

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
REPUBLIC OF SOUTH AFRICA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
01.03.10 DATE	 SIGNATURE

05/03/2010
Case No: A 252/08

In the matter between:

G VERSVELD

Appellant

vs

ERS BUSINESS SYSTEMS (PTY) LTD
t/a NASHUA, PRETORIA

Respondent

JUDGEMENT

CORAM: SAPIRE, AJ et DOLAMO, A J:

SAPIRE, AJ:

This is an appeal against a judgement of the Magistrate's Court for the District of Pretoria, held at Pretoria. In terms of the judgement an application by the Appellant for rescission of a default judgement was refused with costs.

The events leading up to this point stem from a contract in which the Respondent hired equipment to a close corporation of which the Appellant was the sole member. The Appellant is alleged to have bound himself as surety for and co principal debtor with the close corporation for the obligations of the latter to the Respondent. The

close corporation was liquidated before the lease expired and the whereabouts of the equipment are at this stage unknown.

The Respondent has sought to recover from the Appellant the amount it claims as being due to it under the Agreement of Lease. To this end the Respondent issued a Summons in the Magistrate's Court Pretoria and caused the Summons to be served at an address which it alleged to be a *domicilium citandi et executandi* chosen by the Appellant.

It is clear that the Appellant did not receive service of the Summons and was unaware that default judgement had been taken by the Respondent until the Sheriff arrived at the Appellant's home in order to serve a Warrant of Execution. The Appellant then made an application to rescind the Default Judgement but was unsuccessful therein and now seeks to have the Magistrate's judgement refusing set aside.

There is only one point for decision in this matter, that being whether the Summons had been properly served. I have already mentioned the fact that the Respondent alleges that the address at which the Summons was served was the *domicilium* chosen by the Appellant.

Scrutiny of the documents in this matter comprising the lease of the equipment and the suretyship on which the Respondent's claim is based reveal that the address in question was chosen by the Appellant on behalf of the principal debtor. Nowhere in the documents is there a choice by the Appellant of a *domicilium* for service on him as the surety.

As the service of the Summons was effected only by leaving a copy at the premises in question the Appellant's contention that he never received service and was unaware of the Summons must be accepted.

The Magistrate did not consider whether proper service had taken place when she dismissed the application for rescission. In this she erred for the judgment was defective and unenforceable on this account. I avoid the use of the words nul and void in this connection.

Because of this the merits of the defence do not have to be examined and any delay in bringing the application and this appeal should be condoned.

Counsel for Respondent referred the Court to *Leo Manufacturing CC vs Robor Industrial (Pty) Ltd t/a Robor Stewarts and Lloyds*, 2007 (2) SA 1. This is a judgement of the Supreme Court of Appeal and if undistinguishable is binding on this Court.

The headnote of the judgement reads:

"An applicant for rescission of a default judgement will not be successful in his application if he does not set out the grounds of his defence to the Respondent's claim in the Summons even where the default judgement was void aborigine."

A distinguishing feature of the present case is that the Appellant did set forth in his Affidavit in support of the application a number of contentions on which he would

rely as a defence to the Respondent's claim. As the judgement in this matter was founded on a Summons which had not been served it is not necessary to enquire into the merits of the Appellant's contention and the application for rescission should have been granted.

In all the circumstances of this case it is not of decisive consequence whether the application for rescission was made in terms of the Rules of the Magistrate's Court or in terms of the Common Law.

As the central issue of service is to be decided in the Appellant's favour.

The appeal must succeed.

The order of this Court is:

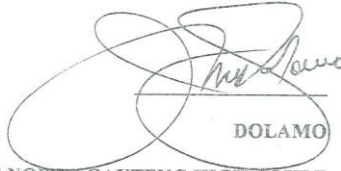
1. The judgement of the Magistrate dated the 21st of December 2007 is set aside.
2. The default judgement entered against the Appellant on 8th February 2007 is set aside.
3. The Respondent is to pay the costs of this appeal.



SAPIRE

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT
PRETORIA

I agree:



DOLAMO

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

PRETORIA

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