

**IN THE HIGH COURT OF LESOTHO**

**(Commercial Division)**

**CCT/79/2010**

In the matter between:

**STANDARD BANK**

**PLAINTIFF**

**and**

**SIMPHIWE DOUGLAS VUMISA**

**1 DEFENDANT**

**NOMSA PATIENCE VUMISA**

**2 DEFENDANT**

**JUDGMENT**

**Coram** : Honourable Justice J.D. Lyons (a.i)

**Date of Hearing** : 3 July, 2012

**Date of Jugment** : 3 July, 2012

**Summary**

Recision application: Decided on fact.

**LYONS J. (A.I)**

**[1]** I heard and determined this matter on 3 July. I delivered my reasons orally. Herewith are those reasons in writing.

- [2]** This is a rescission application pertaining to a default judgment of Guni J. Of 12 September 2011.
- [3]** The applicants are the directors of Batebang Butchery (Pty) Ltd. The respondent is a bank. The respondent loaned money to Batebang Butchery (pty) Ltd by way of loans, hire purchase agreements and an overdraft facility.
- [4]** The applicants gave their surety over these loans.
- [5]** Batebang Butchery (Pty) Ltd defaulted on the loans. On 26 May, 2008 the respondent obtained a default judgment against Batebang Butchery (Pty) Ltd for sums of R182,610.12 and R40,961.68 plus interest. The proceedings were numbered CIV/T/149 of 2008. This judgment remains inforce. The cause of action was the debt owed.
- [6]** By summons filed 4 November 2010 the respondent bank issued proceedings against the applicants. The cause of action was the surety offered by the applicants and accepted (and acted upon) by the respondent. The Declaration pleads a default of the overdraft facility. R61,759.54 is the amount pleaded as owing. It also pleads action against the applicants for the amount of the default judgement against Batebang Butchery (Pty)Ltd. The respondent's claim is based on the surety.

- [7]** On 2 February 2012 the applicants first moved a Notice of Motion for rescission of the judgment of 12 September 2011. This was withdrawn on 22 May 2012 but, on the same date another identical application for rescission was filed.
- [8]** I have read counsels submissions and heard their arguments.
- [9]** I find no merit in the application.
- [10]** It is well settled law that an applicant for rescission of a default judgment must file the application without any inordinate delay. The period 12 September 2011 to 2 February 2012 is, in these circumstances, an inordinate delay. The applicants only filed the application when they found the bailiff at the door with a warrant of execution. The sole purpose of this application is to frustrate that warrant.
- [11]** The applicant must also offer a reasonable excuse for the failure to file a defence. A Notice of Defend was filed on 26 September 2011 but it was too late. No other excuse is offered except perhaps a plea that they were in ‘negotiations’ with the respondent bank. No supporting evidence was put forward as to these supposed ‘negotiations’. The respondent bank’s affiant denies this. I accept that.

**[12]** It has been said that provided the applicant offers up a good triable issue as a defence, any delay or failure of an excuse are not so important – unless of course the judgment creditor has suffered an irredeemable prejudice.

**[13]** The purported defences of the applicant can be quickly disposed of.

**[14]** The applicants plead Res Judicata. The plea submits that this issue has already been tried and adjudicated upon in CIV/T/149 of 2008.

**[15]** The facts fail to support that. CIV/T/149 of 2008 was against Batebang Butchery (Pty) Ltd for a debt owing from a breach of loan contracts.

**[16]** This matter is a cause of action against the applicants regarding the surety they gave to pay for any found debts of Batebang Butchery (Pty) Ltd. These are not only different defendants but also, obviously, different causes of action. In fact, so far as the contract debts are concerned (as distinct from the overdraft) the respondent bank probably had to take action and get judgment against the butchery before it was able to launch this present action.

**[17]** The plea of Res Judicate fails.

[18] Beyond that front the applicants offer no defences. They plead that negotiations were taking place. Even if that were so, it is not a defence.

[19] Without giving any facts or figures, they plead that the respondent bank has already received some money (presumably in reduction of the debt) for the purported sale of some of the butchery's assets. That is not a defence. It may be a circumstance of mitigation for which the respondent bank, as judgment creditor and trustee with a fiduciary duty, has to account for in the final tally up. If not properly accounted for (and only if) the applicants may then have an action against the bank, but not until a final reconcialiation is arrived at. That possible right to action on an act that has not yet occurred and may not occur is not a defence.

[20] For the above reasons the application for rescission for the default judgment of 12 September 2011 is dismissed.

[21] The respondent bank is entitled to its costs to be taxed if not agreed.

**J.D. LYONS**

**JUDGE (A.i)**

For Plaintiff/Respondent : Mr. Mpaka

For Defendants/Applicant : Mr. Kumalo