

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

CIVIL APPEAL NO. 16 OF 1994
HIGH COURT CIVIL CASE NO. 45 OF 1994

In the matter between:

SIDNEY TSHEPISO PILANE

Appellant

and

FIRST NATIONAL BANK OF BOTSWANA LTD
TSHIMOTHEARO SUPERMARKET [PTY] LTD

1st Respondent

2nd Respondent

Mr. Advocate D.A. Bregman for the Appellant

Mr. Advocate R.O. Peterson [with him Mr. J.S.Bookbinder] for the
1st Respondent

J U D G M E N T

CORAM: T.A. AGUDA J.A.
P.H. TEBBUTT J.A.
LORD W.L.K. COWIE J.A.

LORD COWIE J.A.:

This is an appeal against a decision of the High Court at Lobatse granting summary judgment in an action instituted by the first respondent against the appellant and the second respondent [hereinafter called the company]

The action arose out of an agreement entered into in 1990 between the first respondent [which was formerly known as the Bank of Credit and Commerce [Botswana] Ltd] and the company for the purpose of providing banking facilities and a loan to the company. The agreement provided inter alia that should the company fail to effect payment of any sums payable to the first respondent the total balance in respect of the company's account would immediately become due and payable to the first respondent. Following on the said agreement, the plaintiff executed a

suretyship undertaking whereby he bound himself jointly and severally in solidum as surety and co-principal debtor, renouncing the legal benefits of excussion and division and cession of actions for the due performance by the company of all its obligations under the said agreement.

The action was instituted by the first Respondent on 21 December, 1993 against both the company and the appellant, as surety, for the sum of P19,144.26 plus interest on the basis that the company had breached the agreement by failing to make payment of the instalments timeously, with the result that as at 31 January, 1993, there was a debit balance in the company's account of the above sum, which was immediately due and payable.

On 8 February, 1994, the appellant entered an appearance to defend the action, but the company did not do so. On 22 February, 1994, the first respondent applied for summary judgment against the company and the appellant, and lodged the appropriate affidavit as required by Order 34 of the Rules of the High Court [Cap 04:02]. Since the company had not entered an appearance to defend, judgment by default was entered against it on 8 March, 1994. On the other hand, on 4 August, 1994, the appellant lodged an affidavit resisting summary judgment on various grounds and, in particular, on the ground that he had been released from his suretyship sometime between 8 August, and 30 September, 1990 by the manager of the first respondent in Gaborone, one Sheik.

The question whether summary judgment should be granted to the first respondent was considered by the learned Judge a quo, and, on 2 September, 1994, he decided to do so, on the basis that the defence put forward by the appellant was not a bona fide

one. It is against that judgment that this appeal has been taken.

Originally the grounds of appeal were based on the submissions which had been made to the learned Judge a quo and which were reflected in the appellant's resisting affidavit, but when the appeal came before us, counsel for the appellant informed us that he was only proposing to argue one point, namely, that summary judgment should not have been granted because the appellant had stated a bona fide defence to the claim by the first respondent. He contended accordingly that summary judgment should be set aside and the appellant given leave to defend the action.

The relevant part of Order 34 Rule 3 [b] for the purposes of this appeal is in the following terms:-

"Upon the hearing of an application for summary judgment, the defendant may -

[b] satisfy the Court by affidavit that he has a bona fide defence to the action, such affidavit shall disclose full the nature and grounds of the defence and the material facts relied upon therefor."

What is meant by the Rule has been the subject of a number of decisions by the Courts. For example, in South Africa, when dealing with an application in terms similar to the present one Corbett J.A. put it this way in the case of MAHARAJ V BARCLAYS NATIONAL BANK LTD 1976 [1] S.A. 418 AT PAGE 426 A:-

"When the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons or combined summons are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of one party or the other. All that the Court enquires into is:- [a] whether the defendant has fully disclosed the nature and grounds of his defence

and the material facts upon which it is founded and [b] whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters, the Court must refuse summary judgment either wholly or in part as the case may be. The word 'fully' as used in the context of the Rule [and its predecessors] has been the cause of some judicial controversy in the past. It connotes, in my view, that while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standard of pleading."

The principles which apply to Order 34 have also been conveniently summarised by Tebbutt J.A. in the case of DU SETTO [SUNNYSIDE II] [PTY LTD. V FINANCIAL SERVICES COMPANY OF BOTSWANA LTD. [BOTSWANA CIVIL APPEAL NO. 19/9 14TH JULY 1994] and are as follows:-

"The defendant must satisfy the Court that he has a defence which, if proved, would constitute an answer to the claim and that he is advancing it honestly. He must disclose what his defence is and set out the material facts upon which it is based and while he need not deal exhaustively with the facts and evidence relied upon to substantiate his defence or with the detail or precision required of a pleading, he must set them out with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence or not. The allegations in the affidavit must not be bald, vague or sketchy. What is required is that the defence be not set out so baldly, vaguely or laconically that the Court, with due regard to all the circumstances, receives the impression that the defendant has, or may have, dishonestly sought to avoid the dangers inherent in the presentation of a fuller or clearer version of the defence which he claims to have. The affidavit must not lack forthrightness as well as the particularity that a candid disclosure of a defence should embody [see] DIESEL POWER PLANTS HIRE CC V MASTER DIGGERS [PTY] LTD 1922 [2] S.A. 295 AT PAGE 298 D-F].

It has also been held that:

If the statements of fact are equivocal or ambiguous or contradictory or fail to canvass matters essential to the defence raised, then the affidavit does not comply with the rule.

[see also ARENDS V ASTRA FURNISHERS [PTY] LTD. 1974 [1] S.A. 298 AT PAGE 304 A-B]

"It is not an onerous task to file an affidavit which meets the requirements of the Rule. On the contrary it is a simple matter where a bona fide defence is available to a defendant. If he does not do so, the Court will be entitled to grant summary judgment and not only where the plaintiff's case is an unanswerable one."

It is not suggested in this case that the learned Judge a quo misdirected himself on the law which is applicable to it. The submission was that although the facts stated in the affidavit were terse there was a sufficient indication of a bona fide defence which could be expanded upon by evidence. In that situation it would be convenient to look in some detail at the terms of the appellant's resisting affidavit and consider whether they comply with the general principles set out above, and whether in the light of them it can be said that the defence stated is a bona fide one. As I have stated, appellant's defence is that he was released from his suretyship by the manager of the first respondent in Gaborone, one Sheik. He said this followed the sale on 8 August, 1990 of the shares in the company, which he and his wife had owned up to then, to one Percy Kgote and one Johan Scholtz. Clause 5.1.2 of the contract of sale provided that of the purchase price of P102 500 payment had to be made of -

"the sum of P70 00 [SEVENTY THOUSAND PULA] on or before 30th September, 1990. It is recorded that the company is indebted to the Bank of Credit and

Commerce [Botswana] Ltd, Industrial Branch, Gaborone, in the approximate amount of P36 000-00 [THIRTY SIX

THOUSAND PULA]. The Sellers do not warrant the accuracy of this figure. In the event that the Bank release SIDNEY TSHEPISO PILANE from all securities he has provided in respect of the loan, and the burden to do this shall rest wholly on the purchaser, subject to SIDNEY TSHEPISO PILANE'S co-operation in that effort, then the deposit payable by 30th September, 1990 shall be as abovestated less the amount owing by the Company to the Bank as at the time of release."

The relevant parts of the Appellant's affidavit in regard his defence are as follows:-

"4.3 I am not liable to the [first Respondent] as claimed or at all for, Mr. Sheik, then a manager of the Bank of Credit and Commerce, Gaborone, with whom I had negotiated a loan transaction on behalf of [the company] released me from the suretyship I had signed in security of the loan to [the company]. Following the sale of shares, Messrs. Percy Kgote and Johan Scholtz and I went and saw Mr. Sheik at the Bank. We told him of the sale of shares and requested him to release me from the suretyship and obtain whatever security he required from Scholtz and Kgote. He said Kgote was unacceptable as a surety, but said Mr. Scholtz was, and that they would agree some form of security with Mr. Scholtz. They arranged to meet subsequently, but it was agreed that I had fallen out of the picture. Mr. Sheik was acting for the Bank. I attach hereto the Agreement of the sale of shares between my wife and I as sellers, and Scholtz and Kgote as joint purchasers.

5. When I became aware that something may still be owing to [the first Respondent] as successor in title to the Bank of Credit and Commerce [Botswana] Ltd., I looked for Mr. Scholtz, and was told he had since returned to South Africa, leaving no forwarding address. I then told Sinah Maetshakana Kgote, Percy's mother, who is also the Executor Dative in the estate of the late Percy Kgote, of the transaction and the fact that some amount was apparently still owing to the bank. I also told her that, try as I might, I had not been able to find Mr. Scholtz. I advised her that Percy Kgote's estate would have to take responsibility for the liability and discharge it. I gave her an original version of the agreement of the sale of shares aforesaid, and she went away to consult, she said. She subsequently returned and said she and her children had identified his signature as Percy's, and that the estate accepted liability to

[the first Respondent], assuming that the claim is properly computed. The estate in fact approved the claim and advised this to Mr. Ray at a meeting of creditors held on 15th April, 1994."

It is in relation to that statement of the facts that the learned Judge a quo reached the conclusion that the defence was not a bona fide one.

As I read his judgment, he accepted that an assertion that the appellant had been released from his suretyship was prima facie a good defence to the application for summary judgment, but that the appellant had failed to supply material facts in relation to that defence, and, in the absence of those facts, it could not be said that the defence was a bona fide one.

In a clear, concise and well reasoned judgment the learned Judge a quo explained why he considered that the defence was not a bona fide one, and I do not propose to repeat in full his views here. Suffice it to say, that he considered that, amongst other things, the appellant should at least have explained if, in fact he was released from the suretyship, what steps were taken if any to reduce the deposit of P70,000, in terms of clause 5.1.2 of the agreement. That clause provided, as set out above for a reduction in the deposit if the debt to the first respondent was taken over by the company. There is not a word about that in the appellant's affidavit. The learned Judge a quo said:

"It seems most odd that the amount owing to the bank at the time of the release of Pilane from the suretyship, and the assumption of such risk by Scholtz, was not deducted from the deposit of P70,000.00 when the deposit was paid as provided in that agreement. I must act on the assumption that it was not so deducted, as it is now owing and claimed. It seems to me that in placing before the Court any defence relating to the release of Pilane from the suretyship, in the circumstances of this case, and in introducing the shareholders agreement as evidence of

both the sale of shares and release, Pilane should have necessarily dealt in his affidavit, with what happened in terms of Clause 5.1.2 of the agreement. It seems to me that he could have disclosed whether on his release from the surety, and the substitution of Scholtz in his place, the amount then owing was deducted from the deposit as envisaged by the Agreement. The omission to deal with this leaves such a gap in the statement of the material facts supporting the defence that the court is bound to be more than unsure whether this defence is genuine or not."

I agree with the learned Judge. I would add to that the lack of any explanation by the appellant, why, when he heard of the claim being made by the first respondent, he did not immediately contact the bank and state that he had been released from his suretyship in 1990. Instead of doing that, which was the obvious step to take, he tried to contact Kgote and Scholtz although they were supposed to have relieved the appellant of any securities which he had provided in respect of the loan in terms of the contract for the sale of the shares in the company. Such actions on the part of the appellant, without further explanation, is a further reason for holding that the defence was not a bona fide one, because the implication is that the appellant must have been aware that he had not been released from his suretyship by the first respondent.

Furthermore, the affidavit gives rise to a number of commercial improbabilities in relation to the negotiations for the alleged release of the suretyship, which suggest that the defence was not a bona fide one. It was conceded by Counsel for the appellant that improbabilities were a factor which could be taken into account when deciding on the bona fides of the defence, and I am of the opinion that that was a proper concession to make.

One of the major improbabilities in the facts stated by the appellant in his affidavit was the apparently casual way in which the manager of the first respondent was said to have released the appellant from his suretyship. There was no writing confirming the appellant's release and apparently he was told that he had "fallen of the picture" before any alternative surety had been arranged with the purchasers of the company.

In my opinion, such an improbable commercial transaction between a bank and an attorney, as the appellant is, is a factor which militates against the defence being a bona fide one. It is also highly improbable that Mr. Ray, who swore the affidavit on behalf of the first respondent, would have impliedly deposed to the existence of the suretyship if there had been any record at the bank of the release of the appellant.

It is also highly improbable, in my opinion, if the suretyship had been released, that the appellant would have gone to the trouble of obtaining an acknowledgement of debt from the executrix and administrator of Kgote's estate, if he himself had already been released from his suretyship. The implication arising from those actions is that the appellant regarded himself as personally bound and wanted the principal debtors to be responsible for the payment of the sum due to the first respondent.

In all these circumstances, I am entirely satisfied that the learned Judge a quo reached the correct decision in granting summary judgment to the first respondent in this case. In my opinion, the affidavit of the appellant is so bald, vague and sketchy, and, in addition gives rise to such improbabilities,

that it renders the defence of release from the suretyship completely lacking in bona fides. Accordingly, his appeal must be dismissed.

We were addressed briefly on the question of the exercise of the learned Judge's discretion, which, in the end of the day, he exercised in favour of the first respondent.

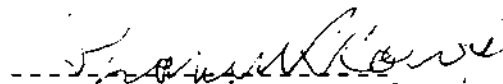
It has to be said that in one respect, he exercised that discretion on an error of fact. He seemed to proceed on the basis that the company's indebtedness to the first respondent had been proved in a court of law. That is not correct, since as I have already indicated judgment against the company was obtained by default.

Nevertheless, even assuming that that was a material factor in the learned Judge's reasoning as to how he should exercise his discretion in the first respondent's favour, and that the matter is, accordingly, at large for this Court to decide, I am quite satisfied that the discretion should be exercised in favour of the first respondent being granted summary judgment.

We were also addressed on the subject of costs, but it seems to me that no problem arises over that matter. Appellant agreed that if first respondent was forced to take legal action to enforce the suretyship undertaking, costs against appellant would be on an attorney and client scale. These would obviously include the costs of any unsuccessful appeal by appellant. Appellant has failed in his appeal. Costs should follow success, in which case the first respondent would be entitled to its costs on an attorney and client basis.

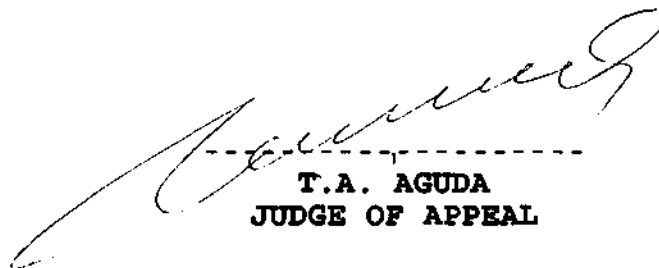
In the result therefore, the appeal is dismissed with costs on an attorney and client scale.

DELIVERED IN OPEN COURT AT LOBATSE THIS 31ST DAY OF JANUARY, 1995.



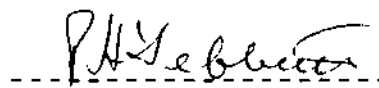
LORD W.L.K. COWIE
JUDGE OF APPEAL

I agree



T.A. AGUDA
JUDGE OF APPEAL

I agree



P.H. TEBBUTT
JUDGE OF APPEAL