IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 31587/21

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.

_____ _____

DATE SIGNATURE

In the matter between:

BMW SOUTH AFRICA (PTY) LTD APPLICANT

and

ADAM DAVE WILLIAM 1ST RESPONDENT

ONE OTHER 2ND RESPONDENT

JUDGMENT

MBONGWE J:

INTRODUCTION

[1] This is an interlocutory application brought in terms of Rule 30 of the Uniform Rules of Court. The Applicant herein seeks that the first respondent's combined summons be set aside due to a failure to serve same in accordance with Rule 4 of the Uniform Rules of Court. In addition, the Applicant denies that the summons were served by the Sheriff as alleged by affixing to the main entrance gate of its premises and/or in any manner whatsoever.

[2] With regards to service of the same combined summons by email, the applicant, while acknowledging receipt of the summons, takes issue with that manner of service as being irregular in that:

(a) There was no agreement in place between the parties for service of the summons by email and,

(b) No basis existed for service of the summons on attorneys Norton Rose Fulbright SA Incorporated as they had not been instructed on the matter at the time.

FACTUAL MATRIX

[3] The first respondent's attorneys allegedly instructed the second respondent, who is the Sheriff of this court, on the 28 June 2021 to serve a combined summons commencing action on the Applicant at its chosen domicilium citandi et executandi. According to the Sheriff, the summons was served on

the Applicant (BMW) on the 30 June 2021 at 11h03, the date on which the first respondent's claim was to become prescribed. Service was allegedly effected by affixing of a copy of the summons at the main entrance gate of BMW as the gate had been kept locked.

[4] On the same day, 30 June 2021, the first respondent's attorneys had allegedly made inquiries from the Sheriff regarding service of the summons and were advised that service had been effected by affixing a copy of the summons to the main entrance gate of the defendant.

[5] The first respondent's attorneys, despite the sheriff's advice, elected to email the combined summons to the applicant and to attorneys Norton Rose Fulbright South Africa Incorporated, the present attorneys of record for the applicant, although they had not been instructed on the matter at the time.

[6] Still on the same day, 30 June 2021, the applicant's attorneys served a notice of intention to defend together with a notice in terms of Rule 30(1) objecting to the irregular service of the summons by email. Despite the objection, the first respondent's attorneys failed to remove the cause of complaint. They contended, on the papers and in court, that by raising the irregularity and calling for its removal, the applicant had aimed for the plaintiff's claim to prescribe and to raise prescription in defence thereafter.

[7] On 05 August 2021 the defendant's attorneys served a notice in terms of rule 23(1) advising that the first respondent's particulars of claim were excipiable in that same could not sustain a cause of action and were vague and embarrassing. The defendant called for the removal of the cause of complaint.

The first respondent's attorneys subsequently filed a notice to amend the plaintiff's particulars of claim in terms of rule 28 and later filed the amended particulars of claim on 03 September 2021. The defendant's notice in terms of rule 30 remained unreacted to.

[8] The applicant launched this application for the setting aside of the summons on 10 September 2021on the basis of the irregularity of the service thereof.

[9] The applicant has cited the Sheriff of the Court, Pretoria North, as the second respondent and as a party having an interest in the matter, more specifically in that the applicant denies that summons was served on it by affixing to the main entrance gate of its premises. The sheriff has not reacted to the application served on him for his joinder.

APPLICANT'S CASE

[10] The foundational facts on which the applicant premises its denial that the summons was served on its premises are set out in its founding affidavit deposed to by Ms Charlotte Theresa Chellan who is employed by the defendant as a manager; Legal Advisor. The contents in the founding affidavit are confirmed in the confirmatory affidavit of Ms Jane-Eleanor Morrison, the Risk Manager in the applicant, in the denial of service of the summons, including the attendance of the sheriff at the premises of the applicant on the 30 June 2021. The applicant states that:

10.1 The applicant's premises on which the summons were allegedly served were fully operational on the date and time the summons were

allegedly affixed to the main entrance gate, Gate land that the gate had not been locked;

10.2 Gate 1 is the only entrance for visitors to enter the premises and is manned by security guards employed by a company named G45 during the two-shift operations of the applicant;

10.3 All gates, including gate 1, are fitted with CCTV cameras;

10.4 On arrival, every visitor is directed to the reception for attention;

10.5 Ms Morris, the deponent to the founding affidavit, had viewed the CCTV footages of all the gates in the applicant's premises and could find nothing that had been affixed to any of the gates. The viewing was done for the period 28 June 2021 to 02 July 2021. The sheriff, Mr Rauwone's vehicle did not appear in the vicinity of Gate 1 nor in the parking area adjacent to it and used by visitors;

10.6 There is no record of the Sheriff's name in any one of the two occurrence books; one at the boom gate and the other at the turnstile entry, that the sheriff had arrived to serve summons;

10.7 The security guards at the applicant's premises were interviewed by Ms Morris and the contract manager at G45 and have all denied that the sheriff or any of his staff had come to serve summons and/or that summons was affixed to the main entrance gate or handed to any one of them.

[11] An affidavit by a candidate attorney, Ms Mokgotho, at the applicant's attorney's office reveals a contradiction in the sheriff's return of service wherein service by affixing to the gate is alleged whereas the sheriff's account to Ms Mokgotho was that the summons were left with security.

[12] With regards to service by email, the applicant acknowledges that the summons were sent to its head of Human Resources and to Norton Rose Fulbright SA Inc., the applicant's present attorneys of record, although they had not been instructed on the matter at the time the email was sent to and received by them.

[13] On 10 September 2021 the applicant launched this application, in light of the first respondent's failure to comply with the notice in terms of rule 30, seeking;

13.1 An order joining the second respondent as a party to this application because of his interest in the matter;

13.2 An order that purported service of the combined summons on the applicant constitutes an irregularity;

13.3 An order that there was no service of the combined summons on the applicant as required in terms of the Rules of Court;

13.4 A order setting aside the return of service of the Sheriff, Tshwane North dated 30 June 2021.

THE FIRST RESPONDENT'S CASE

[14] The first respondent's opposition to this application is premised on the grounds that;

a) Despite raising the irregularity in terms of Rule 30, applicant had taken a further step by the subsequent service of the notice in terms of rule 23(1) and has consequently lost its entitlement to the relief sought in terms of Rule 30 ; that the purpose of the service of a summons commencing action, being to bring to the acknowledge of the party cited as the defendant, BMW in this case, was fulfilled/met by either the alleged service by the sheriff and/or by the emailing of the summons as earlier stated and, lastly that there has been no prejudice to the applicant occasioned by either mode of service of the combined summons. The legitimacy and sustainability of these individual grounds is considered later hereunder.

THE ALLEGED FURTHER STEP

[15] The proviso in Rule 30(4) relating to 'a further step' taken, has to be understood in context and the nature of the step constituting or perceived to be constituting a 'further step'. There are two separate causes of complaints that had been raised at different times and founded on different grounds. The first is exception in terms of rule 30(1) grounded on the alleged irregularity of the service of the summons and the second is an exception to the first respondent's particulars of claim in terms of Rule 23(1) on the ground that same lack averments necessary to sustain an action and/or are vague and

embarrassing.

[16] The first respondent's argument is that by filing the notice in terms of Rule 23(1) subsequent to the Rule 30 Notice, the applicant had taken a further step after filling the notice in terms of rule 30 and, therefore, dislodged itself of the entitlement to rely on the irregularity raised in the rule 30 notice, even if the irregularity may be established. This argument raises the question whether the filing of rule 23 (1) notice constituted the 'further step' envisioned in Rule 30(4).

[17] The further step envisioned in rule 30(4), in my view, would have been taken had the applicant filed a plea, despite the failure of the 1st respondent to cure the alleged defective service of the summons. In this case the applicant had instead raised an additional and distinct cause of complaint; being the excipiability of the particulars of claim premised on (Rule 23(1)). In my view, any notice filed, subsequent to the filling of a rule 30(1) notice, and raising a legitimate additional cause of complaint, does not constitute the further step envisioned in rule 30(4). The words "a further step" as I understand it in the context of the exchange of pleadings, denote the filling of a pleading that progressively lead towards the close of pleadings. In casu, the filling of a rule 23(1) subsequent to the rule 30 (1) notice does not further the exchange of pleadings towards the close thereof, but calls for the removal of yet another cause of complaint that precluded the applicant from filling a plea. It is consequently, in my view, a misreading of rule 30(4) to construe its proviso as being preclusive of the raising of any further legitimate cause of complaint. This view finds support in *Jowell v Bramwell – Jones* 1998 (1) SA 836 (W)

904, where the Court, in approval of the principle in *Nasionale Aartappel Kooperasie Bpk v PriceWaterHouseCoopers* 2001 (2) SA 790 (T) at 796H-797C where Southwood J stated the following;

> ‘’*A further step in the proceedings is one which advances the proceedings one stage nearer completion and which, objectively viewed, manifests an intention to pursue the cause despite the irregularity. Seen in that light, the filling of a notice of exception, which contains as an alternative an application to set pleadings aside under the provisions of rule 18(2) read with rule 30, does not constitute the taking of a further step within the meaning of rule 30(2). Such an excipient is concerned merely to make use of the full remedies which the rules provide for an attack on a defective pleading. The inclusion of the alternative is quite opposed to an inference that the excipient intends to pursue the cause the despite the irregularity.’’*

[18] An irregular service of a summons commencing action effectively means that there was no service of the summons on the defendant/ applicant. As fate would have it in this case, and despite the first respondent’s failure to rectify the irregular service of the summons, the particulars of claim themselves happened to be excipiable necessitating the filing of another notice raising that as cause of complaint. Without the removal of the two causes of complaints, the applicant could not take a further step leading towards the close of the pleadings. I find that the raising of a further legitimate cause of complaint in the circumstances did not constitute the further step envisioned in rule 30(4). The first respondent’s contention must, therefore, be rejected.

SERVICE OF THE SUMMONS

[19] With the first respondent having removed the second cause of complaint raised in terms of the notice in terms of rule 23(1), the central issue remaining for determination is whether there had been a valid service of the combined summons on the applicant. Notable in this matter is that the applicant's evidence denying service of the summons on it by the Sheriff is undisputed by the first respondent. In view of the fact that the joinder of the Sheriff was to be granted on the date of the hearing, this court afforded an opportunity and called upon the Sheriff to assist by filling an affidavit responding to the denial of his service of the summons. Despite the reasonable time given, the Sheriff has not done so. Thus the decision can only be made on available evidence placed before the court. In *Absa Bank v Mare and Others* A56/2019 (Gauteng Division, Pretoria), the full bench stated thus:

> ''[19] *A return of service, it is trite, is regarded as prima facie evidence* of *its contents. Indeed,* s 43(2) of the Superior Courts Act 10 of 2013 *expressly provides that ''[t]he return of the sheriff or a deputy sheriff* of *what has been done upon any process of a court, shall be prima facie evidence of the matters therein stated''. It follows that such evidence may be challenged by adducing the clearest evidence. (See, for example, Greeff v Firstrand Bank Ltd* 2012 (3) SA 157 (NCK),para 10; Deputy Sheriff, *Witwatersrand v Goldberg* 1905 TS 680.) *This is exactly what Ms Mare did in her founding affidavit.*

[20*]* *Ms Mare's factual allegations that the property has no perimeter fence nor any gate, that she was present at the property when the statutory notice and the summons were respectively allegedly left at the property, and that she did not have*

a telephonic discussion with the sheriff about collecting the summons at his office, were not refuted by the generalised and bold denials of those factual averments by the bank's senior legal counsel, Ms Sabashnee Naidoo, who deposed to its answering affidavit. She did not on behalf of the bank engage with Ms Mare's factual allegations in this regard (Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) at 375F -376B*) nor could she, on the face of it, have any first-hand knowledge of whether and how the sheriff served the statutory notice and summons and what communications have transpired between the sheriff and Ms Mare. Her generalised and bold denials cannot be said to have created a genuine factual dispute. The sheriff, who is a party to these proceedings, did not file an affidavit nor was one obtained from him to take issue with the veracity or accuracy of Ms Mare's factual averments in this regard. In the circumstances, Ms Mare's factual averments must be accepted as correct. (See Greeff paras 13-14.)*

[21] *Absent a plausible explanation by the sheriff, I am thus unable to find that service of the statutory notice by affixing it to a gate at the domicilium address, which according to Ms Mare did not exist, constitutes service thereof.*

[20] The sheriff is an officer of the court and, as such, is deemed to have executed any mandate given to him in the manner he describes in the return of service. He was, however, not obliged to enter the fray in this case. It is the seriousness of the denials of the service of the summons by him that was concerning and resulted in the order that he files an affidavit responding to the allegations against him. He has failed to exculpate himself. The undisputed evidence of the applicant is overwhelming and persuasive. The only conclusion, based on available evidence, is that there has not been a proper service of the summons on the applicant. The first respondent's attorneys did nothing to secure the sheriff's affidavit to counter the applicant's denial of service of the summons.

[21] The applicant admits to have received the summons by email sent to its Head of Human Resources on 30 June 2018. It further admits that the summons were also received by email at the law firm Norton Rose Fulbright SA Incorporated on 30 June 2018, although the applicant had not instructed the firm on the matter. It is ultimately the applicant's case that there was never a proper and valid service of the summons on it in terms of the rules. This contention is in the heart of the present hearing.

THE LAW

[22] The initiating document(s) in court proceedings is required by the Rules of Court to be served on the defendant/respondent by the Sheriff of the court - (Rule 4(1)(a)(v). The provisions of rule 4 are mandatory and, consequently, unless there has been compliance therewith, any purported service not

sanctioned by the court constitutes an irregularity and the purported service is invalid.

[23] In appropriate circumstances and upon good cause shown in an application, a deviation from the prescribed manner of service of the initiating court process may be sanctioned by the court (on application for substituted service) prior to the service of the process. The first respondent's attorneys, while aware of these mandatory procedures, purported to adopt unconventional procedures which, in my view, point to an attempt to justify a failure to serve the summons timeously and a manoeuvre to mislead in order to avert the prescription of the first respondent's claim. Seeking to blame the applicant for legitimately raising the irregularities of the services of the summons because of the effect that may have on the first respondent's claim is ill-conceived and does not cure the irregular and/or unsanctioned service by email employed by the first respondent's attorneys. Thus the service constitutes an irregularity and is invalid. I am not in the least persuaded that the emailing the summons, as it was done, had been merely to ensure that the proceedings were brought to the attention and knowledge of the applicant as alleged.

[24] The rules of the court were formulated to regularise processes of the courts. Exceptions were provided for, subject to adherence to the provisions in the rules addressing and catering for the exceptional circumstances. It is not for a party to bend the rules relating to the service of an initiating court process to suit its own circumstances. Instructing the sheriff to serve a court process on urgent basis is almost a daily occurrence. The emailing of the summons purportedly to bring the proceedings to the knowledge of the applicant despite

the alleged advice of service by the Sheriff speak volumes and casts aspersions on the first respondent's attorneys insofar as the service of the summons on the applicant is concerned.

CONCLUSION.

[25] I conclude on the findings in this judgment that there had not been a valid service of the summons on the applicant and that the application ought to succeed.

ORDER.

[27] Resulting from the findings in this judgment the following order is made:

1. The application for the joinder of the second respondent to these proceedings is granted.

2. The purported modes of service of services of the summons on the defendant/applicant constitute irregularities and are invalid.

3. The Sheriff's return of service of the summons dated 30 June 2021 is set aside.

4. The first respondent is ordered to pay the costs of this application on the opposed scale.

_____

M. MBONGWE, J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, GAUTENG
DIVISION, PRETORIA.

APPEARANCES

For the Applicant	Advocate G L Van der Westhuizen
Instructed by	Norton Rose Fulbright South Africa Inc. c/o Mothle Jooma Sabdia Inc. PRETORIA
For the First Respondent	Advocate T P Kruger SC with him, Advocate C D'alton
Instructed by	Welman & Bloem Inc Attorneys PRETORIA

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Applicant's and Respondent's legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be ___ JUNE 2022.