



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

Court of Appeal Civil Case No.CACLB-027-08
High Court Civil Case No.2443-05

In the matter between:

DONALD GAETSALOE

Appellant

and

DEBSWANA DIAMOND COMPANY (PTY) LTD

Respondent

Mr I. Segopolo for the Appellantⁱ

SC Vivian (with Mrs D. Makati-Mpho) for the Respondentⁱⁱ

POSTPONEMENT ORDER
REASONS

CORAM: **MOORE J.A.**
TWUM J.A.
HOWIE J.A.

MOORE J.A.

INTRODUCTION

1. These appeals have been brought by Donald Gaetsaloe (hereinafter The Appellant) against the two judgments of Dingake J of the 11th June 2008. The relief sought from the Court of Appeal in what I would call the prescription appeal is for an Order in the following terms:

“4.1 The appeal is allowed with costs;

4.2 The decision of the Court a quo be and is hereby set aside and substituted with the following Order;

‘The special Plea of prescription is dismissed with costs.’

2. The other appeal which I would call the discovery appeal is against the judgment of Dingake J also dated 11 June 2008 in which he dismissed the application with costs. The relief sought by the appellant is for an Order in the following terms:

“4.1 The appeal is allowed with costs;

4.2 The decision of the High Court dated 11th June 2008 is hereby set aside and substituted for with the following order:

i. The Respondent is ordered within 14 days to discover on oath, and produce, to the Appellant/Applicant copies of the documents listed in the Appellants/Applicant’s Notice of Motion dated 13th July 2006 and filed of record in the High Court.”

3. The Appellant pleaded that he was employed by the Respondent from 10th July 2000 through 3rd December 2004 in several senior capacities in the accounting areas of the Defendant’s business. He claimed to have been a high performing efficient and productive employee entitled to the receipt of certain bonuses as a reward for his industry and productivity.
4. In March 2004, however, the Appellant was summarily dismissed from work after being charged with gross negligence which he says he strenuously contested. He was eventually reinstated on a final written warning. Following these not

insignificant events, the Appellant claims that he worked in an atmosphere of increasing frustration and insecurity which led him to tender his resignation by letter dated 4th November 2004. His resignation was accepted by letter dated 11th November 2004. He was no longer in the Appellant's employ at the time when the annual, performance - based bonus and the retention bonus for the year ending December 2004 became payable.

5. The Appellant complains that he claimed various sums under the heading of acting allowances; substantive unpaid remuneration; annual performance bonus for 2004; together with a retention bonus. His claims amounting in total to P649,650.00 were not satisfied. Hence his action.
6. The Appellant's action appears to have begun on the 23rd of August 2005. I say appears because that date looks like the earliest one on the three seemingly official date stamps appearing on the face of the writ of summons at page 50 of the record. The dates on two of these three date stamps can only be read with some difficulty and at the risk of applying a date of doubtful accuracy. On the 21st of September 2005 the Respondent filed a Request for Further Particulars which were followed up on the 25th October 2005 by the Respondent's Special Plea in which it prayed that the Appellant's claims in respect of the position of Group Management Accountant and of Group Financial Accountant be dismissed because those claims had prescribed. Alternatively the Respondent pled over in respect of the remainder of the Appellant's claim.

7. On the 23rd February 2006, the Appellant countered with a Notice of Exception of even date alleging that the Special Plea filed on behalf of the Respondent did not disclose any defence. It also sought to have paragraph 5.1.1 of the defence struck out because it was imprecise and therefore vague and embarrassing. On the 20th of February 2007, Lesetedi J dismissed the exception with costs. The Appellant's next effort was by way of Notice of Motion in an Interlocutory Application dated 18th August 2006 demanding that within seven days the Respondent discover and produce on oath to the Appellant copies of the documents listed in The Schedule annexed to the Notice of Motion. Dingake J was not satisfied that all of the documents sought by the Appellant should be disclosed and his judgment dated 15th June 2008 reflected that mindset.
8. On the 22nd April 2008, by consent of the parties Dingake J granted an order "that the special plea herein be determined separately prior to the hearing of the other issues in dispute." On the 11th June 2008 the judge found that "the special plea of prescription succeeds with costs." Thus in one inauspicious day, the Appellant suffered two significant reverses in the High Court. He therefore appealed to this Court against both the JUDGMENT on the discovery question and against the RULING on the special plea of prescription.
9. When both these appeals came on for hearing before this Court on the morning of Tuesday 20th January 2009, Counsel for the Appellant reported that he was embarrassed because the respondent's Heads of Argument had not been served timeously. Counsel for the Respondent readily and properly agreed that its Heads of Arguments had not been served within the proper time and offered no objection

to counsel for the Appellant's request that the matter be stood down until 2:00 pm.

10. When the hearing resumed at 2:00pm, Mr. Segopolo for the Appellant began by responding to the matters raised *in limine* in the Respondent's Heads of Argument. His oral presentation was painstaking and time consuming. In spite of counsel's best efforts, he could not avoid tangential references to the substantive appeals.
11. It soon became clear that, even if the arguments on the points raised *in limine* were fully ventilated by both sides that day, the Court would of necessity, in order to give studied consideration to the arguments of counsel, have had to reserve its decision on those points. Furthermore, as the afternoon progressed, it became increasingly plain that the substantive appeals could not be heard on that day. Nor could they be heard in this sitting of the Court because of the court's existing commitments. Counsel conferred between themselves. They arrived at a consensus which the court found to be sensible in the circumstances. Counsel accordingly agreed that:
 - b. This matter was part-heard on points *in limine* only.
 - c. The hearing on points *in limine* is incomplete.
 - d. The matter be adjourned to the July sitting of this Court.
 - e. Counsel for both parties to meet in the interim to discuss the issue of discovery.
 - f. This matter to remain on the roll and to be revisited in July 2009.
 - g. Costs in the cause.

A postponement order was granted accordingly.

For the avoidance of doubt, I think I ought to make it clear that this Court has reached no decision on any matter and that the items enumerated at a. to f. supra are merely a recording of the agreement reached by counsel.

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

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S. A. MOORE
JUDGE OF APPEAL

I agree:

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DR S. I. TWUM
JUDGE OF APPEAL

I agree:

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C. T. HOWIE
JUDGE OF APPEAL

- ⁱ Segopolo & Co Attorneys for the Appellant
- ⁱⁱ Collins Newman & Co Attorneys for the Respondent