IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBUIRG
REPUBLIC OF SOUTH AFRICA

Case No 7255/10

In the matter between :

Suyen Naidoo — Applicant

and

Roith Harilal Somai — First Respondent
Shatha Somai — Second Respondent
The Sheriff of the High Court
of the District of Ladysmith — Third Respondent

J U D G M E N T

Lopes J

[1] In this matter the first and second respondents obtained a judgment on the 7th July, 2010 against the applicant pursuant to an application for default judgment made to the Registrar of this Court in terms of Rule 31.

[2] The Registrar granted an order *inter alia* ejecting the applicant from the premises situated at Shop 1, 95 Lyell Street, Ladysmith.

[3] The first and second respondents' cause of action was based upon the breach by the applicant of a written lease agreement concluded between the

parties.

[4] It is now common cause between the parties that that judgment was "*erroneously granted*" as that phrase is envisaged in terms of Rule 42(1)(a) of the Uniform Rules of this Court. The judgment had been "*erroneously granted*" because there was no service of the application for default judgment as required by Rule 31(5). That was necessary because the applicant was in default of filing a plea.

[5] The applicant is accordingly entitled to have the judgment set aside without a consideration of "*good cause*".

See : Bakoven v J G Howes (Pty) Ltd 1992(2) SA 466 (E) at 471 E 472 C

Promedia Drukkers en Uitgewers (Edms) Bpk v Kaimowitz and Others 1996(4) SA 411 (CPD) at 417 B – I.

[6] Mr van Rooyen who appeared for the first and second respondents conceded that the applicant was entitled to an order for recission of the judgment. He conceded in addition that the writ of execution and the writ of ejectment both had to be set aside and that the movable property of the applicant that had been attached pursuant to the order had to be returned to him. The sale in execution which had been set down for the 30th September 2010 was also to be cancelled.

[7] However, Mr van Rooyen submitted that the applicant is not entitled to

an order which effectively reinstates him into the leased premises. He maintained this was so because a third party had acquired rights in terms of an oral lease concluded between the first and second respondents and a third party in respect of the leased premises.

[8] According to the answering affidavit, a lease agreement had been orally concluded between the first and second respondents and one S P Mosia on the 25th August, 2010, the day after the applicant had been evicted from the leased premises. The lease was for a period of two years commencing from the 1st October 2010.

[9] The first respondent stated that he had given the keys to Mr Mosia to enable him to commence business on the 1st October, 2010. He also stated, however, that as at the date of deposing to his affidavit (which was on the 17th September, 2010 – i.e. one Court day before this hearing) that he was in possession of the keys to the premises for the purpose of installing an alarm system. He stated that as soon as the alarm system had been installed he would return the keys to Mr Mosia who would then be in effective possession and occupation of the premises.

[10] I accordingly deduce from the contents of the first respondent's affidavit that Mr Mosia has not yet taken occupation of the leased premises. Mr van Rooyen had no instructions to the contrary.

[11] It is significant in this regard that the first and second respondents'

attorneys were notified as early as the 17th August, 2010, that the applicant intended to seek an order rescinding the default judgment which was granted. That much is evident from annexure "SNR1" to the replying affidavit of the applicant. Indeed, Mr van Rooyen conceded that it could not be argued that the first and second respondents' attorneys were not aware of the fact that an application for recission would be made prior to the conclusion of the lease.

[12] Mr van Rooyen referred me to the matter of Harris v Unihold (Pty) Ltd and Others 1981(3) SA 144 (WLD) as authority for the proposition that Mr Mosia had an entrenched right which would operate in preference to the applicant.

[13] I believe that that judgment is distinguishable on the facts, firstly because in this case Mr Mosia has not yet occupied the premises, and secondly because that judgment was based upon a suspicion of collusion between the landlord and the third party.

[14] If indeed the facts of that case are on all fours with the facts of this one as contended for by Mr van Rooyen, then I am respectfully in disagreement with the conclusion.

[15] Once it is conceded, as it has been in this case, that the default judgment falls to be set aside, then the consequences of the default judgment also fall to be set aside. Those consequences include the issue of a writ of execution, the writ of ejectment and the attachment of the applicant's property

and his ejectment from the premises.

[16] What follows thereafter is that the obligation of the first and second respondents to restore possession to the applicant is pursuant to the original lease agreement. The rights of the applicant to that lease agreement pre-date any rights which Mr Mosia may conceivably claim.

[17] In any event any rights which Mr Mosia claim can only be personal rights. This cannot be equated to a situation where a purchaser acquires a real right to property (for example the transfer of immovable property into his or her name), and because Mr Mosia only has a personal right against the first and second respondents, that right is trumped by the personal right of the applicant which pre-dated it. In those circumstances I cannot see that it would be of any consequence that Mr Mosia acted in good faith in concluding the lease agreement. In this regard, and although there is no evidence to support such a conclusion, it would appear that the probabilities favour Mr Mosia having been aware of the fact that the applicant had been a previous tenant.

[18] Mr van Rooyen submitted that the application should be adjourned in order to enable the joinder of Mr Mosia. I do not agree. In my view Mr Mosia is in the same position as a sub-lessee would be in eviction proceedings between a landlord and the lessee. He would not have a direct and substantial legal interest entitling him to be joined in the action.

[19] This is more particularly so in circumstances where Mr Mosia has not

yet taken occupation of the leased premises.

[20] At the end of the hearing I reserved judgment but cautioned Mr van Rooyen to notify his client that he was not to part with the keys to the premises or allow Mr Mosia in any way to take occupation therof. This was because I indicated to the parties my intention to make the order set out below.

[21] I considered whether it was necessary to grant an interim order only to enable the joinder of Mr Mosia to take place. However, given that I have had the advantage of argument from both counsel and that another Court would not in the future be in a different position from me to arrive at a conclusion, I have decided to grant a final order. That order is as follows :-

a) the default judgment granted on the 7th July, 2010 under case no 2943/10 is set aside;

b) the writ of execution issued under case no 2943/10 on the 21st July, 2010 is set aside;

c) the writ of ejectment issued under case no 2943/10 on the 12th August, 2010 is set aside;

d) the sale in execution scheduled to take place under the above case number on the 30th September, 2010 is cancelled;

e) the first and second respondents are directed to restore immediate occupation of the premises described as Shop 1, Shrikantha Centre, 95 Lyell Street, Ladysmith, KwaZulu-Natal to the applicant;

f) the first, second and third respondents are directed to return to the

applicant at the premises referred to in sub-paragraph (e) above all goods which were attached by the third respondent pursuant to the grant of the writ of execution issued under case no 2943/10 of the 1st July, 2010, within 24 hours of the grant of this order;

g) the applicant is granted leave to defend the action under case no 2943/10, and the *dies* for the taking of the next step in the proceedings are to be calculated from the date of this judgment;

h) the first and second respondents are directed to pay jointly and severally, the one paying the other to be absolved, costs of the application for default judgment in terms of Rule 31, as well as the costs of the application under case no 7255/10.

Date of hearing : 20th September 2010

Date of judgment : 23rd September 2010

Counsel for the Applicant : V Moodley (instructed by Vathers Attorneys)

Counsel for the Respondent : R M van Rooyen (instructed by Christopher,

Walton and Tatham)