

SOUTH AFRICA / JUDGMENT

Pelser v Annor N.O (40069/2016) [2017] ZAGPPHC 973 (7 November 2017)

[2017] ZAGPPHC 973

COURT

North Gauteng High Court, Pretoria

BEFORE

Mudau

CASE / FILE NUMBER

40069/2016

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REPUBLIC OF
SOUTH AFRICA
IN THE HIGH
COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA

CASE NO: 40069/2016
(1) NOT
REPORTABLE
(2) OF
INTEREST TO OTHER JUDGES
(3) NOT
REVISED
7
NOVEMBER 2017

In the matter between: WILLIE
PELSER Applicant
and
SAMUEL
YAW ANNOR
N.O Respondent

JUDGMENT

MUDAU J:

[1] In this matter the applicant, Mr Pelser, applies for rescission of a judgment and order, of her Ladyship Madam Justice Mali, that was granted on 22 August

2016. In terms of the judgment, the Court ordered the eviction of Mr

Pelser, from the premises known as, the 26 parking bays situated in the basement of the Mary Lynn Square Building, at 566 Serene Street, Garsfontein ("the premises").

[2] In terms of a written agreement of lease the respondent leased the premises to the applicant during March 2015, effective from 1 February 2015, terminating on 31 January 2020 'for the storage and restoration of personal vehicles'. According to clause 9 of the lease agreement, in the event that the lessee(applicant) fails to pay the rental or any other amounts whatsoever due and payable by the lessee in terms of the said agreement or due date, being the first of each and every successive month, amongst other conditions, the lessor (respondent) shall be entitled to cancel the lease agreement forthwith, resume possession of the premises, evict the lessee and claim damages of whatsoever nature from the lessee, until expiry of the lease or until date on which another suitable tenant is secured, whichever is the soonest.

[3] It is common cause that the respondent failed to make payment of the monthly rent due to the applicant[1], in the amount of R4500-00, excluding the water and electricity bill. The respondent claims that he intentionally withheld payment. When the affidavit in support of the applicant's eviction was deposed to on 18 May 2016, the applicant was in arrears with his rental, in the amount of R51, 441-57. Despite entering appearance to defendant the eviction application on 28 June 2016, the respondent failed to file an answering affidavit, a period constituting about 8 weeks. In this application, the respondent places the blame for the failure to file an answering affidavit before the door of his erstwhile attorney. Contractually, it was argued, and correctly so in my view, that the applicant was not entitled to withhold any payments due to the respondent[2]. His explanation amounted to an admission of the fact that he breached the terms of the lease agreement. A breach, which entitled the respondent to cancel the lease agreement as it did.

[4] The applicant, essentially, seeks to rescind the eviction order and to remain in occupation of the property on the basis that the property was defective and unsuitable for the purpose for which he leased it. Despite this alleged unsuitability, the applicant wants to prevent his eviction. In argument before Court it was placed on record from the bar but without more substantiating that, he requires a two months extension, in order to vacate the premises. To date hereof, the applicant has not filed a replying affidavit or heads of argument. It would seem to me that the applicant does not raise in this matter, any material dispute of facts. The applicant, it further seems to me, does not have a bona fide cause in bringing this

application.

- [5] It is trite that an applicant seeking to rescind a judgment in terms of Rule 31(2)(b) must show good cause for the granting of the rescission application[3]. In addition, the good cause must be illustrated in clear terms in the founding affidavit[4]. Rule 31(2)(b) imposes, on the applicant, the burden of actually proving, as opposed to merely alleging, good cause for a rescission. Good cause includes, but is not limited to, the existence of a substantial defence. The defence must not show a probability of success: it suffices, if the applicant shows a prima facie case, or the existence of an issue which is fit for trial. The grounds of defence must be set forth with sufficient detail to enable the Court to conclude that there is a bona fide defence (see *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (0); *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A)).
- [6] What is expected of this Court is to determine whether the applicant has a bona fide defence to the respondent's claim. This may just be a prima facie defence, in the sense of setting out averments which, if established at the trial, would entitle the applicant to the relief sought. In the circumstances, for reasons alluded to in the preceding paragraphs, I am not satisfied that the applicant has made out a case for the relief sought. In my view, the application for rescission is nothing more than a delaying tactic and accordingly stands to be dismissed. There is no reason why the costs should not follow the

result on a scale provided for in clause 30 of the lease agreement.

- [7] The following order is made: the application for rescission of judgment is dismissed with costs on the scale as between attorney and client.

TP MUDAU

Judge of the High Court,

Gauteng Division,

Pretoria

Heard on: 1

November 2017

Delivered on: 7

November 2017

For the Applicant: Adv B R Du Tait

Instructed by: Hansen

Incorporated, Pretoria

For the Respondent: Adv J Vorster

Instructed by: Stuart

Van der Merwe Attorneys, Pretoria

[1] Index 2, founding affidavit, paragraph 6.5, page 72.

[2] Index 2, answering affidavit, paragraph 19.2, page 132. Index 2, Annexure "B" (Lease Agreement), clause 21.3, page 101.

[2] Index 2, answering affidavit, paragraph 19.2, page 132.

Index 2, Annexure "B" (Lease Agreement), clause 21.3, page 101.

[3] Ferris and Another v Firststrand Bank 2014 (3) SA 39 (CC) at 44 paragraph [13].

[4] Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger 1976 (2) SA 701 (D) at 704E-G.

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