Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022-048781

1. Reportable: No
2. Of interest to other judges: No
3. Revised

Wright J
29 January 2024

In the matter between:

LEZEL MARIA DU TOIT **Applicant**

and

ABSA BANK LIMITED **Respondent**

JUDGMENT

WRIGHT J

1. **On 13 June 2019, the parties entered into a written agreement under which the respondent bank sold a car to the applicant. On 14 February, 2023 this court granted default judgment in favour of the bank and against the applicant. The order included an order for the return of the vehicle by the applicant to the respondent.**

2. **Presently, the applicant seeks to rescind the order of 14 February 2023 and she seeks in particular an order that the vehicle be returned to her.**

3. **The present application was launched as an urgent application. On 18 July 2023 my learned brother Dlamini struck the application from the roll for lack of urgency and ordered the applicant to pay the bank's costs.**

4. **The papers are long, complicated and contain many deep disputes of fact. The applicant has placed before the court, in reply, evidence of an important nature. The bank has filed a supplementary affidavit in response.**

5. **In short, the applicant says that although she has serious debt problems, she never received the summons commencing action, she has abided by her debt review obligations and that accordingly she is entitled to a rescission of the order and to the return of the car.**

6. **In the answering affidavit the deponent for the bank, Mr Ndamase undertakes to store the vehicle " *in safekeeping until the outcome of the rescission application*. "**

7. **The answering affidavit says that the applicant applied for debt review but that such lapsed. Certain formalities are alleged not to have been complied with, for example the debt review application was not filed timeously in a court or with the National Consumer Tribunal. The bank allegedly also terminated the debt review on the ground of non-payment of her restructured debt by the applicant.**

8. It is denied by the bank that the restructured agreement, abbreviated by the parties as FACP was served on the bank. Had the relevant application for restructuring been served on the bank it would have opposed same. The bank elected to terminate the debt review process. It then launched the action referred to above.

9. **It would appear that under clause 19 of the original written agreement, the applicant chose as an address for service of process " *[…] […] […] […] […] […] ".* According to the return of service, dated 10 December 2022 the sheriff served the summons at that address " *by affixing to the main entrance*."**

10. **The applicant says that she never got the summons and on the facts of the case she cannot be disbelieved.**

11. **She says that service of the summons was irregular because on 3 January 2022, eleven months before service of summons, her debt counsellor sent an NCR Form 17.1 to all credit providers, including the bank. The notice advised that the applicant had applied for debt review. The notice stated that the address of the applicant was " *[…] […] […], […] […],, Johannesburg, 1501.* "**

12. An affidavit by the debt counsellor, Mr Sager and filed in reply confirms that the relevant Form 17.1 was served on the respondent. A supplementary affidavit on behalf of the bank, filed apparently after the replying affidavit does not take issue with the allegation by Mr Sager that the bank received the Form 17.1 notice. In my view, it is probable that the bank got the Form 17.1 even if the relevant email was not forwarded to the relevant person.

13. The bank says that the notice does not amount to a change of address as contemplated by clause 19. I disagree. Form 17.1 is an important document. Debt review has consequences for debtor and creditor. The applicant makes a fair point when she points out that after judgment was obtained the bank managed to find her and her car, at a different address but at the time of service of the summons the bank relied on a domicillium address.

14. In my view, had the person who granted the default judgment been aware of the change of address, judgment would not have been granted. In these circumstances it is not necessary to deal with the question of the defence to the action. See Promedia Drukkers v Kaimowitz 1996(4) SA 411 C at 417 G-I.

15. The attachment of the vehicle was pursuant to the court order and as Mr Ndamase said, the bank would keep the vehicle pending the outcome of the rescission application. It follows that the vehicle must be returned to the applicant.

ORDER

1. **The order of 14 February 2023 is rescinded.**

2. **The respondent is immediately to return 2017 Renault Sandero 900 T Dynamique with engine number *[…]* and chassis number *[…]* to the applicant.**

3. **The respondent is to pay the applicant's costs.**

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GC Wright

Judge of the High Court

Gauteng Division, Johannesburg

HEARD : 29 January 2024

DELIVERED : 29 January 2024

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