

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Civil Appeal No. 53/95
High Court Civil Case No. (F) 315/92

In the matter between:

LOUIS MULDER

Appellant

and

NATIONAL DEVELOPMENT BANK

Respondent

Mr. P. Phumaphi for the Appellant
Mr. Z. Makhwade for the Respondent

J U D G M E N T

Delivered on 5th February, 1996

CORAM: T.A. AGUDA J.A.
 J.H. STEYN J.A.
 G.G. HOEXTER J.A.

HOEXTER J.A.,

The appellant is a farmer at Pandamatenga. The respondent is the National Development Bank ("NDB"). On the extended return day of an opposed application heard in the High Court at Francistown, Mr. Justice Cotran granted certain orders at the instance of NDB. The first two were declaratory orders. The third was a mandamus in terms whereof the appellant was ordered to restore two standpipes earlier removed by him. In addition the appellant was ordered to pay the costs of the application on the attorney and client scale.

The appeal is concerned with the correctness or otherwise of the mandamus issued and the order for costs. Although the legal issues raised by the appeal fall within a narrow compass, it is necessary to state the facts at some length. The facts

have to be extracted from affidavits some of which are not remarkable either for their precision or their clarity.

Under agreement of lease No. 26/88 J.B. Nkwane {"Nkwane"} and J.B. Moller {"Moller"} are the registered lessees from the Chobe Land Board {"the CLB"} of three pieces of farm land {"the properties"} in the Pandamatenga area. Nkwane and Moller were directors of a company known as Ngwato Farms (Pty) Ltd {"the company"}. NDB lent money in excess of P1m to the company. As security for the loan NDB holds first and second mortgage bonds over the properties.

On 3 June 1993 NDB obtained a judgment in the High Court against the company, Nkwane and Moller, and the properties were declared executable. Pursuant thereto a writ of attachment of immovable property was issued, and on 25 June 1993 the Deputy Sheriff attached the right, title and interest of Nkwane and Moller in respect of the properties. Moller is no longer in Botswana.

It proved difficult to sell the properties. This appeal relates to dealings involving two of the properties. These are Farms Q-02 and Q-04. On an unspecified date in 1995 NDB entered into a written agreement of lease {"the lease"} with one B. Mathe {"Mathe"} in terms whereof NDB leased Farms Q-02 and Q-04 to Mathe. According to its terms the lease was "deemed to have commenced on 1 January 1995" for a period of one ploughing season, with an option to renew on terms not yet agreed upon. The terms of the lease governing the rent payable by Mathe will be mentioned later.

One of the affidavits filed on behalf of NDB in the course

of the application in the court below was deposed to by Mr. P.M. Kgari ("Kgari") who is the secretary of the CLB. Kgari states that regarding farmers to whom farms in the Pandamatenga area had been allocated by the CLB, at some or another time -

"an arrangement or understanding was reached between the landlord and the farms in terms of which each farmer was allowed to build residential premises adjacent to his farm." (emphasis supplied)

In a plan of the Pandamatenga area annexed to Kgari's affidavit it appears that the adjacent residential properties (indicated by small circles) lie close to, but entirely beyond, the boundaries of a particular farm allocated to a particular farmer. Despite this fact, so deposes Kgari -

"the residential premises go with the farms."

Moller had such residential premises ("M's plot") close to the north-western boundaries of Farms Q-02 and Q-04. According to Kgari -

"the residential premises built by Moller were intended to service Farms 2-Q0 and 4-Q0."

On 11 August 1992 the Ministry of Local Government, Lands and Housing informed Moller by letter that his Excellency the President had decided that Moller should be allocated land in the Kasuna Forest Reserve of the Chobe district "for the purpose of carrying out a dairy project."

It will be recalled that all right, title and interest of the leases to the properties had been attached already on 25 June 1992. However, early in December 1992 Moller submitted to the CLB a lease agreement ("the M/M agreement) in terms whereof

Moller purported to lease farms Q-02 and Q-04 to the appellant for a period of seven years. Despite the fact that the M/M contract was signed on 13 August 1992, its terms recited that -

".... the lease shall commence on the 1st day of June 1992...."

On 30 December 1992 the appellant applied by letter to the CLB for 500 hectares of land to be allocated to him "for a dairy project" in Pandamatenga. In his letter he stated that "the said dairy" had been given to him by Moller who owed him money; and the appellant expressed his desire to move the dairy project away from Moller's farm to the appellant's farm Q0-16.

At a meeting of the CLB held towards the end of January 1993 at which the appellant was present the M/M contract came up for consideration. The CLB pointed out to the appellant the fact of the prior attachment of the properties, and in consequence thereof the M/M contract was disapproved. With reference to the M/M contract Kgari states in his affidavit -

"Had the lease agreement been approved by the board Louis Mulder [the appellant] would have been entitled to the residential premises [M's plot] which hitherto were used by Barend Moller."

On 3 August 1993 the CLB wrote to the appellant to inform him that a site 300 hectares in extent would be allocated to him for a "dairy farm" and he was invited to meet the CLB in Pandamatenga Kgotla on 21 August 1993.

Despite the developments indicated above it appears that the appellant remained on and carried on dairy farming there. There were two boreholes on M's plot, one of which had been drilled by Moller. The appellant equipped the latter with a pump and

engine. He built a brick dwelling on M's plot and he improved and extended the milking shed. The appellant was still on M's plot in January 1995 when, pursuant to the lease, Mathe took occupation of Farms Q0-Q2 and Q0-Q4. Mathe's arrival upon the scene marked the beginning of the trouble which culminated in the opposed application before Cotran J.

Mathe brought with him to Farms Q0-Q4 some fifty farm-workers. These employees, so alleged Mathe, were entirely dependent for water on the borehole on M's plot. When Mathe wished to use the residence on M's plot the appellant objected thereto on the ground that upon Moller's departure he (the appellant) had taken over Moller's assets.

Following a complaint made by Mathe to the CLB, both Mathe and the appellant were summoned to a meeting of the CLB held over the period 15-17 March 1995. In addressing the meeting Mathe said, inter alia:

"I was allowed to lease Farms 2 and 4 [Q02-Q04] and buildings adjacent to it [on M's plot]. Informed Mulder [the appellant] who said I could not move there because he had a dairy there...."

In putting his case to the meeting the appellant made significant admissions. He began by saying:-

"I know that I have no right to stay there but I have a civil case with Moller who owes me money....."

When he was asked whether he had a right of occupation the appellant's lame response was the following -

"I didn't have the impression that I couldn't occupy the place."

On 10 August 1995 the appellant removed and sealed two

standpipes on M's plot, thereby cutting off the water used by Mathe's employees. This action by the appellant made it necessary for Mathe to ferry water in drums from a water point 20 kilometres distant.

By notice of motion dated 31 August 1995 NDB as a matter of urgency sought and obtained a rule nisi calling upon the appellant to show cause why it should not be ordered -

- (a) that Nkwane and Moller are the registered lessees of Farms Q-02 and Q -04 and that NDB as the judgment creditor of the lessees is entitled to vacant possession for purposes of sale and recovery of its judgment debt;
- (b) that as judgment creditor NDB is entitled to sell those assets of the company, Nkwane and Moller which are under attachment;
- (c) that the appellant be ordered to restore the two standpipes removed by him; and that he be interdicted from interfering in any way with the supply of water to the occupants of farms Q0-2 and Q0-4;
- (d) that the appellant be ordered to pay the costs of the application on the attorney and client scale.

The application was resisted by the appellant. Both opposing affidavits by the appellant and replying affidavits on behalf of NDB were filed.

To complete the chronicle of events it should be mentioned that on 17 August 1995 the Deputy Sheriff further attached Moller's right, title and interest to the homestead, boreholes, dairy sheds, 78 dairy cows, etc. on M's plot. In the view which I take of the appeal nothing turns on the last-mentioned attachment.

The appellant filed a lengthy opposing affidavit. The burden of it is that he is the legal successor to Moller's rights in respect of M's plot. The claim thus advanced by the appellant

was rightly rejected by Cotran J. In this connection the learned Judge remarked:-

"Mr. Phumaphi submits that the respondent [Mulder] purchased the homestead and the whole dairy project from Moller. The onus is on the respondent [Mulder] so to persuade me, but even his own documents point the other way."

The appellant not only failed to discharge the onus of proving that he had title to M's plot. All the available evidence points to the clear conclusion, on a balance of probabilities, that he was simply a trespasser on M's plot.

In the court below two other arguments were put forward on behalf of the appellant. Both arguments challenged NDB's locus standi. The first argument was that in entering into lease while the properties were under attachment, and without the authority of a court order to do so, NDB acted illegally. In consequence, so the submission proceeded, the lease was a nullity from which Mathe derived no rights capable of protection by anybody.

The second argument ran as follows. Even assuming the validity of the lease, any infraction of Mathe's rights as the lessee by a third party should have been resisted not by NDB but by Mathe himself.

Both arguments were rejected by Cotran J. In dealing with the first argument (in a judgment on 18 September 1995 in which he extended the rule nisi) the court a quo observed that NDB was neither legally bound to sell the attached properties nor to seek the court's approval before leasing them to others.

In his judgment on the return day the learned Judge gave the second argument short shrift. He said:-

"Mr. Phumaphi then submits that Mathe should have been

the applicant only, not NDB. He does not say why, and indeed he concedes that the lessor is bound to protect the lessee against third parties; and this is exactly what NDB did."

Accordingly Cotran J. on 25 October 1995 made absolute the rule nisi granted on 1 September 1995, and he said that the appellant:-

"shall restore the stand pipes that provide water to the homestead within 48 hours."

It is not quite clear whether Cotran J. also confirmed so much of the rule nisi as relates to the two declaratory orders. Nothing turns on this. The appellant's appeal is essentially directed against the mandatory order and the order for costs.

On appeal Mr. Phumaphi, in the course of an able argument, repeated the two arguments based on the absence of locus standi on the part of NDB. The first argument (contending that the lease was void) was debated by counsel on both sides without reference to authority. I prefer to express no opinion thereon. In what follows I shall simply assume, for the purposes of argument, that NDB's lease to Mathe was legally effective.

Mr. Phumaphi's second argument, so I consider, deserves closer attention than it received in the court below. The broad proposition may be accepted that a lessee is entitled to a remission of rent if he has not had the use, in whole or in part, of the thing leased. But that is not the end of the matter.

It is a clear principle of Roman-Dutch law that a lessor's duty to ensure that his lessee has undisturbed use and enjoyment of the leased thing, does not extend to protecting the lessee against unlawful interference, that is to say, disturbance by

third parties having no title to the thing leased. In such case, so the law provides, the lessee must himself proceed against the wrongdoer. See: Joubert, The Law of South Africa, Vol 14, page 148, para. 152. A useful discussion of the principle is to be found in the judgment of Mr. Justice Kotze (a profound scholar of Roman-Dutch law) in the case of Rex v. Stamp (1879) Kotze 63. It was there held that a lessee is not entitled, by reason of the prima facie tortious act of a third party who interferes with the lessee's due enjoyment of the leased premises, to an abatement of rent or cancellation of the lease.

The principle stated above determines the fate of this appeal in favour of the appellant. This is an unfortunate result because this court deplors the wrongful conduct of the appellant. But we must apply the law. For the reasons correctly stated by Cotran J. the appellant had no title to M's plot. Accepting that the lease conferred the right on Mathe to the use and enjoyment of M's plot, the fact of the matter is that the appellant (despite his protestation to the contrary in his opposing affidavit) had no right whatever to M's plot. The cutting off of Mathe's water supply was an illegal infraction of Mathe's rights by a third party with no rights to such water.

For the sake of completeness it is necessary to refer to paragraph 11 of the founding affidavit filed by NDB's senior corporate counsel. In that paragraph she says, inter alia:-

".... it is my considered opinion..... that if the supply of water is not restored timeously Benjamin Mathe will suffer irreparable harm and will look up to the applicant to compensate him for such loss and since the rainy season is just around the corner, if harvesting is delayed the applicant would not be afforded substantial redress at a hearing in due course because its rights to rentals is dependent upon

the gross income of crops from the property let."
(emphasis provided)

In my opinion there is no merit in the submission contained in the underlined portion of the above quotation. In fact the lease provides that the rental payable is P35,000; and that the rental shall be paid by not later than 30 September 1995.

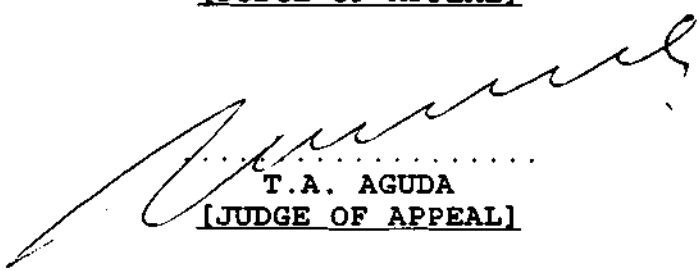
In the result the appellant's appeal succeeds with costs. The mandatory order issued against the appellant on 25 October 1995 is set aside. The order of costs made by the Court below is altered to read:-

"The applicant will pay the costs of the application."

Delivered in open court at Lobatse on 5th February, 1996.


G.G. HOEXTER
[JUDGE OF APPEAL]

I agree:


T.A. AGUDA
[JUDGE OF APPEAL]

I agree:


J.H. STEYN
[JUDGE OF APPEAL]