

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

**Court of Appeal Civil Appeal No. 20 of 2002**  
**High Court Civil Case No. 1 of 2002**

In the matter between:

**PHODISONG PHARMACY (PTY) LTD**

**APPELLANT**

**AND**

**BAROLONG SHOE WHOLESALERS (PTY) LTD**

**RESPONDENT**

Mr D T Morotsi for the Appellant

Mr T Dambe for the Respondent

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**J U D G M E N T**

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**CORAM:   K R A KORSAH J A**  
**N W ZIETSMAN J A**  
**F H GROSSKOPF J A**

**KORSAH J A**

The appellant, who was the unsuccessful defendant in an application for summary judgment, appeals to this Court to have the said judgment rescinded and leave be granted it to defend the action brought against it. The respondent also applied for leave to adduce further evidence on appeal. I propose to deal first with the appeal against the order granting summary judgment.

The respondent was the owner of Nzano Centre in Francistown. On 5 April 1999, a lease agreement was entered into on behalf of the appellant with the respondent, in respect of Unit 19 at Nzano Centre, for the operation of a pharmacy. The lease was for a period of 5 years, commencing from 27 October 1999 at a monthly rental of P7,012.00 with an annual escalation of 10%.

Some six months after the appellant commenced operations, he realised that he was experiencing serious losses. There were less demands on its goods and services than had been anticipated.

On 6 October 2000 the appellant wrote to the respondent informing the respondent that the appellant was experiencing very low business at the premises and does not see any improvement in the future. The appellant complained that due to the high rental exacted for the property it is unable to break even. It therefore served notice to vacate the premises on 31 January 2001.

The respondent's reply dated 16 October recited the fact that it had offered the appellant two options. The first, which the appellant had already turned down, was to reduce the rental to P60.00 per square metre. The second was for the appellant to continue as a tenant paying

the agreed rental until a new tenant is found. As this was contained in the lease agreement it was not really an option.

On the 17 October 2000, the appellant addressed another letter to the respondent stating that unless the rental was reduced to P50.00 per square metre, it would have no alternative but to vacate the premises.

The respondent's reply on 17 November 2000 to this threat was to invite the appellant to substantiate the allegations of a low turn over by disclosing its monthly returns and bank statement in respect of the business over the past year to the respondent. The respondent added that unless this information was made available to it, the rental will remain the same with an escalation of 10% the following month. The respondent reiterated that the appellant's lease would not be cancelled until another tenant is found and that the appellant's assistance in finding another tenant would be of great benefit to both of them.

On 17 January 2001 Minchin & Kelly, the respondent's attorneys, wrote the following letter to the appellant:

"Dear Sirs

Re: **LEASE AGREEMENT – UNIT 19 – NZANO CENTRE –  
FRANCISTOWN**

1. We act on behalf of Barolong Shoe Wholesalers, being the owners of the above property, which you are leasing.
2. According to our instructions:
  - 2.1 You have not paid the rental and service charges for this month, amounting to the sum of P7798.13, in accordance with the agreement;
  - 2.2 You intend to vacate the premises at the end of this month.
3. In respect of the overdue amount of P7798.13, we are instructed to demand, as we hereby do, that you effect payment thereof immediately as you are in breach of the lease agreement.
4. On the issue of your vacating the premises, as there is no early termination clause in the lease with our client, any attempt to vacate the premises without our client's consent, would be a breach of the agreement for which our client would be entitled to damages or other remedies against you.
5. Our instructions are that our client is willing to consider a mutual termination of the agreement only if a new, suitable client is found to takeover the premises. Until such time, the agreement shall remain binding upon you.

6. We await to hear from you in regard to this matter. Please be advised that as the matter has been handed over to us to deal with, any future communication or dealings relating to this issue or your tenancy in general must be directed to us and not to our client.

Yours faithfully

Signed

MINCHIN AND KELLY

Per: T Dambe"

On 7 January 2002 the respondent commenced legal proceedings against the appellant for, among other things, damages suffered by the respondent as a result of the conduct of the appellant. Paragraphs 6 to 10 of the Particulars of Claim are as follows:

- "6. As a result of a breach of the agreement by the defendant in failing to pay rentals in accordance thereof, on the 21 May 2001, this Honourable Court granted an order for the cancellation of the agreement as well as eviction of the defendant from the premises. A copy of this Order is Annexure "B" hereto.
7. The plaintiff subsequently issued summons against the defendant for the arrears outstanding. The defendant subsequently duly paid all arrears up to May 2001.

8. Upon the defendant vacating the premises in May 2001, the plaintiff made all efforts to try and find tenants to move therein. After extensive efforts to locate tenants, the plaintiff was only able to find a new tenant to occupy the premises from 1<sup>st</sup> of September 2001.
9. However, in terms of the agreement of lease with the new tenants, the amount of rental payable is less than the amount which was supposed to be paid by the defendant in terms of the lease agreement being annexure "A" hereto.
10. As a result of the breach of the lease agreement by the defendant, the plaintiff suffered damages in the sum of P133,494.87 being the difference in rental currently being paid by the new tenant and the amount the plaintiff would have received from the defendant in the event that the defendant had not breached the agreement between the parties."

Two points cry out for attention. The first is that neither in the Particulars of Claim nor in the affidavit in support of the application for summary judgment was the monthly rental of the new tenant revealed. The Court below and this Court are told that the difference in rentals for the period May 2001 to September 2001, resulted in a prejudice to the respondent of P133,494.87. Without knowledge of what monthly rental the new tenant was paying to the respondent, one cannot ascertain

whether the prejudice to the respondent was actually P133,494.87. No information, whatsoever, is furnished from which the amount claimed can be calculated or ascertained.

Order 34 Rule 1 of the High Court Rules provides that:

“Where the defendant has entered an appearance to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only –

- (a) based on a liquidated document;
- (b) for a liquidated amount in money;
- (c) for the delivery of specified movable property; or
- (d) for ejectment,

together with any claim for interest and costs.”

The phrase “for a liquidated amount in money” must be understood to cover, a situation where the amount of the debt is capable of prompt ascertainment or “speedy and easy proof.” LEYMAC DISTRIBUTORS LTD v HOOSEN AND ANOTHER 1974(4) S A 524 [D & CLD] at 527 B.

In HUGO FRANCO (PTY) LTD v GORDON 1956(4) S A 482(S R) at 483 G-H, a summary judgment case in which, the expression “a liquidated demand of money” fell for interpretation, MURRAY C.J had no doubt that:

"The money demand must be a liquidated one. As far as I am aware, a claim for a sum of money as damages has never been treated as such, for the claim (unless agreed by the parties) becomes liquidated only on assessment by the court; it is not recognised as capable of the ready and speedy proof necessary to liquidate it."

Damages are always in issue and must be proved by oral evidence, except where the quantum thereof has been agreed by the parties or, the amount claimed is capable of prompt ascertainment or speedy and easy proof. In *casu*, the damages claimed had not been agreed by the parties and were not capable of speedy and easy proof. Therefore, the claim did not lend itself to summary judgment procedure.

The second point which cries out for attention is that in Paragraph 8 of the Particulars of Claim, the respondent by averring that it had gone to extensive efforts to locate tenants to occupy Unit 19, undertook the burden to prove that he did his best to mitigate his damage. This it could do only by oral evidence. This is especially the case because the appellant, in its affidavit in opposition to the application for summary judgment, put the respondent to strict proof of the extent of any prejudice the respondent had suffered as a result of the alleged breach. The appellant stated:



“Paragraph 2 (b) (i)        The plaintiff (sic) action is for recovery of damage and as the Court will have to decide whether the Plaintiff is entitled to damage and if so to what amount, it cannot grant summary judgment.

(iii)    The plaintiff had rent (sic) the premises in 1<sup>st</sup> September 2001 to (sic) a new agreement even though we understood other people like a medical doctor and a Chinese were asking to lease the premises. We understand that the rent paid by the current tenant is P65.00 per square metre which is P5.00 more than the rent was agreeing with us and as such the Plaintiff had not suffered P133,494.87 or any damage as claimed.”

What the appellant was saying in (iii) above was that even though a doctor and a Chinese wanted Unit 19 when the appellant vacated it the respondent waited till September before letting Unit 19. In other words any prejudice suffered by the respondent was occasioned by the respondent himself.

In HANEKOM v AMOD 1950(4) S A 412 C at 416 E it is said by FAGAN J. that:

“It is a well known rule of law that a party who prevents the fulfilment of a condition cannot take advantage of its non fulfilment. It would seem to be within the scope of that principle to say that when non-fulfilment of a condition, or defective fulfilment – in this case late payment – occurs, it should not be relied upon by a party who is even more to blame than the other party.”

Without oral testimony of how the respondent mitigated the extent of its damage, the issue of damages had not been settled and the claim still remained unliquidated. Order 34 Rules 1 and 2 could therefore not be invoked by the respondent. The damages claimed by a plaintiff does not become a liquidated sum merely because it is expressed as such. It follows that the appeal must succeed.

The appellant also applied to be allowed to lead further evidence on appeal on the ground that the learned Judge *a quo* was misled by the withholding of material information by the respondent’s attorneys in granting the summary judgment. Such material evidence as is alleged to have been withheld is that which is spelt out in paragraph 2 (b)(iii) of Praful Jog’s affidavit, above recited, in opposition to the application for summary judgment. In this regard, the appellant sought to draw breath from the provision of Rule 29(1) of the Court of Appeal Rules, which provides that:

“29(1) It is not open as of right to any party on appeal to adduce new evidence in support of his original case but, for the furtherance of justice, the Court may, where it thinks fit, allow or require any new evidence to be adduced in accordance with Part V of these Rules. A party may, by leave of the Court, allege any facts essential to the issue that have come to his knowledge after the decision of the Court below and adduce evidence in support of such allegations.”  
(emphasis supplied)

This Rule is generally stated, but the principles to be applied in deciding whether to allow a party to place further evidence before the Court of Appeal were succinctly enunciated in COLMAN v DUNBAR 1933 A.D. 141 at 161-2 as follows:

- “(a) It is essential that there should be finality to a trial, and therefore if a suitor elects to stand by the evidence which he adduces, he should not later be allowed to adduce further evidence, unless the circumstances are exceptional.
- (b) The party who makes the application must show that the fact that he had not brought (the said evidence) forward was not attributable to any remissness on his part. He must satisfy the court that he could not, by the exercise of due diligence on his part, have procured the evidence.

- (c) The evidence tendered must be weighty, material and presumably worthy of belief, and must be such that if adduced, it would be practically conclusive.

(This principle was applied in [SIMPSON v SELFMED MEDICAL SCHEME & ANOTHER 1995(3) SA 816 A D at 825 B-E])

- (d) If conditions have so changed that the fresh evidence will prejudice the opposite party, the court will not grant the application, for example, if the witnesses for the opposite party have scattered and cannot be brought back to refute the fresh evidence.”

Where, however, remittal is sought by a party who has failed, despite having had the opportunity to do so, to produce any evidence, or any legally admissible evidence, or all the available evidence on a point that was plainly in issue the application will be usually refused. In the instant case the appellant seeks to adduce evidence which was in its possession all along and which was alluded to in its affidavit in opposition to the application for summary judgment. Clearly, the application by the appellant offends principle (b) enunciated in the Colman v Dunbar case above cited, and although our conclusion is that the appeal should be allowed, the additional costs occasioned by the application to lead further evidence must be borne by the appellant.

Finally, it must be stressed that a plaintiff should not apply for summary judgment in a case in which he knows that the defendant intends to defend the action on grounds which, if accepted by the trial court, would constitute a good defence, or where the purpose of an application for summary judgment is to secure a tactical advantage for himself.

FLAMINGO GENERAL CENTRE v ROSBUOGH FOOD MARKET 1978(1)  
SA 586 D.

In the circumstances, the appeal against the Order granting summary judgment to the respondent is allowed.

The application by the appellant to adduce further evidence is misconceived. Accordingly the following Order is made:

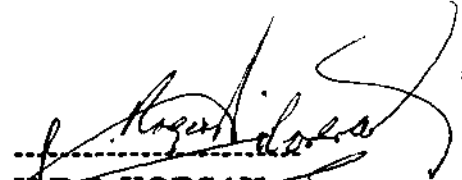
1. The appeal is allowed. The Order granted by Lesetedi J. on 19 April 2002 is hereby set aside and is substituted with the following Order:

The application for summary judgment is dismissed with costs, and the defendant is given leave to defend the action.

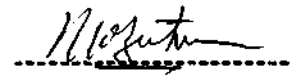
2. The costs occasioned by the preparation, the filing and the perusal of the documents in connection with the application by the appellant to lead further evidence are to be paid by the appellant.

3. Save as stated above, the costs of the appeal, including all costs occasioned in connection with the hearing of the appeal on 11 July 2002 are to be paid by the respondent.

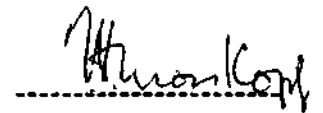
DELIVERED IN OPEN COURT AT LOBATSE THIS <sup>19<sup>th</sup></sup>..... DAY OF JULY 2002.

  
K R A KORSAH  
(Judge of Appeal)

I agree

  
N W ZIETSMAN  
(Judge of Appeal)

I agree

  
F H GROSSKOPF  
(Judge of Appeal)