IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 34218/18

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

27/02/2019
DATE

SIGNATURE

In the matter between:

SELENE E SACERDOTE	Applicant
and	
ANTONELLA P STROMBERG	Respondent

In re:

ANTONELLA PAOLA STROMBERG	Applicant
and	
SELENE ELEONORA SACERDOTE	1st Respondent
ALESSANDRO ENZO SACERDOTE	2nd Respondent
CORALI CINZIA SACERDOTE	3rd Respondent
MASTER OF THE HIGH COURT	4th Respondent

JUDGMENT

MNGQIBISA-THUSI J

[1] The applicant, Ms Selene E Sacerdote seeks, in terms of Rule 30(1) of the Uniform Rules of court, an order setting aside a notice of motion and founding affidavit to an application instituted by the respondent.

[2] Mrs Antonella P Stromberg, the respondent in this application, together with the applicant, Mr Alessandro Enzo Sacerdote ("Mr Sacerdote") and Ms Corali Cinzia Sacerdote ("Ms Sacerdote") are siblings. Their parents died in a motor vehicle collision on 18 December 2005. In terms of the joint will of the parents, all four siblings are heirs and equal beneficiaries in their parents' deceased estates. The applicant and Mr Sacerdote were appointed as co-executors of their parents' separate deceased estates. On 16 February and 6 March 2016 the Master of the High Court, appointed the applicant and Mr Sacerdote as co-executors of the father and mother's estates, respectively.

[3] On 6 May 2018 the respondent issued a notice of motion and founding affidavit in which relief is sought, in terms of s 54(1) (a) (v) of the Administration of Estates Act[1], for the removal of the applicant as co-executor of the parents' deceased estates and her replacement by Mr Roberto Cecil Marcer ("the main application"). Attached to the notice of motion are unsigned confirmatory affidavits of Mr Sacerdote and Miss Sacerdote, who are cited as the second and third respondents, respectively. The application was served on the

[1] Act 66 of 1965.

applicant on 17 May 2018. Further, the respondent sent by electronic mail ("email") the application to the second respondent who resides in Cape Town and to third respondent who resides in the United Kingdom.

[4] Mr Sacerdote and Miss Sacerdote will hereinafter be referred to as cited in the main application.

[5] On 6 May 2018 the applicant filed her notice to oppose in the main application. At the same time the applicant caused to be delivered to the respondent a notice in terms of Rule 30(1)[2]. In terms of Rule 30(3) the court is empowered to set aside the step complained of if it is irregular.

[6] In the rule 30 notice the applicant complains, *inter alia*, that the applicant's notice of motion and founding affidavit constitute an irregular step in that service on the second and third respondents by email was defective as it was not in accordance with the provisions of Uniform Rule 4 (1) and Rule 5(1).

[7] When the respondent failed to remedy the complaint as set out in the Rule 30(1) notice, on 27 June 2018 the applicant instituted these proceedings and on 13 July 2018 the respondent served a notice to oppose the Rule 30(1) application.

[8] On 17 July 2018 the second and third respondents sent the respondent similar worded emails in which they confirmed having received the respondent's

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[2] Rule 30(1) provides that: "A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside."

application and also giving permission to be served with any pleadings and notices at their respective email addresses.

[9] On 2 August 2018, signed confirmatory affidavits of the second and third respondents were served on the applicant's attorneys.

[10] It is the applicant's contention that the respondent's notice of motion is irregular in that despite the provisions of Uniform Rule 4(1)[3] pertaining to service of documents initiating proceedings, the respondent failed to effect personal service through the sheriff on the second respondent. Further, that the respondent had failed, as envisaged by the provisions of Uniform Rule 5(1)[4], to first seek leave of the High Court to issue and serve the application on the third respondent. The purpose of Rule 5(1) is to provide the method by which actions can be instituted and prosecuted against persons it has jurisdiction upon but who because of their absence from the court's jurisdictional area cannot be served with process. Further, the court may order in which way service is to be effected that is likely to bring to the attention of the party to be served the proceedings in question.

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[3] Uniform Rule 4(1) provides in part that: "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..."

[4] Uniform Rule 5(1) reads as follows: "Save by leave of the court no process or document whereby proceedings are instituted shall be served outside the Republic.

[11] It is common cause that the purpose of service is to give notice to the other party about the application. It was aptly quoted by the court in *Investec Property Fund Limited v Viker X (Pty) Ltd and Another*[5] that:

> "It is a cornerstone of our legal system that a person is entitled to notice of legal proceedings against such person"[6].

[12] It is not in dispute that service on the second and third respondents by email and before leave of this court was obtained with regard to the third respondent, was not in compliance with the prescripts of Rule 4(1) and 5(1).

[13] It was submitted on behalf of the applicant that the applicant was prejudiced by the defective service on the second and third respondents in that whatever order is made would not be binding on them due to the improper service. It was further submitted on behalf of the applicant that the purported service on the second and third respondents was irregular in that the subsequent emails by the said respondents acknowledging receipt and knowledge of the application did not cure the defective service. In this regard the applicant relies on the decisions in *Walster v Walster*[7] and *Improchem v USA Distillers*[8].

[14] In the *Walster* matter (above) the court held that there was no proper service in that the plaintiff had not sought the authority of the High Court before serving

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[5] Unreported judgment, Case no 2016/07492, Gauteng Local Division (10 May 2016) para .10.

[6] *Steinberg v Cosmopolitan National Bank of Chicago* 1973 (3) SA 885 (RA) at 892B-C.

[7] 1971 (4) SA 442 (E).

[8] Unreported judgment of the Gauteng Local Division, Case number 2015/13244 (31 August 2016).

the defendant, who was a *peregrinus*. In the *Improchem* matter (above) the court held that since service of the application was only effected after the court had authorised service by edictal citation, the mere fact that the Registrar had issued the main application and the application for service by edictal citation, did not render the service defective.

[15] It is the respondent's contention that service by email and without the authority of the High Court was not irregular as the defective service was cured by the second and third respondents' confirmation of the receipt and knowledge of the application. It was submitted that the applicant would not suffer any prejudice since both respondents have actual knowledge of the main application and endorsed it by filing confirmatory affidavits to the founding affidavit. For the respondent condonation was sought for the imperfect service.

[16] With regard to the *Improchem* matter (above), counsel for the respondent submitted in his supplementary heads of argument, that the matter was distinguishable from the present matter in that in this matter no relief is sought against the second and third respondents and that both had received notice of the application and had also filed confirmatory affidavits in support of the main application and that no purpose would be served in formally joining these respondents.

[17] The requirements pertaining to service as set out in rule 4(1) and 5(1) are peremptory. However, the High Court has the power to regulate its own processes and condonation will be granted only in exceptional circumstances. In exercising its discretion whether or not to condone non-compliance with the

rules, the discretion must be exercised judicially. In *Federated Insurance Company of South Africa Ltd v Malawana*[9] the court held that:

> "It is clear from Rule 27(3 and Rule 30(3) that a breach of the Rules is not necessarily visited with a nullity, and can be condoned. The Court has a discretion which must be exercised judicially after considering the relevant circumstances and deciding what will be fair to both sides".

[18] The main requirement to be satisfied in order for an applicant in a Rule 30(1) application to succeed is that the applicant has to show that if service is not effected as contemplated in terms of the Rules, it will be prejudiced if the process complained of is not set aside as being an irregular step[10].

[19] It is not in dispute that the second and third respondents got notice of the main application. With that knowledge neither of the two respondents sought to oppose the application. With knowledge of the application, the second and third respondents also filed confirmatory affidavits in support of it.

[20] I am satisfied that service on the second and third respondents was effective. Even though the provisions of Rules 4(1) and 5(1) are peremptory, this court has the power to condone imperfect service if it is satisfied that there is no

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[9] 1984 (3) SA 489 (E) at 495H.

[10] Erasmus *Superior Court Practice*, *Prism Payment Technologies v Altech Information Technologies* 2012 (5) SA 267 (GSJ).

prejudice to the applicant. In *Viljoen v Federated Trust Ltd*[11] the court stated that:

> "The Rules of Court, which constitute the procedural machinery of the Courts, are intended to expedite the business of the Courts. Consequently they will be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible".

[21] I am not convinced that the imperfect service on the respective respondents is prejudicial to the applicant. The respondents are aware of the application and no relief is sought against them. They have in fact joined issue with the respondent by filing confirmatory affidavits in the main application and will be bound by whatever order will be granted in the main application. I am of the view that unnecessary costs will be incurred if condonation is not granted. Further I am not persuaded that the applicant will be prejudiced if the respondent's notice of motion is not struck out as an irregular step.

[22] In the application the applicant had sought, in the event of being successful, costs on an attorney and client scale. There is no reason why costs on the same basis should not be awarded to the successful party.

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

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[11] 1971 (1) SA 750 (O).

'The application is dismissed with costs on an attorney and client scale.'

N P MNGQIBISA-THUSI

JUDGE OF THE HIGH COURT

For Applicant Adv SC Vivian SC (instructed by Ian Levitt Attorneys) and for respondent Adv JL Kaplan (instructed by Guiseppe Fitzzotti Attorneys)