

IN THE COURT OF APPEAL FOR BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CIVIL APPEAL NO. 50 OF 1995
HIGH COURT CIVIL CASE NO. 275 OF 1992

IN THE MATTER OF:

NATIONAL DEVELOPMENT BANK

APPELLANT

AND

BANTHI MOGATWANE

RESPONDENT

MRS ATTORNEY GHARTEY-TAGOE FOR THE APPELLANT

MR ATTORNEY P. MATLALA FOR THE RESPONDENT

J U D G M E N T

CORAM: J.H. STEYN JA
P.H. TEBBUTT JA
LORD W.L.K. COWIE JA

STEYN J.A

On February 17, 1989 Appellant (First Respondent in the Court below and to whom I shall refer as "the Bank") lent and advanced the sum of P10,000.00 to Third Respondent, one Gertrude Mogatwane. She is the wife of Respondent in this appeal (the husband and Applicant in the Court below). The debt was to have been discharged by Third Respondent by payment of P465.00 per month inclusive of interest at the rate of 10% per annum.

By November 1991 the sum owed by Third Respondent (the wife) had escalated and amounted to P13,308.08 because of her failure

to discharge her monthly obligations in accordance with the terms of the loan agreement.

The Bank then instituted proceedings against the wife. This they did by way of a Writ of Summons (the summons) which was served on the wife personally. The summons cited Gertrude Mogatwane as the only Defendant. In the Particulars of Claim she is described as an "adult businesswoman of full legal capacity."

The particulars of claim proceeded to outline the Bank's cause of action against the wife along the lines set out above. However, it would perhaps be wise to cite the terms of these particulars of claim in full. They read as follows:

- "(3) On or about the 17th day of February 1989, Plaintiff and Defendant entered to an Agreement in terms whereof Plaintiff loaned and advanced to Defendant the sum of P10000 repayable with interest at the Plaintiff's current rates at P465-00 per month interest as at date being at the rate of 10% per annum.
- (4) It was a condition of the said agreement that should any instalments not be paid on due date, the whole amount would immediately become due and payable and claimable.
- (5) Defendant has failed to effect payment to Plaintiff on due dates of all amount repayable by way of Capital and interest and as at the 30th day of November 1991 the total extent of Defendant's indebtedness to the Plaintiff, inclusive of accrued interest was P13 303-08 which amount became immediately due and payable.
- (7) By reason of the matters aforesaid Defendant is indebted to Plaintiff in the sum of P13308-08 plus interest as hereinbefore specified.

- (8) Notwithstanding demand, the Defendant has failed to effect payment to Plaintiff of the said sum or at all.

WHEREFORE Plaintiff Prays for:-

- (1) Payment of the sum of P13 308.08
- (2) Interest at the rate of 10% per annum from 30th November 1991 to date of payment.
- (3) Costs of suit
- (4) Further and/or alternative relief."

The wife failed to enter appearance to defend the matter and on March 16, 1992 the Bank sought judgment against the wife. Default judgment was duly granted against her on the June 18, 1992.

On August 2, 1993 a Writ of Execution was issued out of the High Court giving certain directions to the deputy-sheriff (Second Respondent in the Court below and also cited accordingly in this Court.) In terms of this writ the deputy-sheriff was authorised to "take into execution the movable goods of Gertrude Mogatwane."

It is not in dispute that up to this stage the husband had no knowledge of the proceedings. The first he learnt of the fact that not only had judgment been entered against his wife and a writ of execution issued to attach her "movable" property, was in November 1993 when the officials of the Gaborone City Council informed him that the Bank's Attorneys had attached Lot 2274

Bontleng, Gaborone. The husband occupies a house on this property. This he does pursuant to a "Certificate of Rights" issued to him on July 1, 1978. He also owns the improvements on the property, i.e. the house aforesaid. His wife had left him in February, 1989. They have lived apart ever since.

He consulted attorneys and on 3 February 1994 they wrote the following letter to the Bank's attorneys.

"Dear Sir

RE: N.D.B. / GERTRUDE MOGATWANE - CC 275/92

We are acting for Mr Banthi T. Mogatwane, the husband of Mrs Mogatwane, defendant in the above matter.

We are instructed that a Deputy Sheriff allegedly sent by yourselves purported to attach immovable property of our client, being lot 2274 Bontleng, Gaborone. Our clients (sic) wish to put on record that he never authorised his wife, (with whom he has been in separation since 1989) to enter into any contract with NDB or to pledge the aforesaid lot 2274 Bontleng, Gaborone, and that he was totally unaware of such transaction.

We also note that the Writ of Execution only authorises attachment of movable goods.

Please make an undertaking that our client will not be bothered any further. However, if you have any contrary view of the situation advise us accordingly so that we may decide on the next course of action.

Yours faithfully

M.T. MOTSWAGOLE

MOUPO, MOTSWAGOLE & DINGAKE"

These contentions were rejected by the Bank's attorneys on 18th March 1994 in terms of a letter which reads as follows:

"Dear Sir

re: NDB / GETRUDE MOGATWANE; CC 275/92

Your letter dated 3th February 1994 makes reference.

You are informed that we are not going to make undertaking that your client will not be (bothered) because yours and wife are married in community of property. This has been confirmed by the wife.

As regards the Writ of Execution, what has been attached is right held over the land as the property is not registered at the Deeds in the name of your client. Your client has no title to this land and you are informed that we are proceeding on the matter unless we receive full payment in the matter.

Yours faithfully

signed

KGOADI & PARTNERS"

On April 5th 1994 the husband launched an application by way of Notice of Motion in terms of which he moved for the setting aside of the judgment of the High Court dated 8th April 1992.

He also sought the setting aside of the Writ of Execution which was issued in consequence of the judgment as well as of the purported attachment of rights in respect of lot 2274 Bontleng, Gaborone.

In his application for this relief the husband made the following averments additional to those already referred to

above.

He said that he informed a Mr Awich of the Bank's firm of attorneys, that he was married in community of property and that he had never authorised his wife to enter into any contract with the Bank. He was informed by the said attorney that the Bank would not be proceeding with the execution of the writ. He also averred that he was informed by the deputy-sheriff that they had verified that his (the husband's) signature on the documentation evidencing the loan was a forgery.

In the circumstances he contended that, being married in community of property, his wife "had no legal capacity to enter into contracts on her own and that the contract purportedly executed by herself and the Plaintiff (the Bank), is null and void."

In reply to these averments the Bank advanced the following relevant contentions.

1. The assistance granted to the wife by the husband in the conclusion of the contract "is redundant." The Bank was suing the wife and she needed no assistance in order to oppose "this application" (whatever that may mean).
2. The husband and the wife have equal shares in the improvements on the property attached by virtue of the fact that they are married in community of property.
3. On the issue of the alleged authority given by the husband for the conclusion of the loan agreement with the Bank it says the following:

- "11.1 I am informed by Mr. Kgoadi and verily believe that the said Deputy Sheriff had been told by Applicant that the latter had not given any authority for 3rd Respondent to raise any loan with 1st Respondent and that any documents purportedly signed by Applicant must be a forgery. I am informed by Mr. Kgoadi and verily believe that the Deputy Sheriff did confirm to Mr. Kgoadi about the story of a forged signature.
- 11.2 As far as Respondent is concerned, 3rd Respondent did not need any authority or assistance from anyone regardless of the status of the marriage. 3rd Respondent made application as a business person and a trader and was regarded by 1st Respondent as having waived whatever impediments there may be. 3rd Respondent conducted the business of Liquor Restaurant (see Annexure "Z1").
- 11.3 As far as Respondent is concerned as shown in the summons served on 1st Respondent (annexure "Z2" hereto) the agreement was entered into on the 17th day of February 1989, five days after signature to the letter which Applicant claims is a forgery. As far as Respondent is concerned, application by married women who are traders are treated the same as any other application except that assistance is required as a formality and as extra precaution. 1st Respondent is not aware of Applicant's regular signature and cannot be held responsible for Applicant's matrimonial conflicts. In any case, it would appear that before and during the period of application for the loan that Applicant and Respondent lived together amicably even going by Applicant's averments at Paragraph 5 of his Founding Affidavit."

The matter came before the High Court. A Rule Nisi was issued, erroneously discharged, reinstated and ultimately came to be argued before Gaelele AJ on the October 6, 1995. The learned Judge ruled that because the Applicant before him (the husband) was not a party to the proceedings in which the default judgment was granted, he had no locus standi to move for its rescission. In his judgment in support of this view he said:

"In this application the Applicant who is not the Defendant in the main action calls upon the Respondents to show cause why:- the judgment in "this action dated 8th August, 1992 should not be set aside." The writ of execution which was issued as a result of the judgment is also sought to be set aside. Clearly an action is a civil proceeding commenced by writ of summons in accordance with Order 6 - Rule 3 of the Rules of the High Court. The Applicant is therefore not the Defendant and cannot claim the setting aside of judgment in the action which he was not himself party to it."

He accordingly discharged paragraphs 1.1 and 1.2 of the Rule. These two prayers in the Rule Nisi called on the Respondent to show cause why -

"1.1 The judgment in this action dated 8 April 1992 should not be set aside and

1.2 Writ of Execution dated 2nd August 1993 should not be set aside in consequence."

However, in regard to paragraph 1.3 of the Rule he ordered that the matter be referred to trial for oral evidence in respect of certain issues.

Paragraph 1.3 of the Rule Nisi called on the Respondent to

show cause why -:

"1.3 The attachment of rights in respect of Lot 2274 Bontleng, Gaborone should not be set aside."

The issues which were referred to trial and on which oral evidence was to be heard were defined as follows:

- "b] Oral evidence be heard in respect of paragraph 1.3 of the Rule Nisi and on the following specified issues:
- i] whether the Applicant and 3rd Respondent are married in community of property;
 - ii] whether the 3rd Respondent is a public trader and can transact business on her own;
 - iii] whether the Applicant's signature was forged by the 3rd Respondent in securing a loan with N.D.B.; and
 - iv] how did Applicant come to know about the forgery i.e. the source of such information."

The Court a quo also ordered that each party should pay its own costs of the application.

The Bank - the Respondent in the application - appealed against that part of the Order that referred the issues under paragraph 1.3 to trial. It is formally before us as an Appellant, but only in respect of this part of the Order. The husband (the Applicant before Gaebele AJ) cross appealed against the whole of the Order. It sought the following relief from this Court.

"3 RELIEF SOUGHT FROM COURT OF APPEAL

3.1 Substituting the order set out hereunder for the order of the Court below:

- 3.1.1 That the judgment of the High Court dated 18th April 1992 is hereby set aside.
- 3.1.2 That the writ of execution dated 2nd August 1993 issued in consequence of the aforesaid judgment is also set aside.
- 3.1.3 That the purported attachment of rights in respect of Lot 2274 Bontleng, Gaborone by reason of the aforesaid writ of execution is also set aside.
- 3.1.4 That Plaintiff/1st Respondent bear the costs of the appeal and the Court below."

When the matter was called before us, Counsel for the Bank, in my opinion quite correctly, conceded that the Court a quo's decision that the husband did not have locus standi to seek a rescission of the default judgment and the setting aside of the writ of execution could not be supported. I say "quite correctly" for the following reasons:

Order 48 of the Rules of the High Court provides as follows:

- "1. The court may in addition to any other powers it may have *mero motu*, or upon the application of any party affected, rescind or vary-
 - a) an order or judgment erroneously sought or erroneously granted without notice to any party affected thereby;
 - b) an order or judgment in which there is an ambiguity or a patent error or omission, but

only to the extent of such ambiguity, error or omission;

- c) an order or judgment granted as the result of a mistake common to all parties."

The provisions of this Order are identical to those contained in Rule 42 of the South Africa Rules of Court. In commenting on the provisions of the South African rule ERASMUS in his authoritative work SUPERIOR COURT PRACTICE says the following in page B1 - 307.

"'Any party affected.' An applicant under this subrule must show, in order to establish locus standi, that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to entitle him to have intervened in the original application upon which the judgment was given or order granted. He must have a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the court."

That this view is correct is apparent from the judgments of the South African Courts.

See: UNITED WATCH AND DIAMOND CO (PTY) LTD v. DISA HOTELS LTD 1972 (4) SA. 409 (C); PARKVIEW PROPERTIES (PTY) LTD V HAVEN HOLDINGS (PTY) LTD 1981 (2) SA 52 (T) AND STANDARD CHARTERED INSURANCE CO. LTD. V. GUTMAN 1982 (2) SA 426 (C) AT 433 H - 436C.

It follows that the Court a quo erred in non - suiting the Applicant, (the husband), because he had not been a party to the original action in which default judgment was granted. Clearly,

the Applicant in the Court below had a real, direct and substantial interest in the original action pursuant to which the judgment was granted. As such he had locus standi to move for the rescission of the default judgment granted against his wife to whom, it was common cause, he was married in community of property.

Counsel for the Bank argued, however, that

1. It had not been established that the order had been "erroneously granted." and
2. If the Writ of Execution should not have been granted without notice to the husband, only the writ and not the judgment should be set aside.

Under paragraph 1 above it was Counsel's contention that because the wife was cited as "a businesswoman with full legal capacity" the judgment was validly granted against her.

The difficulty with this argument is the following:

1. It was common cause that the Defendant in the original action was married in community of property to her husband. This fact was not disclosed in the original proceedings. Such non-disclosure was material - indeed fundamental - to the capacity of the Plaintiff (the Bank) to have instituted legal proceedings against her without the assistance of her husband.
2. The fact that she is a businesswoman - even "with full legal capacity" - is not a sufficient averment to entitle her to be sued without her husband's assistance when she is married to him in community of property. Two further factual allegations should have been made, in view of her status as someone married in community of property. These are:

- 2.1 That she was a public trader, trading for her own account, and
- 2.2 That she did so with her husband's knowledge and consent.

In the absence of these allegations, the Court granted the default judgment on incorrect premises. It was misinformed concerning the status of the Defendant in the original action (the wife) and accordingly granted the judgment "erroneously". In my view the application for rescission of the judgment falls squarely within the terms of Order 48. The provisions of this Order were unfortunately never considered by the Court a quo.

Even more serious, however, is the fact that pursuant to a legal process to which he had never been a party, property belonging to the husband could be attached and sold in execution without his having been heard! This is manifestly unjust. It once again reinforces the finding that he should have been joined in the original proceedings. This is more so when one of the direct consequences of the legal process was that the property to which he had indisputable rights and which he occupied, was capable of being declared executable and could be sold by public auction in satisfaction of a debt contracted by his wife.

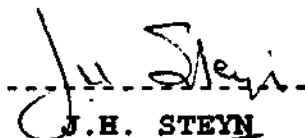
The factual disputes referred to by the Court a quo were in my opinion irrelevant for the purposes of the determination of the true issue it had to decide. This was: was the judgment granted

erroneously or not? For the reasons set out above, there were no factual disputes that inhibited the court from finding that it was granted in error. The moment the admission was made that the parties were married in community of property, the non-disclosure of this fact, compounded by the failure to allege that she was a public trader, trading with her husband's knowledge and consent, vitiated the proceedings. All the subsequent steps in the proceedings were similarly tainted and fall to be set aside.

The appeal is dismissed, with costs. The cross appeal succeeds, with costs. The Order made by the Court a quo is set aside and in the place thereof the following order is substituted:

1. The judgment of the High Court dated 18th of April 1992 is set aside.
2. The writ of execution dated 2nd of August 1993, issued pursuant to the above judgment is set aside.
3. The purported attachment of rights in respect of Lot 2274 Bontleng, Gaborone pursuant to the above writ of execution is also set aside.
4. Respondent (in the court below) is to pay the costs of suit in that Court.

DELIVERED IN OPEN COURT AT LOBATSE THIS 19th DAY OF JULY 1996.

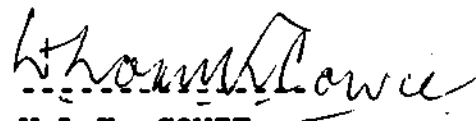

J.H. STEYN
JUDGE OF APPEAL

I AGREE:



P.H. TEBBUTT
JUDGE OF APPEAL

I AGREE:



W.L.K. COWIE
JUDGE OF APPEAL