

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Civil Appeal No. 17 of 1996

In the matter between:

JOB TRANS AND PLANT HIRE

Appellant

vs.

SPOT SECURITY SERVICES (PTY) LTD.

Respondent

Mr. V. Majoko for the Appellant

Adv. T. A. Cherry for the Respondent

J U D G M E N T

Coram: A. N. E. Amissah, J. P.
W. H. R. Schreiner, J. A.
Lord Allanbridge, J. A.

SCHREINER, JA:

This appeal arises out of summary judgment proceedings brought by the Respondent against the Appellant in the High Court at Francistown. A summons had been issued claiming payment of P34 441.50 and ancillary relief, the particulars of claim are short and in paragraph 3 state the amount of the claim and that it is in respect of professional services rendered to the Appellant over a certain period at its special instances and request. The amount due by the Appellant was said to be payable within thirty days or within a reasonable time (presumably of the rendering of the services). The particulars conclude with an allegation in paragraph 4 that notwithstanding lawful demand the Appellant failed, neglected or refused to pay the amount or any part thereof.

The summons and particulars of claim were served by one Mmoni Setso, of the attorneys

for the Respondent, on the 7th March 1995 and appearance to defend was entered on the 16th March. At the same time a request for further particulars was made. The Respondent then commenced summary judgment proceedings. The affidavit which an applicant for summary judgment is required to file in support of the application is by one Mosupi Masole, contains the following:

“

(1)

I am the Managing Director of the Plaintiff company and I am duly authorised to make this affidavit.

(2)

Plaintiff's claim is in the sum of P34 441.50 being in respect of professional services rendered to the Defendant's company during the period October 1992 to October 1994 at the Defendant's special instance and request which amount is now due and payable.

(3)

I verily believe that the Defendant has no bona fide defence to this action and that appearance to defend has (been) entered solely for (the) purposes of delay.

(4)

I therefore ask this honourable court to enter judgment in favour of the Plaintiff as prayed for on the writ of summons.”

The Notice of Application filed on the 21st was dated the 20th April. This was some forty three days after the expiry of the period of fourteen days from the date of entry of appearance stipulated in peremptory terms by Order 34 (2) (1) of the Rules of the High Court. The matter was set down for the 28th April.

On the 28th April Mr. Gulubane acting for the Respondent appeared before Mr. Justice Cotran, and stated the nature of the application, that the papers were in order and that notice had

been served on the attorneys for the Appellant. Mr Majoko then said:

"My Lord I submit that Rule 34 has not been complied with. Order 34 rule 2 sub-rule 1. Plaintiff should have acted within 14 days. Notice of appearance to defend was dated 8th March 1995. The rule says that summary judgment shall be applied for within 14 days. Plaintiff delayed to the 21st April.

Gulubane: The Court has a discretion.

Court: Yes, page 305 of van Winsen 3rd Edition, 3rd paragraph. Further also Order 33 rule 3. There was some disturbances in that there was no Judge. I suggest that the court gives attorneys for the defendant another week.

Majoko: The fact that there was no Judge is neither here nor there."

Mr. Gulubane was wrong to submit that the papers were in order when the application had been launched long after the fourteen day period laid down by the Rule. The reference to the absence of a Judge as being a reason justifying the late application for summary judgment seems to have been irrelevant to the question at issue.

Cotran J. Made the following order in the matter:-

- "1. Matter is postponed to 12th May 1995.
2. Defendant to file papers, 24 hours before with copy to Plaintiff.
3. Costs will be reserved to that day."

It would appear that the "papers" referred to in this Order are the notice of motion and affidavit referred to in Order 34 (3) (b). Counsel for the Appellant suggested that this part of the Order was irregular because it effectively purported to restrict the Appellant as to what course he should adopt when the sub-rule gave to a defendant three possible options, namely, to give security to the satisfaction of the Registrar for any judgment including costs which may be given or to satisfy the Court by affidavit in proper form that he has a bona fide defence or to apply to

Court for leave to substitute oral evidence for evidence on affidavit. I do not think that it is reasonable to interpret the order of the learned Judge as intended to restrict the Appellant in this way. It would have been absolutely clear if the words "if any" had been inserted after the word "papers" in the Order, but in my view that was the effect of it.

Counsel for the Appellant, Mr. Majoko, submitted that it does not appear from the above record of proceedings on the 28th April that an application for summary judgment was actually made on that date. By stating the nature of the application and submitting that the papers were in order, such an application must, in my view, be necessary implied so that, even if the copy of the record reflects everything that was said, it must be accepted that Counsel for the Respondent moved the application. However, that said, it is clear that no decision was taken by the learned Judge on the merits of the application for summary judgement. By directing that papers should be filed twenty four hour before the 12th May, and not expressing any view on the merits of the point in limine taken on behalf of the Appellant, it might seem that the Court had rejected the contention that the application for summary judgment should be dismissed out of hand on the ground that it was not lodged within the time period stipulated in Order 34 (2) (1). However, the order of the learned Judge is also consistent with a decision to allow the point in limine to stand over until the summary judgment application itself was ready for hearing.

The record of the proceedings on the 12th May bears this out. It is as follows:-

"Mr. Gulubane for the Plaintiff Mr. V. Majoko for the Defendant.
Gulubane: There has been no papers filed. Mr. Majoko is making
the same argument.

Majoko: My Lord I seek a Ruling.

Court: Judgment reserved."

If Cotran J had decided on the 28th April that the point in limine should be dismissed he would have said so when the matter was raised again on the 12th May. Instead he appears to have permitted Counsel for the Respondent to repeat his submissions on the point. No argument

appears to have been addressed by the parties on the merits of the application for summary judgment. Thus, when the learned Judge announced that he was reserving judgment, it would have been reasonable for the representatives of the parties to understand that the decision on the point in limine was being reserved which, if it was in favour of the Respondent, would be followed by the Appellant adopting one of the three options mentioned above.

A written judgment was delivered on the 5th June. Having set out certain facts and summarised certain of the provisions at Order 34 the learned Judge commented adversely upon the reason given for the fact that the summary judgment application was made out of time. He continued:

“However the time irregularity is condonable (Strydom v Kruger 1968 (2) SA 226, if there is no doubt that the objection was simply to achieve delay.”

Counsel for the two parties were agreed that Strydom v Kruger (supra) had little to do with the question facing the learned Judge.

It seems that in South Africa it has been held that a Court of the status similar to the High Court has inherent jurisdiction to regulate its own procedure (see e.g. General Plumbing Supplies (1956) (Pty) Ltd v Continental Engineer Co (Pty) Ltd 1960 (3) SA 663 (W) and Badenhorst v Poltides 1963 (1) SA 471 (T)). The same approach would probably be adopted in Botswana. It is not, however, necessary to go into this question because it seems to me that the right to apply for an extension of time is provided for in the Rules of the High Court Order 71 Rule (3) sub-rules (1) and (2) provides:

“3(1) The court may, on such terms as it thinks just, by order extended or abridge the period within which a person is required or authorised by these Rules ... to do any act

(2) The court may extend any such period as is referred to in subrule (1) although the application for extension is not made until after the expiration of that period.”

The result of extending the time for the performance of an act after the time for performing that act has expired is the same as condoning the non-performance of it within the stipulated time. I therefore consider that any debate about whether the word "shall" is peremptory and whether peremptory wording precludes an application for condonation of late filing of the summary judgment application is unnecessary.

Rule (3) subrules (1) and (2) of Order 71 do not expressly provide that good cause must be shown for the extension of the period for filing an application for the extension of a time period. It seems to me that since a plaintiff is seeking an indulgence from the Court the reason or reasons justifying such an indulgence must be given. An extension of the time period is not to be had merely for the asking. Mr. Cherry who appeared for the Respondent argued that the matter could be decided purely on considerations of prejudice. If there was no prejudice to the defendant the extension of the time period should be granted. I do not think that this is so. The proceedings of the Rules of the High Court are there to be followed. Summary judgement is intended to be a relatively speedy remedy which, if not granted, should not interfere unduly with the ordinary steps leading up to a trial action. The time period specified in Order 34 is not unimportant and was presumably determined having this consideration in mind.

No justification for the extension of the time within which to file an application for summary judgment has been given in the present case. The High Court was not given any reason why a period of about forty three days after the entry of appearance was allowed to pass before the application was belayed save for the patently irrelevant one that there was no Judge in Francistown at the time. It has been tentatively suggested that from a purely practical point of view the Rule should be interpreted as requiring that an application for summary judgment should be filed on the date when any further particulars to any request therefor are supplied by a plaintiff. This cannot be so because the provisions of Order 34 (2) (1) is clear and unambiguous and

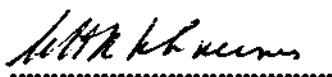
stipulates that the fourteen day period is to commence to run "after the date of entry of an appearance to defend."

It is not necessary in the present case to go into the question of whether in an application for the extension of the time for filing a summary judgment application it is necessary to file and serve a formal notice of application with an affidavit setting out the circumstances which led to the failure to file timeously. I would think prima facie that this is so. Since in the present case no valid reasons were provided either orally or in an affidavit I would prefer to have my judgment on this ground alone. I therefore am of the view that the Appeal should succeed.

The Appellant in his heads of argument before this Court raised the question of whether or not that part of Order 34 Rule 2 (1) requiring an affidavit verifying the cause of action had been complied with. In addition, in his heads of argument Counsel for the Respondent also raised the question of whether or not a counterclaim, especially when it was of doubtful merit, could constitute a bona fide defence. In view of my conclusion on the issue of the failure by the Respondent to file its application for summary judgment timeously, it is not necessary to deal with these points.

The Appeal is upheld and the Order of Cotran J granting summary judgment is set aside. Leave to defend is granted. The Appellant's plea and/or counterclaim is to be filed within twenty one days of the making of this Order. The Respondent must pay the costs of the application for summary judgment and of the Appeal in this Court.

Delivered in open Court at Lobatse this 19 Day of July 1996.

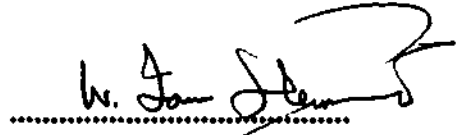

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W. H. R. SCHREINER
Judge of Appeal

I agree

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A. N. E. AMISSAH
Judge President

I agree


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LORD ALLANBRIDGE
Judge of Appeal