IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No.: 424/2019
Date Heard: 30 November 2022
Date Delivered: 9 December 2022

In the matter between:

TNC MINING (PTY) LIMITED Applicant

and

MATHOME TRAINING DEVELOPMENT (PTY) LIMITED Respondent

In re:

MATHOME TRAINING DEVELOPMENT (PTY) LIMITED Plaintiff

and

FINSCH DIAMOND MINE TRAINING CENTRE First Defendant
TNC MINING (PTY) LIMITED Second Defendant

JUDGMENT

WILLIAMS J.

1. This is an application for leave to appeal to the Supreme Court of Appeal, alternatively the Full Court against the whole of my judgment and order of 25 February 2022 wherein I dismissed the special plea of prescription raised by the second defendant (applicant herein).

2. The grounds of appeal can be summarised as follows:

   2.1. That I had erred in finding that service of the summons had been effected at the applicant's chosen *domicilium citandi et executandi*;

   2.2. That I had erred in not finding that the service of the summons was defective and in fact a nullity; and

   2.3. That the plaintiff (respondent herein) failed to discharge the onus of proving that prescription had been interrupted.

AD GROUDS 2.1 AND 2.2 ABOVE

3. In paragraphs 7 to 9 of the main judgment, I dealt with the argument relating to the alleged irregularity of the service of the summons. Mr Matthee who now appears for the applicant has referred me to **Concrete 2000 (Pty) Ltd v Lorenzo Builders CC t/a Creative Designs and others**[1] where it was found that the irregular service amounted to a nullity. In that matter, the facts were found to be distinguishable from those in the **Scott and Another v Ninza**[2] and **Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd (t/a Altech Card Solutions) and others**[3], matters which I have also referred to in the main judgment. I may state that the facts in **Concrete 2000** are distinguishable from the matter *in casu* as well.

4. In the **Concrete 2000** matter the service of the summons was found to have been effected on a fabricated *domicilium citandi et executandi* and the summons fortuitously came to the knowledge of the defendant some four years after the purported service.

[1] [2014] 2 All SA 81 (KZD)
[2] 1999 (4) SA 820 (E)
[3] 2012 (5) SA 267 (GSJ)

5. In *casu* it would appear from the service level agreement entered into between the respondent and the first defendant, that the first defendant, at least in part, contracted on behalf of the applicant. References to the applicant can *inter alia* be found in the clauses mentioned in paras 2 and 3 of the main judgment. In addition clause 17 of the agreement states that:

The signatories to the agreement warrant that they are duly authorised to bind their respective sectors, Finsch Mine Training Centre (first defendant) *on behalf of TNC Mining (Pty) Ltd* (applicant) *and Mathome Training and Development (Pty) Ltd* (respondent)*"* [own underlining and insertions in brackets].

6. The concession made by Ms Carstens, who appeared for the applicant when the special plea was argued, that the first defendant appointed a *domicilium citandi et executandi* on behalf of the applicant is therefore not completely unfounded. The applicant is not a stranger to the agreement and did in fact receive the summons a few days after it was served. This is not a case of a fabricated *domicilium* as in the **Concrete 2000** matter which would cause the summons, in the normal course, never to have come to the attention of the applicant.

7. In any event and as stated in paragraph 9 of the main judgment, had there been a genuine issue with irregular service, the matter should have been dealt with in a Rule 30 application where the presiding judge would have had the opportunity to consider whether the irregularity complained of was condonable or not (see **Federated Insurance Co Ltd v Malawana**[4]). It was not proper, in my view, to sneak in the issue of irregularity of service during argument on a special plea in which plea such issue had not been raised, thereby not even affording the respondent the opportunity to deal with it in its replication.

8. In my view, there are no merits in the above grounds of appeal.

AD GROUND OF APPEAL UNDER PARAGRAPH 2.3 ABOVE

[4] 1986 (1) 751 AD

9. A return of service is regarded as *prima facie* evidence of its content. The respondent has attached the return of service to its replication. The sheriff's return of service, after dealing with the service by affixing it to the outer post box states the following:

"Please note that the same copy was served on the 27th February 2019 via registered post to PO Box 07, Lime Acres, 8410. OD Nnosang collected the parcel on the 06th March 2019 as informed by Post Office officials."

This issue is addressed in paragraphs 17 to 19 of the main judgment. There is no merit in this ground of appeal.

10. In the event I am of the view that an appeal would have no reasonable prospects of success and the application must therefore fail.

ORDER

The application for leave to appeal is dismissed with costs.

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CC WILLIAMS
JUDGE

For applicant / second defendant:	Adv JD Matthee
Instructed by:	Higgs Attorneys c/o
	Engelsman Magabane, Kimberley

For respondent / plaintiff:	Adv WJ Coetzee SC
Instructed by:	Raphela Attorneys Inc
	c/o Mosikare Attorneys, Kimberley