

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

Court of Appeal Civil Appeal No. 5/2004
High Court Civil Case No. 3205/2003

In the matter between:

WAYGUARD SECURITY (PTY) LTD

APPELLANT

and

BOTSWANA TYRE CORPORATION (PTY) LTD

RESPONDENT

Mr G. Kanjabanga for the Appellant

Ms D.T. Matiza for the Respondent

J U D G M E N T

CORAM: TEBBUTT, J.P.
GROSSKOPF, J.A.
AKIWUMI, J.A.

AKIWUMI J.A.

The appeal in this matter was on 14 July, 2004, allowed with costs and the Order of the Court a quo altered to read "Summary judgment refused. Defendant granted leave to defend and costs of summary judgment proceedings to be costs in the cause". The reasons for dismissing the appeal which were to be given later, now appear hereunder.

For the sake of convenience, I shall refer to the Respondent as the Plaintiff and to the Appellant as the Defendant.

The submission made by counsel for the Defendant was to the effect that there was sufficient evidence before the Judge a quo to justify the order of summary judgment made.

The suit giving rise to this appeal was begun by Writ of Summons filed by the Plaintiff in the High Court on 11th September, 2003. The Plaintiff in its Declaration attached to the Writ of Summons, sought the following from the Defendant:-

- P25, 000-00 being the total unpaid monthly rent of P1 000-00 payable under an oral lease agreement, for twenty five months namely, March, 1999, to April, 2001, by the Defendant to its landlord the Plaintiff;
- P3, 808-06 being the unpaid costs of tyres and accessories supplied between 7th May, 1998, and 24th December, 1999, by the Plaintiff to the Defendant at the latter's request; and
- interest and costs based on the two foregoing claims.

What was glaringly clear on the face of the Plaintiff's two claims, was that the Plaintiff's suit was filed more than three years after the rents for the eighteen months being March 1999 to August 2000, some P18, 000-00, and the unpaid costs of P3, 808-06 which were to be paid in 1998 and 1999 for the tyres and accessories allegedly supplied to the Defendant, became due. The above delay by the Plaintiff in filing the suit against the Defendant could well render most of the Plaintiff's claim for unpaid rent and all its claim for unpaid goods supplied, unenforceable by extinctive prescription. However, this important issue that fundamentally affects the validity of the Plaintiff's application for

summary judgment, was not at all considered by the Judge a quo. As set out in section 4 (2) (b) of the Prescriptions Act, the period of prescription shall be:-

"Three years in respect of -

- (i) any oral contract;
- (ii)
the price of movables sold and delivered,
materials provided ...;
- (iii) rent due upon any contract."

Another matter affecting the Plaintiff's claim for payment in respect of the tyres and accessories allegedly supplied by the Plaintiff to the Defendant, is the nature of the only supporting Statement of Invoice itself, attached to the Plaintiff's Declaration and marked "A". This Statement which is addressed to the Defendant and supposed to relate to the tyres and accessories supplied to the Defendant in 1998 and 1999, is first of all, only dated 31 March, 2001. The sequential listing in the Statement of the goods supplied and other factors, make the Statement to look like an afterthought. Whilst the first item is shown in the Statement to have been supplied to the Defendant in February, 1999, the next three subsequently listed items, are shown to have been supplied the year before, in May, 1998. This is then followed by the last three items which are shown to have been supplied in September, November and December, 1999, respectively. Furthermore, the only descriptions of the items supplied shown in the "Description" headed column of the Statement, if they can be called descriptions, are, in respect of the first item, merely serial numbering and in respect of the last three items, only the numbers of orders

made. The second, third and fourth items have no descriptions or entries of any sort.

No copy of the Plaintiff's letter of demand to the Defendant to pay the sums claimed as alleged in the Plaintiff's Declaration, is contained in the record of proceedings in the Court a quo which forms part of the record of appeal. Indeed, the Index of the record of appeal does not show this letter under the heading "Documents Filed", as being any of the documents filed in the matter. The absence of the Plaintiff's letter of demand and the dilatoriness on its part in evicting the Defendant from its premises and in suing the Defendant for rent arrears, all seem consistent with the Defendant's counter claim that the Defendant and the Plaintiff had agreed that what the Defendant owed the Plaintiff by way of unpaid rent, would be deducted from what the Plaintiff owed the Defendant for the security service provided by the Defendant to the Plaintiff. All this raises issues which even though the Defendant's counter claim, which is not fully supported by invoices, may also be time barred, must for reasons to be expounded later, be determined at a trial.

Similarly, since the basis of the Plaintiff's claim for unpaid purchase price for tyres and accessories allegedly supplied to the Defendant, appears impeachable, the only defence that it deserves, is as averred in the Defendant's Opposing Affidavit that the Defendant 'never entered into an

agreement of that nature' and the Plaintiff is 'put to the strictest proof thereof'.

Another uncertainty displayed on the part of the Plaintiff, is contained in its Notice of Motion filed on 3rd November, 2003, notifying the Defendant that the Plaintiff would on 24th November, 2003, make an application for an order of summary judgment in terms of the two claims, strangely "against the 1st and 2nd defendants jointly and severally the one paying the other to be absolved in the following terms".

In its answering affidavit to the Plaintiff's application for summary judgment, the Defendant's defence to the Plaintiff's claim for unpaid rent as already referred to, is that this was to be deducted from what the Defendant owed the Plaintiff for security services that it had supplied to the Plaintiff. Unlike the Plaintiff who did not even have any written contract in support of its claims made against the Defendant, the Defendant produced a written contract entered into between the two for the supply of security services to the Plaintiff by the Defendant. This, and the views that I have already expressed about the supporting evidence of the Plaintiff's claims, in my opinion, do not support the proposition that the Defendant has no bona fide defence to the Plaintiff's claims or that the Defendant's opposition to the Plaintiff's application is solely for the purpose of delaying the Plaintiff's claims.

But what conditions must an application for summary judgment satisfy in order to obtain such a judgment.

The following relevant parts of the well known classic and comprehensive judgment of Tebbutt J.A. as he then was, in the case of **Economy Investments (Pty) Ltd and Others v First National Bank of Botswana Civil Appeal No. 8 of 1996**, which have been frequently followed, tells the whole story:-

"It has been repeated over and over that summary judgment is an extraordinary, stringent and drastic remedy in that it closes the door in final fashion to the defendant and permits a judgment to be given without a trial (see ... **Du Setto (Sunny Side II) (Pty) Ltd and Others v Financial Services Company of Botswana Ltd Civil Appeal 19/94 (unreported)** at page 17 and cases there referred to). It is for that reason that in a number of cases in South Africa, it was held that summary judgment would only be granted to a plaintiff who has 'an unanswerable case'. In more recent cases that test has been expressed as going too far.

In **Du Setto's** case supra, this court came to a similar conclusion and I repeated that view in **Fashion Enterprises (Pty) Ltd v Image Botswana (Pty) Ltd Civil Appeal 24/93 (an unreported judgment delivered on 14 July 1994 at page 12)**. As set out in **Du Setto's** case at page 17 the purpose of summary judgment is well known. It is aimed at a defendant who, although he has no **bona fide** defence to an action brought against him, nevertheless gives notice to defend solely in order to delay the grant of judgment in favour of the plaintiff. It therefore serves a socially and commercially useful purpose, frustrating an unscrupulous litigant seeking only to delay a just claim against him. However, even though the plaintiff need not have to have 'an unanswerable case', it is clear that before a court will close its doors finally to a defendant it must take care to see to it that the plaintiff's claim is unimpeachable.

Because of the drastic consequences of an order granting summary judgment, the courts must be astute to ensure that the procedure is not abused by a plaintiff who may wish either to secure, by the procedure, a judgment against a defendant when he knows full well that he would ordinarily not be able to obtain such a judgment without a trial or who may use the procedure as a means of embarking upon a 'fishing expedition' to try to ascertain prematurely what a defendant's defence is and to commit him to it by having him testify to it on oath."

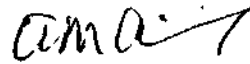
It is for this reason that the courts have insisted on strict compliance with the Rules applicable to the obtaining of summary judgment and if there is not a sufficient compliance with the Rules or if the application is flawed in any other respect, summary judgment should not be granted. See e.g. the judgment of this Court in the case of **Thamatlhogo Training and Conference Centre (Pty) Ltd v Botswana Development Corporation Civil Appeal No. 39 of 1998**. For that reason a defendant who is faced with an application for summary judgment, is entitled to attack the validity of the application without having to set out his defence. See **Economy Investments (Pty) Ltd and Others v First National Bank of Botswana Ltd Civil Appeal No. 8 of 1996**. This dictum was again recently applied by Zietsman J.A. in his judgment in the case of **Kegone Sebina v Gantsi Hotel (Pty) Ltd t/a Kalahari Arms Hotel Civil Appeal No. 27 of 2003**. The validity of an application for summary judgment or the verifying affidavit can also be assailed by a defendant to resist a summary judgment without even filing an affidavit. See **Economy Investment** case (supra).

The formulation of the Plaintiff's claims which I have already commented upon, read together with its unreliable supporting evidence including its Statement of Invoice and the possible applicability of extinctive prescription, raise concerns about the validity of the Plaintiff's claims. It is obvious from my analysis of the Plaintiff's claims and the Defendant's Opposition Affidavit that I am not satisfied that the Plaintiff presented to the Judge a quo an unimpeachable case.

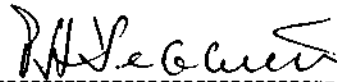
In my view, there was more than a reasonable possibility on all the facts before the Judge a quo, that an injustice may be done if summary judgment was granted. And this is so, even if it may be considered that the Defendant's Opposing Affidavit lacks the details that it should have.

I therefore come to the conclusion on the basis of the evidence before the Judge a quo and which I have already considered, that the Judge a quo clearly erred in not exercising her discretion in favour of the Defendant and in not refusing to grant summary judgment. As already held, the appeal must, for the reasons set out hereinabove, succeed.

DELIVERED IN OPEN COURT AT LOBATSE THIS ^{27th}..... DAY OF JULY 2004.

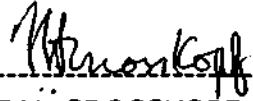


A.M. AKIWUMI
JUDGE OF APPEAL



P.H. TEBBUTT
JUDGE PRESIDENT

I agree,



F.H. GROSSKOPF
JUDGE OF APPEAL

I agree,