IN THE HIGH COURT OF BOTSWANA HELD AT GABORONE

CVHGB- 001273-15

In the matter between:

VLATACOM DOO	APPLICANT
and	
DIKGANG PUBLISHING CO.(PTY) LIMITED T/A MMEGI NEWSPAPER	1ST RESPONDENT
TLHALEFANG CHARLSE	2ND RESPONDENT
NTIBINYANE NTIBINYANE	3TH RESPONDENT
NEWS COMPANY BOTSWANA (PTY) LTD T/A THE BORTSWANA GAZETTE	4TH RESPONDENT
LAWRENCE SERETSE	5TH RESPONDENT

In Re

VLATACOM DOO	PLAINTIFF
and	
DIKGANG PUBLISHING CO.(PTY) LIMITED T/A MMEGI NEWSPAPER	1ST DEFENDANT
TLHALEFANG CHARLSE	2ND DEFENDANT
NTIBINYANE NTIBINYANE	3RD DEFENDANT
NEWS COMPANY BOTSWANA (PTY) LTD T/A THE BORTSWANA GAZETTE	4TH DEFENDANT
LAWRENCE SERETSE	5TH DEFENDANT

RULING

The plaintiff in this case is Vlatacom Doo, a Serbian company with its registered office in Belgrade. The first defendant is Dikgang Publishing Co. (Pty) Limited trading as Mmegi, which carries on business as a newspaper. The second defendant is Tlhalefang Charles, described as a journalist for the first defendant. The third defendant is Ntibinyane Ntibinyane, a journalist and also the editor of the first defendant. The fourth defendant is News Company Botswana (Pty) Limited trading as The Botswana Gazzete, which carries on business as a newspaper. The fifth defendant is Lawrence Seretse, a journalist and also the editor of the fourth defendant. The first and fourth defendants are companies incorporated with limited liability under the Companies Act. Both have their principal places of business in Gaborone.

The plaintiff claims payment in the sum of P500 000,00 against the first, second and third defendants, jointly and severally. The same amount is also claimed by the plaintiff against the fourth and fifth defendants, jointly and severally.

Presently, I have before me two interlocutory applications. In the first interlocutory application, the plaintiff seeks an order striking out the defendants' defence in the main action and granting final judgment in its favour on the ground that the defendants failed to attend and participate in a final pre-trial meeting as well as to discover documents. Furthermore, the plaintiff seeks an order granting judgment for damages to be assessed by the court.

In the second interlocutory application, the defendants seek an order striking out the plaintiff's affidavit filed in support of the notice of motion for the relief adverted to by the court. The defendants further seek an order dismissing the plaintiff's application for striking out their defence and final judgment.

In the pages below, I set out the facts which are assumed to be the position for the purposes of the two opposed interlocutory applications mentioned in the preceding paragraphs. I should make it clear at the outset that the facts or, at least some of them, are assumed; they are not all accepted. As before said, the plaintiff seeks an order striking out the defendants' defence in the main action and granting final judgment.

On the other hand, the defendants' attack against the plaintiff's application is based solely on the contention, firstly, that the document purporting to be "an affidavit of facts" filed by the plaintiff in support of its application is not an affidavit. It is alleged that such document does not contain the affirmation, declaration or oath of its maker and that the person who purportedly translated the documents filed in support of the plaintiff's application neither proved his appointment as a sworn-in court translator nor his proficiency in the Serbian and English languages. The material allegations of fact as pleaded by the two sides are as follows below.

By its writ, the plaintiff demands payment in the sum of P500 000,00 from the first, second and third defendants jointly and severally as a result of an alleged defamatory statement admittedly written by the second and third defendants and published by the first defendant in its newspaper and website. It is pleaded that the statements alluded to were published *animus iniuriandi* and recklessly or negligently. Similar to the claim against the first, second and third defendants, the plaintiff demands payment in the sum of P500 000,00 from the fourth and fifth defendants as a result of an alleged defamatory statement admittedly written by the fifth defendant and published by the fourth defendant in its newspaper, it being likewise pleaded that the statement was published *animus iniuriandi* and recklessly or negligently.

The allegations made in the plaintiff's particulars of claim regarding the articles admittedly published in the first defendant's newspaper and website are that in

2010, the plaintiff was awarded what is described as a closed contract of over P500 000 000,00 to supply the Botswana Government with Public Key Infrastructure Systems, that the contract was awarded without following [normal] tender processes because it was a national security matter, and that part of the money flowing from the transaction may have landed in the offshore accounts of senior government officials. It was alleged that the contract was just a ploy to fleece money from the government coffers because the plaintiff never actually delivered anything from the time the contract was awarded, that the PKI contract was transferred to DIS so that the officers could embezzle the funds without public audit fears, and that the PKI Project was never delivered to the government although the contract price was paid by DIS to the plaintiff. It was further alleged that the words in the context of the article in question were wrongful, defamatory of the plaintiff and intended and understood by readers of the first defendant's newspaper that the plaintiff (among other things) had been awarded the contract under questionable or dubious circumstances, had misappropriated the contract price and was involved in fraud.

The allegations made in the particulars of claim concerning the publication of alleged defamatory matter in the fourth defendant's newspaper were substantially similar, though not in wording, but certainly in effect. It was alleged that investigations revealed a questionable deal between DISS and the plaintiff, that both entities were engaged in-as it is put – 'an under-the-table deal"-to provide security software, and that a sum of P500 000 000,00 was fraudulently transferred from the government to the plaintiff. I pause here to say that the acronym "DIS" may be understood in this context to refer to the Directorate of Intelligence Services.

In the second claim, the basis of the plaintiff's claim differs somewhat from the basis of its claim in the first claim. The fifth defendant's article appeared in its newspaper called The Botswana Gazette, in spite of a statement previously published by the Government in the Daily News, conceivably in an effort to reassure the public at large that the article in the first defendant's newspaper

was false and inaccurate. Comparison with the earlier publication seems inevitable.

The defendants entered appearance on 12 May 2015, in effect, denying that the publications complained of were unlawful and defamatory, or that the plaintiff was injured and damaged in its reputation and good name, or that it suffered damages at all. Remarkably, the defendants admitted publication, although it was indicated that they intended to plead that the statements were made in the public interest and were reasonable in the circumstances. They pleaded 'in the alternative' that the contents of the published articles were true and prayed for dismissal of the action, with costs.

The case was set down for a roll-call on 7 September 2015. It is worthy of mention that in the intervening period, a declaration, documentary annexures and what is described as an "Affidavit of Facts" were filed on the plaintiff's behalf. The affidavit appears on the face of it to have been deposed to by one Bosko Bozilovic (Bozilovic).

Bozilovic says that he is resident in Belgdrade, Serbia. He describes himself as an employee of the plaintiff in the capacity of a Director of ICT. This document, if it is true as contended by the defendants that it is not an affidavit contrary to what it purports to be, then, from whichever angle one may view it, is decisive of the present controversy. It bears the date 17 June 2015, although it was only filed on 28 May 2018. It is accompanied by another document filed on the same date which, too, appears to have been made by Bozilovic. It seems to me that the main difference between the two sets of documents is that the second one is written in a foreign language and duly signed by its maker. Both documents are accompanied by a certified translation from Serbian into English. It is apparent to me that this was done by Maja Popovic in Belgrade. All this is not in dispute. To this subject, more attention will be devoted in later pages of this ruling. Suffice it to say, at this juncture, that it is disputed by the defendants that the document referred to as an "Affidavit of Facts" is in compliance with legislation. Hence their notice of application in terms of

Order 33 as read together with Order 20, rule 18(1), of the Rules of Court. For this reason a plea is yet to be filed.

That portion of the rules of this court, in point, is as follows: Order 33:

Consequently, by their notice, the defendants called upon the plaintiff to remove certain causes of complaint specified therein as the resolution, power of attorney, affidavit of facts and the document entitled "Certified Translation into English". The defendants' said notice goes on further to state that these specific documents were not authenticated in terms of section 13 of the Authentication of Documents Act [CAP. 14:02], "in the event that Serbia is a country in which the Convention de la Haye du 5 October 1961 ('The Convention') is in operation", that they were not authenticated in terms of section 14 of the Act "in the event that Serbia is not a country in which the Convention is in operation", that the document "purporting to be an Affidavit of Facts is not an affidavit in that it does not contain an affirmation, declaration or oath of its maker", and despite this the appointment of the person who purportedly translated the affidavit of facts as a sworn-in court translator and his proficiency in the Serbian and English languages were not proved. Therefore, the plaintiff was accorded ten days to address the causes of complaint raised, it being made clear that this failing an order would be sought to strike out its claim. As a consequence of these assertions, the plaintiff filed another affidavit of facts ostensibly removing the cause of complaint and in order to cure the alleged defects in compliance with Order 20, rule 18(1). The new affidavit of facts in place of the old now contained what the plaintiff described as an "Apostille". The related notice was signed on 13 July 2015 and filed without demur.

Returning to the roll-call on 7 September 2015, it is a common ground that a written draft order, duly signed was handed into court from the Bar by counsel for the plaintiff. It also bore the signature of Mr Salbany, for the defendants. By mutual consent, the draft order was made an order of court. By its obligatory terms, the order enjoined the defendants to deliver their plea before

21 September 2015, it being the agreement that the parties would thereafter convene a case management meeting between them on 20 October 2015 as a prelude to filing a report of their meeting. The report would be filed by 27 October 2015, the parties to attend an initial case management conference in open court on 11 February 2016.

It should be remarked that the defendants' plea was only filed on 22 September 2015, that is, a day later than the agreed date ordered by the court. This is remarkable because clearly the filing of the plea was out of time. No leave was sought by the defendants to extend the period in which it was to have been filed. The Joint Report, too, was not filed before 27 October 2015, as the court had ordered. Now, it is sufficient to say on that pleading (i.e. the defendants' plea) that by it there was no denial by the defendants that the alleged defamatory statements were indeed published in the newspapers already mentioned. This is to state the obvious. Nevertheless, the defendants pleaded that the published matter in each instance was neither defamatory nor published *animo iniuriandi* (as lawyers say). Furthermore, it was denied in each instance that such publications were reckless or negligent. These are of course substantive matters to be canvassed later on in the course of the trial.

The initial case management conference ordered to take place in open court on 11 February, 2016 did not take place. By consent, the conference was postponed to 10 August 2016, the reason for the postponement being that Mr Bayford, for the defendants, was reportedly temporarily indisposed. I had the greatest sympathy for him. According to Mr Carr-Hartley who, commendably, had himself already appended his signature to the Joint Report, Mr Bayford was yet to sign. This time around, the meeting was postponed with a direction by the court that the parties should file a compliant joint report.

On 10 August 2016, the date as before said scheduled for the conference, counsel handed in their Joint Report, which was made an order. It was intimated by both counsel that another case management meeting would not be required, and they asked that in future the parties should proceed straight

away to a final pre-trial conference, which request the court acceded to. Accordingly, I directed that the final pre-trial conference would take place on 21 March 2017, when once the parties had convened their own final pre-trial meeting at an agreed time set by the Judge. When the day of the conference came, the court made an order which it is not necessary to recite at length. None the less, it is desirable to state that the order in question incorporated those matters professedly agreed upon by counsel and their respective clients during the earlier pre-trial case management meeting. This is amply borne out by the respective signatures of counsel appended on the document. I shall return to the Joint Report shortly for detailed comment.

Up to now, I have devoted my energies to a moderately lengthy account by way of the background. I have done this deliberately with the intention to be able in due course to tackle the somewhat more difficult issue of the legal objection taken against the admissibility of the plaintiff's affidavit of facts filed in support of the motion to strike out.

It is well to bear in mind that in the counter-motion the defendants seek an order in effect that the plaintiff's affidavit of facts adverted to be struck out and that the application for final judgment should be dismissed. It is said that the plaintiff's affidavit of facts is not what it purports to be, i.e. an affidavit such as contemplated in law, that the person who translated the contents of the affidavit neither proved his appointment as a sworn-in court translator nor his proficiency in the Serbian and English languages. However, the translation *per se* is not the subject of controversy. Accordingly, I have thought it wise in my search for answers to these involved questions to begin with the simplest and easiest task of considering the legal requirements of affidavits in the domestic context, before proceeding to the somewhat complex issue of admissibility of foreign documents. In this particular respect, the defendants' motion presents the question as to what is to be done when foreign official records or documents are sought to be used in evidence in our courts. The problem is, as I conceive it, of great importance in practice and it becomes necessary in judicial proceedings involving, as here, purely domestic issues to

resolve it. The court's function is to decide questions of law when arising between the parties as a result of a certain state of facts. I propose, therefore, to begin my analysis with the Joint Report purely by way of a preface. The chronological sequence of events is critical.

On 28 May 2015, the plaintiff filed a declaration together with annexures including an affidavit of facts. This prompted the defendants to file a notice of application under Order 33 and Order 20, rule 18 (1), by which an objection was raised against a number of documents, these being the plaintiff's resolution, power of attorney, affidavit of facts and certified translation in terms of Sections 13 and 14 of the Authentication of Documents Act [CAP. 14:02]. Order 33 confers upon a party in proceedings in which an irregular or improper step or proceedings has been taken by another party the right to apply to the court for a setting aside order. On the other hand, Order 20, rule 18 (1), confers a right where a pleading contains scandalous matter, *et cetera*, upon the opposing party to make application for a striking out of the offensive matter before any further pleading can be filed. However, the defaulting party must first be given an opportunity, as here, to remove the cause of complaint within the stipulated period of ten days.

On 14 July 2015, the plaintiff filed an affidavit of facts accompanied by an Apostille. On 7 September 2015, the court made an order incorporating the terms of a draft order agreed to and signed by counsel. The order, based on the draft handed into court from the Bar by counsel, was in the following terms:

> "It is ordered that:
>
> 1. The defendants will deliver their plea or other answer to plaintiff's declaration on or before Monday 21st September 2015.
>
> 2. The parties will hold an Initial Case Management meeting at the offices of Plaintiff's attorneys on 20 October 2015 at 2.30 pm.

3. The Initial Case Management Report will be filed on or before 27th October 2015.

4. The parties will attend an Initial Case Management Conference with the Judge on 11 February 2016 at 9.30 am."

On 24 March 2016, the parties entered into an agreement at a meeting convened between them under the provisions of Order 42. In paragraph 9 of the Joint Report, captioned "OBJECTIONS ON POINTS OF LAW", there appear two subparagraphs touching on points of law. They read, so far as relevant, as follows:

"9.1 The Defendants no longer persist with their objection as regards the Plaintiff's Affidavit of Facts and/or the Power of Attorney and Resolution.

9.2 Neither of the parties has any other objections on points of law at this time."

The Joint Report was made an order of court on 10 August 2016. It recorded the agreement reached between the parties as indicated in the preceding paragraphs. In so far as the facts canvassed in the many affidavits that the parties have filed are concerned, I shall deal with them, so far as necessary, at the relevant stage. For now, I propose to comment below on these unfolding developments and their legal and practical consequences.

What are the consequences of the order? I do not think that on this point there is any difference of opinion between the parties. The parties are bound by the terms of the court order subsequent to and based on their agreement. Paragraph 8.1 of the court order (which is based on paragraph 9.1 of the Joint Report) repels the notion that any objection on the documents filed so far could be appropriate. In fact, no objection has been taken on the order. This is one

of the most important legal consequences of such procedural steps as intentionally taken by the parties under Order 42, rules 8 and 9. No less important, is the consequence possible under Order 42, rule 10. It is described by the provision that issues, evidence and objections not set out in the final pre-trial order shall not be available to the parties. The imperative "shall" should not escape attention in the present context. The converse must surely be that only such issues, evidence and objections set out in the relevant order are available for consideration and decision by the court. In other words, once it has been issued by the court consequent upon an agreement made under rule 10, the order will be held to be obligatory. However, it can only be modified to prevent manifest injustice. To be able to secure any modification to the order requires a motion on notice supported by affidavit. No one has, so far as I am aware, alleged any injustice nor sought the court's leave to challenge the outcome. Accordingly, the order made on 7 September 2015 prevails.

It is also worth mentioning what I consider a most important consequence of Order 42. A judgment or order when once made takes effect from the moment it is pronounced by the court. Thereafter, the judge is *functus officio*. In either instances its effectiveness or enforcement can only be affected by subsequent rescission, abandonment, or upon a successful appeal to an appellate court. The terms of the Joint Report were made an order by mutual consent and the order is without modification at the time of writing. In the circumstances, I hold that the defendants' counter-motion is nothing short of spurious, and the plaintiff's affidavit of facts, power of attorney and resolution reign. These documents cannot now be assailed or objected to or withdrawn. On this sole ground, the defendants' motion to strike out the plaintiff's affidavit of facts cannot succeed. Accordingly, it is dismissed, with costs. The matter does not end there.

On 22 March 2017 the defendants, notwithstanding the court order made by mutual consent of the parties referred to the preceding paragraphs, filed a

notice of application in terms of Order 33 as read together with Order 20, rule 18(1), in response to the application to strike out and grant judgment dated 3 March 2017. Yet again, the plaintiff was called upon to remove the following:

(i) the document filed in support of the application (Order 42, Rule 12), dated 2 March 2017 captioned "Supporting Affidavit", on the ground that it is not an affidavit in that:

(a) it has not been deposed to by or sworn before a commissioner of oaths;

(b) it does not contain an affirmation, declaration, or oath by its maker;

(ii) in contravention of Order 13, rule 16, of the Rules of Court, the annexures referred to in the said document (assuming, but not conceding the same is an affidavit) have not been initialled by the deponent and the commissioner of oaths or officer before whom the same was sworn on the date on which it was sworn to;

(iii) the person who purportedly translated the "Supporting Affidavit" has not proven his;

(a) appointment as a sworn-in court translator; and

(b) proficiency and competency in the Serbian and English languages.

These are the objections in terms of which the defendants seek the striking out of the plaintiff's affidavit and dismissal of its application, under Order 42, Rule 12.

The defendants' application (on the narrow point as to whether the document in question satisfies the form and requisites of an affidavit and whether it is defective in form, the court should refuse to accept the affidavit in support of

the application made by the Plaintiff) is one which if successful will defeat the plaintiff's application. For this sole reason, I propose to deal with it first.

Mr Masuku has argued that the document labelled "Supporting Affidavit" has no *jurat*. It is said that the document cannot therefore be an affidavit. Rather, counsel proceeds, it is a statement signed before a notary public. The learned counsel called in aid a previous decision of this court in *BP Botswana v Estate Construction* [2001] 2 B.L.R 224 (HC). The case involved an application for summary judgment in which the defendant had raised a preliminary objection that the deponent to the plaintiff's affidavit in support of the application did not include the words: "I can swear positively to the facts and I do swear to those facts", as required by the Rules of Court. Therefore, in his submission, the application should be dismissed on this ground. Learned counsel relied on the case in answer to the question the Judge himself posed, namely, what exactly is an affidavit. The facts are, however, distinguishable.

In casu, the plaintiff filed a supporting affidavit together with the summons which on the face of it was signed by the deponent, Andrija Jerinic, on behalf of the plaintiff before a notary public in a foreign jurisdiction, *to wit*, Serbia. It is not in dispute that the place of origin is Serbia. It is also not in dispute that the affidavit was made under the laws of and authenticated in Serbia. Nonetheless, it is said that the document is defective in that it was executed outside the jurisdiction and was not authenticated in terms of the Authentication of Documents Act [CAP. 14:02]. It is said further that the person who purportedly translated it neither proved his appointment as a sworn-in court translator nor his proficiency and competency in both the Serbian and English languages.

It is to be observed that on the embodiment of the affidavit has been attached an apostille. This is in the form of an "allonge". This is a separate sheet of paper containing the apostille. The certification of the translation appears on the same page as that which contains the translation of the apostille. As regards the allonge, the notary public certified as follows:

"I, the undersigned sworn-in Court translator, appointed by decision of the Minisrty of Justice of the Republic of Serbia no. 740-06-968-2000-04 of April 12, 2000, certify hereby that this translation into English is fully true to the original text written in the Serbian language. My commission is permanent.

In Belgrade, May 21, 2015

No. 3252/2015

[...]."

[...]."

The objections raised by the defendants, in essence, are: firstly, that it has not been proven by the translator that he is a sworn translator and has proficiency and competence in the Serbian and English languages; secondly, it is said that the document in question is not in compliance with the provisions of Order 13, rule 16. On the other hand, Ms Keevel, for the plaintiff, submitted that the sworn-in court translator has certified that he is indeed a sworn court translator and that the translation of the affidavit into English is true to the original text written in Serbian phonology. It is to be observed from the quintessence of the document that the signature and seal of the sworn-in court translator appear under the certificate. Quite correctly, no submission has been made by the defendants that the statement attributable to the sworn-in court translator is spurious or fraudulent.

The Authentication of Documents Act applies when foreign official documents are sought to be used as evidence in our jurisdiction. The phrase "document' is defined under section 2 of the Authentication of Documents Act [CAP. 14:02]. It includes:

"(a) A document emanating from an authority or an official connected with the courts of any State being a party to the Convention, including those emanating from a public prosecutor, a clerk or registrar of a court, a sheriff or a process server.

(b) [...]

(c) a notarial act;

(d) an official certificate which is placed on a document signed by a person in his private capacity, such as an official certificate recording the registration of a document, for the fact that it was in existence on a certain date, and an official or notarial authentication of a signature."

Then, there is Section 6 of the same Act. It provides that in any criminal or civil proceedings a document-

(a) [...]

(b) Bearing a seal or stamp which purports to be a seal or stamp of the department, office or institution at which such person is attached, shall on its mere production, without proof of such signature, seal or stamp be presumed to have been signed by such person, unless it is proved not to have been signed by him".

By Section 13, it is enacted:

"Notwithstanding sections 10, 11 and 12, a public document signed in any country or territory in which the Convention is in operation shall

be sufficiently authenticated if authenticated by a certificate or "apostille" in the form in the Second Schedule, signed by any person designated in that country or territory for the purpose of the Convention as an authority competent to issue a certificate or apostille".

Now, I wish to quote from a leading textbook on the subject (Schlesinger, *Comparative Law*, 4 ed., at p136):

> "The certificate method of proof of foreign law is widely used, and indeed indispensable, when foreign official records are sought to be used in evidence.
>
> Very frequently, it becomes necessary in judicial proceedings involving domestic issues, to prove births, marriages, deaths and other publicly recorded events which occurred abroad. Normally, the only practicable method of proof is to offer a copy of the foreign record, attested by the custodian of the original record [...] or by some other official authorized to make such attestation."

In this jurisdiction, the Authentication of Documents Act makes such a document admissible. The conditionalities to be met are generally:

(a) the genuine signature of the attesting officer;
(b) that such officer is shown to hold the office he purports to hold; and
(c) that the holder of such office is the custodian of the original record or, if not, that he or she is authorised to attest the copy.

However, Mr. Masuku of counsel has argued that the affidavit of Andrija Jerinic is liable to be struck out in that it is not such an affidavit as is contemplated under the Authentication of Documents Act as well as Order 13, Rule 16. It is said that the questioned document has not been commissioned

by a commissioner of oaths. It is said, alternatively, that on its face the said affidavit does not appear to have been commissioned by a commissioner of oaths as recognized by the rules of this court, or Serbian law, or the Authentication of Documents Act. Counsel described an affidavit as "a written statement made on oath that the facts set out in the document in issue are true." Further, counsel referred to the case of *Sibanda and Others v Chobe Chilwero* [2013] (1) BLR 251, in which yet another definition was proffered as follows:

> "An affidavit literally means 'pledge one's faith'. By definition an affidavit means a written statement of facts which are pledged and believed to be true and voluntarily made by an affiant under an oath or affirmation administered by a Commissioner of Oaths."

It is said further that there was no evidence that the notary public administered the oath before the deponent signed the affidavit, that the importance of taking an oath before a person authorized to administer it is fundamental to the court system, so that failure to do so is inimical to the administrating of justice, that the courts have expunged evidence received without an oath or affirmation that the Applicant's translation of the supporting affidavit into English amounted to translating a public document emanating from a Convention country, that this is supposed to be authenticated by a certificate or apostille in terms of Section 13 of the Authentication of Documents Act before a designated person in Serbia and, in conclusion, that in *casu,* the translation was not so authenticated and cannot therefore be relied upon by the Applicant.

Ms. Keveel of counsel argued pertaining to the relief sought, that Botswana and Serbia have each ratified The Hague Convention ('the Convention") with the consequence that this brought into effect the Authentication of Documents Act in 1964 (i.e. by Botswana), that the Act makes a distinction between documents from Commonwealth and non-Commonwealth countries, and that as Serbia is not a Commonwealth country, documents emanating from non-

Commonwealth countries are subjected to a system known as "apostille" (i.e. French for notation). Counsel further submitted, rightly in my view, that the Convention provides for the authentication of signatures. It was also said that the affidavit in question is a public document and learned counsel referred the court to Article 1 (d) of the Convention in terms of which, a public document is deemed to *inter alia,* include an official and notarial authentication of a signature. Counsel further cited the provisions of section 13 of the Act. This provides that a document from any Convention country shall be sufficiently authenticated by a certificate or 'Apostille' in the form in the Second Schedule to the Act signed by a person designated in that country as an authority competent to issue the certificate or Apostille.

The court was referred to the decision in *Oitsile Holdings (Pty) Ltd and Another v De Frietas*, where His Lordship Dingake, J. held at paragraphs 15-17 that:

> "15. It is incontrovertible that Affidavits sworn outside the Republic of Botswana are admissible in our Court (see Sec 9 of the Authentication of Documents Act);
>
> 16. it follows, therefore, that whether or not the [...]Affidavits are valid or not must be answered on the basis of what the position of the law in the foreign country is;
>
> 17. in other words, the issue that is sharply posed by the facts and circumstances of this case is whether or not the above affidavits were validly commissioned in terms of the laws of South Africa."

In these premises, Ms Keevel submitted that the affidavit in question was properly deposed to under the law of Serbia and authenticated as required by section 13 and the Second Schedule of the Authentication of Documents Act. Learned counsel further said that by the sworn-in court translator affixing his certificate, there was satisfactory proof that he is a sworn-in court translator.

I turn now to analysis of the competing submissions. The following provisions of the Authentication of Documents Act, are of some relevance:

> "2. In this Act, unless the context otherwise requires –
>
> 'authenticate', in relation to a document, means to certify the authenticity of the signature thereon, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears ...
>
> 'document' includes ... a power of attorney, affidavit ...".

Part V of the Act deals with documents emanating from outside Botswana intended for use in this jurisdiction as regards the Supporting Affidavit of Facts in issue. Section 10 makes plain that it applies section 6 to all those documents. Sections 9, 10, 11 and 12 deal with powers of attorney, affidavits and other documents originating from Commonwealth countries and other countries in the region. Sections 13 and 14 which deal with documents, as here, from outside Botswana. By section 13, a public document from any Convention country shall be sufficiently authenticated by "a certificate" or "apostille" in the form in the Second Schedule, signed by a person designated in that country as an authority competent to issue a certificate or apostille. The Convention referred to is, of course, The Hague Convention which abolishes the requirements of legislation for Foreign Public Documents made at The Hague and dated 5 October 1961. Botswana and Serbia are the Convention countries. There is also section 2. This provision includes 'a Notarial Act' in the definition of 'Public Document'. As before said, the affidavit in question was executed before a notary public. It has not been suggested that this is not covered by the above definition. Lastly, the Second Schedule to the Act provides the form required for a Certificate or Apostille.

The relevant provisions of the Act are, Authentication of Documents I conceive, directory rather than mandatory. This is made clear by section 3(4) which

permits other evidence that the document in question was signed by the person who purported to have done so. The filed apostilles were in precisely the form prescribed by the Second Schedule to the Act, as ascertained from the Authentication of Documents Act. its provisions do require a description of the document whose signature is being authenticated. What is merely required is that the apostille or certificate should be affixed to that document. The Convention guidelines state that an apostille may be affixed to the document by such means as rubber stamps, or self-adhesive stickers, or impressed seals. It may also be placed on a separately attached page, (called an "allonge") and that can be attached to the document in question by staples, glue or other means. Here, the apostilles were stapled to the affidavit in question which was translated from Serbian to English by a sworn translator. Since these steps were slavishly followed and regard being had to the fact that there was no suggestion of any fraud, or any basis for surmising that a detached apostille may have been lifted from another document, there is no room for this court to speculate. Indeed, to do so would be erroneous in the extreme. In addition, there is also no requirement that the document should be described or specified in the apostille. It is the signature of the notary or other official before whom the document has been signed which is being authenticated; it is neither the document nor its contents.

In the above circumstances, the submissions by the Respondents that the Supporting Affidavit of Facts was inadmissible on the ground that it originated outside Botswana and that it was not properly authenticated have no merit. With respect, Mr. Masuku 's attack on the validity of the supporting affidavit of Andrija Jerinic as offending Order 13 of the High Court Rules is misconceived. I say so for the simple reason that the papers having been deposed to in Serbia are not governed by Order 13, Rule 16. It is not in dispute that this deals with affidavits commissioned in Botswana before a commissioner of oaths. Rule 16 of Order 13 does not specifically exclude the judge's discretion and should be read together with Order 5. The latter order clothes a court with the discretion to condone, where applicable, non- compliance with any rule of court (see, e.g., *Kagiso Tiro v. Attorney General* No. CACGB-039-12, unreported)

It is possible to argue that the Applicant's failure to comply with the provisions of Order 13, rule 16, renders the supporting affidavit to the application inherently defective in terms of Order 42, and so liable to be struck out. However, it seems to me that there are two divergent positions taken by Judges of the High Court. On the one hand, it has been decided that such failure to comply with these provisions renders the pleadings complained of, inherently defective (see *Gaongalelwe J* as he then was in *Phakalane Estates (Pty) Ltd v Chiepe*; and Dibotelo, J., as he then was in *Sesana and Others v The Attorney-General;* and Lesetedi, J., as he then was, in *Motlogelwa v Botswana Meat Commission.* All three learned judges came to the same conclusion that any failure to comply with these provisions renders the pleadings defective and a nullity. In addition, they appear to have held that the court has no discretion to condone non-compliance with Rules 11 and 16 of Order 13.

However, in *Baskar v Landscape Decorators (Botswana) (Pty) Ltd* Tafa J, differed. Before the learned Judge a point *in limine* had been raised by the second respondent to the effect that certain annexures to the applicant's founding affidavit were not initialled. This was apparently in violation of Order 13, rule 16. The learned Judge referred to *Motlogelwa's case (supra)* but differed with Lesetedi J., and by extension, with the other judges as intimated above. He thought that that rule 16 was silent on the issue of discretion particularly considered alongside Order 13 rule 5 (which specifically confers discretion upon a judicial officer). He observed that the absence of the words "without, the leave of the judge", under rule 16, did not of necessity exclude the discretion on the part of the judge. It was said as follows:

> "I believe that every judge seized with a matter ought to strive to ensure that he/she dispenses justice fairly, judicially and without prejudice to the parties. Prejudice or absence thereof should be uppermost in his/her mind. To allow Technicalities to prevent proper ventilation of issues would in my mind be tantamount to miscarriage of justice."

I entirely agree. I wish therefore to say that for a foreign affidavit to be acceptable as evidence before this court, it has to be an "affidavit" in terms of the laws of the country in which it was deposed in the first place. In the second place, the document must satisfy and meets the requirements of authenticity as prescribed under our law.

I return to the Applicant's application. On 3 March 2017, the Applicant filed an application in terms of Order 42, Rule 12. It sought an order striking out the Respondents' defence and granting final judgment in its favour in accordance with Order 42, rule 12, (a) and (c). The grounds this was the failure of the Respondents to attend or participate in the Final Pre-trial Meeting and to make discovery of documents. In addition judgment was sought, the damages to be assessed by the court. On 10 August 2016, an initial case management conference was ordered under Order 42, rule 2 (5), with the imperative that all parties were to attend. A Pre-Trial conference was set for 1 December 2016. On 6 December 2016, the Applicant's attorney delivered a letter to the Respondents' Attorneys, by hand. By this, it was sought to reschedule the Final Pre-Trial Meeting to 6 February 2017, at 14:30pm. This is not in dispute. Indeed, a copy of the letter was annexed and marked "FA5". However, neither the Respondents themselves nor their attorneys attended the Final Pre-trial meeting on 6 February 2017. No explanatory letter in this regard was sent nor a telephone call reportedly made to the other side. On 3 October 2016, the Applicant's attorneys caused a Notice to Discover to be served upon the Respondents' attorneys. It called upon Respondents to make discovery on oath in respect of all the documents in their possession or power and relating to any of the matters in question in the suit.

Despite service of the Notice to Discover on the Respondents' attorneys on (3 October 2016), and their being required to have made discovery within 14 Court days of service thereof, the Respondents failed to make any discovery.

No explanatory letter was forthcoming nor a telephone call made. All this is not in dispute.

In the circumstances I find that the Respondents have failed to attend and participate in the Final Pre-Trial Meeting. In addition, they have failed to make discovery of documents. They have also not filed any answering affidavit to the Applicant's application. *Mirabile Visu*, a Notice of Application in terms of Order 33 as read with Order 20 Rule 18(1) which I have accordingly dismissed was made. In the result, the averments made by the Applicant in its supporting affidavit in support of the application for dismissal of the Respondent's defence and for final judgment remain unchallenged. In the premises, the Applicants' application is not opposed.

It will be recalled that Order 42 rule 12 reads:

> "12. If a party or his counsel fails without lawful excuse to attend a roll-call, an initial case management conference, a status hearing, an additional case management conference, or a final pre-trial conference, fails to participate in the creation of a case management report or proposed final pre-trial order, fails to obey a case management order or final pre-trial order, fails to participate, in good faith, in the case management or final pre-trial processes or fails to comply with court deadlines or obligations under the Rules, the judge may enter such orders as are just, including but not limited to the following—
>
> (a) an order refusing to allow the non-compliant party to support or oppose designated claims or defences, or prohibiting that party from introducing designated issues in evidence;
>
> (b) an order striking out pleadings or parts thereof, including any defence, exception or special plea;
>
> (c) an order dismissing a claim or entering final judgment; or

(d) an order requiring the non-compliant party or his counsel to pay the opposing party's costs caused by the non-compliance."

Rule 12(c) invoked by the Applicant in seeking final judgment. Such applications have been previously considered by the Court of Appeal. The case of *Gofhamodimo v Koboyankwe and Others* [2011] 2 BLR 424, CA., is one prime example. The relevant considerations to be taken in to account in the exercises of the judges, discretion under this rule were stated as follows:

(i) firstly, the need to enforce judicial case management in the interest of the stated objects, to uphold the interest of just efficient and speedy dispensation of justice;

(ii) secondly, the court should bear in mind the degree of non-compliance on either side or whether failure to comply has been repeated, resulting in profoundly frustrating the progress of the case;

(iii) thirdly, whether the conduct of the parties or either of them displays lack of seriousness in advancing their case or defence or shows dilatoriness with the hope of delaying a likely negative outcome;

(iv) fourthly, prima facie strength or weakness of the case or defence advanced the complexity of the issues to be determined are also to be born in mind;

(v) the fifth consideration relates to weighing the strength or weakness of any excuse put forward for non-compliance with the timelines set by court; and

(vi) the sixth factor to be taken into account concerns the gravity of fault to be apportioned to the client, as opposed to the attorneys. Whether it is an appropriate situation where the sins of the attorney should be visited upon client.

In the premises, it is ordered as follows:

a) The Defendants' defences are struck out and final judgment is granted to the Plaintiff;

b) Judgment is granted to the Plaintiff for damages, the amount of such damages to be assessed by the court.

c) The Defendants shall bear the costs of the action jointly and severally.

DELIVERED IN AN OPEN COURT AT GABORONE THIS 31ST DAY OF JANUARY 2020

MICHAEL MOTHOBI LETSOGILE MOTHOBI

JUDGE