REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A199/2020

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

DATE: 17 November 2023

In the appeal between:

LIONEL MAKOKOTLELA	**Appellant**
and	
AMOS KHUMALO	**First Respondent**
THE SHERIFF OF THE HIGH COURT PRETORIA CENTRAL	**Second Respondent**
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**Third Respondent**
THE REGISTRAR OF DEEDS	**Fourth Respondent**
SERVIPIX 11 CC	**Fifth Respondent**

Coram: Swanepoel J, Strydom AJ *et* Malatsi-Teffo AJ

Heard on: 11 October 2023

Delivered: 17 November 2023

Summary: Full bench appeal against refusal to rescind order made by default of intention to defend, where service of summons was affected on attorneys who no longer represented the Appellant – Rescission in terms of rule 42(1)(a) not considered a quo –the Appellant had not by way of subsequent conduct ratified irregularity – prior attorneys also had not acted as agents for the Appellant – default judgment was erroneously granted – appeal upheld.

ORDER

It is ordered that:

[1] The appeal is upheld.

[2] The first Respondent is ordered to pay the costs of the appeal, as well as the leave to appeal.

[3] The order of the Court a quo is set aside and replaced with the following order:

"[1] The default judgment granted by Justice Collis AJ on 11 March 2016 under case number 100047/2015 be and is hereby rescinded and set aside.

[2] The Appellant is granted leave to deliver a notice of intention to defend within ten days of date of this order;

[3] The first Respondent is ordered to directed to pay the costs of the application."

JUDGMENT

K Strydom AJ (Swanepoel J and Malatsi-Teffo AJ concurring)

Introduction

[1] This full bench appeal is noted against the dismissal of a rescission application. At its heart, however, it concerns the provisions of Rule 4 of the Uniform Rules of Court and its subrules. It demonstrates how these provisions are far from being mere formalistic requirements in initiating legal proceedings. Instead, it exemplifies how those provisions are, in fact, the codification of the tried and tested methods of service which, as a first step, ensure that *audi alteram partem* principle is upheld throughout the proceedings. A mere "approximate" compliance with the exact provisions, on a practical level, invariably results in a cascade of sequential failures which generally, in turn, lead to a similarly invariable outcome…

Background

[2] To understand the cascading effect referenced in the introduction, the timeline of events needs to be set out in some detail. In an attempt at brevity, where we refer to the

"Respondent", the reference should be meant to refer to the First (and if contextually applicable the fifth) Respondent.

[3] In 2009 the Respondent, whilst in a romantic relationship with the Appellant, paid for two properties in Pretoria. For present purposes we will refer to these properties as the "Jaspit" property and the "Eiffel towers" property. Eiffel towers was registered in the name of the Appellant, whilst Jaspit was registered in the name of a closed corporation Servipix 11CC ("the CC"). The appellant held 40% and the Respondent's accountant held 60% members' interest in the CC. The Respondent also paid for the furnishing of the properties. The agreement governing the ownership and terms thereof of Eiffel towers, the 40% interest in the CC, and the furnishing of Eiffel towers are disputed.

[4] The romantic relationship came to an end in 2014. At that stage the Appellant was residing in Eiffel towers. It appears from the record that the breakup was acrimonious and various legal proceedings have been instituted between the parties. The record does not reveal the nature of those other applications.

[5] For present purposes it is only necessary to note that from 2014 to date of this appeal, the Appellant has been represented on a *pro bono* basis by five sets of attorneys. UNISA law clinic, initially assisted him, whereafter Mavhungu-Masigibri Attorneys represented him until the 20th of November 2014, when they formally withdrew as attorneys of record. [1] Thereafter, in order of succession, he was represented by Van der Merwe and Bester Inc, Rautenbach and Rautenbach Inc, Maritz Smith Inc and, presently, by William Tingtingers attorneys.

[6] On the 22nd of January 2016, the Respondent caused summons to be served on Mavhungu-Masigibri Attorneys,[2] in terms of which he essentially sought the transfer of ownership of Eiffel towers, the 40% members' interest in the CC and the furnishings at Eiffel towers from the Appellant to himself.

[7] The Respondent's claim as per the particulars of claim) is based on a partially written, partially oral contract, in terms of which the Appellant, at all relevant times, acted as his nominee in the acquisition and holding of ownership in the property or member's interest. He explained that, as he (the Respondent) did not want property registered in his name or serve as a director in a company, he bought a shelf company (the CC) as a vehicle to register and invest assets in. Given their relationship of trust, he appointed the Appellant as his nominee to hold 40% interest in the CC and to acquire the Eiffel property. The particulars of claim

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[1] Volume 2 page 177
[2] Volume 1 page 1

make no reference to Jaspit property, which was registered in the name of the CC and, instead, only refer to the 40% interest in the CC, held by the Appellant.

[8] The alleged terms of the agreement were that the Appellant would, as remuneration for holding the members' interest, be entitled to live in the Eiffel property and use the furnishing whilst living there. However, upon demand, the Appellant would transfer the Eiffel property and the 40% interest in the CC to the Respondent. In support of the veracity of the terms in the written portion of the agreement, the Respondent annexed an affidavit (hereinafter "the impugned affidavit"), purportedly deposed to by the Appellant on the 7th of September 2009.[3] The affidavit, on the face of it, confirms the terms as alleged by the Respondent.

[9] The particulars of claim state the residential address of the Appellant as the Eiffel property and that the Appellant was *"..(l)egally represented by Attorneys MAVUNGU-MASIGIBIRI INC.."*[4]

[10] It is common cause that service was effected on *Mavhungu-Masigibri Inc Attorneys.*

Default judgment application before Collis AJ

[11] The Appellant did not file a notice of intention to defend the action and the Respondent duly applied for default judgment in terms of Rule 31 on the 24th of February 2016.[5]

[12] In the founding affidavit, the Respondent repeated the averments as per the particulars of claim regarding the merits of his claim. Regarding procedural entitlement he indicated that *"...(o)n 22 January 2016 the Sheriff of the High Court served the combined summons and annexure on the first defendant, care of* ***his attorneys****, Mavhungu-Masigibri Inc Attorneys"* [6] [Emphasis our own] and that the *dies* for filing a notice of intention to defend had lapsed.

[13] On the 11th of March 2016, Collis AJ granted an order in line with the prayers in the particulars of claim.[7] ("The default order")

[14] The Respondent sent the default judgment order, as well as various other documents aimed at transfer of interest and ownership, to the Appellant personally, via email, on the 8th of April 2016.[8] In response thereto, on the same date, the Appellant replied:

*"I have received your e-mail, however I am of the opinion that you are not following the right protocol in this regard. Please liaise with the relevant parties in this regard (****Ms Mpho***

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[3] Volume 1 page 28-31
[4] Volume 1 page 8
[5] Volume 1 page 37 - 45
[6] Volume 1 page 53
[7] Volume 1 page 66 to 69
[8] Volume 2 page 187; "Annexure LLM15"

***Masibigri** – as per our agreement, given that she is our **mediator** and **Mr Christo Bester - as the lawyer representing me** from the Law Society."* [Emphasis our own][9]

[15] In March 2017, the Respondent, via its agent, launched eviction proceedings against the Appellant on the strength of the default order which had authorized the transfer of ownership of the Eiffel property to him. The Appellant opposed the eviction and indicated, on the 27th of July 2017, that he intended to bring the rescission application against the default order within 15 days.[10]

[16] In his answering affidavit appellant indicated that the basis for the rescission application would be that the summons on the action was not properly served and that, in terms of merits, the impugned affidavit relied upon by the Respondent to prove the written terms of the agreement was fraudulent. To this end he had engaged a forensic graphologist to deliver a report.

The rescission application before Avvakoumides AJ

[17] The Appellant served his rescission application on the 7th of September 2017.[11]

[18] In his founding affidavit the Appellant indicated that service of the summons on Mavhungu-Masigibri attorneys in 2016, when they had withdrawn as his attorneys of record in 2014, was irregular. As a result, the summons never came to his attention and he therefore did not instruct his attorney of record at the time, Mr Bester, to defend the matter.

[19] In support of his contention that he has a *prima facie* defence to the claim, appellant attached the report of a forensic graphologist, which concluded that his signatures on the various pages of the affidavit are exact duplications and that these pages "*...are not genuine documents and in all probability falsified by photocopy/computer manipulation (Copy Paste).*"[12]

[20] With regards to the delay in bringing the application he indicated that, when the order was emailed to him on the 8th of April 2016, he indicated that it should be sent to his attorney at the time, Mr Bester. It is evident that the Respondent did not send the order to Mr Bester. Mr Bester ceased acting for the Appellant in August 2016, whereafter the firm Rautenbach and Rautenbach Inc were appointed to act *pro bono* on his behalf. They, however, indicated that they were unable to act on his behalf and withdrew shortly after their appointment. On the 20th of February 2017, Maritz and Smith Inc were appointed as his *pro bono* attorneys. They wrote a letter to the Respondent on the 9th of March 2017, indicating that the summons

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[9] Volume 2 page 188; "Annexure LLM16"
[10] Volume 2 page 113
[11] Volume 1 page 73
[12] Volume 2 page 157

never came to the Appellant's attention and requesting that the summons, pleadings, as well as the sheriff's return be sent to them.[13] No response was forthcoming. The Appellant's current attorney, Mr Tingtinger, only managed to obtain copies of the pleadings in the action on 19 July 2017.[14] It would therefore only have been at that stage that the basis of the Respondent's claim and impugned affidavit came to the Appellant's attention

[21] On the 14th of August 2017, Mr Tintinger requested the Respondent to provide the original affidavit for examination by the graphologist.[15] In response, on the 16th of August 2014, the Respondent indicated that he is not in possession of a "*clearer copy*" of the affidavit. He made no reference to the existence of location of the original affidavit.[16] In view of this response, the Appellant raised issue with whether the original was filed when the default application was granted.[17]

[22] In his answering affidavit to the rescission application, the Respondent did not deny that the summons was served on attorneys who did not represent the Appellant at that time. However, he stated that:

"The fact remains, that service of the relevant summons was accepted by that attorney on behalf of the Applicant/First Defendant. It is nowhere explained why she would have done so in the absence of the requisite authority from the Applicant/First Defendant. This was our agreement. Significantly in his subsequent letter dated 8 April 2016 (annexure 'LLM16') the Applicant/First Defendant himself confirms that this was our agreement. His challenge has been met. In any event at the very least, there existed ostensible authority to such effect. It is common cause there was no notice of intention to defend or entry of appearance by or on behalf of the Applicant/First Defendant under Case Number 100047/2015. So I was entitled to take default judgment. Procedurally, there was undeniably nothing amiss with the request for and the granting of default judgment under the circumstances."[18]

[23] The Respondent also disputed the correctness of the findings of the graphologist and questioned who the author thereof was with reference to it being signed by a KP Landman and a Lt Col KFC Landman, despite the report being couched in the singular. He attached a report from his own expert document examiner Mr. Cecil Greenfield, stating that it refutes the report of the Appellant.[19] The finding in terms of the report, however, is not couched in such absolute terms. The Respondent's expert also only had sight of a copy of the impugned

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[13] Volume 1 page 85
[14] Volume 1 page 86
[15] Volume 2 page 162 - 169
[16] Volume 2 page 170
[17] Volume 1 page 90
[18] Volume 3 page 204 - 205
[19] Volume 3 page 202

affidavit. He : states that: "*Therefore based on the results of the tests made with the available material, I was unable to prove, with any degree of certainty, that questioned signature and sets of initials are forgeries.*"[20]

[24] Disconcertingly, the Respondent in his answering affidavit, confirmed that he was not in possession of the original, stating that *"...(t)he original affidavit at issue is, to the best of my recollection, in the possession of the Applicant / First Defendant;.."*[21] The Respondent did not indicate on what basis the copy was admitted before Collis AJ when the default application was heard.

[25] Ultimately, on the 28th of February 2020 Avvakoumides AJ handed down judgment dismissing the application for rescission.

The appeal

[26] On the morning of the hearing of the appeal, the Respondent sent an email to the registrar of Swanepoel J, requesting a postponement of the hearing. He indicated that he had mis-diarized the date of the hearing and had therefore not briefed counsel to attend to the appeal hearing. Counsel for the Appellant elucidated the sequence of events in Court. The day prior to the hearing he had contacted the advocate who drafted the Respondent's heads of argument in the appeal to discuss the upcoming hearing, whereupon the advocate informed him that she was not briefed for the hearing of the appeal. She evidently contacted the Respondent as he, on the morning of hearing emailed the Appellant requesting a postponement. The Appellant indicated via email that they would not consent to such a postponement. In response the Respondent indicated that, as he had only become aware of the hearing the previous day, he also did not have the opportunity to brief counsel to attend to an application for postponement. He further indicated that he could not personally attend to the postponement application as he was attending to a bereavement in the Eastern Cape where he had limited connectivity.

[27] Given the fact that we were in possession of a complete record, containing the Respondent's various affidavits containing his submissions on the issues for determination before us, as well as his heads of argument drafted for purposes of appeal, we declined to postpone the hearing of the matter. However, given that the Respondent did not present argument on the day of hearing, we had regard to every argument (and possible legal permutation thereof) raised by the Respondent as evidenced from the entirety of the record.

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[20] Volume 3 page 217
[21] Volume 3 page 201

Discussion

[28] Before venturing into a detailed analysis of the merits of the rescission application and the reasoning in the dismissal thereof, we deem it prudent to first address two problematic aspects that are evident from the judgment delivered by Avvakoumides AJ.

[29] In the first instance, the judgment indicates that the Court a relied on a factual error in its reasoning. When discussing the willfulness of the Appellant's default, the following is stated in the judgment:

"This applicant states that the service of the summons was served [sic] *upon the applicant's erstwhile attorneys after they withdrew on behalf of this Applicant. However, the same attorneys addressed an email to the Applicant advising him of the summons..."*

and

"...on 27 January 2016, the attorneys communicated with the applicant and alerted him to the summons." [22]

[30] There is, in fact, no correspondence on record from Mavhungu-Masigibri Attorneys alerting the Appellant to the summons, prior to the granting of the default judgment. Neither the Respondent's answering affidavit in the rescission application, nor his heads of argument in the appeal, refer to the existence of any such correspondence. The only correspondence between Mavhungu-Masigibri Attorneys and the Appellant is an email dated the 27th of January 2016 (i.e after default judgment had already been granted) which merely states that "We have received more documents on your behalf from Amos Khumalo inc."

[31] Based on this incorrect fact, the Court a quo came to the conclusion that the Appellant knew of the summons timeously, but chose to ignore it. Once it is appreciated that Avvakoumides AJ, viewed the Appellant's conduct in this light, his ultimate dismissal of the application, becomes understandable. Unfortunately, this misconception by the Judge (that the principle of audi alteram partem had been complied with insofar as notice to the Appellant is concerned), permeated his entire evaluation of the application.

[32] The second problematic aspect is the failure to engage with the provisions for rescission in terms of Rule 41(2)(b). The judgment makes it clear that the application was only evaluated with reference to rescissions in terms of Rule 31(2)(b) or, in the alternative, in terms of the common law.

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[22] Volume 3 page 259 – Judgment by Avvakoumides AJ paras 9 and 10

[33] Whilst the Appellant's founding affidavit in the rescission application only referenced those two grounds, it is trite that*"... the fact that an application is specifically brought in terms of one Rule does not mean it cannot be entertained in terms of another Rule or on the common law, provided the requirements thereof are met. [23]"*

[34] In view of the Appellant's submission that the summons was served irregularly and never came to his attention, the Court should have considered whether the default order was erroneously granted from the outset, as envisaged by rule 42 (1) (a) of the Uniform Rules. We do note, however, that the failure to do so, in all probability, stems from the incorrect factual finding that summons had come to the attention of the Appellant, before default judgment was granted.

[35] In view of our finding in this regard, it is necessary for this Court, as a starting point, to first evaluate the merits of the Appellants claim for rescission based on Rule 42(1)(a)

Analysis of rescission in terms of Rule 42(1)(a)

[36] The rule caters for mistakes in the proceedings which may either be apparent from the record of proceedings or may subsequently become apparent from the information made available in an application for rescission of judgement. [24]

[37] The Appellant submits that the default order by Collis AJ was erroneously granted. The Appellant therefore has to show that "*...there existed at the time the order was made facts of which the court was unaware and which, if the court had been aware thereof, would have induced the court not to grant the order sought."*[25]

[38] The Supreme Court of Appeal, in *Lodhi*, qualified the type of facts that would be relevant for purposes of a rescission application in terms of rule 42(1)(a). Such facts would be those that demonstrate whether the plaintiff was procedurally entitled to the order. It held that, where judgment is granted against a party in respect of whom notice of proceedings was required, the absence of such notice would result in the judgment being granted erroneously as the party was not procedurally entitled thereto. [26]

[39] As was stated in the oft-quoted case of *Bakoven Ltd "In contradistinction to relief in terms of Rule 31(2)(b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence Once the applicant*

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[23] *City of Tshwane Metropolitan Municipality v Brooklyn Edge ((Pty) Ltd) Ltd and another* (290/2015) [2016] ZAGPPHC 1088; [2017] 1 All SA 116 (GP) 11 November 2016 paragraph 39. *Bakhoven Limited v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E-F. *Promedia Drukkers en Uitgewers Edms Bpk v Kaimowetz* 1996 (4) SA 411 (C) at 4178-I.

[24] *Kgomo and Another v Standard Bank of South Africa* 2016 (2) SA 184(GP).

[25] *Stander and another v ABSA Bank* 1997 (4) 873 (E)

[26] *Lodi 2 Properties Investment CC and Another v Border Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at para 24.

can point to an error in the proceedings, he is without further ado entitled to rescission."[27] [In-line references omitted]

[40] For purposes of an assessment under Rule 42(1)(a), regard is therefore to be had to the facts that were before Collis J at the time when she granted the default judgment.

[41] The Respondent's founding affidavit in the default application stated that service was effected on the Appellants attorneys of record. The Court was not aware of the fact that the attorneys had withdrawn as attorneys of record almost a year and a half earlier, nor that the Respondent was not in possession of the original of the attached impugned affidavit on which the claim was based.

[42] The founding affidavit does not indicate on which basis the service was effected on attorneys instead of on the Appellant personally, in circumstances where the residential address of the Appellant was cited in the same application (and, for that matter, formed an essential part of the relief sought). There were no averments that such service was on the basis of an agreement inter partes, nor that Mavhungu-Masigibri Attorneys had ostensible authority to bind the Appellant or that they acted as the Appellant's agent for purposes of service in terms of Rule 4(1)(a)(vi). All that was before the Collis AJ was an averment that summons was served "*on his attorneys of record*".

[43] In the Appellant's heads of argument in the appeal it is argued that service on an attorney is incompetent, unless such an attorney already represented the party in the matter at the time of service. This argument is based on service on terms of Rule 4aA, which states that: *"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."*

[44] The sub rule, in fact, does not sanction the service of summons the initiation of action proceeding on attorneys. As the commentary to the rule in Erasmus makes it clear, this sub-rule finds application in interlocutory applications where there is already an attorney of record for the respondent.[28] Simply put, even if Mavhungu-Masigibri Attorneys had not withdrawn as attorneys of record in 2014, service of the summons on them on the basis of the sub-rule would in any event have been irregular.

[45] The Respondent does not deny that Mavhungu-Masigibri Attorneys did not represent the Appellant as attorneys of record at time of service of the summons. He argues that the service on the attorneys was by agreement, that the summons had come to the attention of

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[27] *Bakoven Ltd v GJ Howes (Pty) Ltd* 1990 (2) SA 446 at page 471E to H

[28] Erasmus Superior Court Practice B1-26

the Appellant and that he, through his conduct following receipt of the default order, waived any objection to such improper service.[29]

[46] We will address each of these arguments below.

"Service on the attorneys was by agreement"

[47] In opposing the application for rescission, the respondent averred that there was an agreement between the parties that service could be affected on Mavhungu-Masigibri Attorneys.[30] As proof, he relied on the email sent by the Appellant in response to the Respondent's email attaching the default judgment order on the 8th of April 2016.[31] The relevant portion of the email reads as follows:

*"I have received your e-mail, however I am of the opinion that you are not following the right protocol in this regard. Please liaise with the relevant parties in this regard (**Ms Mpho Masibigri** – as per our agreement, given that she is our **mediator** and **Mr Christo Bester - as the lawyer representing me** from the Law Society."* [Emphasis my own]

[48] We agree with the appellant's contention that the e-mail, having been sent after default judgment was obtained, hardly proves an agreement that was in existence at the time of issuance of the summons. However, even if one assumes that the "agreement" contained in the e-mail was in place at the time of issuance of the summons, it does not assist the respondent's case. To the contrary, the effect of this submission by the Respondent is that, on his own version, the agreement was that Ms Mpho Masibigri was a mediator and Mr Christo Bester was the attorney of record. As such, in stating to Collis J that the summons was served on the Appellant's attorney, whilst knowing it was served on the mediator (and not the known attorney), the Respondent had willfully mislead the Court in the default judgment application.

"The Appellant ratified the defective service by his subsequent conduct"

[49] In his answering affidavit to the rescission application, the Respondent argued that, in accepting the summons, Mavhungu-Masigibri Attorneys had ostensible authority,[32] which bound the Appellant. Pertinent reliance on the doctrine has, wisely, not been pressed in the appeal before us.

[50] Instead, the Respondent's heads of argument on appeal, now contain a more nuanced argument seemingly based on the ratification, alternatively waiver of entitlement to objection

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[29] Respondent's heads of argument CL 450 -452
[30] Volume 2 page 204 and 205; para 17
[31] Volume 2 page 188; "Annexure LLM16"
[32] Volume 2 page 204 and 205; para 17

to irregular service as evidenced by the Appellant's conduct subsequent to the issuance of the summons and subsequent service of the default judgment order.

[51] In formulating this argument, the Respondent relied heavily on the 1905 judgment of *Deputy Sheriff, Witwatersrand v Golberg* ("Goldberg")[33] and the commentary in Erasmus under Rule 4(1)(a)(vi), which deals with service on an agent.[34]

[52] The argument is however fundamentally flawed. On a fundamental level, this was, simply out, not the basis for procedural entitlement presented before Collis AJ during the default judgment application.

[53] Subrule 1(a)(vi), reads as follows:

*"...by delivering a copy thereof to **any agent** who is duly authorised **in writing** to accept service on behalf of the person upon whom service is to be effected;"* [Emphasis our own]

[54] In view of the peremptory provision of the subrule, any reliance on service on an agent should have been accompanied by the necessary averments that a) the person is an agent, and who is b) duly authorized in writing to accept service. The caselaw referred to by the Respondent supports a contention for possible ratification where (b) is not present. It does not however relieve the respondent from alleging (a): that the service was affected on the Appellant's agent.

[55] Even if the Appellant's subsequent conduct pointed to a ratification of the irregular service, the argument would still fail in light of the test under Rule 41(1)(a)(vi): When the default order was granted no facts were placed before Collis AJ to support such an argument. If reliance was placed on service on attorneys acting as agents of the Appellant, the Respondent would have had to inform the Court that the attorneys were not duly authorized in writing to do so. Had the Court been alerted to this, no order could have been made as service would have been irregular. In any event, "attorneys of record" has a distinctly separate meaning to "attorneys acting as agents".

"Defective service is irrelevant as the summons came to Appellant's attention"

[56] As a general proposition there may be an argument to be made that, where it is established that a summons and the content of the particulars of claim came to the attention of a defendant, he cannot evade the consequences of non-action by relying on the Plaintiff's failure to adhere to the technicalities of Rule 4.

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[33] *Deputy Sheriff, Witwatersrand v Golberg* 1905 TS 680
[34] Erasmus "Superior Courts Practice" Volume 2 D1-36

[57] In *Prism Payment Technologies v Altech information Technologies*,[35] Lamont J said the following about the purpose of rule '*The purpose of rule 4 is to provide for a mechanism by which relative certainty can be obtained that service has been effected upon a defendant. If certain minimum standards have been complied with as set out in the rule, then the assumption is made that the service was sufficient to reach the defendant's attention and his failure to take steps is not due to the fact that he does not have knowledge of the summons. The converse is not true – namely that if service is not effected as required by the rule, the service is not effective – in that the purpose for which service is required was fulfilled, namely the defendant came to know of the summons. The rules, as was pointed out by Roux J in United Reflective Converters (Pty) Ltd v Levine 1988 (4) SA 460 (W), set out procedural steps. They do not create substantive law. Insofar as the substantive law is concerned, the requirement is that a person who is being sued should receive notice of the fact that he is being sued by way of delivery to him of the relevant document initiating legal proceedings. If this purpose is achieved, then, albeit not in terms of the rules, there has been proper service.*'

[58] The aforementioned is however not authority for a proposition that litigants have carte blanche to effect service as they deem fit, provided that the other party becomes aware of the fact that he is being sued. Mbongwe J aptly addresses this misconception in *BMW South Africa (Pty) Ltd v William and Another*,[36] :

" *[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.* "

[59] Lamont J's pronouncements in the latter part of the extract from the judgment in *Prism Payment Techologies*, supra, should be read in context with the first part thereof where he explains the purpose of rule 4 as setting minimum standards for service that would create an assumption "*...that the service was sufficient to reach the defendant's attention and his failure to take steps is not due to the fact that he does not have knowledge of the summons.*"

[60] The rationale underlying such an assumption has to be found in the fact that those methods of service contained in the Rule, were not arbitrarily prescribed, but are the codification of what, on a practical level, have been shown to the Courts to give proper effect to the right of a defendant. Implicit herein is that the prescribed methods in general ensure that a defendant is only informed of action instituted against him, but is also sufficiently aware of the basis thereof to enable him to make an informed decision regarding his defence.

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[35] *Prism Payment Technologies v Altech information Technologies* 2012 (5) SA 267 (GSJ) at 271H-272A,
[36] *BMW South Africa (Pty) Ltd v William and Another* (31587/21) [2022] ZAGPPHC 450 (27 June 2022)

[61] For purposes of the present matter, the import of these decisions is as follows: It was, in the first place not for the Respondent to elect his own method of service. If circumstances existed that necessitated a deviation from rule 4, those should have been fully disclosed to Collis AJ. Even if there were exceptional circumstances present that justified deviation from the rule, the Respondent would still have had to prove to the Court hearing the application for default judgment, that the summons, its content and annexure effectively came to the attention of the Plaintiff. Where service is affected outside of the scope of rule 4, the assumption that the Defendant was given proper notice of the action and the basis therefore, does not exist.

[62] At the time of the application for default judgment, Collis AJ was under the mistaken impression that Mavhungu-Masigibri Attorneys were still appellant's attorneys. Respondent's representatives did not correct that material misrepresentation. That was not the case. The order, accordingly, was erroneously granted and stands to be rescinded.

[63] This finding effectively disposes of the appeal. However, in affording the Respondent every possible permutation of argument, given his absence at the hearing of the appeal, we will briefly discuss why the order should also be rescinded in terms of common law and Rule 31(2)(b).

Rescission at common law/31(2)(b)

[64] In the rescission application, Avvakoumides AJ held that the Appellant was not entitled to rescission of the default order on the basis of either the common law or Rule 31(2)(b). As we have already found that the order should be rescinded, we will only briefly address why we disagree with his reasoning in reaching this conclusion. We do so by referencing the requirements for rescission that are, by and large common to both common law and Rule 31(2)(b).

Willfulness of the default

[65] We have already found that the Court a quo factually erred in finding that at the time of the granting of the default, the Appellant was aware of the summons and the particulars of claim. As such there is no basis for holding that the Appellant was in willful default.

The existence of a defence

[66] The Court a quo found that: "*...the Applicant has failed to set out a bona fide defence as is required In terms of Rule 31(2)(b)*"[37] or as required in terms of common law. In reaching this conclusion it reasoned as follows:

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[37] Volume 3 page 262 – Judgment by Avvakoumides AJ para 17

[67] The fact that the Appellant, in his replying affidavit, did not address the question of authorship of the graphologist's report raised by the Respondent *"...is ominous to say the least."*[38]

a) The report of the Respondent's expert is in direct contrast to that of the Appellant's.

b) The Court a quo also referenced the failure by Appellant to address, in reply, a confirmatory affidavit from a police officer confirming that the impugned affidavit was signed in his presence. (The implication of the reference is seemingly that, as the Appellant had not in reply disputed the affidavit, it is admitted.)

[68] In evaluating the merits of the Appellant's defence, the learned Acting Judge both misconstrued the Appellant's defence and the test for a *prima facie, bona fide* defence:

c) At rescission stage the Appellant (regarding merits) only has to prove that he has *"...a bona fide defence, which prima facie, carries some prospect of success."*[39] He was not required to deal with the merits of the case or to produce evidence that the probabilities are in his favour.[40] The inclusion of the expert report by the Appellant in the rescission application, was therefore not strictly necessary as, were they to be proven at trial, the facts as alleged in his founding affidavit would constitute a complete defence to the respondents' claims. The report itself would serve to prove some of those facts at trial, however, at rescission stage it, at most, serves as proof that the defence raised is bona fide.

d) An interrogation into the authorship or relative weight of two (supposedly) contrasting experts was therefore inappropriate and surpassed the bounds of what is necessary to determine whether a *prima facie* defence exists. The Court should have limited its enquiry to a) whether the defence raised constitutes defence on the face of it and, b) to avoid abuse of process, whether in raising such a defence the Appellant was *bona fide*.

Explanation of delay

[69] The Court a quo found that the Appellant failed to satisfactorily explain the delay in bringing of the rescission application (for purposes of condonation in terms of Rule 31(2)(b) or in terms of an explanation of delay in terms of common law).

[70] The basis for this finding was that the Appellant had not explained the basis for the delay between when the order was emailed to him on 6 April 2016 and raising the issue of rescission in opposing the eviction proceedings in March 2017. The Court a quo opined that the Appellant simply failed to inform his attorney (at the time) and subsequent attorneys thereof until he was forced into action by the eviction proceedings. In opposing the eviction

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[38] Volume 3 page 261 – Judgment by Avvakoumides AJ para 16
[39] *Pro Media Drukkers en Uitgewers (Edms) Beperk v Kalmowitz and Others* 1888 (4) SA 411 at page 417
[40] *EH Hassim Hardware (Pty) Ltd v Fab Tanks CC* 2017 JDR 1655 (SCA)

proceedings, the Appellant had indicated that filing of the rescission application would occur in July 2017. It was however only filed in September 2017. The Appellant explained that he was awaiting the graphologist's report. The Court a quo found that this explanation "*..is insufficient.*"[41].

[71] The important of an enquiry as to whether or not the summons and particulars of claim came to the attention of the defendant prior to default judgment (regardless of method of service) here comes clearly to the fore. Apart from the obvious need for a court to ensure that audi alteram partem is adhered to, the outcome of such an enquiry, affects the contextualization of a party's actions in, for instance, any determination relating to reasonableness.

[72] The Court a quo was convinced that the Appellant was fully aware of the summons and concomitantly, the Respondent's claim and basis thereof. Assuming that it was correct in this regard, it is easy to conclude that, having flagrantly ignored both the summons and the default order, the true (and only) reason for launching the rescission proceedings was to frustrate the eviction proceedings. The timing of (and concomitantly, the delay in) bringing the rescission application, in coinciding with the eviction proceedings, is indicative of a litigant who having made no serious attempts to further his defence, now only does so to frustrate the litigation process.

[73] However, when the Appellant's conduct and explanation for delay is viewed from the perspective of a person who, until the 19th of July 2017[42] had not even had sight of the summons, the particulars of claim or the impugned affidavit, his explanation of the delay becomes far more reasonable. When the default order was emailed to him, as part of a bundle of documents, he, as a layman, would not have been aware of how it was obtained or, seemingly, the import of the order itself. He therefore requested that it be sent to his attorney, Mr Bester and concludes: "*Thank you for your time and I will await their notification if there is a need for me to par take* (sic) *in this regard.*" Reliant on pro bono representation, the first attorney who had the opportunity to view the default order, was Mr Michael Maritz, who, wrote to the Respondent on the 8th of March 2017 requesting the return of service, founding affidavit and annexures thereto. He made it clear that "*..the particular matter wherein the attached Court Order was granted, was not brought to the attention of our client.*"[43] The respondent's only reply to the request was the launching of an eviction application on the 8th of April 2017. Similarly, when the Appellant's current attorney in June 2017 requested these documents, the Respondent no longer had any interest in corresponding with attorneys of record.

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[41] Volume 3 page 264 – Judgment by Avvakoumides AJ para 21
[42] Volume 1 page 86
[43] Volume 2 page 154

Therefore, the first time that Appellant was in a position to formulate an application for rescission would have been in July 2022 when Mr Tintinger managed to obtain the court file and the irregular service, alleged terms of the agreement and the impugned affidavit came to his knowledge. The delay in bringing the application for rescission is therefore completely justifiable. Well before launching the eviction application, the Respondent had been made aware that the summons had not come to the Appellants attention. The respondent's steadfast refusal to provide the Appellant's attorneys with the pleadings showing the basis for the granting of the default order and then relying on the order to evict the Appellant is, to borrow a phrase from Avvakoumides AJ "*...ominous to say the least.*"

Finding on appeal

[74] In view of all the aforementioned, we find that the appeal should be upheld.

Costs

[75] The Appellant has argued that the first and fifth respondents should be ordered to pay the costs of the appeal. The normal principle is that costs follow the result. There is no reason to deviate from this principle. We note that the Appellant's entitlement to be awarded costs, despite being represented on a pro bono basis,[44] has now been entrenched in Section 92 of the Legal Practice Act, 2014.

[76] We are however disinclined to order that the fifth respondent should pay costs. The following astute observation made in *Botha v African Bitumen Emulsion (Ply) Ltd* [45] warrants restatement: -*'...it may perhaps be desirable to impress upon judicial officers the necessity of adjusting critically their orders as to costs if these orders are not sometimes to produce results which are unintentional and unjust.'*

[77] The fifth respondent is the same CC in which the Appellant, through the rescission, seeks to regain his 40% member's interest in. If the first respondent, for whatever reason, is unable to satisfy the cost order, the unintended consequence granting such a cost order against the fifth respondent would be that the Appellant would have to hold an asset in his own estate liable for his costs.

[78] In any event, regardless of this possible unintended consequence, it is evident from the record that the fifth respondent took no real part in opposing the rescission application, the leave to appeal application or the appeal before us. The first respondent was the driving force behind the oppositions and noted opposition by the fifth respondent in name only. Save

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[44] This entitlement, prior to the enacted of the Legal Practice Act, 2014, was, for instance, fully analysed in *Zeman v Quickelberge & Others (1) (2011) 32 ILJ 453 (LC)*,

[45] *Botha v African Bitumen Emulsion (Ply) Ltd* 1960 (2) SA 6 (TPD) 10A.

for mentioning the fifth respondent in the headings of the various oppositionary filing notices and the like, he only mentions that he is a member of the fifth respondent in the first and fifth respondents' answering affidavit to the rescission application.[46] The content of the opposition is however framed in the first person singular for the most part. The record also does not **reveal the basis of his authority to act for the fifth respondent, save for the reference to him** being a member thereof.

[79] We note that the costs pertaining to the leave to appeal were ordered to be "costs in the appeal." Accordingly, the first Respondent is, likewise, solely liable for those costs, as well as the costs of the costs of the rescission application.

Order

[83] The following order is therefore granted:

[1] The appeal is upheld.

[2] The first Respondent is ordered to pay the costs of the appeal, as well as the leave to appeal.

[3] The order of the Court a quo is set aside and replaced with the following order:

"[1] The default judgment granted by Justice Collis AJ on 11 March 2016 under case number 100047/2015 be and is hereby rescinded and set aside.

[2] The Appellant is granted leave to deliver a notice of intention to defend within ten days of date of this order.

[3] The first Respondent is ordered to directed to pay the costs of the application."

K Strydom
[Acting Judge of the High Court,
Gauteng Division, Pretoria]

I concur

JJC Swanepoel
[Judge of the High Court
Gauteng Division, Pretoria]

I concur

LM Malatsi-Teffo
[Acting Judge of the High
Court, Gauteng Division,
Pretoria]

[46] Volume 2 page 196

DATE OF HEARING: 11 OCTOBER 2023

DATE OF JUDGMENT: 17 NOVEMBER 2023

APPEARANCE ON BEHALF OF THE APPELLANT:

Adv PJ Greyling

Instructed by [attorney]: William Tintinger

APPEARANCE ON BEHALF OF THE FIRST AND FIFTH RESPONDENT:

Adv RA Britz

Instructed by [attorney]: Amos Khumalo Attorneys