C of A (CIV) 17/92

In the Appeal of :

INSTITUTE OF DEVELOPMENT MANAGEMENT APPELLANT

and

BANGANI B. TSOTSI RESPONDENT

Held at Maseru

Coram: Mahomed J.P.
Steyn J. A.
Browde J. A.

JUDGMENT

Steyn J.A.

In the Court below Appellants defence was struck out because of his failure to comply with a Court Order compelling discovery. It appeals against this Order.

The relevant facts are the following. The pleadings in this matter were closed on the 2nd of August. 1991.

On the 8th of October 1991 Respondent served Appellant with a notice to discover. Appellant failed to comply with this request.

On March 17 1992 another notice of discovery was served on Appellant again with no result.

On June 23 1992 Respondent wrote a letter to Appellant's Attorneys requesting the immediate delivery of Appellants discovery affidavit. On 21st July Respondents both filed of record and served on Appellant a notice to compel it to deliver its discovery affidavit. Appellant gave notice of an intention to oppose the application. On 24th July, however Respondent made an application in chamber for an Order on the Appellant (a) to deliver its affidavit on or before 30th July 1992 failing which

(b) Application would be made to strike out its defence in terms of Rule 34 (a) of the Rules of Court.

Whilst dispensing with the normal rules in regard to service of process the presiding Judge ordered that the papers be served on the Appellant and that the application would be heard on August

3. 1992.

On the postponed date, in open Court and with knowledge of applicants Counsel the application was granted. The order specifically stated that failure to comply might result in the striking out of its defence.

Once again Appellant failed to respond, giving no reasons for such failure.

On August 14 the parties appeared before Mr. Justice Lehohla in open Court. Appellant was represented by Mr. Nathane who filed an affidavit in the following terms:

"3

On the 3rd August, 1992 His Lordship Justice Kheola ordered Defendant to file an affidavit of discovery on or before the 6th August, 1992.

An affidavit of discovery had in fact been prepared and

sent to MR. EPHRAIM LEPETU SETSWAELO, the Regional Director of Defendant, who is based in Botswana, for settling same as far back as June, 1992. I annex a copy of same hereto and mark it "HN1".

5

I have on a number of occasions made reminders to Defendant to have same settled soonest and returned to us for filing in Court. To-date the affidavit has not been returned to us despite our supplications.

6

I want to bring it to the attention of this Honourable Court that failure to comply with its order is not wilful but we are unable to comply with same. I therefore pray this Honourable Court to extend the time limit within which the affidavit must be filed.

7

I make this affidavit in opposition of the prayer sought."

Mr. Justice Lehohla after hearing argument granted the order striking out Appellants defence.

The rule 34 (a) provides as follows:

(9) If any party fails to give discovery as aforesaid, or having been served with a notice under sub-rule (8) omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that sub-rule, the party desiring discovery or inspection may apply to court which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence."

Both before us as well as in the Court below Appellant sought to attack the validity of the Order of August 3 1992 directing Appellant to make discovery. He did so on the ground that there was pending an application for an amendment to the further particulars filed by Respondent. Counsel for Respondent pointed to the fact that in the event the amendment was granted by Kheola J on August 3 1992, also that the relevant order was interlocutory and no appeal lay against it. Moreover, no application for recission was made.

An overriding consideration in my view is that the amendments sought were both formal, remedying an obvious error

furnished by Appellant, reinforced our view that the Court a quo was correct in finding that it was obliged to exercise its discretion in favour of striking out the defence.

The step taken by the Court was indeed the invocation of an extreme remedy. The Courts have held that such an order should only be resorted to if the failure to comply was due to the contumacy of the party in question.

In Wilson v Die Afrikaanse Pers Publikasies (Edms) Bpk. 1971 (3) S.A. 455 at 463, the Court per Phillips A. J. held that:

> "this grave step will be resorted to only if the Court considers that a defendant has deliberately and contemptuously disobeyed its order ...." (In the cited case, a failure to deliver further particulars.)

On the facts in the instant case and in our judgment the Appellant was clearly in contempt and his conduct cannot, in the absence of any explanation, be construed as anything other than a deliberate refusal to comply with the Court's order.

The Court a quo cannot in the circumstances of this case be faulted in exercising its discretion to strike out applicant's defence.

For these reasons the appeal is dismissed with costs.

Signed :

J. H. STEYN
JUDGE OF APPEAL

I agree :

I. Mahomed
PRESIDENT OF APPEAL

I agree :

J. BROWDE
JUDGE OF APPEAL