IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST PROVINCIAL DIVISION, MAHIKENG

CASE NO: CA 989/07

In the matter between:

CLAYTON HARRISON **PLAINTIFF**

And

SETE BENJAMIN HLAKANYE **1ST DEFENDANT**

LENAH PANDORAH HLAKANYE **2ND DEFENDANT**

DATE OF HEARING: **25 JUNE 2015**

DATE OF JUDGMENT: **2 JULY 2015**

LANDMAN J

JUDGMENT

LANDMAN J:

Introduction

[1] The applicants, Mr S B Hlakanye and Mrs L P Hlakanye, (the defendants) apply in terms of the rule 42(1)(a) of the Uniform Rules of Court for the rescission of the judgment granted by Hendricks J in their absence in favour of Mr Clayton Harrison (the plaintiff) on 18 November 2013. The application is opposed.

Background

[2] It is common cause that the defendants, who were married to each other at the time, orally rented a house situated at Valleifontein, Rooigrond, on the farm Ver Genoeg, known as Host Guest House from the plaintiff. The plaintiff alleges that during January 2007 he discovered that the defendants had abandoned the premises. He alleges that on 7 February 2007 plaintiff and the defendants agreed that:

(a) plaintiff will accept the termination of the lease;
(b) defendants would pay the plaintiff the rental outstanding for February 2007 amounting to R3 300;

(c) defendants would do all necessary repairs to the house in order to bring the house in the same condition it was in when it was handed to them at the inception of the lease;

(d) defendants would replace all furniture as listed in the aforesaid inventory back into the house. A copy of the agreement is annexed to the particulars of claim as annexure "B". An addendum to the agreement "B" lists 13 defects which are to be made good. Another addendum lists the furniture and other items to be placed in the house.

[3] On 31 May 2007, the plaintiff issued a summons against the defendants. It is alleged that the defendants breached the above-mentioned agreement. The plaintiff claimed payment of the rental R3 300; payment of R417 123.72 in respect of the costs of repairing the property; payment of R250 000 in respect of furniture removed from the premises by the defendants; interest and costs.

[4] The defendants entered appearance to defend the action. In July 2007 the defendants filed a plea. They aver that during December 2006 the parties orally agreed that the lease would be terminated. As far as the agreement "B" is concerned, the defendants repeated that during December 2006, the parties verbally (presumably orally), agreed that the lease would be terminated and that the defendants could begin to vacate the premises. The defendants aver that save for furniture given by the plaintiff to a certain Ms Gumbo all the furniture which was at the premises or listed in annexure "A" to the summons was not removed from the property. They also aver that all the "properties" that needed to be

replaced or fixed were fixed and/or "replaced to its pre-lease condition". The defendants deny that they owe anything to the plaintiff.

[5] The subsequent developments can be summarized as follows:

(a) On 23 February 2009 the defendants received a notice to discover documents. There is no indication that they did in fact discover any documents.
(b) On the same date, the plaintiffs delivered his discovery affidavit.
(c) On 3 June 2009 a notice to attend a pre-trial conference was delivered to the defendants' attorney.
(d) On 14 June 2010 a second notice to attend a pre-trial conference was served upon the defendants' attorney.
(e) The defendants' attorney of record withdrew from the proceedings.
(f) By notice delivered on 9 December 2010, the defendants' attorney was reinstated as attorneys of record.
(g) By notice served on 21 November 2012 the defendants' attorney again withdrew as attorneys of record.
(h) On 12 September 2013 a summary of the opinion of an expert, Mr Van der Westhuizen, was sent by registered post to the defendants.
(i) The matter was set down for trial on 30 September 2013 but postponed until 18 November 2013 for service of notice of the set down on the defendants.

(j) An application for substituted service was brought and granted. It was alleged that the Sheriff had been unable to effect service of the notice of set down as the defendants had vacated their residence in Leopard Park and a guard stated that they had moved to a house in Unit 6 Mmabatho. The plaintiff contacted the second defendant by phone and she came to see him. She was informed that the matter was on the roll for 30 September 2013. The plaintiff asked her to provide the first defendant's address, but she refused to give it to him. The plaintiff was unable to trace the defendants in Mafeking. The second defendant had worked for the Department of Public Works, but when the sheriff attempted to serve the notice of set down at the Department he was informed that the second defendant was no longer employed there.

(k) An order for substituted service sought and granted. The plaintiff was authorized to service the notice of set down by publishing a copy of the notice in the "Mail" newspaper. In addition, the plaintiff's attorney was ordered to contact the second defendant telephonically and inform her of the date of the pending action and confirm that this telephone number is either a cellular or a landline. The attorney was ordered to file affidavit setting out the action taken.

(l) Plaintiff's attorney, Mr Scholtz, filed an affidavit on 25 October 2013 in which he reported that he made a call to the second defendant on 21 October 2013 to a cellphone number. He informed the second defendant that the matter was enrolled for hearing on 18 November 2013. The second defendant told him that this matter was dealt with by the first defendant and she did not know what was going on. He asked her for the address of

the first defendant. She said that she did not know his where abouts. He asked to how that was possible and she replied that the first defendant used to be in the village. But she had sent her children to look for him and they could not find him.

(m) The notice of set down was duly published in the "Mail" newspaper.

(n) On 18 November 2013 the matter serve before Hendricks J. the defendants did not appear. The plaintiff and his expert witness, Mr Van der Westhuizen, testified. Judgment was entered against the defendants for payment of R3 300 in respect of rental for February 2007; R417 123.72 for repairs of the premises, together with interest and costs.

The application for rescission

[6] On 1 October 2014 the defendants delivered an application for rescission of judgment which serves before me.

[7] The defendants allege that they only became aware of the judgment in mid June 2014 when the first defendant met his attorney and asked about the matter. The second defendant was also not aware of the judgment.

[8] Mr Monnahela, who appeared on behalf of the defendants, submitted that the judgment was sought or granted in error. Mr P Smit, who appeared for the plaintiff, contended to the contrary. He contended that the defendants' remedy

was to appeal against the judgment and not seek to rescind it. This contention does not take cognizance of the fact that an order which may be potentially be rescinded is not a final order for the purposes of an appeal. See **Petelli v Everton Gardens Projects CC** 2010 (5) SA 171 (SCA).

[9] Mr Smit contended that the claim for R417 123.72 was a claim for damages in order to restore the property to the condition it was in at the commencement of the lease. But the claim is based squarely on the alleged agreement, annexure "B". This being the case it was incumbent upon the plaintiff to lead evidence as regards the costs of attending to the 13 defects listed on the addendum to that agreement.

[10] A transcript of the proceedings in court on 18 November 2013 has been provided. Mr Van der Westhuizen testified that he conducted business as EC Services and referred to a quotation dated 17 February 2007. Mr Monnahela submitted that the plaintiff led evidence in respect of defects and structural repairs that were not listed on the addendum. It is not possible to compare the quotations accurately but it is apparent that the "entire rewiring of the property" was not contemplated by the list; it would not ordinarily have been a tenant's responsibility. The fitting of "new concrete capping" around the building (garage) is another item that was not on the list. The repair and sealing of the garage and house roofs is another as is the supply and fitting of "new water supply lines" to the house. The fixing of a garage door is on the list but EC Services' quotation is for "supplying and fitting 5 new garage doors".

[11] On the other hand the defendants alleged in their application for rescission that they obtained a quotation from L S Distributers for the defects on the list and effected the repairs. Whether the repairs were effected or not may remain in dispute but this quotation, unlike that of EC Services, accords with the list. The quotation by L S Doll Distributers is for R68 844.60 (including VAT) while that of EC Services is for R417 123.72 (excluding VAT).

[12] I am satisfied that the plaintiff prima facie sought damages (costs of repairs) of defects that were not agreed upon and in respect of which no case had been made out in the particulars of claim. As a result of this the court erred when it granted judgment as regards this prayer on 18 November 2013.

[13] It follows that justice requires that the order granted should be set aside. This will include the judgment for rental, interest and costs.

Costs

[14] What remains is the question of costs. Both defendants have sought to avoid a trial and have neglected to instruct their attorney of record. This has caused him to withdraw twice in the course of the action. The first defendant has provided his address and Dibate Village, Mmabatho without further particularity.

The second defendant was informed of the date of trial and failed to attend court. I intend ordering that the costs be reserved for hearing by the trial court.

Order

[15] In the result I make the following order:

1. The order of this court granted in this matter on 18 November 2013 is rescinded.
2. The costs in connection with the proceedings on 18 November 2013 shall be costs in the action.
3. The defendants shall provide their attorney of record with their respective current residence and business addresses and telephone numbers (landline and cellular) and the attorney of record shall file a notice setting out these particulars with the registrar by 9 July 2015 and this process shall be repeated whenever their particulars change.
4. The costs of the application for rescission are reserved for decision by the trial court.
5. The plaintiff is directed to have the documents in the court file properly paginated and indexed.
6. The plaintiff and both defendants are directed to hold a pre-trial conference, file a minute and apply for a trial date by 30 July 2015.

AA Landman

Judge of the High Court

Appearances

For the applicant/defendants:	Adv O I Monnahela instructed by M E Tlou Attorneys and Associates
For the respondent/plaintiff:	Adv P Smit instructed by Herman Scholtz Attorneys