NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

Case no: CA352/2012
Date heard: 20 February 2015
Date delivered: 24 February 2015

In the matter between

BRENDAN ROBERTSON **Appellant**

vs

FIRSTRAND BANK LTD T/A WESBANK **Respondent**

JUDGMENT

PICKERING J:

[1] Appellant appeals to this Court against the dismissal by the Magistrate, East London, of a special plea raised in opposition to a claim by the respondent for payment of the amount of R290 008,25.

[2] For the sake of convenience I shall refer hereunder to the appellant and the respondent as the defendant and the plaintiff respectfully.

[3] On 11 November 2005 and at Port Elizabeth the defendant entered into a lease agreement with J.W. Auto t/a J.W. Motors in terms whereof defendant leased a 2005 Ford Ranger motor vehicle. In terms of a Master Discount Agreement concluded between the plaintiff and J.W. Auto the plaintiff acquired all the latter's right, title and interest in and to the agreement of lease.

[4] It is common cause that the motor vehicle was involved in a collision on 27 September 2006 in consequence whereof it was damaged beyond economic repair.

[5] Thereafter, on 4 April 2007, plaintiff purported to terminate the agreement. I use the word "*purported*" as, according to defendant, the agreement terminated, in terms of clause 11 of the agreement, on 27 September 2006 upon the motor vehicle having been damaged beyond economic repair. Nothing, however, turns on this for purposes of this appeal.

[6] In due course, on 24 June 2009, plaintiff obtained judgment by default against defendant in the magistrate's court, East London, for payment of the aforesaid amount of R290 008,25.

[7] A rescission application brought by the defendant was successful. Defendant then filed a special plea raising the issue of prescription and, in the alternative, the issue of non-compliance by plaintiff with the provisions of section 129(1) of the National Credit Act 34 of 2005.

[8] The special plea was apparently separated from the other issues to be determined first. No evidence was led and it appears to have been dealt with as a stated case.

[9] Having heard argument the magistrate dismissed the special plea. His judgment, in its entirety, reads as follows:

> "*The special plea is dismissed with costs. The section 129 was properly served and although few words missing compliance is sufficient.*" (sic).

[10] It is regrettable to have to state that this is an entirely unhelpful judgment. As will appear hereunder the issue of prescription concerned an interpretation of the lease agreement and required a determination as to whether or not the address of the defendant reflected on the agreement constituted his chosen *domicilium citandi et executandi*.

[11] The magistrate's judgment does not deal with this issue at all and this amounts to a dereliction of his duties as a judicial officer. We, sitting as a

court of appeal, do not know on what basis the special plea of prescription was dismissed.

[12] The defendant's attorneys thereafter requested the magistrate to furnish written reasons in terms of Rule 51(1). To this the magistrate replied as follows:

> "*An ex tempore judgment was delivered and the defendants special plea on prescription was dismissed with costs.*
>
> *The defendant now lodged a notice requesting my written reasons before noting an appeal. In my understanding of section 83 Act 32/1944 an appeal can only be lodge against a final judgment. The dismissal of the special plea was not a final judgment.*
>
> *In Zeem v Mutual and Federal Ins. Co LTD SA 1996 (4) it was decided that the dismissal of a special plea where the issue of the special plea does not have the effect of dispensing of the relief claimed in the main proceedings is not appealable.*
>
> *For this reason, your request for reasons is refused.*" (sic)

[13] The magistrate was wrong on two grounds. First, had the special plea of prescription been successful it would have disposed of the relief claimed in the main proceedings and was therefore clearly appealable. Second, it was not for the magistrate to decide the issue of appealability. He was obliged in terms of the Rule to furnish his reasons on request.

[14] A notice of appeal was filed by defendant on the 27th July 2011 pertinently raising the issue of the defendant's *domicilum citandi et executandi*. On 29 November 2013 the magistrate filed a response contenting himself with the statement that "*I have nothing further to add to my judgment of 8 July 2011 or my reasons in terms of Section 51(1) of 13 July 2011*."

[15] This is quite unacceptable. As set out above the magistrate's so-called judgment and reasons in effect said nothing. The magistrate has heaped insult upon injury by his response.

[16] Thereafter, on 25 September 2012 the magistrate delivered a statement in terms of Rule 51(8)(a). His "*reasons*" were set out therein as follows:

> "*The defendant in his special plea alleges that the amount to the plaintiff became due, owing and payable on the 27/9/2006 when the vehicle was destroyed. The defendant further alleges that the summons had to be served on or before 27/9/2009 to avoid prescription.*
> *The summons issued by the plaintiff was duly served at the defendants* domicilium citandi et executandi *on 22/1/2009, eight months before the lapse of the three year prescription period.*
> *The defendant failed to proof his claim and the court therefore dismissed it with costs.*"

[17] These reasons, regrettably, take the matter no further. The very issue which the magistrate had to decide was whether the defendant's address as reflected on the lease agreement was his *domicilium citandi et executandi*. All that the magistrate has done is to state his conclusion without furnishing any reasons for having reached that conclusion.

[18] In the matter of Value Truck Rental (Pty) Limited v John Dirker Engineering (Pty) Ltd (unreported Eastern Cape, Grahamstown decision) case no 127/2007, Plasket J stated as follows:

> "[*6] The importance of the giving of reasons for judicial decisions has been commented on by the highest courts. In Botes and*

another v Nedbank Ltd,[1] *Corbett JA said the following of a failure by a judge to give reasons for a decision:*

> 'I fully concur in the judgment and order of my Brother Howard. I merely wish to add certain observations with reference to two features of this appeal. The first is that the Judge who heard the exception and application to strike out made the orders dismissing the exception and allowing, in part, the motion to strike out without giving any reasons. In my view, this represents an unacceptable procedure. In a case such as this, where the matter is opposed and the issues have been argued, litigants are entitled to be informed of the reasons for the Judge's decision. Moreover, a reasoned judgment may well discourage an appeal by the loser. The failure to state reasons may have the opposite effect. In addition, should the matter be taken on appeal, as happened in this case, the Court of Appeal has a similar interest in knowing why the Judge who heard the matter made the order which he did.'

[7] *More recently, and in the context of the democratic constitutional dispensation, Goldstone J, in Mphahlele v First National Bank of SA Ltd*[2]*said this of reason-giving for judicial decisions:*

> 'There is no express constitutional provision which requires Judges to furnish reasons for their decisions. Nonetheless, in terms of s 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the Judiciary is bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to

[1] 1983 (3) SA 27 (A), 27H-28A. See too *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA), paras 31-32.
[2] 1999 (2) SA 667 (CC), para 12.

> be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer.'"

[19] I turn then to deal firstly with the special plea of prescription. The defendant contends that the debt claimed by plaintiff became due on 27 September 2006 when the motor vehicle was damaged beyond economic repair. He contends therefore that in terms of s 11(1)(d) of the Prescription Act 68 of 1969 the debt would have prescribed within three years, namely on 26 September 2009.

[20] In terms of s 15(1) of the Prescription Act the prescription of a debt is interrupted by service on the debtor of any process (which, in terms of s 15(6) thereof includes a summons) whereby payment is claimed.

[21] It is common cause that, according to the sheriff's return of service, the summons in this matter was served on defendant on 22 January 2009 when the sheriff placed a copy thereof "*into the post box at the given address of the said* domicilum citandi et executandi *of the defendant",* such address being

the address appearing on the first page of the lease agreement, namely 3 Quenera Clear View Crescent, Beacon Bay.

[22] It is contended on the defendant's behalf that at the time of service of the summons the defendant was in the Western Cape where he had been residing since September 2008 until his return to East London in June 2010. It was only in June 2010 that he became aware of the institution of proceedings against him. Defendant contends that his address, which appears on the lease agreement, was not his chosen *domicilum citandi et executandi* and that the service of the summons at that address therefore did not interrupt the running of prescription.

[23] One is immediately struck, on a reading of the lease agreement, by the fact that it is free of the legalistic jargon which one is accustomed to seeing in agreements of this nature.

[24] Clause 17 of the agreement is headed "*Addresses*" and provides:

> "*17.1 It is agreed that the addresses given at the beginning of this agreement shall be the place to which <u>all post, notices or other communication</u> are to be sent to you and you agree that such communications shall be binding on you. (my emphasis)*
>
> *17.2 You must let the Lessor know immediately in writing of any change in your address and the new address you give must not be a post box or private bag number. If you fail to give notice of a change of address the Lessor will be entitled to use the address it has for you for all purposes, even if you are no longer there.*
>
> *17.3 You accept that you will be deemed to have received a notice or letter 5 days after posting to the address you have given*."

[25] Much was made in argument at the hearing of this appeal concerning the absence of any specific reference to a *domicilum citandi et executandi*

and as to the meaning in particular of the word "*notices*" and whether this, properly construed, included a summons.

[26] What was overlooked, however, was that the lease agreement was entered into during November 2005 and was therefore governed at the time by the provisions of the Credit Agreements Act 75 of 1980. The National Credit Act 34 of 2005 only commenced on 1 June 2006.

[27] Section 5(1) of the Credit Agreements Act provided, *inter alia*, that any credit agreement shall:

> "*(a) be reduced to writing and signed by or on behalf of every party thereto;*
> *(b) state the names of the credit grantor and the credit receiver and their business or residential addresses or, if they do not have such addresses, any other address in the Republic.*"

[28] Section 5(4) provided:

> "*(4) The address stated in terms of subsection (1)(b) in a credit agreement, shall for all the purposes of that credit agreement serve as the domicilum citandi et executandi of the parties thereto, and any notice of any change of any such address shall be given in writing by the party concerned and delivered by hand or sent by registered mail by him to the other parties, and in such a case the changed address being so given notice of shall serve as domicilum citandi et executandi of the party who gave such notice.*"

[29] It is clear therefore that in terms of Act 75 of 1980 the address of defendant recorded in the lease agreement served as his *domicilum citandi et executandi* and remained his *domicilum citandi et executandi* despite his absence from the premises.

[30] In terms of s 172 read with s 4 of Schedule 3 of the National Credit Act that Act:

> "*applies to a credit agreement that was made before the effective date, if that credit agreement would have fallen within the application of this Act in terms of Chapter 1 if this Act had been in effect when the agreement was made, subject to subitems (2) to (5).*"

[31] "*Effective date*" means the date on which the Act or any relevant provision thereof came into operation in terms of s 173, namely, 1 June 2006.

[32] In terms of subsection 4(2) of Schedule 3, s 96 of the National Credit Act applied fully to a pre-existing credit agreement.

Section 96 provides:

> "*Address for notice –*
> *(1) Whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at –*
> *(a) the address of that other party as set out in the agreement, unless paragraph (b) applies; or*
> *(b) the address most recently provided by the recipient in accordance with subsection (2).*
> (2) *A party to a credit agreement may change their address 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.*"

[33] A "*legal notice"* would clearly include a summons. Defendant's address appearing on the lease agreement served therefore as his *domicilum citandi et executandi*.

[34] Defendant failed to notify the plaintiff of his change of address. Rule 9(3)(d) of the Magistrate's Court Rules provides that if the person to be served has chosen a *domicilum citandi et executandi* a copy of the process may be left at that *domicilum*.

[35] The service of the summons by the Sheriff placing it in the post box at the nominated address was therefore in accordance with the Rules. The running of prescription was accordingly interrupted thereby.

[36] Whatever the magistrate's reasons may have been for dismissing the special plea, his conclusion was correct. The appeal against his judgment on this issue therefore falls to be dismissed.

[37] The second issue raised by the special plea relates to the alleged non-compliance by plaintiff with the provisions of s 129 of the National Credit Act.

[38] The provisions of s 129(1) are now well known but bear repeating:

> "1. *If the consumer is in default under a credit agreement, the credit provider –*
>
> *(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and*
>
> *(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before –*
>
> *(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and*
>
> (ii) *meeting any further requirements set out in section 130."*

[39] The relevant paragraph of defendant's special plea reads as follows:

> "*The Plaintiff's alleged Notice of November 2008 [Annexure "C" of Plaintiff's Particulars of Claim and Annexure "B" of Plaintiff's Further Particulars] does not comply with Section 129(1) of the National Credit Act.*"

[40] It is immediately noteworthy that no details of the alleged non-compliance with s 129(1) are given. It would appear that the magistrate was also somewhat bemused thereby in the light of his remark that "*although few words missing compliance is sufficient.*"

[41] I should mention that it is not and never has been defendant's case that the s 129(1) notice, in its content, did not fully comply with the provisions of the section. The Notice of Appeal does not enlighten one either. It merely alleges that the magistrate erred in finding that defendant "*had complied fully with section 129(1)(b)(ii) and Section 130(1)(b) of the National Credit Act 34 of 2005."*

[41] Mr. Rugunanan, who appeared for defendant at the hearing of the appeal, submitted in his heads of argument, however, with reference to Kubyana v Standard Bank of South Africa 2014 (3) SA 56 (CC), that plaintiff had failed to prove that the s 129(1) notice had been delivered to defendant at his aforementioned address, the only evidence in this regard being to the effect that plaintiff had dispatched the notice by registered mail on 20 November 2008. He submitted that the absence of evidence to the effect that the notice had reached the correct branch of the Post Office for collection and that the Post Office had notified the defendant at his designated address that a registered item was waiting for his collection, was fatally defective.

[42] It was, however, never the defendant's case that the s 129 notice had not been delivered to defendant's designated address.

[43] In an affidavit in support of his application for rescission of judgment defendant stated as follows:

> "*The letter in question was sent to 3 Quenera Clear View Crescent, Beacon Bay, East London, 5241 on 20 November 2008. This was never received by me, because at the relevant time I was resident in Cape Town*." (My emphasis)

[44] It is clear from the above that the issue of delivery of the notice to defendant's address was not placed in dispute. The only defence raised by defendant was to the effect that he had not received the notice because he was at the time resident in Cape Town. Had he pertinently raised the issue of delivery of the notice plaintiff would have had an opportunity of dealing therewith in its answering affidavits.

[45] There is, therefore, in my view, no merit in the above submission. The actual defence raised by defendant, namely that he had not received the notice because he was in Cape Town is met by the provisions of clause 17.2 and 17.3 of the agreement which provide:

> "*17.2 You must let the Lessor know immediately in writing of any change in your address and the new address you give must not be a post box or private bag number. If you fail to give notice of a change of address the Lessor will be entitled to use the address it has for you for all purposes, even if you are no longer there.*
> *17.3 You accept that you will be deemed to have received a notice or letter 5 days after posting to the address you have given*."

[46] In my view therefore the magistrate was correct in dismissing the special plea on this issue as well.

[47] The following order will issue:

"The appeal is dismissed with costs."

_____
J.D. PICKERING
JUDGE OF THE HIGH COURT

I agree,

_____
I.T. STRETCH
JUDGE OF THE HIGH COURT

Appearing on behalf of Applicant: Adv. Rugunanan
Instructed by: Netteltons Attorneys, Mr. Hart

Appearing on behalf of Respondent: Adv. De la Harpe
Instructed by: Wheeldon Rushmere and Cole, Mr. van der Veen