

**Galt International v Krishna Mart & Co (Pty) Ltd
(2005) SLR 47**

France BONTE with Serge ROUILLON for the Plaintiff
Charles LUCAS for the Defendant

The Appeal resulted in the Court ordering the Appellant to pay security and for records to be prepared within 30 days

Ruling on an application for a new trial delivered on 21 November 2005 by:

PERERA J: This is an application filed by the Defendant Company under Section 194 of the Code of Civil Procedure for a new trial on the ground that it is necessary "for the ends of justice." The Plaintiff Company filed this action on 22 November 2004, claiming a sum of SA Rand, 1,098,430.49 together with interest at 10% as at 1 September 2004 and continuing. On 15 February 2005, the first date fixed for the Defendant to appear and answer the claim, the Defendant was represented by Mr C Lucas Attorney at law who obtained time till 24 May 2005 to file a defence. On that day, Counsel for the Defendant filed a request for further and better particulars, and thereupon time was granted till 12 July 2005 to file a defence. In the meantime the Plaintiff filed a reply to that request on 31 May 2005. On 12 July 2005, Miss L Pool Attorney at Law stood in for Mr C Lucas and obtained further time to file the defence on 29 September 2005. On that day, once again Miss Pool stood in for Mr Lucas and sought further time. No reasons were given for Mr Lucas' absence or the cause for not filing the defence. Counsel for the Plaintiff vehemently objected to granting of further time as extensions had been given on three previous occasions since 15 July 2005. Thereupon Miss Pool stated that she had no further instructions. Karunakaran J then made order that as the Defendant had defaulted appearance as well as failed to file the defence, the case be fixed for ex parte hearing on 5 October 2005 at 9.00 a.m. with notice to the Defendant. On that day, Mr Lucas appeared for the Defendant and filed a defence dated 5 October 2005 and a medical certificate dated 28 September 2005 wherein he had been granted medical leave from that day till 1 October 2005. Although he submitted to Court that Miss Pool has on the previous day informed the Court that he was sick, the proceedings do not indicate that. Mr Lucas then informed Court that the delay in filing the defence was because the parties were negotiating a settlement.

Karunakaran J thereupon explained to Mr Brent Bonnes, the representative of the Defendant Company of the possibility of further delay if an ex parte judgment is entered and subsequently an application to set it aside is filed. However, he and his Counsel Mr Rouillon insisted on an ex parte hearing. Mr Lucas then told Court:

My lord, I will leave it in your hands, procedurally it is in the Court's hand. If they insist my lord, I did not file a motion, I thought it would have been too formal given the nature of the relation between the two parties. As it is now, it is soured up so much and if they move for ex parte, I have no valid motion per

se before the Court today. I will just allow it to go through and then I will make the application, which is necessary.

The Court thereupon stated "if they insist, I will proceed and give judgment." Mr Lucas then left the Court, and the case was heard ex parte upon hearing the evidence of Mr Bonnes. The Plaintiff company was awarded SA Rand 1,098,430.49 with interest and costs as prayed for.

On the same day the Plaintiff applied for attachment under Section 247 of the Code of Civil Procedure, of monies of the Defendant Company in named accounts at the Bank of Baroda, the Mauritius Commercial bank and Barclays bank, three immovable properties and six motor vehicles. The Court issued an order of attachment on 6 October 2005 only in respect of the bank accounts and the motor vehicles, as Section 247 did not apply to attachment of immovable properties. The order was made expeditiously on the application of the Plaintiff who in a supporting affidavit had averred that he, as a non resident was leaving the country on 8 October 2005, and as there was an application for winding up of the Defendant company filed by Opportunity International General Trading LLC in case no. 117/06 pending before this Court. If the application for attachment is considered as the commencement of the execution process; although Section 225 provides that such application should be made 48 hours after the default of payment, yet the proviso empowers this Court on grounds of urgent necessity to direct that a judgment or order be enforced by execution "immediately after judgment has been given and before the costs incurred in the suit can be ascertained by taxation."

On the application made by the Plaintiff to validate the attachment, it was disclosed that the Defendant Company had the follow bank balances:

Mauritius Commercial Bank –
credit balance - R9,714-71
Barclays Bank
Bank of Baroda A/C. 01-536406-01
AIC. 01-386406-01
(AIC number not stated)

Mr F Bonte and Mr Rouillon who represented the Defendant company perused the certificates issued by the respective banks, but did not observe that the certificate from the Baroda bank, without indicating the account number had disclosed a debit balance of R995,334.89 rather than a credit balance.

The attention of the Court was not drawn to the actual status of that account, and hence when the order of attachment was validated, the Court acted per incuriam in respect of the account with bank of Baroda.

Be that as it may, the present application for a new trial was filed on 11 October 2005.

The Plaintiff Company has filed objections to the granting of a new trial, on the following grounds

1. That the application for a new trial under Section 194 was an incorrect procedure, and that in the circumstances of the case, an application ought to have been made under Section 69. It is further averred that the application fails to satisfy any of the 194, 195 and 197 of the Code of Civil Procedure.
2. That the Defendant is using delaying and deceptive tactics to frustrate the Plaintiff's claim and is acting in bad faith and in disrespect of the Court by diverting his money in the bank to other undisclosed accounts and in settling other creditors.
3. That the Defendant is moving stocks and other movable assets into a new company called "Parameshwari Traders (Pty) Ltd."
4. That there is a winding up application filed against the company, and several other local creditors, and hence the Defendant is seeking to frustrate the Plaintiff's claim as a foreign trader.

Firstly, on 5 October 2005, when the case was called for ex parte hearing there was appearance on behalf of the Defendant company. In fact a statement of defence was also filed the same day, albeit without the leave of Court.

In the case of *Biancardi v Electronic Alarm SA* (1975) SLR 193, the circumstances were somewhat similar. In an application under Section 69 of the Code of Civil Procedure to set aside an ex parte judgment, the Court held that:

Section 69 can only apply to cases where the party invoking it has not appeared on the day fixed in the summons for appearance before Court under Section 63. As the Defendant had duly appeared before the Court through the Curator of Vacate Estates on that day, Section 69 had no application and could not be relied upon by the Defendant, and the only procedure – apart from appeal – upon to it was an application for a new trial under Section 193.

The Defendant thereupon made an application for a new trial under Section 193, but the Court on a consideration of the circumstances in which the default occurred, refused the application.

In the present case, the proceedings had passed the stage envisaged in Section 63. The Defendant had appeared in Court through Counsel and obtained adjournments to file a statement of defence. They never failed to appear on any of those adjourned dates. After the case was fixed for ex-parte hearing on 5 October 2005, the Defendant was represented by Counsel who filed a statement of defence the same day. As the case had been fixed for ex parte hearing, the Defendant ought to have first sought to

have that order set aside and thereafter sought leave to file the defence. The proceedings of that day show that Mr Lucas came ready to file the defence as he had not been properly briefed about the order for ex parte hearing made by the Court on 29 September 2005. Although the Court had directed that notice of that order be served on the Defendant, the Registry had failed to do so. There were therefore ample reasons for the Court to either order the Defendant to file a proper motion to set aside the order fixing the case for ex parte hearing as a Defendant should not be deprived of his right to defend, merely because the Plaintiff was insisting on judgment being entered ex parte.

In *Naiken v Pillay* (1968) SLR 101, the Court allowed an application for a new trial order Section 194(c) as the defence was filed, albeit late, and the nature of the claim was altered during the ex parte hearing. An application to file the defence out of time was refused and the case was heard ex parte. Sir Campbell Wylie CJ however stated:

Refusal to permit a Defendant to file a statement of defence, albeit late, combined with a decision to try the proceedings ex parte, may have the effect of depriving the Defendant of one of the fundamental requirements of natural justice — the requirement that a person should have an adequate opportunity to appear in his own defence and answer the claim brought against him. Cases might exist where such a drastic consequence could be justified because of the Defendant's behaviour — for instance, if it was made clear that that the Defendant was merely delaying proceedings and had no intention of putting forward a genuine defence.

Did the Defendant in the present case default filing the defence with the intention of delaying proceedings or without having any intention of putting forward a genuine defence? It has been submitted that:

no defence had been filed for obvious reasons and for other good reasons already known to the Plaintiff's Counsel inter alia that the parties were in the process of negotiating a settlement for the container in the bonded warehouse.

The plaint in this case was filed on 22 November 2004. Correspondence between the parties dated 4th November 2004, 16 February 2005 and 30 September 2005 sent to the Ministry of Finance seeking approval to verify the stocks in the bonded warehouse have also been filed. The Plaintiff has alleged that some of the goods consigned to him by the Defendant had been embezzled by a director of the company or rerouted to third parties. Although none of these matters were disclosed to Court when seeking adjournments to file the defence, the Plaintiff undoubtedly was aware of those matters.

Those letters were attached to the defence filed on 5 October 2005 and subsequently in an amended defence dated 19 October 2005. The Defendant's Attorney Mr Lucas was indisposed during the material time, and hence that was another reason for the delay in filing the defence. Hence, the Defendant was not purposely delaying the proceedings without any intention of putting forward a genuine defence. The Defendant

company has in their amended defence admitted part of the claim, namely goods worth R306,746.97 (C.1,F) in the bonded warehouse, and USD 4768.30 for goods received.

On a consideration of all the circumstances, the Court is satisfied that an order for a new trial should be granted, in the interest of justice, pursuant to Section 194 (c) of the Code of Civil Procedure. Section 198 provides that:

The Court may grant an order for a new trial on such terms, if any, as to costs and finding of security for the amount for which judgment was given at the first trial, or such other terms as to the Court may seem fit.

In the first trial, judgment was entered in favour of the Plaintiff in a sum of SA Rand 1,098,430.49 together with interest at 10% per annum and costs of action.

Hence, the order for a new trial will be subject to the following terms:

- (1) The monies in the following bank Accounts of the Defendant company, which have been attached and validated shall continue to be withheld by those banks until a further order is made by Court.
 - (a) Barclays Bank (Seychelles) Ltd
A/C. No. 0071266079 R66,971.22
 - (b) Mauritius Commercial Bank
A/C. No. 00712164700 R9,714.71
 - (c) Bank of Baroda
A/C. No. 01-536406-01 R119.59
A/C. No. 01-386406-01 R 1, 756.09
R78.561.59
- (2) Motor vehicle bearing no. S. 11663 shall remain under attachment until a further order is made to the Seychelles Licensing Authority.
- (3) In addition, the Defendant company shall deposit a sum of R500,000 at the Registry of the Supreme Court to the credit of this case as security, or alternatively, furnish a bank guarantee for that amount within 30 days from today.

The case will be mentioned on 22 December 2005 at 9.00a.m. to ascertain whether the security sum of R500,000 has been deposited. If so, the Court will fix a date for hearing on that day. If the Defendant company fails to fulfil that condition, the Plaintiff company will be entitled to execute the ex parte judgment dated 5 October 2005.

The Plaintiff Company will also be entitled to taxed costs of the mention and hearing dates from 5 October 2005.

Record: Civil Side No 318 of 2004