SEBEREKO AND ANOTHER v CAPITAL BANK LTD IN RE: CAPITAL BANK LTD v PROSPERITY INVESTMENTS PTY LTD

Citation: 2012 2 BLR 128 HC

Court: High Court, Village Court

Case No: Civ Case No 1687 of 2011

Judge: Garekwe J

Judgement Date: 28 March 2012

Counsel: T Baloi for the applicants.rnMM Maswabi for the respondent.

Flynote

Practice and procedure—Applications and motions—Affidavit—Annexures—Requirement that annexures be initialled—Meaning of initialling—Rules of the HighCourt (Cap 04:02) (Sub Leg), Order 13, rule 16.

Headnote

n an application for the rescission of a default judgment, the respondent argued that the applicant's founding affidavit should be expunged as the annexures to the affidavits had not been initialled in compliance with Order 13 rule 16 of the Rules of the High Court (Cap 04:02)(Sub Leg). The applicantcontended that the annexures were initialled as they bore the words 'Annexure 1' to 'Annexure 4'on each respective document.Held: (1) There was clearly a difference between labelling an annexure and initialling it.(2) Each annexure in fact had to contain both the label and the initials. One did not and could not replace the other.(3) In the present case however as the information contained in the annexures was already on record in other documents the affidavits did not need to be expunged.

Case Information

Cases referred to:Big Game Development Company (Botswana) (Pty) Ltd v De Kock[1997] BLR 301Late Our Properties (Pty) Ltd and Another v First National Bank of Botswana Ltd and Another[1997] BLR 618Letsoalo v Lesuma Trading Co (Pty) Ltd and Another[1993] BLR 214Pinkworth (Pty) Ltd v Phoma Enterprises (Pty) Ltd; In Re Pinkworth (Pty) Ltd v Phoma Enterprises (Pty) Ltd[2007] 1 BLR 21Sesana and Others v The Attorney-General[2002] 1 BLR 452URGENT application for the rescission of a default judgment. The facts are sufficiently stated in the judgment.T Baloifor the applicants.MM Maswabifor the respondent.

Judgement

GAREKWE J:The applicants, Khumo Sebereko and Prosperity Investments (Pty) Ltd filed an urgent application with court wherein they, through their draft order sought the following orders:2012 (2) BLR p129GAREKWE J'1. That this matter is urgent and Rules of Court relating to time frames and service of douments and processes may be dispensed with.2. A stay of judgment/orders of the Court in case No. CVHLB-001687-11 are hereby stayed [sic] pending resolution of the matter in due course; alternatively3. Costs of suit.'When the matter was called, the applicants sought an amendment of their draft order to include para 3 of the notice of motion, to wit:'3. Recission of orders of the Court in the afore-stated case.'There was no objection to the application for amendment. This meanstherefore that what is now para 3 in the draft order will become para 4. The respondent opposed the urgent application by filing points in limine and an answering affidavit.The parties agreed to argue both points in limine and the substantive grounds and at the close of their arguments I dismissed the urgent application in respectof the second applicant and rescinded the default judgment of 5 December 2011 made against the first applicant. I further ordered the second applicant to pay three quarters of the costs of the application. I reserved my reasons to a date to be announced. The said reasons follow below.The respondent raised four points in limine, to wit:(a) The matter is not urgent.(b) The founding affidavit of Khumo Sebereko is fatally defective in that the annexures thereto are not initialled by the deponent, Khumo Sebereko and the commissioner of oaths.(c) In the event that the annexures to the founding affidavit are struck off, the said affidavit is fatally defective in that it refers to annexures that are not attached to it.(d) That the applicants' papers do not disclose that the first applicant or his attorneys have any mandate or authority to act for the second applicant in that no resolution of the second applicant has been filed. Moreover, the power of attorney filed of record only authorises the first applicant's attorney to act for the first applicant and not the second applicant.Points in limineUninitialled annexuresIt is common cause that all the four annexures attached to the founding affidavit are not initialled either by the deponent or

the commissioner of oaths. These annexures are the certificate of incorporation, return of service (for theservice of the originating summons), the appearance to defend and the notice of sale in execution.Order 13 rule 16 of the Rules of the High Court (Cap 04:02) (Sub leg) provides:'16. Every exhibit or annexure referred to in an affidavit shall be initialed by the deponent and the commissioner or officer before whom the affidavit is sworn on the date it is sworn to.'2012 (2) BLR p130GAREKWE JThe respondent has argued that unlike Order 13 rule 15, the court has nopower to condone non-compliance with the requirements of rule 16, which requirements are peremptory. (Sesana and Others v The Attorney-General[2002] 1 BLR 452).In their defence, the applicants first argued that their annexures to the founding affidavit are initialled. This, counsel for the applicants argued, is evidenced by the words 'Annexure 1 to Annexure 4' on each respective document attached.I must straight away dismiss the applicants' argument on this point. There is clearly a difference between labelling an annexure and initialling same. Each annexure in fact has to contain both the label and the initials. One does not and cannot replace the other. Labelling is normally indicated by the word 'annexure' followed by either an alphabet or letter (for example A) or a number (for example 1) or a combination of the two (for example A1). Under no circumstances doesthis translate to initialling a document or annexure as envisaged by Order 13 rule 16. In my view therefore, the applicants were either too ignorant or clutching at straws to justify the obvious default.The applicants have however argued in the alternative that in any event most of the annexures (that is, annexs KS2 and 3) are documents which are already on record. As such, even if expunged, the court will still have regard to themin perusing the file since this is an interlocutory application. I do agree with the applicants on this point and the respondent's attorney also conceded that the applicants' affidavit will not be affected by the expunging of these two annexures.Though I recognise that the other two annexures could be expunged I do not see the need to do so, since my decision to dismiss the application wasnot premised on this point. The same will also apply to the third point which is inter-linked to the one discussed above. It is not necessary for me to discuss same any further.Mandate and authorityThe respondent's contention on this point is that the first applicant has noauthority to depose to an affidavit on behalf of the second applicant, due to lack of mandate. In addition, no resolution has been filed at any stage of the entire proceedings. The first applicant's averment at para 7 of the founding affidavit to the effect that he has authority to depone to the affidavit on the second applicant's behalf is misplaced, unjustified and untrue.The applicants have sought to argue that it is inconceivable for the secondapplicant to be expected to file a resolution when the first applicant is its sole director and shareholder. The applicants contended this despite their concession that the second applicant is a private company as contemplated by Order 4 rule 4(2) of the Rules of the High Court. This particular rule mandates such type of company to file a resolution and power of attorney authorising inter alia, a director to institute or defend court proceedings.In the absence of any exception to the rule laid by the order cited above, I cannot agree with the applicants' contention. Without a resolution mandating the first applicant to instruct counsel to move this application on behalf of the second applicant the attorney is definitely improperly before court. In fact, the second applicant is not or should not be part of this urgent application. This point, amongst others, is one of the reasons I dismissed the urgent application2012 (2) BLR p131GAREKWE Jpurportedly filed on behalf of or by the second applicant. I will however, ex abundante cautela, consider other reasons for the dismissal.UrgencyThe respondent contended that this application is not urgent due to the fact that the applicants have not complied with the requirements of Order 12 rule 12(2).They have not set forth explicitly circumstances rendering the matter urgent, they have failed to state when they became aware of the sale in execution, they have not stated why the application was not brought on time immediately after they became aware of the sale in execution.The applicants at para 17 of the founding affidavit aver that the matter is urgent as the first applicant stands to lose his immovable property through theimpending sale in execution.As argued by the respondent, the documents before court do not state the date when the applicants first became aware of the sale in execution. What is clear though is the fact that the notice of motion was signed on 6 February 2012, followed by the founding affidavit commissioned on 23 February and the rest of the documents which bear the date of 24 February 2012. The last date is the oneon which this application was filed with court. No explanation has been given for the lapse of time between 6 February 2012 and 24 February 2012.Our courts have time and again dealt with the issue of urgency as raised by the respondent and I see no need to regurgitate the well founded principles on urgency. In my view, this application falls way short of meeting the requirements of Order 12 rule 12 as elaborated in the many decisions of thiscourt and the Court of Appeal (seeLate Our Properties (Pty) Ltd and Another v First National Bank of Botswana (Pty) Ltd and Another[1997] BLR 618;Big Game Development Company (Botswana) (Pty) Ltd v De Kock[1997] BLR 301;Letsoalo v Lesuma Trading Company (Pty) Ltd and Another[1993] BLR 214;Pinkworth (Pty) Ltd v Phoma Enterprises (Pty) Ltd In Re: Pinkworth (Pty) Ltd v Phoma Enterprise (Pty) Ltd[2007] 1 BLR 21). This therefore, convincedme to dismiss the application. Having said that I will briefly consider arguments made in respect of the substantive application.Substantive applicationThe applicants' main contention is that they entered appearance to defend the main action such that any default judgment granted could only have been sogranted erroneously.From the documents filed of record, the second applicant was served with the writ of summons on 22 October through the first applicant. In other words, the first applicant received process on behalf of the second applicant on the date in question.The return of service filed however, says nothing about service on the firstapplicant. For all intends and purposes therefore, the first applicant was never served with the originating process and this is the sole reason I granted an order rescinding the default judgment granted against him.Coming back to the second applicant, following service of summons on this applicant, the respondent filed an application for default judgment with this court on 11 November 2011, a day after expiration of the dies (that is, time allowed for a defendant to make its intent to defend the action known).2012 (2) BLR p132GAREKWE JWhile the respondent filed its application for default judgment at 8am, the firstapplicant filed an appearance to defend and a power of attorney at 11.30am of the same day.Though the first applicant filed his appearance to defend out of time, I have already ruled that he was never served with the summons and clearly became aware of such process by virtue of receiving process on behalf of the second applicant. Nothing therefore takes the first applicant's late filingof his appearance to defend any further. Neither does this justify an otherwise erroneous judgment granted against him for

lack of service.In so far as the second applicant is concerned however, no appearance to defend, resolution or power of attorney were ever filed by this applicant despite being the applicant who was served with the originating process.The contention therefore that the default judgment granted against thisapplicant was erroneous is unmeritorious. The second applicant never defended or showed intent to defend the proceedings filed against it.Even if I were to give second applicant a benefit of doubt, this applicant has not afforded the court reasons for its failure to enter appearance, neither has it properly ventilated its case for rescission of judgment. The attorneywho appeared for the applicants also had no mandate to appear for the second applicant. He also failed to satisfy the requirements of a rescission application.The only submission made was that the amount claimed is way too high considering the fact that then respondent only advanced the sum of P200 000 to the second applicant. The amount claimed is manifestly unfair, counsel for the applicant argued. This argument was however shot down by the respondent'scontention that the second applicant was not just advanced the sum of P200 000 but was given an overdraft facility of P125 000 in addition. Both these figures are pleaded at paras 7.2 and 7.3 of the respondent's particulars of claim. Additionally, both facilities attracted an interest rate of 23.5 per cent on a daily balance compounded monthly.I therefore found no strength in the applicants' argument on this point, moreso that there is no contention by this applicant that he has in fact fully paid or that it is excused by some legal and lawful event from paying.I want to note something I have observed which is a serious contradiction in the applicants' submissions. At the time second applicant applied for a loan from the respondent, it prepared a resolution of the company and filed same with the respondent. This seriously contradicts the applicant's current assertionthat it is inconceivable for the company to prepare and file a resolution whilst the first applicant is its sole director and shareholder.Owing to all the above, I found no merit in second applicant's application and dismissed it accordingly while I granted an order for rescission of the default judgment granted against the first applicant in favour of such applicant owing to the reasons discussed fully above.In the result and just to reaffirm my earlier decision the following orders are hereby issued:(a) The urgent application is dismissed in respect of the second applicant and default judgment and writs of execution dated 5 December 2011 are confirmed.2012 (2) BLR p133GAREKWE J(b) Default judgment of 5 December 2011 is rescinded in favour of the first applicant.(c) The second applicant is to pay three quarters of the costs of this application.Application dismissed.2012 (2) BLR p133