

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

CIVIL APPEAL NO. 52 OF 1995
HIGH COURT CC 1696/95

In the matter between:

FIRST NATIONAL BANK OF BOTSWANA LTD APPELLANT

AND

VALLEY SCI CONSTRUCTION (BOTSWANA)	
(PTY) LTD	FIRST RESPONDENT
CLARA MASILI VUMA	SECOND RESPONDENT
JONATHAN DAVISON MAKOTA	THIRD RESPONDENT

MR ATTORNEY B.B. TAPA FOR THE APPELLANT
 MR. ATTORNEY Z. MAKEWADE FOR THE RESPONDENTS

J U D G M E N T

CORAM: SCHREINER J.A.
 TEBBUTT J.A.
 LORD COWIE J.A.

LORD COWIE J.A.

This is an appeal against a decision of the High Court at Lobatse, refusing an application for summary judgment against the

second Respondent and granting her costs, in an action instituted by the Appellant against the first Respondent (hereinafter referred to as ("the Company")) and two other Respondents.

The action arose out of an Agreement entered into in June 1991 between the Appellant (which was formerly known as the Bank of Credit and Commerce (Botswana) Ltd and the company for the purpose of providing overdraft facilities of P90,000.00 and a fixed loan of P30,000.00 to the Company. It was further agreed that the overdraft was repayable immediately on demand by the Appellant and that the fixed loan was repayable not later than 1st January 1992 together with interest on both loans.

It was a condition of the Agreement that the second Respondent bind herself as surety and co-principal debtor jointly and severally in solidum with the company for the due performance by the latter of its obligations under the Agreement to the Appellant, and grant a First Surety Mortgage Bond over a piece of land, being Lot 1477 in Francistown, in favour of the Appellant as security for the company's said obligations.

In consequence of the said condition the second Respondent attended at an attorney's office in 1991 and signed a personal guarantee and a Power of Attorney in favour of the attorney to enable a Mortgage Bond to be registered with the Registrar of Deeds for Botswana over the said piece of land. The said

Mortgage Bond was registered on 26th June 1991.

In spite of demands by the Appellant, no repayments of the money due to them has been made by any of the Respondents. Accordingly the Appellant issued a Writ of Summons against all three Respondents on 7th August 1995. The Writ was served on 18th September 1995 on the representatives of the Company and on 20th September 1995 at the domicilium citandi et executandi of the second Respondent. There is no record of service on the Third Respondent in the file. In any event only the Second Respondent entered appearance to defend.

Thereafter on 19th October 1995 the Appellant filed a Notice of Application for Summary Judgement and, in response thereto, the Second Respondent in terms of Order 34 Rule 3(b) of the High Court Rules filed an opposing affidavit dated 7th November 1995.

In due course the application was heard by Acting Judge Gaefele who on 1st December 1995 dismissed the application for Summary Judgment with costs and granted leave to the Second Respondent to file a plea or other answer to the Appellant's claim.

The Appellant was granted leave to appeal against the learned Acting Judge's decision and on 19th December he filed a Notice of Appeal to this Court setting out the grounds of appeal and seeking an Order Granting Summary Judgment in favour of the

Appellant against the Second Respondent for:-

- (a) Payment of the sum of P200,740.62;
- (b) Interest thereon at 19.5% per annum, compounded monthly from 1st April 1994 to date of payment;
- (c) An order that Lot 1477 Francistown be declared specially executable;
- (d) Costs of Suit.

The grounds of appeal filed by the Appellant alleged errors in fact and law by the learned Acting Judge and were extensive, but in view of the fact that the attorney for the Second Respondent filed a Notice of intention to contend that the Judgment of the learned Acting Judge should be affirmed on grounds other than those relied on by the Courts below, the range of those grounds of appeal were greatly restricted.

The Notice intimated that the grounds upon which the Second Respondent intended to rely on support of the decision were as follows:-

1. That the Respondent has a bona fide defence as disclosed in the affidavit filed under Order 34 Rule 3(a) (sic) (it should read (b)) of the High Court Rules; alternatively
2. That on the material before the Court injustice may be done against the Respondents if summary judgment is entered and therefore the Court should exercise its discretion and refuse to grant summary judgment."

In view of the fact that the Second Respondent is, in effect, departing from the grounds upon which the learned Acting

Judge decided this application, it would be convenient to consider whether the decision to refuse summary judgment can be supported on the position now taken by the Second Respondent, rather than to approach this appeal on the grounds stated by the Appellant.

BONA FIDE DEFENCE

Order 34 Rule 3 (b) in so far as relevant to this case is in the following terms:-

"3 Upon the hearing of an application for summary judgment, the defendant may

(b) satisfy the Court by affidavit that he has a bona fide defence to the action, such affidavit shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

In the present case, the Second Respondent lodged an affidavit in opposition to the application which in so far as it is relevant to this appeal was in the following terms:-

"Save as to the admission of my identity averred in paragraph 1.3 of the particulars of the claim, I have no knowledge and do not wish to comment about the rest of the allegations in paragraph 1 thereof.

I have no knowledge of the allegations made in paragraph 2 of the particulars of claim, as I was not a party to the dealings between the parties to the agreement.

- 5.1 With respect to paragraph 3.1 and 3.2 of the particulars of claim I have no knowledge of the condition referred to, have never seen the agreement referred to, have never discussed the condition with the Plaintiff (the Appellant) in or with the first Defendant (the company).
- 5.2 In 1991 the Plaintiff instituted an action against me in case No MISCA 42/91.
I went to sought (sic) legal advice from my attorney of record. My attorney of Record explained to me the concept of security by way of a Mortgage Bond and the implication of being a co-principal debtor and the effect of renunciation of the various benefits as appear on page 2 of the Mortgage Bond. None of this had ever been explained to me before.
- 5.3 I wish to state further that I have never had anything explained to me either by the 3rd defendant who was then running the affairs of the 1st respondent nor by the conveyancer who registered the Bond. In fact I never met the Bank Manager nor the attorney. I do recall however being asked to sign some documents by a secretary at the offices of the conveyancer's office. The secretary merely asked me to sign the documents which were neither read to me nor explained to me.
- 5.4 Had it been explained to me that the consequence of this was that my house would be sold I would have refused to sign the documents. I signed at the offices of Mosojane, Phumaphi & Co. Had the meaning of co-principal debtor and the renunciation of the benefit of excusion (sic) been similarly explained I would have refused to sign the agreement.
- 5.5 I have also been advised by my attorney of record and I believe the same to be true that even if there is a good claim such a claim would not amount to the sum claimed for the following

reasons among others:-

5.5.1 Part of the claim is prescribed.

5.5.2 The bond does not cover money lent and advanced after the registration of the bond."

In his submission to us, the attorney for the Second Respondent did not address us on the point taken in 5.5.2 above. The bona fide defence upon which he relied fell under two heads.

The first was that part of the claim had prescribed and so summary judgment could not be granted in an action claiming P200,740.62; and second that it was never explained to the Second Respondent at the office of the conveyancer Mosojane Phumaphi & Co., that by entering into the Mortgage Bond, she was renouncing the benefits specified on page 2 thereof, and in particular the benefit of excussion.

There are many cases in which the meaning of a bona fide defence has been discussed, and they are conveniently referred to in the case of DU SETTO (SUNNYSIDE II) PTY LTD v HERMANS CHRISTOFEL DU PLESSIS AND ANOTHER CIVIL APPEAL NO. 19/94 IN COURT OF APPEAL OF BOTSWANA (UNREPORTED) where Tebbutt J.A. at page 19, having considered these cases, went on to set out the principles which apply to the expression bona fide defence in the Rule. What he said was this:-

"Those cases lay down that the defendant must satisfy the Court that he has a defence which, if proved, would constitute an answer to the claim and that he is

advancing it honestly. He must disclose what his defence is and set out the material facts upon which it is based and while he need not deal exhaustively with the facts and evidence relied upon to substantiate his defence or with the detail or precision required of a pleading, he must set them out with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence or not.

The allegations in the affidavit must not be bald, vague or sketchy. What is required is that the defence be not set out so baldly, vaguely or laconically that the court, with due regard to all the circumstances, receives the impression that the defendant has, or may have, dishonestly sought to avoid the dangers inherent in the presentation of a fuller or clearer version of the defence which he claims to have.

The affidavit must not lack "forthrightness as well as the particularity that a candid disclosure of a defence should embody" (see Diesel Power Plant Hire case supra at 298 D-F). It has also been held that

"If the statements of fact are equivocal or ambiguous or contradictory or fail to canvass matters essential to the defence raised, then the affidavit does not comply with the rule"

(See also Arends v. Astra Furnishers supra at 304 A-B). It is not an onerous task to file an affidavit which meets the requirements of the Rule. On the contrary it is a simple matter where a bona fide defence is available to a defendant. If he does not do so, the Court will be entitled to grant summary judgment and not only where the plaintiff's case is an answerable one."

Applying those principles to the two heads under which the attorney for the Second Respondent maintained that there was a bona fide defence to this action, I have come to the conclusion that neither of them satisfy those principles.

So far as the alleged defence of prescription of part of the claim is concerned, the only reference to it in the Second Respondent's opposing affidavit are the words "Part of the claim is prescribed"

Such an allegation could not be balder or more sketchy, to use two of the adjectives in Tebbutt J.A's judgment.

The attorney for the Second Respondent clearly appreciated that situation and proceeded to found on various passages in the Appellant's Writ of Summons and Particulars of Claim to support his allegation. I do not regard that as a justifiable exercise. A similar situation arose in Du Setto (supra) and Tebbutt J.A. commented on it as follows:-

"In order to rely on prescription a defendant would have to set out the material facts which establish that prescription has run against the plaintiff. In the present case, du Plessis has made only the bald assertion that the claim is prescribed. No facts are alleged to support this. Mr. Segopolo avers that on the facts set out in respondent's own papers the claim is prescribed. I am not convinced of this. The running of prescription can be interrupted in many ways. Nothing is before us to suggest that this may not be so. The court cannot be expected to make assumptions to assist a defendant. It is he who must set out fully the facts upon which he relies for his defence. Du Plessis has not done so, apart from his bald assertion that the claim is prescribed. That, in my view, is insufficient to set out a valid defence."

In my opinion precisely the same considerations apply in the present case.

Notwithstanding the ingenious attempts by the attorney for

the Second Respondent to spell out a defence of prescription from the Appellant's papers, I am not convinced that he has done so. In any event I am not persuaded that such an exercise is permissible. It is for the Second Respondent to set out fully the facts upon which she relies for her defence and not for the Appellant to meet all possible defences in his particulars of claim. This is not to say that there may not be cases in which a very clear defence may appear from an applicant's papers, but even then, in my opinion, a clear reference to the material facts relied on should appear in the opposing affidavit and not just a bald assertion of the nature of the defence. It is to be noted that the learned Acting Judge in the present case rejected this defence, and I would take the same view.

Accordingly, I reject the submission that there is a bona fide defence of prescription in this case.

The second head on which the attorney for the Second Respondent relied in submitting that there was in this case a bona fide defence has even less merit. It is said in the Second Respondent's opposing affidavit that it was never explained to her at the offices of the conveyancer, Mosojane Phumaphi & Co., that by entering into the Mortgage Bond she was renouncing the benefits specified on page 2 thereof, and in particular the benefit of excussion and division. In other words she is saying

that although she signed the documents, the principle of Caveat subscriptor does not apply because there was justus error on her part brought about by the failure of the conveyancer to explain to her that by signing she was renouncing the benefit of excussion. In the leading case on this subject GEORGE V FAIRMEAD (PTY) LTD 1958 (2) SA 465 (A) Fagan CJ said this at p 471 A-D

"When can an error be said to be justus for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party - the one who is trying to resile been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? (Vide Logan v. Beit, 7 S.C. 197; I. Pieters & Company v. Salomon, 1911 A.D. 121 esp at pp. 130, 137; van Ryn Wine and Spirit Company v. Chandos Bar, 1928 T.P.D. 417, esp at pp.422,423,424; Hodgson Bros. V. South African Railways, 1928 C.P.D.257 at p. 261). If his mistake is due to an misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound."

In the present case it was submitted on behalf of the Second Respondent that the failure to explain to her that by entering into the Mortgage Bond she was renouncing the benefit of excussion was a misrepresentation, albeit an innocent one, which led her into justus error. I would point out first of all, however, that it is not said in her opposing affidavit that this failure amounted to a misrepresentation innocent or otherwise.

Leaving that point aside, I have decided that for the purposes of this case I do not need to go into the law of Caveat Subscriptor and justus error in detail because, in my opinion, the answer to this submission by the attorney for the Second Respondent, lies in the Second Respondent's own opposing affidavit. In the first place it is not explained what she thought she was doing when she went to sign the two documents, but more importantly in the second place having signed the personal guarantee and the Power of Attorney and entered into the Mortgage Bond, the Second Respondent states at paragraph 5.2 of her affidavit that in 1991 the Plaintiff (Appellant in this case) instituted an action against her, No MISCA 42/91, and that she went and sought legal advice from her own attorney. She then states that her attorney explained to her the concept of security by way of a Mortgage Bond and the implication of being a co-principal debtor and the effect of renunciation of the various benefits as appear on page 2 of the Mortgage Bond. Accordingly it is clear that at that stage she was made aware of the effect of entering into the Mortgage Bond and in particular the fact that she had renounced the benefit of excussion, and yet, in the full knowledge of her position, she made no attempt to resile from either her personal guarantee or the Mortgage Bond. In my view therefore any innocent misrepresentation that there may have

been arising from a failure at an earlier stage to explain her position was cured by the explanations given to her by her own attorney when she sought his advice about the 1991 action.

In these circumstances I am quite satisfied that there is no merit in the second head of the submission that the Second Respondent has a bona fide defence to this action and I have no hesitation in rejecting this ground of appeal.

Finally the question arises in terms of the second ground for supporting the judge a quo's decision whether, notwithstanding the failure of the Second Respondent to aver a bona fide defence, this Court should in the exercise of its discretion refuse to grant summary judgment. It is clear that in refusing summary judgment in the exercise of his discretion the Judge a quo misdirected himself and proceeded on a consideration which is no longer supported by the Second Respondent. In these circumstances the question whether or not summary judgment should be refused in the exercise of a discretion is for this Court to decide.

Having considered all the circumstances of this case and, in particular, all that was said in the Second Respondent's affidavit, I am quite satisfied that there is no basis for exercising a discretion in her favour. She was fully advised of the extent of her obligations as far back as 1991 and she took

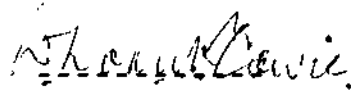
no steps to resile from them.

In these circumstances I would allow the appeal, set aside the decision of the Judge a quo and make an Order in the following terms:-

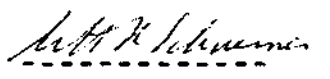
"Granting Summary Judgment in favour of Appellant against the Respondent for:

- (a) Payment of the sum of P200,740.62;
- (b) Interest thereon at 19.5% per annum, compounded monthly, from 1 April 1994 to date of payment;
- (c) An order that Lot 1477, Francistown be declared specially executable;
- (d) Costs of suit."

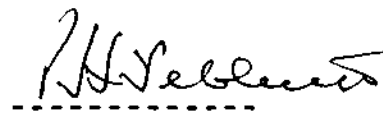
DELIVERED IN OPEN COURT AT LOBATSE THIS DAY OF FEBRUARY 1996.


W.L.K. COWIE
JUDGE OF APPEAL

I AGREE:


W.H.R. SCHREINER
JUDGE OF APPEAL

I AGREE:


P.H. TEBBUTT
JUDGE OF APPEAL