

IN THE COURT OF APPEAL OF BOTSWANA HELD AT LOBATSE

CIVIL APPEAL NO. 29/96

In the matter between:

EVELYN MASEABATA MSIMANGA

Appellant

and

**KEOLELETSE KEOLELETSE
FRANCISTOWN TOWN COUNCIL**

**1st Respondent
2nd Respondent**

**Mr. Attorney A.M. Marumo for the Appellant
Mr. Attorney I. Munaani for the 1st Respondent**

J U D G M E N T

**CORAM: AGUDA JA
 STEYN JA
 TEBBUTT JA**

STEYN JA:

A Rule Nisi was issued out of the High Court on the 23rd of July 1996 granting 1st Respondent (hereinafter referred to as Respondent) the following relief against the Appellant.

She was called upon to show cause why it should not be ordered that:

1. This matter cannot be treated as urgent;
2. The Court should not dispense with the rules of Court regarding service of process, formalities and time limits and hearing this application as one urgent;
3. The Court should not declare that commercial Plot No. 5544 in Francistown sold to the Applicant by the Respondent belongs to the Applicant;
4. The Court should not direct the Respondent to effect transfer of ownership of the Applicant within seven (7) days;
5. The Court should not direct that the Respondent pay the costs of this Application."

This rule was made final on the 6th of August, 1996.

On the 28th of August 1996 the High Court at the instance of the Appellant made the following Order:

"It is ordered that:

1. Pending final adjudication on an appeal to be noted and prosecuted by Applicant herein against the Order of the High Court granted

on 6th August 1996 as read with the Rule Nisi of 23rd July 1996, the transfer of ownership to 1st Respondent of Plot 5544 Francistown is stayed;

2. The appeal aforesaid should be noted by 10th September 1996 and shall be prosecuted within one month thereafter;
3. Costs of the day shall stand over for decision by the Court hearing the appeal."

The appeal referred to in the Court order was duly noted on the 5th September 1996. In so far as its terms are material it reads as follows:

"It was incorrect of the Honourable Judge in the court quo to confirm the Rule Nisi notwithstanding the following:-

- a. INSUFFICIENT NOTICE - Appellant was virtually given one working day's notice to resist confirmation of the Rule Nisi, process of the said Rule Nisi having been served on her in part on the 2nd day of August 1996;
- b. DEFECTIVE SERVICE - Annexures to Respondent's Supporting Affidavit to the original Notice of Motion were not served on Appellant and the Honourable Judge in the court quo made no inquiry into the propriety of service before sounding the death knell of a final Order."

Appellant also sought leave to rely on the terms of an affidavit dated the 22nd of August 1996 signed and submitted by Appellant

in support of her appeal. I will deal with its contents later in this judgment.

It is necessary to give a broad outline of the facts. The Rule Nisi issued on the 23rd of July 1996 was decreed on the basis of an urgent application brought on Notice of Motion by the Respondent. He based his claim for the relief set out in the Rule Nisi on the following allegations. He says that on the 11th of May 1985 he and the Appellant "concluded a sale agreement of Plot 5544 which was partly written and partly oral. I annex a copy of the written part marked "A" as proof thereof."

Annexure A to Respondent's affidavit reads as follows:

MEMORANDUM OF AGREEMENT

"(SALE OF PLOT NO. 5544)

BETWEEN K. KEOLELETSE OF BOX 727 FRANCISTOWN
(BUYER)
EVELYN MSIMANGA OF BOX 10018 TATITOWN
(SELLER)

I Evelyn Msimanga have today the 11th day of May, 1985 received the sum of P2 000.00 (Two Thousand Pula) from K. Keoleletse being the full payment of Plot 5544. This Plot is undeveloped therefore a transfer letter will follow immediately K. Keoleletse has put up or has developed a Plot.

Signature of Seller E.M. MSIMANGA

Witnesses: D.K. Keoleletse
 K.K. Keoleletse
 M. Dennis

Appellant avers that when he bought the property referred to in the "Memorandum of Agreement (sale of Plot No. 5544) "it was undeveloped and there was no fence or building structure on it." He goes on to allege that the terms of the agreement were the following:

- "a. That Respondent sell to me Commercial Plot No. 5544;
- b. That the sale price be P2 000.00;
- c. That I was supposed to substantial (sic) develop the aforesaid plot before ownership is transferred to me, (which was not written but was verbal) but that whether or not the plot has been developed, transfer of ownership to me has to be effect within ten years. That is no later than the 10th May 1995;
- d. Ownership was to remain with Respondent until such a time that it has been transferred to me in terms of paragraph c.
- e. The Respondent was not to sell or in any where (sic) dispose of the aforesaid property without my consent."

Respondent then proceeds to detail how over the years he brought about improvements to the property, erected a dwelling house on it and added value to the extent of some P150 000.00 to the property in question. He also details the attempts he made to try to persuade Appellant to transfer the property to him but without success. He then makes the following allegations:

"Since 1991 up to now I have been approaching the

Respondent to have the property transferred to me but she has given me so many excuses for not having transferred the property and assurances that the property will be transferred to my name within a given number of months. All this did not happen and I lost faith and trust in her and engaged Attorneys Joina & Associates my present Attorneys."

The improvements he made to the property were financed by loans which were consolidated into a single loan in favour of a creditor, "Glazing Botswana Ltd."

He was sued by this creditor in respect of the debts he had incurred in bringing about the improvements to the property. Although the 10 year period, entitling him to demand transfer in his name had elapsed, Appellant either refused or failed to effect same. Threatened with execution against his assets Respondent brought the application for a Rule Nisi referred to above as a matter of urgency.

As can be seen from Appellant's Notice of Appeal cited above, Appellant relies upon what is referred to as "insufficient notice" and "defective service" as the basis upon which she seeks to set aside the rule nisi granted by the High Court.

In the supporting affidavit referred to in the notice of appeal the following relevant averments are made:

1. Appellant complains that she was only served with the rule nisi issued out of the High Court on the 2nd of August at 3 pm;
2. After service of the rule on the 2nd of August she says "I was only able to see my attorney on the 12th of August." Her legal advisor, according to her, "expressed doubt that the rule nisi would be confirmed." She says she would have resisted confirmation of the Rule had she been served with it in good time;
3. She was "desirous of being given an audience in resistance of the Rule Nisi on the following grounds, inter alia:
 - (a) There never was a contract of sale between me and 1st Respondent but an agreement to lease against (sic) 1st Respondent, construction expenses as rental;
 - (b) In any case the property is not mine yet it belongs to 2nd Respondent (The Francistown Town Council)."

This so-called 2nd Respondent was never joined, given notice or served with any of the papers in this matter. The only reference to it is the one that appears in the passage just cited.

4. Finally, Appellant avers that the service of the proceedings is defective, in that annexures "A" and "B1 - B5" of Respondent's Supporting Affidavit were not served on her.

It will be convenient to deal with the issue of service first.

Although Appellant nowhere in her papers mentions the fact, it would appear from an affidavit of service filed in the original application for the issue of a Rule Nisi, that service of the "notice of motion, founding affidavit, verifying affidavit, certificate of urgency and notice of set down" was effected personally upon Appellant and "the nature and exigency thereof" explained. Appellant however refused to sign that she had received the documents referred to.

In respect of the service of the Rule Nisi the affidavit of service states that, "On the 2nd of August at 11 am a copy of the 'Notice of Set down and the Rule Nisi' granted on 23rd July 1996" was personally served on Appellant. Once again she refused to sign that she had received the documents concerned.

Finally on the 20th of August 1996 and at 1:30 pm the Court Order confirming the Rule Nisi was served on the Appellant. It was the service of this document that prompted her to make the application supported by her affidavit dated the 22nd August 1996 referred to above.

It is apparent that as early as the 21st of July 1996, Appellant was apprised of the proceedings which were being instituted

against her and that she took no steps - other than a visit to her attorney on the 12th of August 1996 - to engage in the litigation initiated against her by the Respondent. The reason why there is no reference in her papers to the earlier service of the papers on her on the 21st of July 1996, is presumably because this day was a Sunday. In terms of Order 8 1(2) of the Rules of the High Court no service of process (other than in the case of an arrest) shall take place on a Sunday, and "no such service shall be valid."

It seems clear to me that the Appellant has with some justification complained about the irregularities and deficiencies in the service of the process upon her. That she is herself not blameless is however also obvious. It is difficult to understand why she allows a period of 3 weeks to elapse (from the 21st of July to the 12th of August) before seeing an attorney and why a further 10 days elapses before any intervention by her in the litigation occurs. For these delays there is no explanation other than the unsatisfactory statement that she "was only able to see (her) attorneys on the 12th of August 1996."

Nevertheless the unsatisfactory manner in which this process was communicated to the Appellant could well have prompted the Court

to give serious consideration to vitiating the proceedings that culminated in the issue of a Rule Absolute, decreeing Respondent to be the owner of the property concerned and ordering Appellant to transfer the property to him.

However it is clear from the papers upon which Appellant relies for the relief she seeks, that she has only two arrows in her quiver through which she seeks to ward off Respondent's claim for relief. These are clearly stated in her supporting affidavit, the terms of which have been cited above. For purposes of convenience I repeat these verbatim. They are:

"I am desirous of being given an audience in resistance of the Rule Nisi on the following grounds, inter alia.

- a. There never was a contract of sale between me and 1st Respondent but an agreement to lease against 1st Respondent construction expenses as rental,
- b. In any case the property is not mine yet it belongs to 2nd Respondent who was conveniently not cited by 1st Respondent."

When the matter was called before us, the Court put it to Appellant's Counsel that it would be an exercise in futility to accede to Appellant's plea to rescind the Order made by the High Court, if she has not disclosed that she has a bona fide defence

to the relief the Respondent seeks. The above cited averments do not appear to us to constitute such a defence. It is true that the agreement was partly written and partly oral and that the parol evidence rule would therefore not be applied as rigidly as in a case of a contract which is exclusively in writing. However, it would be fanciful to imagine that any Court hearing the matter would countenance the leading of oral evidence in order to prove that a written agreement which -

1. is referred to as a "sale" of plot no. 5544;
2. refers in the heading to "Buyer" and "Seller";
3. refers to the receipt of a single sum of P2000.00 "as payment for the plot";
4. refers to Appellant as having signed as the "Seller"; and which
4. entitles the Respondent to a 'transfer letter' once he has complied with the condition stipulated -

in truth and in fact was "an agreement to lease" with "construction costs as rental."

The introduction of such evidence would not only offend against the principles underpinning the parol evidence rule, but such a version would in any event be so fundamentally improbable and far-fetched as to be incapable of belief.

It is also, as Counsel for Appellant was ultimately obliged to concede, no defence to Respondent's claim for specific performance to allege that Appellant was not the owner of the property concerned. Appellant undertook in 1985 to ensure upon compliance with the condition stipulated for, that Respondent would be entitled to receive transfer. She would accordingly be obliged to take the necessary steps to ensure that she could fulfil this obligation. This defence was therefore not legally sustainable. In cases where summary judgment is sought, and a bona fide defence has to be raised in order to avoid judgment, it has been held that such defence must be valid in law. See: - ERASMUS, SUPERIOR COURT PRACTICE B1 - 225 AND AREND V. ASTRA FURNISHERS (PTY) LTD 1974(1) SA 298(C) AT 303. The same principle would apply mutatis mutandis in the instant case.

Appellant has not seen fit-

1. To place any credible evidence before this Court that would give substance to her alleged defences;
2. To disclose matter which would constitute a defence; and
3. To contradict any of the detailed evidence placed before the High Court by the Respondent, corroborated in part by independent testimony.

As we have indicated above, there are serious deficiencies in the

service of the process on the Respondent. The Appellant was however also less than diligent in taking steps to protect her rights. However, her failure to establish any basis upon which it could be contended that she had a bona fide defence to the relief claimed by the Respondent, obliges this Court to hold that she is not entitled to have the Rule Nisi rescinded because the service of the process upon her was deficient. Albeit that the original service of papers may have been invalid by virtue of having been served on a Sunday, and the Rule was therefore initially granted ex parte, the Rule itself was duly served upon her. She failed to take any steps for some 3 weeks to protect such rights as she may have had. When she did so, she failed to disclose facts that could be held to be a defence to Respondent's claim for relief.

For these reasons the appeal is dismissed with costs. Such costs are to include the "costs of the day" reserved by the High Court in its order dated the 28th of August 1996.

DELIVERED IN OPEN COURT THIS 28th DAY OF JANUARY, 1997.

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J. H. STEIN
JUSTICE OF APPEAL

I AGREE:

.....
T.A AGUDA
JUSTICE OF APPEAL

I AGREE:

.....
P.H. TEBBUTT
JUSTICE OF APPEAL