IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 1252/2006

DATE: 30 NOVEMBER 2007
UNREPORTABLE

In the matter between:

V T NKOSI **APPLICANT**

And

MOATLA INVESTMENTS HOLDINGS [PTY] LTD **FIRST RESPONDENT**
THE DEPUTY SHERIFF [HALFWAY HOUSE] **SECOND RESPONDENT**

JUDGMENT

MAKGOKA (AJ)

[1] This is a application for rescission of a judgment granted by this court. The background thereto is that the Respondent issued summons in November 2005 against the Applicant for an amount of R170 000.00 pursuant to an alleged ora1 contract. Combined summons was duly served upon the Applicant. The applicant failed to enter an appearance to defend. Upon lapsing of the *dies induciae,* the Respondent applied for, and obtained judgment against the Applicant on 18 July 2006.

[2] This application is brought in terms of rule 31 [2] [b] of the Uniform Rules of Court, which provides:

> "*A defendant may within 20 days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set*

aside a default judgment on such terms as to it seems meet."

[3] From the above, it is clear that there are, two jurisdictional requirements that an Applicant has to overcome before such an Applicant could succeed in terms of the above Rule, namely:

[3.1] the application has to be brought within a period of twenty days of the applicants' knowledge of the judgment.

[3.2] the Applicant has to demonstrate good cause.

[4] I now turn to consider the first of the jurisdictional requirements. First, with regard to the 20 day period, for the court to determine if same has been satisfied, the court must be informed of the date upon which the default judgment came to the knowledge of the judgment. This should be a factual enquiry. In this case, the Applicant has not made any averments in this regard. However, the objective facts from the totality of the evidence before the court are the following:

[4.1] on 16 November 2006 the Sheriff attached the Applicant's property.

[4.2] on 14 March 2007 the Sheriff attempted to remove the attached property;

[4.3] on 20 March 2007 the Applicant deposed to his Founding Affidavit in support of this application, which application was served on both the First Respondent and the Sheriff respectively, on the same day.

[5] The Applicant has denied that the execution on 16 November 2006 was

brought to his attention. According to the sheriff's return of service, the warrant of execution was served upon a “Mrs Johanna”. There is no indication on sheriff's return of service as to who Johanna is in relation to the Applicant. I am prepared, though reluctantly, to grant the Applicant the benefit of the doubt in this regard. Having so held, the Applicant would know of the judgment for the first time on 14 March 2007, when the Sheriff attempted to remove his property. His application was then served on 20 March 2007, four court days thereafter. On this basis then, the Applicant has made this application within the 20 day period.

[6] With regard to the second requirement of good cause, it entails two essential elements namely, a reasonable and acceptable explanation for default and a demonstration of a *bona fide* defence. In ***Chetty v Law Society, Transvaal*** **1985** ***[2] SA*** **756** ***[A]*** **at 765** ***B-C****,* the following was stated:

> “”*But it is clear that in principle and in the long standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:*
>
> *(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and*
>
> *(ii) that on the merits such a party has a bona fide defence, which prima facie carries some prospect of " success.”*

[7] It is not sufficient if only one of these elements is established - [see ***Promedia Drukkers & Uitgewers [EdmsJ Bpk v Kaimowitz and Others 1996 [4] SA* 411 (C) *at* 418 *B]***.

[8] Against the above general approach I proceed now to consider the two elements of the good cause. I must do so in the light of the explanation proffered for the Applicant's default and against the backdrop of the nature of the defence disclosed by the Applicant. With regard to the Applicant's fault, the explanation is simply that upon receipt of the summons, the Applicant did not receipt of the summons, the Applicant did not consider it necessary to enter an appearance to defend, as he had no agreement with the First Respondent as indicated on the summons. He submits further that his failure to enter an appearance to defend was due to his inexperience regarding what he had to do on receiving the court papers. This simply is no explanation at all. The Applicant, had prior to receipt of summons, been aware that the vehicle belonged to the First Respondent. To simply ignore summons, the Applicant did so at his own peril. In my view, the explanation for the default is not reasonable or acceptable.

[9] Having held as I did of the inadequacy of the Applicant's explanation, I must in principle, dismiss this application without further consideration of the defence disclosed by the Applicant. However, in the interest of justice, I will consider that defence. Before I deal with the defence disclosed by the Applicant, it is prudent to set out the factual background of the matter as follows: The First Respondent's deponent, ***Joseph Nhlapo ['Nhlapo']*** was looking for a buyer for the First Respondent's trailer. After the Applicant had inspected the trailer, he expressed interest in buying same. There is a dispute as to whether the parties agreed on the purchase price. The First Respondent avers that the purchase price was indeed agreed

upon at R170 000.00, while the Applicant avers that no such purchase price was agreed upon.

[10] The Applicant nevertheless took possession of the trailer on 27 August 2004. During January 2005, the Applicant handed over three post-dated cheques in the amount of R40 000.00 each. On behalf of the First Respondent, it is contented that this was part payment of the purchase price. Payment in all the three cheques was stopped by the Applicant, the reason being that no purchase price had been agreed upon. The Applicant is to date in possession of the trailer. The First Respondent then issued summons against the Applicant for R170 000.00 being the alleged purchase price, and obtained judgment under the circumstances set out above.

[11] With regard to his defence, the applicant's contention is two fold. First, the Applicant contends that he did not enter into an agreement with the First Respondent. At all material times, the Applicant negotiated with one Joseph *Nhlapo ['Nhlapo1,* who did not disclose that he was acting on behalf of the First Respondent, nor was he aware that the trailer belonged to the First Respondent. Second, [I understand this to be in the alternative], in the event it be found that the Applicant was aware that *Nhlapo* was acting on behalf of the First Respondent, then the parties had not agreed on a purchase price, as a result which no valid agreement came into existence.

[12] I will now deal *seriatim* with the above contentions argued on behalf of the Applicant:

[a] Applicant did not enter into any agreement with the First

Respondent.

The Applicant's contention in this regard is improbable. After delivery of the trailer, the Applicant received from ***Nhlapo,*** the registration papers of the trailer, which reflected that the First Respondent was the owner of the trailer. Upon this, the Applicant did nothing to demonstrate the assertion contended above. On the contrary, he was happy to continue his possession of the trailer under those circumstances. In any event, even if it was found that ***Nhlapo*** never disclosed that the trailer was the property of the First Respondent the principle of undisclosed principal would be applicable- see ***Cullinan v Noordkaaplandse Aartappel Kernmoerkwekers Koop*** **1972** ***[1] SA*** **767** ***[A].*** The point argued on behalf of the Applicant should accordingly fail.

[b] No agreement on purchase price.

To properly consider this contention, the following common cause factors should be borne in mind. The Applicant took possession of the trailer shortly after discussions with ***Nhlapo.*** He has been and still is in possession of the trailer to date he has not offered to return the trailer; prior to or in these proceedings; he gave ***Nhlapo*** three post-dated cheques totalling R120 000.00; he was placed in possession of the registration papers of the trailer and he is still in such possession. In my view, these factors indicate a strong indication that the parties indeed reached agreement on the purchase price. The Applicant's contention to the contrary in the face of the above, is highly improbable and disingenuous.

[13] In the premises I am of the view that the Applicant's defence is not *bona fide* and has no prospect of success. As a result the Applicant has failed to establish both elements of sufficient cause. The Applicant having failed to establish such elements is fatal and the application should fail.

[14] As a result, the application is dismissed with costs.

T M MAKGOKA
ACTING JUDGE OF THE HIGH COURT.

Date of hearing: 31 OCTOBER 2007

For Applicant: J LUVUNO

Instructed by Applicants: GOVENDER ATTORNEYS

No appearance for Second Respondent.

For the First Respondent: D E MEYER

Instructed by Respondents: RANAMANE PHUNGO INC

Date of Judgment: 30 November 2007