



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

Court of Appeal Civil Case No.CACLB-037-08
High Court Civil Case No.MAHLB-000362-08

In the matter between:

MCHAE JACOBUS JORDAAN
KIKUYU INSTANT LAWN (PTY) LTD

1st Appellant
2nd Appellant

and

KEETSE BAITSHUPI

Respondent

Ms M. Molema for the Appellantⁱ
Respondent in person

JUDGMENT

CORAM: **TEBBUTT J.P.**
LORD COULSFIELD J.A.
FOXCROFT J.A.

FOXCROFT J.A.

1. This appeal succeeded with costs after it was heard in this Court on 20 January 2008. These are the reasons for the allowing of the appeal.

2. On 25 August, 2008, Lesetedi J ordered the dismissal of appellants' application against respondent for an interdict, transfer of immovable property and ancillary relief, for want of prosecution. No reasons for the dismissals were provided and a Notice of Appeal was lodged on 10 September, 2008 against the order of the learned Judge a quo.
3. Ms Molema, who appeared for the appellants, submitted in her Heads of Argument that when the matter was called for dismissal, the proceedings were unfortunately not recorded either by the stenographer present or the learned Judge presiding.
4. From the Bar, she informed us that she was able to make this submission because she had appeared in the matter and had not been allowed to address the Court a quo. The learned Judge had taken the view that Order 23(2) of the Rules of the High Court, published on 19 May 2008 required the presiding judge to dismiss the action with costs "unless sufficient reason is shown to the contrary", and that those words of the Order meant that sufficient reason had to be shown to the contrary on affidavit. Accordingly, so we were told, the learned judge a quo had refused to allow Ms Molema to address him in any meaningful way.

5. The rule (Order 23(2)) makes no mention of an affidavit being necessary, and the learned judge certainly ought to have heard what the attorney appearing for the applicants in the interdict proceedings had to say.
6. Ms Molema also submitted that Order 42 of the High Court Rules now provides for a system of case management requiring the Registrar of the High Court to allocate “existing causes” as well as any cause registered after the commencement of the Rules, to a judge. The judge assigned was obliged, by no later than 31st December 2008, on notice to the parties, to
 - “schedule an initial case management conference with the parties and their counsel, subject to Rule 12 of the Order.
7. Rule 12 provides that in the case of an opposed application, where the issues are straightforward and no evidence is to be led, the judge may dispense with the case management conference and assign a date for hearing giving such directions for the conduct of the hearing as he or she deems fit.
8. Ms Molema submitted that since the pleadings were closed on 17 December 2007 with the filing of a Replying Affidavit, the appellants were entitled to wait until the opening of the legal year to obtain a date of hearing of their application. Because of a

backlog of older cases, appellants' application did not come up for a date of hearing in terms of Order 42, as it should have. Instead it was listed for dismissal for want of prosecution on 25 August, 2008. At the hearing, according again to Ms Molema's Heads of Argument, the Court a quo refused to hear submissions made in the absence of an affidavit and further refused to allow counsel an opportunity to file an affidavit expressing "sufficient reason" not to dismiss the appellant's application.

9. There was clearly no basis for this view of the Court a quo that an affidavit was required. A legal representative should certainly have been allowed to explain the appellant's position before the Court a quo. Only then could the Court have exercised a proper discretion as to whether sufficient reason not to dismiss had been shown. Part of that consideration would have been an examination of the question whether Order 42 and not Order 23 should have been followed. After all, all that applicants awaited was a date of hearing of their application.
10. The respondent was unrepresented on appeal and made no submission, indicating through an interpreter that she could not assist the Court.

11. In our view, the learned judge a quo erred in dismissing the application for the reasons set out above.

12. The order of the Court, given on 20 January, 2008 was as follows:

1. The appeal is allowed.
2. The order of the Court a quo dismissing the application is set aside.

**DELIVERED IN OPEN COURT AT LOBATSE THIS 20TH DAY OF
DECEMBER 2008**

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J.G. FOXCROFT
JUDGE OF APPEAL

I agree:

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P. H. TEBBUTT
JUDGE PRESIDENT

I agree:

.....
LORD COULSFIELD
JUDGE OF APPEAL

ⁱ Salbany & Torto Attorneys for the Appellants