REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

CASE NO: 1997/2766

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

....
DATE
SIGNATURE

In the matter between:

NTHIBI DORAH RADEBE (born RASIBITSE) Appellant

and

LINDIWE MOKOENA First Respondent

MASTER OF THE SOUTH GAUTENG HIGH COURT Second Respondent

J U D G M E N T

SUMMARY:

Practice – application for condonation and rescission of default judgment – application brought under Rule 42(1) of the Uniform Rules and/or common law on grounds of alleged fraudulent conduct on part of plaintiff and sheriff of Court – appellant failing to show good sufficient cause for condonation and rescission – inordinate delays in prosecuting rescission application – sheriff

return of service *prima facie* proof of contents therein contained requiring appellant to challenge return of service by compelling evidence to contrary – even though application referred to trial in terms of Rule 6(5)(g) of Uniform Rules of Court appellant failed to do so – appeal dismissed.

MOSHIDI, J (A LOUW J AND R E MONANA J CONCURRING):

INTRODUCTION

[1] This appeal concerns a failed application for rescission of a default judgment. The appellant appeals against the whole of the judgment of Nicholls J in dismissing her application for condonation and application (later action) for rescission of the default judgment on 23 February 2012. The appellant sought to rescind a divorce order granted by this court by default as far back as 13 March 1997.

[2] The appellant initially brought a rescission application which was opposed. As a consequence, the application was referred to trial. Nicholls J was subsequently allocated the trial. This appeal is with the leave of the court *a quo*.

[3] The grounds of appeal, which I deal with later below, are as set out in the notice of appeal dated 10 December 2012.

COMMON CAUSE FACTS

[4] The following are common cause facts, or not seriously in dispute: The appellant and Mr Jeremiah Jerry Radebe ("*the deceased*") were married to each other in community of property at Johannesburg on 2 April 1996. There are no children born of the marriage. They lived in Soweto, Johannesburg, after the marriage. However, the marriage was short-lived. In February 1997, the deceased issued divorce summons in this court, and acting in person. The return of service shows that the summons was served by the sheriff of the Court on the appellant personally on 7 February 1997. There was no appearance to defend. On 13 March 1997, the matter came before Cassim AJ who granted a divorce order unopposed. There was also an order for the division of the joint estate. The question of the sheriff's return of service was, and is a hotly contested matter in the court *a quo*, and also in this appeal, as discussed later herein. In May 2004, at a meeting convened at the deceased's place of employment, i.e. the Reserve Bank, Johannesburg, the question of the deceased's estate was discussed. The appellant was also in attendance. She was informed that the deceased had divorced her. In 2005 the appellant launched an application for rescission of the divorce order. However, this application was not proceeded since the presiding Judge raised certain procedural issues. In 2006, another rescission application was launched. This application was postponed *sine die* because the Master's Report was required. In November 2009, the appellant brought another application for rescission which application forms the subject-matter of the current proceedings and appeal. There are other matters such as the joinder

of the deceased's sister ("*the first respondent*"), her appointment as executrix in the estate, the appointment of the appellant by the Master as executrix in the estate of the deceased, the withdrawal of such letters of executorship, the Master's Report, and correspondence from the Family Advocate, Gauteng, which are also not in dispute. These will be referred to later only when necessary.

THE APPELLANT'S EVIDENCE

[5] In the court *a quo*, in her papers and oral evidence, the appellant advanced several reasons in support of her application for condonation for the late filing of the application for rescission. These may be summarised as follows: that the appellant resided with the deceased until his death on 17 April 2004 when they jointly acquired accommodation at No 9247 Protea Glen, Extension 12. On or about 10 March 2006 she was informed by the deceased's employers that they were in possession of a decree of divorce obtained against her and that she was required to discuss the matter with the office of the Master. This was subsequent to her appointment as executrix by the Master in July 2004. In this regard, it is significant to observe that the earlier testimony of the appellant was that she knew already by 10 May 2004 at the meeting with the deceased's employers, the Reserve Bank, that a divorce order was in place. In spite hereof, the appellant contended that she was devastated by the news conveyed by the Master's office to the effect that she had been divorced by the deceased as far back as March 1997. She was also informed that another deceased estate file had been opened at the

Master's offices in Pretoria. She confirmed that she launched separate rescission applications in September 2005 and 2006 which were not proceeded with for a variety of reasons. In March 2006 the appellant instead approached the Department of Home Affairs in Pretoria ("*Home Affairs*") where it was confirmed by letter that she was still reflected as being married to the deceased. A second letter from Home Affairs dated 16 March 2006 confirmed that the appellant was reflected as a 'widow'. At the same time (March 2006) the appellant addressed a letter to the Department of Justice and she was advised to enlist the services of Legal Aid SA in regard to rescinding the divorce order. Thereafter, approximately 18 months, the appellant said she received a letter from the Master's office at Johannesburg informing her that the Letter of Authority issued to her in terms of sec 18(3) of the Administration of Estates Act 66 of 1965 on 2 July 2004 was withdrawn as invalid. For the sake of clarity the letter read:

> "*Please note that the letter of authority issued to you on 2 July 2004 is withdrawn with immediate effect, please return the original issued to you. You are further instructed not to use this letter of authority as same has been declared invalid.*"

[6] In the condonation application, the appellant also contended that due to lack of funds, she was unable to instruct her attorneys of record to prosecute her rescission application. It was only on 18 July 2008, some four years after she knew of the divorce order, that she consulted her present attorneys, C M Leballo Attorneys ("*C M Leballo*"). In spite hereof, C M Leballo took a year, i.e. 24 June 2009, to address a letter to the first respondent's then

attorneys of record, Molefe Dlepu Inc. This delay was ascribed to the two estate files opened in Johannesburg and Pretoria to a large extent. This was also, as contended by the appellant, that she did not have the contact details of the first respondent, the sister of the deceased. It is necessary to reproduce parts of the letter which read:

> "*The decree of divorce obtained by the late Jeremiah Jerry Radebe was fraudulently obtained in that the sheriff served the summons commencing action on the 7th February 1997 at United Bank, Cnr Fox and Eloff Street, which was purportedly the place of employment of our client and proceeded to obtain a decree of divorce by default (see attached summons and return of service). As opposed to what the late Jeremiah Jerry Radebe alleged in his summons and particulars of claim our client was at all material times employed at Powertech Management Services as a receptionist from 1 June 1996 until 4 July 2008 (see attached herewith letter from employer). In the light of the above we request from yourselves to furnish us with a letter consenting to the setting aside of the decree of divorce and we also seek your permission that we can serve the application at your offices.*"

The delay from the time the appellant first consulted with C M Leballo to the dispatching of the letter just quoted, has not been explained satisfactorily. The appellant also said that her legal representatives, presumably at the same consultation, advised her that the rescission application had to be served on a family member of the deceased as well. Thereafter it took the appellant more than a year i.e. 22 July 2009 to establish the address of the first respondent. On the basis of this unexplained dilatoriness, the appellant nevertheless contended that she had not delayed in prosecuting the application for rescission.

[7] In her oral evidence in the court *a quo* the appellant testified that she first became aware of the divorce order in May 2004. She also testified about the Master's Report dated 21 December 2004 as requisitioned by the court previously. The Master's Report, in short, conveyed that the appellant was issued with letters of authority as she presented to the Master that she was still married to the deceased (the deceased had died some three months earlier i.e. 17 April 2004). The appellant knew this. She had visited the deceased on his sickbed in hospital on her version on occasions. She also attended the funeral on her version. The relevant parts of the Master's Report are paras 6 and 8. Paragraph 6 read as follows:

> "*And then later during October 2004, it then came to the Master's attention that the applicant* [appellant] *was in fact a divorcee at the time of the deceased's death. And upon the Master's knowledge same was communicated to the applicant with the view to withdraw the said letter of authority issued to the applicant forthwith …*" (my insertion)

The Master then sought legal advice from the Chief State Law Advisor. In para 8 of the report the Master proceeded to state that:

> "*On the 20th of January 2005 the said office duly responded and opined that the applicant 'committed the crime of fraud and/or theft depending on the facts we* [they] *are not privy to*.' *And also suggested that the State Attorneys' office be briefed in this regard 'with a view regarding costs, the institution of possible criminal proceedings against the suspect and other related matter. …*"

The Master was obliged to withdraw the letter of authority issued to the appellant and demanded the return thereof, which demand was not complied with as at the date of the Master's Report. As second respondent in the present application, the Master chose to abide the decision of the Court.

[8] Indeed, the evidence in the court *a quo* revealed that the conduct of the appellant, after the granting of the divorce order in question, continued to show that she in fact knew that she was already divorced by the deceased. For example, in 2001 the appellant purchased immovable property in Naturena for her brother. In this transaction she used her maiden names. She also knew that the deceased too, purchased immovable property at Protea Glen in 2002 through a home loan from the then People's Bank. In the transaction, the deceased reflected his marital status as being single. The appellant new and took part in the transaction.

[9] In regard to the continued existence of the decree of divorce, the appellant testified that she was prejudiced as the administration of the deceased estate has not been finalised. She did not receive the divorce summons, she was not employed at the address reflected on the sheriff's return of service, but elsewhere, i.e. Power Technologies (Pty) Ltd ("*Power Tec*"). She lived with the deceased at all material times until his death. There was no reason for the deceased to divorce her. Their marriage was generally a happy one although they had the usual marital problems which they resolved amicably. The service of the summons was accompanied by fraudulent conduct in which the sheriff was complicit. The appellant also testified about a letter dated 26 March 2000, written in the Setswana language confirming that the deceased paid lobola to her father for marrying her. However, it later turned out that the letter was not for lobola payment but, according to the appellant, for the renewal of marital vows. However, on the evidence of the family of the deceased, through the first respondent, the

payment mentioned in the letter represented unsuccessful attempts by the deceased and the appellant to reconcile after the marriage was dissolved.

THE FIRST RESPONDENT'S EVIDENCE

[10] In her papers and oral evidence, the first respondent challenged the contentions of the appellant in respect of both the condonation application as well as the allegation that the appellant was divorced surreptitiously. The first respondent said that she was not obliged to inform the appellant of the existence of the divorce order immediately after it was granted. In any event, according to the first respondent, at that stage the appellant had already moved out of the common home which she shared with the deceased. However, the appellant must have become aware of the divorce order during the funeral of the deceased. In fact, the appellant had instructed a lawyer who contacted the family of the deceased shortly before the funeral. The contact was accompanied by a threat to halt the funeral proceedings. Alternatively, the fact that the deceased had divorced her was pertinently brought to the appellant's attention at the subsequent meeting held at the deceased's place of employment on 10 May 2004, as indicated earlier in the judgment. The appellant and the first respondent were the only witnesses at the trial.

THE GROUNDS OF APPEAL

[11] I turn to the grounds of appeal as amended. These are extensive but may be summarised as follows: that the court *a quo* erred in concluding that there were two mutually destructive versions at the trial; that the court *a quo* erred in criticising and ultimately rejecting the appellant's evidence on several issues; that the court *a quo* should not have found that the letter written in the Setswana language referred to payment of lobola; the fact that the appellant signed the transaction as a person of single status when she purchased the immovable property at Naturena was no proof that she was single; that the court *a quo* erred in rejecting the correspondence from Home Affairs and not subpoenaing to court the authors thereof; that the court *a quo* erred in finding that the deceased had no possible motive to divorce the appellant in a clandestine manner or surreptitious manner; and that the appellant did not delay unduly in bringing the application(s) for rescission. The main challenge mounted by the appellant against the judgment of the court *a quo* is that the sheriff's return of service was fraudulent since the summons was served at a workplace which was not her place of employment. This, coupled with the first respondent's failure to inform the appellant of the divorce order.

THE FINDINGS OF THE COURT *A QUO*

[12] The court *a quo*, in a well-reasoned judgment properly dealt with all the issues now raised on appeal. The court *a quo* found the evidence of the appellant to be confusing, contradictory to her previous affidavits, and

unimpressive on several issues. These included her initial version on affidavit that the lobola was paid as a result of the deceased's realisation that he had divorced her fraudulently. This version was changed in evidence to paying lobola for the renewal of marriage vows. The court *a quo* also found in this regard that it was highly improbable that the respective families would enter into lobola negotiations if the couple was still married. The court *a quo* also found the version of the appellant relating to the acquisition of the immovable property at Naturena as improbable. The version implied that the appellant, in collusion with the deceased, and with his consent, fraudulently declared that the appellant was unmarried in order to assist her brother in obtaining a mortgage bond. In the evaluation of the evidence, the court *a quo* took into account the applicable legal principles in situations of mutually destructive versions as set out in, *inter alia*, *National Employers' General Insurance Co v Jagers* 1984 (4) SA 437 (ECD); *Stellenbosch Farmer's Winery Group Limited v Martell et Cie* 2003 (1) SA 11 (SCA) and the necessary inferences to be drawn from proven facts as set out in *Cooper & Another v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA). Indeed, the record of the proceedings reveals several other reasons why the appellant's version was rendered improbable.

[13] In regard to the granting of the divorce order in her absence, the Court noted that the appellant contended largely that the deceased obtained a decree of divorce by fraudulent means. The appellant sought condonation and the rescission of the divorce order in terms of Rule 42(1) of the Uniform Rules. At the outset it is necessary to deal with the appellant's condonation

application. The common cause facts listed earlier in this judgment demonstrate the dilatory attempts made by the appellant. These are unnecessary to restate. In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532B-F, the Court said:

> "*In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated : they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the foregoing clearly emerge from decisions of this Court, and therefore I need not add to the evergrowing burden of annotations by citing the cases.*"

In the present matter, and in refusing condonation, the court *a quo* found that the appellant took almost 16 months to institute rescission proceedings which were also fatally defective. Thereafter, the appellant waited for the following year to either re-enrol the matter or, consistent with her conduct, to bring a second application. The court *a quo* was not informed when in 2006 the matter had been set down but merely that it was postponed *sine die*. This is also not apparent from the record of the proceedings. However, thereafter the appellant delayed for another three years until 5 November 2009 before bringing the application forming the subject-matter of the present appeal. The

reasons advanced by the appellant for the inordinate delay, as stated earlier above, were not convincing at all. The appellant, on her own version, had been in continuous employment, even though the appellant said she consulted with the attorneys of record on 18 July 2008, the latest rescission application was instituted only on 5 November 2009, almost a year and four months later, and some five years after the death of her husband. For these reasons, the court *a quo* concluded that the appellant had not shown good cause for condonation to be granted. I may add at this stage that on a consideration of the conspectus of the evidence, this matter is not the kind where it could be said that the appellant reasonably did what she could to timeously bring her application before court. See in this regard *Napolitano v Commissioner of Child Welfare, Johannesburg and Others* 1965 (1) SA 742 (A) at 744G.

SOME APPLICABLE LEGAL PRINCIPLES

[14] In *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA), to which the court *a quo* had regard, at para [27], Court held that:

> "*[27] Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequent disclosed defence. A Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in term of the Rules*

> *entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.*"

In the instant matter, as found by the court *a quo*, there was no suggestion at all that the Judge who granted the divorce order was ever made aware of any irregularity in the manner in which the summons was served on the appellant.

[15] The court *a quo*, even on the assumption that the appellant's application was brought under the common law where a judgment may be set aside on various grounds, including fraud, came to the conclusion that the appellant could not succeed. In order to succeed, the appellant would have had to show that her deceased husband was a party to such fraud. In this regard, the court *a quo* relied on, *inter alia*, *Rowe v Rowe* 1997 (4) SA 160 (SCA); *Makings v Makings* 1958 (1) SA 338 (A). See also *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T). (*Cf*. *Topol and Others v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W).)

[16] Based on the above principles, the court *a quo* concluded that no fraud had been perpetrated on the appellant. This, for a variety of reasons. If the deceased intended to defraud the appellant, he would not have asked for division of the joint estate in his divorce summons. In any event, there were no assets of any real value to share, and no immovable property. There was no evidence placed before the court of any collusion between the deceased and the sheriff who served the summons leading to the divorce order. In Hahlo *The South African Law of Husband and Wife* 5 ed at 419 stated:

> "*A decree of divorce which was obtained by the plaintiff through collusion of fraud is liable to be set aside at the instance of the defendant, provided the latter was not a party to the fraud and provided further neither of the parties has since married a person ignorant of the fraud.*"

In the instant matter there is no evidence of fraud on the part of either the deceased or the appellant. There is also no evidence of fraud on the part of the sheriff. The court *a quo* found that the divorce order was correctly granted. The fact that the appellant contended that she was employed elsewhere did not advance her case at all.

THE SHERIFF'S RETURN OF SERVICE

[17] Prior to concluding on the findings of the court *a quo*, there is one matter which requires some further indepth discussion. This is the question of the sheriff's return of service. Rule 4(1)(a) of the Uniform Rules provides:

> "***4 Service***
>
> *(1)(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:*
>
> (i) *By delivering a copy thereof to the said person personally: Provided that where such person is a minor or a person under legal disability, service shall be effected upon the guardian, tutor, curator or the like of such minor or person under disability;*
>
> (ii) *by leaving a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than sixteen years of age. For the purposes of this paragraph when a building, other than an hotel, boarding-house, hostel or similar residential building, is occupied by more than one person or family,*

'residence' or 'place of business' means that portion of the building occupied by the person upon whom service is to be effected;

(iii) *by delivering a copy thereof at the place of employment of the said person, guardian, tutor, curator or the like to some person apparently not less than sixteen years of age and apparently in authority over him;*

(iv) *if the person so to be served has chosen a domicilium citandi, by delivering or leaving a copy thereof at the domicilium so chosen;*

(v) *in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law;*

(vi) *by delivering a copy thereof to any agent who is duly authorized in writing to accept service on behalf of the person upon whom service is to be effected;*

(vii) *where any partnership, firm or voluntary association is to be served, service shall be effected in the manner referred to in paragraph (ii) at the place of business of such partnership, firm or voluntary association and if such partnership, firm or voluntary association has no place of business, service shall be effected on a partner, the proprietor or the chairman or secretary of the committee or other managing body of such association, as the case may be, in one of the manners set forth in this rule;*

(viii) *where a local authority or statutory body is to be served, service shall be effected by delivering a copy to the town clerk or assistant town clerk or mayor of such local authority or to the secretary or similar officer or member of the board or committee of such body, or in any manner provided by law; or*

(ix) *if two or more persons are sued in their joint capacity as trustees, liquidators, executors, administrators, curators or guardians, or in any other joint representative capacity, service shall be effected upon each of them in any manner set forth in this rule.*

[Rule 4(1)(a) amended by GN R2410 of 30 September 1991.]

(aA) Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings.

[Para (aA), previously para (a)*bis*, renumbered by GN R2410 of 30 September 1991.]

(b) Service shall be effected as near as possible between the hours of 7:00 and 19:00.

[Para (b) amended by GN R2410 of 30 September 1991.]

(c) No service of any civil summons, order or notice and no proceedings or act required in any civil action, except the issue or execution of a warrant of arrest, shall be validly effected on a Sunday unless the court or a judge otherwise directs.

(d) It shall be the duty of the sheriff or other person serving the process or documents to explain the nature and contents thereof to the person upon whom service is being effected and to state in his return or affidavit or on the signed receipt that he has done so.

[Subrule (1) substituted by GN R235 of 18 February 1966 and by GN R2004 of 15 December 1967.]"

Even though the sheriff's return reflected that the summons was served on the appellant personally, she contended that she never received it. She was not employed at the address where the summons was served, but elsewhere, i.e. at Power Tec. In this regard a letter from her employer was submitted. It is common cause that neither the employer nor the sheriff was called to testify even after the initial application was referred to trial. This was so even though it seemed possibly the strongest contention in her favour.

[18] However, she was not without any difficulty. It has always been accepted that the return of service constituted *prima facie* proof of the contents therein contained, but open to challenge. The kind of challenge envisaged occurred in *Greeff v Firstrand Ltd* 2012 (3) SA 157 (NCK). There

the applicant brought an application for condonation for bringing an application for rescission which was out of time. The applicant, as in the present matter, contended that she was not aware of having been summonsed, and challenged the sheriff's return of service on the basis that he/she could not have attached the summons on her residence's front door as stated therein since it was inaccessible to the public. The house had been fenced in, the gate had at all times been locked, and that in the circumstances, she never became aware of the summons. In ultimately granting condonation and rescission, the Court at para [10] of the judgment said:

> "*The provisions of s 36(2) of the Supreme Court Act are to the effect that a return of service will constitute prima facie proof of the contents. It follows that such evidence may be challenged.*"

See also *Tupper v Tupper* 1969 (1) SA 213 (GWPA) at 214C-D. In *Great Kei Municipality v Danmist Properties CC* [2004] 4 All SA 298 (E), the applicant sought rescission of a default judgment on the basis that the relevant papers were served by the sheriff at an incorrect address. In ultimately granting rescission and castigating the sheriff, the Court at 304d said:

> "*In terms of section 36(2) of the Supreme Court Act 59 of 1959 the return of the Sheriff or a Deputy-Sheriff of 'what has been done upon any process of the court, shall be prima facie evidence of the matters therein stated'.*"

The Court also referred with approval to the *dictum* in *Mutebwa v Mutebwa and Another* [2001] 1 All SA 83 (Tk) at 202D.

[19] The facts in the above cases were, however, distinguishable from the facts in the present matter in several respects. Here, the return of the sheriff reflected that the summons was served personally on the appellant. Her attempt at challenging the return of service was rather lame and unconvincing. As stated earlier in this judgment, when the application was referred to trial the appellant could and should have subpoenaed the sheriff to testify on the return of service, or called her employer, Power Tec, to testify in support of her contentions. This was easy to do. She did not do so. In any event, the court *a quo* found that even if the appellant's assertions were correct that she was divorced without her knowledge and notice been served on her, the recorded inordinate delays in prosecuting the rescission application, were simply insurmountable. (*Cf Dada v Dada* 1977 (2) SA 287 (T).) It is so that the return of service in question at first glance looks suspicious. It does not state that the service was effected in terms of Rule 4(1)(a) of the Uniform Rules, but Rule 9(3). The latter Rule has however, in any event since been repealed. The errors, including that the appellant's full names were not reflected, are insignificant. There was no fraud proved against the sheriff or any collusion with the deceased. Rule 4(1)(a) is quoted in *extenso* above.

[20] It is interesting that certain foreign jurisdictions, not only follow our principle that a sheriff's return of service is *prima facie* proof of the contents thereof and may be challenged by a party contesting it, but also provide that a return of service is conclusive evidence in certain circumstances. For

example, in the UK, in *Gyfford v Woodgate* (1809) 11 East 297, it was held that:

> "*The sheriff's return endorsed upon the two writs (which writs had been produced in evidence by the plaintiff as part of his case) wherein the sheriff stated that he had foreborne to sell under the first, and had sold under the second writ, by the request and with the consent of the now plaintiff, were prima facie evidence of the facts so returned; credence being due to the official acts of the sheriff between third persons.*"

The same principle was followed in regard to a *nulla bona* return in *Avril v Mordat, Bart and Others* (1834).

20.1 In the US, in *Benton v Maddox* cases, Court of Appeals of Georgia (26137) 1937, the cases involved a defendant who disputed the service by the sheriff. The defendant in support of the contention, deposed to an affidavit of illegality disputing such service. The Court said:

> "*It is the duty of the sheriff to deliver a copy of the petition and process to the defendant either personally or by leaving same at the defendant's residence, and to make an entry of* ***service*** *upon the original petition and return the same to the clerk of the court. Code 81/202. A judgment having been rendered, there is a presumption that such entry of* ***service*** *was made upon the original petition. If there was such a* ***return*** *of* ***service****, in the absence of a legal traverse, to which the sheriff is a party, it is conclusive. An affidavit of illegality will not take the place of a traverse of the officer's* ***return****. An affidavit of illegality, denying* ***service****, is of itself sufficient to raise that issue only when no* ***return*** *of* ***service*** *exists; since a* ***return*** *of* ***service*** *is conclusive upon that question, in the absence of a timely traverse. Webb v Armour Fertilizer Works 21 Ga.App, 409 (94S.E.610). The officer making the* ***return*** *is a necessary party to such traverse.*"

20.2 In *Jorge Robles-Martinez, et al,* (appellants) *v Diaz Reus and Targ LLP* (appellee), in the third District Court of Appeal, State of Florida, July Term A.D.2011, the appellants filed a motion to quash service process. The appellants, in support of their motion, filed an affidavit by the occupant of the apartment on whom service was effected who averred that the applicants were not living at the address on the date of service. In dismissing the appeal, the Court said:

> "*The verified returns of service were regular on their face, creating a presumption of valid service. Appellants failed to overcome the presumption of valid service by clear and convincing evidence, and there was competent substantial evidence to support the trial court's determination that the apartment in question was appellants' usual place of abode on the date of service. We affirmed the trial court's denial of appellants' motion to quash.*"

See also *Temple Law Quarterly* 9 Temp L.Q333, 1934-1935, where it is said:

> "*That the return regular on its face, of any writ served by the sheriff, shall constitute prima facie evidence of the truth of all the statements contained therein, to be overcome by clear, precise and indubitable evidence to the contrary.*"

Finally, Wigmore, *Evidence In Trials* at Common Law, vol 4, 1972 at 1346, states that:

> "*A sheriff's return, besides being admissible as an official statement …, is also usually treated as conclusive (i.e. not to be shown erroneously) to the same extent that the other parts of the same judicial proceedings are conclusively determined by the judgment, i.e. as against the parties and their privies; while as against the sheriff himself it will be affected by the doctrines of estoppel.*" (footnotes omitted)

20.3 From the above, it is plain that not only do the abovementioned foreign jurisdictions follow our approach that, a return of service of the sheriff is *prima facie* proof of its contents, but also that a party aggrieved thereby may challenge the return of service by clear and convincing evidence to the contrary. In addition, the challenge must also involve the sheriff concerned, otherwise the return of service, which on the face thereof is regular, is presumed to be valid and conclusive. This, based on the high premium placed on the duties, functions, integrity, obligations and office of the sheriff of the court.

20.4 In our law the duties and powers of sheriffs are regulated by the Sheriffs Act 90 of 1986, as amended, and Rule 4(1)(a) of the Uniform Rules of Court, quoted above. In the present matter the service was effected by the sheriff personally on the appellant, as this issue was in dispute during the initial application, the application was referred to trial in terms of the provisions of Rule 6(5)(g) of the Uniform Rules of Court. As stated earlier in this judgment, at the subsequent trial, the appellant, for some inexplicable reason, did not avail herself of the right to apply for

the sheriff to be called to testify and be cross-examined. See in this regard *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 635A-B. For this reason too, the appellant's denial that service of the summons was not effected on her can hardly be said to be a convincing and credible challenge.

WHETHER THIS COURT CAN INTERFERE

[21] Finally, I turn to the factual findings made by the court *a quo* in dismissing the rescission application. This Court on appeal, can only interfere with such factual findings if there was a clear misdirection or irregularity *ex facie* the record, or if the trial court exercised its discretion capriciously. See *Western Cape Minister of Education and Others v Governing Body of Mikro Primary School and Another* [2005] 3 All SA 436 (SCA) at para [54]. In *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at para [21], the Court said:

> "*A court of appeal can interfere only if the Court which heard the application exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons.*"

(Cf S v Myburgh [2002] 2 All SA 603 (C).)

CONCLUSION

[22] Based on the above legal principles, I conclude that in the present matter it cannot be said that the court *a quo* misdirected itself in any manner in dismissing the appellant's rescission application. Consequently, there are no grounds to interfere with the factual findings and conclusions made. For these reasons the appeal must be dismissed with costs.

ORDER

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

1. The appeal is dismissed with costs.

_____

D S S MOSHIDI
JUDGE OF THE GAUTENG LOCAL DIVISION
JOHANNESBURG

I concur:

_____

A LOUW
JUDGE OF THE GAUTENT LOCAL DIVISION
JOHANNESBURG

I concur:

_____

R E MONAMA
JUDGE OF THE GAUTENG LOCAL DIVISION
JOHANNESBURG

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DATE OF HEARING	26 FEBRUARY 2014
DATE OF JUDGMENT	14 MARCH 2014