

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case Nr: 59/2008
Case Heard: 30/05/2008
Date delivered: 06/06/2008

In the matter between:

Mosímanegape Enoch Molehane

APPLICANT

and

Tuzi Trade CC
Reuben Thamí Geco

1ST RESPONDENT
2ND RESPONDENT

JUDGMENT

Olivier J:

1. The applicant, mr Mosimanegape Enoch Molehane, has applied for the stay of a writ of execution, apparently pending an application for the setting aside of a default judgment obtained by the first respondent, Tuzi Trade CC, against him in the amount of R808 034.07.
2. After the applicant's replying affidavit was filed, the respondents lodged an application for leave to file a duplicating affidavit. At the hearing mr Haddad, the attorney who appeared on behalf of the respondents, abandoned the application for leave to

duplicate, in my view wisely to, and no more need be said in this regard.

3. In the summons it was alleged, basically, that the applicant had received and misappropriated the amount and that it had actually been owing to the first respondent. It appeared that the first respondent had done work for a third party, Raubex Construction (Pty) Ltd ("*Raubex*"), and that the allegation was that the money had been intended to be payment by Raubex to the first respondent.
4. The applicant joined mr Reuben Thami Geco, one of the members of the first respondent, as the second respondent. It appears that the applicant himself is also a member of the first respondent, as well as four other persons ("*the other members*").
5. As far as the prospects of a successful application for the setting aside of the default judgment are concerned the applicant would have to give a reasonable explanation of his default and make out at least a **prima facie** case that he has a **bona fide** defence to the claim. The application must also be **bona fide** and not for the sole purpose of delaying the claim (see **Erasmus: Superior Court Practice**, B1-201).

EXPLANATION OF DEFAULT

6. The summons was served on the applicant personally on 9 April 2002 and the default judgment was granted shortly thereafter.
7. The applicant says that he never defended the action because he had been assured by the other members of the first respondent "*that this matter would be resolved outside the Court and the*

action proceedings against me would withdrawn". It would appear as though the applicant's case is that it was only at a later stage (sometime during 2007) that he became aware of the fact that default judgment had been granted against him, and that the writ of execution had been issued, when the sheriff arrived at his house with the writ.

8. The applicant annexed to his affidavit a document dated 19 March 2007, addressed to the respondents' attorneys and containing a statement by the applicant and the other members:
 - 8.1. that the second respondent had not been mandated to take legal steps against the applicant on behalf of the first respondent;
 - 8.2. that they distanced themselves from the writ of execution; and
 - 8.3. that it was not possible and did not "*make any business sense*" that an amount of R808 043,07 could in any event have been owing by Raubex to the first respondent.
9. The respondents never objected to the admissibility of this document. In fact, it is common cause that it had been signed and forwarded to the attorneys.
10. The averments in the second respondent's answering affidavit in this regard are the following:

- 10.1. He denies that the applicant received any such assurance from the other members at the time that the summons was issued.
- 10.2. He admits that "*at a much later stage*" the other members accused him of acting "*unilaterally*".
- 10.3. Finally he alleges that the other members "*have since changed their minds and have now agreed that execution against the property of the applicant take place*".
11. The second respondent has annexed four identical affidavits to his answering affidavit, purporting to be deposed to by the other members and in which the following is stated:
- "
- 2.
- I can quite categorically state that the members of the First Respondent have now agreed that the judgement taken against the Applicant in favour of the First Respondent be executed.*
- 3.
- I confirm and ratify all the action taken by the second respondent in this matter and I respectfully request that the application of the Applicant be dismissed with costs."*
12. I must say that I agree with the applicant that this sudden change of heart is strange. One of these affidavits was purportedly signed by one Joseph Smit. The document dated 19 March 2007 contains a list of the members of the first respondent (with the exclusion of the second respondent) and this deponent's name does not appear in that list. There is,

though, the name of one "*M Smit*" in that list, and it is interesting to note that the signature of the person who had at the time signed that document on behalf of "*M Smit*" looks a lot like the signature of the person who signed the particular affidavit.

13. Be that as it may, what is of more importance for present purposes is that not one of the other members have denied the applicant's averment that they had given him the assurance that the action would not be proceeded with. The second respondent's denial of this averment is therefore unsubstantiated hearsay.
14. In fact, the second respondent's admission that the other members had accused him of acting unilaterally, would fit in perfectly with the applicant's case in this regard.
15. In view of the above, and in view of the nature of the relief now sought, I have no hesitation in accepting the application's version in this regard. He has therefore given a reasonable explanation for not defending the action.
16. The respondents blame the applicant for not having taken steps to apply for the setting aside of the default judgment at an earlier stage. It is, however, on their own papers clear that there had been more than one meeting, during 2003, where the subject of discussion was the calculation of the amount owing to the first respondent by Raubex.
17. It is also not disputed that, apart from obtaining the writ, no execution steps were taken until fairly recently, when the sheriff arrived at the applicant's house with the writ.

18. The minutes of one of the meetings, the letter of the respondents' attorneys dated 23 July 2003 (annexure G5 to the answering affidavit), and even the second respondent's own affidavit, do not contain a single indication of the applicant having been aware, at that stage, of the default judgment or the writ of execution.

BONA FIDE DEFENCE

19. What remains to be considered is the question whether the applicant has a **bona fide** defence to the first respondent's claim and whether his application is therefore **bona fide** and not intended merely to delay (see **Kouligas & Spanoudis v Boland Bank** 1987 (2) SA 414 (OPD) at 417). In my view this issue can be very easily disposed of.
20. The applicant's case is clearly that he never received the money from Raubex. The allegations in the second respondent's answering affidavit in this regard are:
 - 20.1. that, when summons was issued by the first respondent against Raubex for the outstanding money, Raubex "*advised that their defence was that all monies had been paid directly to the Applicant*"; and
 - 20.2. that at a later meeting, the applicant admitted having received the monies from Raubex but "*stated that he had used the monies to pay salaries*".
21. The allegation regarding what Raubex "*advised*" is clearly hearsay and inadmissible.

22. The allegation that the applicant admitted having received money from Raubex is difficult to reconcile with, **inter alia**, the minutes of the first meeting in July 2007, which was attended by, **inter alia**, the applicant, the second respondent and the respondents' attorney, and where it was resolved that the "*full amount*" owing by Raubex would be calculated and that the respondents' attorney would then demand "*full payment*"; obviously from Raubex.
23. Apart from this it is on the respondents' own papers very clear that, long after the default judgment had been granted against the applicant, there was so much uncertainty about the extent of the work done by the first respondent for Raubex and therefore about the amount owing to the first respondent by Raubex, that it was decided that further steps should be taken to "*calculate the full amount owing*".
24. On this basis alone there is in my view a clear case that the applicant would at the very least have a **bona fide** defence as far as the **quantum** of the default judgment is concerned (see **Morkel v Absa Bank Bpk en 'n Ander** 1996 (1) SA 899 (CPD) at 903E).
25. In view of this conclusion it is unnecessary to consider the effect of the alleged ratification by the four other members (see, however, **Smith v Kwanonqubela Town Council** 1999 (4) SA 947 (SCA)).
26. In my view there is therefore no indication that the sole purpose of the application for the stay of execution is to delay execution of the first respondent's claim.

27. The balance of convenience clearly favours the applicant and it would be senseless to allow the execution of a judgment which might be set aside. There is also no other remedy available to the applicant.
28. I therefore intend granting an order staying or suspending the execution of the writ of execution, but also to make it subject to the applicant applying for the setting aside of the default judgment within a specified period, failing which the suspension will lapse and the first respondent will be free to proceed with execution steps.

COSTS

29. I can see no reason why the costs of this application should not follow the result. Mr Haddad, the attorney who appeared on behalf of the respondents, suggested that, should a stay of execution be granted, the costs of this application should be ordered to be costs in the application for rescission. I can see no reason for such an order. It is quite clear that the respondents would not have agreed to a stay of execution pending an application for rescission.
30. Although it might be so that the issues regarding the explanation and the defence will again be addressed in the application for rescission, they also had to be ventilated in this application and, where this Court has come to certain conclusions in this regard, there would be no reason why the costs of this application should in effect be subjected to what happens in the application for rescission.

31. The fact that the Court in that application might come to a different conclusion on these issues is immaterial, because it will then be doing so on different papers and possibly on different evidence and grounds.
32. Mr Haddad also submitted, in the alternative, that because the applicant is in fact seeking an indulgency, no costs order should be made and that each party should therefore pay its own costs if a stay of execution is ordered. Again I do not agree. The respondents have left the applicant with no other option than to apply for rescission and have opposed the application to the bitter end.

ORDERS

33. In the premises I make the following orders:
 1. **The execution of the writ of execution issued in case number 286/02 is stayed and suspended pending an application by the applicant to have the default judgment granted in that case set aside.**
 2. **The applicant must lodge the application to set aside the default judgment within 30 days of the date of these orders, failing which the order in paragraph 1 will lapse and the first respondent will be free to proceed with execution.**
 3. **The respondents are ordered to pay the costs of this application, jointly and severally, the one to pay the other to be absolved pro tanto.**

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

For the Plaintiff:	Adv J J Schreuder
Instructed by:	Matshidiso Attorneys, KIMBERLEY
For the Respondent:	Mr V W Haddad
	Elliot Maris Wilmans & Hay, KIMBERLEY