**IN THE HIGH COURT OF LESOTHO**

**(Commercial Division)**

**CCT/43/2010**

In the matter between:-

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| **MOTLATSI JOHN RAMETSE** | **1 APPLICANT** |
| **UNIQUE COMPUTERS(PTY)LTD** | **2 APPLICANT** |
| **TILOANE RAMETSE** | **3 APPLICANT** |

**And**

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| **FIRST RAND BANK LIMITED** | **1 RESPONDENT** |
| **DEPUTY SHERIFF (T MOKHOTHU)** | **2 RESPONDENT** |

Date of Hearing : 23 May 2011

Date of Judgment : 23 May 2011

**CORAM : MR ACTING JUSTICE J.D. LYONS**

**Counsel:**

**Ms Khiba for Applicant**

**Mr. Mpaka for Respondent**

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**JUDGMENT**

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**LYONS J. (AGT)**

By an application filed 6 March 2011, supported by a founding affidavit of M.J. Rametse, the applicant seeks recission of a default judgment of 11 February 2011. The judgment is against the applicant, M.J. Rametse only.

The application cannot succeed. By his own admission, the deponent, (M.J. Rametse – against whom the judgment was ordered), the judgment debtor (M.J. Rametse) has no defence to the 1st respondent's (the bank) claim. To allow this recission, and let the applicant (judgment debtor) in to defend would be a pointless exercise, Rametse admits the contract, the liability and the breach. No issue was raised regarding the Judge's orderd as to the quantum.

Rametse is a director of Unvique Computer Systems (Pty) Ltd (Unique). Unique was afforded and overdraft facility by the bank. Rametse and his wife, were both co-directors. Security for the overdraft was offered. That security included a mortgage bond over Lease No.1372-347. This bond was registered. The Lessee (owner) is Rametse.

The overdraft facility expanded to the extent that by March/April 2010 Unique (the account holder) owed in excess of M300,000.

Rametse, in his capacity as a director of Unique (and duly authorised) attended upon the office of the Bank's lawyers. These he signed an acknowledgment of debt on behalf of unigue. The amount of debt confessed to then stood at R309,065.31. Unique (through its director, Rametse) offered to repay this by 6 equal monthly installments of R7500 and thereafter by equal monthly installments of R8000 until the debt (overdraft) was paid off.

The bank (through its lawyers) accepted this offer of repayment. In the letter of acceptance the lawyers offered "that in the even of you not being able to make full payment every month to communicate with us in regard to the ability to pay".

Unique defauted on the agreed repayments. It does not seem to have accepted the conciliatory offer of the lawyers and contacted them.

By summons (with annexed declaration) dated 11 August 2011, the bank sued Rametse for the amount then owing (allowing for such payments as were made past April 2010) being M281,524.00. More particularly it sought a declaration that the land be specially executable.

Rametse was served. He failted to appear. He gives no reason for his decision not to appear. It appears that, like an astrich, he buried his head in the sand. That, of course, expose the nether regions for a ckckling. As I said, judgment by default, was finally entered as prayed.

In an attempt to raise a defence, Rametse presents the ancient South African case of Mosert v S.A. Association (1868) B p 286. In Moserts case the applicant there in had signed a confession of claim that was prepared by the judgment creditors lawyers. In the circumstances of Moserts case, the court held that the confession was involved and should be set aside. Hence all subsequent proceedings thereunder should be similarly set aside.

Rametse's affidavit material attempts to align itself factually with Mosert. However if fails for one simple, yet critical reason. Unlike Rametse, Mosert had an arguable defence. In the circumstances of Mosert's case, it could have been argued (after further examination) that the judgment creditor's claim was premature. This was because of the unique fact that the, judgment creditor's action in Mosert's case came about from a renunciation of a beneficiary's interest under mutual wells. The court considered that the

renunciation may not have been valid – or at least that was open for mosert to argue. Consequently the court held that the confession, having been drawn up by the judgment creditor's lawyers, should be set aside as it may have denied mosert (al beit inadvertently) the opportunity to obtain indefendent advice on a possible defence. Mosert's case did not decide that, as a matter of immutable principle, confessions of liability/debt drawn up by a creditors lawyer are to be ruled invalid. What it did decide is that in drawing up such confessions the lawyer is engaging in a perilous venture for it can be said (as well intentioned as the lawyer maybe) is that the confessor may be denied access to objective and unformed advice from another lawyer. In the circumstances of Mosert's case, that denial of opportunity was crucial as there existed an arguable defence.

That is not the case here. Rametse, even putting his case at its highest, does not have an arguable defence – even by hi s own admission.

It cannot be argued (as in Mosert's case) that the bank's action was premature. Unique had defaulted in the payments **it** offered. The concilliatory offor to talk about any difficulties, if they arose, cannot be said to be a contractual term. At best this was an understanding and generous creditor extending an offer to helpt out, if approached.

The principles applicable to recission of a default judgment have at the very core, the requirement that the applicant (judgment debtor) show a bona fide or arguable defence. That is not the case here. The application for recissions must be dismissed.

Application dismissed.

Applicant to pay the respondent bank's costs to be taxed if not agreed.

**J.D. LYONS**
**JUDGE (AGT)**