

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2954/2011

In the matter between:-

MOFUTA, SANKOELA PETRUS

Applicant

and

SA TAXI SECURITISATION (PTY) LIMITED
(Registration number: 2005/021852/07)

Respondent

In re:

SA TAXI SECURITISATION (PTY) LIMITED

Plaintiff

and

MOFUTA, SANKOELA PETRUS

Defendant

HEARD ON: 25 APRIL 2013

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 20 JUNE 2013

- [1] The applicant seeks to have a default judgment granted against him rescinded and a writ issued pursuant to such judgment set aside. The respondent opposes the application.

- [2] The parties concluded a lease agreement on 19 May 2009. The object of the lease agreement was a motor vehicle, a 2009 Toyota Quantum (aka Sesfikile). The vehicle was leased for the purpose of passenger transportation, in other words, a taxi service. The lease agreement was supposed to endure for 60 months. The defendant paid an initial deposit of R50 000,00. The monthly lease instalment was R8 429, 60. The first instalment fell due and payable on 1 July 2009.
- [3] The applicant failed to make regular payments in terms of the lease agreement. By 5 March 2010 he was R28 345,33 in arrears. On that date the parties met and signed a variation agreement whereby the arrears were capitalised and added to the original amount of the lease. The lease period was extended to 72 months; the monthly instalment marginally increased by R248,02 to R8 677,62 and the rate of interest was fixed at 26,5% per annum. See addendum to the original lease agreement.
- [4] It would appear that the subsequent variation of the lease did not have the desired effect. Notwithstanding the extension of the contract period, the applicant again fell into arrears. The respondent then sued the applicant. The summons was issued on 1 August 2011. The plaintiff alleged that the defendant was in arrears and that on account of such default it considered the lease agreement cancelled.
- [5] In due course the respondent applied for default judgment essentially making the elementary averments:

- that the summons had been duly served;
- that the prescribed time for entering an appearance to defend had lapsed; and
- that the defendant had failed to signal his intention to defend the action.

[6] On 21 September 2011 the registrar granted default judgment against the applicant as requested. The applicant was ordered, *inter alia*, to restore possession of the leased motor vehicle to the respondent. See annexure “spm1”. On the same day the respondent issued a writ.

[7] The sheriff served the writ and judicially attached the vehicle on 16 November 2011. Two days later, on 18 November 2011, to be precise, the sheriff repossessed the vehicle and returned it to the respondent.

[8] On 21 December 2012 the applicant filed the current rescission application. In his founding affidavit the applicant alleged that he had no knowledge of the action on which the writ was based, because the summons was never served on him. Accordingly he contended that the default judgment was erroneously granted.

[9] On 29 January 2013 the respondent filed its answering affidavit. The respondent alleged:

- that the applicant chose a specific address as his *domicilium citandi et executandi*;
- that the sheriff served the summons at that address;

- that before the lease agreement was concluded, the plaintiff assessed the credit risk, in accordance with the relevant credit legislation;
- that the requisite notices in terms of section 129 read with 130 of the National Credit Act 34 of 2005 were sent by way of registered mail to the applicant's *domicilium citandi et executandi*.

Accordingly the respondent contended that the application was not materially defective and that it did not fall foul of the provisions of the credit statute as the applicant alleged.

[10] On 2 April 2013 the applicant filed his replying affidavit. He denied

- that the deponent of the answering affidavit was authorised to depose to such an affidavit on behalf of the respondent;
- that the respondent assessed his credit profile before the lease agreement was signed;
- that the notice in terms of section 129 was sent to him and that he received it;
- that such notice reached his appropriate post office;
- that the sheriff served the summons on him.

[11] The matter was argued before me on Thursday, 25 April 2013. At the beginning of the live proceedings, the applicant raised a preliminary point that the respondent's entire action was defective, because the plaintiff had not attached to the

summons a certificate to show that it was a registered credit provider. Instead of giving an *ex tempore* ruling on the point, I called upon the two counsels to argue the point, together with the merits. At the end of it all I reserved judgment. I deemed it expedient to start with the merits. I shall revert to the point raised *in limine* afterwards.

[12] The principal issue in the application is whether the applicant had knowledge of the respondent's summons before the registrar granted default judgment against him.

[13] The requirements for rescission of judgment, though well-known, need to be recited here. In the first place, the applicant bears the onus of establishing sufficient cause for his application to have the default judgment rescinded. Whether the applicant has successfully established sufficient cause to warrant rescission of the default judgment under attack depends on the outcome of an inquiry with two legs.

[14] As regards the first leg, the court has to determine whether the applicant has presented a reasonable and acceptable explanation for his apparent default. As regards the second leg, the court has to determine whether the defendant has shown the existence of a *bona fide* defence, in other words, a defence that has some probable prospect or probability of success – **Chetty v Law Society, Transvaal** 1985 (2) SA 756 (AD) at 765 A – C per Miller JA.

[15] The test is conjunctive and not disjunctive. An explanation of the defendant's default must co-exist with evidence of reasonable prospect(s) of success on the merits – **Harris v Absa Bank Ltd t/a Volkskas** 2006 (4) SA 527 (T) at par [5] as regards the test.

[16] In **Chetty v The Law Society** Miller JA said the following about the dual nature of the test as to whether sufficient cause has been shown:

“It is not sufficient if only one of these requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment granted against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had a reasonable prospect of success on the merits.”

[17] An application for rescission of default judgment is governed by Rule 31(2)(b) of the Uniform Rules of Court. The rules require the defendant to establish good cause for his default before a default judgment granted against him earlier may be rescinded. The phrase “good cause” refers to the rescission test according to the statute law whereas the phrase “sufficient cause” is indicative of the rescission test according to common law. Other than that the substance of the two phrases is in essence the same – **Harris**, *supra*, par [6].

- [18] The nature of the discretion a court has in rescission application was outlined as follows in **Harris v Absa**, *supra*, at par [8] per Moseneke J:

“Before an applicant in a rescission of judgment application can be said to be in 'wilful default' he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions.”

- [19] The first element of the test of sufficient cause concerns an explanation for the applicant's default – **Harris**, *supra*, par [10].

“A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation.

'Instead, the explanation, be it good, bad, or indifferent, must be considered in the light of the nature of the defence, which is an important consideration, and in the light of all the facts and circumstances of the case as a whole.'

De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd (*supra*) at 711D.”

- [20] In his founding affidavit the applicant stated as one of the reasons as to why he did not give notice of his intention to defend the action, that he did not receive the respondent's notice in terms of section 129 National Credit Act 34 of 2005.

- [21] In its answering affidavit the respondent challenged the applicant's allegation. It answered that it sent the notice in terms of section 129 to the applicant's chosen *domicilium citandi et executandi* being 597 Meqheleng, Ficksburg – vide 2 annexure "aa3" – addendum to the credit agreement and the preamble to the credit agreement (annexure "aa1").
- [22] In his replying affidavit the applicant denied receiving the respondent's alleged letter, in other words, notice in terms of section 129. He pointed out that the track and trace report (annexure "spm2") issued by the South African Post Office (SAPO) indicated that the notice (annexure "aa6") was delivered to someone unknown to the applicant.
- [23] Upon my perusal of annexure "aa6", it appeared to me that the respondent addressed a letter of demand to the applicant on 14 July 2011; that the letter was headed "Notice in terms of section 129 read with 130 National Credit Act 34 of 2005"; that the letter was sent by registered mail to the same address as given in annexure "aa3" and that as on that particular day the applicant's account appeared to be R41 882,29 in arrears.
- [24] The certificate of posting marked RT3697 (annexure "aa7") showed that the notice in terms of section 129 (annexure "aa6") was posted to the applicant on 14 July 2011. Again the address was identical to the applicant's chosen *domicilium citandi et executandi* as set out in the credit agreement.

[25] The tracking line report (annexure “aa8”) issued by the SAPO indicated that:

- On 18 July 2011 the letter was in transit at Witspos;
- On 19 July 2011 the letter was in transit in Bloemfontein;
- On 20 July 2011 the letter was at Ficksburg;
- On the same day the first notification was sent to the addressee;
- On 13 August 2011 the letter was delivered to one N.D. Makhubo at Ficksburg branch of SAPO.

[26] What clearly emerged from the aforesaid reports (annexures “aa6”, “aa7” and “aa8”) issued by SAPO was, firstly, that the notice in terms of section 129 was mailed to the applicant’s correct address; secondly, that the notice reached the applicant’s post office; thirdly, that SAPO sent out the usual notification for the collection of the registered parcel (RD588 433 855 ZA), and fourthly, that a certain person by the name N.D. Makhubo collected the registered article with that same code. What was unclear to me was the identity and the address of the addressee.

[27] Mr Olivier contended, on behalf of the applicant, that since the delivery of the registered item to the aforesaid Makhubo meant either that the track and trace code was incorrect or that the notice was delivered to the wrong person. Counsel submitted that in either case the applicant would not have received the notice.

- [28] It was undisputed that the applicant did not collect the notice and that someone else did. However, the contention that the track and trace code was incorrect, was untenable. The track and trace code on annexure “aa7”, certificate of posting, and on annexure “aa8”, tracking line or final report, was exactly the same – viz RD 588 433 855 ZA. From that it could, therefore, be logically deduced that N.D. Makhubo collected annexure “aa6”, in other words, the notice in terms of 129 whose final destination was Ficksburg Post Office, being the appropriate branch of SAPO nearest to the applicant.
- [29] It seemed to me highly probable that Ficksburg Post Office correctly sent the collection notification to the applicant’s correct address and that Makhubo collected the letter from the post office on behalf of the applicant. It was unlikely, firstly, that the post office could have erroneously dispatched the collection notification to a wrong address; secondly, it was unlikely that the post office could have again erroneously handed the letter to a complete stranger whose name and address totally differed from those on the registered letter, and thirdly, it was unlikely that the said N.D. Makhubo would, just like the post office counter clerk, have mistakenly collected a registered mail which had no connective bearing on him. The addressee’s name on the collection notification and the addressee’s name on the registered mail would not have tallied at all. The same discrepancy would have applied to the addresses. Our society is deemed to consist of reasonably diligent people. The clerk and the collector, as members of

that society, would probably not have made the same comedy of errors.

[30] I am of the firm view that the applicant's submission that the registrar of this court, or even the court itself, had no jurisdiction in this matter seeing that the respondent has allegedly failed to comply with section 129, which required that he be given pre-summons notice of his default. The facts was substantially compelling that the applicant had indeed received the requisite prior notice in terms of section 129.

[31] I am persuaded by counsel for the respondent that the respondent had duly satisfied the requirements of section 129 read with section 130. The respondent posted the letter to the applicant on 14 July 2011 by prepaid registered mail. The letter, which undeniably constituted notice in terms of section 129, was correctly mailed to the address purposefully chosen by the applicant as his *domicilium citandi et executandi* – vide annexure "aa6". The averments thereof had to be incorporated herein by connective reference.

[32] The letter in question reached the appropriate post office on 20 July 2011 for collection by the applicant. Despite collection notification to him, the letter was not collected by the applicant personally, but by a certain N.D. Makhubo who, most probably, did so at the applicant's special instance and request. The respondent provided proof of delivery of the letter to the appropriate post office branch – vide annexure "aa8".

- [33] Notwithstanding such constructive delivery per *traditio longa manu* the applicant failed to respond to the respondent's notice in terms of section 129. He failed to liquidate the arrears within 20 business days from the actual date of default, being 14 July 2011. He neglected to avail himself to any accredited agency in order to have the dispute resolved without recourse to litigation. His financial inability to service his vehicle account notwithstanding, he persists with his demand that the respondent restore the vehicle to him.
- [34] But even if I was wrong in finding that the applicant probably received the notice in terms of section 129 through the aforesaid collector, whom I regarded as his authorised agent, the applicant would still derive no meaningful joy from my wrong conclusion.
- [35] In **Majola v Nitro Securitisation 1 (Pty) Ltd** 2012 (1) SA 226 (SCA) par [19] the applicant alleged, as in this instant matter, that he had not received the respondent's notice in terms of section 129, claiming that such notice had been sent to the wrong address. Seeing that the respondent had sent the requisite notice to his expressly chosen *domicilium citandi et executandi* it was of no moment in law that he did not actually receive it. The court held that there was proper service of the notice in terms of section 129. The court pertinently held that the fact that the applicant never received the notice did not render the notice invalid and the subsequent issue of the summons abortive or premature.

- [36] Two years prior to the decision in **Majola**, *supra*, it was held that it was not incumbent upon the credit provider to prove that the credit consumer actually received the plaintiff's notice in terms of section 129 – **Rossouw and Another v Firstrand Bank Ltd** 2010 (6) SA 439 (SCA) paras [31] – [32].
- [37] The matter ultimately caught the attention of the highest court in the land last year. In the subsequent decision of **Sebola and Another v Standard Bank of South Africa Ltd and Another** 2012 (5) SA 142 (CC) per Cameron J writing for the majority ultimately put the whole debate to rest.
- [38] The thrust of the decision in **Sebola** may be condensed by saying that proof that the credit consumer's appropriate post office branch received the notice ordinarily tips the scale of probabilities in favour of the credit provider that the notice reached the credit consumer. Simply put, the credit consumer is deemed to have received the notice.
- [39] In the matter of **SA Taxi Development Finance (Pty) Limited v Mahlodi Rulph Phalafala** (2013) SGHC, Johannesburg 1512 (2013) van Eeden AJ reviewed applicable caselaw. At par [8] the learned judge commented:

"In **Mkhize's** case, however, Olsen AJ found that there is non-compliance with the statute where it was conclusively proved that the notice did not reach the consumer, e.g. because the notice was not collected from the correct post office. In **Binneman's** case, Griesel J came to the opposite conclusion in a matter where the notice reached the correct post office, but was subsequently

returned to sender. The court held that the credit provider had duly provided notice as required by the majority decision in **Sebola's** case. In **Binneman's** case judgment by default was granted, whereas in **Mkhize's** case the court adjourned and made an order in terms of s 130(4)(b)(i) and (ii) setting out the steps the credit provider must complete before the matter may be resumed. Thus Olsen AJ refused to enforce the credit agreements, whereas Griesel J enforced them.”

[40] At par [9] Van Eeden AJ further commented:

“In both the **Mkhize** and **Binneman** matters the consumer clearly did not receive the notice prior to summons. It is the same in this matter. But even if actual receipt of the notice is an absolute requirement, it has been satisfied in this matter, since the required notice was attached to the summons, which was served on the defendant. What remains in issue is what to do with the fact that the credit provider commenced legal proceedings to enforce the credit agreement before first providing the notice to the consumer.”

[41] In the instant matter, unlike in the cases of **Phalafala**, *supra*, **Binneman**, *supra*, and **Mkhize**, *supra*, it could not be factually contended, with conviction, that the credit consumer did not receive the requisite default notice prior to the issue of the summons. The mere fact that actual delivery of the notice was not effected upon the credit consumer personally was not, on the peculiar facts of this particular matter, *per se* an irrefutable indication that the credit consumer never received the requisite notice.

[42] Nowadays certain practical exigencies frequently dictate that we rely on others to run our personal affairs. Collecting registered mail from post office is a classic example of instances where very busy individuals, such as doctors in big hospitals, pilots of global airliners and captains of international ocean liners, such as MSC Opera and taxi drivers in big cities, greatly depend on others to collect registered articles on their behalf from their appropriate post office branches.

[43] An English judge once eloquently reminded us about the realities of life. He says:

“The law does not demand that you should act upon certainties alone. . . . In our lives, in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds. . . . The law asks for no more and the law demands no less.”

Lord Coleridge in **R v Dickman** quoted in **R v Reddy** 1996 (2) SACR 1 (AD) at 9d – e per Zulman AJA.

I am in respectful agreement. The crux of the matter is that non-receipt of the notice prior to the service of the summons does not invalidate the issue of the summons *ab initio* – **Phalafala**, *supra*.

[44] The first leg of the applicant’s explanation of default was that he did not actually receive the requisite default notice. Since that was factually the case, so he contended, the statutory

requirement of section 129 National Credit Act 34 of 2005 were not legally complied with. He accordingly submitted that default judgment was granted in error against him. There was no substance in that argument, in my view. Consequently I am inclined to reject the first leg of the applicant's explanation of default.

[45] In a case where it was factually proven that the credit consumer never received the requisite notice, it was held that the mere fact that the defendant did not receive the notice prior to the service of the summons, does not render the issue of the summons premature – **Majola**, *supra*, at par [19] and **Phalafala**, *supra*, at par [12]. In the instant matter, the probabilities strongly tended to suggest that the applicant received the requisite notice. Accordingly I find that the applicant was duly forewarned about the action the respondent was contemplating to institute against him. Since there were strong and probable indications that the applicant actually received the requisite notice and in view of the fact that the time periods as envisaged in section 130(1)(a) have already passed or lapsed, it would serve no useful practical purpose to adjourn the matter or to make orders in terms of section 130(4)(b). In any event such remedies of the statute were intended for situations different from the one in the current matter.

[46] Now I turn to consider the second leg of the applicant's explanation that he did not file notice of intention to defend the action, because he had no knowledge of the plaintiff's action

against him. He contended that it was his serious intention to defend the action. He asserted that he would certainly have delivered the notice to that effect had he received the summons.

[47] In response to the applicant's exculpatory explanation, the respondent answered that the applicant's explanation was untrue. It was contended on behalf of the respondent that the summons was properly served at the applicant's *domicilium citandi et executandi* and that it was served on the applicant personally. Therefore, it was submitted that the applicant had knowledge of the action.

[48] The applicant resided at 597 Meqheleng, Ficksburg at all times material to the dispute. The respondent filed the sheriff's return. The sheriff reported that:

"On this 3rd day of August 2011 at 12:50 I served this COMBINED SUMMONS AND PARTICULARS OF CLAIM WITH ANNEXURES HERETO upon MOFUTA SANKOELA PETRUS, Defendant, personally at 597 MEQHELENG FICKSBURG by handing to the abovementioned a copy thereof after exhibiting the original and explaining the nature and exigency of the said process. Rule4(i)(a)(i)."

[49] At the heart of the contest was the question whether, at the time default judgment was granted, the applicant knew that the plaintiff had instituted action against him.

[50] Mr Olivier submitted that the applicant did not have such knowledge. Accordingly counsel urged me to rescind the default judgment and granted against him. He submitted that the mere fact the sheriff stated that he served the summons and the declaration together with the annexures thereto upon the applicant personally, did not in itself render the service of the summons incontestable.

[51] Mr Mollentze submitted that the applicant did have full knowledge of the respondent's action. He argued that the applicant had failed to present a reasonable and acceptable explanation for his default; that the summons was served on him personally; that the summons did come to his personal attention and that he knew the consequence of his failure to defend the action.

[52] It was common cause that the full names and the physical address as stated in the sheriff's return (annexure "aa9") accurately tallied with the applicant's correct names and his correct residential address. Besides his bald statement that he never received the respondent's summons, the applicant made no meaningful attempt to challenge the substantive essence of the sheriff's return. The applicant did not venture to say where he was on 3 August 2011 at 12:50 when the sheriff was at his place of residence. His founding affidavit was a seven page document with fifteen paragraphs. Of those paragraphs, he devoted only two of them to deal with the sheriff's return.

[53] At paragraph 5 founding affidavit the applicant stated:

“On 01 August 2011 the Respondent issued summons under case number 2954/2011. **I pause to state that I never received a copy of the summons** nor any of the court processes consequent upon which the judgment was taken and the summons was never served upon me. The first indication I had that judgment had been entered against me was when the vehicle which forms the subject matter of this application being a 2009 Toyota Sesfikile with engine number **2TR8193474** and chassis number **JTFSX22P706061571** (“**the vehicle**”) was repossessed by the Sheriff on 18 November 2012. A copy of the warrant is attached hereto marked “**SPM1**”.”

[54] At paragraph 6 founding affidavit the applicant stated:

“I reiterate that I did not receive a copy of the summons in this matter and I have had to attend in the Free State High Court to access the file for the purposes of annexing the summons to this application. Had I received a copy of the summons I would have filed an appearance to defend and a plea which would have set out a defence to the Respondent’s claim. As no summons was served, the Court entered judgement under the incorrect notion that I had received the summons and that I had wilfully not entered an appearance to defend, this is not the case and the judgement was wrongfully sought, alternatively wrongfully granted, and accordingly falls to be set aside in terms of rule 42.”

[55] The high watermark of the defendant’s explanation was:

“I pause to state that I never received a copy of the summons nor any of the court processes consequent upon which the judgment was taken and the summons...”

Vide par 5 of founding affidavit.

Again he stressed the same allegation by saying:

“I reiterate that I did not receive a copy of the summons in this matter...”

Vide par 6 founding affidavit.

- [56] Both paragraphs were factually very thin. The applicant was not candid with the court. Precisely where he was at the critical time and crucial date, mentioned in the sheriff's return, does not appear in those two paragraphs or anywhere else in his founding affidavit as a whole. Moreover, he said nothing about other inmate(s) of the house, if any, and their possible whereabouts at the relevant time and date. Could N.D. Makhubo have been one of them? Seemingly the applicant personally made no effort and seemingly none was made on his behalf to confront the sheriff about the alleged false return with its adverse impact on his fundamental rights to have the dispute resolved by court of law.
- [57] The writ was issued on 21 September 2011. The founding affidavit was signed at Bramley on 18 September 2012. It follows from this two dates that the vehicle must have been judicially attached and removed before the founding affidavit was made. Upon careful examination of the major historical events of the matter, everything seemed to indicate that the writ was executed on 18 November 2011 and not 18 November 2012, as stated in paragraph 5 of the founding affidavit. The current rescission application was motioned on

21 December 2012, some 13 long calendar months after the applicant had become aware of the default judgment now under attack. There is no examination whatsoever as to why this rescission application was not launched as soon as practically possible after the unwelcome repossession of the vehicle on 18 November 2011. Moreover, there was no application to have such lateness condoned.

[58] The applicant's founding affidavit was riddled, not only with deep gaps and rents through which the applicant could not safely pass, but it was also materially blemished by substantial vagueness which irredeemably plagued his explanation. All those acts of omissions were outward manifestations of lack of serious intent to defend the action.

[59] Mr Olivier's submission was correct. Indeed the mere fact that the sheriff stated that he served the summons upon the applicant personally, was not conclusive proof of that he did. It does not irrefutably render the issue of service incontestable. In any given matter a return of service by the sheriff is merely a *prima facie* proof of the assertions embodied therein. Such assertions may be challenged and rebutted in certain circumstances. If and when a defendant joins an issue with the plaintiff as regards service of a summons, the sheriff concerned might have to be called to testify regarding the correctness of his return – **Greeff v Firststrand Bank Limited** 2012 (3) SA 157 (NCR). In my view that can only become imperative where, on the papers as a whole, a reasonable doubt is created as regards the veracity of the sheriff's return.

A sheriff is an officer of the court whose return must generally be relied upon. Unless a reasonably sound and persuasive challenge and not flimsy insinuations, is made against his return, his return has to stand as correct and accepted by the courts.

[60] In his founding affidavit the applicant barely stated that he did not receive the summons – *vide* paragraph 5. In his replying affidavit the applicant barely denied that the summons was served on him – *vide* paragraph 13. I am not persuaded at all that such fleshless and dry bones boiled down to a reasonably solid challenge which, on a balance of probabilities, refuted the *prima facie* proof that the sheriff duly served the summons on the applicant personally at his place of abode on 3 August 2011. This was one important factor against the applicant's case.

[61] The other important factor which materially militated against the applicant's explanation, was that the respondent caused the summons to be served at the address specifically chosen by the applicant for that particular purpose. Since the sheriff served the summons at the specific address in accordance with clause 11 of the credit agreement (annexure "aa2") read with the formal heading of the contract on page 1 where the personal details of the lessee were fully described, the applicant was contractually barred from relying on non-receipt of any notice delivered to his *domicilium*.

- [62] The applicant agreed that if such notice was delivered by hand, he shall be deemed to have received it on the day of the delivery. The applicant expressly chose the given address as his *domicilium* for all purposes of communication. It follows, without saying - therefore, that all the respondent had to do in order to prove that the applicant received the summons, was to show that the summons was correctly served at the address specifically chosen by the applicant himself. It was undisputed that the sheriff did precisely just that.
- [63] To rebut the *prima facie* proof that he received the summons, the applicant had three options only, firstly, that he did not choose the address where the sheriff served the summons as his chosen *domicilium*, or secondly, that although he had chosen a specific address as his *domicilium* the summons was served at a wrong address as in **Greef's** case, *supra*, or thirdly, that although he had originally chosen the address where the summons was served, he had subsequently changed it by giving the respondent written notice to that effect. Needless to say, that the applicant raised none of those grounds in support of his bold statement that he did not receive the summons. There was no real factual dispute, in my view, created by the applicant's hopelessly hollow challenge to warrant the giving of oral evidence by the sheriff in this matter. The sheriff *prima facie* prove that he effected the service of the summons on the applicant personally now has to be endorsed as conclusive proof that the defendant actually received the summons. That, in my view, is now an accomplished fact.

[64] Accordingly I find that the summons did come to the attention of the applicant at his residence on 3 August 2011 some 35 calendar days before default judgment was granted. That been the case it must be accepted that the applicant was indeed in wilful default. There was no doubt on my mind that the applicant knew and fully appreciated the adverse legal consequences of his acts of remissness. I chose to use the phrase “in wilful default” within the context ascribed to it in Harris, *supra*, at par [8] where Moseneke J said:

“Before an applicant in a rescission of judgment application can be said to be in 'wilful default' he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions.”

[65] The applicant’s contention that default judgment had been granted in error, had to be rejected. That point was without merit. Therefore, the second leg of the applicant’s explanation also failed to impress me.

[66] It was incumbent upon the applicant to show that sufficient cause existed to justify the setting aside of the default judgment. I have considered the two legs of his explanation for the default which precipitated the grant of default judgment against him. I found each one of them substantially wanting. It follows, therefore, that the applicant has presented no reasonably acceptable explanation for his default. Accordingly

the first element of the test of sufficient cause remains unsatisfied.

[67] It does not automatically follow that because the first element was not satisfied by the applicant, therefore the rescission application has to fail. In **Harris**, *supra*, Moseneke J stressed that the applicant's explanation must not be considered in isolation, but rather in the light of the nature of the applicant's defence, the facts and the circumstances of the case as a whole. To the defence of the applicant I now turn.

[68] As regards the second element of the test of sufficient cause it was incumbent upon the applicant to show that there exists in his favour a *bona fide* defence that is one that has some prospect or probability of success.

[69] In **Chetty**, *supra*, at 768A – C Miller JA said:

“As I have pointed out, however, the circumstance that there may be reasonable or even good prospects of success on the merits would satisfy only one of the essential requirements for rescission of a default judgment. It may be that in certain circumstances, when the question of the sufficiency or otherwise of a defendant's explanation for his being in default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission. (Cf *Melane v Santam Insurance Co Ltd* [1962 \(4\) SA 531 \(A\)](#) at 532.) But this is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so,

whatever the prospects of success on the merits. In the light of the finding that appellant's explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant's prospects of success. Nevertheless, in the interests of fairness to the appellant, it is desirable to refer to certain aspects thereof."

[70] I subscribe to this aforesaid view. An acceptable explanation of default must co-exist with reasonable prospect of success on the merits – **Harris**, *supra*, paras [4] – [6].

[71] The respondent's cause of action was premised on the averment that the applicant had defaulted in the payment of the agreed monthly instalments due to the respondent in terms of the lease agreement. As a consequence of such default the respondent cancelled the lease agreement and claimed the return of the vehicle, which formed the subject matter thereof.

[72] The applicant asserted that he had a *bona fide* defence. The essence of his defence was founded on the averment that the respondent bent the rules and violated the provisions of the statute and thereby unduly influenced and pressured the applicant. Ultimately the respondent, so claimed the applicant, entered into a reckless credit agreement with him. In doing so the respondent acted in contravention of section 80 of the National Credit Act 34 of 2005. That, in brief, was the heart of the applicant's defence.

[73] The respondent denied the allegation that it granted reckless credit to the applicant. In any event, even if the credit granted by the respondent to the applicant amounted to the giving of reckless credit, that in itself would not have constituted a *bona fide* defence to the respondent's action for an order for the return of the leased vehicle - **SA TAXI SECURITISATION (PTY) LTD v MBATHA AND TWO SIMILAR CASES** 2011 (1) SA 310 (GSJ).

[74] At paragraph 7 founding affidavit the applicant stated:

“I dispute the amount claimed as arrears.”

In that statement the applicant implicitly admitted that he was in arrears. The only aspect he denied was obviously the quantum of the arrears. On the one hand, the respondent explicitly stated the amount of the arrears. On the other hand, the applicant, notwithstanding his denial of the amount of the arrears as averred by the respondent, evaded the issue. Although he admitted the arrears and disputed the quantum claimed by the respondent, he did not specify the exact amount which was in arrears according to him. Moreover, he did not pertinently deny that he was in breach of the agreement, but merely and timidly denied the accuracy of the amount of the arrears.

[75] The applicant was barred, at any rate, from disputing the balance as stated in the certificate of balance, which served as a *prima facie* proof of his indebtedness to the respondent.

Since he failed to rebut the correctness of the outstanding balance, as well as the arrears, the *prima facie* proof of both the arrears and the balance became conclusive proof.

[76] I pause to remark that in his founding affidavit the applicant did not succinctly disclose any defence on the merits. If the applicant was already over indebted at the time the respondent gave him reckless credit, I found it strange that he never came to court at the earliest possible moment for an appropriate relief. He took no proactive steps at all to be freed from the burdensome shackles of the reckless credit advanced to him against his will. He did not volunteer to surrender the minibus, which was obviously the primary cause of his alleged over-indebtedness. Instead he signed the subsequent variation agreement at the time when the shoe was already pinching. He did not then and there complain about the reckless credit. He, for the very first time, complained about the reckless credit after the leased vehicle had been repossessed. The fact that he was reactive and not proactive substantially watered down the *bona fides* of his already dubious defence. The applicant cannot eat his cake and still have it.

[77] I was astonished to read, at paragraph 7 of the founding affidavit, that the applicant had been advised that the merits of his defence were not relevant and that he should only disclose the nature of his defence in these proceedings. The respondent correctly denied the allegation that the merits were not relevant at this juncture. The applicant's statement, located as it were in the founding affidavit, strengthened the

respondent's case. It showed that the applicant never had and still has no defence on the substantive merits of the matter. It appeared that, on account of the advice, the applicant did not fully aver material facts that could have bolstered the prospects of enhancing the success of his application for rescission of the default judgment.

[78] Accordingly, I am persuaded that the applicant has also failed to demonstrate the existence of a *bona fide* defence, that is to say, a defence that has some prospects or probability of success on the substantive merits.

[79] In **Chetty**, *supra*, at 765D – E Miller JA said the following about the two elementary requirements of common law – the test of sufficient cause:

“It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.”

That remains the test. The applicant failed both elementary requisites of that test.

[80] There were two point(s) raised *in limine* by the applicant. The first was that the respondent had not shown, by means of an official certificate, that it was a registered credit provider. The second was that the respondent's deponent had not shown, by means of a resolution, that he was authorised to make the answering affidavit on behalf of the respondent in order to oppose the rescission application. I have considered both objections. In my view, none of them was well taken. I would, therefore, dismiss each of them. The applicant was clearly clutching on the straws.

[81] I found nothing in the applicant's defence to compensate for the deficiencies of his explanation. Therefore, the applicant has failed to prove the two critical elements of the test of good cause to justify the granting of the rescission application.

[82] In the result:

82.1 The applicant's application is dismissed.

82.2 The applicant is directed to pay the costs.

82.3 The default judgment and the writ stand.

M.H. RAMPAL, J

On behalf of applicant: Adv J.L. Olivier
Instructed by:
Symington & De Kok
BLOEMFONTEIN
and
Larry Marks Attorneys
JOHANNESBURG

On behalf of respondent: Adv J.H. Mollentze
Instructed by:
Bezuidenhout Attorneys
BLOEMFONTEIN
and
Marie-Lou Bester Inc
JOHANNESBURG

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