

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/38713

DATE:07/08/2011

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

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DATE

.....  
SIGNATURE

In the matter between:

**PRISM PAYMENT TECHNOLOGIES (PTY) LTD**

Plaintiff

and

**ALTECH INFORMATION TECHNOLOGIES (PTY) LTD  
t/a ALTECH CARD SOLUTIONS**

First Defendant

**ALTECH DATA (PTY) LTD  
t/a ALTECH CARD SOLUTIONS**

Second Defendant

**ALTECH CARD SOLUTIONS (PTY) LTD**

Third Defendant

**BONFRER, PETRUS ADREANUS**

Fourth Defendant

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**J U D G M E N T**

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**LAMONT, J:**

[1] The fourth defendant in this matter has brought an application against the plaintiff in terms of Rule 30(1) to set aside the service of a summons. The plaintiff albeit informally counterclaims conditionally for condonation for non-compliance with the rules to the extent that the rules are found not to have been complied with.

[2] On 28 September 2010 the plaintiff instituted action against four defendants claiming payment as against such defendants which were held liable of some R56,6 million and other relief. The Sheriff rendered returns reflecting that on 29 September 2010 and at Linbro Business Park, 11 Enterprise Close, Sandton ("the service address) he had served the summons and that such place was the employment address of the fourth defendant; that on 5 January 2011 and at the service address he had served a letter on the fourth defendant; that on 5 January 2011 and at the service address he had served a copy of the summons and particulars of claim; that on 29 September 2010 at the service address he had served a copy of the summons and particulars of claim.

[3] Each defendant individually delivered a notice of intention to defend. The notice of intention to defend for the fourth defendant was delivered on 12 October 2010.

[4] The irregularity of which the fourth defendant complains is that the service address is not his employment address and hence (ignoring other

deficiencies in the returns of service) the service of the summons was irregular.

[5] In terms of Rule 4(1)(a) of the Rules service is to be effected by the Sheriff leaving a copy of the process at the place of employment of the defendant.

[6] Rule 30 affords a party to a cause in which an irregular step has been taken by any other party the right to apply to court to set it aside.

[7] The Rule applies to assist a party provided that the party:

1. has not taken a further step in the cause. The filing of an appearance to defend does not constitute a further step;
2. within 10 days of becoming aware of the step by written notice it has afforded the other party an opportunity to remove the cause of complaint; and
3. within 15 days after the expiry of the 10 days shall prosecute the claim by way of delivery of the application.

The fourth defendant was late and seeks condonation. I am of the view that condonation should be allowed because there is no prejudice to the plaintiff. The fourth defendant could as well have raised the complaint currently raised

by way of a special plea hence the fact that he is late in the current context does not afford any prejudice to the plaintiff.

[8] The court at the hearing (in terms of Rule 30(3) of the Rules) is granted the power to set aside the step in whole or in part if it is irregular or improper and to grant leave to amend or to make such other order as to it seems appropriate.

[9] The fourth defendant brought the application by way of notice. No affidavit was attached to the notice. Inside the notice the fourth defendant alleged that the summons was not served as prescribed by Rule 4 in that the place of employment of the fourth defendant is not at the service address.

[10] The plaintiff's evidence was that the fourth defendant had resigned from the plaintiff's employ during or about October 2007 and had then taken up employment with either the first alternatively the second alternatively the third defendant after he had successfully facilitated the transfer of certain business to the new employer.

[11] The plaintiff set out that a similar summons to that forming the subject-matter of the present matter was served on the fourth defendant at the service address on a person who was a "*HR Practitioner*" and that such place was the place of employment of the fourth defendant. The fourth defendant entered an appearance to defend that action on 3 August 2010 being represented by the same attorneys who currently represent him. The fourth defendant did not

take issue with the service but raised instead an exception in terms of Rule 23(1).

[12] When the Sheriff attempted to serve the summons by which the current action was instituted on the fourth defendant at the registered offices of the first, second and third defendants he was advised by one De Villiers that the fourth defendant was based at Linbro Business Park. The plaintiff believed that the fourth defendant was employed by "*Altech Card Solutions*" and sent its attorney to the reception desk at the service address, that being the place of business of that entity. The attorneys representing the plaintiff entered the premises and requested the receptionist to call the fourth defendant. They were advised by the receptionist that the fourth defendant was out and would only return later in the afternoon. The receptionist pointed to a notice board which reflected the names of employees of Altech Card Solutions and which indicated whether the employees were "*in*" or "*out*". The fourth defendant was reflected on the board as being out. A copy of the Altron Group Products and Services Card for October 2010 reflects the fourth defendant as being the General Manager E-Security. The plaintiff was aware that an entity known as Thales played a role in the affairs of the fourth defendant and investigated its web site. The Thales website reflects Altech Card Solutions as a partner and reflects the contact person as the fourth defendant of "11 Enterprise Close, Linbro Business Park, Sandton" ("the service address")

[13] The fourth defendant filed a replying affidavit and in that affidavit set out that since October 2007 he had been employed by the second defendant

in its Altech Card Solutions Division. Until December 2007 he was employed at the service address. In January 2008 he was transferred to the first defendant and went to his current place of employment at 39 Galaxy Avenue, Linbro Business Park, some 1½ kilometres from the other premises. The division of the first defendant which employed the fourth defendant remained in that place after the first defendant left the building and went to carry on business at the service address. From December 2010 telephone calls were routed from the first defendant's offices at the service address to his place of employment. The reception is at the service address. It appears that the gateway to the place where the fourth defendant's office is, is at the service address. The fourth defendant's submission was that while the fourth defendant at the time of service was employed by the first defendant whose business is at the service address his *de facto* employment was 39 Galaxy Avenue. The rule so it was submitted requires service upon the fourth defendant at the fourth defendant's place of employment which is not necessarily at the place where his employer carries on business.

[14] The question which is to be considered is whether or not if access to the fourth defendant's "*place of employment*" is to be gained by way of first gaining access at the place where the employer carries on its business that results in his place of employment being there even if his office was some distance away. It is apparent from the evidence that in order to gain access to the fourth defendant access must first be gained to the receptionist at the service address where the employer carries on its business. It is at that place that telephone calls are received and routed to the fourth defendant. It is at

that place that his receptionist sits. It is at that place that he is designated as being in or out of office. There is no evidence indicating that access can be gained to the fourth defendant otherwise than by first approaching the place where service was effected.

[15] In my view the connection which the fourth defendant has with the place of business of the employer, the first defendant is sufficiently close to render that place as being his place of employ.

[16] The decision in *African Guarantee and Indemnity Co Ltd v Mills NO 1955 (2) SA 522 (TPD)* is distinguishable in that the service was at a branch office which was disconnected from the registered office. In the present matter the place where service was effected is the gateway to the place of employment of the fourth defendant.

[17] In the circumstances there was service at the fourth defendant's place of employment as required by the rule.

[18] Even if I am wrong in the foregoing approach in my view there is no prejudice to the fourth defendant by reason of the service. Prejudice is a prerequisite for success in the application (see *Superior Court Practice Erasmus B1-193 Note 9* where the authorities are collated).

[19] The fourth defendant suffers no prejudice in the current proceedings.

[20] The service of the summons was effective.

*“It is cornerstone of our law that the defendant is entitled to notice of proceedings. See Steinberg v Cosmopolitan National Bank of Chicago 1973 (3) SA 885 (RA) at 892.”*

The fourth defendant received it and was able to enter an appearance to defend. It is true as was submitted on behalf of the fourth defendant that the fact that he has entered an appearance to defend does not interfere with his right to attack the service. It is equally true that the fact that he entered an appearance to defend is indicative of the fact that he received and has knowledge of the summons and was able to defend it. The inference to be drawn from this is that the service was effective.

[21] 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 are 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 that 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 the *United Reflective Converters (Pty) Ltd v Levine* matter 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. In the present matter the non-compliance with the rules accordingly does not result in prejudice to the fourth defendant as the purpose of the substantive law has been fulfilled namely that he be given notice of the process.

[22] The facts in *Scott and Another v Ninza* 1999 (4) SA 820 (E) are similar to those in the present case. The finding there was different in that it was held that the service was irregular. It was however held that condonation should be granted. The reasoning in this judgment supports my reasoning (*supra*) that condonation if the step is irregular is appropriate. Similarly in *Federated Insurance Co Ltd v Malawana* 1986 (1) SA 751 (A) service at a branch office was condoned where service should have been effected at the principal place of business there being no prejudice.

[23] It was submitted that if service was irregular I should not grant condonation to the plaintiff for its failure to comply with the rules. This submission was founded upon a submission that in doing so I would create in the hands of the plaintiff a right to defeat the claim that the service of the summons did not interrupt prescription, service having taken place. In my view it is an improper approach to the question of condonation to consider what effect it might have on claims which may be pleaded in the future and of which no detail is currently given. In addition Rule 30 requires me to consider only whether the service was as Rule 4 stipulates not whether the service was effective as would have been considered as that would be required for the

service to interrupt prescription. Had I formed the view that the service was irregular I would have condoned the irregularity on the basis that the fourth defendant had knowledge of the summons and was able to enter into an appearance to defend timeously. There should not be a rigorous and formalistic approach to the rules. The court should take into account the true intention of the fairness of the rules of court and the realities of the situation. See *Protea Assurance Co Ltd v Vinger* 1970 (4) SA 663 (O), *Wiehahn Konstruksie Toerustingmaatskappy (Edms) Bpk v Potgieter* 1974 (3) SA 191 (T); *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A) at 595.

[24] I raised with counsel the issue of whether the use of Rule 30 was appropriate in the context of considering an alleged irregularity concerning service. I was referred to a number of cases where this course was followed including *African Guarantee supra*. The service is only “irregular” if the extraneous fact is established namely that service was not at the place of employment. The irregularity does not appear from the steps taken. In addition if a service is set aside on the basis of the irregularity no consideration is given to the question of whether or not the service was effective save perhaps in the condonation application. The effectiveness issue is not, in my view appropriately decided as a condonation issue. It is the central underlying purpose of the rule. On the face of it a summons served in any manner but which is served effectively is regularly served. Great injustice may follow if the service is set aside on the basis of irregularity without applying the effectiveness test as it may then be argued that prescription has not been interrupted. In my view it is doubtful that Rule 30 is the proper

procedure to follow. By reason of my finding *supra* there is no need to decide this issue.

[25] I would accordingly dismiss the application with costs. The order which I make is:

**Application dismissed with costs.**

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**C G LAMONT  
JUDGE OF THE SOUTH GAUTENG  
HIGH COURT, JOHANNESBURG**

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| <b>Attorneys for Plaintiff</b>         | <b>:</b> | <b>Smith Sewgoolam Inc</b>    |
| <b>Counsel for Plaintiff</b>           | <b>:</b> | <b>D.C. Fisher SC</b>         |
| <b>Attorneys for Fourth Respondent</b> | <b>:</b> | <b>Cowan-Harper Attorneys</b> |
| <b>Counsel for Fourth Respondent</b>   | <b>:</b> | <b>J.R. Peter SC</b>          |
| <b>Date matter heard</b>               | <b>:</b> | <b>26 May 2011</b>            |
| <b>Judgment date</b>                   | <b>:</b> | <b>7 June 2011</b>            |