



**IN THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA,
PRETORIA**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

14 February 2017

In the matter between: -

CASE NO: 2014/3072

GLADWIN LIDDENE BARNES

14/2/2017

FIRST APPLICANT

YVETTE ROSILINE BARNES

SECOND APPLICANT

And

ABSA BANK LIMITED

RESPONDENT

JUDGEMENT

TSATSAWANE AJ

Introduction

- 1 The applicants seek an order in terms of which the default judgement granted against them on 11 March 2014 is rescinded and set aside. In addition, the

applicants seek an order in terms of which the writ of execution issued pursuant to the default judgment is set aside. Both parties applied for condonation for the late filing of their papers. These applications were correctly not opposed and I condoned the non-compliance for which both parties sought condonation.

- 2 The rescission application is opposed by the respondent on various grounds set out in its answering affidavit.

The default judgement

- 3 On 17 January 2014, the respondent issued a notice of motion against the applicants seeking an order in the following terms ~

- “1. *Payment in the sum of R1 076 775,27;*
2. *Payment of interest on the amount of R1 076 775,27 at the rate of 7.20% per annum...*
3. *An order in terms whereof the movable property described below is declared specially executable...*

PORTION 227 OF ERF 1227 CLAREMONT TOWNSHIP...”

- 4 The respondent’s claim was based on a mortgage loan agreement in terms of which it lent and advanced monies to the applicants for purposes of purchasing immovable property, i.e. Portion 227 of Erf 1227 Claremont Township (“the

property”). The loan amount was advanced to the applicants against registration of a mortgage bond over the property in favour of the respondent.

- 5 There is no serious dispute between the parties that the respondent advanced a loan to the applicants and that a mortgage bond was indeed registered over the property in favour of the respondent.
- 6 In its founding affidavit in the main application, the respondent alleged that the amount claimed in the notice of motion was due and payable and that it had complied with the requirements to enforce the mortgage loan agreement in the manner sought in the application.
- 7 In two returns of service attached to the papers filed of record in the main application, the relevant sheriff reported that he served the application upon the second applicant at the chosen *domicilium* on 4 February 2014. In terms of section 43(2) of the Superior Courts Act 10 of 2013 these returns of service constitute *prima facie* proof that the application was properly served upon the applicants. The fact that a return of service only constitutes *prima facie* proof of the contents thereof means that a return of service could be impeached, amongst others, on the basis that the contents thereof are not true.
- 8 In *Deputy-Sheriff for Witwatersrand District v Harry Goldberg And Others* 1905 TS 680, it was held that ~

“It is, I think, clear, in the first place, that if the return can be impeached it can only be impeached on the clearest and most satisfactory evidence.” (my emphasis).

- 9 It therefore follows that a return of service cannot be impeached by a simple, bare and unsubstantiated denial of receipt of process – the “*clearest and most satisfactory evidence*” is required to disturb the *prima facie* status of a return of service.
- 10 The applicants did not deliver a notice of intention to oppose the application nor did they deliver opposing papers. The respondent’s notice of motion notified the applicants, amongst others, that “*the application will be heard on 11 March 2014 at 10:00...*” if no notice of intention to oppose is given. Assuming that the returns of service in this case are not impeachable, it must necessarily follow that the applicants knew the consequences of not delivering a notice of intention to oppose.
- 11 The respondent’s application was called before Kollapen J on 11 March 2014 who granted default judgement on the terms set out in the notice of motion on an unopposed basis. It is this default judgment which the applicants seek to rescind and set aside.

The application for rescission

- 12 In their founding affidavit, the applicants rely on Rule 42(1)(a), the common law, and further alternatively, Rule 31 for the relief which they seek. In addition to this, the applicants also raised a point *in limine* which was correctly abandoned at the hearing of the matter. It is for this reason not necessary to deal with that point *in limine*.
- 13 The applicants contend that the default judgment was erroneously sought and erroneously granted in that ~
- 13.1 there was no proper service of the application upon the applicants – in fact, the applicants say that despite what is stated in the returns of service, the application was not served upon them; and
- 13.2 the respondent did not deliver to each of the applicants the notice contemplated in section 129 of the National Credit Act 34 of 2005 (“the NCA”).
- 14 If the applicants are correct, it follows that the proceedings in terms of which the default judgment was granted and the default judgment itself are a nullity.
- 15 In view of the fact that the applicants say that they were not served with the respondent’s notice of application, they contend that they were not in wilful

default. In this regard, in paragraph 5 of their founding affidavit, the applicants say that ~

"5. *The above order was taken in default on 11 March 2014, as stated above, at the outset, I refer to the two returns of service, in respect of myself and the second applicant, annexed hereto marked AA3, the contents of which are self-explanatory. I dispute in the strongest possible terms the contents of the respective return of service. The second applicant categorically denies that copies of the application on this matter were served personally on her. The court entered default judgment under the incorrect notion that the application had been properly served and that I had wilfully not entered notice to oppose, and that a copy of the application was served properly on me and came to my attention, this is not the case. I categorically deny that I received the summons or that it came to my attention until recentlyand the judgment was wrongfully sought, alternatively wrongfully granted as stated above and accordingly the judgment falls to be set aside.*"

16 In relation to non-compliance with the provisions of the NCA, the applicants say the following in their founding affidavit ~

"22. *The respondent asserts that it gave notice in terms of section 86(10) of the Act and refers to annexure F to the founding affidavit, being a letter dated 4 October 2013. We never received the notice in terms of*

section 129. The purported notice in terms of section 86(10) that the respondent avers it had sent to us was not dealt with as required by law and I deny categorically that we received same or that same came to our attention, the first time I saw it was as an annexure to the application. The honourable court will notice that the respondent on its version, which version I deny in any event, sent only one letter to us (both defendants) being the letter of the 04 October 2013, as opposed to sending two separate letters as required by the National Credit Act.

23. *I also categorically deny it was posted to either my residential, business, domicilium or actual property address. Accordingly, there is no compliance with section 86(10) of the Act and false allegation were put before the Court in both the summons and in the affidavit by Sabashnee Naidoo of compliance which directly lead the court to entering the judgement under the false and erroneous misconceptions that there had not only been compliance with section 86(10), but that the application and even been served."*

Service of the application

- 17 In paragraph 6 of their founding affidavit, the applicants correctly accept that *"the return of service itself constitutes only prima facie proof that service was effected as set out therein."* The applicants, however, challenge the truth of the contents of the returns of service.

- 18 If the challenge to the returns of service is good, it would necessarily follow that the default judgement was erroneously sought and erroneously granted as contemplated in Rule 42(1)(a) and the default judgment must then be rescinded and set aside without any further enquiry. In this regard, in *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007(6) SA 87 (SCA) the Supreme Court of Appeal stated the legal position to be as follows ~

“[24] ... 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....”

- 19 There is no dispute that the applicants were entitled to receive notice of the respondent's application and that the default judgment was granted in their absence. At issue in this application as far as notice of the application is

concerned is whether the applicants have adduced the clearest evidence to challenge the truth of the contents of the returns of service to entitle them to impeach the two returns of service.

20 Whilst it is correct that the contents of a return of service may be challenged and the return set aside, such a challenge is not one which a Court should easily and lightly uphold. This is due to, amongst others, the very status and purpose of the return of service and what would be required to meet such a challenge to impeach a return of service. For example, the litigant who instructed the sheriff to serve the process would not know how and if the process was served and only the sheriff would know and it would be impractical to require the sheriff to give evidence each time that there is a challenge to a return of service, even a in respect of slight challenge based on a simple, bare and unsubstantiated denial of receipt of process.

21 What then constitutes a good challenge to impeach a return of service? The answer to this question must necessarily depend on the circumstances of each case and what is contained in the return of service, in particular, the manner in which service is reported to have been effected. In my view, and with specific reference to the circumstances of this case, where the Sheriff says that the process was served upon the “*second respondent personally*” and in respect of the first respondent (the first applicant herein) upon his wife, who is the second respondent (and the second applicant herein) “*at the chosen domicilium citandi et executandi*” of the applicants, it would be necessary for the applicants to allege and prove at least the following ~

- 21.1 the reasons why it could not have been possible for the sheriff to effect service in the manner reported in the return of service;
- 21.2 that service could not possibly have been effected upon the person whom service is said to have been effected on the date and at the time stated in the return of service and the reasons for such impossibility;
- 21.3 the whereabouts of the person upon whom service is said to have been effected on the date and at the time stated in the return of service if it is reported that personal service was effected and this is denied;
- 21.4 if service is said to have been effected at a place of residence or *domicilium citandi et executandi*, whether the intended recipients were still residents thereat or whether they had changed their *domicilium citandi et executandi*; and
- 21.5 if the process is said to have been served upon a person other than the intended recipients, whether such a person could not possibly have been at the address of service and if such a person is known to the intended recipients of the process and that person, if known, must have deposed to an affidavit to deny that the process was served upon him or her and to state why it is not possible that the service could have been effected upon him or her at the time, date and manner stated in the return.

- 22 The above is obviously not an exhaustive list nor would it be desirable to formulate a list cast in stone. The above list, in my view, contains what would strengthen a challenge to the *prima facie* status of a return of service as opposed to a simple, bare and unsubstantiated denial of service even though the return of service states that service was effected upon one of the applicants at the chosen *domicilium citandi et executandi* without it being alleged as to why it could not have been possible to effect service in the manner stated in the return of service.
- 23 In my view, alleging some of the issues in the aforesaid list would enable the litigant on whose behalf process was served to meaningfully deal therewith and to obtain the sheriff's comments thereon. Without such allegations, the respondent (and possibly the sheriff) would be confined to what is stated in the return of service (which the intended recipients would be disputing) and the Court would not be in any better position to resolve the matter. In *Greeff v First Rand Bank 2012 (3) SA 157 (NCK)*, the applicant for the rescission of judgment contended that the summons "*never came to her attention*" and on the facts of the case, the Court accepted her version and stated that ~

"[10] *The provisions of s 36(2) of the Supreme Court Act are to the effect that a return of service will constitute prima facie proof of the contents thereof. It follows that such evidence may be challenged.*

[11] *This is exactly what the applicant did in her founding affidavit. The applicant pointed out that accordingly to the sheriff's return the*

summons had been served by attaching it to the main door of her house in her absence, and she stated –

- that the house had been fenced in, that the gate had at all times been locked and the sheriff would not in the circumstances have had access to the main door of the house; and*
- that she never received or became aware of the summons before 7 March 2011.*

[12] *The only comment to this by Mr. Robert Freeborough ...was to repeat the statement in the return that the summons had been attached to the main door of the house ...”*

24 In *Greeff*, the court was clearly influenced by the fact that the applicant had stated the reason why *“the sheriff would not in the circumstances have had access to the main door of the house.”*

25 The applicants before me simply deny service even though the return states that service was effected upon the second applicant and at the *domicilium*. There is no suggestion made as to why it could not have been possible for the sheriff to do that which the sheriff says he did in the return of service. In the result, I am not persuaded that the applicants have presented a proper challenge to the returns of service supported by the clearest evidence to justify an impeachment of the returns of service. In the circumstances, the challenge must fail.

- 26 The applicants referred me to the judgment of Wepener J in *Absa Bank Ltd v Wu and Another* [2014] ZAGPJHC 46 (14 March 2014) in support of their contention that the notice of the respondent's application ought to have been served personally upon each of them. That case dealt with the practice directive of the Gauteng Local Division of the High Court which requires personal service to be effected – this Court does not have a similar practice directive. Therefore, that case does not assist the applicants.

Non-compliance with the National Credit Act

- 27 The applicant disputes that the respondent complied with the provisions of the NCA before bringing its application. They say that they “*never received the notice in terms of section 129*” and the notice in terms of section 86(10) of the NCA.
- 28 The applicants also point out that the notice in terms of section 86(10) of the NCA upon which the respondent relied in its founding affidavit “*was not dealt with as required by law*” presumably due to the fact that the respondent “*sent only one letter to us (both defendants) ... as opposed to sending two separate letters as required by the National Credit Act.*”
- 29 In its founding affidavit in the main application, the respondent alleged that it terminated the debt review process initiated by the applicants in relation to the credit agreement. The respondent terminated the debt review process “*in accordance with the provisions of Section 86(10)*” and then sent notice of the

termination to the applicants. In this regard, the respondent relied upon its letter of termination dated 25 November 2013.

30 In terms of the aforesaid letter, the respondent invited the applicants “*to raise a dispute regarding the termination of your debt review*” should they wished to. The same notice was also sent to the applicant’s debt counsellor.

31 It would appear from the termination letter that the respondent terminated the debt review process due to the fact that the applicants were “*in default of your obligations*” in terms of their home loan agreement.

32 In paragraph 22 of their founding affidavit, the applicants refer to a letter dated 4 October 2013 as the letter in terms of which the respondent terminated the debt review process. In addition, the applicants further refer to a “*track and trace*” document which, on their version, shows that the letter dated 4 October 2013 and the “*track and trace*” document are not attached to the applicant’s founding papers. Assuming in favour of the applicants that these two documents say what, the applicants allege in paragraphs 24 and 25 of their founding affidavit, the applicants’ allegations must be wrong in that the respondent’s termination letter attached to its founding affidavit is dated 25 November 2013 and could not possibly have been in Cape Town on 17 March 2013. Furthermore, the respondent has attached to its founding affidavit proof of sending the termination letter by registered post which is dated 29 November 2013.

33 At the hearing of this matter, I stood the matter down to enable counsel for the applicants to obtain a full set of the applicants' papers, in particular, those referred to in the founding affidavit but are not attached thereto. This did not improve the applicants' papers and the matter was then fully argued on the basis of the rescission application papers consisting of 127 pages and the main application papers consisting of 73 pages. In the premises, the matter was argued and it is decided on the basis that ~

33.1 there is no evidence to show that the respondent's termination letter referred to above was in fact sent to Cape Town;

33.2 there is no evidence to contradict the respondent's version in paragraph 10.2 of its answering affidavit that the "*relevant Section 86(10) notices were however sent to all relevant and applicable addresses of the Applicants*" and in paragraph 10.3 that the notices "*reached the relevant Post Offices and that notifications were sent out*". The applicants did not make out a case to suggest that this did not constitute compliance when regard is had to the decisions of the Constitutional Court in *Sebola v Standard Bank And Others 2012(5) SA 142 (CC)* and *Kubyana v Standard Bank of SA 2014(3) SA 56 (CC)*.

34 The applicants' further point is that they did not receive a notice in terms of section 129 of the NCA. The respondent is silent on this point, presumably due to the fact that it acted in terms of section 86(10) of the NCA. This raises the

question whether the respondent was obliged to deliver a notice in terms of section 129 of the NCA after terminating the debt review process.

35 The purpose of section 129 of the NCA is to inform a consumer, who is in default under a credit agreement, of the possible remedies available to remedy the default so as to invoke such remedies before legal proceedings are instituted. The possible remedies available to a consumer who is in default include, amongst others, referring the credit agreement to a debt counsellor *“with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.”*

36 When the applicants realised that they were in default under the credit agreement concerned, they invoked one of the remedies provided for in section 129 of the NCA. In this regard, they applied for debt review in terms of section 86 of the Act. The application for debt review was informed by the applicants’ knowledge of the fact that they were in default under the credit agreement and their knowledge of the remedies available to them to bring the payments under the credit agreement up to date. In my view, this means that there was no longer a need to *“draw the default to the notice of the consumer”* and to draw the remedies available to the consumer’s attention as contemplated in section 129 of the NCA. The applicants were already aware of these and they had already taken the necessary steps to invoke the remedies available to them.

37 In *FirstRand Bank Limited t/a Honda Finance v Owens 2013 (2) SA 325 (SCA)* the Supreme Court of Appeal considered the question whether it was necessary

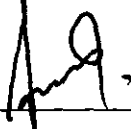
to deliver a notice in terms of section 129 of the NCA in circumstances where the consumer had already invoked the provisions of section 86 of the NCA and the debt review process had been terminated by the credit provider in terms of section 86(10). This is exactly what happened in this case. The Supreme Court of Appeal answered the question as follows ~

“[10] *A reading of ss (1) of each of ss 129 and 130 shows that where it is the credit provider that wishes to enforce the debt, a notice must be given by it to the consumer in terms of s 129(1)(a). That subsection also makes it clear that the credit provider must draw to the consumer’s attention the possible methods of resolving the debt default. Section 86(10), on the other hand, assumes knowledge on the part of the consumer of these methods: it applies only where the consumer has already applied for debt review. A notice under s 129(1)(a) is thus redundant where the consumer has already taken steps to rearrange her debts. That is why s 129(1)(b)(i) states that in order to commence legal proceedings, a credit provider must give notice either under s 129(1)(a) of s 86(10). The former applies where there has been no debt review. The latter applies where there has been. The requirement of two notices to the consumer where these are meant to serve different purposes, and in different contexts, is absurd.*

[11] *I accordingly agree with the decision of Murphy J in Changing Tides that a notice in terms of s 129(1)(a) is not required where a notice under s 86(10) has been given ...”*

38 This Court is bound by the above quoted decision of the Supreme Court of Appeal. For this reason, the applicants' point that they were not served with a notice in terms of section 129 of the NCA must fail.

39 In the circumstances, the application is dismissed with costs.



Kennedy Tsatsawane

Acting Judge of the Gauteng Division of the High Court of South Africa, Pretoria.