

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

COURT OF APPEAL CIVIL APPLICATION NO. CACLB-114-11
HIGH COURT CIVIL CASE NO. MLHLB-000472-11

In the matter between:

JAY BEE ASSOCIATES (PTY) LTD

APPLICANT

and

ATTORNEY GENERAL

RESPONDENT

Mr J.B. Gaetsewe, Director for the Applicant

Ms Attorney J. Mokoti (with Ms N.K.T. Sharp) for the Respondent

R U L I N G

KIRBY JP:

1. The papers in this application, which is now headed "Application for extension of time and departure from the Rules" show that the applicant, represented by its director, is in a state of some confusion. Mr Gaetsewe, the director, who is an engineer, has filed voluminous papers and correspondence on his own, which are extremely difficult to follow. He would be well advised to seek legal representation if the matter proceeds.
2. It appears from the papers filed of record, which may not be complete, that:

- (1) The applicant sued out process (whether by summons or notice of motion is not clear) against the Attorney General under Case No. MAHLB-000076-10 in which he claimed sums of money said to be due to him for engineering services rendered, totalling some P800,000 plus interest.
- (2) The same claim was then made in Case No. MAHLB-000188-10, which was (according to the applicant) 'consolidated' under the original case number. It is not clear if in fact this was done.
- (3) The claim was dismissed on 28th March 2011 for want of appearance by the applicant at a case management conference.
- (4) An application for the "withdrawal" of the order dismissing the claim and for the re-instatement of the case was refused by an order of the court made on 9th June 2011.
- (5) Undeterred, the applicant sought to start over again by registering a Notice of Motion seeking the original relief, under case No. MAHLB-000472-11 on 13th July 2011.
- (6) Notice of Opposition was filed, and the respondent raised the defence of *res judicata*, since the order dismissing the claim had not been subjected to any appeal, nor had it been rescinded.
- (7) The application was dismissed by Dingake J. on 25th August 2011 as being without merit, on the ground that the subject matter was *res judicata*.
- (8) On 20th September 2011 the applicant filed a document headed "Notice of Motion for Leave to Appeal." This stated that the applicant sought leave to appeal against the decisions of the High Court given on 9th June 2011 and 25th August 2011. It added, unusually, that the proposed grounds of appeal were set out in an attached affidavit. That affidavit does not contain itemized grounds of appeal, as required by Rule 12 of the Court of Appeal Rules. Instead it contains a rambling philosophical and factual discourse covering nine closely typed pages, with a number of documentary attachments. It does reveal, however, that the monetary claim was disputed by the respondent.

3. It also contains the rather optimistic suggestion (although this is not included in the application) that the applicant should be given legal representation as a pauper or “as a poor person” as Order 30 of the Rules describes such an appellant. This clearly does not refer to limited liability companies, and particularly ones which have already paid security for costs in a quite substantial sum, as in the present case. It refers to natural persons, and reflects the imperative that supplicants to the court should not be denied a hearing because of poverty alone.
4. Because the Notice of Appeal was not compliant with the rules, this is an application (as it says), for leave to appeal out of time against each of the decisions complained of, namely the refusal to re-instate the dismissed action, as ordered by Dingake J. on 9th June 2011, and the dismissal of the re-launched proceedings by the same Judge on 25th August 2011. It is not proper to roll two appeals into one as the applicant has attempted to do but because it is represented by a lay person, and no objection has been raised to this procedure, I will condone it and consider both applications.
5. To succeed in its applications the applicant must show firstly that it has a reasonable explanation for its non-compliance with the Rules, and secondly, that it has reasonable prospects of success, or at least an

arguable case, on each of its appeals (See **REINHARD vs TRANS OKAVANGO (PTY) LTD (1993) BLR 252**).

6. The source of all the applicant's woes appears to have been its director's belief that he was able to handle a number of potentially complex procedures on his own, without engaging a trained lawyer, and his reluctance to employ counsel. This has led to documents being filed and procedures being adopted which are confused and non-compliant with the Rules. His real complaint was the dismissal of his earlier action on 28th March 2011. There is no application for leave to appeal against that order at all. Where such a order is made for non-compliance with case management orders, the proper remedy for an aggrieved litigant is to appeal, if he was present when the order was made, or to apply under the common law for rescission of the judgment if he was not present, and alleges a lawful excuse for his non-attendance or non-compliance. See **TSWEDISANG GOFHAMODIMO vs SAM KOBOYANKWE AND OTHERS CACLB-098-10** (Judgment dated 29th July 2011) as yet unreported, where the correct approach and procedures are set out.

7. It is not open to the Judge who has dismissed a case for non-compliance merely to re-instate it upon the application of the aggrieved party because the Judge is *functus officio* unless and until a lawful application for the

rescission of his judgment is made to him. See **BRIGITTE VAN DER CASTEELE vs AGS CONSTRUCTION Civ.App. 38/09** (Court of Appeal).

8. The application for condonation of departure from the Rules, itself something of a novel concept, is perhaps justified because the applicant has also bundled what should have been two applications into one. This is not normally permissible, but again I will condone it as the applicant is unrepresented and has done his best throughout to advance his case. There is no suggestion that his claim, whatever its merits, is not honestly made.

9. The first application concerns leave to appeal out of time against the refusal of the Judge a quo on 9th June to re-instate his dismissed action. An application purely for re-instatement would not have succeeded, as I have said. But the draft order in fact sought two main reliefs – the “withdrawal” of the order, and the reinstatement of the action. The language is ill-chosen by a lay litigant, but an appeal court may well hold that the word “withdrawal” in the sense used is equivalent to “rescission”. If it is so, then what Dingake J. had before him was in fact a common law application for rescission. This, on the record before me, which may well be incomplete, was summarily refused by the Judge with no written

reasons. The order stated only that “the applicant has failed in its affidavit to show good cause.” The applicant claims that the Judge believed that no lawful excuse or reasonable explanation had been given in the affidavit supporting the application, because he was reading the wrong affidavit – one filed in support of an application to strike out – rather than the correct supporting affidavit. The correct affidavit did in fact give his reason for failure to attend the case management conference. This was that it, or he, never received the Case Management Notice which set a hearing for 28th March 2011. This was issued in his absence, and he only heard about it, and the dismissal, after the event, from a court official, despite having had no response to previous requests for information.

10. Since, on the available material before me, the Judge gave no reasons for his decision (which, on the authority of **GOFHAMODIMO’s** case (supra) he should have done), there is nothing to show that the appellant’s reason for non-attendance was considered. Prima facie, it may well be true, and his cause of action, which was a straightforward claim for payment for services rendered, was before the Judge in affidavit form. So reasonable prospects of success have been shown for an appeal against what was, in effect, a refusal to rescind the order dismissing his claim, the consequence being that it would be reinstated and the trial would continue. The reason

for his lateness in appealing is that he believed that all he had to do was to start the action afresh, which he did. This was a wrong belief, but there is nothing to suggest he was not acting in good faith, and he was a lay litigant. As soon as his new case was dismissed as being *res judicata*, he took steps, confused as they were, to launch the application.

11. Ms Mokoti, for the respondent, has told the court that the record is not complete in regard to the original application. It contains only those documents annexed by the applicant to his founding affidavit, which do not comprise the whole record in cases numbers 000076/10 and 000188/10. These would have included points *in limine* raised by the respondent objecting, *inter alia*, to the bringing of a disputed monetary claim by application rather than by writ of summons, and other matters. These were not dealt with by the Judge, since he dismissed the case for non-compliance with a case management order. She has also, very fairly, informed the court, that the dispute between the parties is actually as to quantum. They disagree as to the formula to be used in calculating the sum due. On the respondent's own calculations, as much as P500,000 of the P800,000 of principal claimed may be payable together with interest. It is not, she concedes, the Attorney General's intention to "win" this sum from the applicant on technicalities.

12. There is, it seems, much room for compromise, which may, if there is give and take, enable the parties to settle their dispute ahead of the appeal which I shall in due course authorize. This is particularly so since even if the appeal is successful, there is a procedural morass which will need to be negotiated, if that is possible, before the real issues are determined. The applicant will be well advised, as I have said, to obtain the services of legal counsel.
13. I consider, in view of what has gone before, that its first application, for leave to appeal out of time against dismissal of the rescission application, should succeed. It has an understandable reason for its lateness, and a reasonably arguable case for rescission of the order of dismissal.
14. As to the second application, that there should be leave to file a proper notice of appeal against the dismissal of Case No. MAHLB-000472-11 as being *res judicata*, that application is without merit, because an appeal against that order has no prospects of success. The original dismissal of the claim was a final judgment. It finally disposed of his monetary claim against the Attorney General. The Judge was undoubtedly correct to dismiss an attempt to re-launch the case under a different number on the grounds that it was *res judicata*. The respondent is incorrect when he

described the initial dismissal and the refusal of reinstatement, as interlocutory in nature.

15. Since both parties have had a measure of success it is just that each party should bear their own costs of the application.

In result:

- (1) Leave is granted to the applicant to appeal against the order of 9th June 2011 refusing rescission of the order of dismissal of 28th March 2011 and the reinstatement of the case.
- (2) A proper Notice of Appeal is to be filed and served, dealing with that appeal only, within 30 days of today.
- (3) The Record is to be checked to ensure that it contains all documents relating to the original proceedings in cases No.s MAHLB-000076-10 and MAHLB-000188-10 and the application for rescission/reinstatement.
- (4) Application for leave to appeal in Case No. MAHLB-000472-11 is refused.

(5) There is no order as to costs.

**DELIVERED IN OPEN COURT AT LOBATSE THIS 16TH DAY OF
MARCH 2012.**

**I.S. KIRBY
JUDGE PRESIDENT**