

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Civil Appeal No. 17/01
High Court Civil Case No. 1674/99

In the matter between:

WESTERN INDUSTRIAL ESTATES (PTY) LTD. **Appellant**

and

MAXI SAVE (PTY) LTD. **Respondent**

Mr. A. W. Modimo for the Appellant
Ms. M. Awuah for the Respondent

J U D G M E N T

CORAM: KORSAH J.A
LORD WEIR J.A
LORD SUTHERLAND J.A

KORSAH J.A.

The appellant was the plaintiff in the proceedings against the respondent in the High Court. On 8th December 1999, the appellant caused to be served on the respondent a Writ of Summons and Particulars of Claim. By those documents, the appellant claimed various sums alleged to be owing to it by the respondent as a result of certain breaches of a lease agreement.

A notice of appearance to defend was duly filed on the 26th January 2000. On 22nd February 2000, the respondent served on the appellant a letter of request, in terms of Order 20 Rule 20 of the High Court, calling upon the appellant to remove certain causes of complaint from the particulars within 14 days, failing which an application would be lodged to strike out the offending portions or an exception raised in respect thereof to have the claim against the respondent dismissed.

On 1 August 2000, the appellant filed in the Registry of the High Court amended particulars, presumably in response to the respondent's letter of request. The amended particulars was served on the respondent's attorney on 24th August 2000. The amended Particulars of Claim addressed some of the complaints raised in the respondent's letter of request aforementioned. The Respondent did not file any defence to the amended Particulars of Claim and the Appellant served on the Respondent a Notice of intention to Bar on 30 October 2000. As is the practice, the Appellant gave the Respondent 4 days within which to put its house in order. If the Respondent failed to do so the Appellant would file a copy of the Notice with the registrar to constitute a bar.

The Respondent's reaction to the threat to bar it was to serve on the Appellant another letter of request in terms of Order 20 Rule 20, on 3rd November 2000. Upon receipt of the Respondent's second letter of request on 3rd November 2000, the Appellant replied to the letter of request. That reply, in relevant part, reads:-

- "2. We find no substance in the complaints in the letter under reply. The only reasonable inference to be drawn from your client's latest move is that it is hell bent on employing dilatory tactics solely to frustrate a lawful claim. A conspectus of events bears testimony to that.
3. Be that as it may, the bar has been perfected. Your letter of 2nd November 2000 as are your previous letters of similar effect, has failed to provide an answer to our client's claim. We await payment of the amount owing together with interest as claimed in the Plaintiff's Particulars of Claim. If no payment is received by Friday 10th November 2000, we will, without further recourse to you, move an application on behalf of the Plaintiff for judgment to be entered against your client. (emphasis added)
4. We will await hearing from you."

The contents of the Notice of Intention to bar addressed to Nazneen Sadiq Khan and Associates, which was filed in the Registry of the High court to constitute a bar, in so far as material are as follows:-

"A copy of this notice was handed by me (or by P. Ncube a clerk in our employ.)

To N S K (partner of, or clerk in the employ of the above named firm) On 30th day of October 2000, at 10;45.

To: The Registrar of the High Court at Lobatse/Francistown.

The time limited by the Notice set out above having expired, we hereby bar the Defendant in terms thereof.

DATED AT GABORONE THIS 20 DAY OF OCTOBER 2000"

The Respondent's attorneys received the Appellant's attorneys letter, intimating that the Appellant had been barred, on 13 November 2000. A search at the Registry revealed that the Appellant had on 6 November 2000, filed a bar in the Registry of the High Court.

On 23 November 2000, the Respondent, presumably in pursuance of its Notice of request served on the Appellant on 3 November 2000, or the threat contained in the Appellant's letter received on 13 November 2000, filed its Notice of Exception and Defendant's Plea over.

On 4 December 2000, the Registrar with some reluctance, because of the Notice of request issued in terms of Order 20 rule 20, granted interlocutory judgment to the Appellant. On 7 December 2000 the Appellant filed a Notice for the assessment of damages. On 11 December 2000, the Respondent gave notice of opposition to the application for assessment of damages in which it prayed :

(a) for the removal of the bar in terms of Order 27 Rule 4; and

(b) for the rescission of the default judgment granted, in terms of Order 48

Rule 1.

The Respondent's grounds for upliftment of the bar was that it was erroneously perfected. On 15 December 2000, in the absence of the Respondent, the Appellant obtained an order (Kirby J) that the damages it was claiming from the Respondent should be assessed by the Registrar. The Respondent's application for upliftment of the bar and rescission of judgment was heard by Lesetedi J on 14 March 2001. He ordered that no further steps were to be taken in the matter pending the outcome of the Respondent's application filed on 11 December 2000.

On 30 March 2001, upon holding firstly that the bar filed by the Appellant was defective because it showed that it was perfected on the 20th day of October 2000, whereas the notice of intention to bar had been served on 30th day of October (2000); and secondly, that "the request issued by the defendant to the plaintiff on the 2nd day of November 2000 raised certain complaints and required certain particulars," and that "it was patently clear that many of the complaints raised were not frivolous;" Lesetedi J.

- (a) rescinded the interlocutory judgment granted against the Respondent on 4th December 2000.
- (b) ordered the upliftment of the bar; and
- (c) awarded costs in favour of the Respondent.

The Appellant's application for leave to appeal against the decision by Lesetedi J. to this Court went before Walia Ag. J, who dismissed it. The Learned Acting Judge in dismissing the application for leave to appeal, observed rightly, in my view, that

“as judgment was given in pursuance of the Notice of Intention to bar, it is important to peruse the relevant documentation. Walia Ag. J, held, after a perusal of the Notice to Bar, that it was indeed defective as was found by Lesetedi J.

The Appellant dissatisfied with the refusal of leave to appeal to this Court by Walia Ag. J, applied to this Court for leave to appeal as he was entitled to. At the hearing of the application, I pointed out the shortcomings of the application to counsel, who was holding brief for Mr. Modimo, and invited him to withdraw the application. Counsel said he had no instruction to withdraw the application for leave, but he would convey my views on the matter to Mr. Modimo. To obviate any further delay in the matter, I granted the application for leave to appeal in the hope that Mr. Modimo would see the light and withdraw the appeal on the set down date. Mr. Modimo despite my intimation that the prospects of success on appeal were not good, persisted in arguing the appeal.

By order 27 Rule 5 of the High Court Rules, “the Court may, upon an affidavit of merits, and other sufficient grounds, order the removal of a bar on such terms including costs as it deems just,” but the court also has inherent jurisdiction to raise the bar. Thus in Nathan (Pty) Ltd. v. All Metals (Pty) Ltd. 1961 (1) S.A. 297 at p300 B – D HENOCHSBERG J. said:

“Rule 48 of Order XI of the Natal Rules of Court, (cf Order 27 Rule 5 of Botswana High Court Rules) gives a person who has been barred from pleading the right to apply to Court upon sufficient cause being shown to

remove the bar upon such terms as the court may impose, and it has been held that in order to show sufficient cause within the meaning of that Rule, it is necessary to allege on oath that the defendant has a defence to the action. That Rule has, I think, application also where a defendant, having been duly served with a summons, has not entered appearance within the time fixed by such summons. At any rate the Court has an inherent jurisdiction to raise the bar notwithstanding that the Rules of Court may make no provision therefor. In any such application, if the applicant can show good cause for the indulgence of the Court which is asked, the court will come to his assistance and remove the bar unless it appears that he has recklessly disregarded his obligations under the Rules of Court, or the case appears to be a hopeless one, or the court is convinced that he does not really intend to proceed. The court exercises its discretion according to the circumstances of each case, and generally leans towards the granting of relief where it is satisfied that the defendant is bona fide in his belief that he has a good defence and that his delay is reasonably excusable,"

The Respondent successfully moved the Court a quo, upon an affidavit of merits, to lift the bar and set the default judgment aside. Lesetedi J. held that the bar was defective. The Notice of Intention to bar was dated 20th October 2000. The second page of the Notice of Intention to Bar bears an endorsement that it was served on the respondent's attorneys on 30 October 2000.

A further endorsement then appears on the same page as follows;

“The time limited by the notice set out above having expired we hereby bar the defendant in terms hereof.”

The date appearing under this endorsement is 20th October 2000. It would appear by this Notice that the Respondent was barred on 20 October 2000, before the Notice of Intention to bar was served on its attorneys on 30 October.

Mr. Modimo has contended that a bar is perfected when it is filed at the registry and that the stamp of the High Court Registry on the Notice of Intention to bar shows that the bar was filed on 6th November 2000. This argument does not cure the defect in the Notice to bar. Order 27 Rule 2 provides that:-

“On the expiry of the time limited by the notice (to bar), not being less than the time allowed in these Rules for the particular case, the party who has served the notice may bar the opposite party by filing a copy of the notice, duly completed, at the Registry.”

I understand this provision to mean that the date appearing under the endorsement that the time limited by the notice had expired ought to be a date four days after the date of service on the Respondent or his attorney had elapsed. Walia Ag. J. observed that in the absence of an explanation in the record as to this obvious discrepancy, the learned Judge’s finding that the bar was defective cannot be faulted. I am in complete agreement with that observation. The terms of a Notice to bar, having important procedural consequences, require close scrutiny by

the Court in order to determine its validity. Mr. Modimo tried to explain from the bar of the court how the defect might have occurred, but he was not the one who completed the notice and we cannot hear evidence from the Bar.

Lesetedi J. in whom was reposed the discretion to lift the bar, noted that the Respondent 's letter of request which was served on the Appellant was not frivolous. In his view, there were a number of contradictions in Appellant's particulars which at the very least may well have led to certain portions of the particulars of claim liable to be struck out as vague and embarrassing. In other words the Respondent was serious about defending the action, subject to the complaints to the particulars being rectified.

The principle has long been established that an Appellate Court will not interfere with the exercise of discretion reposed in a lower court unless it comes to the conclusion that "the court a quo has not exercised its discretion judicially, in that it has exercised its discretion capriciously, or upon a wrong principle, has not brought its unbiased judgment to bear on the question, or has not acted for substantial reason" Ex parte Neethling and Ors. 1951 (4) SA 331 (AD) per Greenberg J.A. at 335 D –E. The trial court cannot, in the exercise of its discretion in this case, be faulted on any of the above grounds.

I am of the view that the Respondent showed good and sufficient cause for seeking the indulgence of the Court in lifting the bar and setting aside the default judgment.

"Generally, a refusal to agree to the removal of a bar will not lead to an award of costs against the party refusing, but unreasonable opposition to an application for removal of a bar will accordingly affect the order as to costs."

Herbstein and Van Winsen: The Practice of the Supreme Court of South Africa – 4th Edition pp 552-3.

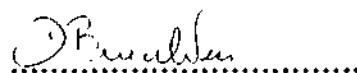
The facts of this case give the impression that the Appellant was trying to steal a march on the respondent and, as Lesetedi J. so aptly expressed it, "A plaintiff who flouts the Rules of Court in a rush to obtain judgment does so at his own peril. He not only risks his ill-gotten judgment being set aside but he also risks, as in this case, bearing the costs for an innocent party who is then put out of pocket in trying to set aside such judgment." I find that the Appellant has been most unreasonable in persisting that the bar ought not to be removed.

Accordingly the appeal is dismissed with costs.

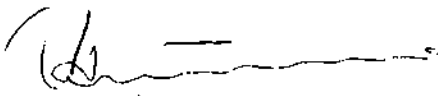
DELIVERED IN OPEN COURT THIS 30TH DAY OF JANUARY 2002.


K/ R. A. KORSAH
JUDGE OF APPEAL

I agree


LORD WEIR
JUDGE OF APPEAL

I agree


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LORD SUTHERLAND
JUDGE OF APPEAL