REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2021/00399

In the matter between:

NEDBANK NAMIBIA LIMITED **APPLICANT**

and

LAZARUS NDANGI EMVULA **RESPONDENT**

Neutral citation: *Nedbank Namibia Limited v Emvula* (HC-MD-CIV-MOT-GEN-2021/00399) [2022] NAHCMD 591 (28 October 2022)

Coram: RAKOW J
Heard: **14 September 2022**
Delivered: **28 October 2022**

Flynote: Jurisdiction – *Metlike Trading LTD and Others v Commissioner, South African Revenue Service* – Court in the current matter has jurisdiction - failing to do so might mean that Contempt of Court proceedings could be instituted.

Service – *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others* – The fundamental purpose of service is after all to bring the

matter to the attention of a party, including having the benefit of an explanation as to the meaning and nature of the process.

Summary: The applicant and respondent entered into a written installment sale agreement for the purchase of a 2016 Maserati Grancarbio vehicle on 06 April 2017. In terms of the agreement, the ownership of the Maserati vehicle would remain vested with the applicant until the purchase price and interest upon that has been paid in full by the respondent.

The respondent breached this agreement and fell into arrears. Because of this breach, the applicant was entitled to an order declaring the amounts paid by the respondent in respect of the purchase price forfeited in favour of the applicant and to repossess the vehicle and resell it at market value. The applicant issued summons under case number HC-MD-CIV-ACT-CON-2019/00838 and obtained default judgment on 25 April 2019. The applicant then obtained a writ of execution on 26 April 2019 to attach the property of the respondent. The applicant alleges that it is still the owner of the property and is therefore entitled to attach the said vehicle but could not do so as it cannot be found at the *domicillium citandi et executandi* address of the respondent. The applicant thus seeks an order against the respondent, in terms of which the deputy sheriff is authorized to repossess and sell a 2016 Maserati Grancarbio vehicle. The deputy sheriff is unable to attach the vehicle at any other address as neither the court order nor the warrant of execution specifically mention the vehicle

Held – that the court in the current matter has jurisdiction over the respondent and as such can order him to produce the vehicle even though the vehicle might be in South Africa.

Held further that – service of the documents can therefore not be said to have been a nullity.

Held further that – in the original matter that gave rise to the current matter, the plaintiff never proceeded with a *rei vindicatio*, but only with the damages claim for the full outstanding amount on the agreement and for cancellation of the agreement.

Held furthermore - the application is dismissed with costs, costs to include the costs of one instructed and one instructing counsel.

ORDER

The application is dismissed with costs, costs to include the costs of one instructed and one instructing counsel.

JUDGMENT

RAKOW J

Introduction

[1] The applicant is Nedbank Namibia Limited, a registered commercial bank and public company with limited liability, duly registered and incorporated as such in accordance with the applicable laws of Namibia. The respondent is Lazarus Ndangi Emvula, a self-employed male person with his chosen *domicillium citandi et executandi* at no 39 Le mont Complex, Estate River, Avis Road Windhoek.

[2] The purpose of this application is to be granted an order in terms of which the deputy sheriff is authorized to repossess and sell a 2016 Maserati Grancarbio vehicle.

Background

[3] On 6 April 2017 the applicant and the respondent concluded a written Instalment Sale Agreement for the purchase of the Maserati vehicle. The purchase

price of the said vehicle according to the agreement was N$3 303 889.21 which the respondent agreed to pay in 54 monthly instalments of N$61 183.13. In terms of the agreement entered into between the parties, clause 2 of the said agreement, the ownership of the Maserati vehicle would remain vested with the applicant until the purchase price and interest upon that has been paid in full by the respondent.

[4] It was further part of the Terms and Conditions of the sale that in the event that the respondent should default in the punctual payment of his instalment, the applicant would be entitled to cancel the agreement, repossess the vehicle and retain the payments already made by the respondent and to claim as liquidated damages payment of the difference between the balance outstanding and the value of the vehicle. It further allows the vehicle to be sold and that such a sale amount would amount to the value of the vehicle.

[5] The respondent breached this agreement and fell into arrears since September 2017. Because of this breach, the applicant was entitled to an order declaring the amounts paid by the respondent in respect of the purchase price forfeited in favour of the applicant and to repossess the vehicle and resell it at market value. This is then what the applicant did. It issued summons under case number HC-MD-CIV-ACT-CON-2019/00838 and obtained default judgment on 25 April 2019, on the following terms:

1. Cancellation of the Agreement;
2. The amounts paid by the respondent in terms of the agreement is forfeited in favour of the applicant;
3. Payment in the amount of N$ 2 383 641.20 and interest of 16.80% per annum as from 9 January 2019 to date of final payment;
4. The respondent had to pay the costs of suit on a scale of attorney-client costs.

[6] The applicant then obtained a writ of execution on 26 April 2019 to attach the property of the respondent. The applicant alleges that it is still the owner of the property and is therefore entitled to attach the said vehicle but could not do so as it cannot be found at the *domicillium citandi et executandi* address of the respondent.

The full judgment debt therefore remains outstanding. A further problem is that the deputy sheriff is unable to attach the vehicle at any other address as neither the court order nor the warrant of execution specifically mention the vehicle. Upon information received from the respondent it further seems that the vehicle might be in Johannesburg, South Africa.

The notice of motion

[7] In the notice of motion, the applicant seeks the following:

1. An order that the deputy sheriff is authorised to repossess and sell a 2016 Maserati Grancarbio, with engine number M145 B301 220 and Chassis number ZAMVM45C000181407;
2. The proceeds of the sale shall be set off against the judgment debt and interest of the court order dated 25 April 2019 under case number HC-MD-CIV-ACT-CON-2019/00838;
3. Costs of suit as between attorney and client;
4. Further and/or alternative relief.

The arguments

[8] Various questions were raised on behalf of the applicant. These questions can be seen as points *in limine* and will be discussed separately.

Does the court have jurisdiction?

[9] The defendant argued that the court does not have jurisdiction to make any decision regarding the vehicle as there is no evidence that the vehicle is still in Namibia. It was submitted that the default judgment in its current form does not order the delivery of a specific *merx* (the vehicle) to the applicant. The onus is on the plaintiff to show that the court is vested with jurisdiction – should there be any doubt about this, the application cannot be granted. This onus begins with what is pleaded.

[10] The court was referred to *Einwald v German West Africa Co*[1]. This involved a motion to attach goods belonging to the defendant in the Colony to found jurisdiction in an action for damages for wrongful dismissal. Both parties were foreign *peregrini*. The contract had been concluded in Germany and had to be performed beyond the limits of the Colony. De Villiers CJ held that in the absence of any jurisdiction *ratione domicilii, ratione rei sitae*, or *ratione contractus*, the Court ought not to assume jurisdiction by means of attachment of the defendant's goods.

[11] It was submitted that a vindicatory action is an action *in rem* and therefore the question of jurisdiction is two-fold, namely, does this court have jurisdiction over the cause and does this court have jurisdiction over the *merx*, being the vehicle in this instance. It is so that the court have jurisdiction over the cause but that does not necessarily mean that the court has jurisdiction over the *merx* as it is not so pleaded.

[12] On behalf of the applicant, it was argued that *Metlike Trading LTD and Others v Commissioner, South African Revenue Service*[2] is applicable. In this matter the court made an order against the *incola* to return the item to the Republic of South Africa, in this case it was an aircraft which was registered in South Africa. This is so because the order being sought is an order *in persona* and not *in rem*.

[13] It seems that the South African courts will not grant orders to compel peregrine to perform acts outside its jurisdiction but the position change when the person is an incola of the jurisdiction. In the *Metlike Trading* case the court goes to great length to explain the current position in the South African law. Streicher JA says the following:

'[36] If the Court a quo were not able to enforce compliance with the order which it granted, it had no jurisdiction to grant it. It is, therefore, necessary to determine whether the Court a quo could enforce compliance with the order. In support of their submission that the Court a quo could not give effect to its order, the respondents relied on *Lenders & Co Ltd v Lourenco Marques Wharf Co Ltd 1904 TH 176; Minister of Agriculture v Grobler 1918 TPD*

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[1] *Einwald v German West Africa Co* (1887) 5 SC 86.
[2] *Metlike Trading LTD and Others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA).

483; South Atlantic Islands Development Corporation Ltd v Buchan 1971 (1) SA 234 (C); Makoti v Brodie and Others 1988 (2) SA 569 (B); and Parents' Committee of Namibia and Others v Nujoma and Others 1990 (1) SA 873 (SWA).

[37] ……

[38] The Roman-Dutch jurists held conflicting views in this regard. Some were of the view that disputes as to ownership or possession should be aired only at the place where the thing was situated. Others were of the view they could also be dealt with at the place where the defendant was domiciled. *Voet* says at 5:1:77: 14

"Movables are not tied to any definite place, but allow of restitution at every place, having to be moved from one place to another at the discretion of the Judge or even of the unsuccessful defendant. A Judge was thus able effectively to give judgment against a defendant subject to him in respect of domicile for the making restitution of something movable in any suitable place, including the very place of domicile. It makes in the same direction that it has been generally laid down by commentators that movables go with the person, and, so far as concerns legal results, are deemed to be at the place where the owner of them cherishes domicile, even though physically they have been stationed elsewhere.'

[39] . . .

[40] In *South Atlantic Islands Development Corporation Ltd v Buchan*, the Court refused to grant an order against the master of a foreign fishing vessel, prohibiting him from fishing in the waters of Tristan da Cunha. The respondent was only temporarily within the area of jurisdiction of the Court. The Court would therefore have been powerless to enforce its judgment if the respondent chose to ignore the order and started fishing in the waters of Tristan da Cunha.

[41] . . .

[42] . . .

[43] *Pollak* accepts that Lenders reflects our law as regards foreign jurisdictions, ie that the mere fact that a respondent is an *incola* of the court is insufficient to confer jurisdiction on the court to make an order for delivery of movable property situate outside the Republic. *Forsyth, Private International Law* 4th ed at 233, on the other hand, is of the view that 'if the

respondent is an incola, the court may assume jurisdiction to grant an interdict (whether mandatory or prohibitory) no matter if the act in question is to be performed or restrained outside the court's area'. He argues that if 'the respondent is an incola . . . the court will have control over him and will be in a position to ensure compliance with its order'.

[44] In *Ashtiani and Another v Kashi* [1986] 2 All ER 970 (CA) at 976 and 979, the Court of Appeal in England, dealing with a pre-judgment Mareva injunction, concluded that Mareva injunctions should be limited to assets located within the jurisdiction. However, that is no longer the position in England. Some 14 years later, in respect of an appeal against an order made after judgment, precluding the defendants from dealing with any of their assets worldwide without giving five days' notice to the plaintiffs' solicitors in every case, Kerr LJ said, in *Babanaft International Co SA v Bassatne and Another* [1989] 1 All ER 433 (CA) at 444b - d:

> "Apart from any EEC or EFTA connection, there is in any event no jurisdictional (as opposed to discretionary) ground which would preclude an English court from granting a pre-judgment Mareva injunction over assets situated anywhere outside the jurisdiction, which are owned or controlled by a defendant who is subject to the jurisdiction of our courts, provided that the order makes it clear that it is not to have any direct effect on the assets or on any third parties outside the jurisdiction save to the extent that the order may be enforced by the local courts. Whether an order which is qualified in this way would enforced by the courts of states where the defendant's assets are situated would of course A depend on the local law. . . ."

Lord Donaldson of Lymington MR said, in *Derby & Co Ltd and Others v Weldon* and Others (No 2) [1989] 1 All ER 1002 (CA) at 1007f - g:

> " We live in a time of rapidly growing commercial and financial sophistication and it behoves the courts to adapt their practices to meet the current wiles of those defendants who are prepared to devote as much energy to making themselves immune to the courts' orders as to resisting the making of such orders on the merits of their case."

[45] . . .

[46] . . .

[47] In Hugo v Wessels 1987 (3) SA 837 (A) at 855J - 856A, Hoexter JA said, in regard to the question whether effect could be given to an order that an immovable property situated outside the jurisdictional area of the court, but within the Republic, be transferred:

> " Na my oordeel behoort hierdie vraag bevestigend beantwoord te word. 'n Belangrike faktor wat ommiddellik na vore tree, is die feit dat 'n vonnisskuldenaar wat nie vrywillig aan 'n Hofbevel *ad factum praestandum* uitvoering gee nie minagting pleeg en hom aan gevangenisstraf blootstel."

[48] . . .

[49] In the light of the aforegoing, I agree with Forsyth's view that, if the respondent is an incola, the Court may assume jurisdiction to grant an interdict (whether mandatory or prohibitory) in *personam* no matter if the act in question is to be performed or restrained outside the Court's area of jurisdiction. The authority to the contrary is not persuasive and should, to the extent not consistent with this judgment, be considered to have been overruled.'

[14] It is a rather long quote however from reading it, it must be clear that the court in the current matter has jurisdiction over the respondent and as such can order him to produce the vehicle even though the vehicle might be in South Africa, failing to do so might mean that Contempt of Court proceedings could be instituted. The court therefore has a way in which it can enforce its decision.

Was there appropriate service in the circumstances?

[15] The complaint by the respondent about service can be shortly summarized in that the deputy sheriff served the application on a *domicilium citandi et executandi* which was agreed to in the now cancelled instalment sale agreement. The agreement was cancelled as part of the default judgment order. The respondent says that the application never came to his notice prior to him accidently seeing the application on the first motion court roll on 2 December 2021. The Deputy Sheriff Mr Essop indicates that he affixed a copy of the documents to the door of the property after various attempts were made to serve the documents, as there was nobody home to receive the documents.

[16] The respondent contends that he has not been served. Counsel for the applicant referred the court to *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others*[3], where Smuts J as he then was said the following regarding service:

'The fundamental purpose of service is after all to bring the matter to the attention of a party, including having the benefit of an explanation as to the meaning and nature of the process. If a party then proceeds to enter an appearance to defend or notice to oppose through legal representatives, that fundamental purpose has been met, particularly where that the legal representative in question had been served with the process (and was thus in possession of the papers and would appreciate their import.)'

[17] Using the *Witvlei Meat*[4] case, the counsel for the respondent summarized the principles applicable to service of process as follows:

1. The purpose of service is to notify the person to be served of the nature and contents of the process of court and to provide proof to the court that there has been such notice.

2. Where there has been a complete failure of service this cannot be condoned. However, a lessor serious form of non-compliance in relation to service may be condoned.

3. The complaint in regard to defective service must however take the facts of the matter into consideration.

[18] On behalf of the applicant it was argued that nowhere in the Opposing Affidavit did the Respondent allege that he no longer owns, or periodically occupies, No. 39 Le Mont Complex, Estate River, Avis Road. He merely submits that he had a different actual address. Counsel referred the court to the matter of *Standard Bank Namibia Ltd v Maletzky and others*[5] in which the following was said:

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[3] *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others* (1) (APPEAL 212 of 2011) [2012] NAHC 32 (20 February 2012).
[4] Supra.
[5] *Standard Bank Namibia Ltd and Others v Maletzky and Others* 2015 (3) NR 753 (SC).

'The fundamental purpose of service is after all to bring the matter to the attention of a party, including having the benefit of an explanation as to the meaning and nature of the process. If a party then proceeds to enter an appearance to defend or notice to oppose through legal representatives, that fundamental purpose has been met, particularly where the legal representative in question had been served with the process (and was thus in possession of the papers and would appreciate their import)."

[19] The remainder of the discussion in *Standard Bank Namibia Ltd v Maletzky and others*[6] is also of importance in deciding on the objection against service.

'It is a fundamental principle of fairness in litigation that litigants be given proper notice of legal proceedings against them. Defective service can be raised in different ways during the litigation process. In two recent decisions, somewhat different outcomes were reached by the Namibian High Court in determining the effect of defective service in the initiation of proceedings. In *Knouwds NO v Josea and Another*[7], Damaseb JP had to consider the adequacy of service of a rule nisi in sequestration proceedings. Damaseb JP found that on the record before him that the respondent the sequestration of whose estate was sought (Mr Josea) had not been served with a copy of the rule nisi and the founding papers and he held that the proceedings were accordingly null and void. The High Court held that –

"Where there is complete failure of service it matters not that, regardless, the affected party somehow became aware of the legal process against it, entered appearance and is represented in the proceedings. A proceeding that has taken place without service is a nullity and it is not competent for a court to condone it."

[19] An apparently different outcome was reached in *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others*.[8] The case concerned the question whether the Disciplinary Committee for Legal Practitioners had been properly served with the application. The Disciplinary Committee had originally entered an appearance to defend but then withdrew its opposition to the application. Counsel for another respondent argued as a point *in limine* that service on the Disciplinary Committee had been defective because it had been effected on the Office of the Government Attorney, when service should have been on the Chairperson of the Committee. Smuts J held that

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[6] Supra.
[7] *Knouwds NO v Josea and Another* 2013 (1) NR 245 (HC).
[8] Supra.

the rule in the Knouwds matter should be confined to the facts of that case which had concerned an application that affected status. He held that –

"The present circumstances are different and distinguishable. There was service on the Government Attorney in respect of a committee whose secretary is an employee of the Ministry of Justice. But any defect as far as that was concerned would in my view be cured by the entering of opposition by the committee. The fundamental purpose of service is after all to bring the matter to the attention of a party, including having the benefit of an explanation as to the meaning and nature of the process. If a party then proceeds to enter an appearance to defend or notice to oppose through legal representatives, the fundamental purpose has been met, particularly where the legal representative in question had been served with the process (and was thus in possession of the papers and would appreciate their import)"

[20] The two cases turned on different facts and neither of them involved an application to set aside a pleading or notice of motion as an irregular step in terms of rule 30 of the High Court Rules on the basis of defective service and accordingly neither can provide firm guidance as to the manner in which defective service should be addressed in this appeal.

[21] In addressing the appellants' arguments in this regard, it will be helpful to address four issues briefly:
(a) what is the purpose of service?
(b)does defective service always constitute a nullity, or may irregular forms of service, short of a nullity, be condoned?
(c) is it necessary for an applicant to show prejudice in addition to defective service in a rule 30 application? and
(d) what is the effect of a decision in a rule 30 application that there has been defective service – is the irregular service set aside, or is the pleading or process that has been served set aside?

<u>What is the purpose of service?</u>

[22] The purpose of service is to notify the person to be served of the nature and contents of the process of court and to provide proof to the court that there has been such notice.[9] The substantive principle upon which the rules of service are based is that a person is

[9] In this regard, see the reasoning in *Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd t/a Altech Card Solutions* 2012 (5) SA 267 (GSJ) para 21.

entitled to know the case being brought against him or her[10] and the rules governing service of process have been carefully formulated to achieve this purpose and litigants should observe them. In construing the rules governing service, and questions whether there has been compliance with them, this fundamental purpose of service should be borne in mind.

Does defective service always constitute a nullity, or may irregular forms of service, short of a nullity, be condoned?

[23] Appellants argued that improper service constitutes a nullity relying, amongst other authorities, on the dictum in *Knouwds* cited above at para 17. Yet the court in *Knouwds* clearly considered there to have been 'a complete failure of service' in that case that could not be condoned, which suggests a distinction between a nullity and a less serious form of non-compliance in relation to service, which may be condoned. This is a distinction that has been drawn by the South African courts, which have held that irregular service may be condoned, where the service is not so irregular as to constitute a nullity.[11] The line between 'a complete failure of service' and 'irregular service' is not always easy to draw but will be a 'question of degree'.[12]

[24] Acknowledging the possibility that irregular service may be condoned where there has not been a 'complete failure of service' will avoid an over-formalistic approach to the rules, for an approach that precludes condonation whenever there has been non-compliance with the rules regulating service may prejudice the expeditious, cost-effective and fair administration of justice.[13] The possibility of condonation of irregular service that falls short of a nullity, would also accord with the approach to civil procedure evident in the new Rules of the Namibian High Court that came into force in April 2014, and with the recently introduced practice of judicial case management that seeks to ensure expedition, fairness and cost-effectiveness in the administration of justice.

Is it necessary for an applicant to show prejudice in addition to defective service in a rule 30 application?

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[10] *Steinberg v Cosmopolitan National Bank of Chicago* 1973 (3) SA 885 (RA) at 892B-C.
[11] See, for example*, Scott and Another v Ninza* 1999 (4) SA 820 (E) at 828F–G; *Federated Insurance Co Ltd v Malawana* 1984 (3) SA 489 (E) at 495I, and, on appeal, *Federated Insurance Co Ltd v Malawana* 1986 (1) SA 751 (A) at 762G–I; *Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd t/a Altech Card Solutions*, cited above in 9 para 23. For a recent case where service was found to constitute a nullity, see *Concrete 2000 (Pty) Ltd v Lorenzo Builders CC t/a Creative Designs and Others* 2014 (2) All SA 81 (KZD) paras 29 – 30.
[12] See the remarks of *Nestadt J in Krugel v Minister of Police* 1981 (1) SA 765 (T) at 768D–E (which concerned the question whether a summons was a nullity, not the issue of service). See also, Concrete 2000 (Pty) Ltd, cited above n 11 para 29.
[13] *See also Prism Payment Technologies*, cited above in 9, para 23.

[25] Applications to set aside process that has been served irregularly in terms of rule 30 will ordinarily only succeed if the defendant can show he or she has suffered prejudice in relation to the proceedings as a result of the defective service.[14] The requirement of showing prejudice accords with the well-known dictum of Schreiner JA in *Trans-Africa Insurance Co Ltd v Maluleka* –

'No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and if possible inexpensive decision of cases on their real merits.'[15]

[26] In many cases, the issue of prejudice will traverse similar considerations to those that will be relevant to the question of condonation of irregular service.[16] Accordingly, if prejudice is not established, and the service of a summons is not 'patently bad'[17] but condonable, it is likely that condonation of the irregular service will be granted, and the rule 30 application will not succeed.

What is the effect of a decision in a rule 30 application that there has been defective service?

[27] The effect of a finding in a rule 30 application that service has been irregular, is that the irregular service will ordinarily be set aside, and leave will ordinarily be given to the relevant party to cause proper service to be effected within the terms of the rules.[18] In this case, the relief initially sought by appellants in their rule 30 application was an order that the service on them had been 'irregular and improper . . . and consequently, the application is set aside, alternatively struck out'. However, in their written and oral submissions, counsel for the appellants appeared to accept that an order setting aside the application would not follow from a finding that the service was irregular or void.

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[14] For South African authority on the requirement of prejudice, see, for example, *Federated Insurance Co Ltd v Malawana* 1986 (1) SA 751 (A) at 763B–C; *Scott and Another v Ninza*, cited above n 20, at 828G; *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik* GmbH 1991 (1) SA 823 (T) at 824G–J and 825G-H.

[15] *Trans-Africa Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278.

[16] See, for example, *Federated Insurance Co Ltd v Malawana*, cited above n 14 at 762H–763C.

[17] This was the formulation adopted in Concrete 2000 (Pty) Ltd, cited above n 11, para 29. See also Greathead v Slabbert 1964 (2) SA 771 (T) at 772E.

[18] In this regard, see the order made in *Concrete 2000 (Pty) Ltd*, cited above n 11, para 39.

[28] What is clear is that the relief sought by the three appellants when they launched their rule 30 application was the setting aside of the notice of motion and founding affidavit. However, that is not relief that will ordinarily follow from a conclusion that service has been irregular, or even void.[19]'

[19] In the matter of *Metzger v Purity Manganese (Pty) Ltd*[20] Smuts J found that:

'Delivery to a chosen domicilium was accepted in our law as proper delivery.'

And further in the same judgment under 15:

'She submitted that once a domicilium is chosen for service, it would not matter whether the person who received service had authority to receive it or whether the addressee was present at the time by reason of the fact that that party had elected to receive service at that chosen domicilium. She referred in this regard to *Amcoal Collieries v Truter*[21] in which it was held:

"It is a matter of frequent occurrence that a *domicilium citandi et executandi* is chosen in a contract by one or more of the parties to it. Translated, this expression means a home for the purpose of serving summons and levying execution. (If a man chooses domicilium citandi the domicilium he chooses is taken to be his place of abode: see *Pretoria Hypotheek Maatschappij v Groenewald* 1915 TPD 170.) It is a well-established practice (which is recognised by Rule 4(1)*(a) (iv)* of the Uniform Rules of Court) that, if a defendant has chosen a *domicilium citandi,* service of process at such place will be good, even though it be a vacant piece of ground, or the defendant is known to be resident abroad, or has abandoned the property, or cannot be found. (Herbstein and Van Winsen The Civil Practice of the Superior Courts of South Africa 3rd ed at 210. See *Muller v Mulbarton Gardens (Pty) Ltd* 1972 (1) SA 328 (W) at 331H - 333A, *Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 847D - F.) It is generally accepted in our practice that the choice without more of a domicilium citandi is applicable only to the service of process in legal proceedings. (*Ficksburg Transport (Edms) Bpk v Rautenbach en 'n Ander* (supra 333C - D). Parties to a contract may, however, choose an address for the service of notices under the contract. The consequences of such a choice must in principle be the same as the choice of a *domicilium citandi et executandi* (cf the *Ficksburg Transport* case *ubi cit*), namely that

[19] See *Concrete 2000 (Pty) Ltd*, cited above n 11, para 39.
[20] *Metzger v Purity Manganese (Pty) Ltd* 2012 (1) NR 93 (HC).
[21] *Amcoal Collieries v Truter* 1990 (1) SA 1 (A).

service at the address chosen is good service, whether or not the addressee is present at the time".

[20] In the current matter before court, the service of these documents were not attacked because of being defective service. The service was on the *domicilium citandi et executandi* of the respondent as per the documentation which was in possession of the applicant and in terms of rule 8(1)*(d)* of the High Court rules. This seemingly is also the address displayed on the warrant of execution. Except for saying he is no longer staying at the *domicilium citandi et executandi* address, there is no evidence on where the respondent is currently staying. We also do not know when he moved to his new address and whether the domicillium address is of a property still belonging to him or where he stays from time to time.

[21] When looking at the unique circumstances of this case, it is also clear that the current application follows on a default judgment and writ of execution which was already granted and authorized by this court and cannot be divorced from those initial proceedings. The domicillium address therefore should be a valid address for the respondent in these proceedings also. The respondent in any case did not inform the applicant to whom he is in debt for quite a substantial amount of money that he no longer resides at the domicillium address nor of what his new address is. The service of these documents can therefore not be said to have been a nullity. The only problem that is raised, is that the respondent did not receive these documents, although the service was good.

[22] The respondent is further represented and before court because he came to know about the application from the first motion court roll. He therefore has knowledge, although obtained purely by accident, of the proceedings before court and has participated in the case management stage as well as filed heads and argued the matter. On the part of the respondent it was never argued that he suffered prejudice and as such, the court accept the service.

<u>Arguments on the merit of the matter</u>

[23] On behalf of the applicant it was argued that in terms of the Instalment Sale Agreement concluded between the parties, the Applicant has the right, in terms of clause 10(a) and (b) of the Terms and Conditions of sale, should the Respondent default in the punctual payment of any instalment or other amount falling due in terms of the Agreement, or abandon the Vehicle, the Applicant would be entitled to cancel the Agreement and take repossession of the Vehicle. For this reason, the present application is brought to specifically attach the Vehicle, being that it has the right of repossession and is still the owner of the vehicle.

[24] On behalf of the respondent it was argued that this application in actual fact is nothing more than an application for the issuing of a new writ of execution in a matter where the original judgment is older than 3 years. This application should not be granted as it does not follow the process as set out in rule 112 of the High Court rules dealing with superannuation.

[25] Rule 112 provides as follows:

'112. (1) A writ of execution may not be issued after the expiry of three years from the day on which a judgment has been pronounced, unless the –
(a) debtor consents to the issue of the writ; or
(b) judgment is revived by the court on notice to the debtor, but in such a case no new proof of the debt is required.

(2) In case of a judgment for periodic payments the three years referred to in sub-rule (1) run in respect of any payment from the due date of payment.

(3) Once a writ of execution of a judgment has been issued, it remains in force and may, subject to section 11*(a)(ii)* of the Prescription Act, 1969 (Act No. 68 of 1969), at any time be executed without being renewed until judgment has been satisfied in full.'

<u>Discussion</u>

[26] In general, the purpose of retaining ownership of the vehicle until the purchase price is paid, is a form of sercurity. In *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others*[22] it was stated:

'In the present case the reason for Wesbank and Nissan Diesel concluding the supplier agreement was to provide Wesbank with the security of being the owner of the vehicles, before providing finance to motor dealers. The agreement said so explicitly and had a clear commercial purpose, namely the provision of appropriate security for a financial transaction, in the form of ownership of the *merx*. Obtaining security in that way is no different from any commercial seller stipulating that ownership of the goods sold will not pass until the full purchase price is paid *(pactum reservati domini)*. That is the foundation for hire-purchase contracts and financial leases.'

[27] It is certainly true that the initial agreement between the applicant and the respondent provided for the vehicle to remain the property of the applicant until such time as it is fully paid. The plaintiff in the initial matter and the applicant in the current matter was therefore entitled to request the return of the vehicle, failure to do so, institute a claim for damages. This will then be a Vindication claim and the cause of action is explained as follows in *Amler's Precedents of Pleadings*[23]:

'An owner is entitled to reclaim possession of her or his property with the *rei vindicatio.* The action is an action in rem. It may be advisable for a plaintiff to claim alternative relief on the assumption that the defendant may have disposed of the plaintiff's property before the institution of the action or may dispose of it thereafter.'

[28] And at 393 the relief available to a plaintiff:

'Return of possession of the property or, in lieu thereof, payment of its valuc calculated on the day of the trial.'

[29] In the original matter that gave rise to the current matter, the plaintiff never proceeded with a *rei vindicatio*, but only with the damages claim for the full outstanding amount on the agreement and for cancellation of the agreement. The

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[22] *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others* 2014 (4) SA 319 (SCA).
[23] *Amler's Precedents of Pleadings*, 7th edition by LTC Harms, LexisNexis 2009 at p 392.

bank therefore never claimed its ownership of the vehicle but only for the damages it suffered.

[30] The judgment the applicant received is therefore for the full outstanding amount and the warrant of execution was therefore issued for that amount and did not include the return of the vehicle as it was never asked for and therefore never formed part of the judgment. What did form part of the judgment however the cancellation of the agreement is. As from the date of cancellation, no agreement governed the relationship between the applicant and the respondent. The plaintiff in the original matter now had a judgment based on the contractual damages it suffered as a result of the non-payment by the defendant. With the cancellation of the agreement, the plaintiff never called up the surety, being the return of the vehicle.

[31] In this instance it seems that the plaintiff was never interested in recovering the vehicle and it never formed part of the pleadings or the judgment in the first matter. It selected to institute a claim for contractual damages and as such, must now live with the election it made. It cannot now go back and seek to enforce the return of the merx as it is after the selection was exercised to proceed with a purely contractual damages claim. For the above reasons I have also not dealt with the superannuation argument.

[32] In light of the above discussion, the court makes the following order:
The application is dismissed with costs, costs to include the costs of one instructed and one instructing counsel.

E RAKOW
Judge

APPEARANCES

APPLICANT:	SJ Jacobs (with him J Vermeulen) Instructed by Ellis Shilengudwa Inc., Windhoek
RESPONDENT:	JP Jones Instructed by Evert Gous Legal Practitioners, Windhoek