IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAALSE PROVISIONAL DIVISION)

Case number: 27230/2006

Date: 26 August 2008

UNREPORTABLE

In the matter between:

DAWN J HASSET

Plaintiff / Applicant

and

KOOP DE VRIES STRYGER Defendant / Respondent

JUDGMENT

PRETORIUS J,

This is an application for the rescission for a default judgment granted in this Court on 16 February 2007. There is also a counter application for the eviction of the applicant in terms of the provisions of the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998**.

The respondent, as plaintiff, instituted action against the applicant, as defendant. The respondent relied on two claims against the applicant.

The respondent alleged in the particulars of claim that it is the registered owner of immovable property situated at 30 Potgieter Street, Suideroord, Johannesburg and that the respondent and applicant had concluded a written lease agreement on 25 July 2005. Respondent alleged that the applicant breached the lease agreement, failing to pay the agreed monthly rental. This agreement was cancelled.

The respondent claimed for payment of the arrear rental and future damages and sought an order of ejectment of the applicant from the property.

The return of service shows that the summons was served personally on the applicant. As the applicant did not enter a notice of appearance to defend default judgment was granted against the applicant on 16 February 2007 for:

> *"- Payment of the capital amount of R27 000.00;*

- *Interest on the aforesaid capital amount at a rate of 15.5% per annum with effect from 18 August 2006 until date of payment;*
- *Costs of suit."*

On 7 July 2007 applicant launched an application to have the default judgment rescinded in terms of Rule 42 (2) (a) and/or Rule 31 (2) (b).

The applicant was the previous owner of the property and had a mortgage bond registered over the property. She fell in arrears with bond payments and during July 2005 the extent of the arrears was R 40 000.00.

In July 2005 she received a call from one Sakkie who informed her that he could arrange a loan for her to avoid losing the property.

One Jacques, an associate of Sakkie's, arranged to meet her in order to have the paperwork signed. She met Jaques on 25 July 2005 and signed a document which was in Afrikaans and according to which she borrowed R 40 000.00 and would repay R 65 000.00. According to the applicant she continued paying instalments on her home loan and money due to her local authority. She did not start repaying the R 40 000.00 loan as, according to her, she did not have the particulars as to where, how and when to pay.

Applicant admits that she received the summons and tried to contact the respondent's attorney, Mr Joubert. She alleges that she and Mr Joubert entered into an agreement in terms of which the legal proceedings against her would be stayed. According to her the arrangement was confirmed by her in a telefax letter and enquiries by her on 9 October 2006 and 15 November 2006, but without any response from Mr Joubert.

According to the applicant the respondent obtained default judgment against her contrary to the undertaking Mr Joubert had given. Her present attorneys of record made enquiries from applicant's attorneys and she received a number of documents which included the written agreement in terms of which respondent had bought her house for the purchase price of R 160 000.00.

Her defence to these agreements is that she is not bound to them as she had signed them under false pretences.

The applicant sets out her reasons for launching her application to have the judgment against her rescinded. She admits that she had acquired knowledge of the default judgment during March 2007. Her explanation is that due to ill health she only sporadically dealt with her affairs and that explains why the application for rescission of the default judgment was only launched in September 2007.

The requirement that must be met by the applicant to succeed in this application is that she must show that she was not willful in ignoring the judgment, she must give a reasonable explanation for her default; her application must be *bona fide* and not a delaying tactic; she must have a *bona fide* defence which *prima facie* established at trial will entitle her to the rescission of the default judgment.

As regards willful default it was found in **Koekemoer v Viljoen 1921 TPD 129** that the applicant will not be held in willful default if she acted on a *bona fide*, but mistaken belief. The respondent's attorneys denies giving an undertaking to the applicant to stay the proceedings. The applicants only has to show that she has a *prima facie* case or the existence of an issue which is fit for trial. In **Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 O** Brink J at 476 – 477 found:

> *"He must show that he has a bona fide defence to the plaintiff's claim. It is sufficient if he makes out a* prima facie *defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."*

In **Standard Bank of SA Ltd v El-Naddaf and Another 1999 (4) SA 779** at 784 Marais J found:

> *"In a case such as this, where the applicant for rescission admits having signed a clear suretyship, I feel that it cannot be sufficient to establish* bona fides *if she baldly states 'the plaintiff misled me as to the contents of*

> *the document I was signing' without saying how the plaintiff misled her. I am at a loss to understand how, if so bald and sketchy an averment is made, a court can be satisfied as to the* bona fides *of an applicant who is in a position to set out much more clearly (without requiring massive detail) how she was misled and by whom on behalf of the plaintiff."*

In the present matter the applicant's set out that she did not understand fully the Afrikaans agreements she had signed, which distinguishes it from the abovementioned matter.

In **Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T)** at p 228 A – B Colman J found:

> *"It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the bona fides of his defence. It will suffice, it seems to me, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing."*

and further:

> *"I respectfully agree, subject to one addition, with the suggestion by MILLER, J., in Shepstone v. Shepstone , 1974 (2) SA 462 (N) at pp. 466-467, that the word 'fully' should not be given its literal meaning in Rule 32 (3), and that no more is called for than this: that the statement of material facts 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. What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides."

The power of attorney does seem to support the respondent but that will have to be decided at trial. I cannot find in this application that the applicant does not have a *bona fide* defence which, if proven at trial, will not entitle her to the relief she requests.

After considering all the facts and the allegations in the affidavits of both parties, it is possible that the applicant may show at trial that due to the fact that the agreements were in Afrikaans she did not understand the terms of the agreements and therefore did not pay.

The counter-application:

It is clear that the counter application for the eviction of the applicant from the premises has not been properly served on the Johannesburg Metropolitan Municipality.

In these circumstances I am not prepared to dismiss the counter application but will postpone it to the next available date on the opposed roll to enable the respondent to effect proper service as required by the **Prevention of Illegal Eviction from and Unlawful Occupation of Property Act 19 of 1998**.

It is ordered that:

1. Default judgment granted on 16 February 2007 under case number 27230/2006 is rescinded;
2. The counter application is postponed to 2 March 2009 on the opposed roll;
3. The Sheriff is instructed to serve the notice in terms of section 4 (2) of Act 19 of 1998 on:
    - 3.1 the respondent at the property situated at 30 Potgieter Street, Suideroord, Mondeor;
    - 3.2 Johannesburg Metropolitan Municipality;
4. Costs of the application for rescission of the default judgment to be costs in the cause;
5. Costs of the counter-application are reserved.

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C Pretorius

Judge of the High Court

Case number	:	27230/2006
Heard on	:	14 August 2008
For the Applicant / Plaintiff	:	I S Ferreira
Instructed by	:	TIntingers
For the Respondent / Defendant	:	M P van der Merwe
Instructed by	:	Johan Joubert
Date of Judgment	:	28 August 2008