

REPUBLIC OF SOUTH AFRICA



HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 11354/2015

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| 1. | REPORTABLE: | NO |
| 2. | OF INTEREST TO OTHER JUDGES: | NO |
| 3. | REVISED: | YES |

M. G. Barrie.

SIGNATURE

DATE: 1 May 2017.

In the matter between:

WEST WING SPORTS BAR CC

First Applicant/Defendant

UGBOKE, HENRY OSAGIE

Second Applicant/Defendant

and

INVESTRA CC

Respondent/Plaintiff

JUDGMENT

Barrie AJ:

1. The first and second applicants ("the applicants"), respectively West Wing Sports Bar CC ("West Wing") and Mr Henry Osagie Ugboke ("Mr Ugboke") apply for rescission of a judgment given against them on 24 June 2015, jointly and severally, for payment of R211 372,32, plus interest and costs.

2. Mr Ugboke is the only member of West Wing.
3. The respondent is Investra CC ("Investra"), the plaintiff in whose favour the court granted judgment.
4. Investra is the owner of premises situate at 237 Anderson Street, City & Suburban, Johannesburg ("the premises"). Its cause of action against West Wing was non-payment of rentals and other charges that were payable in terms of a written lease of the premises ("the lease") that commenced on 1 March 2014. Investra's cause of action against Mr Ugboke was a deed of suretyship ("the suretyship") in terms of which Mr Ugboke bound himself as surety for and co-principal debtor with West Wing for the latter's obligations to Investra in terms of the lease.
5. West Wing and Mr Ugboke chose the address of the premises as *domicilium citandi et executandi* in terms of respectively the lease and the suretyship.
6. Investra instituted the proceedings against the applicants by notice of motion that its attorneys caused to be served at the premises. In terms of the deputy sheriff's returns of service the application documents were served at the premises on 31 March 2015 by service on a Mr Funduyagi. The returns of service evidence proper service in accordance with rules 4(1)(a)(iii) and (iv) of the Uniform Rules of Court.
7. The applicants did not give notice of their intention to oppose the matter. According to Mr Ugboke's founding affidavit in support of the rescission application, that was because the documents that the deputy sheriff had served at the premises did not come to his notice. In these circumstances this court gave judgment against West Wing and Mr Ugboke on 24 June 2015 after the matter had been set down for hearing in accordance with rule 6(5)(c).

8. Mr Ugboke became aware of the judgment by no later than 24 July 2015. The applicants instituted their application for rescission on 10 March 2016.
9. Rescission of a judgment given by default in application proceedings potentially arise either in terms of the provisions of rule 42, or at common law. Rule 31(2)(b) does not apply – it applies only in respect of default judgments that the court grants in actions (if a defendant is in default of delivery of notice of intention to defend or of a plea).
10. The applicants' application for rescission cannot succeed under rule 42 – the applicants have not made out any case pertaining to the grounds for rescission or variation of an order or judgment specified in rule 42(1). In the circumstances the applicants have to show good cause for rescission of the court's order at common law, encompassing, in principle, their providing a reasonable and acceptable explanation for the default and to show that they have a *bona fide* defence against Investra's claims.
11. In Mr Ugboke's founding affidavit he raises three potential defences against Investra's claims.
12. The first two potential defences that Mr Ugboke puts forward relate to West Wing's obligation to pay for water and electricity used at the premises. The obligation arose in terms of clause 10 of the lease agreement that provided, among others, that:

"The Tenant shall:

10.1. ...

10.2. *in addition to monthly rental, pay for:*

10.2.1. *all electricity, gas, water, used by the Tenant in or on the Premises as recorded by means of a pro rata share of the total charge for electricity, gas and water used in the building of which the Premises form part, in respect of the electricity, gas and water used by the Tenant in or on the Premises; The Tenant shall notify the Landlord immediately should any such electricity or water supply to the Premises cease or become defective or interrupted.*

10.2.2. *all sewerage/effluent, sanitary services, refuse removal services and special refuse removal services in respect of or attributable to the Premises."*

13. Mr Ugboke says, firstly, that in terms of an oral agreement and understanding reached with Investra, West Wing was entitled to receive copies of municipal accounts rendered in respect of the premises to enable him to verify the water and electricity charges that Investra levied against West Wing.
14. In its answering affidavit Investra concedes that the applicants would have been entitled to copies of the municipal accounts, but avers that the applicants never requested these to be supplied until early in January 2016, when the documents were requested and were then supplied.
15. Mr Ugboke avers in his replying affidavit that the municipal accounts he received (only on 18 February 2016) were incomplete, stating that he did not receive copies of, among others, the municipal statements for January and February 2014 (i.e. the two months preceding commencement of the lease) and March 2014 (i.e. the first month after commencement of the lease).

16. Mr Ugboke avers, secondly, that on receipt of the copies of the municipal accounts in 2016, he noticed charges on these accounts that preceded commencement of the lease. He states that the applicants are not liable for such charges.
17. Investra in its answering affidavit denies that any charges levied against West Wing included billings for electricity and other consumables that arose prior to the date of West Wing's taking occupation.
18. Mr Ugboke does not, whether in his founding or replying affidavit, provide a breakdown of any sort of payments that the applicants made to Investra from the inception of the lease for rent and the charges that were levied for water, electricity and the like, referencing these to the municipal accounts that he received in January 2016, to show that the sum in respect of which the court granted judgment is, in some way or another, overstated. Taking into account that Mr Ugboke alleges that he did not receive copies of the municipal statements for January, February and March of 2014, he, moreover, does not in his replying affidavit explain how he came to the conclusion that Investra had charged the applicants in respect of water and electricity that related to any period prior to commencement of the lease.
19. The third potential defence that Mr Ugboke raises is that, because Investra's representatives did not inform him that the premises were zoned "*Business & Commercial*" and not "*Residential*" when he concluded the lease on behalf of West Wing, they, in effect, misled him, in so doing inducing him to conclude a lease that he would, otherwise, not have agreed to.
20. Mr Ugboke avers in this regard that clauses 1.3 and 8 of the lease show that the premises were let for "*residential*" purposes. According to Mr Ugboke he only learnt when he received the municipal accounts that the premises were zoned "*Business*

& *Commercial*" which meant that the municipality charged higher rates than would have been charged if the premises had been zoned for residential purposes. Mr Ugboke says that Investra's representatives never informed him of the actual zoning of the premises when the lease was concluded and that, if he had known of the actual zoning, he would never have concluded the lease.

21. Clauses 1.3 and 8.1 of the lease do, indeed, provide that the premises were to be used for residential premises. It is also common cause that a major part of the premises was from inception of the lease occupied by subtenants, from whom West Wing collected rent. Mr Ugboke, nevertheless, states in his founding affidavit that he agreed with Investra's representatives that portion of the premises would be used by his brother for a motor vehicle repair and service workshop, i.e. for purposes other than residential purposes.
22. I find that the defences that Mr Ugboke suggests in his founding affidavit do not provide a *bona fide* basis for the applicants' defending the claim or for my rescinding the judgment of 24 June 2015.
23. Firstly, even if Investra failed to provide copies of municipal accounts to the applicants in breach of a side agreement to the effect that such copies would be provided, it has no bearing on the validity of the judgment.
24. Secondly, Mr Ugboke does not make out any case from which it can be concluded that any part of the sum for which judgment was granted arose from water, electricity or other charges that Investra had inappropriately charged to West Wing, that were not actually owing.

25. Thirdly, although Mr Ugboke suggests that Investra was under some obligation to inform him, representing West Wing, of the actual zoning of the property, he avers no basis for the existence of such an obligation of disclosure. Taking into account that the premises are situated in downtown Johannesburg and it is common cause that part of the premises was going to be used for commercial and business purposes by agreement with Investra, there is no potential basis for finding that such an obligation did arise.
26. In the circumstances, it is not necessary for me to make any findings regarding whether the applicants provided a reasonable explanation for their failure to deliver notices of intention to oppose Investra's application and whether they have satisfactorily explained the lapse of time of approximately eight months that occurred from when Mr Ugboke became aware of the judgment until the applicants prosecuted the application for rescission thereof.
27. In these premises the applicants' application for rescission of the judgment granted against them under the above case number on 24 June 2015 is dismissed with costs.

F. G. Barrie.

F. G. BARRIE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE APPLICANTS: **B MARAIS**
 Instructed by BDK ATTORNEYS

FOR THE RESPONDENT: **A J VENTER**
 Instructed by TREVOR SWARTZ ATTORNEYS

DATE OF HEARING: **27 October 2016**