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FEDERATED INSURANCE COMPANY LIMITED — APPELLANT

AND

JACKSON MAGELEKEDLE MALAWANA — RESPONDENT

CASE NO. 303/84
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

FEDERATED INSURANCE COMPANY LIMITED Appellant

and

JACKSON MAGELEKEDLE MALAWANA Respondent

CORAM: RABIE, CJ, MILLER, TRENGOVE, BOTHA et BOSHOFF JJA

HEARD: 1 NOVEMBER, 1985

DELIVERED: 29 NOVEMBER 1985

J U D G M E N T

TRENGOVE, JA:

This/ .....

This is an appeal from a judgment of Ziets-man J., in the East London Circuit Local Division, dismissing an application by the appellant company for an order, under rule 30 of the Uniform Rules of Court, setting aside the service of a summons as ir-regular on the ground that it was not in accordance with the provisions of rule 4(1)(a)(v) of the said Rules. I do not consider it necessary to refer in detail to the factual background of the application for this is clearly and concisely set out in the judg-ment of the court a quo which is fully reported at 1984(3) S A 489.

The appellant company is an insurance

company./.....

company. Its head office is in Johannesburg and it has a branch office in East London. The summons in question relates to a claim by the respondent (as plaintiff) against the appellant company (as defendant) for payment of the sum of R34 500 under the provisions of the Compulsory Motor Vehicle Insurance Act, 56 of 1972 (the Act). The amount was alleged to represent damages suffered by the respondent as a result of injuries sustained by him in a motor accident in East London, on 10 November 1980, in circumstances rendering the appellant company liable under the Act. The summons was issued on 7 February 1983 and it then had to be served upon the appellant company on that same

day in order to obviate prescription of the respondent's claim under section 24(1) of the Act. However, by the time that the summons had been issued, it was too late to have it served on the appellant company at its local branch office. On the instructions of the respondent's attorney, the deputy-sheriff then served the summons upon the manager of the local branch, Mr Donly, at his residence in East London, at 10h25 on the day in question. The deputy-sheriff's return of service reads as follows:

> "On the 7th day of February 1983 at 10.25 p m I duly served a true copy of the annexed Summons and Particulars of Claim in the above matter on Mr A W Donly, the Manager of the local branch of the above Defendant Company at 63 Vincent Gardens Rise, Vincent, East London being his

> private residence. Mr Donly informed me that he was duly authorised to accept service of the process on behalf of the Company but he considered that service was incorrectly effected as the service should have been effected at the offices of Federated Insurance Company Limited, 301 Allied Building Society, 7 Buxton Street, East London during business hours. I exhibited the original and explained the nature and exigency thereof and handed him a true copy thereof at the same time."

On 21 February 1983 the appellant company gave notice of its intention to defend the action and thereafter brought the application to have the service of the summons set aside as irregular. According to the founding affidavit the appellant company's sole complaint was that the summons had been served at the residence of its branch manager instead of at its

registered office or its local branch office. The application was opposed by the respondent. In the answering affidavit on his behalf, the respondent's attorney explained why there had been such a long delay in instituting proceedings. Furthermore, he averred that there had been substantial compliance with rule 4(1)(a)(v) and that even if it should be found that the service of the summons was bad, this should be condoned and the application be dismissed.

When the matter came before Zietsman J, counsel for the appellant company, Mr Leach, did not confine his argument to the issue explicitly raised in the papers. He went further and submitted

that the service of the summons was so irregular and defective as to be a nullity which was not capable of being rectified by condonation. He contended that in terms of rule 4(1)(a)(v) service could not be effected upon the appellant company at East London at all because neither its registered office, nor its principal place of business, was situated there. Thus, even if the summons had been served upon Mr Donly at the branch office during ordinary business hours, the service would nevertheless, on counsel's contention, have been irregular. Mr Leach relied mainly on the following cases in support of this argument, namely: S A Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd 1977(3) S A 703 (D & CLD),

Prudential Assurance Co. Ltd. v Swart 1963(2) S A 165(E), and T W Beckett & Co. Ltd v Kroomer Ltd. 1912 AD 324. The learned judge, having carefully considered these and other related authorities, came to the conclusion that counsel's contention was unsound. He held that in terms of rule 4(1)(a)(v) service upon Mr Donly at the branch office would have been quite in order. He came to the conclusion that the service of the summons was defective only because it had been served upon Mr Donly at his house and not at the branch office. However, the learned judge also found that there were good grounds for condoning this irregularity and he therefore dismissed the application.

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The central issue in this appeal is whether the learned judge erred in rejecting the contention that service of the summons could not properly have been effected at East London. The answer to this question depends almost entirely on the meaning of the words "principal place of business within the court's jurisdiction" (Afr: "vernaamste besigheidsplek binne die hof se regsgebied") in the context of rule 4(1)(a)(v). The relevant part of this rule reads as follows: "Service of any process of the court directed to the sheriff ..... shall be effected by the Sheriff .....: ..... in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered

office or at its principal place of business within the court's jurisdiction...."

Having regard to the context in which the words in question are used, there seems to me to be no reason why they should not be given their plain, ordinary meaning. These words do not appear to have been used in any special or technical sense. One of the objects of sub-rule (v) is, no doubt, to facilitate the service of process upon a company which does not have its registered office within the jurisdiction of the court. This can be inferred, in my view, from the fact that the provision for service at the company's "principal place of business" is qualified by the words

"within/ .....

"within the court's jurisdiction". These words refer to the territorial jurisdiction of the court from which the summons (or other process) to be served, is issued. (Sub-rule (v) obviously pre-supposes that that court has jurisdiction in the matter.) Giving the words "place of business" their ordinary connotation, I have no doubt in my own mind that companies like individuals can, and often do, have more than one place of business within the area of jurisdiction of a particular court. For example many banks, insurance companies, large retail trading companies, and so on, carry on business in more places than one. (See Davies v British Geon, Ltd (1956) 3 All E R 389).

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I am therefore of the opinion that, in the context of sub-rule (v), the words "principal place of business" of a company relate to the main or principal place of business of the company within a certain area, namely, the area of jurisdiction of the court from which the summons was issued. Giving the words in question their ordinary meaning, I am of the opinion that the effect of rule 4(1)(a)(v) can be stated as follows:

(a) a summons may always be served upon a company at its registered office, wherever that may be situated;

(b) if a company has no place of business within the court's jurisdiction, the summons would have to be served at its registered office; (c) if a company has

only/ .....

only one place of business within the court's jurisdiction, that would be regarded as its principal place of business within that area, and the summons could accordingly be served there; and (d) if a company has more than one place of business within the court's jurisdiction, the summons would have to be served at the company's chief or principal place of business within that area, unless, of course, it is served at its registered office. A litigant should not, in practice, have any real problem in identifying the principal place of business of a company within the area of jurisdiction of a particular court for, in case of doubt, he could approach the company itself for the

information. And if such information cannot be obtained from the company, or any other source, service could, in any event, be effected at the company's registered office.

I now come to Mr Leach's argument and the authorities quoted in support thereof. He submitted in this court, as he did in the court a quo, that rule 4(1)(a)(v) should be construed as meaning that the service of a summons can be effected on a company at its principal place of business only if such place of business happens to be within the court's jurisdiction. This submission was based mainly on the following statement of James J P in S A Instrumentation

(Pty)/ .....

(Pty) Limited v Smithchem (Pty) Limited (supra) at 705 E - F, with reference to the service of a summons upon a company, at its principal place of business under sub-rule (v), namely: "in this regard the test is not whether the place of business was the chief place of business within the jurisdiction of the Court but whether it is, in fact, the principal place of the company's business and only if it is within the Court's jurisdiction may summons be served there." I respectfully disagree with the view expressed in this statement, which is plainly an obiter dictum. The applicant applied for an order setting aside as irregular the service of a summons upon it at

the instance of the respondent. The facts were: (a) that the summons had not been served at the company's registered office; (b) that the company had only one place of business and the summons had not been served there; and (c) that the summons had not been served upon anyone who had authority to accept service on behalf of the company. There had, in fact, been no service upon the company whatsoever. Thus, the question as to the true meaning of the words "principal place of business within the court's jurisdiction" did not arise as an issue in that case. The two cases quoted by the learned judge in this regard, namely Prudential Assurance Co. Ltd./ .....

Ltd. v Swart (supra) and T W Beckett & Co v Kroomer Ltd (supra) do not, in my view, lend support to his statement nor do they assist in the interpretaion of sub-rule (v).

The decision in the Prudential Assurance case is clearly distinguishable. There the question was whether the local branch office of the company was the "place of business" of the company within the meaning of rule 16(2) of the rules of that court. The provisions of this rule differ materially from those of sub-rule (v). The relevant portion of rule 16(2) provided as follows:

"A copy of every summons shall be

served/ .....

served either by delivering such copy to the defendant personally or by leaving it at his usual or last known residence or place of business with some adult inmate thereof."

The learned judge (O'Hagan J) came to the following conclusion on p. 168:

"It is true that the branch office of the defendant company in this case is one of its places of business, but considerations of convenience lead me to the conclusion that Rule 16 (2) did not use the term 'place of business' in a wide sense but in the more restricted sense. In other words, to comply with Rule 16(2) service of process must be effected at the place where the management of the corporation concerned is situated. That being so, the service in the present case

is not service in compliance with Rule 16(2)."

This conclusion was based on certain observations of Innes J A in the T W Beckett case, and in Sciacero & Co v Central South African Railways, 1910 T S 119, which, as I shall presently show, bear no relation to the problem under consideration in the present case. I mention, in passing, that the reasoning of the learned judge in the Prudential Assurance case (supra) was followed and adopted in Parity Insurance Co. Ltd v Wiid, 1964(1) S A 216 (G W) and in Dowson and Dobson Ltd v Evans and Kerns (Pty) Ltd, 1973(4) S A 136 (E).

The decision in Sciacero & Co v Central South African Railways (supra) relates to a

dispute/ .....

dispute about jurisdiction. The Magistrates' Court Proclamation rendered a defendant liable to be sued not only where he resided but also where he carried on business. The point the court had to decide was whether the railway administration "carries on business" at an ordinary railway station. Innes C J, delivering the judgment of the court, said this at pp 121 - 122:

> "In the widest sense, no doubt, the administration does 'carry on business' at Belfast. ..... But the words can hardly be taken in their widest sense, because of the serious inconvenience which would follow in the case of great bodies like railway administrations, which have agencies and branch offices in numerous parts of the country, if they were sued not at the place

where the management is situated, and where an explanation of the matters in dispute could be given, but at any small station where any of their officials reside and service could be effected. The English courts have therefore held, construing exactly similar words in the County Courts Act, that 'to carry on business' does not mean to carry on any business at all, but to carry on the general business of the corporation; and that such general business can only be said to be carried on at the place where it is managed. I propose to read what was said in Brown v London and North Western Railway Co. (19 Jur. N.S. 234), and has been approved by later cases. Wightman, J: 'The words of the section are general, and contemplate the case only where the general business of the party is carried on, and have no reference to a place where a particular and

> limited portion thereof is transacted.' And Blackburn, J: 'Generally speaking, a man can only be said to carry on business in the place where its general management and superintendence are carried on. No doubt there may be cases where a man carries on more businesses than one, and in different places; but such cases are quite exceptional, and the place of business in general must be where its general superintendence and management takes place.' ..... It is clear that a railway administration stands on a rather different footing from an ordinary trading company. Such a company can hardly carry on a branch business without a very substantial degree of management and discretion being entrusted to its local representatives."

It is quite clear from the above passage that the decision of the court was based on grounds of convenience.

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The decision in the T W Beckett case (supra) also concerns a dispute about jurisdiction, namely, the jurisdiction of the Witwatersrand Local Division in an action against a company which had its registered office at Pretoria, and an extensive branch at Johannesburg. The main issue was whether the company, for the purpose of jurisdiction, could be said to be resident in Johannesburg. This question was answered in the negative. Innes J A (Lord de Villiers C J and Solomon J A concurring) stated (at p 324) that the doctrine was firmly established that "where a company carries on business at more places than one its true residence is located where its general

administration/.....

administration is centred." The learned judge referred in this regard to the Sciacero case (supra) and to a number of English cases in which it was held that trading and railway corporations reside or carry on their business at the place where their chief office is situated, and that the locality of that office determines the forum in which alone the company was justiciable. In Davies v British Geon Ltd (supra), the Court of Appeal dealt with a dispute about the meaning of the words "resides or carries on business" in the context of R S C, Ord 12 r 4 and r 5, relating to the entry of appearance by a defendant to a writ. Denning and Birkett, L J J (Harman J dissenting) held that for the purpose of the rule a company,

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like an individual or firm, could carry on business in more places than one. In his judgment, Denning L J, referred to the English cases cited by Innes J A in the above decision and observed (at p. 396 F - H):

> "In each of those cases the decision was put by the judges on the ground of convenience. They recognised that, according to the ordinary use of language, a railway company carries on business at every station on the line, however small; but, inasmuch as that would have meant that it could be sued in every county court throughout its system, the judges went to the other extreme and held that a railway carried on its business at the principal station only. Those cases have frequently been said to be sui generis."

However,/ .....

However, it is quite clear from what has been said above that the Sciacero case (supra) and the T W Beckett case (supra) dealt with the problem of jurisdiction in respect of actions against corporations or companies, and the meaning to be given to words such as "reside" and "carry on business" for that purpose. The observations of Innes J A in that connection cannot, in my view, be invoked for the purpose of departing from what I consider to be the plain, ordinary meaning of the words in sub-rule (v). I respectfully agree with Zietsman J that the interpretation of sub-rule (v) by the learned judge in S A Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd. (supra)/.....

(supra), "strains the language" used. But there is another reason why I am unable to agree with that interpretation. The rules of court which were in force in the various provincial and local divisions prior to the introduction of the Uniform Rules of Court, provided, in effect, that a summons could be served upon a company either at its registered office or at its principal place of business. On the meaning given to the words of sub-rule (v) in the above case, a summons could be served upon a company at its principal place of business only if it were within the court's jurisdiction. I cannot accept that rule 4 (1)(a)(v) was intended to have that effect. It seems to me

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to be much more likely that the intention was, as I have already stated, to facilitate the service of process upon a company by providing that it could be effected upon a company at its principal place of business within the area of jurisdiction of the court from which the summons is issued.

On the information contained in the papers, I have no doubt the learned judge a quo was fully justified in holding that for the purposes of rule 4(1)(a)(v) the appellant company's branch office in East London was its principal place of business within the court a quo's jurisdiction. Service of the summons upon Mr Donly at the branch office would

therefore have been proper service. I consequently also agree with the judge a quo that the service of the summons was irregular only because it had been served upon Mr Donly at his home instead of at the branch office.

I come, finally, to the question whether the court a quo erred in granting condonation of the irregularity in the service of the summons. The court derives its discretion to condone such an irregularity from rule 27(3) and rule 30(3). And, as Holmes J A observed in Northern Assurance Co. Ltd. v Somdaka 1960(1) S A 588 at 595 A, the court has a discretion, "to be exercised judicially upon consideration

of/ .....

of the circumstances, to do what is fair to both sides."

Mr Leach's main attack upon the exercise by the learned judge of his discretion in favour of granting condonation was, as I have already mentioned, that the service of the summons was so irregular as to be a nullity, which could not be rectified by condonation. He did not seriously contend that the judge a quo erred in other respects in deciding to grant condonation. Although the service of the summons was irregular it was plainly not so irregular as to be a nullity. It was served upon the appellant company's branch manager who was authorised to accept service of process on behalf of the appellant company, although not at his private

residence/ .....

residence. The learned judge accepted the explanation by the respondent's attorney for the delay in instituting proceedings and it has not been contended that he erred in doing so. The learned judge furthermore had regard to the following circumstances:

(a) that the appellant company had suffered no real prejudice as a result of the irregularity; (b) that the appellant company had been furnished with full details of the respondent's claim, in terms of section 25 of the Act, some three months before the service of the summons; and (c) that although the appellant company was aware of the irregularity in the service of the summons, it nevertheless entered appearance to

defend the action, before applying to have the irregular service set aside. Having regard to all the circumstances of this case, I am not persuaded that the learned judge a quo erred in exercising his discretion in favour of granting condonation of the irregularity in the service of the summons.

The appeal is accordingly dismissed with costs.

TRENGOVE, JA

RABIE, CJ)
)
MILLER, JA) CONCUR
)
BOTHA, JA)
)
BOSHOFF, JA)