CA NO. 7/02

IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

IN THE MATTER BETWEEN:

ALL OCCUPANTS OF HOUSE NO. 2523 MOTSATSI STREET, TLHABANE **APPELLANTS**

AND

OUPIET SALTIEL MALATSI **RESPONDENT**

CIVIL APPEAL

MMABATHO

MOGOENG JP & NKABINDE J

DATE OF HEARING: **08 NOVEMBER 2002**

DATE OF JUDGMENT: **12 DECEMBER 2002**

COUNSEL FOR THE APPELLANTS: **ADV R HENDRICKS**

COUNSEL FOR THE RESPONDENT:

REASONS FOR JUDGMENT

NKABINDE J**:**

Introduction

[1] The appellant appealed against the dismissal of the application for rescission of judgment by the Learned Magistrate for the district of Bafokeng. The respondent did not oppose the appeal. The appeal was upheld with no order as to costs and the order by the court *a quo* under Case No. 7993/2001 dismissing the application for rescission of judgment was set aside and replaced with the following order:

"(a) The application for rescission of judgment is granted;

(b) There will be no order as to costs, and

(c) Power of attorney is to be filed within seven days of this order.".

What follows hereunder are the reasons for the order.

[2] The appellant was the defendant and the respondent the plaintiff in an action instituted in the Magistrates' Court. The respondent sued the appellant for eviction from house 2523 Motsatsi Street, Tlhabane ("the property") and costs. The respondent based his claim on the fact that he was the lawful possessor of the property. The summons, after a diligent search and enquiry for service, were served upon the appellant by affixing a copy thereof to the principal door of the property in terms of Rule 9(7) of the Magistrates' Court Rules. ("the rules") The appellant did not file notice of intention to defend.

[3] On 7 December 2001 the respondent applied for judgment by default. In support of the application for default judgment the respondent filed an affidavit in which he states as follows:

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3.1 I hereby wish to explain further the following:

This matter arises out of civil matter adjudicated under case number 388/98 before this Honourable Court. In this matter (388/98) Plaintiff's case against me for ejectment from

house number 2523 Motsatsi Street, Tlhabane was dismissed.

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I have been advised by my attorney that legally speaking I should be put in the position I was prior to the action. As on the date of finalisation of the matter under Case No. 388/98, Plaintiff in that case had already summarily "evicted" me out of the house in issue after ordering me to go out of it and locking it; He even put other occupant (sic) into the same house: these are the people I am now evicting. I do not know the names and full particulars of these tenants.

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I humbly request this Honourable Court to grant me the prayers as stated in the summons.".

[4] One of the occupants of the property, Mrs Mojako, applied for rescission of judgment on the grounds, *inter alia*, that she never received the summons. She stated that if a copy was affixed on the door someone might have removed it. She became aware of the judgment on 12 March 2002 when the messenger of the court arrived at the property and showed her a copy of the order. The messenger had gone there to evict them from the property. She stated further that she has a *bona fide* defence against the respondent's action as the respondent has no right to the property. She attached a Deed of Sale in support of her defence.

[5] In opposition of the application for rescission the respondent averred, *inter alia*, that he had exchanged houses with one Mr Kgatshe. He took occupation of the property. He waited for Kgatshe to effect a change of name and registration of the property into his name. Whilst waiting for such change of ownership and registration he received summons under case 388/98 in which Mr Kgatshe sought an order evicting him from the property. Mr Kgatshe obtained default judgment against him and evicted

him from the property. Such default judgment, according to him, was allegedly rescinded but he "was never put back into the house even after rescission of judgment". The appellant's defence and her explanation for the default were not gainsaid.

[6] On 29 April 2002 the Learned Magistrate dismissed the application for rescission of judgment and ordered the appellant to pay the "costs on an attorney and client scale including preparation costs". In his reasons for dismissing the application for rescission the Learned Magistrate states that the respondent had a first right to the property because he contracted with Mr Kgatshe before the appellant. He relied in the decision of the Appellate Division in the case of Krauze vs Van Wyk 1986 (1) SA 156 (AA) where it was held that the rule *qui prior est tempore potior est jure* lay at the root of the preference granted to a person who was first entitled to the *res* where there were competing claims to delivery of the same.

[7] I interpolate here that it is not necessary for me to deal with the decision relied upon by the Learned Magistrate. It is sufficient to say that the judgment in that case has no relevance to the factual situation in the instant case. In the instant case the respondent, in his summons, clearly relied on the fact that he is a "lawful possessor" of the property. In the affidavit in support of the claim (paragraph 4 thereof) respondent states that-

> "... on the date of finalisation of the matter under case no 388/98, the plaintiff in that case had already summarily "evicted" me out of the house in issue after ordering me to go out of it and locking it; He even put other occupant into the same house: these are the people I am now evicting. I do not know the names and full particulars of these tenants.".

[8] The Learned Magistrate did not express any doubt as to the *bona fides* of the appellant's defence and/or deal with the questions whether good cause had been shown. Rule 49(1) of the rules provides that a court may rescind or vary a default judgment -

> "(a) upon good cause shown; or
> (b) if it is satisfied that there is good reasons to do so.".

[9] Although our Courts have shown some reluctance to provide an exhaustive definition of the concept 'good cause' in the context of rescission of judgments (see Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352G-H), it is generally accepted that for good cause to be present the applicant must provide a reasonable explanation for his/her default; must show that he/she has a *bona fide* defence; and that the application is made *bona fide* (see Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476; Mercedes Benz v Mdyogolo 1997 (2) SA 748 (E) at 751E-I). As regards the phrase "if it is satisfied that there is good reason to do so" in Rule 49(1) the authors of Jones and Buckle <u>The Civil Practice</u> of Magistrate's Courts in South Africa 9th ed volume 2 state the following:

> "Good reason will for the most (where the appellant is the defendant) be found in the defendant's reasons for his or her default, and in his or her grounds of defence.".

[10] Clearly, from his reasons, the Learned Magistrate concerned himself only with who was first entitled to the *res*: that was not the issue. The appellant stated in her supporting affidavit that she had not received the summons which had been delivered by affixing a copy on the principle door and which might have been removed by some other person. The

respondent, save for pleading a non-admission, did not specifically refute the allegation. Accordingly, the correctness thereof must be accepted unless it is shown to have been patently false or impossible. The Learned Magistrate seem to have ignored and/or disregarded the adequacy or reasonableness of the appellant's explanation for her default. The Learned Magistrate appears also to have disregarded and/or ignored the averments by the respondent that he was not in possession of the property which, in actual fact, runs counter to his claim in the summons.

[11] As there appears to be no basis upon which the Learned Magistrate could have found that the appellant's averments were incorrect and patently improbable, he should have found that the appellant discharged the *onus* of showing that there was "good cause" and/or "good reason" for rescinding the default judgment.

[12] At the hearing of this case this Court, *mero motu,* raised the question whether the Learned Magistrate should have invoked the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the Act"). After a careful re-consideration of the facts in this case as well as the definition of "unlawful occupier" within the context of the Act, it does not appear to me that the appellant was entitled to the protection in terms of the Act.

B.E. NKABINDE

JUDGE OF THE HIGH COURT

I agree

M.T.R. MOGOENG

JUDGE PRESIDENT OF THE HIGH COURT

Attorneys for the Appellants	: Phancy Mogano & Partners
Attorneys for the Respondent	: Kgomo, Mokhetle Tlou