

IN THE COURT OF APPEAL OF BOTSWANA
HELD IN LOBATSE

Civil Appeal No. 49 of 1996
High Court Civil Case No. (F) 510/96

In the matter between:

S & A INVESTMENTS (PTY) LTD

Appellant

and

MATER SPEI GCE STUDY GROUP
HARDING ASAMOAH BEKOE

1st Respondent
2nd Respondent

B. Williams for the Appellant
N. Chadwick for the Appellants

J U D G M E N T

CORAM: **Schreiner JA.**
 Steyn JA.
 Cowie JA.

STEYN, JA:

Appellant issued summons out of the High Court against 1st and 2nd Respondent jointly and severally for payment of the sum of P441,705.78 as arrear rent, future damages in the sum of P37,312.00 per month and certain other relief. Both Respondents entered appearance to defend. Appellant applied for summary judgment against both Respondents for the following relief:

- “(a) Payment of the sum of P441,705.78 in respect of arrear rent to 30th
 September 1996;
- (b) Interest thereon a tempore morae at 10% per annum;
- (c) In the sum of P37,312.00 being rent for October 1996;
- (d) Interest thereon a tempore morae at 10% per annum;

- (e) In the sum of P20,000.00 in respect of the balance due and payable for motor vehicle sold;
- (f) Interest thereon a tempore morae at 10% per annum;
- (g) Eviction;
- (h) costs of suit;
- (I) Further or alternative relief.

This application came before Cotran J on the 1st of November 1996. The proceedings as recorded read as follows:

"CORAM:- COTRAN J.

1st November 1996

Mr. B. Williams for the Plaintiff

Mr. F. Mukoma for the Defendants

Williams: My Lord this is an application for summary judgment to be entered against the above defendants for payment of rent, interest thereon, eviction and costs of suit. Rent is outstanding. My Lord the defendants have no bonafide defence. Entry of appearance is for the delay of process. The amount outstanding as at 30/9/96 is P441 705.78, and the October rent in the amount of P37,312.00 and interest of 10%. Also arrears of instalment on a vehicle.

Court: What are the principal sums all told?

Williams: P4 990 17.18 plus 10% interest. We served defendant on 10/10/96. We received no opposing papers.

Mukoma: I ask for one week adjournment. We have received no instructions but we understand that this was a new agreement to pay over three years.

Williams: This is not acceptable. There will be further delay and delay and delay.

ORDER:

1. Summary judgment entered as prayed against 1st defendant with costs.
2. Execution thereon stayed for two weeks to 15/11/96.
3. Costs.

Williams: D2 has signed the lease.

Mukoma: Yes on behalf of the group.

ORDER:

Case is postponed to the 15th November 1996."

On the latter date the parties once again appeared before Cotran J. Both Respondents had filed notices of opposition to the application for summary judgment which was supported by affidavits and certain supporting documentation. The Court, after hearing argument reserved judgement. Four days later, the Court unambiguously refused summary judgment against 2nd Respondents. (The reason for the use of the word "unambiguously" will become apparent later in this judgment). In its judgment the Court said that "had the affidavits now before me been before me on the 1st of November 1996, I would not have been minded to grant summary judgment against (1st Respondent)" The Court then proceeded to ask itself the following

question; i.e.

"Whether or not this Court has power to recall its order of 1st November granting summary judgment and ordering the parties to go to trial." Cotran J then goes on to say: "I think the Court has inherent power to stop a possible injustice. Furthermore Order 48 of the High Court Rules grants the Court power mero motu to vary or rescind an Order. I accordingly rescind the order granted to the Plaintiff on 1st November 1996 and order the parties to go to trial". He also granted Respondents a stay of execution "pending appeal".

Indeed, Appellant did note an appeal against the decision of the High Court to rescind its judgment. It also noted an appeal against the refusal of summary judgment against 2nd Respondent.

1st Respondent has in turn and with leave of the Court a quo, appealed against the decision of the Court to refuse it a postponement as well as against its decision to grant summary judgment against it on 1st of November, 1996. It abandoned the judgment in its favour in terms of which the Court purported to rescind the summary judgment ordered as aforesaid.

After hearing argument on the matter this Court upheld 1st Respondent's cross-appeal against the decision to grant summary judgment against it and intimated that it would give reasons for this decision and make such order in this respect as it deemed fit. Counsel for Appellant indicated that he could not argue that the appeal in respect of the refusal to grant summary judgment against the second Respondent should be upheld. He was clearly right in making this concession. The affidavit submitted on 2nd Respondent's behalf certainly raised a bona fide defence, inter alia that he was not personally liable for the payment of the debts incurred by 1st Respondent. I say "inter alia" because defences are also raised which go to the merits of Appellant's case against the Respondents. What therefore remains to be dealt with are:

1. The reasons why this Court upheld the appeal in respect of the decision to

grant summary judgment against 1st Respondent.

2. What form of order it considers appropriate to make.

3. What order for costs it should make.

1. Reasons for upholding the appeal

Before us, in addition to the matters set out above, there was an application for rectification of the record. It is not necessary to set out its terms in full or to debate it. It was not disputed by Counsel for the Appellant that in material respects the allegations made by Respondents' Counsel who appeared at the trial were true and correctly reflected what had occurred. There are two material factual matters that stand to be considered. The first is that Counsel did not aver that he had no instructions, (as the record purports to reflect) but stated that he had indeed received instructions but too late to enable him to file affidavits in terms of the Rules. He also indicated what the nature of the defence was and that he required a one week postponement in order to prepare and file papers in opposition. This application, as would appear from the record of the proceedings cited above, was refused. Without however granting Counsel any opportunity to address him on the merits of the application for summary judgment, the learned Judge proceeded to enter judgment against 1st Respondent as prayed.

The second amendment to the record concerns the fact that apparently the Court a quo initially granted summary judgment without hearing argument also against 2nd Respondent. This prompted his Counsel to direct the Court's attention to the fact that it was entering judgment also against 2nd Respondent of a liability incurred by 1st Respondent and that the lease agreement upon which the claim was based had been signed by 2nd Respondent as representing it and not personally as tenant, debtor or guarantor. It was then that a postponement of the hearing in respect of 2nd Respondent was granted and summary judgment ultimately refused.

It is clear from the record that the Court did not afford Counsel for the Respondents an

opportunity to address it after refusing an application for a postponement. That it should have done so is equally clear. There were two distinct and separate matters before it. An application for postponement and an application for summary judgment. The refusal of the request for a postponement did not mean that judgment had necessarily to be granted either in whole or in part. All three parties should have been given an opportunity to address the Court. This is the more so where the Court is dealing with a drastic remedy such as summary judgment and orders payment of a sum of half a million pula without affording the parties an opportunity to present their defence or to be heard. The law as encapsulated in Order 34 and as interpreted by the Courts in Southern Africa provides that the Court has an unfettered discretion whether to grant summary judgment or not; See in this regard particularly the provisions of Order 34 (5) and the judgement of Corbett J in the full bench decision in Arend and Another v. Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (c) 304 where the learned Judge says the following:

“Thirdly where the defendant has failed to comply with Rule 32 (3) (b) - and has also not furnished security in terms of Rule 32 (3) (a)- the Court has what has been termed a “discretion” as to whether to grant summary judgment or not; and, if it refuses summary judgment and grants leave to defend, it may attach conditions, etc. under sub-para. (8), as aforementioned. That the Court has such a discretion is indisputable (see *Gruhn v. M. Pupkewitz & Sons (Pty) Ltd* 9173 (3) SA 49 (AD) p. 58 D-E and the authorities therein cited to which may be added *Spring & Van den Berg Construction Pty Ltd. V. Banferevan Properties (Pty) Ltd.*, 1968 (1) S.A. 326 (D)): what is not so clear is how and according to what criteria the discretion should be exercised.”

The learned Judge then goes on to say what has so often been laid down, i.e. that when exercising such a discretion, the Court must take into account that the procedure of summary judgment “constitutes an extraordinary and very stringent remedy; it permits a final judgment being given against a defendant without a trial.”

In these circumstances the Court a quo would have been well-advised to have given the parties the opportunity to put their defence before it. Be that as it may, it was clearly wrong not

to have afforded 1st Respondent such opportunity before granting judgment. Indeed these procedural errors were the triggers that set off the series of events referred to above. It culminated in a futile attempt to rectify the initial irregularity by rescinding the judgment against 1st Defendant. This the Court clearly could not do - certainly not mero motu and certainly not without notice to the Appellant.

However, Mr. Williams for Appellant pointed to the fact that Counsel for Respondents in the Court below did address the Court on behalf of 2nd Respondent after the refusal of a postponement. His failure to do so in respect of his other client - so it was submitted - must be taken to mean that he did not wish to pursue the opportunity to present argument resisting the granting of judgment against 1st Respondent. There is force in this submission. However in the circumstance of this case the failure to grant a hearing was such a fundamental departure from the procedural norms that they should be deemed to vitiate the process. Moreover, the defence in respect of 2nd Respondent was glaringly obvious and the judgement so patently open to challenge that one has understanding for the fact that Counsel failed to apply his mind to the fact that it was open to him also to address the Court on the issue of the general discretion referred to above, or to contend that there were defects in Appellant's papers that could persuade the Court not to grant the summary relief Appellant sought. I should say in this regard that there is matter in Appellants papers which prima facie appears to have been introduced - via its application for summary judgment - in conflict with the provisions of Order 34 in order to enhance the liquidity of Appellant's claim.

However that may be, and for the reasons aforesaid we are of the view that it was a fatal flaw in the proceedings not to have afforded Respondents a hearing after refusing their application for a postponement and to decree summary judgment against 1st Respondent before doing so. It was for these reasons that we upheld the cross-appeal lodged by 1st Respondent.

I come now to deal with the two outstanding issues, viz the form of the Order and what an appropriate Order for costs should be.

2. It would be inappropriate to refer the matter back as if it were frozen in time at the point where the application for postponement was refused and to oblige 1st Respondent to proceed with the case as if no further papers had been filed. Both Respondents have presented their defence. It has been conceded that in respect of the 2nd Respondent the matter has to go to trial. The issue which has to be referred back to the Court a quo is to determine whether or not this is also an appropriate order to make in respect of 1st Respondent on the papers presently filed of record. (This does not mean that the Court is deprived of a discretion to have the papers supplemented if an application to do so is proper in terms of the rules and is in accordance with sound practice.)

Therefore it is ordered as follows:

- a. 1st Respondent's cross-appeal against the granting of summary judgment against it on the 1st of November 1996 is upheld.
- b. The hearing of the application of the Appellant for summary judgment is to recommence before the Court a quo on a date to be fixed by the Registrar of the High Court in accordance with the instructions aforesaid.
- c. The appeal against the decision of the Court a quo of the 15th of November 1996 refusing summary judgment is dismissed.

3. Although Mr. Chadwick for Respondents has urged us for persuasive reasons to order attorney and client costs in regard of the appeal lodged - and pursued until the hearing - against the refusal to order summary judgment against second Respondent, we have decided that it would not be wise to do so. The matter still has to be adjudicated upon and the equities have yet to be determined. Appellant is however ordered to pay the costs of appeal in respect of both

the appeal and the cross-appeal in respect of both Respondents. The costs in Court below are reserved for decision in that Court at an appropriate time.

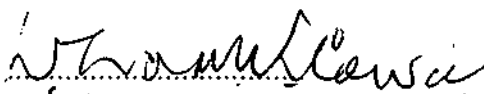
Delivered in open Court at Lobatse this ^{28th} day of January 1997.


J. H. STEYN
Judge of Appeal

I agree


W. H. R. SCHREINER
Judge of Appeal

I agree


LORD COWIE
Judge of Appeal