

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**CASE NUMBER:**

5932/2006

**DATE:**

13 OCTOBER 2010

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In the matter between:

**INDUSTRIAL DEVELOPMENT CORPORATION**  
**OF SOUTH AFRICA**

1<sup>st</sup> Plaintiff

**FINDEVCO (PTY) LIMITED**

2<sup>nd</sup> Plaintiff

10 and

**ROBERT HSU-NAN TSUNG**

1<sup>st</sup> Defendant

**ROBERT CHENG-LI TSUNG**

2<sup>nd</sup> Defendant

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**J U D G M E N T**

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**DAVIS, J:**

I shall provide more comprehensive reasons if required. But  
as I have already indicated in debate with counsel, the  
20 application for the stay of the trial, based on the application  
for rescission of a default judgment, which was granted against  
the company (Dynasty Textiles (Pty) Limited) raises the  
question whether the defendants in the present application will  
be prejudiced if the default judgment which was granted, is not  
25 rescinded. The basis for this approach, as I understand it, is  
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firstly that the continued existence of the default judgment against Dynasty Textiles (Pty) Limited would preclude the defendants in the present application from raising defences of prescription and other defences of which content at this stage I am not entirely clear.

The debate between counsel resulted in a concession being made by the plaintiffs in this particular case, Mr Fitzgerald, who appears together with Ms Buikman, namely that the plaintiff would not raise the fact that the default judgment is an answer to any defence that might be pleaded. This particular concession was reduced to writing and it is from that written document that I now read it into the record. The route that Mr Fitzgerald urged upon me was that I should not decide the rescission application, but that this issue should be postponed, pending a hearing of the evidence in the present case, namely the case based on section 424 of the Companies Act of 1973.

Mr Brusser, who appears with Mr Crowe, on behalf of the defendants has urged that if the default judgment continues to be in existence, his client would be prejudiced insofar as the formulation of some defences may be concerned, to which I have already made reference. An application for stay compels the Court to weigh up the possible prejudices to the two parties. This case has been long in the making. It has taken

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six years since the launching of the present action to come to this point. Understandably, plaintiffs are anxious to proceed and have already incurred costs with regard to witnesses that they wish to have testify in court.

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Of course, plaintiffs are entitled to an expeditious hearing and should not be subjected to delays which have little or any basis in law. That is not to say that the defendants are not without rights in this case. Indeed, the issues raised by Mr Brusser require careful consideration. If the existence of a default judgment constitutes an obstacle to a fair defence, then this would contribute to clear prejudice which needs to be considered. Given the approach which I have adopted, it appears to be necessary to deal with the unexplained or seemingly unexplained delay (Mr Brusser submitted in argument that the delay was neither unexplained nor unreasonable and I shall make no decision in relation to that question), which was caused by the application for rescission.

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That is better dealt with at a later date, because as Mr Brusser correctly submits, if the defendant proceeds on the basis of the common law insofar as the rescission is concerned, the requirements, as set out by Miller, JA in Chetty v Law Society Transvaal 1985(2) SA 756 at 764, would require a reasonable and acceptable explanation as to the default and furthermore

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## JUDGMENT

that applicant, on the merits, has a *bona fide* defence, at best  
*prima facie*, but which carries some prospect of success.

In my view, whilst the issue of the explanation can be  
5 examined and debated, it would be preferable to have some  
evidence which would allow a Court to assess whether there is  
some prospect of success insofar as a *bona fide* defence is  
concerned. For this reason, Mr Fitzgerald's suggestion carries  
considerable weight. It means that the rescission application  
10 will be postponed, presumably at least until the end of the  
evidence which is to be heard in the main application. That  
evidence may well compel a finding in favour of the defendant;  
that is for a later date.

15 At this point I should say that disturbing features of the  
present justice system in South Africa, are incessant delays.  
Of course, parties have rights to bring interlocutory  
applications and to pursue their rights, but Courts have to be  
careful to balance those rights against the rights of the other  
20 side to have access to justice in terms of section 34 of the  
Constitution of the Republic of South Africa Act 108 of 1996.

In this case, the correct balance will be struck as follows.  
Plaintiffs will not be allowed, in terms of their concession, to  
25 raise the fact that default judgment is an answer to any  
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## JUDGMENT

defence that may be pleaded. To the extent that the defendants wish to reconsider what further defences they may wish to plead, since I propose to commence the trial on Monday, there is ample time for this to be done. The rescission application can then be heard at a time which would be convenient for the parties. In this way, I seek to protect the defendants' rights, so that they will be able to ensure that any defence which can be raised, which would justify a dismissal of the action brought against them, could be properly aired and considered. On the other hand, plaintiffs' desire, after six years, to have its case brought before the Court and heard will also be guaranteed.

For these reasons (which I am prepared to amplify, if necessary), the application for a stay is refused. The application for rescission of the default judgment is postponed to a date to be determined and the costs in relation to the latter are to stand over. Accordingly the costs in relation to the stay application will also stand over for later determination. As a result the main action will commence on Monday morning at 10 o'clock.

  
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DAVIS, J