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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No. 2023-061498

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

05/09/2024

DATE

SIGNATURE

In the matter between:

MALESHANE JOHANNAH OLIPHANT

Identity Number: 8[...]

Applicant

and

STANDARD BANK (SOUTH AFRICA) LIMITED

First Respondent

THE SHERIFF OF THE HIGH COURT, LENASIA N.O.

Second Respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to Court Online and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on September 2024.

JUDGMENT

BEYERS, AJ:

[1] This is an application, brought on an urgent basis, wherein the Applicant *inter alia* seeks the following relief:

- “1. That the order granted in default by this Honourable Court on 11 September 2023, under the same case number, be rescinded and set aside.*
- 2. That the warrant for delivery of goods pursuant to the order granted in default issued on 09 October 2023 against the movable property, namely a **2012 AUDI A5 2.0 TDI CAB MULTI** with engine number **C[...]** and with chassis number **W[...]** (‘the motor vehicle’) be rescinded and set aside.*
- 3. Directing that the costs of this application, are to be paid by the Respondent only in the event of opposition.”*

[2] The application is opposed by the Respondent.

[3] The following factual background is common cause on the papers:

- a. The parties entered into an instalment agreement in terms whereof the Applicant purchased a motor vehicle from the Respondent.¹
- b. The Applicant lost her job during September 2022 and was unable to honour her obligations under the agreement. The last instalment payment was made in November 2022.²
- c. The outstanding amount under the agreement is R153,596-52.³
- d. The Respondent instituted proceedings against the Applicant in this Honourable Court and an Order (“*the Order*”) was granted by default against the Applicant on 11 September 2023 in the following terms:

¹ Founding Affidavit, par 7, Caselines 001-7 to 001-8; Answering Affidavit, par 75, Caselines 004-25.

² Founding Affidavit, par 8, Caselines 001-8; Answering Affidavit, paras 76 and 77, Caselines 004-25.

³ Founding Affidavit, par 9, Caselines 001-8; Answering Affidavit, paras 76 and 77, Caselines 004-25.

*“**HAVING** heard Counsel for the Applicant/Plaintiff and having read the papers and considered the matter, judgment is granted against the Respondent/defendant for:*

- 1. Confirmation of the termination of the agreement.*
 - 2. Return of a 2012 AUDI A5 2.0 TDI CAB MULTI with engine number C[...] and chassis number W[...] to the Plaintiff forthwith.*
 - 3. Retention of all monies paid to Plaintiff by Defendant.*
 - 5. Costs of suit on the attorney and client scale;”⁴*
- e. On 28 June 2024 the Respondent through the Sheriff took possession of the motor vehicle in execution of the terms of the Order.⁵*

[4] Rule 42(1)(a) provides as follows:

“42 Variation and rescission of orders

(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

[Paragraph (a) substituted by GN R235 of 18 February 1966.]”

[5] It is common cause that the Order was granted in the Applicant’s absence. The sole question is whether it was erroneously sought or erroneously granted.

[6] The Applicant alleges that she is entitled to a rescission of the Order under Rule 42(1)(a) of the Uniform Rules on the basis that service of the summons had been improperly effected by the Second Respondent.⁶

[7] This is disputed by the Respondents.

[8] The Second Respondent’s return of service⁷ indicates as follows:

“NATURE OF PROCESS: COMBINED SUMMONS

⁴ Founding Affidavit, par 6, Caselines 001-7 and “MJ1” at 001-14; Answering Affidavit, par 74, Caselines 004-25.

⁵ Founding Affidavit, par 10, Caselines 001-8; Answering Affidavit, par 76, Caselines 004-25.

⁶ Founding Affidavit, par 17, Caselines 001-11.

⁷ “SN4” to Answering Affidavit, Caselines 004-72; “MJ3” to Answering Affidavit, Caselines 002-31.

MANNER OF SERVICE/EXECUTION:

On 30-Jun-2023 at 16:05 I served this COMBINED SUMMONS on above mentioned DEFENDANT by affixing a copy of the above-mentioned document(s) to the principal door at the above-mentioned address, being the chosen domicilium citandi et executandi." (underlining added)

[9] The return indicates the relevant service address as 3[...] Z[...] Street, L[...].

[10] The Applicant's complaint is that "*the Second Respondent acted improperly by affixing a copy of the (sic) outside my chosen domicilium and not at my domicilium.*"⁸ (underlining added) The Applicant alleges that, at the time service was effected there was no-one at the premises and the main gate to the premises is always locked.⁹ She further provided a photograph of the main gate to the premises¹⁰ which depicts a walled exterior to the property and a large gate as the sole point of entry into the premises.

[11] The crux of the Applicant's complaint is that, given that there is no principal door to the premises, the Second Respondent could not have effected proper service of the summons. The return of service, which alleges that service occurred by affixing a copy of the summons to the "*principal door*" at the service address, is accordingly alleged to be incorrect.

[12] The issue for determination is therefore whether service of the summons, by affixing same to the main gate and sole point of entry to the premises, constitutes proper service under the Uniform Rules and whether the Second Respondent's return of service is consistent with such factual scenario.

[13] As at the date upon which service was purportedly effected, 30 June 2023, Rule 4(1)(a)iv) provided that:

⁸ Replying Affidavit, par 22, Caselines 006-9.

⁹ Founding Affidavit, par 11, Caselines 001-9.

¹⁰ "MJ8" at Caselines 001-28.

“Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any documents initiating application proceedings shall be effected by the sheriff in one or other of the following manners: ...

(iv) if the person so to be served has chosen a domicilium citandi, by delivering a copy thereof at the domicilium so chosen,” (underlining added)

[14] The latter wording has subsequently been amended with effect 12 April 2024¹¹. The Rule now requires that a copy has to be handed to a person not less than sixteen years of age at the *domicilium* address.

[15] However, for present purposes the sufficiency of the service has to be determined with reference to the regime that applied on 30 June 2023 when the summons in this matter was served.

[16] It is well-established that, in order for service under Rule 4(1)(a)(iv) to be valid, the manner of service must be effective. It must be such that the process served at that address would, in the ordinary course, come to the attention of and be received by the intended recipient.¹² This is a factual enquiry.

[17] In the instant case the Applicant alleges that service was not effected at the principal door of her property, but at the principal gate, and that, as a consequence, the service was ineffective and the sheriff’s return incorrect.

[18] The photograph provided by the Applicant shows that the gate against which the summons was affixed is the only entrance to the premises.

[19] The Second Respondent’s return of service indicates that a copy of the documents was affixed at the principal door at the premises.

¹¹ By GN R4477 of 8 March 2024 (GG50272 of 8 March 2024).

¹² **ABSA Bank v Mare 2021 (2) SA 151 (GJ)** at paragraph [26] of the judgment. **Sibeko v Shackleton Credit Management (Pty) Ltd** (unreported, GJ case no 3664/2015 dated 21 December 2022) at paragraph [13]; **Gamede v Wesbank, a division of FirstRand Bank Limited** (unreported, GJ case no 24707/2020 dated 20 July 2023) at paragraphs [5]-[8] and [23]-[25].

[20] On the level of the facts in the instant case, there is only a single entrance to the property.

[21] Entry to the Applicant's property is accessed through what could be described either as a "*door*" or a "*gate*". Within the current context this difference is a matter of semantics. The Second Respondent's return of service cannot therefore be faulted for referring to a principal door, rather than a principal gate.

[22] In my view the affixing of a copy of the documents served to the sole point of entry to the Applicant's property constitutes effective service of the summons under Rule 4(1)(a)(iv). This manner of service would, in the ordinary course, and on the facts of the instant matter, have had the the best prospect of coming to the attention of and being received by the Applicant. In the instant case, the chosen domicilium address is also the Applicant's home address.

[23] In the circumstances I am not persuaded that the Second Respondent's return of service is incorrect or that service was ineffective.

[24] The Order was accordingly not erroneously sought or erroneously granted and should not be rescinded.

[25] In the circumstances I make the following order:

- a. The Applicant's application is dismissed with costs on party and party scale A.

J BEYERS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 23 July 2024

Date of Judgment: 5 September 2024

APPEARANCES:

For the Applicant:

Instructed by:

Mogaswa & Associates Inc

For the First Respondent:

Instructed by:

Adv Muhammad Amojee

Strauss Daly Inc

For the Second Respondent:
affidavit

Instructed by:

Not opposed, have submitted confirmatory