




REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 28797/2016

8/12/17

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

In the matter between:

PETRUS JOHANNES DE JAGER

Applicant/1st Defendant

and

DINA JOHANNA MARIA BARKHUIZEN

Respondent/Plaintiff

in re:

DINA JOHANNA MARIA BARKHUIZEN

Plaintiff

and

PETRUS JOHANNES DE JAGER

1st Defendant

THE MASTER OF THE HIGH COURT, PRETORIA

2nd Defendant

JUDGMENT

BRAND, AJ

- [1] This is an application for rescission of an order granted in default in favour of the Respondent/Plaintiff (hereafter 'the Respondent') and against the Applicant/1st Defendant (hereafter 'the Applicant') on 4 July 2016 ('the order'). The order was in sum for payment by the Applicant of the amount of R400 000.00 to the Respondent. On the version of the Respondent, this was to give effect to an agreement with respect to the share of an immovable property in the deceased estate of the late mother of the Applicant. In terms of this alleged agreement, the Applicant would pay R500 000.00 to the Respondent for her half of the value of the property, from the proceeds of an investment to the value of R1 000 000.00 of the parties' late mother, with respect to which the Applicant had been nominated as sole beneficiary.

- [2] 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
- [3] It was not in dispute that the judgment is indeed rescindable, it having been obtained in true default, with the Applicant having filed neither notice of intention to defend nor any other opposing papers, and not appearing at the hearing of this matter
- [4] It remains therefore to assess whether the Applicant meets all three the requirements for rescission listed above.

Reasonable explanation for default

- [5] The Applicant's version is that he had no knowledge that a final order for payment was sought against him and only came to know of the proceedings when the Sheriff attended at his home on 15 July to attach movables in order to execute on the judgment. Although he admits that he received the summons personally, he alleges that he did not understand it to be related to new proceedings against him, but thought that it was simply documentation related to existing, ongoing litigation between he and the Respondent. He gave the summons to his attorney of record at the time, Ms Botma, who then failed to follow up on it and with whom he lost contact, to the extent that he appointed new attorneys of record.
- [6] The Respondent's version is in essence that the Applicant was fully aware of the proceedings, having received and understood the summons for what it is; that he discussed the summons with his attorney of record at the time, Ms Botma, who

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

did not take the matter up as she terminated her relationship with him due to failure to pay for services rendered.

[7] I find it difficult to accept the version of the Respondent in this respect. Some questions arise. If it is so that Ms Botma, who was at one time the attorney of record of the Applicant with respect to ongoing litigation between the parties herein had terminated her professional relationship with the Applicant, why was there no notification of her withdrawal as attorney of record to the attorneys for the Respondent? Why was summons in the proceedings that resulted in the order not served also on her as attorney of record at the time? If indeed she withdrew due to non-payment for services rendered, why was the Applicant able to appoint new attorneys of record, who, the assumption must be, he is able to pay?

[8] In this light I am satisfied that at the very least the Applicant was indeed unaware of the proceedings resulting in the order against him; that he had informed his attorney of the summons and that, for whatever reason, this was not followed up on. This constitutes a reasonable explanation for the Applicant's default.

Is this application made in good faith?

[9] The Respondent makes a number of allegations and veiled suggestions of the Applicant willfully delaying proceedings against him and of this application similarly being a tactic of delay and frustration. She refers to other litigation in which he is involved in which, she alleges, similar tactics were employed. All of these allegations are bald, without substantiation.

[10] It seems to me that the Applicant, now having obtained new legal representation, is ready and willing to defend the main action against him should the order be rescinded, so that I am satisfied that this application is not brought in bad faith.

Does the Applicant have a *bona fide* defense to the underlying claim, which shows some prospects of success?

[11] The dispute between the parties in the underlying action is in essence a dispute of fact: the Respondent alleges existence of an oral agreement that R500 000.00 will be paid to her from the proceeds of a R1 000 000.00 investment of which the Applicant is the sole beneficiary and cites as proof of the existence of that agreement that the Applicant has already paid her R100 000.00 toward that.

[12] The Applicant in turn denies existence of any such agreement; alleges that he is willing to sell the house and pay half of whatever is the proceeds to the Respondents; and alleges that the R100 000.00 paid to the Respondent was simply half of the cash proceeds of the deceased estate, to which she is entitled in terms of the will.

[13] If proven at trial, this defense of the non-existence of the alleged agreement would clearly defeat the Respondent's claim. The dispute of fact between the parties can be properly ventilated only at a trial where the appropriate evidence can be placed before the trial court for consideration.

[14] In this light I am satisfied that the Applicant has a good faith defense.

[15] Accordingly I conclude that the application for rescission of the judgment should be granted.

[16] I order as follows:

1. The judgment granted on 4 July 2016 under case number 28797/16, is rescinded and set aside.
2. The costs of this application are reserved, to be determined at trial.



JFD Brand

Acting Judge of the High Court

Appearances:

For the Applicant: Attorney SB Coetzer of Coetzer & Partners

For the Respondent: GJ Scheepers
Instructed by Barnard & Patel Inc

Appearances:

For the Applicant: G Matlombe
Instructed by Retief Attorneys

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