REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2015/41464

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

....

DATE MOKOSE SNI

In the matter between:

PATEL, SORAYA — Applicant

(Defendant in main case)

and

DORASAMY, REKHA — Respondent

(Plaintiff in main case)

JUDGEMENT

MOKOSE AJ

[1] This is an application in terms of which the Applicant seeks a rescission of a judgement obtained by the respondent on 1 March 2016 for payment of the sum of R280 000,00 against return of the business and its assets to the Applicant.

[2] It is common cause that the matter commenced by way of summons. No notice of intention to defend was filed and judgement was granted in favour of the respondent on 1 March 2016.

[3] The applicant contends that she first became aware of the judgement on 29 April 2016. She further contended that she was not in wilful default as she was not present when the summons was served on her. Furthermore, she alleges that the Sheriff blatantly lied about her refusal to accept service of the summons as she would immediately have instructed her attorney to defend the matter.

[4] A court may on good cause shown, or if it is satisfied that there is a good reason to do so, rescind a judgement. Such good cause includes, but is not limited to, the existence of a substantial defence. The applicant must furnish an explanation of his default sufficiently to enable the court to understand how it came about and to assess the applicant's conduct and motives. Prejudice and convenience are not factors to consider. For the requirement of good cause to be satisfied, there should be evidence of the existence of a substantial defence and of a *bona fide* held desire by the applicant to raise the defence if the rescission is granted.

WILFUL DEFAULT

[5] Service of the summons was effected on the *domicilium citandi* of the applicant being […] H. Drive, Houghton on 26 November 2015 at 15H30. The summons was served by affixing a copy to the main door. The Sheriff further noted that the defendant refused to accept and sign the document. The applicant avers in her founding affidavit that the Sheriff's allegations on the return of service that she refused to accept the summons is a blatant lie. She avers that she was not home on the day in question as she was at work in Ga-Rankuwa, Pretoria. If she had found the summons affixed to the front door, she would have immediately instructed her attorney to defend the action.

[6] Section 43 of the Superior Courts Act 10 of 2013 provides that:

"….(2) the return of the Sheriff or Deputy Sheriff of what has been done upon any process of the court, shall be prima facie evidence of the matters therein stated".

It follows that where a defendant or respondent seek to impeach a return of service of the sheriff, this must be done on the "clearest and most satisfactory evidence". It is not open to anyone to impeach a return of service on flimsy grounds or when ther exists no reasonable basis on which to do so.

[7] On the face of it, the return is valid. It states:

"On the 26th day of November 2015 at 15H30 and at […] H. Drive, […], Houghton, JHB the annexed COMBINED SUMMONS, PARTICULARS OF CLAIM AND ANNEXURES was served on the DEFENDANT, by affixing a copy of the original to the main door, at the given address, being the defendant's chosen *domicilium citandi et executandi*, in terms of Rule 4(1)(a)(iv), as the DEFENDANT REFUSED TO ACCEPT AND SIGN THE DOCUMENT."

The effect of it is clearly that the applicant refused to acknowledge receipt of the summons from an officer whose duty is, *inter alia,* to serve summons. The applicant further submitted that on a balance of probabilities a well-educated person such as herself, would not have been unaware of the consequences of not accepting service of a summons.

[8] In **Sussman & Co (Pty) Ltd v Schwarzer 1960 (3) SA 94 (OPD) at 96 D – H** it was stated that if one wishes to impeach those facts (a return of service) then the onus shifts onto him to show by clear evidence that although the return shows that the requirements of Sec. 8(b) have been complied with they were in fact not complied with and that the return is not a proper return.

[9] The onus shifted to the applicant to show that the facts contained on the return of service are not correct. The lack of a confirmatory affidavit confirming that the applicant was indeed at her place of employment at the time of service of the summons by the sheriff does not aid her case at all. The applicant did not discharge the onus of disproving the contents of the sheriff's return. Accordingly, I am of the view that the applicant was in wilful default.

BONA FIDE DEFENCE

[10] The absence of a bond fide defence must be assessed with reference to the agreement of sale entered into by the parties. The relevant terms are as follows:

"1.3 Conditions Precedent

This agreement in its entirety, is subject to the fulfilment of the following condition:

1.3.1 that the purchase is able to secure a 1 (one) year lease for the business at 50 Grant Avenue, Norwood, with an option to renew the lease for 1 (one) further year by 15th May 2015.

1.3.2 ……

1.3.3 If the condition precedent is not fulfilled timeously then the provisions of this agreement shall never become effective and the *status quo ante* shall be restored as far as may be possible."

[11] The facts are briefly that the respondent paid a deposit of R140 000,00 to the applicant on 12 May 2015. A subsequent payment of R140 000,00 was made on 22 May 2015. However, the lease was signed on 18 May 2015.

[12] The applicant submitted that although the lease agreement was signed on 18 May 2015, the suspensive condition had not failed as the lease had been secured prior to its signature. The applicant also avers that she had been advised by the respondent that a lease agreement had been finalised by the 15 May but was only signed on the 18 May 2015. Although the applicant in her founding affidavit had contended that she would obtain a confirmatory affidavit from the owner of the premises that a lease agreement had in fact been negotiated in the lead up to the signature on 18 May 2015, an affidavit indicating the inverse was secured by the respondent.

[13] It is notable that the applicant was not a party to the lease agreement. She is unable to gainsay the version of the parties to the lease agreement, being the respondent and owner of the premises. She relied on inadmissible evidence in her attempt to

challenge the date when the lease was in fact finalised. As such, I am of the view that the condition precedent had not been fulfilled.

[14] In trying to indicate that the suspensive condition had been fulfilled, the applicant further contended that if the condition had in fact not been fulfilled, the respondent would not have paid the balance of the purchase price. I am of the view that the respondent had paid the balance of the purchase price as it was an obligation of the sale agreement. Had she not done so, she would have been in breach of the agreement. The fact that a party performs in terms of a lapsed agreement does not automatically re-instate the agreement. If the condition precedent is not fulfilled, the whole agreement falls away and the restitution must be tendered.

Palm Fifteen (Pty) Limited v Cotton Tail Homes (Pty) Limited 1978(2) SA 872 (A)

[15] The applicant further avers that the respondent waived the condition precedent by her conduct. The respondent continued to run the business for a further period of 5 (five) months prior to alleging that the contract was void and unenforceable. Furthermore, the respondent corresponded with the owner of the premises about the split of the rent for the month of May. The applicant avers that such behaviour constituted a cleat tacit waiver of the condition precedent.

[16] Clause 10.8 of the agreement of sale signed by the parties stipulates as follows:

"No latitude, extension of time or other indulgence…….in respect of a performance of any obligation hereunder……and no single or partial exercise of any right by a party shall under any circumstances be construed to be an implied consent by such

party or operate as a waiver or novation of, or otherwise affect any of that part's rights in terms of or arising from this agreement……"

[17] I am of the view that a continuation of the lease and running of the business was not a re-instatement of the agreement between the parties. As such, no case for a rescission exists and the matter falls to be dismissed.

Accordingly, I make the following order:

(i) The application for rescission of the judgement is dismissed;

(ii) The respondent is granted costs on an attorney and own client scase on account of the deficient and frivolous case put up by the applicant, which matter had very little prospect of success.

_____

MOKOSE AJ

DATE: 10 MARCH 2017