

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Civil Appeal No. 10 of 2004
High Court Civil Case No. 2053 of 2003

In the matter between

KWENENG LAND BOARD

APPELLANT

AND

DANIEL SELAKI
PAPHANE SEKGOME

1ST RESPONDENT
2ND RESPONDENT

Mr. K. N. Monthe for the Appellant
Mr. G. Kanjabanga for the 2nd Respondent

J U D G M E N T

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

KORSAH J.A.

This is an appeal against the judgment of Chatikobo J. delivered in the High Court, Lobatse on 7 May 2004, refusing the grant of summary judgment to the appellant and awarding costs to the respondent. The appellant appeals to this Court on several grounds without complying

with the provisions of section 11 of the Court of Appeal Act [Cap. 04:01]

which recites that:-

- “11 subject to section 10, an appeal shall be from any decision of the High Court to the Court of Appeal with the leave of the High Court, or, if such leave has been refused, with the leave of the Court of Appeal, in the following cases –
- (a) from any interlocutory order;
 - (b) from any order relating to costs only;
 - (c) from any order made with the consent of the parties;
 - (d) from any decision in any civil or criminal proceedings given on appeal from any other Court to the High Court;
 - (e) in any case where express provision for such appeal is made in any written law.”

The above section makes it patent that the granting of summary judgment is a final judgment since it determines the rights of the parties and the only way to upset such a decision is on appeal. On the other hand, the refusal of a summary judgment is thus a simple interlocutory order which is not appealable, without leave, because it did not directly bear upon or dispose of the issues in the action or irreparably anticipate or preclude any of the reliefs which must be given at the hearing.

In Polliack & Co. Ltd v. Pennick 1936 TPD 167 the headnote reads:-

“A magistrate refused to grant summary judgment, finding that the defendant had a prima facie defence. The grounds upon which the magistrate based his finding were such that, if correct, they would dispose of the action at the trial.

Held, on appeal against such refusal, that the refusal was an interlocutory order against which no appeal lay.”

Greenberg J. said in the final paragraph of the judgment in that case –

“But in the present case the only point that has been decided is whether the defendant should have leave to defend and this in my opinion does not decide the real issue in the case.”

Therefore, the preliminary objection taken by counsel for respondent that no appeal lies, since the order was interlocutory was, in the circumstances upheld.

Again, Schreiner J.A. cites with approval of Amissah J.P. and Bizos J.A.

in De Beers Botswana v. Diphoko 1993 B.L.R 237 at 242

“the distinction made by the Appellate Division of South Africa in Zweni v. Minister of Law and Order 1993 (1) SA 523(A); between a ruling and a judgment and order which may be appealed against with the leave of the court hearing the matter or, if this is refused, where leave is granted to a petition of the Chief Justice.”

At p. 532 of the report Harms A.J.A. says:-

“A judgment or order is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible to alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (*Van Streepen & Germs (Pty) Ltd.* case supra at 586I-587B; *Marsay v. Dilley* 1992 (3) S.A. 944 (A) 962C-F). The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief

(Willis Faber Enthoven (Pty) Ltd. v. Receiver of Revenue and Another 1992 (4) S.A. 202).”

The learned judge summarises the nature of a non-appealable decision at first instance at p. 536 as follows:

“In the light of these tests and in view of the fact that a ruling is the antithesis of a judgment or order, it appears to me that, generally speaking a non-appealable decision (ruling) is a decision which is not final (because the Court of first instance is entitled to alter it), not definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings...”

The conclusion is inevitable that under our rules above cited the refusal to grant summary judgment is an interlocutory order and no interlocutory order shall be subject to appeal save with the leave of the Court by which judgment was given or the order was made, or with the leave of the Court of Appeal.

Accordingly, for non compliance with section 11 of the Court of Appeal Act [Cap. 04:01] no appeal is extant before this Court and the matter is struck off the roll.

Regarding the question of costs, if either counsel had been vigilant and paid heed to the Rules of Court by which their cases are superintended they would, no doubt, have saved their clients considerably. Since they are both equally to blame, I think it only just and equitable that costs

should be awarded to the successful party, who has been dragged to court for nothing.

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


K. R. A. KORSAH
JUDGE OF APPEAL

I AGREE


LORD R. I. SUTHERLAND
JUDGE OF APPEAL

I AGREE


S. A. MOORE
JUDGE OF APPEAL