IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

DATE: 31/07/2014 **SIGNATURE:**

31/07/2014

CASE NUMBER 72853/12

In the matter between -

LAZARUS RANDILENI MOLAUDZI **APPLICANT**

and

ABSA BANK LTD **RESPONDENT**

JUDGMENT

MAVUNDLA J.

[1] This is an opposed application for rescission of default of judgment granted against the applicant on the 05th April 2013.

[2] The grounds relied upon for the rescission are that the s 129 letter of demand and the summons never came to the attention of the applicant until the 8th May 2013 during consultation with his attorneys or record when he was shown copies of the court file. He further contended that both the s 129 letter of demand and the summons were served at 158 Dzanini which was not his address. He further contended that the letter of demand was served by the Sheriff in terms of Rule 9(3)(a), which is ostensibly the Magistrates' Court rules, and there was no condonation in respect of this service.

[3] The applicant further contended in his affidavit that the summons could not have been served on him on the 9th January 2013 because then he was in Gauteng for medical treatment and was bedridden as he was seriously ill.

[4] According to the applicant, the deputy Sheriff of Dzanani, Mr. Ndou, explained to him that Mr. Bologa left two sets of summons at the offices of sheriff of Dzanani with a request that these be served on the applicant on his return from Gauteng. In this regard he attached the affidavit of Mr. Ndou[1].

[5] On behalf of the respondent it was contended that the summons were served on the applicant on the 9th January 2013 by the Deputy Sheriff of Thohoyandou, specifically Victor Bologa[2]. The summons advised the applicant that should he not enter an appearance to defend, judgment may be claimed against him without further notice to him.

[6] It was further contended by the respondent that on the 6th February 2013 the applicant contacted the offices of Ruth & Wessels and spoke to

[1] Annexure LMR2.
[2] Annexure A is the attached copy of the return of service.

Mrs JC Bekker, the attorney who was responsible for the handling of the file. During the conversation the applicant was advised that an application for default judgment had already been lodged. The applicant's response was that he was previously unemployed, but was now employed. The applicant sought to make arrangements to make payment of R40 000.00, which was, however, rejected. It was denied that the applicant only became aware of the summons only on the 8th May 2013. The applicant would not have known of Ruth & Wessels had he not received the letter of demand, so it was contended by the respondent.

[7] The respondent further contended that s 36(2) of the Supreme Court Act 59 of 1958 provides that the return of the Sheriff or Deputy Sheriff is *prima facie* evidence of the matters stated therein and removed any doubts as to whether of the return could be impeached for want of accuracy or truth.[3] In the absence of clearest evidence adduced, an impeachment of the return of service will not be lightly upheld.[4] The courts have held that it is permissible to supplement an incomplete return[5] or to explain an ambiguous or incorrect one by oral evidence.[6] It was further submitted that the erroneous reference to the magistrate rules on the return does not make it invalid.[7]

[8] The interpretation of any provision of the NCA must be done within the ambit of the Constitution of the country to ensure that the values espoused by the Act fall in line with those enshrined in the Constitution. The authorities of pre-1994 must also be understood in the context of, and be followed in so far as they are in line with those values espoused in the Constitution.

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[3] Greef v FirstRand Bank Ltd 2012 (3) SA 157 (NCK) at 160D
[4] Deputy Sheriff, Witwatersrand v Goldberg 1905 TS 680.
[5] Vermuelen v Vermuelen 1940 OPD 25 at 35.
[6] Vermuelen (supra).
[7] Both6.a v Measroach 1917 TPD 142 at 14

[9] It is common cause that the instalment agreement between the parties is regulated by the National Credit Agreement Act. The purpose of the NCA is to protect the consumer; *vide Nkume v Transunion Credit Bureau.*[8] In *FNB v Clear Creek Trading 12*[9] Kollapen J quite correctly held that:

> "The Act accordingly seeks to bring within the credit market place fair and non-discriminatory provisions and, broadly speaking, seeks to advance the values of fairness, equality and freedom within the credit industry. In addition the Act contains a number of provisions specifically designed for the protection of the consumer."

In my view, if the protection of the consumer is to be realised, a strict compliance of the provisions of s129 must be enforced by the courts, notwithstanding the use of the word "may" in s 129.

[10] It is common cause that the s 129 notice was served at 158 Dzanani. The respondent contended that the said address was the most recent known address of the applicant. However, there was no evidence provided as to the source that informed such conclusion. The agreement founding the relation between the parties reveals the address 58 Dzanani as the chosen address for correspondence and domicilium purposes. In my view, the respondent was not at liberty to serve both the letter of demand and the summons at any other address either than the chosen address.

[8] 2014 (1) SA 134 (ECM) 134 at 139C-D and footnote 5 thereof.
[9] 2014(1) SA 23 (GNP) at 29B.

[11] Rule 4 of the High Court Rules is peremptory that any document initiating application proceedings shall be served by the Sheriff. This rule must be read together with s129 and 130 of the NCA, which provide that the credit provider may not commence any legal proceedings to enforce the agreement before delivering a notice. The envisaged notice in terms of s129, where the action is being initiated in the High Court, must therefore logically be served by the Sheriff of the High Court. I therefor find that *in casu*, the service of the notice by the Sheriff of the Magistrates' Court was irregular.

[12] The irregular service of the notice does not vitiate the proceedings. The Court is, however, at liberty to stop the proceedings and give direction as to the further steps to be taken before the matter may be proceeded with. I am of the view that at the time when the default judgment was sought, had it been drawn to the attention of the Court that the agreed upon address for correspondence and *domicilium* purposes was 58 Dzanani, the Court would have stopped the proceedings and directed that service be effected at the agreed upon address.

[13] It is trite that the grant of an application for rescission is a matter of the discretion of the Court. In the circumstances of this case, in the exercise of my discretion, I propose to stop the proceedings and set aside the default judgment and direct the respondent to serve the notice *de novo* at the correct address before further steps are taken.

[14] In the premises the following order is made:

1. That the default judgment granted against the applicant on the 05th April 2013 is hereby rescinded and set aside;

2. That the respondent/plaintiff serve *de novo* the s129 notice at the given address 58 Dzanani in terms of Rule 4(1) of the High Court Rules, pointing out, *inter alia*, that the action has already been commenced and that the purpose of this letter is merely to regularize the action;

3. That the respondent be ordered to pay the costs of the application.

N.M. MAVUNDLA J
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT	:	31 / 07/ 2014
PLAINTIFF`S ATTORNEY	:	TAMBANI MATUMBA ATTORNEYS
PLAINTIFF`S ADVOCATE	:	ADV HEIN GROENEWALD
RESPONDENT'S ATTORNEY	:	RUTH & WESSELS INC.
RESPONDENT'S ADVOCATE	:	ADV WHITE D.S.