REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG HIGH COURT
(LOCAL DIVISION JOHANNESBURG)

CASE NO: 27612/2010

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

Date: ……..2014 _____

In the matter between

HARTLEY, ROEGSHAAN	**FIRST APPLLICANT**
HARTLEY, SAFIYA	**SECOND APPLICANT**

And

FIRSTRAND BANK LIMITED	**FIRST RESPONDENT**
MATSOBANE MAROKANE	**SECOND RESPONDENT**

J U D G M E N T

MOSIKATSANA AJ:

Introduction:

[1] This is an application to declare the default judgment granted against the applicants in the respondent's favour on 7 September 2010 and all attachments and sales in execution pursuant to such judgment as void. The applicants rely on Uniform

Rule of Court 42(1)(a) The first respondent opposes the application requesting that the application be dismissed.

Common Cause Facts:

[2] The following facts are common cause, or not seriously in dispute. The first respondent, First Rand Bank Limited launched application proceedings against the first and second applicants who are married to each other in community of property, for payment of R 759 741.02 with interest thereon, at the rate of 10.95% per annum, calculated from the 30 January, 2010 and, for an order declaring their property at Erf 3278 Ennerdale Extension 3 Township executable.

[3] After service was effected allegedly at the applicants' chosen *domicilium citandi et* executandi, notice of intention to oppose was served shortly thereafter. However, the applicants failed to file answering affidavits and default judgment was granted on 07 September, 2010 against the applicants.

[4] Execution on the judgment was stayed, pursuant to a payment arrangement which had been concluded with the applicants on or about 18 November 2010. The applicants having failed to honour the terms of the payment arrangement, the property was sold at a sale in execution held on 31 January 2013.

Disputed Facts:

[5] The applicants contend that the Court which granted the default judgment lacked personal jurisdiction over them, in that proper service, was not effected at their chosen *domicilium*. The applicants contend that the Sheriff's return of service, indicates that the process was not personally served but was affixed to the door at 3278 Poseidon Street, Ennerdale Extension 3, which is not the applicants' chosen

domicilum and not at 3267 Phosphorous street, Migson Manor, Lenasia which is their chosen *domicilium*.

[6] The applicants contend that because there was no proper service, the default judgment was erroneously granted and that this is a proper case for rescission in terms of Rule 42(1)(a).[1]

[7] The applicants further contend that the fact that they knew of the application that was defectively served and that they in turn served notice of intention to oppose, cannot remedy the defective service. To this end, the applicants rely on the dictum of Horn AJ in *First National Bank of SA Ltd v Ganyesa Bottle Store (Pty) Ltd and Others and First National Bank of SA Ltd v Schweizer Drankwinkel (Pty) Ltd and Another*[2] where it was stated that:

> 'The issue of a summons is the initiation process of an action and has certain specific consequences, one of which is that it must be served. The methods of service are prescribed in the Rules. Mere "knowledge" of the issue of a summons is not service and a plaintiff is not relieved of his obligation to follow the prescribed Rules.'[3]

[8] First respondent opposes the rescission application on the basis that:

8.1 The applicants do not have a *bona fide* defence to first respondent's claim;

8.2 the argument relating to irregular service is without merit in that the application had been properly served at the applicants' chosen *domicilium*;

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[1] Rule 42(1)(a) stipulates that: ' The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary: (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;'.

[2] 1988 (4) SA 565 (N)

[3] Supra note 2 at 568 B-C.

8.3 the rescission application was not brought timeously having delayed for a period of nearly three years from the date when default judgment was granted; and

8.4 the applicants acquiesced in the judgment by entering into a payment arrangement about three months after judgment had been granted.

[9] The first respondent contends that, the applicants having failed to make out a case for rescission or to demonstrate good cause for the judgment to be rescinded, it prays for an order dismissing the rescission application with costs.

Issues for Determination

[10] The issues for determination are whether the Court's lack of personal jurisdiction over the applicants due to irregular service is dispositive of the matter or whether the applicants' acquiescence deprives them of the right to seek rescission.

Court's Lack of Personal Jurisdiction due to Irregular Service

[11] Service of process is an essential step in initiating a civil lawsuit. In fact, service of process is so essential in a lawsuit, that if there is no service, or if it is not performed properly, a lawsuit cannot proceed. Service of process is essential in that it establishes that the court hearing the lawsuit has personal jurisdiction over the applicants in this matter.

[12] In *First National* Bank of SA Ltd v Ganyesa Bottle Store (Pty) Ltd and others; First National Bank of SA v Schweitzer Drankwinkel (Pty) Ltd and Another.[4] It was

[4] Supra note 2. See also *Dada v Dada* 1977 92) SA 287 (T); *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA); *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA); *Suid Afrikaanse*

decided that where the service of process is defective as in the instant case, the judgment and any other process which is a corollary of the judgment obtained is a nullity. The above is decision quite compelling as it unequivocally reinforces the notion of *audi alteram* partem, however, in my view, the above decision will not avail the applicants in this case, as they acquiesced in the default judgment obtained on 7 September, 2010 as a consequence of the alleged defective service.

The Doctrine of Peremption

[13] According to the common law doctrine of peremption, a party who acquiesces to a judgment cannot subsequently seek to challenge the judgment to which he has acquiesced. This doctrine is founded on the logic that no person may be allowed to opportunistically endorse two conflicting positions or to both approbate and reprobate, or to blow hot and cold. It may even be said that a party will not be allowed to have her cake and eat it too.

[14] The doctrine of peremption was enunciated in *Hlatswayo v Mare and Deas*[5] where Lord De Villiers held that 'where a man has two courses of action open to him and he unequivocally takes one he cannot afterwards turn back and take the other.' Similarly, in *Dabner v South African Railways and Harbours*[6] Innes CJ stated:

> 'The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with

Sentraale Ko-Operatiewe Graanmaatskappy Bpk v Shifren and Others and the Taxing Master 1964 (1) SA 162 (0) In all these cases, either no summons, applications or notification of arbitration hearings were served on the applicants or defendants when judgments were obtained against them. The courts uniformly confirmed that judgments obtained in the absence of service, or proper service, were a nullity.

[5] 1912 AD 242.

[6] 1920 AD 583 at 594-5

any intention to appeal. And the *onus* of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.'

[15] Applying the doctrine of peremption to the facts of this case, it is incontrovertible that the applicants by their own conduct acquiesced to the default judgment obtained against them on 7 September, 2010 by entering into a payment arrangement three months after judgment had been granted. Such acquiescence is fatal to the success of a rescission application.

Order

[16] In the result the following order is made:

16.1 The application that default judgment granted against the applicants in the first respondent's favour on 7 September 2010 and all attachments and sales in execution pursuant to such judgment be rescinded is dismissed.

16.2 The applicants are ordered to pay the costs of the application.

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T MOSIKATSANA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

COUNSEL FOR THE APPLICANTS ***UNREPRESENTED***

COUNSEL FOR FIRST RESPONDENT	***A LAMPRECHT***
INSTRUCTED BY	***BEZUIDENHOUT VAN ZYL & ASSOCIATES***
COUNSEL FOR SECOND RESPONDENT	***UNREPRESENTED***
DATE OF HEARING	***24 MARCH 2014***
DATE OF JUDGMENT	***24 OCTOBER 2014***