

Eviction order 'not just'

Grounds for rescission of high court judgment found by SCA

By Sayed Iqbal Mohamed

A TENANT who receives summons from the magistrate's court or the high court will have to defend it within a specified time. A tenant who has a proper defence, i.e. a reason why the court should not give judgment in favour of the landlord or landlady must inform the court, and this is done by defending the summons or entering an appearance to defend.

This legal process is the first step that is followed by several procedures till the matter is finally decided when an order or judgment is given.

Should the tenant fail to respond to a summons within the time allowed, default judgment can be taken against him or her.

Can a default judgment be cancelled or withdrawn?

Yes, but one must have good reasons and follow certain procedures.

If a default judgment is granted, the person may be able to have it withdrawn or rescinded. This must be done within the time specified of the default award. When judgment is given by default, it means that the court has decided in favour of the plaintiff (e.g., landlord / lady). Whatever the court has granted in favour of the claim(s) made by the plaintiff can be executed against the defendant.

The plaintiff's (landlord's) claim for arrear rentals and the ejection of the tenant and all occupants from the dwelling will be carried out on further instructions from the landlord to the sheriff (warrant of execution). The tenant (defendant) who wants to have the default judgment rescinded (cancelled or withdrawn) must follow certain procedure. He or she will have to file an application in court and on all parties to the court proceedings (e.g., the plaintiff). The tenant must set out the reason(s) in an affidavit when making an application to court to consider rescission of the judgment and must show good cause in his or her defence to the landlord's claims.

The court must also be informed in the application why the case was not defended and there must be good reasons to support the failure to defend. If the magistrate or judge is satisfied that good cause exists, the default judgment will be set aside. The tenant/defendant is then required to defend the summons, within the time allowed, by filing an affidavit in which he/she will state the reasons for opposing the landlord's claims.

It is very important to seek legal advice so that an action is defended within the time limit allowed by law.

A case in point is where the landlord, Mr Mark Steele was granted a default judgment in June 2008 for the eviction of his tenants from 11 Hendon Road, Yeoville, Johannesburg. He had served notices on the tenants but since they refused to move out, brought an application in the high court to have them evicted.

Seventy people occupied the four large flats and three separate rooms that were divided into multiple units at a rental of R1, 239 per flat and R266 per room. The tenants were poor and traded as street vendors and comprised of women as household heads, children and the disabled. The landlord claimed that he wanted to carry out renovations since the property was run down and overcrowded.

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Judge Satchwell granted the eviction order directing the tenants to move out of the property. They then applied to the court to have the default judgment set aside but Judge Tsoka dismissed their application. The tenants then took their plight to the Supreme Court of Appeal (SCA) to argue the right to be granted rescission, that is, to have the default judgment cancelled.

The case is referred to as the *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA). Acting judge Leona Theron, supported by four other judges of the SCA, granted a rescission order on 25 March 2010 under the common law. The court was satisfied that the tenants had shown good cause since they genuinely believed that their matter was being defended by an organisation they approached when summons were served.

The judgment also found that the court is required to protect the occupier's Constitutional rights and "that evictions take place in a humane manner consistent with the values of the constitution". Granting an eviction order, as the court did, was not just and equitable since it failed to take into consideration all the relevant facts relating to the needs of the elderly, children, disabled persons and households and the municipality's view regarding availability of temporary or permanent accommodation.

The high court in granting the evictions did not discharge its statutory obligations. The following order was granted:

- 1 The rescission appeal (case no 499/09) is upheld with costs including the costs of two counsel.
- 2 The order of the high court is replaced with the following:
 - '(a) The default judgment granted against the applicants on 18 June 2008 is rescinded and the applicants are granted leave to oppose the application for their eviction.
 - (b) The applicants are directed to file their opposing affidavits within the time period prescribed by the Uniform Rules of this Court and the *dies* in this respect will be calculated as from the date of this order.
 - (c) The costs of this application are reserved for the trial court.'
- 3 No order as to costs is made in the appeal against the order of eviction (case no 102/09).

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