**CA 301/2001**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(BOPHUTHATSWANA PROVINCIAL DIVISION)**

**IN THE MATTER BETWEEN:**

**MICHELE COLAVITA** **APPLICANT**

**AND**

**SAMSTOCK PORTFOLIO PROPERTIES (PTY LIMITED** **RESPONDENT**

**JUDGMENT**

**FOR THE APPLICANT : MR MOTHIBE**

**FOR THE RESPONDENT : MR JONKER**

**DATE OF HEARING: 13 DECEMBER 2001**

**DATE OF JUDGMENT : 24 JANUARY 2002**

**NKABINDE J:**

[1] This is an application to set aside (a) judgment granted in default of notice of intention to defend and (b) the warrant of execution issued in terms of such default judgment. After hearing argument on the matter I reserved judgment as I desired to have an opportunity to consult authorities on

certain aspects of the law.

[2] A default judgment may be set aside by-

(a) virtue of the provisions of rule 42 of the Uniform Rules of Court ('the Rules") which provide that a court may, in addition to any other powers it may have, *mero motu* or upon the application of any affected party, rescind:

(i) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(ii) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;
(iii) an order or judgment granted as a result of a mistake common to the parties;

(b) under the common law where, for instance, judgment was obtained by fraud; and

(c) in terms of rule 31 (2) (b) of the Rules. Under this rule the applicant must-

(i) launch the application on notice, and not on notice of motion, within 20 (twenty) days after the defendant has knowledge of the judgment;

(ii) furnish security to the plaintiff-

(aa) for the payment of the costs of the default judgment;

(bb) for the costs of the application and

(iii) show good cause for the rescission of the judgment.

[3] It is necessary and important to set out the facts and circumstances which led to the granting of the default judgment. On 31 May 2001 the plaintiff/ respondent issued summons out of this Court under Case No. 301/2001 against the defendant/applicant claiming an amount of R675 616-98, interest thereon and costs. I shall, for the purpose of this judgment refer

to the plaintiff as "respondent" and to the defendant as "applicant". The return of service, filed of record under such case number and addressed to both the Registrar and the attorneys for the respondent, reads as follows:

> " On this 5th day of JUNE 2001, and at 10h17, I served this COMBINED SUMMONS WITH PARTICULARS OF CLAIM AND ANNEXURE upon the FRONT DOOR, at the address being SHOP 14 SUN VILLAGE SHOPPING CENTRE, SUN CITY, MANKWE, by affixing a copy of the mentioned process to the principal door as I found it temporarily locked. Rule 4 (1) (a) (ii).".

[4] On 26 June 2001 the respondent set the matter down for default judgment to be entered against the applicant. The Registrar entered such judgment on 5 July 2001 in the applicant's absence. On 18 July 2001 and subsequent to the granting of the default judgment the Registrar, in the absence of the applicant, issued a writ of execution which was executed on 17 August 2001. It was during this month of execution that the applicant sought legal advice pursuant to which this application was launched on 10 September 2001. In essence, the case for the applicant is that he was not notified of the action against him and that the default judgment was granted in his absence.

[5] The respondent opposed the application. It emerged from the answering affidavit and annexure thereto that another service ("the second service"), was effected also on 5 June 2001, allegedly at the applicant's place of residence. It is remarkable that this return ("fresh return"), was not addressed to the Registrar. It is remarkable further that the fresh return had not been filed of record when an application for default judgment was

heard by the Registrar. The fresh return reads as follows:

> " Dat op 5 June 2001 on 18h30 te UNIT 2, MOGWASE synde die adres vermeld op die prosesstuk is _ afskrif van die DAGVAARDING MET AANHANGSEL op die verweerder se dogter beteken nadat die oorsponklike dokument getooon en die aard en inhoud daarvan aan haar verduidelik is. Die persoon wat oenskynlik nie jonger as sestien jaar oud is nie en wat oenskynlik in beheer is van genoemde adres, het betekening in die tydelike afwesigheid van die verweerder aanvaar. Reel 4(1)(a)(ii).".

[6] In his replying affidavit the applicant denied that he was served with the summons as stated in the fresh return of service. He stated, *inter alia,* that-

> " 12.1 "I am unable to remember whether or not my daughter was in Cape Town on 5th June 2001. However, she is presently in Italy and I phoned her to enquire about service on her which she denies.
>
> 12.2 The return of service attached to the application for default judgment, Annexure "B", to the Founding Affidavit is in the form and style different from the one attached to the answering affidavit.
>
> 12.3 The default judgment was granted on the basis of the said Annexure "B" to the Founding Affidavit.
>
> 12.4 I really believe that Annexure "B" to the Answering Affidavit is a fabrication and distortion of the true situation...".

[7] Mr Mothibe, on behalf of the applicant, submitted that as service of the summons was not effected on the applicant judgment by default was

erroneously granted in the applicant's absence. As to the second service Mr Mothibe argued that the return of such service was not filed before the Registrar and further that even assuming that same was filed, the return was defective. Mr Jonker, on behalf of the respondent, correctly conceded that the first service was bad in law. He argued however that the second service, which was effected at the applicant's place of residence, was proper. He argued further that it was immaterial that the fresh return had not been filed of record at the hearing for default judgment.

[8] The main issues are-

(a) whether default judgment was wrongly granted in the absence of the applicant; and

(b) whether sufficient grounds exist for rescission.

[9] Section 36 (2) of the Supreme Court Act 59 of 1959 ("the Act") provides that:-

> " The return of service of the sherif or deputy-sheriff of what has been done upon any process of the court, shall be *prima facie* evidence of the matters therein stated."

From this it is clear that, the return not being conclusive but merely *prima facie* evidence of service, proof that there has been no or insufficient service will be allowed. Section 36(1) of the Act requires the return to be made to the Court and to the party at whose instance the process was issued.

[10] Rule 4(10) of the Rules confers discretion on the Court. It reads:

> "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.".

So, if service was effected the court will require to be satisfied that the applicant has received the process or that it has come to his knowledge.

[11] In the absence of a proper return of service or proof of service, the court may nevertheless, where it is satisfied that the applicant has actually received the process, allow the hearing to proceed (See Morcom v Wagoner 1948 (4) SA 542 (W)). It follows therefore, as correctly submitted by Mr Jonker, that it is immaterial whether or not such return was before the Registrar because the court is normally not confined to the record(See Harms, "Civil Procedure in the Supreme Court", p 421 O7 under footnote 4).

[12] It can clearly be seen from the inspection of the first return of service that the service effected did not comply with the requirement of the relevant rule. As this point was correctly conceded by counsel for the respondent it is not necessary to state, in detail, the extent of the incorrectness of such return. It suffices to state that the applicant could not have become aware of the process after such first service was effected. The Registrar probably assumed that the applicant knew of the action when he granted the order. It might not have occurred to him to scrutinize the return, as he was duty-bound so to do, to satisfy himself that proper service was effected. It is the duty, not only of the attorneys representing the litigant but also of the Registrar/Court, to examine the return and satisfy themselves and itself, respectively, that it is in order(Van Niekerk v

Barket 1922 OPD 164).

[13] The second service was effected at "Unit 2 Mogwase synde die adres vermeld op die prosesstuk...". I must hasten to mention that the address mentioned in the summons is "Shop 14, Sun Village Shopping Centre, Sun City," being the principal place of the applicant's business and not "Unit 2 Mogwase". It boggles the mind that the second service was allegedly effected at the applicant's residential place whereas the fresh return refers to two different addresses, "Unit 2 Mogwase" and the address referred to on the summons, "Shop 14, Sun Village Shopping Centre, Sun City", being the applicant's principal place of business. In his answering affidavit, the respondent admitted that the address "743 Kwena Drive Unit 2 Mogwase", is the applicant's residential place. On the contents of the fresh return and such admitted facts it is hard to say precisely where the second service was effected. Two possibilities emerge from the reading of this return: the one is that the return may be a distortion of the truth and the other that the sheriff might have made a mistake. It is also remarkable that the fresh return was, unlike the first defective return, not addressed to the Court as required by the law (s. 36 (1) of the Act), even though both returns were prepared by one and the same person, Mrs Okes. No explanation is placed before this court why the fresh return, if both services were effected on the same day, was not filed. I find that in the probabilities it is overwhelmingly clear that the applicant had no knowledge of the action instituted against him. It follows, therefore, that this court should allow rescission on the basis that the default judgment was wrongly granted in the absence of the applicant and that sufficient ground exist for such rescission.

[14] Having so found, the next question that calls for consideration is whether the application for rescission falls to be dealt with under Rule 42 (1) (a) or Rule 31 (2)(b) of the Rules or the common law. Mr Mothibe submitted that the application is brought under Rule 42 (1)(a) while Mr Jonker submitted that the applicable Rule was Rule 31 (2)(b).

[15] I have no doubt, on the reading of the founding papers, that the applicant was not in willful default. I now have to decide whether the Registrar, in granting the judgment, did so erroneously within the meaning of Rule 42 (1)(a). The order was clearly granted in the absence of the applicant who

was clearly affected thereby. As I found, the applicant had not been made aware of the action and by some error judgment was entered against him. This, I consider, was an error of the kind which brought it within the purview of Rule 42(1)(a).

[16] Rule 42 (1) does not require "good cause" to be shown before the Court rescinds a judgment. In the case of Hardroad (Pty) v Oribi Motors (Pty) Ltd 1977 (2) SA 576 (W) McEwan J at 578G stated the position under Rule 42 (1)(a) as follows (even though he found that the order was neither erroneously sought or erroneously granted):

> " This Rule does not specifically require "good cause" or sufficient cause (as in certain earlier Rules) to be shown, before judgment can be rescinded or varied. Paragraph (a) requires, however, that the judgment must have been "erroneously sought" or "erroneously granted". Examples of that sort of error that will or will not avail an applicant are to be found in *Ex parte* Jooste 1968 (4) SA 437 (O); Custom Credit Corporation (Pty) Ltd v Bruwer 1969 (4) SA 564 (D); Shield Insurance Co Ltd v Van Wyk 1975 (4) SA 781 (NC). The only possible error that could be suggested in the present case is that the service of the provisional sentence summons on the applicant was defective.".

[17] Shakenovsky AJ in Topol and Others v LS Group Management Services (Pty) Ltd 1988 (1) SA 639 (WLD) at 649 E-F, relying on what McEwan J said in Hardroad's case, supra, said the following:

> "It is clearly implicit in this judgment that, in a case where there had been defective service and the party affected thereby was in default, such a case could have fallen within the purview of the provisions of " erroneously" being "granted"

> under Rule 42 (1)(a)...".

(See also Theron NO v United Democratic Front (Western Cape Region) and Others 1984 (2) SA 532 (C) at 536C; Clegg v Priestly 1985 (3) SA 950(W)).

[18] The view expressed above is fortified by the decision of the Full Bench of the TPD in the case of Tshabalala and Another v Peer 1979 (4) SA 27, where Ellof J, as he then was, dealt with rule 42 and stated:

> "The Rule accordingly means - so it was contended - that, if the Court holds that an order or judgment was erroneously granted in the absence of any party affected thereby, it should without further enquiry rescind or vary the order. I agree that is so, and I think that strength is lent to this view if one considers the Afrikaans text which simply says that: "Die hof het benewens ander magte wat hy mag hê, die reg om...".

(See further in this regard De Wet and Others v Western Bank Ltd 1977 (4) SA 770 at 777 F-G(which was upheld by the Appellate Division in De Wet and Others v Western Bank 1979 (2) SA 1031(AD) at 1038).

[19] Having regard to the above considerations and generally to the circumstances of this case, I am satisfied that it is just and equitable that the relief sought should be granted in terms of Rule 42(1)(a). I am also satisfied that the application was brought within a reasonable time. It is therefore not necessary to consider whether, in terms of Rule 31 (2)(b), the applicant would also have a remedy.

[20] As to the costs I can see no basis for exercising my discretion otherwise

than in accordance with the normal rule, i.e that costs should follow the result.

[21] In the result, I order as follows:

(a) The default judgment granted by the Registrar of this Court on 5 July under Case No. 301/2001 and the Writ of Execution issued by him on 2 August 2001 are set aside;

(b) The applicant is granted leave to defend the action; and

(c) The respondent shall pay the costs of this application.

B.E. NKABINDE

JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE APPLICANT : PHANCY MAGANO & PARTNERS

ATTORNEYS FOR THE RESPONDENT: MINCHIN & KELLY