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|---|---|
| *Reportable:* | *Yes/No* |
| *Circulate to Judges:* | *Yes/No* |
| *Circulate to Magistrates:* | *Yes/No* |

# IN THE HIGH COURT OF SOUTH AFRICA
# (NORTHERN CAPE HIGH COURT, KIMBERLEY)

***CASE NO.: 729/2017***

***Date heard: 11-05-2018***
***Date delivered: 29-06-2018***

In the matter between:

**Raymond Louw** **Applicant**

And

**BMW Financial Services (SA) PTY LTD** **Respondent**

**CORAM: WILLIAMS J:**

## JUDGMENT

**WILLIAMS J:**

1. This is an application for the rescission of a default judgment granted in favour of the respondent, BMW Financial Services SA (Pty) Ltd, for the confirmation of the cancellation of the agreement between the parties and the repossession of a BMW motor vehicle.

2. The parties had entered into an instalment sale agreement, regulated by the National Credit Act 34 of 2005 (the Act), on 25 February 2015, in terms of which Mr Raymond Louw, the applicant purchased a BMW motor vehicle. The purchase price of the vehicle was R431 872,40, to be paid in monthly instalments of about R7055, 00.

*3.* The applicant fell into arrears with his payments and on 2 December 2016 the respondent sent him a notice in terms of section 129(1) of the Act, setting out his rights and requesting him to pay the arrears (which at the time amounted to R16 362, 66), within 10 days failing which legal action would be taken to enforce the provisions of the agreement. The section 129 (1) notice was sent by registered mail to the applicant's chosen *domicilium citandi et executandi.*

4. The section 129(1) notice elicited no response from the applicant, which resulted in summons being issued and served on 25 April 2017.

5. Upon failing to enter an appearance to defend (the period expired on 11 May 2017), the respondent applied to the Registrar for default judgment in terms of Rule 31(5) on 27 July 2017. After attending to certain queries from the Registrar, default judgment was granted on 6 September 2017. I will revert to the queries in due course.

6. The applicant, in his founding affidavit for the rescission of the judgment states that he only received the section 129(1) notice on 24 August 2017 when it was delivered to his home by courier. Thereafter, and before he could respond within the stated time, the sheriff repossessed the motor vehicle on 16 September 2017.

7. The applicant then obtained legal advice and after his attorney obtained a copy of the court file they discovered the following:

   7.1 That the summons was served by affixing it to the front door of his house on 25 April 2017; and
   7.2 That the summons had annexed to it a section 129(1) notice dated 2 December 2016 as well as a track and trace report from the Post Office.

8. The applicant alleges that he had not received the summons which the sheriff, despite his ladyfriend being at home during the course of that particular day, chose to post on the outer door of his premises. He also denies having received the section 129(1) notice dated 2 December 2016 which was addressed to both Bloemfontein and Kimberley. He asserts that had he received the notice he would have settled any outstanding payments immediately.

9. At this stage I pause to mention that the confusing address of the notice of 2 December 2016 – 27 Amy Street, Kirstenhof, Kimberley, Bloemfontein – was one of the queries raised by the

Registrar in the application for default judgment on 27 July 2017. The other issue raised by the Registrar related to the fact that the affidavit accompanying the application was not commissioned.

10. The respondent at that stage addressed these problems raised by the Registrar by submitting a properly signed and commissioned affidavit and attaching the track and trace report which shows that although the notice made a detour through Bloemfontein on 14 December 2016, it reached the Kimberley Post Office on 15 December 2016, on which date the first notification was dispatched to the applicants residence in Kimberley, his chosen *domicilium citandi et executandi.*

11. The respondent explains in its answering affidavit that the section 129(1) notice which was sent by courier to the applicant on 24 August 2017 was done as a mere precautionary measure in the event the Registrar did not accept the explanation regarding the notice of 2 December 2016. The respondent does not rely on the notice received on 24 August 2017 for the default judgment, but on the notice of 2 December 2016 of which the first notification was sent from the Kimberley Post Office on 15 December 2016.

12. The applicant failed to file a replying affidavit. Mr Pillay who appeared for the applicant persisted in argument however that the respondent was not entitled to default judgment since the applicant only received the section 129 (1) notice on 24 August

2017, a mere 9 days before default judgment was granted on 6 September 2017 and before the applicant had a proper opportunity to exercise his options in terms of the notice. Mr Pillay also contends on behalf of the applicant that it was incumbent upon the sheriff, when serving the summons, to have made all attempts reasonably possible to effect service personally before affixing the summons to the door of the residence, which should be a measure of last resort. The alleged failure by the sheriff in his duty to effect service, properly, it is argued therefore amounted to non service, which is another reason why the judgment should be rescinded.

13. I deal firstly with the issue of service of the summons. There can be no doubt that personal service would always be the ideal manner in which to effect service. It is however not always a requirement and is specifically not so in cases where the person has chosen a *domicilium citandi et executandi.* Rule 4(1) (a) (iv) provides for service of any process to be effected by the sheriff *"if the person so to be served has chosen a domicilium citandi, by <u>delivering or leaving a copy thereof at the domicilium so chosen</u>*."

14. It has in fact been held that service on a chosen domicilium *citandi et executandi* will be good even though it is known that the defendant is not living there. See *Prudential Building Society v Botha* 1953 (3) SA 887 (W). In such cases, service on vacant land will also be good, provided strict compliance

with the Rules is observed. See *Naidoo v FirstRand Finance Co Ltd* 2012 (6) SA 122 (WCC) at 127 A-B.

15. As to the argument that the sheriff had failed in his duty by neglecting to first establish whether there was anyone present at the applicant's residence, the following is illuminating. The applicant averred that his ladyfriend who is a nurse, was off-duty and at home during the day of 25 April 2017 when the summons was served. As confirmation hereof he attached the duty roster (nursing services) for the Galleshewe Day Hospital where the ladyfriend, Ms Shokhoe is employed. The duty roster has marked on 25 April 2017, next to the name of Ms Shokhoe, the letter "D" as opposed to the letter *"N"* which appears next to the names of other nursing staff. The immediate impression created is that Ms Shokhoe was on day duty and that she would therefore not have been at home when the summons was served. Although Ms Shokhoe has deposed to a confirmatory affidavit in which she confirms that she was off-duty that particular day and that the sheriff had not served the summons on her nor affixed it to the door, she does not explain the apparent contradiction of her (and the applicant's) version as shown on the duty roster.

16. As far as proof of delivery of a section 129(1) notice is concerned the Constitutional Court has once and for all set out the obligations which credit providers have to discharge to bring the notice to the attention of a consumer. In *Kubyana v*

*Standard Bank of SA Ltd* 2014(4) BCLR 400 at paragraph 53 it is stated as follows:

> *"[53] Once a credit provider has produced the track and trace report indicating that the section 129 notice was sent to the correct branch of the Post Office and has shown that a notification was sent to the consumer by the Post Office, that credit provider will generally have shown that it has discharged its obligations under the Act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached her attention if she wishes to escape the consequences of that notice. And it makes sense for the consumer to bear this burden of rebutting the inference of delivery, for the information regarding the reasonableness of her conduct generally lies solely within her knowledge. In the absence of such an explanation the credit provider's averment will stand. Put differently, even if there is evidence indicating that the section 129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour."*

17. *In casu* the respondent has shown that the section 129(1) notice had reached the correct post office on 15 December 2016 and that a notification that a registered item was available for collection was sent to the correct address. The applicant has failed to give any explanation why, in the circumstance, the notice would not have come to his attention. He has therefore failed to discharge the burden of rebutting the inference of delivery.

18. An applicant in an application for rescission of a judgment taken by default against him is generally required to give a reasonable explanation for his default, show that his application

is made *bona fide* and show that he has a *bona fide* defence on the merits which *prima facie* carries some prospect of success.

19. The applicant has unfortunately failed to meet any of the requirements. On his own admission he had failed to pay three monthly instalments by the time default judgment was obtained. His failure to make these payments stands unexplained and there can therefore be no *bona fide* defence on the merits. The applicant's *bona fides* in bringing this application is also seriously doubted. In his affidavit he states that he would have immediately settled his outstanding payments had the respondent notified him properly. However in the sixteen days since he, on his version, first received the section 129(1) notice, until the motor vehicle was repossessed, no effort was made to settle the outstanding payments or to negotiate a payment arrangement. To date of the hearing of this application the arrear payments had still not been settled. In addition and as already dealt with herein above, the applicant failed to give a reasonable explanation for his default. The application for the rescission of the default judgment can therefore not succeed.

20. Finally, the applicant included a prayer for condonation of the late filing of the rescission application in the Notice of Motion. In terms of Rule 31 (2) (b) an application for rescission of a default judgment should be made within 20 days of the defendant becoming aware of the judgment. The application was launched 29 days after the motor vehicle was repossessed and 26 days after the applicant's attorney received a copy of

the court file. While the delay is not extreme, the applicant has not given a single reason in his affidavit for the cause of the delay. As a result of his failure to give any explanation and in the light of my finding on the application for rescission, the application for condonation also stands to be dismissed.

**The following orders are made:**

a) **The application for condonation is dismissed.**

b) **The application for the rescission of the default judgment is dismissed with costs.**

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CC WILLIAMS
JUDGE

For Applicant: Mr J Pillay
Justin Pillay & Associates

For Respondent: Adv Sieberhagen
MacRobert Inc Attorneys
c/o Roux, Welgemoed & Du Plooy Attorneys