J. said:

“The principle that, (in the absence of express provisions to the contrary) no statute is presumed to operate retrospectively is one recognized by the Civil Law as well as the Law of England. The law giver is presumed to legislate only for the future.”

In Van Wieligh's case it was held that:

“It is a rule both of England and of Roman Dutch Law that a law is presumed not to be retrospective, unless such was clearly the intention of the legislature.”

The Roman Dutch Law, which is, of course, the Civil Law referred to be Innes CJ, is also the common law of Botswana and what is said in the above quoted decisions applies equally in Botswana

8. The purpose of Order 23 was clearly to ensure that litigation which is not pursued with due diligence is brought to an end (see *Botipeng Healthcare Holdings (Pty) Ltd (2000) 2 BLR 112 (CA) at 118 E*). The amendment of the Rule by reducing the period of one year to six months was, it would seem, designed to compliment the case management system which was introduced into the procedures of the High Court by the inclusion in the Rules of a new Order 42, in order to expedite the passage of actions and opposed applications through that court. Order 42 also came into operation on 19 May 2008. That Rule, however, provided for a machinery to deal with “existing causes” and those “registered after the commencement of these Rules.” (See Order 42(1)(a) and (b). This to my mind is a clear indication that the amended Rules, including Order 23, were not intended to have retrospective effect.
9. It follows that the Registrar erred in listing the case for dismissal and the learned Judge in dismissing it.
10. Moreover, as this was an existing cause, the Registrar should have acted in terms of Order 42 (1)(a) and allocated the case to a judge forthwith to schedule, in terms of Order 42(2)(2) a case management conference with the parties. In listing the case for dismissal, he adopted the wrong procedure.
11. In any event, as pointed out by my Brother, Lord Coulsfield, during the hearing of the appeal, there was no step the appellant could have taken, whether the period of

inertia referred to in Order 23 was a year or six months. The pleadings had closed and it had applied for trial dates and was waiting for these to be allocated by the Registrar. The matter was out of the hands of the parties and in the domain of the Registrar. For him then to have listed the case for dismissal for want of prosecution was clearly an error. The court was, therefore, equally in error in dismissing it.

12. I would add a final comment. Upon receipt of the notice from the Registrar informing him that the case was listed for dismissal on 25 August 2008, the appellant's attorney complained that the date was allocated without prior consultation with his office. He requested that, as he would be out of the country on that date, the matter be rescheduled for another date. This was not done and there was no appearance for the appellant on 25 August 2008 when the respondent's attorney moved for the dismissal of the case.

13. The learned Judge noted that there was no requirement under Order 23 for prior consultation with the parties should the Registrar wish to list a case for dismissal in terms of the Rule. In that he was correct. However, the dismissal of a case under the Rule brings it to an end. It effectively closes the door on a party, most usually the plaintiff, unless cause can be shown why the matter should not be dismissed. This Court has held that this need not be done by way of affidavit but can be done from the Bar. (see *Michael Jordaan and Another v. Keetse Baitshupi Civ.App. 037-08* *unreported*).

14. Because of the drastic consequence of a dismissal and because of the peremptory provisions of the Rule (“the judge shall dismiss the action unless sufficient reason is shown to the contrary”), it seems to me that where there is what, on the face of it, appears to be a reasonable request for a postponement to enable the party affected to appear, the court should consider whether to allow it or not before dismissing the action without more. The court is not obliged to do so but should give it the court’s fair consideration. This was recognized by the Court in the Botipeng case, supra, where the Court said that the provision to dismiss a matter under the Rule was peremptory “save that the court could on good cause shown postpone the matter for determination” before doing so.
15. While the amendment to Order 23 and the introduction of Order 42 are to be commended for seeking to clear the backlog of ancient cases and, by the case management system, to expedite those already registered and to be registered in the future, the enthusiasm for those procedures should not cloud the desirable requirement that courts should ensure fairness to litigants.
16. In the result:
 1. The appeal succeeds, with costs.
 2. Acting in terms of the provisions of Order 23(3), the Court directs the Registrar to allocate trial dates forthwith so as to have the matter expeditiously set down for trial.

DELIVERED IN OPEN COURT AT LOBATSE THIS 30TH DAY OF JANUARY 2009

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P. H. TEBBUTT
JUDGE PRESIDENT

I agree:

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LORD COULSFIELD
JUDGE OF APPEAL

I agree:

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J. G. FOXCROFT
JUDGE OF APPEAL

ⁱ Osei-Ofei Swabi & Co. Attorneys for the Appellant

ⁱⁱ Modimo & Associates Attorneys for the Respondent