

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 25162/2015

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
	<u>22/09/2016</u>
	DATE
	<u>[Signature]</u>
	SIGNATURE

In the matter between:

DIRK JACOBUS RIEKERT DE WET

APPLICANT

and

SOUTH AFRICAN SECURITIZATION
PROGRAMME (RF) LIMITED

FIRST RESPONDENT

THE SHERIFF, BOKSBURG

SECOND RESPONDENT

J U D G M E N T

COLLIS AJ:

INTRODUCTION

[1] In the present application, applicant seeks an order for the rescission of a default judgment taken against him on 24 November 2015. The application is purportedly brought in terms of the provision of Uniform Rule 42(1)(a), albeit that the founding affidavit also addresses the applicant's absence of wilfulness of default and his *bona fide* defence. The application is opposed by the first respondent.

BACKGROUND

[2] During May 2014, Bulk Line Haul Services CC ("the principal debtor") concluded two rental agreements with Sunlyn (Pty) Ltd ('Sunlyn'). The relevant terms of both rental agreements were:

Clause 7.1: 'claim immediate payments of all amounts which would have been payable in terms of the Agreement until expiry of the rental period stated in the Schedule, whether such amounts are then due for payment or not. You agree that we may take possession of the goods and only return them to you on receipt of full payment of all amounts owing by you. You will not be able to withhold payment or make any deductions from any amount owing as a result of your loss of possession of the goods; or

Clause 7.2 immediately terminate the Agreement, take possession of the goods, retain all amounts already paid by you and claim all outstanding rentals, all legal costs as between attorney and own client and as agreed pre-estimated liquidated damages, the aggregate value of the rentals which would have been

payable had the Agreement continued until expiry of the initial period stated in the Schedule.

Clause 13: You may not transfer your rights in terms of the Agreement ...We may, without notice to you, transfer all or any portion of our rights in terms of the Agreement....You agree that, if we transfer, you will hold the goods and continue to fulfil your obligations to the new owners of the rights to the Agreement and/or the goods."

[3] On the same day that both rental agreements were concluded, the applicant and two others agreed to guarantee the debts of the principal debtor owed to Sunlyn. The principal debtor subsequently defaulted on its obligations and the first respondent elected to act in terms of the clause 7.1 and 7.2 as quoted above.

[4] Rule 42(1)(a)¹ empowers the court to rescind an order erroneously sought or erroneously granted in the absence of a party seeking rescission, provided that such party is affected by such order or judgment. The prerequisite factors for granting rescission under this Rule are the following: firstly, the judgment must have been erroneously sought or granted; secondly, such judgment must have been granted in the absence of the applicant; and lastly, the applicant's rights or interest must be affected by the judgment. Although the language used in Rule 42(1) indicates that the Court has a discretion to grant the relief, such discretion is narrowly circumscribed. The use of the word 'may' in the opening paragraph of the Rule, indicates the

¹ The Rule reads as follows:

"42(1) The Court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary-

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby....."

circumstances under which the Court will consider a rescission or variation of the judgment.

[5] Once those three requirements are established, the applicant would ordinarily be entitled to succeed. He is not required to show good cause in addition thereto. See the decision *De Sousa v Kerr* 1978 (3) SA 635 (W).

GROUNDS OF OPPOSITION

[6] The first respondent opposes the application on the following grounds:

6.1 It is denied by the first respondent, that there was no service of the summons as contended by the applicant.

6.2 It is denied that the Conventional Penalties Act 15 of 1962 is relevant to the dispute.² In this regard the first respondent alleges, that the amounts claimed in respect of both rental agreements are the agreed pre-estimated liquidated damages, which is the value of the rentals which would have been payable had the agreements continued until expiry of the initial rental period, as stated in the rental agreements. It is denied that these amounts are penalties, but rather that the parties have simply agreed to an acceleration of all amounts due.

6.3 Lastly, the first respondent relies on the cession agreements. In terms of the cession agreements, Sasfin elected to cede all its rights in terms of both rental agreements to SASP.³

² Answering Affidavit page 46 paragraph 42

³ Answering Affidavit page 44 paragraph 30

[7] I will proceed to deal firstly, succinctly with the requirements under Rule 42(1)(a) as mentioned above.

Service of the summons

[8] On 21 July 2015, the summons in the present matter was served on the third defendant (applicant) at 68 Victor Whitmill Drive, Sunward Village, Sunwardpark Boksburg. The return of service depicts that the summons was affixed to the gate at the applicant's chosen *domicilium citandi et executandi* at around 16h30.⁴ In his founding affidavit, the applicant does not deny that the said address was his chosen *domicilium* address as per the guarantee. He, however, alleges that at the time of service of the summons, his two daughters were present at the house and as such if indeed the deputy sheriff had made enquires at the given address, as is alleged in his return, in all probability he would have found someone at the given address at the time of service of the summons. Apart from the above, the applicant further contends that he has no gate at his premises and as such the deputy sheriff would have easily been able to access the front door to his house.⁵

[9] At paragraph 32 of the founding affidavit, he further alleges that his address is situated within an estate, where access into the estate is controlled by a security company. On the day that service allegedly took place the entrance logbook reflects no booking of an entry by the deputy sheriff around the time when service allegedly occurred. The applicant thus disputes that the summons was served as alleged by the

⁴ Founding Affidavit page 12 paragraph 29

⁵ Founding Affidavit page 13 paragraph 31

deputy sheriff in his return. It is on this basis that the applicant contends that the judgment had been erroneously sought or granted.

[10] The deponent to the first respondent's answering affidavit, refrained from dealing with the allegations in the founding affidavit, which she either admitted or could not dispute.⁶ As such, no evidence in rebuttal of the factual allegations made in the founding affidavit, in relation to the service of the summons was presented before this court.

[11] Section 43(2) of the Superior Courts Act 10 of 2013 reads as follows:

'The return of the sheriff or a deputy sheriff of what has been done, upon any process of court, shall be *prima facie* evidence of the matters therein stated.'

[12] It is so, that where an applicant refutes the *prima facie* evidence of the matters stated in a return, such applicant carries the *onus* to disprove the contents of the return of service. As mentioned in paragraph 8 above, the applicant categorically states, in paragraph 31 to his founding affidavit that he has no gate at his premises and as such the summons could not have been affixed to his gate. This was not denied by the first respondent, nor was an affidavit obtained from the deputy sheriff, to expressly contest the factual allegation made by the applicant in this regard.⁷

[13] Furthermore, in paragraph 32 of his founding affidavit, the applicant annexed an extract of the entrance logbook to his estate, which reflects no entry by the deputy

⁶ Answering Affidavit page 45 paragraph 36

⁷ See *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) paras 12 and 13

sheriff on the day and around the time stipulated in the return of service, when the alleged service of the summons must have taken place. Here too, the first respondent has failed to obtain an affidavit from the deputy sheriff wherein, the said sheriff expressly denies the contents of the extract of the logbook.

[14] Whereas, an action is commenced when the summons is issued, the defendant is not involved in litigation until service is effected. This is because it is only at that stage that a formal claim is made.⁸ It has been held in the past that a proper service of the summons commencing an action is an act necessary for the defendant's due citation and such citation constitutes the foundation of the proceedings.⁹

[15] In the absence of any rebuttal evidence which is presented before this court, I find that the applicant has established that no service of the summons has taken place.

[16] It is for this reason that I find that the order of 24 November 2015 was erroneously granted, in the absence of service of the summons. The failure to serve the summons on the applicant rendered the proceedings wherein the order of 24 November 2015 was granted, null and void ab initio.¹⁰ The applicant is therefore entitled to have the said order set aside even though in actual fact it constitutes a nullity.

[17] Counsel representing the first respondent submitted during argument that if the court is of the view that the applicant had satisfied the court on the issue of service, then the application for rescission must succeed.

⁸ See *Marine and Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407 (A) at 413D

⁹ See *Mutebwa v Mutebwa and Another* 2001 (2) SA 193 (Tkh) at 201

¹⁰ See *Dada v Dada* 1977 (2) SA 287 (T) at 288C-D

[18] In the circumstances, I find it unnecessary to deal with the remainder of the grounds of opposition.

ORDER

[19] In the result the following order is made:

1. The default judgment granted against the applicant on 24 November 2015 is hereby rescinded.
2. The first respondent is ordered to pay the costs of this application on the scale of attorney and own client.



C. J. COLLIS

ACTING JUDGE GAUTENG LOCAL DIVISION JOHANNESBURG

APPEARANCES:

FOR APPLICANT	: Adv. D. Williams
INSTRUCTED BY	: MALHERBE RIGG & RANWELL INC.
FOR FIRST RESPONDENT	: Adv C. Cothill
INSTRUCTED BY	: SMIT JONES & PRATT
DATE OF HEARING	: 04 August 2016
DATE OF JUDGMENT	: 22 September 2016