

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

11/9/2012
CASE NUMBER: 34030/2010

In the matter between

PIETER JOHANNES LODEWIKUS NEL APPLICANT

and

THOMAS WALTER EDMUND RITSON RESPONDENT

DELETE WHICHEVER IS NOT APPLICABLE	
☒	REPORTABLE YES/NO
☒	OF INTEREST TO OTHER JUDGES YES/NO
☒	REVISED
DATE	SIGNATURE

JUDGMENT

KUBUSHI, J

- [1] In this matter the respondent obtained judgment by default against the applicant, for outstanding rental for a residential property. The claim is based on a written lease agreement between the applicant and the respondent. The judgment was granted on the 6 October 2010. A warrant of execution to attach the applicant's movable goods was issued on the 31 October 2010. The applicant is therefore bringing an application for the rescission of the said judgment.
- [2] The applicant became aware of the judgment on the 12 December 2010. He served and filed the application to rescind the judgment on the 15 December 2010. On the 7 February 2011 the respondent served his opposing affidavit

and on the 23 April 2011 the applicant served his replying affidavit. The replying affidavit was served more than two months after the respondent had served his opposing affidavit.

- [3] The respondent is opposing the application and has raised two points *in limine*, which I will deal with before considering the application.

THE FACTUAL BACKGROUND

- [4] The facts of the case are that on the 30 January 2010 the parties signed a lease agreement. The relevant salient terms of the agreement, which I will quote *verbatim* from the lease agreement, are the following:

"2.2 DURATION OF THE LEASE

2.2.1 This **Lease** shall be for a period of **60 months** commencing on 01 February 2010.

2.2.2 ...

2.3 RENTAL

2.3.1 The rental shall be the sum of **R40 000.00 (Forty Thousand Rand per month)** (hereafter referred to as "**The Rental**") payable in advance, free of exchange, without any deduction for any cause whatsoever, on or before the **1st day of every month** by way of a direct cash deposit into the trust account of the owner, ...

2.3.2 The rental for the first 12 month will be paid in advance before occupying the premises.

2.4 DEPOSIT

2.4.1 The **Lessee shall, before moving into** the **Premises**, pay the sum of **R80 000.00** (Eighty Thousand Rand) as a **Key deposit**,

2.4.2"

- [5] The applicant did not comply with the above terms of the lease agreement or any other term for that matter. It is in respect of these terms that the respondent has issued summons and obtained judgment against the applicant.

POINTS IN LIMINE

- [6] The respondent raised the following points *in limine*: firstly, the failure by the applicant to apply for condonation for the late filing of the replying affidavit; secondly, that the application was fatally defective due to the applicant's failure to include a prayer in his notice of motion requesting the setting aside or staying of the warrant of execution.

CONDONATION

- [7] As already stated, the applicant filed his answering affidavit more than two months after the respondent had filed his opposing affidavit. This affidavit was filed way out of time without any condonation from the court. Even at the hearing of this application the applicant's counsel did not apply for condonation. The contention by the respondent's counsel is

that in the absence of the condonation the applicant cannot rely on the affidavit and the court must therefore strike it out, and I agree.

- [8] In terms of rule 27 (1) and (3) of the Uniform Rules of Court, only a court may upon application on notice and on good cause shown, make an order extending or abridging any time for doing any act or may condone any non-compliance with the rules. There being no application, in this instance, for the court to extend the time within which to file the answering affidavit or to condone the late filing thereof, I find that the answering affidavit is not properly before me and must be regarded as *pro non scripto*.

DEFECTIVE APPLICATION

- [9] I do not agree with the contention by the respondent's counsel that failure by the applicant to include a prayer in its notice of motion requesting the setting aside or staying of the warrant of execution pending the rescission, renders the application fatally defective. The judgment in **NEL v ROUX NO & OTHERS** 2006 (3) SA 56 at 59F –J, to which counsel referred me to, does not find application in this instance. The facts of that case are not similar to those in the present case. In that case, at the time of the hearing of the application for the rescission of judgment, the applicant's property had already been sold in execution. The applicant having filed his application to rescind the judgment before such sale in execution took place. The judge had, therefore, to decide whether, in terms of section 78 of the Magistrates Court Act,

the filing of an application for rescission of judgment automatically suspends its execution. The judge, correctly so, found that the section does not provide for the automatic suspension of the execution of a judgment on filing of an application for rescission of that judgment; and that there is also no substantive rule of law that says the filing of an application to rescind a judgement automatically suspends execution thereof. I did not understand the judge to be saying that failure by an applicant to pray for the stay of execution would render the application fatally defective.

- [10] In this instance, the applicant's property has been attached and not yet sold. It is not necessary, in my view, for the applicant to pray for the stay of execution. The consequences of a default judgment fall to be set aside once that judgment has been rescinded. Those consequences would include the issue of a writ of execution. Where a writ has already been issued, they will include the setting aside of the writ together with the attachment of the applicant's property. See NAIDOO v SOMAI 2011 (1) SA 219 (KZP) at 221H.

THE APPLICATION

- [11] As regards the application, the issue that I was required to decide was whether the defence raised by the applicant to the respondent's claim was a *bona fide* defence.
- [12] The defence raised by the applicant is that the agreement, which the respondent relies upon, lapsed due to the fact that

he (the applicant) never took occupation of the premises and never complied with the suspensive conditions in paragraphs 2.3.2 and 2.4.1 of the lease agreement.

- [13] The respondent on the other hand denies that the defence raised by the applicant is a *bona fide* defence to the respondent's action. According to him, paragraphs 2.3.2 and 2.4.1 are not suspensive conditions but are merely the *naturalia* of the agreement which fixes a specific date of payment.
- [14] Rule 31 (2) (b) imposes, on the applicant, the burden of actually proving, as opposed to merely alleging, good cause for a rescission. Good cause includes, but is not limited to, the existence of a substantial defence. The defence must not show a probability of success: it suffices if the applicant shows a *prima facie* case, or the existence of an issue which is fit for trial. The grounds of defence must be set forth with sufficient detail to enable the court to conclude that there is a *bona fide* defence. See Erasmus: **SUPERIOR COURT PRACTICE** at B1-203 – B1-204 and the cases quoted there.
- [15] It is therefore not upon this court to interpret the lease agreement. What is expected of me is to determine whether the applicant has a *bona fide* defence to the respondent's claim. This should just be a *prima facie* defence, in the sense of setting out averments which, if established at the trial, would entitle the applicant to the relief sought. I am satisfied that the applicant has succeeded in doing so.

COSTS

[16] The applicant's counsel contended that a costs order should be made against the respondent for if the respondent had considered the matter properly he would not have opposed the application. In the alternative he argued for an order for costs to be in the cause. The respondent's counsel argued for a cost order against the applicant as the respondent was entitled to oppose the matter. My view is that an appropriate cost order in the circumstances of this case is for cost to be in the cause.

[17] Consequently, the following order is made:

- 17.1 The default judgment granted against the applicant on the in this matter is rescinded.
- 17.2 The applicant is granted leave to defend the matter.
- 17.3 Costs to be costs in the cause.


E.M. KUBUSHI, J

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