REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 26465/2012

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

13 June 2014 ..... E M Kubushi .....

DATE SIGNATURE

In the matter between:

JAN HENDRIK MARE **APPLICANT**

and

FIRSTRAND BANK LIMITED T/A NISSAN FINANCE **RESPONDENT**

J U D G M E N T

KUBUSHI, J

[1] In this application before me the applicant seeks to rescind a judgment granted in his absence which he contends was granted erroneously.

[2] The parties entered into an instalment sale agreement on 23 November 2007. In October 2009 the applicant applied for debt review and was on 11 August 2010 granted a debt review order. The applicant defaulted on the payments in terms of the debt review order. Based on such default, the respondent instituted action and obtained judgment against the applicant. It is this judgment which the applicant seeks to rescind.

[3] The applicant not being aware of the judgment granted against him, brought a second debt review application which resulted in a second debt review order being granted in his favour. The respondent is disputing the validity of this order. Subsequent to the above mentioned processes, the applicant became aware of the judgment granted against him and has as a result approached this court for the rescission thereof.

[4] The applicant launched the rescission application in terms of uniform rule 42 (1) *(a)*. The rule provides as follows:

> "1. The court may, in addition to any other powers it may have, *mero motu* or upon application of any party affected, rescind or vary:
>
> *(a)* An order or judgment erroneously sought or erroneously granted in the absence of a party affected thereby. . . ."

[5] Generally a judgment is erroneously granted if there existed at the time of issue a fact which the judge was unaware of, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant judgment. For example, an order or judgment is erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for a court to make that order. See *Naidoo v Matlala NO*[1]

[6] The applicant raised various grounds in support of the rescission of the judgment granted against him. However, in my view, what was important was whether at the time the judgment was granted there was a fact which the judge was unaware of, which would have precluded such judge from granting the judgment.

[7] In this instance, the submission by the applicant is that the fact that may have induced the judge not to grant the judgment is that the summons was not properly served on him. According to the applicant, at the time of service of the summons he had already moved away from the address at which the summons was served. He contends that because of this move the summons did not come to his knowledge that is why he did not file his notice to defend the matter. The respondent on the other hand contends that the service was proper as it was served at the address chosen by the applicant in terms of the instalment sale agreement, that is, the applicant's *domicilium citandi et executandi.*

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1 2012 (1) SA 143 (GNP) at 153C

[8] The parties' counsel went at length to debate whether it was proper or not to have served the summons at the applicant's *domicilium citandi et executandi,* a debate which I found irrelevant for purposes of this application. What was of importance in my view was whether the applicant was aware of the summons at the time the judgment was granted. The applicant's evidence is that he was not aware of the summons. The evidence of the respondent does not gainsay this allegation. In fact, the respondent's evidence confirms that they were aware of the change of the applicant's physical address which was reflected in the debt review court application served on them. In my view, I have to infer that they were aware that the applicant has moved places.

[9] Absent evidence disproving the applicant's allegation that he had not been resident at the address at which service of summons was effected I have to infer that the applicant was not aware of the summons that had been issued before the judgment was granted. In the premises there had not been service of the summons on the applicant. If this fact had come to the knowledge of the judge who granted the judgment he or she may not have granted it. The judgment was therefore granted erroneously in the applicant's absence. In general an improper service of summons will cause all subsequent steps to be invalid as a result where a summons has not been served on a defendant, a subsequent judgment granted in default is liable to be set aside in terms of uniform rule 42 (1) *(a).*

[10] Once the court holds that an order or judgment was erroneously granted it should without further enquiry rescind the order and it is not necessary for a party to show good cause. See *Tshabalala and Another v Peer*[2] and *Topol and Others v LS Group management Services (Pty) Ltd* [3].

[11] The applicant in his notice of motion prayed for an order of costs against the respondent on an attorney and client costs. My view however is that since the applicant was asking for an indulgence the respondent should not be burdened with a cost order. An appropriate cost order is for each party to bear own cost.

[12] Consequently I make the following order:

12.1 The judgment granted against the applicant under case number 26465/2012 on 18 June 2012 is rescinded.

12.2 All execution steps including the repossession and sale of the goods described as 2004 Ford Bantam 1.3 XL A/C with engine number 3L020449 and chassis number AFAWAXMJKW4E00691, is set aside.

12.3 Each party to pay own costs.

E. M. KUBUSHI

JUDGE OF THE HIGH COURT

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2 1979 (4) SA 27 (T) at 30D – E

3 1988 (1) SA 639 (W) at 650D – I

Appearance

HEARD ON THE	**: 13 MAY 2014**
DATE OF JUDGMENT	**: 13 JUNE 2014**
APPLICANTS' REPRESENTATIVE	**: MR GREEFF**
APPLICANTS' ATTORNEY	**: GREEFF & VAN WYK ATTORNEYS**
RESPONDENT'S COUNSEL	**: ADV JACOBS**
RESPONDENT'S ATTORNEY	**: HACK STUPEL & ROSS**