**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 20402/2012

**DELETE WHICHEVER IS NOT APPLICABLE**

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

In the matter between:

**ABSA BANK LIMITED** **APPLICANT**

and

**WU, CHONGGUANG** **FIRST RESPONDENT**

**LI, JIA** **SECOND RESPONDENT**

**Coram:** WEPENER J

**Heard: 12 MARCH 2014**

**Delivered: 14 MARCH 2014**

**Summary: Foreclosure in matter where execution is sought against immovable property that may be the primary residence of the consumer – practice directive that personal service on consumer required – practice directive to be adhered to.**

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**JUDGMENT**

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**WEPENER J:**

[1] This is an application for default judgment and declaring immovable property executable. In such matters the practice directive of this court is that the attorney must file an affidavit in accordance with draft, affidavit set out in the practice directive. Under the heading Service of Process the following appears:

> 1.7.1. The process was served personally as appears at page – para - ; or
>
> 1.7.2. Service was affected as appears at page – para – as authorised by the court (Powel para 7.9) as appears at page – para -.

[2] I do not think that there can be any uncertainty as to the fact that personal service is required and failing such, a court can authorise another form of service. This requirement was introduced by the practice directive as a result of the plethora of litigation to set default judgments aside and based on considerations of the interests of justice when execution is sought against property, which may be a primary residence.

[3] The Constitution in section 26 provides:

> ’26. Housing
>
> (1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions'.

[4] This led to the Constitutional Court holding that a foreclosure and execution against immovable property, which might be a person's primary residence or home, can only occur with due regard to the provisions of section 26 of the Constitution. Since the *Gundwana*[1] and *Jaftha*[2] matters it has been a trite principle and after the amendment of Uniform Rule 46, it is now generally accepted that execution against immovable property (in this context always referred to as residence or home) can only be ordered by a court of law, the latter which should have due regard to all the circumstances of the case.

[5] Changes in legislation, and in particular safeguards favouring consumers, have been introduced, most notably by the National Credit Act, 32 of 2005 (NCA) and by the development of the law by the High Courts, Supreme Court of Appeal and Constitutional Court pursuant to its duties imposed, both by legislation and in particular, the Constitution and the *stare decisis* rule.

[6] Thus taking into account that banks are ordinarily entitled to their judgments and execution, certain safeguards or requirements developed during the last few years to protect consumers. In the Western Cape, in the matter of *ABSA Bank Ltd v Janse van Rensburg and Another* 2013 (5) SA 173 (WCC), a full bench has set out certain requirements of practice in that Division. Similarly, this Division has issued a practice directive setting out requirements to be adhered to.

[7] In his affidavit filed in this matter, the attorney did not state that which is contained in either paragraphs 1.7.1. or 1.7.2. of the practice manual. He stated:

'The process was served on a person as appears at pages 122 of the additional bundle'.

[1] Gundwana v Steko Development Others 2011 (3) SA 608 (CC)
[2] Jaftha v Schoeman and Others; van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC)

[8] This is not in compliance with the practice directive and I caused the attorney to file an affidavit to explain this clear non-compliance with the practice directive. An affidavit was filed. The attorney admits that "service was affected on a person but not personally as stipulated in the practice manual". After quoting the practice manual, he then states:

> 'The aforesaid paragraph clearly stipulates that there must be personal service in accordance with the decision of Powel.'

This statement is devoid of any substance if regard is had to the clear wording of the practice directive which requires personal service upon the consumer and alternative service, if personal service is not possible.

[9] The attorney, despite him ignoring paragraphs 1.7.1. in order to make this allegation, then arrogantly suggests that the practice manual requiring personal service in paragraph 1.7.1. was an oversight or error and should have stipulated that service on a person would suffice. This, in my view, is a contemptuous attitude towards the practice manual and the courts. It shows that the attorney understands that personal service is required in this Division, but that he elects to regard it as an oversight or error and that practice manual should have read differently.

[10] In the heads of argument, counsel for the applicant refers to *Greenberg v Khumalo* (GS case numbers 22258/02 and 23302/02 ) wherein Potgieter AJ found that a practice manual, which conveys a requirement additional to those contained in the Rules, is procedurally incompetent and of no force and effect and should not be applied. Based on this view, it was argued that the additional requirement for the personal service is inconsistent with the Rules.

[12] However, in *In re: Several matters on the urgent court roll* [2012] ZAGPLHC 165; [2012] 4 All SA 570 (GSJ0; 2013 (1) SA 549 (GSJ) (18 September 2012) the following was said:

> 'In *Greenberg v Khumalo and Another* [2012] JOL 29170 (GSJ), Potgieter AJ held that the practice directive which is inconsistent with the Rules is procedurally

incompetent. I disagree with the views expressed in Greenberg for two reasons. Firstly on the reasoning of the learned judge it has to be determined whether a practice directive is indeed inconsistent with the Rules. If the practice directive is compatible with or in addition to the Rules, the objection of the learned judge falls away.

More importantly though, there has been a prescribed practice in this Division as in many other Divisions where practice directives have been issued by the Judges President or Deputy Judges President on authority of the Judges President. This practice has been a long standing one that has been respected by judges and practitioners.

The reasoning in the *Greenberg* matter in paragraph 17 is as follows:

> "[17] The Supreme Court Act empowers the judge president of a provincial division to make rules regulating proceedings with reference to the times for the holding of courts, the placing on the roll of actions for hearing and the extension or reduction of time periods in terms of the Rules of Court. In terms of Rule 1 of the Rules of Court "action" is defined to mean "a proceeding commenced by summons or by writ in terms of rule 9". Accordingly, the provisions of the Supreme Court Act as to the powers of the judge president to make rules are not relevant to the matters under discussion."

I do not believe that it is correct to interpret the word "action" in the Supreme Court Act 59 of 1959 ('Supreme Court Act') be referring to the definition in the Rules. The meaning of the word "action" in the Supreme Court Act is to be determined with reference to that Act. There is no definition of the word "action" in the Supreme Court Act. It is consequently necessary to interpret the word "action" in section 43 of the Supreme Court Act purposefully for puposes of that Act. As was pointed out by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Enviromental Affairs* 2004 (4) SA 490 CC para 90:

> "The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be constructed are clear and unambiguous. Recently in Thoroughbred Breeders' Association v Price Waterhouse 2001 (4) SA 551 (SCA) at para 12 the SCA has reminded us that:

> "The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have readily discernable meaning."

If regard is had to the definition section of the Supreme Court Act wich defines "civil summons" as:

> "…any summons whereby civil proceedings are commenced, and includes any rule nisi, notice of motion or petition the object of which is to require appearance before the court out of which it is issued of any person against whom relief is sought in such proceedings or of any person who is "interested in resisting the grant of such relief;"

and "defendant":

> "…includes any respondent or party against whom relief is sought in civil proceedings;"

and "plaintiff":

> "…includes any petitioner or other party who seeks relief in civil proceedings

I am of the view that there can be no doubt that the Supreme Court Act is intended to regulate all proceedings in the High Court and not only actions in the narrower sense as described in the Rules. The legislature could not have intended that a Judge President can only make rules regarding actions in the narrow sense of the word. There is no justification to have recourse to a definition in the Rules to interpret the meaning of a word in the Supreme Court Act.

I am consequently of the view that the word "action" in s 43 of the Supreme Court Act should be read to include all proceedings in the High Court. This would entitle the Judge President to issue practice directives relating to the setting sown of matters both in action and in application court. In the circumstances, all practice directives issued by the Judge President, or which are issued on his authority in relation to matters contained in the Practice Manual, are competent and should be adhered to.' (own underlining)

[13] The practice manual was issued as a directive from the head of this court. It is binding upon practitioners, at least until set aside or amended. (See *Oudekraal*

*Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 26). In *Judicial Service Commission v Cape Town Bar Council* 2013 (1) SA 170 (SCA) Brand JA said in para 13 as follows:

> 'As I see it, the short answer to this contention is, however, that this is not so. The mere fact that an administrative decision was unlawful does not visit all its consequences with automatic invalidity. Unless and until an administrative decision is challenged and set aside by a competent court, the substantive validity of its consequences must be accepted as a fact (see eg *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) (2011 (2) BCLR 121) para 62). Moreover, even if an administrative decision is challenged and found wanting, courts still have a residual discretion to refuse to set that decision aside (see eg *Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA) ([2008] 3 All SA 245 para 13). In a sense, the 'invalid' administrative decision is then, in the exercise of the court's discretion, clothed with validity (see eg *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) ([2005] 4 All SA 487) paras 28 – 29; *Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 9).'

It is not for an individual practitioner to decide what the practice manual 'should have stipulated'. The procedure, as is the case in sequestration and divorce proceedings, requires personal service as a matter of practice due to its constitutional importance to consumers.

[14] The attorney then sets out the fact that a full bench of this Division is in due course to consider the question of personal service in foreclosure matters. This underlines his knowledge of the requirement of personal service. No full bench of this Division has heard such an appeal and the attorney's unequivocal disregard of the provisions of the practice manual is consequently deliberate.

[15] Attorneys who wish to deliberately disregard their duties to the court are, in my view, contemptuous of the very court they are required to assist to bring matters to a successful conclusion,

[16] Having regard to the behaviour of the applicant's attorney and due to the deliberate failure to comply with the practice directive, the matter is removed from the roll. This matter may not be re-enrolled unless there is compliance with the practice directive if this Division. I further order that the attorney may not recover any costs from the applicant in this matter up to this stage of the matter due to his conduct referred to above. I further direct that the registrar of this court must forward a copy of this judgment and order, directly to the applicant as well as to the Law Society of the Northern Provinces.

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**Wepener J**

Counsel for Applicant: J. A. Swanepoel

Attorneys for Appellant: Smit Sewgoolam Inc.