IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 40411/2016

REPORTABLE: ~~YES~~ / NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED.
28.09.2021

In the matter between:

ISAAC MOHLOKI MOTLOUNG Applicant

and

MEYERSDAL NATURE ESTATE HOMEOWNERS ASSOCIATION (NPC) Respondent

JUDGMENT

CRUTCHFIELD AJ:

[1] This opposed application came before me on 27 July 2021. The applicant, Mohloki Isaac Motloung, claimed the rescission of a judgment taken by default by the respondent, Meyersdal Nature Estate Home Owners Association (NPC), against the applicant for payment of R225 924.34, on 20 January 2017 under case number 2016/40411 ('default judgment'). The respondent was the plaintiff in the action proceedings.

[2] In addition, the applicant sought condonation for the late filing of the replying affidavit and costs *de bonis propriis* against the respondent's attorney on the basis of alleged malicious conduct amounting to abuse of the process of this Court.

[3] The respondent claimed the dismissal of the application for condonation with costs and the dismissal of the rescission application with costs on an attorney and client scale.

[4] The application for rescission was brought in terms of Rule 42 of the Uniform Rules of Court. The application was served on the respondent's attorneys on 28 September 2017.

[5] The respondent contended that the application was brought at a significantly late stage after the existence of the judgment came to the applicant's attention and that the applicant failed to set out a *bona fide* defence to the action.

[6] The applicant and his wife, Annah Mamokale Motloung, to whom the applicant is married in community of property, are the owners of a vacant stand, Erf [....], Ext 9, Nature Estate, Meyersdal, having street address [....] T[....] Street, Nature Estate, Meyersdal ('Erf'). The Erf is situated inside a communal residential estate, Meyersdal Nature Estate, of which the respondent is the controlling and managing agent.

[7] The respondent, prior to the events leading up to the commencement of this application, issued summons for payment of R57 157.49 against the respondent in the Palm Ridge Magistrates' Court under case number 3341/2014 on 24 April 2014 (the 'Palm Ridge action'). The respondent procured service of the summons in the Palm Ridge action on the applicant's chosen *domicilium citandi et executandi*, being the Erf, a vacant stand. Once the *dies induciae* for delivery of a notice of intention to defend had expired, the respondent sought judgment by default against the applicant.

[8] The summons in the Palm Ridge action came to the applicant's attention after the respondent had applied for default judgment. Notwithstanding the applicant's delivery of a notice of intention to defend outside of the permitted time period, the respondent obtained default judgment against the applicant and his wife on 13 August 2014.

[9] The applicant and his wife subsequently launched an application for rescission of the default judgment that was granted on 12 August 2015 together with costs *de bonis propriis* against the respondent's attorney.

[10] Subsequently, the quantum in the Palm Ridge action was increased by agreement to R134 340.30 under a consent to jurisdiction of the District Court given by the applicant. Thereafter, the proceedings were held in abeyance by agreement between the parties subject to certain conditions.

[11] On 25 August 2017, the applicant became aware of a writ of attachment issued under case number 40411/2016 in this Court, when the Sheriff arrived at the applicant's home with the writ. The applicant attempted to procure copies of the relevant documents from the court file but to no avail. Thereafter, on 11 September 2017, the applicant obtained copies of the papers from the respondent's attorney.

[12] The applicant gleaned that service of the summons under case number 40411/2016, occurred on 28 November 2016 by service on the Erf, the applicant's chosen *domicilium citandi et executandi* (the '*domicilium address').* Judgment by default was granted against the applicant on 11 January 2017.

[13] The applicant argued that he had no knowledge of the judgment prior to the Sheriff arriving at his home with the writ and the applicant obtaining copies of the papers from the respondent's attorney. Service of the summons at the applicant's *domicilium address* did not come to the applicant's attention.

[14] One of the arguments raised by the applicant at the hearing was that service ought not to have taken place at his chosen *domicilium* address but at the address that he nominated for the delivery of all process in the Palm Ridge action. I deal with that argument hereunder.

[15] Furthermore, the applicant contended that service on his *domicilium* address was bad service given that the respondent knew, regard being had to the proceedings in the Palm Ridge action, that it was improbable that service at the applicant's *domicilium* address would come to the applicant's attention during the time period available to him to deliver a notice of intention to defend the action. The

applicant relied in this regard on the judgment of *Absa Bank Limited v Mare & Others*.[1]

[16] Effective service, being the essential purpose of Rule 4 of the Uniform Rules of Court, requires that the process so served be brought or come to the attention of the party intended to receive such process.

[17] The fact that a party nominates a *domicilium* address does not preclude a plaintiff from taking such steps as are reasonably necessary to ensure that effective service occurs, that the summons comes to the attention of the intended defendant.[2]

[18] Furthermore, the choice of a *domicilium* address by a defendant does not preclude or prevent a plaintiff from invoking an alternate method provided for in terms of Rule 4,[3] if use of such alternate method is necessary in order to achieve effective service on the defendant.

[19] The circumstances in this matter are somewhat unusual given the proceedings in the Palm Ridge action in terms of which service at the applicant's *domicilium* address was not effective and the summons did not come to the applicant's notice timeously.

[20] Hence, the respondent's attorney knew or ought to have realised that there was a reasonable likelihood that service of the summons under case number 40411/2016 at the applicant's *domicilium* address, would not come to the applicant's attention timeously and would not constitute effective service.

[21] Notwithstanding, the respondent persisted with service at the applicant's *domicilium* address, which did not come to the applicant's notice prior to default judgment being granted.

[22] In the particular circumstances of this matter, the respondent ought to have taken steps additional to service on the applicant's *domicilium* address, or, invoked alternate methods of service in terms of Rule 4 in order to ensure effective service of the summons on the applicant. The respondent was in possession of the applicant's

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[1] *Absa Bank Limited v Mare & Others* 2021 (2) SA 151 (GP) ('*Mare*').
[2] *Botha v Measroch* 1916 TPD 142 at 148; *Grobler v Schmahman Bros* 1916 TPD 218 at 222-3.
[3] *Sandton Square Finance (Pty) Ltd v Biagi, Bertola and Vasco* 1997 (1) SA 258 (W) at 260C.

residential address as well as the address from which the applicant practises as an attorney but failed to make use of them for purposes of service of the summons.

[23] Whilst I accept that service on a *domicilium* address in circumstances where there is a reasonable probability that such service will come to the attention of the defendant, is good and valid service, the particular circumstances of this matter take it outside of that general principle.

[24] Notwithstanding, the applicant's submission that the respondent ought to have served the summons on the address chosen by him for the delivery of process in the Palm Ridge action holds no merit. That submission, if given effect to, would have resulted in uncertainty and confusion and could have served potentially as a basis for a rescission application. The chosen address for service of process in the Palm Ridge action was limited to service in that matter only.

[25] The provision of a *domicilium* address by the applicant to the respondent did not prevent or preclude the respondent from serving the summons on an alternate address in terms of Rule 4, if such service was necessary in order to obtain effective service. In my view, the respondent ought to have taken such additional steps in the light of the circumstances of this matter.

[26] In *Mare*,[4] Kubushi AJ, in the court *a quo*, stated:

> " … 'even though uniform rule 4(1)(a)(iv) allows for service at a chosen *domicilium citandi* by delivering or leaving a copy of the process at such address the rule does not, …, preclude strict compliance with the rules governing proper and effective service required by the rule … By simply leaving the process to be served at the *domicilium citandi*, … without taking the necessary precautions that same will come to the notice of the defendant, does not constitute effect service to me'."

[27] Whilst the *Mare* judgment dealt with service in respect of the execution, sale and transfer of ownership of a residential property, the requirement of effective service on a defendant in terms of Uniform Rule 4 applies equally to this matter.

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[4] *Mare* note 1 above para 12.

[28] As regards the alleged lateness of the application itself, the applicant obtained knowledge of the content of the court file from the respondent's attorneys on 11 September 2017. The applicant issued this application on 28 September 2017, well within a reasonable period of time as required by Rule 42(1).

[29] The respondent argued that the applicant did not allege a defence to the action. Rescission of the judgment, however, was sought on the basis that the judgment was granted erroneously pursuant to the absence of proper service of the summons on the applicant. A defence to an action in which a judgment was erroneously granted is not a prerequisite to the rescission of the judgment.

[30] In respect of the condonation for the late filing of the replying affidavit, the document placed before me was not commissioned and was withdrawn by the applicant at the hearing.

[31] In the light of that stated above, I am of the view that the applicant is entitled to rescission of the default judgment granted under case number 40411/2016.

[32] There is no reason why the costs of this application should not follow the merits of the outcome on a party and party scale.

[33] By virtue of the aforementioned, I grant the following order:

1. The judgment granted by default on 20 January 2017 under case number 2016/40411 is rescinded.

2. The applicant is ordered to deliver a notice of intention to defend the action under case number 2016/40411 within ten (10) days of delivery of this judgment.

3. The respondent is ordered to pay the costs of this application.

A A CRUTCHFIELD SC
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 28 September 2021.

ATTORNEY FOR THE APPLICANT: Mr Motloung (in person).

INSTRUCTED BY: Maluleke Seriti Makume Matlala Inc (Germiston)

COUNSEL FOR THE RESPONDENT: Mr J W Kloek.

INSTRUCTED BY: S Brown Attorneys Inc.

DATE OF THE HEARING: 27 July 2021.

DATE OF JUDGMENT: 28 September 2021.