

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO: 10521/2017

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

10 MAY 2018

FHD VAN OOSTEN

In the matter between

ALWYN PIENAAR

APPLICANT

and

TLB TRANSPORT CC

RESPONDENT

Practice – Application for rescission of court order - wilful default – sheriff's return certifying personal service of summons - applicant denying personal service - effect of – requirement of bona fide defence - two mutually destructive versions - approach to be adopted by court - inherent difficulties in plaintiff/respondent's version - dispute only capable of resolution on oral evidence - rescission granted - costs in the cause.

J U D G M E N T

VAN OOSTEN J:

[1] This is an application for rescission of an order granted by default by this court (Van der Linde J) on 20 June 2017. The application is opposed by the respondent on the grounds that the applicant has failed to show either that he was not in wilful default or that good cause exists why the judgment should be rescinded. For the sake of convenience and ease of reference I shall refer to the parties as in the action.

[2] The plaintiff sued the defendant for the return of a DAF truck with registration [...] (the vehicle), based on the defendant's breach of a verbal lease agreement having been entered into with the defendant. The summons commencing the action, according to the sheriff's return of service, was served on the defendant personally. No opposition was filed and the plaintiff launched an application for default judgment in terms of rule 31(5). The papers in that application were likewise, according to the sheriff's return of service, served on the defendant personally. On the date of hearing of the application before Van der Linde J, the plaintiff was still in default and an order for the return of the vehicle and costs was granted.

Wilful default

[3] The defendant denies that the summons was served on him personally or that he was aware thereof until 1 August 2017. In response thereto the plaintiff referred to and attached a copy of the sheriff's return certifying personal service of the summons on the defendant at his home address. In the replying affidavit the defendant persisted in the denial that personal service of either the summons or the rule 31(5) application had had been effected on him.

[4] The sheriff's returns of service constitute strong prima facie proof of their content (*Deputy Sheriff for Witwatersrand District v Harry Goldberg and Others* 1905 TS 680). On the other hand the plaintiff does not merely baldly deny personal service, he remains adamant that the documents were not served on him personally. He has gone to great lengths to track his actions and whereabouts on the date of the alleged service of the summons. He established from his golf schedule, a copy of which is

attached to the papers, that on that particular day he was playing golf at the Benoni Country Club, together with three friends of his, who are all willing to confirm his version in this regard.

[5] Having considered the two opposing versions before me, I am satisfied that the dispute cannot be resolved on paper but only after the hearing of oral evidence including the evidence of the sheriff.

[6] It follows that for purposes of the present application, a finding in regard to wilful default cannot be made.

[7] The question remaining and decisive of the application, is whether the defendant has shown a bona fide, triable defence to the plaintiff's claim, to which I now turn.

Bona fide defence

[8] The plaintiff's pleaded cause of action is a 'verbal' agreement of lease concluded 'on or about August 2013' in terms of which the defendant leased the vehicle for an amount of R25 000.00 per month, payable by way of two equal payments of R12 500.00, on the first and fifteenth day of each month. No time period in respect of the duration of the lease is pleaded to have been agreed upon, although the agreement pleaded provided for immediate return of the vehicle upon the defendant's failure to pay any one payment.

[9] The defendant states that he, at all times, was acting on behalf of AS Vervoer CC, in respect of which no details are given. He relies on an oral agreement of purchase of the vehicle, for the purchase price of R320 000.00, which was to be paid by way of monthly instalments of R25 000.00 each, from July 2013. He has listed all the payments that were made, in respect of which supporting documents are attached. He states that having paid the purchase price, a demand was made for handing over of the vehicle's registration papers in order to register the vehicle in the name of the Close Corporation, but that the plaintiff refused to do so alleging for the first time that he had only leased the vehicle in terms of a lease agreement.

[10] There are two opposing mutually destructive versions before me concerning the true nature of the agreement between the parties. The plaintiff's version suffers from

certain inherent difficulties: in the answering affidavit in this application the plaintiff sets out a prior *ad hoc* lease agreement between the parties which was 'varied' in June 2013, to a monthly lease agreement. This is not reflected in the plaintiff's summons. The terms of the lease agreement set out in the answering affidavit differ from those pleaded in the particulars of claim. Of importance however, is that the plaintiff states that it was a term of the 'varied lease agreement' that the terms thereof would be reduced to writing and signed by the parties. This he did with the assistance of his daughter but, despite several unsuccessful attempts by his daughter to contact the defendant to sign the draft, it remained unsigned. The existence of the unsigned document quite clearly would have materially corroborated the plaintiff's version but for some unexplained reason, it has not been attached to the papers nor was it referred to, so it seems, when the parties were at loggerheads whether a lease agreement or sale agreement had been entered into. Except for mere say-so of both parties there is no corroboration of either version nor would it be permissible, as counsel for the plaintiff sought to do, to search for probabilities in either version. The dispute must clearly be resolved by the hearing of oral evidence in the trial of the action.

[11] I am satisfied that the defendant has disclosed a bona fide triable defence and it follows that the order of Van der Linde J falls to be rescinded.

[12] In the result the following order is made:

1. The order granted by Van der Linde J in the above matter, on 20 June 2017, is rescinded.
2. The defendant shall deliver a plea to the plaintiff's particulars of claim within 20 days of the date of this order.
3. The costs of the application shall be costs in the action.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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SCHULTZ MMUOE INC

DATE OF HEARING

10 MAY 2018

DATE OF JUDGMENT

10 MAY 2018