REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 08/32310

DATE:12/08/2011

REPORTABLE

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

....
DATE SIGNATURE

In the matter between:

FIRSTRAND BANK LTD First Applicant

KHOZA, NEKETANE PIET Second Applicant

KHOZA, SELINA Third Applicant

and

MEYER, GEORGE FREDERIK Intervening Party

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] This is an application for the rescission of the default judgment granted by the Registrar of this Court in favour of the first applicant against the second applicant and the third applicant on 5 November 2008.

[2] The application is opposed by the intervening party on the grounds set out later below.

[3] In the amended notice of motion, the applicants also seek an order declaring the sale in execution conducted by the Sheriff of the Court, Roodepoort, on 23 January 2009 to be null and void.

[4] The factual background to the application is as follows. The first applicant, Firstrand Bank, is initiating the application. The second applicant and the third applicant are a couple who are the registered owners of the immovable property known as Erf 594, Eagle Canyon Golf Estate, Honeydew Manor, Extension 8, ("*the mortgaged property*"). The first applicant holds a registered security bond over the mortgaged property for money lent and advanced to the second and the third applicants ("*the loan agreement*").

[5] At the time of the granting of the loan, and the registration of the bond over the mortgaged property, the second and the third applicants instructed the first applicant that they do not, and did not intend to reside at the mortgaged property. Instead, the second and the third applicants provided to the first applicant, and which was recorded by the first applicant, their residential and postal address as 109 Columbine Street, Mondeor, 2091 ("*the Columbine Street address*"). The second and the third applicants further

chose the Columbine Street address for the purposes of the service of notices and any court process arising from the loan agreement. Clause 20 of the mortgage bond agreement, which was executed by the Registrar of Deeds on 26 January 2007, reflects the *domicilium citandi et executandi* of the applicants as the Columbine Street address. By early 2008, the second and the third applicants had fallen in arrears with the payments in terms of the loan agreement. As a result, the first applicant instituted legal proceedings against them by issuing summons out of this Court on 23 September 2008. In the particulars of claim, the first applicant alleged that the second and the third applicants were ordinarily resident at the mortgaged property, and that they had chosen the mortgaged property as their *domicilium citandi et executandi*. The first applicant, supported by the second and the third applicants, states that this is factually incorrect in that the first applicant never instructed its attorneys that the second and the third applicants were ordinarily resident at the mortgaged property or that they had in fact chosen the mortgaged property as their *domicilium citandi et executandi*. The first applicant also never instructed its attorneys to serve the summons at the mortgaged property, as the Sheriff eventually did on 8 October 2008. The service was effected by affixing it to the outer door.

[6] The first applicant, as a result, contends that the service of the summons at the mortgaged property was defective because it was not the second and the third applicant's chosen *domicilium citandi et executandi*. As a consequence, the summons did not come to the notice or attention of the second and the third applicants. They did not oppose the action and the first

applicant's attorneys later applied to the Registrar for default judgment, which was granted on 5 November 2008 in the absence of the second and the third applicants. Following upon the granting of the default judgment, the first applicant's attorneys proceeded with the execution of the order, and the mortgaged property was sold in execution on 23 January 2009 to the intervening party who is ordinarily resident at 70 Blouberg Street, Noordheuwel, Krugersdorp. The first applicant, once more supported by the second and the third applicants, avers that it was only subsequent to the sale in execution of the mortgaged property to the intervening party that the second and the third applicants brought the defective service of the summons to the attention of the first applicant.

[7] Based on the above factual background, the first applicant contends that there had not been proper service of the summons on the second and the third applicants, and in the circumstances the first applicant erroneously sought and obtained default judgment.

[8] In the opposing papers, with which I shall deal briefly only, the intervening party denies that the default judgment was erroneously sought and obtained. He is a businessman, specialising in the residential property field. He purchases properties at sales in execution and resells these properties thereafter for a profit. He contends that on a proper reading of clause 20 of the mortgage bond, the second and the third applicants chose as their *domicilium citandi et executandi* either at the Columbine Street address or at the mortgage property. As a result, so the argument proceeded, the first

applicant was entitled to serve any process, at its option, at any one of the two addresses, so chosen. He has expended a sum of money in complying with the conditions of the sale in execution, and in seeking to register transfer of the mortgage property into his name, and simultaneously into the name of the person who subsequently purchased from him the mortgaged property. When the first applicant refused to cooperate, and threatened to cancel the sale, the intervening party approached this Court in order to enforce the sale agreement. As a result, on 14 July 2009, Coetzee J granted an order by default, declaring the agreement of sale in execution to be valid and binding. The first applicant's attorneys were also ordered to lodge the required documentation in order to effect transfer of the mortgage property into the name of the intervening party with the Registrar of Deeds. This has not happened to date. The second and the third applicants have attached supporting affidavits to the founding papers. So much for the facts, common cause or disputed.

[9] The issue in this application is really whether the default judgment granted on 5 November 2008 was erroneously sought and erroneously granted, and by implication, whether the service of the summons at an address not being the chosen *domicilium citandi et executandi* of the second and the third applicants was proper. It is also necessary to attempt at a proper interpretation of clause 20 of the mortgage bond.

[10] I deal with some applicable legal principles. It is trite law that in matters relating to rescission of judgments and the service of processes, the Court

has some discretion. Rule 4(1)(a)(i)-(iv) of the Uniform Rules reads as follows:

> "*Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:*
>
> *(i) By delivering a copy thereof to the said person personally: Provided that where such person is a minor or a person under legal disability, service shall be effected upon the guardian, tutor, curator or the like of such minor or person under disability;*
>
> *(ii) By leaving a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than sixteen years of age. For the purposes of this paragraph when a building, other than an hotel, boarding-house, hostel or similar residential building, is occupied by more than one person or family, 'residence' or 'place of business' means that portion of the building occupied by the person upon whom service is to be effected …*
>
> (iii) (Not applicable)
>
> *(iv) If the person to be served has chosen a domicilium citandi, by delivering or leaving a copy thereof at the domicilium so chosen; …*"

[11] In the present matter, it is common cause that Erf 594, Honeydew Manor Extension 8 is the mortgaged property. It is further common cause that the street address, the Columbine Street address, nominated by the second and the third applicants is not the street address of the mortgaged property. It is convenient to reproduce clause 20 of the mortgaged bond, which is entitled "*domicilium*":

> "*For the purposes of this Bond and of any proceedings which may be instituted by virtue hereof, and of the service of any notice, domicilium citandi et executandi is hereby chosen by the Mortgagor at 109 Columbine Street, Mondeor, Johannesburg, 2091 or at the option of the Bank or failing the insertion of an address in the space above, then at the mortgaged property and if more than one property is mortgaged, then at any one of them*"

The Columbine Street address was clearly typed in the space provided. There was clearly no failure to insert an address since it was done. The interpretation of the intervening party that the second and the third applicants, in effect, chose two addresses in the alternative, cannot be correct. The clause must be read by interpreting the clear and grammatical meaning according to the '*golden rule*' of interpretation. There is no alternative address chosen. It is evident from the agreement that the second and third applicants chose one address only, being the Columbine Street address. The alleged alternative address is plainly inferred by a standard term in the agreement and was never chosen by the second and the third applicants. In addition, when the second and the third applicants defaulted under the loan agreement, the first applicant addressed to them a notice in terms of section 129 of the National Credit Act 34 of 2005 at the Columbine Street address, and not at the mortgaged property.

[12] In my view, the argument advanced by the applicants in their heads of argument correctly sets out the applicable legal principles.

[13] The Supreme Court of Appeal, in *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A) at 5J-6, confirmed the principles of service at a chosen *domicilium* as follows:

> "*It is a matter of frequent occurrence that a domicilium citandi et executandi is chosen in a contract by one or more of the parties to it. Translated, this expression means a home for the purpose of serving summons and levying execution. (If a man chooses domicilium citandi the domicilium he chooses is taken to be his place of abode: see Pretoria Hypotheek Maatschappij v Groenewald 1915 TPD 170.) It is a well-established practice (which is recognised by Rule 4(1)(a)(iv) of the Uniform Rules of Court) that, if a defendant has chosen a domicilium citandi, service of process at such place will be good, even though it be a vacant piece of ground, or the defendant is known to be resident abroad, or has abandoned the property, or cannot be found. (Herbstein and Van Winsen The Civil Practice of the Superior Courts of South Africa 3rd ed at 210. See Muller v Mulbarton Gardens (Pty) Ltd 1972 (1) SA 328 (W) at 331H - 333A, Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd 1984 (3) SA 834 (W) at 847D-F.).*"

[14] In confirming the principle, the Supreme Court of Appeal confirmed the ratio in *Muller v Mulbarton Gardens (Pty) Ltd* 1972 (1) SA 328 (W) as follows, at 331H-332G:

> "*Generally speaking a person who chooses a domicilium citandi et executandi chooses a place where summons may be served on him and execution may be levied against his property. There are good reasons why a person may be required to choose such a domicile. See Rebuffus, Tractatus de domicilii electione et a quisus, quando, et usi eliqi debeat; Glossa Una. I think it is also reasonably clear that such an election is only made in respect of litigation.*
>
> …
>
> *Our Courts adopt the view that normally where a person chooses a domicilium citandi et executandi, the domicilium so chosen must be taken to be his place of abode within the meaning of the Rule of the Rules of Court which deals with the service of a summons. Downey v Downey, 16 S.C. 475; Pretoria Hypotheek Maatschappij v Groenewald, 1915 T.P.D. 170; Botha v Measroch, 1916 T.P.D. 142; I'ons v Freeman & Frock, 1916 W.L.D. 64; Hollard's Estate v Kruger, 1932 T.P.D. 134; Lindrup v Lowe, 1935 NPD 189 at pp. 192 to 193; Goldberg and Another v Di Meo, 1960 (3) SA 136 (N) at p. 143.*"

[15] The *Amcoal* matter *supra* confirms further the *dicta* of Margo J, sitting in this Division, in the matter of *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (W), at 847C-F, the Court held the following:

> "*The choice of a domicilium citandi et executandi is primarily related to the service of process in judicial proceedings. As appears from Rule 4 (1) (a) (iv), which reflects our common law practice (see Muller v Mulbarton Gardens (Pty) Ltd1972 (1) SA 328 (W) at 331 in fine to 333H and the authorities there cited), service of any process may be effected by delivering or leaving a copy thereof at the domicilium chosen by the party concerned. Such service is then good, even if the process may not be received, for the very purpose of requiring the choice of a domicilium is to relieve the party causing service of the process from the burden of proving actual receipt. Hence the decisions in which service at a domicilium has been held to be good, even though the address chosen was vacant ground, or the party was known to be resident abroad, or had abandoned the property, or could not be found. See the cases cited in the Mulbarton case, supra at 332G, and in Herbstein and Van Winsen's The Civil Practice of the Superior Courts in South Africa 3rd ed at 210, notes 80 to 84.*"

[16] Despite the wording of the *domicilium* clause it is clear that the second and third applicants chose the Columbine Street address as their chosen *domicilium citandi et executandi*.

[17] Moreover, service of a process document in terms of Rule 4(1)(a)(iv) at an address chosen by a party to a contract is not tantamount to the fulfilment of a contractual provision.

[18] Despite service effected in terms of the provisions of Rule 4(1)(a) this Court has a discretion by operation of Rule 4(10) that provides as follows:

> "*Whenever the court is not satisfied as to the effectiveness of the service, it may order such further steps to be taken as to it seems meet.*"

[19] Despite service in terms of Rule 4(1)(a)(iv), the Court required alternative forms of service in the matter of *Firstrand Bank Ltd v Gazu* 2011 (1) SA 45 (KZP) at 47B-48C.

[20] In the *Gazu* matter the Court exercised its discretion as follows:

> *[11] In Amcoal Collieries Ltd v Truter1990 (1) SA 1 (A) at 5I Nicholas AJA stated:*
>
> > *'It is a matter of frequent occurrence that a domicilium citandi et executandi is chosen in a contract by one or more of the parties to it. Translated, this expression means a home for the purpose of serving summons and levying execution. (If a man chooses domicilium citandi the domicilium he chooses is taken to be his place of abode. . .). .It is a well-established practice (which is recognised by Rule 4(1)(a)(iv) of the Uniform Rules of Court) that, if a defendant has chosen a domicilium citandi, service at such a place will be good, even though it be a vacant piece of ground, or the defendant is known to be a resident abroad, or has abandoned the property or cannot be found . . . . It is generally accepted in our practice that the choice without more of a domicilium citandi is applicable only to the service in legal proceedings . Parties may, however, choose an address for the service of notices under the contract. The consequences of such a notice must in principle be the same as the choice of a domicilium citandi et executandi . . . namely that the address chosen is good service, whether or not the addressee is present at the time.'*
>
> *[12] Notwithstanding the dicta referred to above, this court has a discretion with regard to the provision of service. In this matter it is clear that:*

(a) Miss Gazu was contracting with a banking institution; and

(b) the provision of the domicilium citandi et executandi is stated in clause 20 of the mortgage bond to be at the hypothecated property; and

(c) those words 'THE HYPOTHECATED PROPERTY' have been typed into the mortgage bond which was a document obviously prepared by the bank; and

(d) it is notorious that, in dealing with the banks, mortgage bonds and other formal documents are presented to their clients on a 'take it or leave it' basis, and the ability of the other contracting party to balance out the unequal bargaining power in the mortgage bond is extremely limited, if not entirely excluded; and

(e) given the requirements with which banks have to comply in order to meet their obligations in terms of the provisions of the Financial Intelligence Centre Act 38 of 2001, it is inevitable that the bank will have a great deal of personal information concerning the applicant. This information will almost certainly include matters such as a residential address, a home and cell telephone numbers and even probably the e-mail address of Miss Gazu.

[13] In those circumstances it seems unfair that the bank made no further effort whatsoever to contact Miss Gazu and notify her that it was taking such drastic action against her.

[14] In the premises I make the following order:

(a) The application for default judgment is declined.

(b) The plaintiff is given leave to apply to the registrar of this court on the same papers supplemented, insofar as it is able to do, with regard to the provision of service of the combined summons on the defendant, at any other address available to the plaintiff in its records. In the event the plaintiff has no other means of contacting the defendant in its records, then it is granted leave to place this application, supplemented to set out those circumstances, before the registrar for default judgment.

(c) The costs of this application for default judgment are to be costs in the cause of the action."

[21] The *Gazu* matter is persuasive authority that this Court should exercise its discretion in favour of the applicants. More so in this application where a chosen *domicilium* was provided and the first applicant elected to use the mortgaged property address for service, knowing that the summons would not come to the second and third applicants' notice. The execution debtors are the applicants.

[22] Rule 42(1)(a) of the Uniform Rules of Court provides as follows:

> "*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.*"

In *Colyn v Tiger Food Industries Ltd* 2003 (6) SA 1 (SCA), at para [3], the Court said:

> "*The question is whether in these circumstances the judgment can properly be rescinded in terms of Rule 42(1)(a) of the Uniform Rules of Court. Rule 42(1)(a) provides that the High Court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. The arguments before us centre on the question whether the facts upon which the defendant relies give rise to the sort of error for which the Rule provides and, if so, whether the order was erroneously sought or erroneously granted because of it.*"

The test was restated in *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A), at 1043B. It is also not necessary for the party seeking the rescission under Rule 42(1) to show good cause as is required with other types of applications for rescission of a default judgment. See *Topol v LS*

Group Management Services (Pty) Ltd 1988 (1) SA 639 (W) at 650D-J. In the present matter, the applicants have established convincingly that there was a *bona fide* error. It was caused by the first applicant which led to the service of the summons to be served at the mortgaged property instead of at the second and the third applicants' chosen *domicilium*, namely at the Columbine Street address.

[23] The evidence, which the intervening party cannot dispute, is overwhelming that the second and the third applicants never received the summons, and as a result, they could not defend the action. In *Fraind v Nothmann* 1991 (3) SA 837 (W), at 839H, the Court said:

> "*In the premises, there had not been service of the summons on the applicant and the judgment should not have been granted against him. Judgment was therefore granted erroneously in the absence of the applicant and is liable to be set aside in terms of Rule 42(1)(a).*"

The argument of the intervening party in resisting the rescission of the judgment in the present matter is plainly untenable. In his opposing papers the intervening party further alleges that he has fulfilled all his obligations in terms of the purchase agreement relating to the mortgaged property. There is a dispute in this regard. I am unable to make a definitive finding in this regard. In any event, the applicants deny the version.

[25] In terms of the amended notice of motion, the applicants seek an order rescinding and setting aside the default judgment. They also seek an order declaring as null and void the sale in execution, as well as costs against the

intervening party. I have some difficulty in granting prayers 2 and 3 of the amended notice of motion. Having found that the default judgment was obviously granted erroneously, it follows that in the exercise of my discretion, the default judgment ought to be rescinded. However, in regard to the sale in execution, it is my view that it will be improper to accede to the request that such be declared null and void without the Sheriff having been joined in these proceedings. Furthermore, there is presently a dispute regarding the fulfilment of the conditions of the sale. In addition, there is in place an order of Coetzee J declaring the sale to be valid. I have not been called upon to rescind such order, although the finding that the judgment was sought and obtained erroneously would suggest that the sale ought to fall away as well. In regard to costs, and in the exercise of my discretion, this is a proper case to order that the first applicant should pay the costs. The first applicant is clearly to blame for obtaining the default judgment. The intervening party's opposition was reasonable. By all accounts, he appears to have acted *bona fide* in purchasing the mortgaged property at the auction.

[26] In the result the following order is made:

(1) The default judgment granted by the Registrar of this Court under Case No. 08/32310 on 5 November 2008 is hereby rescinded and set aside.

(2) Prayer 2 of the amended notice of motion seeking to declare the sale in execution null and void is postponed *sine die* for the joinder of the Sheriff.

(3) The first applicant is ordered to pay the costs of the application, including the costs of two counsel, where applicable.

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D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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