

**IN THE COURT OF APPEAL FOR THE REPUBLIC OF
BOTSWANA HELD AT GABORONE**

COURT OF APPEAL CIVIL APPEAL NO. CACGB-034-12
HIGH COURT CIVIL CASE NO. CVHFT-000313-10

In the matter between:

Zazi Nabo (Pty) Ltd
Mahomed Farooq Ebrahim

1st Appellant
2nd Appellant

and

National Development Bank

Respondent

For the first appellant: Mr. V. Chikole

Second Appellant in person

For the respondent: Mr. Attorney B. D. Leburu (with Ms. Sere)

JUDGMENT

CORAM: KIRBY JP
FOXCROFT JA
GAONGALELWE JA

FOXCROFT JA

1. On 12 May 2011, Letsididi J granted summary judgment in the sum claimed by the respondent (then plaintiff) of P1,313,301.15 with interest, further relief and costs on the attorney and client scale. The order reflects that it was made upon hearing the respective attorneys for the parties,

Messrs “R. Lekorwe for the Plaintiff and T. Masuku for the Defendants”.

2. The appellants filed a Notice of Appeal on 24 June 2011 against the order of 12 May 2011. In essence, the grounds of appeal were directed to the High Court’s failure to find in favour of appellants on certain technical objections raised, and the granting of judgment despite the “triable issue” raised by the appellants in the High Court.
3. This Notice of Appeal was filed despite the recording in the summary judgment order that judgment was granted after hearing both attorneys acting in the matter, and more importantly, the handwritten notes of Letsididi J at p.74 of the appeal recording counsel as informing the Court that:

“I have discussed with my colleague. By consent may order be granted except para (d)”.

There follow the words:

“Ct. (By Consent)

Order is granted in terms of Paragraphs (a) (b) (c) and (e) of the Particulars of Claim.”

4. Mr. Chikole, a director of the first appellant and former paralegal in the same law firm as Mr. T. Masuku (Furusa and Company), appeared for the first appellant in the capacity of a director of the first appellant. No objection was taken to this appearance. He submitted that the respondent had raised the issue that summary judgment had been ordered by consent. It seemed that he had not seen the handwritten document referred to above reflecting the judgment by consent. Mr. Leburu, for the respondent, provided him with a copy of page 74 of the record which records the judgment by consent. Mr. Chikole was given time to consult with Mr. Masuku and, after an adjournment for this purpose, he informed us that Mr. Masuku's response was that he would need to see the original record.
5. Mr. Chikole was presumably referring to the Heads of Argument of the respondent when he said that the point had been raised by the respondent. The respondent's Heads of Argument filed on 4 January 2013 and presumably served on appellants before their Heads dated 10 January 2013 were prepared, did indeed take the point that judgment had been taken by consent of all the parties with

the appellants being represented by Mr. T. Masuku. Understandably the respondent considered that the appeal was against the consent order.

6. It was put to Mr. Chikole that it must have come as a surprise to him when he received respondent's Heads a week before the appeal that judgment had been granted by consent. His response was that he had spoken to Mr. Masuku about this "last week". All that Mr. Masuku had said was that he would need to see the original document. It is beyond belief that Mr. Chikole would have made no attempt to obtain a copy of the document referred to above (Record p.74) before coming to court on the 17th January. It is also highly unlikely that he would have received the same answer from Mr. Masuku on the morning of the hearing as he did "last week" as he put it.

His further complaint that his company had not been "consulted" about any consent to judgment cannot assist the company even if the complaint is genuine. A properly instructed attorney's consent to judgment on behalf of a client is binding on the client whether or not specific

instructions to consent to a judgment were obtained. If an attorney were to consent to a judgment without any authority to do so from his client, the judgment would still stand, leaving the client to sue his attorney for any damages sustained. Mr. Chikole did not deny the authority of Mr. Masuku to act for the first appellant, claiming only that the appellant company had not been consulted on the matter.

7. On the merits of the defence raised, Mr. Chikole did not dispute that money was owing to the respondent, closing his submission by saying that the “money owing would probably be paid today or tomorrow”. His only attempt at a defence to the claim was that it had been premature. Given that the repayment of the loan to the first appellant was to commence a year after the drawdown on 17 July 2008, no explanation was provided for the fact that by September 2010, when the summons was issued, no payment had been made of money owing. In my view, no *bona fide* defence was raised in this matter and the High Court, even without the consent of the parties, would have been entitled to grant summary judgment. It is plain that what the

appellants were attempting to achieve was a delay in repayment of money lent to the first appellant and secured by the second appellant. In that they have had much success.

8. In any event, when parties consent to judgment, the order is generally unappealable. On the face of it, the judgment by consent given in this matter was properly obtained. There is certainly not even a suggestion by Mr. Chikole that consent was given by first appellant's attorney dishonestly, or that fraud somehow vitiated what the record shows happened.
9. There is accordingly no merit in this appeal and it is dismissed with costs. As for costs, they were awarded on the attorney and client scale in the High Court and I see no reason to make a different order on appeal. The appellants have persisted in an unsustainable defence and in the face of a judgment by consent properly obtained against them. Mr. Leburu moved for attorney and own client costs in his Heads of Argument. In my view, and it has been so held in

South Africa, there is no generic difference between attorney and client costs, and attorney and own client costs.

See: **LAW SOCIETY OF THE CAPE OF GOOD HOPE v. WINDVOGEL 1996 (1) SA 1171 (C) 1176;**

THOROUGHbred BREEDERS' ASSOCIATION v. PRICE WATERHOUSE 2001 (4) SA 551 (SCA) 596

HERBSTEIN & VAN WINSEN: CIVIL PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA, Fifth Edition at 975.

10. Accordingly, the appeal is dismissed with costs, such costs to be taxed on the attorney and client scale.

DELIVERED IN OPEN COURT AT GABORONE THIS 1st DAY OF FEBRUARY 2013.

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J. G. FOXCROFT
JUSTICE OF APPEAL

I agree

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I.S. KIRBY
JUDGE PRESIDENT

I agree

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M. S. GAONGALELWE
JUSTICE OF APPEAL