IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAALSE PROVISIONAL DIVISION)

Case number: 17221/2006

Date: 20 November 2007

UNREPORTABLE

In the matter between:

OSTRISAN CC 1st Applicant

ANDRE COETZEE 2nd Applicant

and

LEADWOODS TOURIST PROPERTIES (PTY) LTD Respondent

JUDGMENT

PRETORIUS J,

In this application the applicants request a rescission of judgement granted on

27 November 2006 under case number 17221/2006. The application is brought under rule 31 (2) (b) and/or rule 42 (1) (a) or (c) of the Rules of Court and/or in terms of the common law.

Summons was issued on 1 June 2006 by the respondent. This summons was served on the applicants at the *domicilium citandi et executandi* as chosen by the applicants in the lease agreement. The action was not defended at the time and default judgement was granted in terms of rule 31 (5) on 27 November 2006. Writs of execution were issued on 5 February 2007 and served on the applicants on 19 February 2007.

The causa for the default judgment is based on a lease agreement entered into between the applicants and the respondent. The first and second applicants chose as a *domicilium citandi et executandi* an address of service in terms of the lease agreement and the deed of suretyship.

In the lease agreement the *domicilium citandi et executandi* was set out in clause 20 as:

> *"20.* 1 *the parties chose* as *their domicilia et executandi for all purposes under this agreement, whether in respect* of *court process, notices or other communications* of *whatsoever nature, the addresses specified in schedule* 1.
>
> *20.2 .any notice or communication required or permitted to be given in terms* of *this agreement shall be valid and*

effective only if in writing.

20.3 either party may by notice to the other party change its domicilium citandi et executandi to another physical address in the Republic, provided that the change shall become effective on the 14th day after receipt of the notice by the other party.

20.4 any notice to a *party contained in* a *correctly addressed envelope and*

20.4.1 sent by registered post to it at its domicilium citandi et executandi; or

20.4.2 delivered by hand during ordinary business hours at its domicilium citandi et executandi

Shall be deemed to have been received, in the case of clause 20.4. 1. *on the 7th business day after posting (unless the contrary is proved) and, in the case of clause 20.4.2 on the day of delivery.*

20.5 notwithstanding anything to the contrary herein contained a *written notice or communication actually received by* a *party shall be an adequate written notice to it notwithstanding that it was not sent to or delivered at its chosen domicilium citandi et executandi.* "

clause 4 of schedule sets out:

"4. *The domicilia citandi executandi in terms of clause* 20 *are:*

The landlord: *Chameleon Vii/age*
Old Rustenburg Road
Dam Doryn
Hartebeespoort
Northwest

The tenant: *As above"*

In terms of the suretyship clause 11:

> *"I chose domicillum citandi executandi at Ostrisan Show Farm Chameleon Vii/age."*

The summons was served on both the first and second applicants on 1 June 2006 by the sheriff, Brits at their chosen *domicilium citandi et executandi* and the sheriff completed the return of service as follows:

> *"On the first day* of *June 2006 at 13h35 and at Chameleon Vii/age, Old Rustenburg Road, Dam Doryn, Hartebeespoort Northwest being the chosen domicilium citandi et executandi address i.r.o. both Defendants the COMBINED SUMMONS, PARTICULARS OF CLAIM and ANNEXURES "A" to "0" was served by affixing two copies thereof to the main door to the office. No other means of service. Defendants no longer at given address."* (my emphasis)

Rule (4) (1) (a) (iv) of the Uniform Rules of Court provides:

> *"if the person* so *to be served has chosen* a *domicilium citandi,*

> *by delivering or leaving* a *copy thereof at the domicilium* so *chosen;"*

It is common cause that the address chosen is also the address of the principal place of business of the respondent. It is clear from the return of service by the sheriff that the first applicant was no longer at the premises. In **Botha v Measroch 1916 TPD 142** at p 146 Mason J found:

> *"Now, where,* as *in* a *case* of *this kind, the plaintiff himself has selected his own office* as *the domicilum citandi by agreement with the defendant, I think there is, in all probability, an implied obligation on him to communicate the fact* of *the service* of *the document to the defendant."*

and at p 148:

> *"It may be, and I* am *inclined to think that, where the defendant has agreed that the plaintiff's own office shall be the place* of *service, an implied obligation is cast upon the plaintiff to give notice to the defendant* of *the service, but, even if such an obligation does arise, it is satisfied in the present case, because it appears that immediately the messenger served the summons at his own office he wrote to the defendant informing him* of *the fact.* "

Similarly in **Grobler v Schmahmann Bros and A R M Belfast 1916 TPD 219** at 222 and 223 the full bench found by De Villiers JP:

> *"it is said that was because the defendant had chosen domicilium at the place of business of the plaintiff. A defendant can of course choose domicilium where he likes, but if he does choose it at the office of the plaintiff, with his concurrence, an obligation would, I think rest upon the plaintiff to see that the summons should come to the knowledge of the defendant. One would expect that the defendant would choose domicilium at the plaintiff's place of business because the plaintiff had undertaken to send summons to him or that the defendant either lived at the plaintiff's place of business or was in the habit of coming there. It would not be* a *proper thing for the plaintiff to consent to the defendant choosing domicilium at his place of business when the plaintiff knew perfectly well that the defendant would never get to know in any way whatever about the summons."* (my emphasis)

The applicants state that they were not aware of summons issued and served and could not enter notice of intention to defend the action. This allegation is not denied by the respondent.

The applicants became aware of the action and default judgment on 19 February 2007. This application was issued and served on the respondent on 1 June 2007.

The respondent agreed that the application could not be launched out of time,

unless the court condones the late launching of this application. This application is brought in terms of rule 31 (2) (b) which provides for a rescission of judgment:

> *"A defendant may within* 20 *days after he or she has knowledge of such judgement apply to Court upon notice to the Plaintiff to set aside such judgement and the court may, upon good cause shown, set aside the default judgement on such terms* as *to it seems meet."*

In this instance an application for condonation is not necessary as it is common cause that the parties had agreed to the late filing of the application. Rule 27 (1) is applicable:

> *"in the absence* of *agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms* as *to it seems meet."*

The applicants have to give a reasonable explanation of their default, which shows that they were not wilful and the default was not due to gross negligence.

There is no evidence from the respondent that the respondent endeavoured

to inform the applicants of the summons on the business address of the respondent which also happened to be the *domicilium citandi et executandi* of the applicants. The respondent must have known that the applicants had no knowledge of the action when the respondent received the sheriff's return of service and should have ensured that the summons came to the attention of the applicants.

The court finds that the applicants could not have not known of the action, as it is common cause that they had left the leased premises early in 2006 and the summons was served on 1 June 2006.

If the court takes into consideration the authorities and the facts in this application the court cannot but find in favour of the applicants. Furthermore the court has to consider whether this application is *bona fide* and not being brought to delay the plaintiff's action. The respondent condoned the late launching of this application and thereby, to my mind, acknowledged that the application is *bona fide.*

The last hurdle the applicants have to overcome is that the applicants have a *bona fide* defence to the plaintiff's claim. In **Wahl v Prinswill Beleggings (Edms) Bpk 1984 (1) SA 457 (T)** van der Walt J found on p 461 H-I:

> *"Die Hof het by beoordeling van goeie redes ook 'n diskresie* om *toe te sien dat reg en billikheid teenoor part*ye *geskied.* "

The reason for rescinding a judgment is to place the applicant in the position

where he can defend the action instituted by the respondent. As said in **Saphula v Nedcor Bank Ltd 1999 (2) SA 76 (W) at 79** C - D by Flemming DJP:

> *"It has always been the hallmark* of *what lawyers call* a *bona fide defence (which has to be established before rescission is granted), that defendant honestly intends to pursue before* a *Court* a *set* of *facts which, if true, will constitute* a *defence."*

The *bona fide* defence raised by the applicants in regards to the respondents claim must be examined by the court. The applicants rely on the failure of the respondent to comply with the conditions of the lease agreement which includes the so-called addendum, which was completed before the lease agreement was entered into.

The court must bear in mind that it is not necessary for the applicants to show a probability of success, should the rescission be granted. It will suffice if the applicants shows a *prima facia* case or prove a triable issue.

In January / February 2005 negotiations took place between applicants and respondent regarding a lease agreement for premises. It is common cause that several letters were exchanged between the parties, before the lease agreement was eventually entered into. In a letter by the respondent dated 1 February 2005 the respondent undertook *inter alia:*

> "1. *Chameleon Village will supply you with* 3 *phase power to* a *point in the building.*

are several disputes which should be dealt with at a trial. I find that the applicants have complied with the requirements to have the default judgment rescinded in terms of rule 31 (2)(b).

A further letter dated 1 February 2005 was addressed to the applicants by the respondent and the respondent's agent marked this letter as *"Addendum to lease".* This lead the applicants to believe that the letter of 1 February 2005 should be treated as an addendum to the lease as well. After a meeting between the parties on 1 March 2005, a further letter was sent to the applicants by the respondent which mentioned: *"All other agreements as per our previous letter stand.* "

The applicants contend that these additional terms as set out in the three letters, form part of the lease agreement.

C Pretorius

Judge of the High Court

The applicants allege that the respondent did not comply with the conditions as set out in the letters, which was according to the applicants, incorporated in the lease agreement. The failure of the respondent to supply three phase electricity as agreed, an occupancy certificate, and the failure to repair the serious leaking roof caused a breach of the lease agreement by the respondent according to the applicants. These allegations by the applicants regarding the structural defects are confirmed by a qualified structural engineer.

It is clear that the applicants have proven a *prima facie* case and that there

Case number	17221/2006
Heard on	7 November 2007
For the Applicant / Plaintiff	JE Ferreira
Instructed by	J van Heerden Inc
For the Respondent	T Bosch
Instructed by	Cuzen Pandaram
Date of Judgment	20 November 2007

The following orders made:

1 That the order granted against the first and second applicants on the 2ih of November 2006 under case number 17221/2006 be rescinded.

2 That the respondent pay the costs of the application.

Whatever damage will obtain a certificate of occupancy prior with insurance purposes

The roof will be repaired where leaking."