

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

Date: 2009-10-08

Case Number: 26340/09

In the matter between:

PRINZONE CC

Plaintiff

and

LIAQUAT ALLI AHMED

Defendant

JUDGMENT

SOUTHWOOD J

- [1] The plaintiff applies for summary judgment against the defendant for an order ejecting him from portion 4a, Erf 36, Pretoria, known as 3A, Prinsloo Street, Pretoria ('the premises'). The plaintiff's claim is based on the cancellation of a written lease agreement entered into by the parties on 7 June 1997. The plaintiff has other claims against the defendant but does not seek summary judgment in respect of those

claims. It concedes that the defendant should be granted leave to defend those claims.

[2] The defendant failed to deliver an answering affidavit before this matter was heard for the first time on 28 July 2009. On that day the court postponed the application to 14 August 2009 to enable the defendant to file an answering affidavit and formally apply for condonation for the failure to file his answering affidavit timeously. The court placed the parties on terms regarding the filing of the affidavits. When the matter came before court on 14 August 2009 the defendant had not filed his replying affidavit in the condonation application and he sought another postponement to enable him to do so. The court postponed the application again to 6 October 2009 and ordered the defendant to file his replying affidavit not later than 21 August 2009, which he did. The costs of that postponement were reserved.

[3] On 6 October 2009 the defendant failed to appear. Instead, his nephew, Mr Hamied Valjee, requested the court to postpone the hearing because his uncle was indisposed. He handed the court a doctor's certificate dated 3 October 2009 which states cryptically that the defendant is suffering from an ear infection with vertigo and nausea and indicates either that he has had or should have a stress ECG. The plaintiff opposed the application and handed in an affidavit by Dr Hassim, its sole member, who investigated the defendant's condition on 5 October 2009. He records that the defendant's wife was not

aware that the defendant had been admitted to a hospital and only knew that he had been to a doctor but had been to the shop that day, 5 October 2009. For reasons given in a separate judgment the application for postponement was refused. The refusal was based primarily on the history of the matter and the defendant's unsatisfactory explanation.

- [4] The plaintiff's case is that it entered into a written agreement of lease in respect of the premises with the defendant; that in terms of that agreement the lessor was entitled to cancel the agreement if the lessee failed to pay the rental; that the defendant failed to pay the rental and that on 8 May 2006 the plaintiff notified the defendant that the lease was cancelled.
- [5] To avoid summary judgment the defendant must satisfy the court by means of his affidavit that he has a *bona fide* defence to the claim for ejectment and his affidavit must disclose fully the nature and grounds of the defence and the material facts relied upon therefor – see Rule 32(3)(b). This means that the defendant must set out in his affidavit, facts, which if proved at the trial, will constitute an answer to the claim and that he must show that this is a *bona fide* defence. This requires that the defendant must swear to a defence, valid in law, in a manner which is not inherently and seriously unconvincing – see **Breitenbach v Fiat (SA) (Edms) Bpk 1976 (2) SA 226 (T)** at 227G-228B. With regard to the requirement that the defendant 'fully' disclose the nature

and grounds of his defence and the material facts relied upon therefor, the statement of material facts must be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. If the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague and sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides* – see ***Breitenbach v Fiat (SA) (Edms) Bpk supra*** at 228B-F.

- [6] In the present case the plaintiff is assisted by the fact that in the application for condonation it has had the opportunity to rebut the defendant's allegations that he paid all the rentals – see ***South African Breweries Ltd v Rygerpark Props (Pty) Ltd 1992 (3) SA 829 (W)*** at 833B-D.
- [7] The defendant's defence is that he paid all the rentals owing to the plaintiff in terms of the lease agreement and accordingly that he had not failed to pay any rentals which would entitle the plaintiff to cancel the agreement. This is alleged in bald and vague terms with no attempt to produce any proof of payment or reconciliation of all amounts owing and paid. The defendant alleges that he regularly and punctually paid the rentals to the plaintiff which never provided him with any receipts. According to the defendant all the payments made to the plaintiff were in cash.

- [8] These allegations must be assessed in the light of the agreement which provides that the defendant has to pay the rentals into the plaintiff's bank account at the Struben Street branch (the account number and branch code being recorded in the agreement) and that the defendant does not allege that the clause was amended in accordance with the standard non-variation clause. It must also be considered in the light of the defendant's own statement that on 9 May 2006, after the plaintiff delivered the notice of cancellation to the defendant, the defendant signed a document in which he stated that he would pay R21 000 to the plaintiff, R11 000 in respect of arrear rental, and admitted that after such payment he would still owe R8 024. This payment is reflected in the plaintiff's bank statement. These facts, which are not disputed, show that the defendant has no defence and that his denial of his default is not *bona fide*. The plaintiff is therefore entitled to summary judgment for the eviction order. The plaintiff seeks an order for costs on the scale as between attorney and client but no reasons were advanced for such an order and the agreement itself does not provide for attorney and own client costs.

Order

- [9] I make the following order:

1. Leave is granted to the defendant to defend the claims set out in prayers 1, 3, 4, 5, 6 and 7 of plaintiff's particulars of claim dated 4 May 2009;
2. Summary judgment is granted in favour of the plaintiff against the defendant in the following terms:
 - (1) The defendant and all those occupying under or through him are ejected from and ordered to vacate the premises, portion 4 of erf 36, Pretoria, known as 3A Prinsloo Street, Pretoria (situated on the south-west corner of Bloed and Prinsloo Streets opposite the petrol station) and are ordered to return to the plaintiff the keys of the premises;
 - (2) The Sheriff is authorised and directed to take all steps necessary to ensure that the premises are vacated by whosoever, be it sub-tenants or other persons occupying with the defendant's consent, and that the possession of the premises is restored to the plaintiff if the defendant fails to comply with the order in (1) above within 14 days of this order;
 - (3) The defendant is ordered to pay the costs of the application including the costs of the postponement on 14 August 2009.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 26340/09

HEARD ON: 6 October 2009

FOR THE APPLICANT: ADV. C.A. DA SILVA SC
ADV. S.K. HASSIM

INSTRUCTED BY: Iqbal Mahomed Attorneys

FOR THE RESPONDENT: In person

DATE OF JUDGMENT: 8 October 2009