

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

Court of Appeal Civil Appeal No. 3/2004
High Court Civil Appeal No. 1980/2003

In the matter between:

SUNG YONG JO

APPELLANT

VS

BOTSWANA HOUSING CORPORATION

RESPONDENT

Mr I. Seloko for the Appellant

Mr R.S. Busang for the Respondent

J U D G M E N T

CORAM: TEBBUTT, J.P.
ZIETSMAN, J.A.
PLEWMAN, J.A.

PLEWMAN J.A.

At the conclusion of argument in this appeal the Court made an order allowing the appeal and granting appellant leave to defend the action instituted against him by the respondent (It is implicit that summary judgment against appellant was refused). The Court indicated that its reasons would be filed later. These are the Court's reasons for its order.

The parties to the appeal concluded a lease in respect of a house described as House No. 40353/76 in Gaborone in terms whereof the appellant was to occupy the house and pay monthly rental. It is common cause that the appellant fell into arrears with his rental payments and that respondent was

entitled, after giving him notice and time to make good his breach, to cancel the lease and evict him. The respondent duly gave the requisite notice and when the arrears had not been paid it resolved to issue summons against appellant for payment of the arrears with interest, an order cancelling the lease, the eviction of the appellant, damages for holding over and costs. A summons was prepared. The summons was delivered to the Registrar of the Court (that is handed in to the Registrar) on 3 June 2003. But the summons was only issued by the Registrar on 10 June and only served on appellant on 11 June. Before issue of the summons appellant paid the arrears. This was done on 6 June 2003. It is common cause that the arrear rental was so paid and that the payment was accepted unconditionally. When the summons was thereafter served on him appellant avers that he approached representatives of the respondent. He says he made a further payment of some P4 000-00 as an advance against rent to fall due in the future. He says he also came to an arrangement with respondent's officials that he would provide or give a debit order instruction to his bank for the regular monthly payment of the rent. This he did and a copy of the instruction is annexed to his opposing affidavit (the source of the facts recounted above). In a supplementary affidavit it is asserted that the respondent received the debit order sum in July 2003. Further features of his arrangements with respondent's officials will be referred to presently.

Appellant then entered appearance to defend. Respondent, in consequence, applied in terms of Order 34 for summary judgment. Appellant responded by

filing an opposing affidavit in which he asserted that he had a bona fide defence to the respondent's claims. In due time the application was argued and respondent sought judgment on all the claims in the summons other than the prayers for payment of the arrears. An order in these terms was granted. Regrettably the judgment demonstrates a misconception as to both the nature and scope of proceedings in terms of Order 34 and, with respect to the learned Judge, also (as it seems to us) with the consequences in law of steps taken to remedy a breach of contract. There are several grounds upon which we are of the view that the Court a quo erred – each of which should have induced the Court to refuse summary judgment.

It is appropriate to commence with a comment on the nature of the proceedings. The remedy of summary judgment, it has repeatedly been said, is an extra-ordinary, stringent and drastic one. I would in this regard direct attention, only to the case of **Thamatlhogo Training and Conference Centre (Pty) Ltd vs Botswana Development Corporation Civil Appeal 39 of 1998**. I have in fact traced at least nine other cases in this Court in the last few years which are to the same effect. They all stress the fact that great care must be taken when dealing with such applications and state that strict compliance with all requirements of the procedure must be made. Order 34 makes it clear that all that a defendant is called upon to do in order that he be allowed to enter upon his defence (where he does not give security in terms of Order 34 (3) (a)) is to satisfy the Court by affidavit "... that he has a bona fide defence to the action". Such affidavit must disclose

fully the nature and grounds of the defence and the material facts relied upon therefor. But there is no obligation on a defendant to prove his defence on a balance of probabilities at the summary judgment stage. Order 34 also imposes a strict limit to the type of claim that can be the subject of an application for summary judgment. The order provides as follows:-

"Order 34(1) where the defendant has entered an appearance to defend the plaintiff may apply to court for summary judgment on each of such claim as is only

- (a) based on a liquid claim;
- (b) for a liquidated amount of money;
- (c) for delivery of specified movable property; or
- (d) for ejectment together with any claim for interest and costs" (emphasis added)

In the present case the claims on which respondent applied for summary judgment included orders for cancellation of a lease agreement, eviction of the (appellant) or anyone in occupation of the leased premises through the (appellant) from House No. 40353/74 and holding over damages at the rate of P17 320.00 per month from date of arrears to date of eviction. Since the court's order canceling the lease was sought such an order takes the form of a declarator and as the pleadings have been framed is necessarily a prerequisite to an order for eviction. Eviction cannot be granted unless the declaratory order is made. The court a quo however granted all three orders and the short answer to the appeal is that the terms of Order 34 do not authorize an application for summary judgment on a claim for a declarator or on a claim for damages. The court's order granting judgment on both of these claims was therefore incompetent. For the reason already given it

follows that the order for eviction was likewise incompetent. The necessary precursor should not have been granted. But there is more to be said.

In the present case appellant timeously filed the opposing affidavit in which he "disputed that (he had) breached the agreement" because, he stated, he had paid the arrears prior to service of the summons on him (which had been shown to be the case and has been accepted as fact). He also averred that he had paid P4 000 as rental in advance on the strength "that the lease agreement" would not be "cancelled".

The affidavit further contains a statement by appellant that he had also signed a stop order on his bank authorizing respondent to be paid the rental due on the 31st of each month commencing as from 31 July 2003. The affidavit continues with the allegation that "all these arrangements were made on the strength of the advice of two senior officers of the (Respondent) who informed that upon payment the case will be withdrawn." It is therefore clear that appellant both disclosed the nature and grounds of his defence and set out the material facts.

The manner in which the learned Judge approached the matter can be illustrated by two passages from the judgment. The first is the following. "... that the Defendant is not being truthful with the Court. It was for him to say who are the two senior officials he discussed the matter with". The second is "but there is no doubt that the (respondent) never took the position that

payment of arrears would mean abandonment of the rest of its claim against Defendant”.

Not only do these statements impose a standard of proof not called for by the Order but it is manifestly improper for a Court to claim to disbelieve a deponent on affidavit in circumstances such as I have outlined. Over and above this, appellant attached to his affidavit documentary support for his allegations. Order 34 does not permit of a reply. In our view it is beyond question that appellant should have been allowed to enter upon his defence. The hearing at trial will be the appropriate time to test the truth or otherwise of his assertions.

A further problem with the judgment arises from the fact that in the respondent's particulars of claim it has pleaded a specific breach of the terms of the lease namely the appellant's (alleged) default to pay the rental due timeously by his failure to make good such default. This allegation forms the basis for all the relief claimed – that is both for the claim to arrears and for respondent's claim for cancellation of the lease. But once appellant purged his default, his breach was “made good” by the unqualified acceptance of his payment. This put an end to all the respondent's claims.

Underlying respondents argument (and, it seems to us, the judge's order) is the notion that after payment of the arrears respondent by some means retained the right to claim cancellation. As has been pointed above the

particulars of claim are not based on an allegation that the lease had terminated. What is alleged is a breach which gave him a right to terminate. This breach had been remedied before service of the summons. This led Mr. Busang to argue that the respondent's cause of action to claim an order canceling the lease had been "frozen" when the summons was delivered to the Registrar on 3 June 2003. He relied for this submission on a sentence in the judgment of Korsah J.A in the Zimbabwean case of **Ngani v Mabanje** **1998 (2) SA 649(Z) at page 651** to the following effect

"It seems to me that the process initiating action in the court has the effect of freezing the rights of the parties at the time it is filed in the registry."
(Emphasis added).

But this sentence must be read in the proper context. The case concerned a point of law raised in an appeal against the refusal of an application for rescission of judgment. It was claimed that because of the terms of a lease the initiation of proceedings had been premature. The initiating process was a notice of motion and it was common cause that this had been served before it was filed in the registry. See 651 B. The initiating process had been served on the party in question on 27 April 1987 and filed at the High Court Registry on 28 April 1987. The sentence cannot then be read as Mr. Busang would have it. "Filed in the registry" in that case, unlike the present one connotes a filing after service.

There can be no doubt in our view that not only had the existence of a bona fide defence been properly raised but indeed the respondent's cause of action had fallen away.

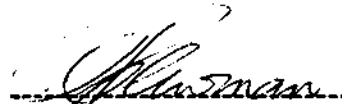
It remains only to say that summary judgment was in addition granted in respect of the damages claim with interest thereon. Interest on this claim was not in fact sought in the summons (and could not for that reason be granted). The order granted in this regard was granted in error for these reasons.

It follows that the appeal had to succeed. However it has occurred to us that the costs order, as made in Court when allowing the appeal may well be ambiguous. We therefore now take the opportunity to correct our order to amplify or correct it to eliminate any possible ambiguity or uncertainty.

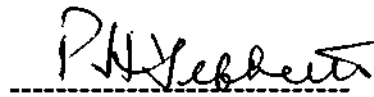
The following order is therefore made:-

1. The appeal succeeds, with costs (being the costs of the appeal).
2. Summary judgment is refused and appellant is given leave to defend.
3. Costs of the summary judgment proceedings are to be costs in the cause.

DELIVERED IN OPEN COURT AT LOBATSE THIS 27th DAY OF JULY 2004.


C. PLEWMAN
 JUDGE OF APPEAL

I agree,


P. H. TEBBUTT
 JUDGE PRESIDENT

I agree,


N. W. ZIETSMAN
 JUDGE OF APPEAL