



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 3664/2015

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

21.12.2022
DATE

SIGNATURE

In the matter between:

SIPHO SIBEKO

Applicant

and

SHACKLETON CREDIT MANAGEMENT (PTY) LTD

First Respondent

LYNN & MAIN INCORPORATED ATTORNEYS

Second Respondent

JUDGMENT

CRUTCHFIELD J:

[1] The applicant, Siphon Sibeko, sought rescission of a judgment granted against him by default in his absence, on 20 November 2015, at the instance of the first respondent, Shackleton Credit Management (Pty) Ltd ('the judgment'). In addition, the applicant claimed a declarator that the purported service of the summons on the applicant on 24 October 2015 was invalid, as well as the setting aside of any process issued pursuant to the judgment.

[2] The second respondent was Lynn & Main Incorporated Attorneys, the first respondent's attorneys of record. The applicant claimed costs of the application on a punitive scale against the second respondent pursuant to their allegedly dilatory conduct in providing documents to the applicant pursuant to their attachment and freezing of the applicant's Capitec bank account.

[3] The applicant relied for the relief sought by him on Rule 42(1)(a), alternatively Rule 31(2)(b), further alternatively the common law, for rescission of the judgment.

[4] The respondents opposed the application.

[5] In order to find success, the applicant had to meet the requirements of a rescission, being a reasonable explanation for his default and a bona fide defence to the first respondent's claim.

[6] The applicant concluded an instalment sale agreement for the purchase of a motor vehicle with Wesbank, a division of Firststrand Limited ('the agreement'). Wesbank ceded the agreement to the first respondent.

[7] In terms of the agreement, the applicant chose a *domicilium citandi et executandi* as the address for service on him of legal process pursuant to the agreement, being 71 Herenshaw Street, Buccleuch, Sandton, Gauteng ('the *domicilium* address'),

[8] *Ex facie* the sheriff's return of service upon which the first respondent relied for purposes of the application for default judgment, "at 71 Herenshaw Street, Buccleuch, Sandton, being the chosen *domicilium citandi et executandi* address of the defendant Siphon Sibeko, a copy of the combined summons was served upon Solomon Pango, security, being a person not less than 16 years of age and apparently employed there after the original document had been shown and the nature and contents thereof explained to the said person." The service was effected by the sheriff in terms of rule 4(1)(a)(ii).

[9] The return of service was signed by one Mr J Mathamba, duly appointed in terms of s 6(1) of the Sheriff's Act, 90 of 1988.

[10] Accordingly, the return of service indicated that service of the summons took place on the applicant's *domicilium* address albeit that the sheriff stated that the service took place in terms of rule 4(1)(a)(ii). Notice of intention to defend the summons was not delivered by or on behalf of the applicant.

[11] Whilst the first respondent placed an amended return of service before me in terms of its answering affidavit, it is the return on which reliance was placed by the first respondent at the time that default judgment was sought and granted, that stands to be considered for purposes of this judgment.

[12] The applicant contended that service on the security guard at the entrance to the security complex at the *domicilium* address, did not accord with any of the competent methods of service. As a result, the judgment was sought and granted in error as envisaged in rule 42(1)(a) according to the applicant.

[13] Service on an address chosen by a debtor as the *domicilium citandi et executandi* constitutes good service even if the debtor is known not to be residing at the *domicilium*

address, is overseas or has abandoned the premises.¹ The manner of service at a *domicilium* address, however, must be effective. It must be such that the process served at the *domicilium citandi et executandi* would, in the ordinary course, come to the attention of and be received by the intended recipient.²

[14] It is the obligation of a debtor, being the applicant, to update or amend the debtor's chosen *domicilium* address with the credit provider, the first respondent, in the event of a change to the *domicilium* address.

[15] The applicant alleged and the first respondent accepted that the applicant informed the first respondent telephonically that he was no longer living at 71 Herenshaw Street, Buccleuch, Sandton in early 2014 or thereabouts. A change in residential address does not serve to change a *domicilium* address and the applicant's averment did not amount to an amendment of the applicant's *domicilium* address.

[16] In any event, the first respondent, it's representatives having visited the premises of the new address, denied that the applicant resided there. This was because the security guard at the new address informed the first respondent's representatives that the applicant's possessions were in the relevant unit but the applicant did not reside there. I accept that the applicant informed the first respondent's representatives telephonically that he resided at an address other than the *domicilium* address but that did not serve to amend the *domicilium* address.

[17] The first respondent, in my view, was entitled and contractually obliged³ to rely on the *domicilium* address for the purposes of service of the combined summons on the applicant.

¹ *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A) ("*Amcoal*") at 5H – 6D; *Absa Bank Ltd v Mare and Others* 2021 (2) SA 151 (GP) ("*Mare*") para 25.

² *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 3(3) SA 834 (W) ("*Solarsh*"); *Maree* id para 26.

³ *Shepard v Emmerich* 2015 (3) SA 309 (GJ).

The telephonic conversation relied upon by the applicant in respect of his change of residential address did not constitute a valid amendment to the *domicilium* address in terms of the agreement. The obligation rested upon the applicant to update the *domicilium* address in accordance with the requirements of a valid amendment to the agreement. The telephonic conversation did not do so.

[18] Absent a valid amendment to the agreement, the first respondent was well within its rights to serve the combined summons on the applicant at the *domicilium* address. That service, in order to be valid, had to be effective and comply with the relevant principles.

[19] It was common cause between the parties that the summons was not left at unit no 71, being the specific unit of the *domicilium* address, but with the guard at the gate of the complex.

[20] Both parties relied on *Kemp v Knoesen*,⁴ in which the court held that service on a security guard at the entrance to a security complex was good service. The court in *Kemp* had regard to the difficulties of accessing such complexes in order to serve process on the unit occupied by the debtor, as well as certain evidence specific to that matter. These included an arrangement in terms of which the security guard received deliveries on behalf of residents of the complex, an aspect not present in the application before me. Furthermore, the debtor in *Kemp* entered an appearance to defend, meaning that the summons came to the debtor's attention.

[21] The principles governing effective service on a *domicilium* address require that service be effected "in any manner by which in the ordinary course the (process) would come to the attention of and be received by the (intended recipient)".⁵

⁴ *Kemp v Knoesen* [2007] JOL 19194 (T).

⁵ *Mare* note 1 above para 26.

[22] One of the methods of doing so is by handing the process to a responsible employee.⁶

[23] The security guard at the applicant's *domicilium* address *ex facie* the return of service was a responsible employee who accepted service of the combined summons. I accept that the security guard was not the applicant's employee but an employee of the complex. That, however, in the light of the difficulties with gaining access to complexes in the absence of the relevant occupants, was not sufficient to render the service ineffective. This was notwithstanding that there was no evidence before me of any arrangement whereby the security guard would receive deliveries on behalf of residents of the complex. The guard referred to in the return of service accepted service of the combined summons and was a responsible employee over the age of 16 years.

[24] Furthermore, I accept that the complex situated at the applicant's *domicilium* address had many residents. That did not militate against the validity of service of the summons by way of it being handed to the security guard at the applicant's *domicilium* address, in the face of the difficulties posed by access to such complexes.

[25] In my view, given the difficulties of a sheriff or his deputy accessing a security complex in the absence of the occupant for the purposes of service in terms of rule 4, service of process by way of it being handed to the security guard at the complex, a responsible employee older than 16 years, is valid and effective service on the debtor.

[26] In respect of the argument that the first respondent could not serve on the applicant's *domicilium* address after cancellation of the agreement, termination of the primary obligations by way of cancellation of a contract does not bring an end to the secondary obligations. The debtor remains liable for performance of obligations due and enforceable as

⁶ *Solarsh* note 2 above at 849A-B.

at cancellation. The *domicilium* address is reasonably necessary to effect service on the debtor such as may be necessary after cancellation of the agreement. Thus, the *domicilium* address survives cancellation of the agreement.

[27] Accordingly, service on the applicant at the *domicilium* address by way of the process being handed to the security guard at the complex, a responsible employee older than 16 years, was valid and effective service⁷ on the applicant.

[28] Thus, the application in terms of rule 42(1)(a) must fail in that the first respondent justifiably sought and was entitled to be granted default judgment against the applicant in the absence of the latter.

[29] As to the applicant's defences to the summons, the applicant contended that the first respondent's claim prescribed prior to service of the summons and the applicant's bank account was unlawfully attached and frozen.

[30] The applicant relied on the alleged cancellation of the contract on 14 October 2011, as pleaded in the first respondent's particulars of claim. The applicant argued that the claim prescribed on 14 October 2014, three years after cancellation of the agreement. However, the first respondent repossessed the vehicle that was the subject of the agreement, on 31 October 2012, after the applicant signed a voluntary termination notice ("VTN"), in terms of s127 of the National Credit Act, 2005 ("the Act"). The applicant acknowledged liability for any shortfall on the motor vehicle, after the sale of the vehicle, in terms of the VTN.

[31] Thereafter, the first respondent issued summons, service of which took place on 24 October 2015.

⁷ *Mare* note 1 above para 27.

[32] The first respondent argued that the cancellation date of 14 October 2011, pleaded in the particulars of claim was a typographical error that ought to have read 14 October 2012. This because the vehicle was repossessed on 31 October 2012 after the applicant signed the VTN. Furthermore, the vehicle was sold on auction towards the end of 2012 and the proceeds of R36 480.00 from the sale were received on 7 December 2012.

[33] The applicant implied that the signed VTN relied upon by the first respondent in these proceedings was not a genuine document. However, the applicant admitted that he may have signed a document when surrendering the vehicle but did not recall it being the VTN. There was no suggestion however that the applicant signed any other document at the relevant time.

[34] In those circumstances, I accept that the agreement was cancelled in 2012 and that the reference to 2011 in the particulars of claim was a typographical error that ought to have read 2012.

[35] Subsequent to the applicant surrendering the vehicle, the first respondent, in terms of s 127(5)(b) and (7) of the Act, provided the applicant with a post-sale notice that served to advise the applicant *inter alia* of the gross and net proceeds of the sale and the amount credited or debited to the applicant's account, sent to the applicant at the *domicilium* address on 19 February 2013 ("the post-sale notice").

[36] In addition, the post-sale notice informed the applicant that his account reflected an outstanding balance of R108 162.98 together with interest thereon calculated from the date the proceeds of the sale were credited to the applicant's account, and, required the applicant to contact the author of the post-sale notice within ten (10) days in order to make suitable arrangements for payment of the outstanding balance.

[37] Furthermore, the post-sale notice advised the applicant that his failure to do so would result in the first respondent having no alternative but to proceed with legal action for recovery of the outstanding amount.

[38] The post-sale notice in terms of s127(7) served as a statutory demand for payment. It afforded the applicant ten days in which to make suitable arrangements with the first respondent to pay the amount owing.

[39] Section 128 of the Act provides in terms that if the consumer, the applicant, fails to pay the amount demanded in terms of s 127(7) of the Act, within ten business days of receiving the demand notice, the creditor may then commence legal proceedings.

[40] Accordingly, the first respondent was not permitted to issue summons prior to expiry of ten days from 19 February 2013.

[41] Thus, prescription of the outstanding amount did not incept until the expiry of ten days after the s 127(7) notice sent to the applicant on 19 February 2013, being 1 March 2013. Service of the summons on 24 October 2015, fell well within the three-year period of prescription.

[42] In any event, the applicant acknowledged his indebtedness to Wesbank in respect of the shortfall in terms of the VTN. Whilst the document placed before the Court was of extremely poor quality, the relevant provision, paragraph 6, was sufficiently legible.

[43] The applicant's contention that the first respondent's cause of action prescribed prior to service of the summons, held no merit.

[44] Subsequent to procuring the judgment against the applicant, the first respondent obtained a warrant of execution during June 2021 and caused the applicant's Capitec bank account to be frozen from 26 June 2021 to 13 July 2021.

[45] The applicant contended that he became aware of the judgment for the first time during July 2021. Contrary thereto, however, the applicant's attorney of record requested various pleadings and the court order from the second respondent's representative, from 29 June 2021. The documents were provided to him on 12 July 2021.

[46] The freeze on the applicant's bank account allegedly rendered him penniless and without financial means to pay medical expenses incurred during a bout of covid. The applicant, however, was a beneficiary of a medical aid scheme at the time and his medical expenses were paid by the medical aid.

[47] Whilst the applicant complained about the attachment of his bank account in terms of rule 45(12)(a), that he alleged was not effected in a procedurally correct manner, those averments, if meritorious, did not constitute a substantive defence to the first respondent's combined summons against the applicant. Nor did they constitute a *bona fide* triable defence, for purposes of this rescission application.

[48] Assuming but without finding in the applicant's favour that the writ was not lawfully executed, that would not result in the judgment being set aside.

[49] The second respondent did not perfect the attachment of the applicant's bank account as the applicant was hospitalised with covid and in an allegedly financial straightened position.

[50] The defences raised by the applicant to the first respondent's combined summons for purposes of this rescission application were those dealt with above.

[51] The applicant did not deny his indebtedness to the first respondent in the amount claimed. Moreover, the applicant did not suggest that if the summons had come to his attention, he would have been financially able to pay the outstanding amount claimed by the first respondent.

[52] The applicant did not disclose his financial circumstances at the time of service of the summons or at the stage that the rescission application was launched, to this Court. Nor did the applicant state what would have transpired if the summons had come to his knowledge, which was of particular relevance in the light of the applicant signing the VTN.

[53] In the circumstances, the applicant failed to set out a triable defence and failed to meet the requirements for rescission of the judgment. Accordingly, the application for rescission stands to be dismissed and a suitable order will follow hereunder.

[54] As regards the applicant's claim for punitive costs against the second respondent, the latter alleged that the reason for the delay in furnishing the requested documents to the applicant's attorney was that the second respondent's representative dealing with the applicant's matter at the time, fell ill with covid. The second respondent ought to have ensured that the representative's workload was covered by an alternate employee.

[55] However, in the light of the applicant's complaints in respect of the attachment not being material to the rescission itself, there is no basis upon which I should award punitive costs against the second respondent.

[56] There is no reason why the costs of this application should not follow the order on the merits.

[57] In the circumstances, the application is dismissed with costs.

**A A CRUTCHFIELD
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 21 December 2022.

COUNSEL FOR THE APPLICANT: Mr U Van Niekerk.
INSTRUCTED BY: J I Van Niekerk Inc.

COUNSEL FOR THE RESPONDENTS: Ms R Stevenson.

INSTRUCTED BY: Lynn & Main Incorporated.

DATE OF THE HEARING: 2 August 2022.

DATE OF JUDGMENT: 21 December 2022.