IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A221/2019

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

16.9.2021
DATE

SIGNATURE

In the matter between:

MONEY BOX INVESTMENTS 268 (PTY) LTD **APPELLANT**

and

EASY GREENS FARMING AND FARM PRODUCE CC **RESPONDENT**

JUDGMENT

Coram: Raulinga J, Basson J, Strijdom AJ

1. This is an appeal against the judgment and order by the Court a quo, dismissing the appellant's application for recission of the default judgment that was granted against the appellant by the Court on 23 July 2015. This appeal is with the leave of the Supreme Court of Appeal.
2. Default judgment was granted against the appellant in favour of the respondent for payment of R383, 000.00 plus interest and costs. Pursuant to the judgment, the respondent caused a writ of execution to be issued. When the Sheriff attempted to execute the writ of execution on 19 August 2015, he could not find attachable assets.
3. Appellant's application for rescission was launched on 9 March 2016, which was appropriately six months after allegedly having obtained knowledge of the default judgment granted against the appellant. According to the Deputy-Sheriff's confirmation of service on appellant, the action had come to appellant's notice on 22 May 2015.
4. On 15 October 2015, the appellant's attorneys of record wrote to the respondent's attorneys, contending that the judgment that had been granted falls to be set aside. In the application, the appellant inter alia applied for condonation for the late filing of the application for rescission of the judgment; and an order that the judgment be rescinded. The

respondent opposed the application and filed its answering affidavit on 15 April 2016.

5. On 4 December 2017, when the matter served before the Court a quo, appellant served and filed an amended Notice of Motion together with affidavits deposed to by appellant's erstwhile attorneys and its attorneys of record. Appellant also applied for leave to serve and file a supplementary founding affidavit, subsequent to respondent's answering affidavit opposing appellant's application for rescission of the default judgment handed down. In the supplementary founding affidavit, appellant abandoned its reliance on the alleged incorrect citation and added a new defence founded thereon that appellant had not contracted with respondent, and therefore respondent lacked *locus standi in iudicio* to institute action against the appellant. Subsequently, on 4 December 2017, leave was granted by the Court a quo for appellant to serve and file its supplementary answering affidavit in response thereto. The application was argued in the Court a quo on 15 December 2017.

6. The appellant inter alia brought the application under Rule 42(1) (a). Although the appellant does not expressly refer to Rule 42(1) (a) in its founding affidavit, it states that the aim of the application is the rescission of the judgment "erroneously granted" on 23 July 2015. The phrase

"erroneously granted" is clearly a reference to the wording of Rule 42(1)(a).

7. I agree with the respondent that in bringing an application for rescission of the judgment under Rule 42(1) and at common law, the appellant had to bring the application within a reasonable time. The appellant brought the application more that 6 (six) months after it became aware of the judgment. The appellant concedes that the application was not brought within a reasonable time, the reason why it applied for condonation for the late filing of the application.

8. It is evident from the condonation application that the appellant in seeking condonation for its conduct makes a bald statement without sufficient justification for condonation to be granted. The appellant regards an application for condonation as a mere formality which need not be founded and substantiated to justify condonation being granted. One agrees with the Court a quo's conclusion that the appellant cannot blame the inefficiency for the default on its erstwhile attorneys. There comes a point when the client has to bear the consequences of negligence of its attorneys.

9. As the Court a quo explained in its judgment, the only explanation put forward by the appellant is that whilst preparing to draw and finalise a

replying affidavit, it was discovered that the defence originally relied on was unfounded and that an additional defence was available according to appellant's counsel. It is also significant that no confirmatory affidavit had been deposed to by either appellant's counsel or attorney of record confirming same. Accordingly it is hearsay evidence and therefore inadmissible. Consequently, it does not advance appellant's application. The Court a quo considered the relevant facts in accordance with the principles relating to condonation and in its discretion refused condonation.

10. It is worth noting that the appellant does not appeal against the findings by the Court a quo relating to condonation and its refusal of the application for condonation. This point too is dispositive of the appeal.

11. Regarding the abandonment by the appellant of its initial defence, the Court a quo's view is that "an endeavour to place a supplementary founding affidavit before the Court subsequent to respondent having served and filed its answering affidavit was clearly an attempt and a stratagem to circumvent its failure to present a complete case in its founding affidavit". I agree with the Court a quo that this stratagem to place new material before Court, which should have been contained in its founding affidavit subsequent to respondent having responded to the

case made out by the appellant in its founding affidavit does not serve to assist the appellant- the defence raised by the appellant does not have good prospects of success- it cannot be said that it has a *bona fide* defence.

12. In its new defence, the appellant relies upon a contention that no contract was concluded between the appellant and the respondent as alleged in the summons and particulars of claim, but that the contract was concluded between the appellant and Mr S J Erasmus, represented by Mr F Coertze. The appellant accordingly contends that the respondent does not have *locus standi* to institute the claim as set out in the summons and particulars of claim.

13. The respondent submits that the defence is in itself contrived and premised on an opportunistic interpretation of annexure "Du6 to the founding affidavit". In support of its contention, the respondent argues that the appellant conducts business as a dealer in second-hand motor vehicles. As such, it is a "dealer" as defines in the Second- Hand Goods Act, 6 of 2009. Under "section 24(1) (d) and (4) of the Second- Hand Goods Act, the appellant was obliged to obtain and keep proof of registration of the vehicle in question. The evidence at hand confirms that the respondent was the registered owner of the vehicle in question at the

time; and Mr S J Erasmus is the CEO and representative of the respondent. It is therefore clear that the appellant would not have been misled by the content of annexure "Du6" to believe that Mr S J Erasmus was the seller of the vehicle. These facts were provided to the appellant.

14. The fact that the appellant now raises the new unsustainable defence in its supplementary affidavit is simply indicative of the appellant's lack of *bona fide*.

15. The Appellate Division in **Cullinan V Noord-Kaaplandse Aartappel-Kernmoerkwekers Kooperasie Bpk**[1] held that the doctrine of undisclosed principal had become embedded in our law and that it could not be jettisoned. In **SA Metal & Machinery Company (Pty) Ltd V Klerck**[2], Leach J (as he then was) held that the doctrine of undisclosed principal is justified on the grounds of commercial convenience and that it recognises that in the world of contractual relations, parties may well be acting on behalf of another person but fail to disclose that fact when concluding a contract.

16. It is therefore correct that the appellant's version that it contracted with Mr S J Erasmus and not with the respondent is correct, and the doctrine of undisclosed principal finds application. A *vinculum iuris* is therefore

[1] 1972(1) SA 761 (A) at 766 F to 768 A and 768G to 769B
[2] [2005] 1 All SA 44 (E) at 57F-G

created between the respondent and the appellant; on the basis thereof that the respondent has *locus standi* to institute the claim as set out in the particulars of claim.

17. On a proper assessment of the conspectus of the facts, it is my considered view that the Court a quo correctly dismissed the appellant's application for rescission of judgment.

18. In the premises, I propose the following order:

18.1 The appeal is dismissed with costs, including the costs of the appeal.

RAULINGA J

JUDGE OF THE HIGH COURT

I agree

BASSON J

JUDGE OF THE HIGH COURT

I agree

STRIJDOM AJ

ACTING JUDGE OF THE HIGH COURT

Appearances:

Appellant's Counsel	: Adv. B.D Stevens
Appellant's Attorneys	: Hartzenberg INC. Attorneys
Respondent's Counsel	: Adv J.S Stone
Respondent's Attorney	: Len Dekker Attorneys INC.
Date of hearing	: 28 July 2021
Date of judgment	: 16 September 2021