IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: A809/2012
COURT A QUO CASE NUMBER: 10843/1996

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

....
DATE SIGNATURE

In the matter between: DATE: 17/6/2014

CHRISTIAAN TROSKIE NEETHLING Appellant
(Respondent *a quo*)

And

MBD SECURITISATION Respondent
(Applicant *a quo*)

CORAM:

MASIPA T.M, J
BAM A.J, J
STRAUSS S, AJ

HEARD ON: 11 JUNE 2014

DELIVERED: 13 JUNE 2014

JUDGMENT

STRAUSS AJ

1. This is an appeal against a judgment of the North Gauteng High Court, Pretoria dated 4 May 2012, in which the Learned Judge

granted an application by the respondent for substitution of Absa Bank with the respondent as judgment creditor, and thereafter confirming the judgment in favour of the respondent, for default judgment granted on 27 September 1996 by the Registrar, leave to appeal was refused by the trial court but subsequently granted by the SCA.

2. Default judgment was granted by the registrar of this Court on 27 September 1996 in favour of Absa Bank, against the appellant.

3. Absa Bank, inter alia, sold the appellant's account to Asset Solution Company Trading (Pty) Ltd ("ACS") in terms of an account of sale agreement and thereafter ACS ceded its rights and, inter alia, the appellant's account to the respondent in terms of a written deed of cession.

4. The respondent then instituted on application relief for an order substituting Absa Bank with the respondent as judgment creditor in relation to the default judgment and an order as envisaged in Rule 66(1) for the revival of the judgment as no warrant of execution could be located by the respondent.

5. The appellant opposed the relief so sought by filing an opposing affidavit and a counter-application for rescission of the default judgment.

6. The respondent filed a replying affidavit and also addressed *de novo* issues raised by the latter counter-application.

7. At the hearing of the matter the appellant produced the writ of execution together with a notice of attachment served in October 1996, thereby negating the necessity of the respondent to seek revival of the judgment and the relief sought in terms thereof was abandoned.

8. The hearing subsequently proceeded only upon the question of whether the application for substitution of the judgment creditor should be granted, and in doing so the Court *a quo* considered the counter-application of the appellant and therefore also considered the facts that lead to the default judgment.

9. The Court *a quo* in considering the facts of the application and counter application, found that there was proper service upon the appellant of the summons. The cause of action in the summons, under case number 10843/96, was based on a deed of surety signed by the appellant. The appellant is cited in the

summons as one CT Neethling, a major man with chosen *domicilium citandi et executandi* at Parkel Woonstel, 2007 Boeing Street, Elardus Park, Pretoria.

10. The appellant throughout and in his application for rescission contended that there was a dispute of fact as he denied that the summons had been served on him by the Sheriff. It was common cause that no proof by way of a sheriff's return, could be provided. The appellant therefore contended that the default judgment granted in 1996, is void *ab origine* and that it was unnecessary to bring a rescission application, should this be found.

11. The Court *a quo* found in its judgment that the allegation of the appellant not having received the summons did not necessarily give rise to a real dispute of fact regarding the actual service, as the respondent had approached the Court at the outset stating that the return of service of the original summons in respect of the appellant, being one of the defendants in the initial action, could not be traced.

12. The Court *a quo* on the issue of non-service assessed the probabilities of service having taken place, and referred to the notes of the Registrar when granting and considering default

judgment, indicating an amount of R197.40 in respect of Sheriff's costs which had been calculated by way of a written inscription on the return of service on the first defendant, and that this hand-written note indeed referred to the service on the first defendant , as the amount of R55.12 supposedly referred to a return of service on the appellant.

13. The return of service the Court *a quo* referred to was in respect of the first defendant, was dated 31 May 1996, and reflected another address being […..] Pretoria East. The Court continued to mention service on each of the other respective defendants that took place at their *domicilium citandi et executandi* addresses, which addresses were different from that of the appellant's as previously mentioned, but was effected by the same sheriffs' office.

14. The return of service in respect of the service on the appellant could not be located on the Court file or at the offices of the then plaintiff or at the offices of the Sheriff, such records having been destroyed as a result of the lapse of time.

15. The Court *a quo* found that when the Registrar granted the default judgment it did so firstly against all the said three defaulting defendants and, secondly, by also totalling the

Sheriff's fees for service of the summons on the said three defendants.

16. The Court *a quo* also found that the query list of the Registrar indicating deficiencies in the application for default judgment, merely requested copies of a draft order of the order sought, and the relevant block querying "service" had not been ticked by the registrar.

17. The Court *a quo* found that in all probability and based on the above notes of the Registrar the summons had been served and a return had been placed before the Registrar who had then correctly granted the default judgment.

18. The court *a quo* did not consider whether service was affected on the appellant with regard to the letters written by the appellant to the attorneys of the respondent at the time, subsequent to the default judgment, as these letters were never referred to by the court *a quo.* The content of the letters written by the appellant did not contain any admission that the summons was served on him, but referred to previous correspondence between the appellant and the attorneys.

19. It was however argued by counsel for the respondent that this court should have regards to these letters as a indication that service of the summons was effected on the appellant, due to the appellant offering to pay the legal cost of the then respondent. There was no substance in this argument.

20. When having regard to the citation of the addresses of the defendants in the initial summons the Court *a quo* failed to have regard to the fact that the Sheriff who would attend to the service of the summons on the other defendant*s vis a vis* the appellant would be a different Sheriff, being the Sheriff's office Centurion, as all the other addresses, with the exception of the appellant, were in [….], Pretoria. The appellant's address, as previously stated, was in Elardus Park, which does not fall under part of the jurisdiction of the Sheriff, Pretoria East.

21. The Court *a quo* therefore did not consider whether a different Sheriff had been used to effect service on the appellant and it was not placed before the Court *a quo*.

22. Further, the Court *a quo* erred, in my view, to find that due to the existence of the other returns of service, the probability existed that service was effected on the appellant. There was no basis for this finding.

23. As to the law on service of summons, Rule 4(1)(a)(ii) in the Uniform Rules of Court provides as follows: *service of any process of the Court directed to the Sheriff and, subject to the provisions of paragraph (a), any document initiating application proceedings shall be effected by the Sheriff in one or other of the following manners:*

> *By leaving a copy thereof at the place of residence or business of the said person…*

Rule 4(d) states that:

> *It shall be the duty of the Sheriff or other person serving the process or documents to explain the nature and contents thereof to the persons upon whom service is being effected and to state in his return or affidavit or on the signed receipt that he has done so.*

Rule 4(6) states that:

> *Service shall be proved in one of the following manners:*
>
> *(a) Where service has been effected by the Sheriff by the return of service of such Sheriff.*

Rule 4(10) states that:

> *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.*

24. As set out in ***Robertson v Swan & Kelly 1905 15 CTR 16*** judgment will only be given against those served. The only proof of service therefore in terms of the Rules is the Sheriff's return. A positive return of service is therefore *prima facie* evidence of service on a defendant.

25. In terms of Rule 4(6) there is also a duty on the Court to inspect the return. If the Court finds that service does not comply with the requirements the Court should not grant any relief prayed for in default, before a proper return has been obtained. This is set out in ***Ritchie v Andrews 1882 (2) EDC 25C*.**

26. It remains a cornerstone of our legal system that a person is entitled to notice of any proceedings brought against him, and in the event that the defendant has not been notified the subsequent proceedings are void and any Court order granted in terms thereof is without any force or effect and can be ignored without the necessity of a formal application to set it aside.

27. It is therefore trite law that if a summons was not served on a defendant, in this case the appellant, a subsequent judgment taken by default is invalid and unenforceable. The evidence relied upon by the respondent and the Court *a quo* was insufficient and amounted to nothing more than speculation.

28. This Court finds that the facts considered by the Court *a quo* were nothing more than possibilities which could not equate to *prima facie* proof of service.

29. The Court *a quo* was not entitled in the circumstances to make deductions on the probabilities of service on the appellant.

30. In my view the Court *a quo* misdirected itself in finding on the probabilities that the summons was served on the appellant.

31. The post litigation communication by the appellant cannot be regarded as proof of service of the summons, as it would be speculation and conjecture especially due to the fact that the communication refers to previous correspondence between the appellant and the respondent attorneys, and the letters written to the appellant to which he replied were also not found, and did not form part of the record.

32. Once this Court has found in favour of the appellant, on this issue, the question in regard to the session of the claim, debt or such to the Respondent, becomes academic and unnecessary for this Court to deal with. Due to the fact that the respondent could not cross the first hurdle to prove that summons had indeed been served on the appellant. Therefore in my opinion the default judgment granted was not a valid judgment in law.

I therefore propose that the following order is made:

1. The appeal is upheld with costs.

2. The order of the Court a quo is set aside and substituted with the following order:

3. The applicant's application to confirm the default judgment of 27 September 1996 is dismissed with costs.

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MASIPA, T M
JUDGE OF THE HIGH COURT, PRETORIA

I Agree:

_____

BAM, A J
JUDGE OF THE HIGH COURT, PRETORIA

I Agree:

_____

STRAUSS, S
ACTING JUDGE OF THE HIGH COURT, PRETORIA