IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER : 745/2009

In the matter between

MARTHA MARIA MAGDELENA STARITA
(a.k.a. **VAN JAARSVELD**) Applicant

and

ABSA BANK LIMITED First Respondent

SHERIFF OF THE COURT, BRAKPAN Second Respondent

JUDGMENT

André Gautschi AJ

[1] This is an application for rescission of a default judgment granted in favour of the first respondent against the applicant in this court on 30 April 2009, which order included declaring a certain immovable property executable.

[2] The applicant had been granted a loan by the first respondent during the middle of 2005 to enable her to purchase the aforesaid property. The loan was secured by a first mortgage bond registered over the property. The applicant thereafter experienced financial difficulties and was unable to meet her commitments to the first respondent and other creditors.

[3] On 23 November 2007, attorneys acting on behalf of the first respondent sent a notice in terms of section 129 of the National Credit Act, Act No 34 of 2005, ("the Act") to the applicant's chosen *domicilium citandi et executandi* by registered mail. It is common cause that the Act applies to the agreement in question. There is no dispute that the content of the notice complied with the provisions of section 129 of the Act. The applicant states that she did not receive this notice, and denies that it was delivered at her *domicilium* address. The first respondent has attached proof of posting, and it is not disputed that the section 129 notice was duly posted by registered post.

[4] The first respondent thereafter issued a summons out of this court under case number 33019/2007, which was served on 8 January 2008. Service took place at the applicant's *domicilium* address. The applicant does not dispute that the summons was served at that address, but alleges that she did not receive it. The applicant did not deliver a notice of intention to defend, and the first respondent accordingly applied to the Registrar for default judgment in terms of rule 31(5). Many months later, the first respondent's attorneys of record, in querying why default judgment had not been granted, ascertained that the case number had been duplicated in another case, in which default judgment had

been granted, which prohibited (apparently) default judgment from being granted in the plaintiff's matter. Accordingly, on 12 January 2009 the first respondent issued a second summons under case number 745/2009, without withdrawing the first summons. The second summons was served on the applicant's *domicilium* on 14 January 2009, and it is upon that summons that the default judgment was granted which is now sought to be rescinded. Again, the fact that the second summons was served is not disputed by the applicant, but the applicant contends that she did not receive it, this time because the property was then occupied by a tenant with whom the applicant was not on good terms and who therefore did not advise her of the service of the summons.

[5] In the time between the two summonses being issued, and more particularly on 8 May 2008, the applicant applied for a debt review in terms of section 86(1) of the Act. She was at that time unaware of the issue and service of the first summons. The debt review thereafter proceeded through its various stages, and was by the time this application was launched, pending in the Benoni Magistrates' Court.

[6] The applicant's defences to the action relate mainly to the existence of two summonses for the same debt and the effect which that has on the validity of the section 129 notice.

[7] The applicant's first contention is that it is impermissible to have two extant summonses for the same debt, and that that position invalidates the default

judgment granted on the second summons. It is true that such a position would afford a defendant the right to raise the defence of *lis alibi pendens*, which is invariably done by way of a special plea. But the defence is merely a dilatory one, since, if it is upheld, the usual practice is to stay the proceedings in the one matter[1]. The court has a discretion whether to uphold the defence, and could refuse to do so in a proper case[2] Ordinarily the plaintiff would simply withdraw one of the actions. The mere fact that there is at any point in time two extant summonses does not render one or both of them invalid or inoperative. If it did, the special plea of *lis pendens* would not be merely dilatory and the court would not have a discretion in the matter; it would be dispositive of the case. If the special plea of *lis pendens* is never raised, there would be no adverse consequences to the plaintiff other than the fact that it would not be entitled to obtain judgment in both actions, but only in one. Accordingly, in my view, the fact that two summonses had been issued, and that both actions were pending at the time when default judgment was granted on the second, does not invalidate the default judgment granted.

[8] Then it is contended that the section 129 notice, having formed the platform on which the first summons was based, could not be used again for the second summons, either *per se*, or because of the lapse of a period of time.

[9] It is necessary that sections 129 and 130 be examined. Their relevant parts read as follows :

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1 Kuhne & Nagel (Pty) Ltd v Elias & Another 1979 (1) SA 131 (T) at 132

2 Loader v Dursot Bros. (Pty) Ltd 1948 (3) SA 136 (T) at 138

"129. Required procedures before debt enforcement

(1) If the consumer is in default under a credit agreement, the credit provider-

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, 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; and

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130.

(2) . . .

(3) . . .

(4) . . .

130. Debt procedures in a Court

(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and-

(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be;

(b) in the case of a notice contemplated in section 129(1), the consumer has-

(i) not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider's proposals; and

(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.

(2) In addition to the circumstances contemplated in subsection (1), in the case of an instalment agreement, secured loan, or lease, a credit provider may approach the

court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if-

(a) all relevant property has been sold pursuant to-

(i) an attachment order; or

(ii) surrender of property in terms of section 127; and

(b) the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement.

(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-

(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;

(b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and

(c) that the credit provider has not approached the court-

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or

(ii) despite the consumer having-

(aa) surrendered property to the credit provider, and before that property has been sold;

(bb) agreed to a proposal made in terms of section 129(1)(a) and acted in good faith in fulfilment of that agreement;

(cc) complied with an agreed plan as contemplated in section 129(1)(a); or

(dd) brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a).

(4) . . . "

[10] It will be observed that there is no time period specified in the Act for the continued validity of a section 129 notice, nor can one be implied. Its ongoing validity then depends upon the facts of the case. For instance, if the arrears specified in the notice were fully extinguished after the notice had been given, the notice could not then be utilised for any legitimate purpose if further arrears occurred thereafter[3]. On the other hand, if after the giving of a section 129 notice the arrears were not extinguished (albeit that payments were made), there is nothing in the Act that demands that the notice has to be acted upon by the issue of summons within a short or limited period of time, or that it may only be used for one summons. The only imperative is that certain time periods have to elapse before the notice may be acted upon.

[11] The issue of the first summons prevented the debt review from being valid, by virtue of the operation of section 86(2) of the Act. The relevant parts of section 86 provide as follows :

> "**86. Application for debt review**
>
> (1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.
>
> (2) An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement.
>
> . . . "

[12] Section 86(2) therefore prohibits the application for a debt review in respect of a particular credit agreement where the credit provider under that credit

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[3] *Cf* BMW Financial Services (South Africa) (Pty) Ltd v Dr MB Mulaudzi Inc 2009 (3) SA 348 (BPD) at 352E-F read with H

agreement "has proceeded to take the steps contemplated in section 129 to enforce that agreement". On a plain reading of those words, steps taken under section 129 would include the giving of a notice under that section. However, section 129(1) requires the credit provider, in the notice, *inter alia* to propose that the consumer refer the credit agreement to a debt counsellor (clearly in terms of section 86). If the consumer does so, the credit provider may argue that section 86(2) prohibits this. In order to avoid the resulting circuitous absurdity, it seems to me that the proper construction of section 86(2) is that the steps taken under section 129 as referred to in section 86(2) are the steps taken after the notice has been given, starting with the issue of summons[4].

[13] Section 86(2) must in my view be read objectively, namely that an application for debt review is prohibited if the credit provider has in fact taken the steps to enforce the credit agreement as envisaged. Knowledge on the part of the consumer of the steps taken is not required. In the present case, I accept for the purposes of this application that the applicant did not know of the issue or service of the first summons. However, these occurred in fact, and the debt review could therefore not apply to the credit agreement upon which the first respondent sued.

[14] That position did not in my view change because a second summons was issued, and default judgment was granted on the second summons. The fact is

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[4] In this regard I prefer the conclusion reached by Boraine and Renke 2008 De Jure 1 at 9 (that the issue of summons would bar the consumer from applying to a debt counsellor for a debt review) to that of Van Loggerenberg *et* al 2008 (Jan) De Rebus 40 and J W Scholtz *et al*, Guide to the National Credit Act, para 11.3.3.2(d) (that the service of summons is the operative step). It is however unnecessary that I decide this point.

that at the time of the default judgment, the first summons, which had the effect of preventing a debt review application being made in respect of the credit agreement in question, was still extant. Even if the first summons had been withdrawn after the application for a debt review had been made[5], that application would still not have applied to the credit agreement in question, in terms of section 86(2), and a new application for a debt review would have been required once the summons had been withdrawn. The effect of making an application for a debt review after the credit provider has taken the steps contemplated in section 129 (i.e. issued summons) is in my view simply that the application does not apply to the credit agreement in question. A fresh application would be required if the circumstances changed so as to permit such an application to be made in respect of that credit agreement.

[15] I indicated above that the applicant contended that she had not received the section 129 notice. Although this point was raised pertinently in the founding and replying affidavits, it was not advanced in argument on behalf of the applicant. I ought nevertheless to address this, since, depending on the line of decisions followed, this may constitute a defence.

[16] The mortgage bond upon which the action against the applicant is founded, contains the following clause :

> "10. **DOMICILIUM CITANDI ET EXECUTANDI**
>
> Die Verbandgewer kies hiermee as sy adres vir die betekening van alle kennisgewings, mededelings of regsprosesstukke (*domicilium citandi et*

[5] It was only withdrawn in the answering affidavit.

> *executandi*) vir alle doeleindeskragtens hierdie verband, die fisiese adres van die eiendom wat kragtens hierdie verbind is ... "

[17] There is no dispute that the address to which the notice was sent by registered mail, was the applicant's chosen *domicilium citandi et executandi*, or that the first respondent dispatched the notice by registered post to that address. The applicant denies that the notice was at any stage delivered to that address, and blames the Post Office for this fact.

[18] Judicial authority is divided on whether a section 129 notice must be received by the consumer before it will constitute a valid notice, entitling the credit provider to approach the court for an order to enforce the credit agreement. On the one hand there is the Munien[6] case, followed in Rossouw[7], Mellet[8] and Rockhill[9], which found that actual receipt of the notice is not required. On the other hand there are the Dhlamini[10] and Prochaska[11] cases, which found the contrary[12]. I support the conclusion reached by Wallis J in the Munien case, although my reasoning is somewhat different. With great deference, I respectfully disagree with the conclusion reached in the Dhlamini and

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6 Munien v BMW Financial Services (SA) (Pty) Ltd & Another 2010 (1) SA 549 (KZD) ((Wallis J)

7 First National Bank Ltd v Rossouw and Another (unreported, GNP, case number 30624/2009, delivered on 6 August 2009) (Ellis AJ)

8 The Standard Bank of South Africa Ltd v Mellet & Another [2009] ZAFSHC 110 (30 October 2009) (Musi JP)

9 The Standard Bank of South Africa Ltd v Rockhill & Another [2010] ZAGPJHC 10 (11 March 2010) (Epstein AJ)

10 FirstRand Bank Ltd v Dhlamini (unreported, GNP, case number 50146/2009, delivered on 17 March 2010) (Murphy J)

11 ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors 2009 (2) SA 512 (D&CLD) (Naidu AJ)

12 It is not clear in the Prochaska case that this was actually the finding, but it appears to have been impliedly found.

Prochaska cases, and I decline to follow these cases. I set out hereunder my reasoning :

18.1 It is true that section 129 requires the credit provider to "draw the default to the notice of the consumer in writing" and to "first [provide] notice to the consumer", which would seem to indicate more than simply dispatching a notice, but rather to require that such notice be received by the consumer. One might even add that the word "propose" (to the consumer) in section 129(1)(a) and the expression "give notice" in section 86(10) have a similar connotation. These requirements are all encapsulated in the word "delivered" as used in section 130(1)(a)[13].

18.2 Those requirements however beg the question, as to how the default is to be drawn to the notice of the consumer, the various alternatives are to be proposed to the consumer, or notice is to be provided or given to the consumer. The answer to this question, in my view, is to be found in sections 65 and 168. Section 65 provides :

> "65. **Right to receive documents**
>
> (1) Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any.

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[13] I consider, with respect, Murphy J to be wrong in regarding the word "delivered" as used in section 130(1)(a) as merely providing for a procedural mechanism (Dhlamini para 24), and for failing to recognize that the use of this word is rather an indication of the legislature's intention in using the disparate phrases that it did.

(2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must

(a) make the document available to the consumer through one of more of the following mechanisms –

(i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;

(ii) by fax;

(iii) by email; or

(iv) by printable web-page; and

(b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).

... "

The term "prescribed" is defined in section 1 of the Act to mean "prescribed by Regulation".

18.3 The Regulations do not prescribe how documents are to be delivered to a consumer, but Regulation 1 contains a definition of the word "delivered". The relevant part of that definition reads :

"1. **Definitions**

In these Regulations, any word or expression defined in the Act bears the same meaning as in the Act and –

. . .

> "**delivered**" unless otherwise provided for, means sending a document by hand, by fax, by e-mail, or registered mail to an address chosen in the agreement by the proposed recipient, if no such address is available, then the recipient's registered address ...;
>
> . . . "

18.4 It is fallacious in my view to apply a definition in the Regulations to an expression used in the Act[14]. The Act does not permit the Minister, in making Regulations, to define expressions in the Act; the Minister is not empowered to dictate matters in the domain of the legislature. The definition of the word "delivered" in the Regulations also does not purport to contain a "prescribed manner" for delivery. It is only a definition and simply indicates the meaning to be ascribed to the word "delivered" as used in the Regulations. In my view, therefore, no regard can be had to the definition of the word "delivered" in the Regulations in interpreting sections of the Act.

18.5 The closest that one comes to a "prescribed manner of delivery of a document to a consumer[15] is section 168, which provides :

> "168. **Serving documents**
>
> Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either –
>
> (a) delivered to that person; or

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14 *Cf* Munien *supra* at para [12]; Scholtz *et al* Guide to the National Credit Act *supra* para 12.4.4

15 As required in section 65(1) of the Act.

(b) sent by registered mail to that person's last known address." [16]

18.6 In my view there is no substantial difference between the words "delivered" and "served". In addition, whilst the words "delivered", "deliver" and "delivery" are used often in the Act[17], I have searched in vain for any reference to the words "served" or "serve". Section 168 is therefore applicable to a notice which has to be "delivered", which includes a notice in terms of section 129(1) in view of the wording of section 130(1)(a). In terms of section 168, the notice will have been properly served (delivered) when it has been, *inter alia*, sent by registered mail to that person's last known address.

18.7 If I am wrong in this, and section 168 does not constitute the "prescribed manner" referred to in section 65(1), then there is no method prescribed for the delivery of the notice, and it may then be made available to the consumer "by ordinary mail" in terms of section 65(2)(a)(i), provided that that is not in conflict with a manner chosen by the consumer in terms of section 65(2)(b). In the present case there was no manner expressly chosen by the consumer from the options made available to her in terms of section 65(2)(a) (save for choosing a *domicilium* address). The first respondent chose to mail the notice.

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[16] Note that section 65 applies only to delivery of a document to a consumer, whereas section 168 applies to service on a person, which would include consumer and credit provider alike. I do not believe that the distinction detracts from what follows.

[17] See for instance sections 48(3); 63(1), (2), (6), (7) and (8); 64(1); 96(1) and (2); 108(1) and (3); 110(1), (2) and (3); 111(1); 116; 117(1); 118(3); 121(2)(a); 130(1)(a) and 139(3).

Using registered mail is an *a fortiori* position, of better efficacy that ordinary mail, which cannot be objectionable.

18.8 Section 168(b) requires the registered mail to be sent "to that person's last known address". That appears to conflict with section 96(1) which provides :

> "96. **Address for notice**
>
> (1) Whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at -
>
> (a) the address of that other party as set out in the agreement, unless paragraph (b) applies; or
>
> (b) the address most recently provided by the recipient in accordance with sub-section(2). "

It will be readily appreciated that the last known address may be different from the address as set out in the agreement. There is no similar conflict between sections 65 and 96(1), since section 65 does not stipulate the address to which the ordinary mail is to be sent. In my view, a section 129(1) notice is a "legal notice" as envisaged in section 96(1)[18], and section 96(1) therefore applies. In regard to section 65, section 96(1) does not detract from the efficacy of a chosen *domicilium* in the credit agreement. The apparent conflict between section 96(1) and section 168 is more difficult to resolve. Section 96(1) prescribes, in

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[18] I agree in this regard with Scholtz *et al*, Guide to the National Credit Act *supra* para 12.4.5, Van Heerden and Otto 2007 TSAR 655 at 664, and Van Loggerenberg *et al supra* at 41

peremptory terms, the address at which notice must be delivered. Section 168 is a deeming provision, which in effect deems proper service to have taken place when the document has been sent by registered mail to the last known address. The difficulty arises when those addresses are not the same. In most cases (the present one being such a case) the chosen *domicilium* of the consumer would be the only known address to the credit provider, and the difficulty will not arise.

18.9 Murphy J places great emphasis on the fact that section 129(1)(a) requires the credit provider to "draw the default to the notice of the consumer in writing"[19], and assumes that the legislature consciously did not use the words "deliver" or "serve" in section 129(1)(a)[20]. There are two flaws in this line of reasoning. The first is that the legislature is assumed to have chosen its words with precision. The fact is that it is a badly drafted Act. The circuitous absurdity referred to in paragraph 12 above is an example thereof. Another example is the use of the word "enforce" in section 129(1)(b) which in ordinary legal parlance would mean to claim specific performance of the agreement, but must probably be construed to include cancellation and damages[21]. A perusal of the Act further shows that the expressions "giving written notice", "advise in writing", "give notice", "deliver" and "serve" are used

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19 Para's 23 and 27

20 Para 27

21 Otto The National Credit Act Explained p 87/8

indiscriminately and without precision. Accordingly, undue emphasis should not be placed on the actual words used. In the second place, as I have pointed out in paragraph 18.1 above, the various expressions used in section 129(1) are all reduced to the single word "delivered" in section 130(1)(a), which is in my view the clearest indication (if one can be found) of the legislature's intention with regard to the fate of the notice.

18.10 Murphy J and Naidu AJ emphasise the purpose of the Act as set out in section 3 thereof[22], and the fact that it is directed strongly at the interests of consumers. That is undoubtedly correct, but the legislature has not thereby ignored the interests of credit providers. There is no imperative that credit providers should be put to the trouble and expense of ensuring actual receipt by consumers of a section 129 notice, or other notices which might have equally adverse effects. Certainly, the Act does not require personal service on the consumer, as suggested by Murphy J[23]. Section 168 is in my view a telling indication of the legislature's desire to balance the interests of both credit providers and consumers. Whether the intended recipient is the credit provider or the consumer[24], sending by registered mail to that person's last known address is deemed to be proper service.

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22 Dhlamini para's 28 and 29; Prochaska para's [54] to [56]

23 Dhlamini para 30

24 Certain of the sections of the Act provide for delivery of notice to the credit provider, for instance section 48(3); 96(1) and (2); 111(1) and 121(2)(a).

18.11 It violates no purpose of the Act to permit a credit provider to send a section 129(1) notice by registered mail, requiring of it only that it should prove, if necessary, that it duly sent the notice in that manner, and that it sent it to the exact address chosen by the consumer for that purpose. To require more places far too heavy a burden on the credit provider, which is not in my view required by the Act. This is the more so where the consumer has chosen a *domicilium citandi et executandi*. The purpose of choosing a *domicilium* address for the giving of a prescribed notice under a contract, which is the same as it is for the service of process, is to relieve the party giving the notice of the burden of proving actual receipt of the notice[25]. It may also be borne in mind that service of a summons on a consumer who has chosen a *domicilium* address may take place in terms of rule 4(1)(a)(iv) of the Uniform Rules of Court, by leaving the summons at such address, without proof of actual receipt thereof, although service of a summons is conceivably a far more drastic step, and potentially far more detrimental to the consumer, than delivery of a section 129(1) notice.

[19] For these reasons, I support the conclusion that the section 129(1) notice need not be actually received by the consumer. It was sufficient that it was sent by registered post to the *domicilium* address.

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[25] Judson Timber Co (Pty) Ltd v Ronnie Bass & Co (Pty) Ltd & Another 1985 (4) SA 531 (W) at 538A-B; Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd 1984 (3) SA 834 (W) at 847D-I

[20] From the aforegoing it is clear that the applicant has no defence to the action. That makes it unnecessary for me to consider the question of wilful default or the delay in bringing the application. I may for the sake of completeness observe that I would accept on the facts placed before me that there was no wilful default, and that although there was a delay in launching the application, of about a month beyond the 20 days allowed by Rule 31(2)(b), the application could equally have been brought under the common law, where no time period is stipulated. I would accordingly not non-suit the applicant on the bases of wilful default or delay in bringing the application.

[21] In the result the application for rescission is dismissed with costs.

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ANDRÉ GAUTSCHI
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	10 February 2010
Date of judgment	:	26 March 2010
For applicant	:	Adv C van der Merwe (instructed by CMM Attorneys Inc)
For first respondent	:	Adv J J Durandt (instructed by Jay Mothobi Inc)

No appearance for second respondent