

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

7/8/15

CASE NO: 82195/2014

(1)	REPORTABLE: NO/YES
(2)	OF INTEREST TO OTHER JUDGES: NO/YES
(3)	REVISED
(4)	Signature <i>[Signature]</i> Date 07/08/2015

MODISE JOSEPH MOKGATLE

APPELANT

and

ABSA BANK

1st RESPONDENT

SHERIFF OF THE HIGH COURT

2nd RESPONDENT

JUDGMENT

KHUMALO J

INTRODUCTION

[1] The Applicant in this matter is seeking an order that the Judgment entered in default against it on 15 September 2014 by the registrar in the above honourable court be rescinded.

[2] Applicant's has brought the Application in terms of Rule 42 (1) alleging that the judgment was erroneously granted for the reason that the summons that was served upon Applicant was not issued by the Registrar in the sense that it did not have a case number and also that at the time when 1st Respondent sought judgment by default there was an arrangement, with which he was complying, to settle the outstanding arrears.

Historical background

[3] On 30 May 2012 Applicant bought from the 1st Respondent a motor vehicle on an installment sale agreement to the value of R573 900 which he was to repay together with the interest and ancillary charges thereto in instalments of R 10 053.42 over a period of 72 months. In terms of the agreement the 1st Respondent was to remain owner of the vehicle

until the full purchase price has been paid in full and on Applicant's failure to make payment of any of the installments payable on due date, First Respondent was to be entitled to institute legal proceedings to repossess the vehicle.

[4] On or about May, Applicant was in default with the payment of his installment and the arrears amounts owing came to R102 889.98 (One Hundrend and Two Thousand Eight Hundrend and Eighty Nine and Ninety Eight Cents). The First Respondent sent a Notice in terms of s 129 of the National Credit Act, 34 of 2005 by registered post to him. The Notice was collected by the Applicant's cousin who brought it to his attention albeit allegedly late. Summons was subsequently served at Applicant address on Applicant's cousin. Applicant confirms having sight of the summons.

[5] On receipt of the s 129 letter Applicant contacted the 1st Respondent and made enquiries regarding the arrears payable. During that period in July 2014 he also advised the First Respondent that he will settle the arrears in three weeks and thereafter bring his installments up to date. 1st Respondent proceeded with legal proceedings and served a summons on him on 31 July 2014. The Applicant failed to settle the arrears as per his word however made various payments between the period August – November 2014 in the amount of the installment with a surplus of a R 1000 or R2000 on two instalments. On 15 September 2014, 1st Respondent obtained default judgment against Applicant who by then still had not entered an appearance to defend and not settled the arrears that 1st Respondent alleged were at the time amounting to R 143 424.91.

[6] The Applicant's contention is that the summons did not comply with Rule 17, a defect so serious that the summons lacked validity and therefore the judgment that was granted on the basis thereof ought to be nullified. Also he alleged that since he was paying his installment at the time, the application for default judgment was premature.

[7] The 1st Respondent denies that judgment ought to be rescinded for the reasons stated by the Applicant alleging that its summons were properly issued and handed to the sheriff for service upon the Applicant. The sheriff then brought back the original summons and its return of service bearing the case number as was allocated by the Registrar and reflected on the original summons. It also denies that there was an arrangement between itself and the Applicant and points out that even if that was the case, the Applicant on its own version indicates that it made payment that did not comply with the alleged arrangement and did not settle the arrears.

[8] The question that arises is whether or not

[6.1] service of the summons on the Applicant without a case number amounts to a procedural irregularity that nullifies the proceedings?

[6.2] the 1st Respondent's seeking of a default judgment against the Applicant on September 2014 was erroneous, as a result to be rescinded.

[8] A summons is a process that commences civil proceedings and there is therefore a an obvious need that it is in due and proper form, hence the terms of Rule 17 are regarded as peremptory in nature. However it was accepted in *Western Bank Bpk v De Beer en Ander* 1975 (30 SA at 774D-F, that notwithstanding the peremptory nature of Rule 17, by virtue of the provisions of Rule 27 (3) substantial compliance with a particular provision would be a

sufficient basis for condonation. Therefore whether a step or proceeding is to be judged as being so irregular or defective that it constitutes a nullity (that which cannot be condoned) appears to be a question of degree, which has resulted it seems in a differentiation of non-compliance that is regarded as an irregularity and one that is regarded as a nullity.

[9] The relevant Rule 17 (3) © that is applicable in casu reads

“...., the summons shall be signed and issued by the registrar and made returnable by the sheriff to the court through the registrar. “

[10] It has been suggested as indicated in *Erasmus Superior Court Practice* by Farlam, Firtchrd and Van Loggerenberg that issue by registrar probably means steps taken by the registrar, *inter alia*, noting the summons in his office, allocation of a case number, stamping it with the stamp of his office and “send out”. A summons which has not been issued by the registrar is said to be a document to which the registrar is not party and which does not emanate from his office and therefore would not constitute a summons it would be a nullity. See *Minister of Prisons and Another v Jongilanga* 1985 (3) 117 (A) at 123H Eloff AJA held that

“It stands to reason that when the basic component of an action, viz the issue of a summons by a registrar, is absent, the court will not condone the omission.”

[11] In this matter we have to establish whether the summons was issued when a copy of thereof was served on the Applicant, because if it was not issued, the proceedings would have resulted in a nullity.

[12] The original summons dated 4 June 2014 exhibits a case number 40369/14, the registrar’s stamp that was affixed on 4 June 2014 and signatures of the Plaintiff’s attorney of record and the registrar thereto affixed. The sheriff’s return is dated 15 July 2014 and reflects that service of the summons was effected on 15 July 2014. Therefore at the time when the summons was served upon the Applicant it fully complied with the provisions of s 17, properly issued and signed by the registrar.

[13] Since when the judgment was sought and granted by the court the documents were not tainted by any irregularity nor nullity, the decision of the court to grant judgment was not erroneous. On that ground the rescission application must fail.

[14] On the issue of an agreement I need not take the matter any further as proven by the evidence, that there was no agreement. Applicant in that regard failed to comply with his own commitment to settle the arrears and when judgment was sought and granted the amount of the arrears had increased notwithstanding him resuming the installments that regrettably did not cover the arrears. Wallis j in *B M W Financial Services v Donkin* 15548/08[2009]ZAKZDHC 17; 2009 (6) SA 63 (KZD) that

“the NCA makes express provision for a consumer who falls into arrears to prevent the credit provider from exercising a right of cancellation, even one that has accrued, by paying the arrears, together with default charges and the reasonable costs of enforcing the agreement up to that stage.”

[15] Under the circumstances there is no ground for alleging that the court granted the judgment erroneously.

It is therefore ordered

1. The Application for rescission is dismissed with costs on an attorney and client scale.
2. The order of the registrar dated 15 September 2014 stands.

For the Applicant: G F JANSEN
Instructed by: ROTH & WESSEL INC
 PRETORIA

For the Respondent: M Z SEIMA
Instructed by SELOANE VINCENT ATTORNEY
 PRETORIA

N V KHUMALO J

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA**

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[6] The Applicant's contention is that the summons did not comply with Rule 17, a defect so serious that the summons lacked validity and therefore the judgment that was granted on the basis thereof ought to be nullified. Also he alleged that since he was paying his installment at the time, the application for default judgment was premature.

[7] The 1st Respondent denies that judgment ought to be rescinded for the reasons stated by the Applicant alleging that its summons were properly issued and handed to the sheriff for service upon the Applicant. The sheriff then brought back the original summons and its return of service bearing the case number as was allocated by the Registrar and reflected on the original summons. It also denies that there was an arrangement between itself and the Applicant and points out that even if that was the case, the Applicant on its own version indicates that it made payment that did not comply with the alleged arrangement and did not settle the arrears.

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Instructed by: ROTH & WESSEL INC
PRETORIA

For the Respondent: M Z SEIMA
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N V KHUMALO J

JUDGE OF THE HIGH COURT
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