



Consumer Note 11

Address for Service





Please note that the information provided does not constitute expert legal or financial advice. You should consult a professional legal or financial adviser for expert advice.

The purpose of the document is to provide you with practical information based on our experience. Each case we investigate is however assessed on its merits.

Background

We regularly receive complaints and enquiries about banks having taken judgment or instituted legal action without notice to the complainant. The complainant generally requests the bank to cease further legal action or requests that the judgment be rescinded and that any adverse credit information be removed from credit bureaux records.

We must stress that this office cannot set aside/rescind judgments granted by a court of law. Only a court of law with similar or higher jurisdiction may, on application, rescind a judgment. Our *Terms of Reference* further not only prohibit us from adjudicating a case that has previously been considered by a court of law or other ombud (clause 3.2(c)) but also limits our involvement in pending litigation.

Clause 3.2(c) provides as follows:

(c) Other processes

The OBS may not consider a complaint or dispute that:

- (i) falls within the jurisdiction of any statutory ombud as defined by their enabling legislation; or*
- (ii) is based on the same event and facts as any matter which is, was, or becomes, the subject of any proceedings in any court, tribunal or regulator or other independent dispute resolving body or an investigation by a statutory ombud of any jurisdiction, unless the proceedings were instituted by the bank and the OBS has considered it appropriate to intervene and is not prohibited from doing so under any law;*

Delivery and service of documents

Before granting judgment, a Court must satisfy itself that the Summons and/or Notice of Motion was properly served in terms of the Rules of Court.



Rule 4 of the Uniform Rules of Court (promulgated in terms of the Supreme Court Act 59 of 1959, as amended) dictates the manner of service of any process in the High Court. Service of documents can take place in any one of ways listed under Rule 4 which includes:

- i.) Delivering a copy to the person personally;
- ii.) Leaving a copy at the place of residence or business with the person apparently in charge, being a person not less than 16 years old;
- iii.) Delivering a copy at the place of employment of the person to some person apparently not less than 16 years old;
- iv.) If a person to be served has chosen a *domicilium citandi*, delivering or leaving a copy thereof at the *domicilium* so chosen.

Some facts about a *DOMICILIUM* address

Contracts often require both parties to choose a *domicilium citandi et executandi* (often referred to simply as *domicilium* or domicile).

A *domicilium* is a Latin legal term meaning an address nominated or chosen by you in a legal contract at which you elect to receive a summons or any legally required notice. It must be a physical address and not a postal address.

The choice of *domicilium* should not be taken lightly. Once it has been selected, documents and notices can be served on this address and you will be deemed to have received them, even if you did not in fact do so.

It is often wise to have the contract stipulate that in addition to any other method of delivery the notice must also be sent to your fax number or email address.

It is also important that the contract stipulates that you can change your chosen *domicilium* so that if you relocate, you can give the other party notice of your new *domicilium* and the date from which it will be effective, and the previous address rendered ineffective.

Delivery and service of documents (cont.)

The Rules issued in terms of the Magistrates Court Act (Act 32 of 1944) have similar provisions to Rule 4 of the Uniform Rules of Court regulating the service of documents initiating a process. The service of documents initiating a process in the Magistrate's Court is dealt with in Rule 9. Rule 9 is essentially the same as Rule 4 of the Uniform Rules of Court save for a proviso in Rule 9(3) which states that the court may, if there is reason



to doubt whether the process served has come to the actual knowledge of the person to be served, and in the absence of satisfactory evidence, treat such service as invalid.

If the document initiating the process is served in any of ways listed in Rule 4 in the case of a High Court process or Rule 9 in the case of a Magistrate Court process and the Court satisfied itself that service was duly executed, judgment will be granted in the absence of a notice of the respondent/ defendant's intention to defend.

Once a court has granted judgment, this office cannot investigate and adjudicate on the same facts. The customer would have to apply for a rescission of judgment in terms of the Rules of Court.

Domicilium address

Service of documents normally does not pose any problems save for service on a *domicilium* address.

A *domicilium* address, having been chosen, is recorded in the agreement with the bank, be it a mortgage loan, vehicle finance, personal loan or overdraft agreement. The place for delivery of any notices (including a notice in terms of section 129 of the National Credit Act) is therefore agreed between the bank and its customer beforehand. The bank also appoints an address for service of notices and documents in the agreement.

Service of any document, whether received or not, is deemed to have been duly served for purposes of judgment if served in accordance with the Rules of Court. Essentially the sheriff may even serve the document on a vacant stand if the vacant stand is your chosen *domicilium* address in terms of the agreement with the bank. The return of service from the sheriff serves as evidence of service.

In Magistrate Court proceedings, the Clerk of the Court or the Magistrate may disregard the return of service if any doubts exist whether the process served has come to the knowledge of the Defendant/Respondent in terms of the proviso mentioned above. The High Court Rules do not have a similar proviso and as such the return of service from the sheriff shall be sufficient evidence of service in most circumstances.

It may very well be that the *domicilium* address is different to your residential or business address. You may even change from one address to another during the term of the agreement. Unless you notify the bank and change your *domicilium* address as required in terms of the agreement, the bank may validly serve documents and notices on the address reflecting in the agreement. It is therefore imperative that you advise the bank, in writing, of any change in address.



As the *domicilium* address is a contractual term, you cannot expect that the bank will change your address on all agreements with the bank if you change your address on one of your accounts i.e. your current account. It is best to change your address for each individual account you have in terms of the provisions of the agreement pertaining to that account.

The Code of Banking Practice

The Code of Banking Practice (“the Code”) also requires you to advise the bank of any change in your address or contacts details. There are several references in the Code, some of which are quoted below together with the Preamble of the Code, which explains the application of the Code on the relationship between you and your bank.

Preamble

The Code of Banking Practice (“the Code”) is a voluntary code that sets out the minimum standards for service and conduct you can expect from your bank regarding the services and products it offers, and how we would like to relate to you. The Code only applies to personal and small business customers.

3.2 Your responsibilities

The body of the Code that follows includes a number of responsibilities that your bank expects you to fulfil in your relationship with your bank. For ease of reference these responsibilities include the following:

- *It is your responsibility to inform us of any change in your contact details or in your financial affairs as and when this occurs.*

8.6 Debt Enforcement and Recovery

Should your account go into default, your bank’s first step will be to try to contact you to discuss the matter. It is therefore imperative that you inform us always of any changes to your address and contact details.

12. Useful definitions

These definitions are not precise, legal or technical definitions and are intended to assist you with your broader understanding of banking terms used in the Code.



Contact details: Details you have provided to your bank at which you would like to receive notices and other communications. This may include postal, email, telephone and cell phone information. Where you are required to provide an address for legal notices, you must provide a physical address.

Conclusion

Most contracts with the bank include a *domicilium* clause which sets out the address you chose for delivery of documents and notices and service of processes. As the terms are agreed, the bank may serve any document or process on the address so chosen, regardless of whether you reside there.

The bank may forward all notices, like a Section 129 notice enforcing a credit agreement, to this address and serve court documents at this address. Proof of dispatch or a return of service from the sheriff is sufficient evidence that the document was delivered or the process duly served.

A court of law will consider this evidence when deciding the matter and if satisfied, may grant judgment. Our office does not have any control over this process and you should obtain legal advice on the remedies available to you, as our jurisdiction is excluded when a court has granted judgment, albeit by default.

It is therefore important to advise the bank of any change of address as required in terms of the Code, in the manner dictated in terms of the contract with the bank.

The Ombudsman for Banking Services

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