✓ 7/12/2017

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 13470/17

7/12/17

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

7.12.2017 — DATE

SIGNATURE

In the matter between:

MATHYS WYNAND DE BRUYN t/a
DE BRUYN AND ASSOCIATES — **APPLICANT**

and

CLASSIS NUMBER TRADING 80 (PTY) LTD
t/a NASHUA TSHWANE — **RESPONDENT**

Heard: **4 December 2017**
Delivered **7 December 2017**

JUDGMENT

VAN DER SCHYFF AJ

[1] This is an application for rescission of judgment. Although the Respondent conceded to the rescission of judgment, the cost order sought by the Applicant is opposed.

Background

[2] The Applicant leased certain equipment from the Respondent in terms of a written rental agreement. Subsequent to a dispute between the parties Respondent issued summons against Applicant. The summons was served at the *domicilium citandi et executandi* as chosen by Applicant in the written agreement. No notice of intention to oppose was delivered and default judgment was granted on 27 March 2017.

[3] On 31 May 2017 Applicant served his notice of motion for rescission of judgment. Prayer 1 contained the request for the rescission and setting aside of the judgment. In prayer 2 the Court is requested to order the Respondent to pay the costs of the application on attorney and client scale.

[4] Applicant's argument was that Respondent knowingly and intentionally served the summons on Applicant's chosen *domicilium* address, despite the fact that Respondent knew that the Applicant moved from that address. This knowledge is presumed on the basis that Applicant concluded rental agreements with Respondent for other equipment at the address that he is currently doing his business at. It is indeed also true that in the summons Applicant is cited as Defendant with the description – " ... a major male accountant with Identity Number 630301 5050 083,whose further/and or full particulars are to the Plaintiff unknown, with current address situated as BLOCK 9, BOARDWALK OFFICE PARK, BOARDWALK BOULEVARD, FAERIE GLEN, PRETORIA GAUTENG PROVINCE and with chosen *domicilium citandi et executandi* situated at OLD FARM OFFICE PARK, 881 OLD FARM ROAD, FAERIE GLEN, PRETORIA, GAUTENG PROVINCE."

[5] Counsel for the Applicant concedes that although Respondent, and Respondent's legal representatives, were informed that it vacated the property, it never formally changed its *domicilium* address. Applicant's main argument is that Respondent is liable for the costs of the rescission application because Respondent effected service of the summons on this *domicilium* address, while knowing very well, not only that Applicant vacated the premises at that address, but where Applicant moved to. Applicant also contends that Respondent's decision to oppose the application was unreasonable because Applicant's defence was explained in correspondence prior to the application being brought.

[6] It is trite that even where an application for rescission is not opposed, an Applicant must make out a proper case for rescission. The fact that Respondent required Applicant in

a letter dated 16 May 2017 to bring a substantial application for rescission cannot be regarded to be unreasonable. The main question that needs to be answered in order to determine in whose favour the costs should be awarded, is whether Respondent acted reasonably in effecting service of the summons at the Applicant's chosen *domicilium* address in circumstances where it knew that the Applicant has vacated the property and were doing business from another address, of which the latter was also know to them.

[7] Neither party could refer the Court to applicable case law. This is a pity since such case law is available, and it would have been beneficial to hear counsels' argument on the applicability of the authority. Counsel for the Respondent argued that the only instance she is aware of where more than service at a *domicilium* address is required, pertains to applications for the executability of a primary residence in terms of Rule 46. Counsel for the Applicant contended that even where a *domicilium* address were chosen in a written agreement, effective service on another address would suffice.

[8] It should be kept in mind that the *domicilium* address was chosen in a written contract concluded between the parties. This is dealt with in clauses 37 to 40 of the agreement. Clause 39 provides that each party may change its *domicilium* address by written notice to the other. Clause 40 stipulates that where no written notice of change of address was provided, the last address may be used for service.

[9] It is correct that the mere fact that a domiciliary address has been chosen does not preclude effective service through any of the other methods prescribed under the Uniform Rules of Court – see *Sandton Square Finance (Pty) Ltd v Biagi, Bertoli and Vasco* 1997 (2) 258 (W) at 260 C. However, there is no obligation on a plaintiff to use any other address for the service of summons where a domiciliary address has been nominated in a written agreement. A plaintiff who decides to effect service on another address where a domiciliary address has been chosen, might find itself in a predicament when personal service at the other address cannot be effected. Where, for example a domiciliary address has been chosen and service is effected through affixing at another address, such service will not be regarded as proper service for the purpose of obtaining, for example, default judgment. In *Sheppard v Emmerich* 2015 (3) SA 309 (GJ) at 310 I-J, it was held by Van Oosten J "that where a specific method of effecting service is contractually agreed, that method should be strictly complied with.". It was similarly held in *Van der Merwe v Bonaero Park (Edms) Bpk* 1998 (1) SA 697 (T) that "It is the obligation of the Defendant to change the *domicilium*

citandi et executandi address or to change its registered address and accordingly I find that the service at the address referred to in the summons and the return of service was good service on the Defendant."(See also : *Muller vMulburton Gardens* (Pty)Ltd 1972 (1) SA (W) at 332 G; *United Building Society v Sternback* 1942 (WLD) 3, *Wishart No and Another v First-rand Bank Limited* (3459/2013) [2014] ZAKZDHC 58 (28 November 2014), *Hollard 's Estate v Kruger* 1932 TPD 134.)

[10] The Respondent was fully in its right to serve summons on the Applicant's chosen domiciliary address. The service of summons on the domiciliary address even in circumstances where the Respondent was made aware of the fact that the Applicant vacated the property, does not entitle Applicant to punitive costs. The Respondent was well within its right to oppose the cost order sought by the Applicant. If the second prayer was not formulated in the Notice of Motion in the manner that it was, this matter could have been dealt with as an unopposed matter. Respondent cannot be expected to carry the costs brought about by the prayer pertaining to costs that Applicant included in the Notice of Motion.

[11] Due to the fact that the rescission of the judgment was not opposed the Applicant's submissions pertaining to the judgment *per se* stand uncontested. On the papers as it stands, the Applicant has shown good cause for the rescission to be granted.

[12] I take the following into consideration in determining an appropriate order as to costs:

- Respondent was within its rights to require that a formal application for rescission was brought
- Respondent was within its rights to oppose the order as to costs prayed for by the Applicant.
- Applicant proposed in a letter dated 3 July 2017 that the Applicant "takes an unopposed rescission order and that the costs of the rescission application stand over for determination by the trial court."
- Respondent did not provide any reason in argument as to why this Court would be in a better position than the trial Court to determine the liability as to costs- specifically in light of the fact that the rescission *per se* was not opposed.
- No practice note and no heads of arguments were filed on behalf of the respondent. This omission is *contra* the requirements contained in the Practice Manual.

ORDER:

In light of the aforesaid it is ordered that:

[1] The default judgment granted on 27 March 2017 is rescinded and set aside;

[2] Applicant to pay the costs of the application incurred up to 3 July 2017.

[3] Each party to carry their own costs incurred after 3 July 2017.

E VAN DER SCHYFF

Acting Judge of the High Court