

**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO: 9383/2012**

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

.....  
DATE

.....  
SIGNATURE

In the matter between:

**MARTINES JOHANNES BARNARD**

**APPLICANT**

**And**

**NEDBANK LIMITED**

**RESPONDENT**

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**JUDGMENT**

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**WEBSTER J**

1. This is a rescission application against an order granted by this court on 4 May 2012. It was enrolled on the opposed motion roll as the respondent filed a notice of intention to oppose the application.

2. Much is said in the founding affidavit of an agreement between the applicant and Brusson Finance (Pty) Ltd. For purposes of this application it is not necessary to deal with the various allegations and arrangements between the applicant and Brusson Finance (Pty) Ltd nor the validity of any agreements.
3. The most crucial point to be considered is whether the applicant knew about the action which was instituted by the respondent by way of summons. The applicant alleges in his founding affidavit at page 19, paragraph 23 of the paginated papers that *"...The Respondent obtained judgment against myself on the 4<sup>th</sup> day of May 2012. I never received the summons as it was served on the domicilium address, where the original owner still resides. On the 31<sup>st</sup> day of May 2012 I obtained my credit report and ascertained that this judgment was obtained against me. I instructed my attorney of record to obtain copies of the judgment, summons and return of service which was obtained on the 1<sup>st</sup> of June 2012."*
4. The respondent filed an answering affidavit deposed to by Zander Roald Bosch, a senior legal advisor in the employ of the respondent. He states the following at page 47, paragraph 13 of the papers:

"AD PARAGRAPH 23

*The Respondent admits that judgment was obtained against the Applicant on 4 May 2012. In terms of the Agreement of Loan the Applicant chose his domicilium address and it is not in dispute that the summons was in fact served on the Applicant's domicilium address"*

He annexes a copy of the Agreement of Loan as annexure "ZRB1" at page 50 of the paginated pages.

5. Under the heading "Address for Notices" at page 59 of the paginated papers, the following appears:

*"18. ADDRESS FOR NOTICES*

*18.1 Whenever a party to this Agreement is required or wishes to give legal notice to the other party for any purpose contemplated in this Agreement, the Act or any other law, the party giving notice must deliver that notice to the other party at the address*

*of the other party as set out in clause 2 of this Agreement or at the address most recently provided by the recipient in accordance with clause 18.1.*

*18.2 Either party to this Agreement may change its address for the purposes of this clause by delivering to the other party a written notice of the new address by hand, registered mail or electronic mail, if that other party has provided an email address.*

*18.3 Unless otherwise provided by this clause or the Act, a notice, order or other document that, in terms of the Act, must be served on either party to this Agreement will have been properly served when it has been either delivered to that party or sent by registered mail to that party's last known address."*

6. Nowhere in the Agreement of Loan is there an express reference to the chosen *domicilium citandi et executandi*. Instead the following appears at page 52 of the paginated papers under paragraph 2.2.3 "...'*Client*' means: MARTINES JOHANNES BARNARD; of: 4 J[...] B[...] STR, A[...], PRETORIA NORTH, 182..." and under paragraph 2.2.10 "...'*Property*' means: ERF [...] S[....] V[...] K[...]; situated at K[...] G[...]'". As it is not specified which of these two addresses are the chosen *domicilium citandi et executandi*, and no return of service is attached to the papers by the respondent, there is a very real possibility that the applicant was not served with the papers. In the absence of an official return of service this court cannot find that the summons was served at the appropriate address set out in paragraph 18 of the Agreement of Loan. The respondent when filing its affidavit were aware of the allegation by the applicant that he did not receive the summons. It has not contested nor indicated where exactly the summons was served. The applicant has made out a case for rescission.

7. The following order is therefore granted:

**IT IS ORDERED:**

1. THAT the judgment obtained against the applicant on the 4<sup>th</sup> of May 2012 under case number 9383/2012 be and is hereby rescinded;
2. THAT the respondent pays the costs of this application.

**G. WEBSTER**  
**JUDGE IN THE HIGH COURT**

DATE OF HEARING : 12 March 2014