REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 24707/2020

(1)	REPORTABLE: Yes☐/ No ☒
(2)	OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3)	REVISED: Yes ☐ / No ☒
Date:	20 July 2023 WJ du

In the matter between:

NHLANHLA PASCAL GAMEDE	**APPLICANT**

and

WESBANK, A DIVISION OF FIRSTRAND BANK LIMITED	**RESPONDENT**

JUDGMENT

DU PLESSIS AJ

[1] Background

[1] This is an opposed rescission of a default judgment brought in terms of Rule 42(1)(a).

[2] The facts that are common cause are

i. There was an agreement, the terms of which are also common cause;

ii. There was a breach and a failure to pay the instalments;

iii. The Respondent cancelled the agreement;

iv. The Applicant fell in arrears;

v. The outstanding balance amount;

vi. Compliance with the National Credit Act.

[3] The only issue to be determined in this matter is whether the summons was properly served in terms of Rule 4(1)(a)(iv) of the Uniform Rules of the High Court ("the Rules").

[4] The Respondent issued summons in this court on 7 September 2020, claiming cancellation of the agreement and the return of the motor vehicle as well as costs. Summons was allegedly served on 28 September 2020, and because no appearance was entered, the default judgement was granted in the Applicant's absence on 1 March 2021.

[5] In his founding affidavit the Applicant states that he did not receive the summons as alleged. He only became aware of the summons on 29 July 2022 when his attorney sent it to him after having been granted access to CaseLines by the Respondent's attorney.

[6] The Sheriff's (Visagie) return of service states that summons was served on 28 September 2020 "by leaving a copy thereof to (sic) the outer door". The address where it was affixed is the Applicant's chosen *domicillium citandi et executandi* in terms of the agreement between the parties.

[7] The Applicant avers that the description does not make sense, since the outer door of the house is inaccessible from the street and cannot be seen from the outside boundary gate.

[8] When the motor vehicle was removed from his possession, the Applicant inquired from his attorney how an order could be sought in his absence. When his attorney queried the return of service, the Sheriff (Jonker, not the same person who served the papers) sent a letter to explain that it should have read "outer gate" and not "outer door". This information he obtained by looking at now deceased Visagie's jobcard that had "OG" scribbled on it. This means, he says, that the summons was therefore allegedly left "on the outer gate of the premises".

[9] This service, the Applicant avers, does not comply with Rule 4(1)(a)(iv), as it was not left at the *domicilium* but outside the *domicilium*, and that nothing can be affixed to the gate as it is rusted. Had it been placed through the bars in the boundary gate, it would have come to his attention, and would have constituted service. However, on the current service, the summons did not come to his attention after service.

[10] It is then based on this unclarity on the Sheriff's return that the court made an order granting the default judgment, under the impression that summons has been properly served. Due to this erroneously granted order, the Applicant wants the order rescinded.

[11] The Applicant also offers reasons for the non-payment and the default, although in the context of Rule 42(1)(a), as will be explained below, this seems irrelevant for purpose of this application.

[2] The law

(i) Rescission

[12] Rule 42(1)(a) provides that

> The court may in addition to any other provisions it may have, *mero motu* or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[13] In terms of Rule 42(1)(a), unlike Rule 31(2)(b) or the common law, the Applicant need not show good cause in explaining his default or that he has a *bona fide* defence. All he needs to do is to show that the judgment is erroneously granted.[1]

(ii) Service

[14] The Applicant avers that an order is erroneously sought if there is no proper notice to the absent party. In *Lodhi 2 Properties Investment CC v Bondev Developments (Pty) Ltd*[2] the Supreme Court of Appeal stated

> Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, *proper notice of the proceedings has in fact not been given*. That would be the case if the sheriff's return of service wrongly indicates that the relevant document has been served as required by the rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously. (own emphasis)

[15] The crux of the issue then lies in the answer to the question: was there proper service at a chosen *domicilium citandi* in terms of Rule 4(1)(a)(iv)?

[16] Rule 4(1)(a)(iv) states that

> Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA)1 any document initiating application proceedings shall be effected by the sheriff in one or other of the following mannersif the person so to be served has chosen a domicilium citandi, by delivering or leaving a copy thereof at the domicilium so chosen;

[17] In *Amcoal Collieries Limited v Truter*[3] the court stated

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[1] *Freedom Stationery (Pty) Ltd and others v Hassam and others* 2019 (4) SA 459 (SCA); *Mutebwa v Mutebwa & Another* 2001 (2) SA 193 Tk at 198F; *Bakoven Ltd v GJ Howes (Pty) Ltd* 1990 (2) SA 446 (E) at 471E to H.

[2] 2007 (6) SA 87 (SCA) para 24.

[3] 1990 (1) SA 1 (A).

> ‘It is a well-established practice (which is recognised by Rule 4(1)(a)(iv) of the Uniform Rules of Court) that, if a defendant has chosen a domicilium citandi, service of process at such place will be good, even though it be a vacant piece of ground, or the defendant is known to be resident abroad, or has abandoned the property, or cannot be found.”

[18] In *Rossouw v FirstRand Bank Ltd*[4] the court stated that

> A right to choose the manner of delivery inexorably points to an intention to place the risk of non-receipt on the consumer’s shoulders. With every choice lies a responsibility, and it is after all within a consumer’s sole knowledge as to which means of communication will reasonably ensure delivery to him.

[19] From these judgments it seems that if the defendant has chosen a *domicilium citandi* as a method of service, and service was affected at such a place, it will be good even if it is on vacant piece of ground or the defendant cannot be found.

[20] In *Absa Bank Limited v Mare*[5] the court have developed this rule by looking at what effective service requires. In this case, summons was purportedly served on the Applicant’s *domicilium* address by “affixing a copy thereof on the grass” of the smallholding. It did not come to attention of the Applicant. The court held that this was not proper service, as the purpose of such service is to notify a person of the nature and the contents of the documents.[6] It confirmed the finding of the court a quo,[7] where the court stated[8]

> As I understand, the purpose of service of a process is to notify the person on whom the process is to be served of such process and its contents. In terms of the rule applicable the court is, thus, required to be satisfied as to the effectiveness of the service. For such service to be effective, it must have the effect of notifying the person on whom the process is to be served of the process and its contents.
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> By simply leaving the process to be served at the *domicilium citandi*, as happened in this instance where the section 129 (1) notice was attached to the gate and the summons was affixed to the grass, without taking the necessary precautions that same will come to the notice of the defendant, does not constitute effective service.

[21] All this should be understood in the context of Rule 4(10) that states

> Whenever the court is not satisfied as to the effectiveness of the service, it may order such further steps to be taken as it deems fit.

[22] The court thus has a general discretion whether to accept service.

[23] In this case it is not in dispute that the summons was served on the chosen *domicilium citandi*, or that the mode of service was acceptable. What is in dispute is the manner in which the documents were service, and whether this manner complies with the Rules of this court constituting effective service. The question of whether effective service in this case was can only be answered when the purpose of service is examined.

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[4] 2010 (6) SA 439 (SCA) para 32.

[5] (A56/2019) [2020] ZAGPPHC 372.

[6] Para 26.

[7] Mare v Absa Bank Limited 2019 JDR 0098 (GP).

[8] Para 32.

[3] Discussion

[24] The fundamental rule of service is that the court must be satisfied that a party (in this case the Applicant) received the documents and is therefore aware of the legal proceedings against him.[9] This is important to enable compliance with another fundamental principle in law, the *audi alterem partem* principle. Without knowledge of the proceedings, a party cannot be heard (or at least make the election to do so), and judgment may be granted against him in his absence, as in this case.

[25] It is these principles that inform the exercise of the court's discretion in terms of the Rules. In this case, "by delivering or leaving a copy thereof at the *domicilium* so chosen" means "in a way that it will come to the notice of the defendant" as per the *Mare* case. I am not convinced from the facts that the service in this case was done in a way that it would have come to the attention of the defendant.

[4] Order

[26] I, therefore, make the following order:

1. The default judgment granted against the Applicant in his absence under case number 24707/2020 by the above Honourable Court on 1 March 2021 is rescinded, with costs.

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WJ DU PLESSIS

Acting Judge of the High Court

[9] *First National Bank of SA Ltd v Ganyesa Bottle Store (Pty) Ltd and Others; First National Bank of SA Ltd v Schweizer Drankwinkel (Pty) Ltd and Another* 1998 (4) SA 565 (NC).

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

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Counsel the for Respondent:	Mr JC Viljoen
Instructed by:	Rossouws, Lesie Inc
Date of the hearing:	19 July 2023
Date of judgment:	20 July 2023