


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 15354/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
8/12/2017	
DATE	SIGNATURE

8/12/17

In the matter between:

EDSON KAPHUKA PHIRI

Applicant

and

SCANIA FINANCE SOUTH AFRICA (PTY) LTD

Respondent

JUDGMENT

BRAND, AJ

- [1] This is an application for rescission of a judgment for the sale in execution of a property, being the primary residence of the Applicant and his family, granted on default.

- [2] The Applicant was a shareholder of Addis Africa Investment (Pty) Ltd (Addis). Addis entered into a lease agreement with the Respondent for the lease of two buses. Addis defaulted on its lease agreement and the Respondent took back its buses.

- [3] The Applicant, together with three other shareholders of Addis stood surety in their personal capacities for Addis. Seeking payment of its outstanding debt on the lease agreement, the Respondent sought and obtained an order against Addis and the four sureties jointly and severally on 21 June 2011, for payment of the amount of R3 282 617.53 plus interest.

- [4] To execute on this order, the Respondent sought and obtained an order to declare the Applicant's immovable property (his primary residence) executable. This order was obtained by default, with the respondent although having served notice of intention to oppose and having filed a full set of opposing papers, failing to appear on the day of the hearing.

- [5] The applicant seeks rescission of this default execution judgment in terms of Rule 31(2) of the Rules of this Court. In cases where a judgment is rescindable, an applicant for rescission has been held to have to show good cause for

rescission, which entails giving a reasonable explanation for the default; showing that the application is made in good faith; and showing a *bona fide* defense to the underlying claim or application, which on its face has some prospects of success.¹

Is the default judgment rescindable?

- [6] Mr van der Merwe for the Respondent impressed upon me that, given that the only default at issue here was default of appearance at the hearing, with a notice of intention to oppose and a full set of opposing papers having been filed and before my brother De Vos when considering and granting the order for sale in execution, the order was in fact not granted in default, is final and can only be reconsidered on appeal, but not rescinded.
- [7] For this proposition he referred me to the unreported judgment in this Division of *Benson & Another v Standard Bank of South Africa Ltd & Others* (17143/2011) [2014] ZAGPJHC 428 (14 October 2014), where it was held that, where an opposing affidavit had been filed and was before the court when the judgment that is sought to be rescinded was considered and made, that judgment is not properly a default judgment simply because the respondent or his/her counsel failed to appear at the hearing. Instead, such judgment was properly made on an opposed basis, as the respondent's case was in full before the court.²
- [8] *Benson* appears on all fours with this matter. Here too the only alleged default is default of appearance on the actual day of hearing. The Applicant's full set of opposing papers, including a full answering affidavit, was properly before my brother De Vos and considered by him before he granted the order in execution. The Applicant was, in other words, not in default; my brother De Vos' judgment is final; and the the Applicant's proper remedy is an application for leave to appeal, not rescission.

¹ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA (SCA) at para 11.

² At paras 10 – 12.

[9] In this light it becomes unnecessary for me to consider whether the three requirements for rescission have been met.

[10] Accordingly I make the following order:

The application for rescission of judgment is dismissed with costs.



JFD Brand

Acting Judge of the High Court

Appearances:

For the Applicant: G Matlombe
Instructed by Retief Attorneys

For the Respondent: C van der Merwe
Instructed by Senekal Simmonds Inc