

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

Court of Appeal Civil Appeal No. 6 of 2001
High Court Miscellaneous Application Nos. 60/97 & 414/97

In the matter between:

WATER ENGINEERING (PTY) LTD

APPELLANT

AND

MURRAY & ROBERTS (BOTSWANA) (PTY) LTD
(Formerly Multi Construction Building
& Engineering (Pty) Ltd

RESPONDENT

Mr Makuyana for the Appellant
 Advocate Slomowitz S C with him Advocate J Peter
 & Mr J Bookbinder for the Respondent

J U D G M E N T

CORAM: K R A KORSAH J A
LORD R I SUTHERLAND J A
A M AKIWUMI J A

KORSAH J A

A dispute arose between the appellant and the respondent. The dispute was in regard to a sub-contract agreement between them relating to the construction of certain works at Serowe. The parties agreed to refer their dispute to arbitration before Advocate D.V Duke S.C (the arbitrator). After a lengthy hearing of the issues, the arbitrator made his award on

21 January 1997. Upon an application made by the respondent's attorney, that award was by consent made a judgment of the High Court, in terms of Section 20 of the Arbitration Act (Cap.06:01), by Nganunu J. (as he then was) on 10 March 1997.

The appellant applied to have the order made by Nganunu J., as he then was, rescinded and on the 11 May 2000 Lisimba J. granted the appellant's prayer, but made no order as to costs in respect of the application. An application for leave by the appellant to appeal against the order of Lisimba J. denying both parties their costs was refused by Lisimba J. However, on 3 July 2001 this Court (Lord Weir J.A presiding) granted appellant leave to appeal to it solely on the issue of costs. The respondent also noted a cross appeal.

The sole point on which Lord Weir granted appellant leave to appeal to this Court is whether Lisimba J. erred in not granting to it the costs of its successful application for rescission of the order making the award of the arbitrator a judgment of the High Court.

When this Court convened on 8 July 2002 for the hearing of the appeal in this matter, Mr J S Drynan, a director of Water Engineering, insisted on appearing on behalf of the appellant company and addressing the

Court. Mr Drynan was told by the Court that he had no right of audience on behalf of the appellant in this Court.

It was explained to him that the company was the respondent in the application in the Court *a quo* to have the arbitral award made an order of the High Court. Order 9 rules 1(1) and (2) of the Rules of the High Court provide as follows:

“1. (1) Subject to subrule 2 and to Order 7, a defendant to an action begun by writ of summons (whether or not he is sued as a trustee or personal representative or in any other representative capacity) may enter an appearance in the action and defend it by an attorney or in person.” (Emphasis added)

“(2) Except as provided by any written law, a defendant to such an action who is a body corporate may not enter an appearance in the action or defend it otherwise than by an attorney.”

Order 1 rule 3 recites that:

“3. In these Rules unless the context otherwise indicates – “action” means a civil proceeding commenced by writ of summons in accordance with Order 6, or in such other manner as may be prescribed, but does not include a criminal proceeding by the State.”

Thus, it does not lie in the mouth of Mr Drynan to argue that because the action was commenced by way of an application, and not by a writ of summons as perceived in Order 9 rule 1(1) the appellant company is exempted from the provision of Order 9 rule 1(2) and may enter appearance in the action and defend it otherwise than by attorney. He, Mr Drynan, cannot be heard on behalf of a body corporate in the High Court.

By Section 7 of the Court of Appeal Act:

“For all purposes of and incidental to the hearing and determination of any appeal, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act or the Constitution, the power and authority and jurisdiction vested in the High Court.”

This means, if Mr Drynan cannot be heard in the High Court on behalf of a body corporate, he likewise cannot be heard in the Court of Appeal on behalf of a body corporate.

Thus, the right of audience in this Court on behalf of a body corporate is not bestowed on this Court by agreement of the parties. It is a matter of statute law, that a body corporate may not enter appearance in an action or defend it otherwise than by an attorney. There being a statutory provision ordaining the appearance and audience in this Court on behalf

of a body corporate, there was no need for the President of the Court to provide any further regulation, under Section 16(f) of the Court of Appeal Act (Cap.04:01), to cover the right of audience in the Court of Appeal on behalf of a body corporate.

In Botswana, the matter of representation of corporate bodies in the superior courts is not a matter of policy, but of statute law. It is no doubt true that Mr Drynan has a right in terms of Section 12(1) of the Constitution of Botswana to communicate ideas and information to “any person or class of persons,” and this Court does not seek to deprive Mr Drynan of any of his Constitutional rights. If Mr Drynan were himself a party in these proceedings the Court would be depriving him of his Constitutional right under Section 12(1) if he was not granted audience in the superior courts, but Mr Drynan is not a party to these proceedings. The party to the proceedings is Water Engineering (Pty) Ltd, a corporate body, which cannot claim the constitutional right that Mr Drynan claims for himself and is entitled to.

Clearly, the provision that: “a body corporate may not enter an appearance in the action or defend it otherwise than by an attorney in the superior courts,” has its origins in the statute law of Botswana and comparison with the practice in other jurisdictions where the law, in this

regard, has not its origin in statute law would not profit us. And I do not intend to do so.

After this explanation of the law of Botswana relating to appearance and representation of a body corporate in the superior courts, Mr Drynan seemed to grasp the legal situation and sought a short adjournment of fifteen minutes to brief Mr Makuyana, who had at all times held a watching brief for the appellant and sat beside Mr Drynan all along. At the resumption of proceedings Mr Makuyana announced that he was appearing for the appellant.

The point was raised that Mr Bookbinder had served on the appellant fresh Heads of Argument clarifying the previous Heads of Argument. In the new heads he had raised for the first time the issue as to whether the appeal was filed timeously. Mr Slomowitz indicated that prior notice was given to the appellant that the appeal was filed out of time, but the respondent, to obviate the possibility of a further postponement, does not wish to pursue that issue nor the respondent's cross appeal.

To appreciate the contention of the appellant, it is necessary to set out the history of events prior to the respondent's application to have the arbitrator's award made a judgment of the High Court and the events leading to the granting by Lisimba J. of his order rescinding and setting

aside that judgment. They are, as above stated, relevant to the appellant's appeal, and the necessity to set them out is in order to understand counsel's submission as to why Lisimba J. erred in refusing to award the appellant his costs.

The arbitrator made his award on 21 January 1997, in these terms:

1. The Defendant (i.e. the appellant) is ordered to pay the sum of P157 435.26 (ONE HUNDRED AND FIFTY SEVEN THOUSAND FOUR HUNDRED AND THIRTY FIVE PULA AND TWENTY SIX THEBE) to the Claimant (i.e. the respondent).
2. In addition, the Defendant is ordered to pay interest on the said amount at the rate of 10% calculated from 1 July 1994 to the date of payment.
3. The counterclaims are dismissed.
4. The Defendant is to pay the costs of the proceedings on the High Court scale as well as the costs of arbitration.

An application seeking an order that the arbitral award be made a judgment of the High Court in terms of Section 20 of the Arbitration Act, (Cap. 06:01) and that a writ of execution be issued in respect thereof, was filed on 19 February 1997. This application was listed for hearing

on 10 March 1997, but there was a flow of correspondence between the respective attorneys of the parties. The respondent's attorney was insistent on payment of the arbitral award and said that he was proceeding with the application to make the award a judgment of the Court.

In their letter dated 20 February 1997, the appellant's attorneys confirmed having received instructions from their client and stated:

"That without prejudice to anything it may have on receiving the reasons for the award, it is making arrangements to settle the capital debt plus interest. Client approximates the total sum to be in the region of P200 000.00. May we have your statement on the exact total sum owing up to 28 February 1997.

That this sum should be paid by 5 March 1997. In the event of client failing to meet this deadline we are instructed to assure you that all efforts to expedite payment will nonetheless be pursued until payment has been made.

Client would prefer that costs be settled amicably without the inconvenience of taxation. May we have in this regard your proposals.

We hope this proposal negates the need for a Court Application which will serve, we submit, to escalate costs

unnecessarily. Please may you in the premises, hold any further action in that regard. (emphasis added)

We await your response.”

The appellant’s attorneys wrote to the respondent’s attorneys on 4 March 1997 indicating that the award was technically void as it was initially stated to be in Rands instead of Pula, and the rate of interest was put at 18.5% instead of 10% as agreed by the parties. On the same day the respondent’s attorneys confirmed that the award had been rectified as appears above, and that they would proceed with the application for the amended award to be made a judgment of the High Court. The respondent’s attorneys indicated in their letter that:

“We are taking this step to secure our client’s right to issue a Writ of Execution in respect of costs in the event we are not capable of reaching agreement in respect of same.

In the premises simultaneously with this letter we are serving a Notice of Set (sic) for 10 March 1997. It is our suggestion that this application proceed on an unopposed basis to keep costs to a minimum. It will be recorded by the writer that (hopefully) the capital, interest and costs of the proceedings are paid and the only matter outstanding is the issue of costs.”

On 7 March 1997, three days before the hearing of the application, the appellant paid the capital amount together with the interest thereon. The attorney for the respondent, Mr Bookbinder, thereupon deposed to an affidavit in which he acknowledged receipt of "the capital amount, interest as calculated in accordance with the amended award and the costs of the arbitration. Applicant (i.e. the respondent) has instructed us to proceed with this application to protect its rights to costs of the proceedings." The final paragraph of Mr Bookbinder's affidavit reads:

"6. Respondent's (i.e. appellant's) attorneys of record has been given the copy of the award and notice of our intention to proceed as set out herein by a letter dated 4 March 1997 a copy of which is annexed hereto marked 'S.A.2.' As of the date hereof they have not opposed same and in the premises I move that the application be granted as prayed."

The above final paragraph of Mr Bookbinder's affidavit, to the extent that it does not mention that the appellant had consented to the granting of an appropriate order without prejudice to any rights that it may have on receiving the reasons for the award, is misleading. Had the Court's attention been drawn to the stipulation that the appellant does not oppose the grant of the application without prejudice to any rights it may have subsequent to receiving the reasons for the award, the order made may very well have been differently worded.

With the reservation that the award be made an order of court without prejudice to the appellant's future rights, Counsel for the parties were in agreement that the application would not be opposed. Accordingly, Nganunu J. (as he then was) granted the order in the absence of the applicant's attorneys in these terms:

"That the award on a submission to an arbitration by the parties hereto be made a judgment of this Court, save that the said award is that which is annexure (SA 1) FA to the supplementary affidavit;

That the Applicant is hereby granted leave to enforce the said award as a judgment of this Honourable Court in terms of Section 20 of the Arbitration Act (Cap.06:01) and that a writ of execution be issued in respect of the same.

The respondent pay the costs of this application."

Again, it would appear that, through inadvertence on the part of Mr Bookbinder, the Court was not told that the parties had agreed that the application would not be opposed so as to obviate escalation of costs, and so the order of costs made in favour of the respondent was inappropriate.

On 21 August 1997, the parties came to an agreement that the costs of the arbitration were P120 000.00; that the payment should be without

prejudice to the appellant's rights to review the arbitrator's decision; and that the appellant had made payment to the Claimant's (respondent's) attorney as of that date. The agreement was subscribed to by Jeffrey Bookbinder on behalf of Collins, Newman & Co attorneys for respondent, and by someone on behalf of Doreen Khama & Co attorneys for appellant. This indicates that all along the appellant had made it clear to the respondent that its compliance with the demands of the respondent's attorneys were without prejudice to his rights of review of the arbitral award.

On 16 September 1997, the appellant in the exercise of its purported reserved rights to bring on review the arbitrator's decision, filed an application for review of the award. Upon the hearing of the application before Reynolds J., Advocate John Peter, appearing on behalf of the respondent raised two preliminary objections. The first, was that the Arbitrator's award was made an Order of the High Court with the consent of both parties, and this Order still subsists, therefore the matter is not subject to review. The second, was that the applicant is attempting to "dress up an appeal as a statutory setting aside" and this is incompetent. A proper consideration of the argument would require, "a full and comprehensive review of all the evidence before the Arbitrator."

As to the first point, that the judgment was entered by consent of the parties, as has been said above, although the judgment was entered with the consent of the parties, the Court making the award a judgment of the High Court was not informed that the settlement of the substantive portion of the award and the consent to have the award registered as a judgment was on a without prejudice basis. Reynolds J. accepted the argument, rightly in my view, that if the respondent was well aware that the appellant would be bringing an application for review, and it was for this reason that the “without prejudice” clause was attached to its agreement not to oppose the making of the Order, that would constitute a good ground for applying to the Court for a rescission and setting aside of the Order making the award a judgment of the Court.

Again, if the respondent persuaded the appellant to agree to the making of the Order as it was only trying to safeguard its rights to costs, then the respondent’s attitude of resisting the hearing of the review application on the merits borders on the dishonest – I would not go as far as to say it was fraudulent – and would ground an application for rescission of the order making the award a judgment of the High Court.

Reynolds J. rightly concluded that the appellant had to have the Order making the award a judgment of the Court rescinded before a review of the award could take place. If, having regard to the “without prejudice”

clauses, the respondent had consented to the setting aside of the order making the award a judgment of the court, Reynolds J. could have proceeded with the review of the award without the necessity of a separate application to have the order of Nganunu J. (as he then was) set aside. It was as a consequence of the respondent's refusal to have an order, which was admittedly made without prejudice, set aside, that occasioned the extra costs of bringing a separate application to have that order set aside to pave the way for the hearing of the application for a review of the award.

In my judgment, having regard to the events leading to the making of the award a judgment of the court, the respondent was acting in bad faith in resisting the application to have that order, which had been agreed upon without prejudice, set aside. It follows that the appellant was entitled to his costs when he successfully applied to have that order set aside.

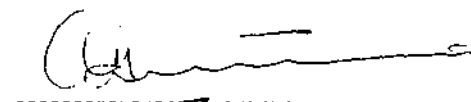
Accordingly the appeal is allowed with costs. The Order of Lisimba J. depriving both parties of their costs is hereby set aside and in its place is substituted the following:

The Respondent is to pay to the Applicant the costs of the Application.

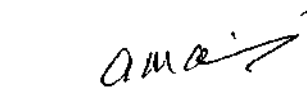
DELIVERED IN OPEN COURT AT LOBATSE THIS ...19... DAY OF JULY
2002.


K R A KORSAH
(Judge of Appeal)

I agree


LORD SUTHERLAND
(Judge of Appeal)

I agree


A M AKIWUMI
(Judge of Appeal)