

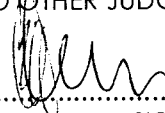
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

22/5/15

CASE NO: 17086/2014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
22/5/15	
DATE	SIGNATURE

In the matter between:

PHEDISA CIVIL ENTERPRISES (PTY) LTD

First Applicant

FRANS JACOBUS REYNEKE

Second Applicant

and

BEAUX LANE (SA) PROPERTIES (PTY) LIMITED

Respondent

JUDGMENT

DODSON AJ

Introduction

[1] This is an application for rescission of a judgment granted by the Registrar

in terms of rule 31(5)(b)(i) of the uniform rules.

- [2] Rescission is sought in terms of rule 42(1)(a), alternatively, rule 31(5)(d), alternatively, the common law.
- [3] To the extent that the application was brought in terms of rule 31(5)(d), the application was filed one day outside the 20 day period provided for. Condonation is sought in this regard, is not opposed and is granted.

Factual background

- [4] The factual background provided in the affidavits is sparse.
- [5] The indebtedness which forms the subject matter of the default judgment has its origins in a lease agreement concluded between the first applicant and the respondent and in respect of which the second applicant bound himself as surety.
- [6] It is common cause that the first and second applicants abandoned the leased premises on 3 December 2013, notwithstanding that the lease term only expired on 31 October 2015.
- [7] Arising out of the events pertaining to the lease, the respondent issued summons against the applicants in respect of various claims. Only two of these form the subject matter of the default judgment proceedings.
- [8] The first claim is in respect of an amount of R115 615,38 arising from an acknowledgement of debt signed by the second applicant on behalf of the

first applicant. The acknowledgment of debt pertained to outstanding amounts due in terms of the lease agreement in respect of rental, rates and taxes, electricity, sewerage, water and interest.

[9] Also included in the first claim is a separate amount of R48 519,06. It is also in respect of arrear charges for rental, rates and taxes, electricity, sewerage, water and interest there was no acknowledgment of debt signed in this regard.

[10] The second claim pertains to an amount of R382 631,87 being in respect of pre-estimated liquidated damages provided for in the lease agreement in respect of the applicants' having abandoned the premises and ceased to pay rental well before the end of the lease term.

Analysis

[11] Although the respondent disputes this, I will assume in favour of the applicants that they were not in wilful default.

[12] What must then be considered is whether the applicants have shown that they have bona fide defences to the claims concerned.

[13] In respect of the claim for R115 615,38 based on the acknowledgment of debt, the second applicant says the following in the founding affidavit:

"8.2 I was requested to sign this document on behalf of the first defendant and I was told that in the event that the first defendant does not sign this document it would be required to vacate the premises forthwith and that it would not be entitled to take any of the machinery and movable assets with me.

8.3 At that stage the first defendant leased various machinery from other suppliers and I was concerned about the machinery. I thus

signed the document under duress fearing that the business of the first defendant, if forced to vacate the premises forthwith, would fail and that I would forfeit the rights to access to the machinery on the premises."

[14] He also goes on to say-

"I deny that I would have signed the acknowledgment of debt on behalf of the first defendant had I not been pressurised or influenced to do so under the threat of severe financial implications."

[15] Christie *The Law of Contract in South Africa*¹ quotes Wessels at para 1167

where the latter sets out the requirements for duress as follows:

"In order to set aside a contract on the grounds of violence or fear our law requires the following elements:

- (1) actual violence or reasonable fear;*
- (2) the fear must be caused by the threat or some considerable evil to the party or its family;*
- (3) it must be the threat of an imminent or inevitable evil;*
- (4) the threat or intimidation must be contra bonis mores;*
- (5) the moral pressure used must have caused damage."*

[16] Tested against the backdrop of these requirements, the applicants' version in the second applicant's own affidavit simply does not pass muster as constituting duress.

[17] On top of that, as counsel for the respondent pointed out, the fear that the second applicant alleges induced him to sign the acknowledgment of debt, was the fear of being forced to vacate the premises forthwith. Yet, despite this, the applicants vacated the premises of their own volition shortly after signing the acknowledgment of debt.

[18] Accordingly I am not satisfied that the applicants have put up a *bona fide* defence in respect of this component of the first claim.

¹ 6th Ed at p 315

[19] In respect of the amount of R48 519,06, the second applicant says in the founding affidavit-

"The amount set forth for monthly electricity, sewerage and water have not been supported by any documentation and thus the computation of these amounts remains in dispute until such time as proof of these amounts is provided by the plaintiff."

[20] This does not amount to a defence. It is simply a request for proof and it is implicit in this paragraph that once the proof is provided, the applicants will concede the claim. That too does not amount to a *bona fide* defence. Particularly so where no facts are put up to form a basis upon which it might be concluded that there is a risk of incorrect calculation of the amounts.

[21] In respect of the amount of R382 631,87 claimed under claim 2, the second applicant says the following in the founding affidavit:

"The amount so claimed and granted by the registrar was for pre-estimated liquidated damages. I submit that there should be a significant reduction in this pre-estimated damages in that the term in the lease agreement amounts to a penalty, in the sense that the plaintiff intended it to operate 'in terrorem'.

8.11 The penalty is grossly disproportionate to any prejudice which may have been suffered by the plaintiff and I should be given an opportunity to prove the extent to which the penalty should be reduced.

8.12 In terms of the Conventional Penalties Act, 15 of 1962, section 3, I should be given an opportunity to defend the claim and plead for a reduction of the penalty."

[22] The allegations in this regard are bald and sketchy. No facts are put up to support the basis upon which the applicants intend to make their claim for a reduction. There is no suggestion that the respondent has been able to or is likely to be able to find a replacement tenant who might be in a position to mitigate the damages.

[23] Further, the allegation, only made in reply, that there was a verbal

agreement reached with the respondent's agent at the time of vacating the premises that another tenant in the building would take over the section formerly occupied by the applicants, is extremely vague and defeated by the non-variation clause in the lease agreement.

[24] In those circumstances I am not satisfied that the applicants have a *bona fide defence* in respect of the second claim.

Judgment erroneously sought or erroneously granted

[25] The applicants further allege that the judgment was erroneously granted because the registrar should have observed that, as a result of it being recorded in the return of service that the summons was served by affixing it to the door, it would not have come to the attention of the applicants. He ought therefore not to have granted judgment until there had been better service, such as at the second applicant's personal address which was reflected on the suretyship agreement annexed to the particulars of claim.

[26] In the answering affidavit, the respondent averred that-

"The Registrar granted the judgment because the summons was properly served in terms of the Rules and is not under an obligation to require further service, when there has been compliance with the Rules."

[27] This allegation went unanswered in the replying affidavit.

[28] Moreover, the service address was the applicants' chosen *domicilium citandi et executandi* in terms of the relevant agreements.

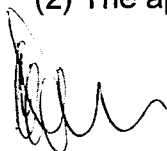
[29] In the circumstances I am not satisfied that the default judgment was

erroneously granted by the registrar as contemplated in rule 42(1)(a).

[30] I accordingly make the following order:

(1) The application for rescission of judgment is dismissed.

(2) The applicants are ordered to pay the respondent's costs.



**A DODSON
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA**

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Date of hearing : 4 May 2015

Date of judgment: 22 May 2015