IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 24922/06

DATE: 22/05/2007
REPORTABLE

In the matter between

DIKELEDI WINNIE MASANGO Applicant

and

KIMBERLY CLARK OF SOUTH AFRICA (PTY) LTD Respondent

IN RE:

KIMBERLY CLARK OF SOUTH AFRICA (PTY) LTD Plaintiff

and

DIKELEDI WINNIE MASANGO Defendant

JUDGMENT

MURPHY J

1. The applicant seeks an order rescinding the summary judgment granted by Ledwaba J on 2 November 2006. The summary judgment was based

upon a suretyship which the applicant signed on behalf of Kganane Trading Enterprises CC (now in liquidation) of which she was the sole member.

2. It is not stated in the founding affidavit (and no heads of argument were filed on behalf of the applicant) whether the application for rescission was brought in terms of the common law or rule 42.

3. In terms of the common law the applicant is obliged to show that the judgment against her was obtained on default of appearance and that sufficient cause exists for its rescission - *De Wet and others v Western Bank Ltd* 1979(2) 1031 (AD) at 1042 F-H. The requirement of sufficient cause is made up of two elements, namely there must be a reasonable and acceptable explanation for default and the applicant must have a *bona fide* defence which carries some prospect of success.

4. In terms of rule 42 a party may seek rescission of a judgment erroneously sought or erroneously granted in the absence of that party.

5. In its answering affidavit the respondent avers that the judgment was not granted in the absence of the applicant, who it claims was not in default of appearance, but was in fact present and participated when the judgment was handed down.

6. The applicant's version of what transpired at the proceedings of 2 November 2006 is cryptic. The relevant provisions of her founding affidavit read:

> ''44 On the initial date of the hearing, on 17 October 2006, a request for postponement was made with the sole purpose of seeking an indulgence to file an opposing affidavit. The reason for the request for

postponement was that the bookkeeper needed a period of at least two weeks. Such postponement was granted until 02 November 2006. I attach herein a letter from my erstwhile attorney, together with the court order as annexures WM 4 and WM 5 respectively.

45 Immediately before the hearing on 02 November 2006, I was informed by my attorney that they will again seek postponement. I then realised that they have not prepared the required papers to oppose this application. I then took my file and went on to look for another attorney.

46 When the summary judgment was heard on 02 November 2006, I was not represented by an attorney, I appeared myself in court to request an indulgence to properly find an attorney that will prepare the necessary paper work to present my defence.

47 The plaintiff argued against postponement and thereafter summary judgment was granted against me.

48 I submit that this matter was heard without my participation as my presence in court was only to merely ask for postponement. As soon as postponement was refused the plaintiff moved for summary judgment basically by default."

7. The explanation is lacking in particularity as to time, the names of the attorneys involved, the reasons of the judge and whether the judge heard

any oral evidence or submissions in regard to the application for summary judgment. No transcription of the proceedings is annexed, or any confirmatory affidavit of the attorneys. The respondent denies that the matter was heard without the applicant's participation, as she was present in court when judgment was granted.

8. The issue then is whether judgment was granted in default of appearance or in the absence of the applicant.

9. In *Katritsis v De Macedo* 1966(1) 618 (A) the court made reference to *Voet*, 2.11.11 to determine what is meant by default of appearance. The passage reads:

> ‘‘Moreover not only is he who does not attend at all on the day fixed to be accounted a dallier and defaulter, but also he who does indeed attend, but does not take in hand the business for the taking in hand of which the day had been appointed. For instance a plaintiff appears and makes no claim; or a defendant does not challenge the plaintiff's claim when he should do so. He who though present makes no defence is surely reckoned in the position of one who is not there; and he who when called upon does not plead is deemed to have been futile and is expressly classed as contumacious.”

Van Blerk JA interpreted this statement to mean that a party who appears when the hearing starts, but thereafter withdraws, and absents himself

from the remainder of the proceedings, must also be accounted a defaulter.

10. In the present matter the evidence is not clear or satisfactory about whether the applicant after unsuccessfully seeking a postponement took "in hand the business for the taking in hand of which the day had been appointed". If she did, she was not a defaulter; if she did not, the judgment was granted in default of her appearance. Her claim is to the effect that she ceased participating after the postponement was refused and that "the plaintiff moved for summary judgment basically by default". It is not clear to me what she means by that. It remains uncertain whether the judge engaged with her on the merits of her defence in the summary judgment application. The respondent's denial that the applicant failed to participate is somewhat thin and provides no detail or particulars of the nature and extent of her participation. The fact that she did not file an opposing affidavit in the summary judgment application in terms of rule 32 is not conclusive because the presiding judge always has a discretion to hear oral evidence (see *Meek v Kruger* 1958(3) SA 154 (T)) and there is no evidence before me indicating whether he did or did not do so. To compound the difficulty, the applicant did not file a replying affidavit or heads of argument.

11. Even though the respondent's averment that the applicant participated in the summary judgment lacks substance as to the details of her participation, it placed the matter squarely in issue and as such begged a reply that could have been easily met with a transcript of the proceedings. The failure by the applicant to file a reply means that she has failed to make out a case for the relief claimed, such entitlement being dependant upon her showing that she was in default of appearance when judgment was granted. The facts stated by the respondent together with the facts stated by the applicant admitted by the respondent do not justify the order

sought. Had the dispute of fact remained unresolved after the filing of a replying affidavit, there may have been some justification for referring that question to oral evidence, but absent a reply I am not minded to do so.

12. In the final analysis the applicant has failed to discharge her onus to show that the judgment was granted in default of her appearance or in her absence, with the result that the pre-requisites of an application for rescission have not been met.

13. In the result, the application is dismissed with costs.

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard:	16 May 2007
For the Applicant:	Adv MM Mojapelo, Pretoria
Instructed By:	Selahle Attorneys, Pretoria
For the Respondent:	Adv BM Jackson, Sandton
Instructed By:	Orelowitz Inc c/o Jacobson & Levy, Pretoria