

IN THE COURT OF APPEAL OF BOTSWANA
AT LOBATSE

COURT OF APPEAL CIVIL APPEAL NO. 6 OF 1995

In the matter of:

GAOLEKWE DITEKO RABANA

APPELLANT

AND

BOTSWANA HOUSING CORPORATION

RESPONDENT

ADVOCATE HOFFMAN S.C WITH MR. ATTORNEY
GRIFFITHS FOR THE APPELLANT

ADVOCATE N. CASSIM WITH MR ATTORNEY DIBOTELO FOR
THE RESPONDENT

J U D G M E N T

CORAM: A.N.E. AMISSAH JP
 J.H. STEYN JA
 G.G. HOEXTER JA

STEYN JA:

This matter is a regrettable example of how irregular proceedings and their professional mismanagement can result in unnecessary and expensive litigation, with little if any benefit for the litigants concerned.

For the sake of convenience I will refer to the parties as they are cited above; i.e. Mr. Rabana as Appellant and the Botswana Housing Corporation as Respondent. The reason why it is necessary to make that statement will become clear when I recite the tortuous history of the case.

Appellant was employed by Respondent in a senior management position. He was dismissed from their service; so he alleged: irregularly. He moved the Court to set aside his dismissal. The application was successfully opposed by Respondent. Appellant alleged that the Court which had ruled in Respondent's favour (Nganunu J. presiding), had erred in doing so. He contended that the Court had decided on the merits of the case without having regard to his replying affidavit. He lodged an appeal to this Court, citing this irregularity as a ground of appeal.

At the hearing of the appeal and by agreement between the parties, this Court on the 24th of January 1994 (Amissah J.P., Aguda and Schreiner JJA presiding) granted the following order:

"It is ordered that -

Pursuant to an agreement between the parties:

1. the matter be referred back to the High Court for argument on all the affidavits filed of record;
2. by consent, each party shall bear his or its own costs of appeal."

The matter now came before Horwitz J. In the meantime and before the matter could be heard, Appellant had given notice that he was withdrawing his original application, tendered to pay the wasted costs and launched an application for the relief set out

above de novo. We were informed that Horwitz J. heard full argument on the re-launched application. He gave judgment on 13th of March 1995.

In his judgment and after setting out the nature of the dispute and the order of this Court cited above, the learned Judge proceeded to say the following:

"The application was mainly based on the fact that [a] the disciplinary regulations of the Botswana Housing corporation were not applicable to the Applicant, and [b] he was not given a fair hearing. Subsequent to the order set out above, the Applicant withdrew his application being Misca 74/93 and made another application being Misca 94/94 which has not come before me. In the original application the answering affidavit disclosed a document signed by the Applicant acknowledging receipt of the disciplinary rules. In the second application, the Applicant accepts that he was bound by the disciplinary rules and now complains that the Respondent did not act upon those rules.

The precise meaning or the effect of the order made by the Court of Appeal is now in issue in the following respects:

1. Was the matter referred back to be heard by the Judge a quo, that is Nganunu J. or was it referred to the High Court in general terms?
2. What is the status of the judgment given by Nganunu J.? Was it set aside or suspended pending argument on all the affidavits or was Nganunu J. merely given power to change the judgment or order if necessary after having heard the argument?
3. What is the effect of the withdrawal of the proceedings which had been before the Appeal Court, the subject matter of the order, especially on the judgment of Nganunu J.?

The importance of the referral is:

The original application was withdrawn before the argument was heard. The Respondent, argues that if the judgment had not been set aside, the withdrawal of the application has the effect of confirming the judgment of Nganunu J. or rather making it a judgment

in rem. The applicant argues that it is implicit in the order that the judgment and order by Nganunu J. were set aside.

This matter is respectfully referred to the Court of Appeal in terms of Section 15 of the Court of Appeal Act Cap 04:01 for clarification of the order made by it on the 24th January, 1994."

It is in these circumstances that the matter came before us on the 7th of July 1995.

Ms Cassim who appeared for Respondent, both in her heads of argument and initially before us, contended that the order of this Court was unclear in as much as it failed to set aside the judgment of Nganunu J. and that Appellant should have applied, for a clarification of that order. Upon being questioned by the Court she conceded:

1. That it was the parties intention in approaching the Court for an order by consent to have the matter heard de novo before the High Court - and
2. That both parties knew that for the order they sought to be of any force and effect, it would necessarily be implied that the original judgment was being set aside, and
3. That this Court in its order did so.

It is difficult to see how it could ever be contended otherwise. It would have been impossible for the High Court to have considered the matter "on all the affidavits filed of record" on the premise that the judgment of Nganunu J stood. That this concession was rightly made is therefore obvious. However it was a concession that should have been made before Horwitz J., more particularly as Respondent's Counsel knew that it was the intention of both parties that this was an essential term of the agreement between them.

In view of this fact, i.e. that it was clearly implicit in the judgment and intended also by the parties, that the judgment of the High Court was being set aside, it is also clear that any Judge of the High Court would have been competent to try the matter. Certainly, Horwitz J was - and in my view should have done so. He should also have decided the third matter, which is the only issue of some - albeit slight substance.

This Court in its order dated 24th January 1994 gave no judgment on the merits of the dispute between Appellant and Respondent. What it did was to give procedural directions as to

the further conduct of the litigation - (Nganunu J's judgment having been set aside)

Therefore there was no judgment which barred either of the parties from availing themselves of any procedural option available to them in terms of the Rules of Court, or any other procedural provision or precedent. It is trite that at any time before judgment, a party to litigation can withdraw his claim or his defence, provided that he makes an appropriate tender as to costs. Obviously, the Court as master of its process can in appropriate, but I would suggest exceptional circumstances, rule that a particular procedural step taken by a party is an abuse of the process of the Court, and on motion to do so, or mero motu, set aside such a step. Respondent was heard to complain that Appellant should not be allowed to withdraw its case and substitute for it a different - and inconsistent cause of action. This is however not a matter before us to be decided as a question of law. Should it be so contended it is an issue for the High Court to resolve. Moreover, any inconsistency in Appellant's cause of action if established, will weigh heavily

in the scale against the Respondent and could be relevant as to the nature of the costs order the Court makes. The issue to be decided by this Court, supported in argument by Respondent before us, is whether Nganunu J's judgment, or alternatively the order of this Court, was a bar precluding Appellant from withdrawing his application. For the reasons aforesated this contention cannot be upheld.

To sum up:

1. The judgment of Nganunu J. was set aside by an agreement between the parties, confirmed by this Court as per its Order dated 24th of January 1994.
2. There was no bar to Appellant's withdrawal of his action as a result of either the judgment of Nganunu J or the Order of this Court of January 24, 1994.
3. The matter can be heard by any Judge of the High Court.

Because he has made a putative finding on the merits of the matter, it may well not be advisable for Nganunu J to preside. In view of the fact that the merits of the dispute were argued

before Horwitz J. it would obviously be most efficacious for him to hear it. Should he not be available, the matter will have to be reargued before any other High Court Judge.

Miss Cassim argued that Applicant should be ordered to pay the costs of this hearing or alternatively each party should pay his own costs. There is certainly no basis for an order of costs in Respondent's favour; both contentions advanced on Respondent's behalf having been decided in Appellant's favour. The ground upon which the latter contention was based was that the matter is before us pursuant to a reservation of a question of law by Horwitz J. and not on appeal.

On the facts of this case that consideration does not avail Respondent. It advanced the contention that Appellant was non-suited because of the alleged ambiguity of this Court's order. It did so in both Courts. It also did so, despite the fact that it was common cause that both parties intended that the original judgment should be set aside, in order for a rehearing to take place. This was unconscionable. It was also Respondent who advanced the contention that Appellant was precluded from

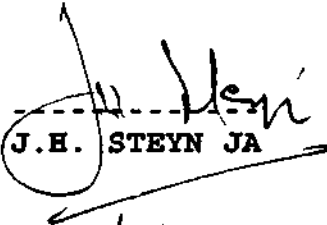
withdrawing his original application because of the fact that Nganunu J's judgment was extant and enforceable.

Miss Cassim was heard to present the forlorn argument that the merits of the matter would demonstrate that Appellant was guilty of conduct worthy of condemnation. If that is the case - and clearly it is not for us to express a view on it - the greater should have been Respondent's motivation to have the merits of the matter determined and not to waste its energies and its resources in pursuit of ephemeral procedural points that make no contribution to the speedy and effective resolution of the dispute between the parties.

Procedural wrangles have protracted the litigation between the parties since the launching of the Notice of Motion for urgent relief on the 25th of February 1993. "Justice delayed is justice denied", is no empty slogan. Pursuing futile points of process as in this case, does not promote the cause of justice.

In my view Respondent should pay the Appellant's costs in this Court. The costs in the Court below are reserved for decision by the Court hearing the merits of the application.

DELIVERED IN OPEN COURT THIS 11TH DAY OF JULY 1995



J.H. STEYN JA

I AGREE:



A.N.E. AMISSAH JP

I AGREE:



G.G. HOEXTER JA