IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: **YES**

Date: ***10th MAY 2016*** Signature: ______________

CASE NO: 2016/07492

In the matter between:

INVESTEC PROPERTY FUND LIMITED Plaintiff

And

VIKER X (PTY) LIMITED First Defendant

BUCHNER: MARKUS Second Defendant

JUDGMENT

<u>ADAMS AJ</u>:

[1]. This is an application by the plaintiff for summary judgment against the first and second defendants. The application against the first defendant, which is at present under *Business Rescue,* is unopposed and the plaintiff is only proceeding with the application against the first defendant for eviction from the leased premises. As regards the second defendant, he is opposing the application for summary judgment on the basis that service of the summons on him was defective and therefore of no force and effect. Also, second defendant contends that this court does not have the necessary jurisdiction over him as he is presently resident in Italy, which means that he is a *peregrinus.*

[2]. Plaintiff's claim is based on a written agreement of lease in terms of which the plaintiff let to the first defendant commercial premises. It is alleged by the plaintiff that the first defendant breached the lease agreement by failing to make payment of the monthly rental and related charges. In this application for summary judgment, the plaintiff's claim is for eviction from the leased premises, arrear rentals and a refund of the tenant installation allowance, arising from the first defendant's breach of contract.

[3]. The lease agreement was signed by the second defendant on behalf the first defendant, and the second defendant also bound himself as surety and co – principal debtor to the plaintiff for the due and proper fulfilment of all the obligations of the first defendant in respect of the lease agreement.

[4]. According to the Sheriff's return of service, the summons was served on the second defendant at his place of employment in Bryanston, which falls within the geographical area of jurisdiction of this court, upon a person, who is described in the return as an employee of the second defendant. This is the same person who accepted service on behalf of the first defendant, and who, in the sheriff's return of service, is also described *vis-a-vis* the first defendant as an employee.

[5]. Notice of service of the summons clearly came to the attention of the second defendant, because approximately 18 days after service of the summons was effected, his attorneys of record delivered notice of appearance to defend.

[6]. In his affidavit resisting summary judgment, the second defendant denies that he is employed at the address at which the summons was served. He is not employed at the said address, so it is alleged by the second defendant, nor does he carry on business there. He goes on to say that at the time that the summons was served and at the time that he deposed to the resisting affidavit he was resident in Italy. Therefore, so the second

defendant contends, this court does not have jurisdiction as there has not been an attachment of his assets to find or confirm jurisdiction.

'IRREGULARITY' **– SERVICE OF THE SUMMONS**

[7]. It is contended on behalf of the second defendant that the service of the summons and the subsequent legal proceedings (the action instituted against him) are fatally defective and a nullity. The summons ought to have been served on him by edictal citation with the leave of the court as he is resident outside of the Republic of South Africa. The rules of the Court relating to service of the summons, so it is submitted, have not been complied with, and the service of the summons stands to be set aside.

[8]. No prejudice to the second defendant appears to have resulted from the alleged defective service, and Mr Winterton, who appeared on behalf of the second defendant, was unable to direct my attention to any possible prejudice suffered by the second defendant occasioned by the non – compliance with the letter of the Rule of Court relating to service of the summons.

[9]. At the outset let me say that I associate myself entirely with the following remarks by the court in the matter of *Viljoen v Federated Trust Ltd,* 1971 (1) SA 750 (O):

> *'The Rules of Court, which constitute the procedural machinery of the Courts, are intended to expedite the business of the Courts. Consequently they will be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible'.*

[10]. *'It is a cornerstone of our legal system that a person is entitled to notice of legal proceedings against such person'*. See *Steinberg v Cosmopolitan National Bank of Chicago*, 1973 (3) SA 885 (RA) at 892B – C.

[11]. If proceedings have begun without due notice to the defendant, the subsequent proceedings are null and void, any judgment is of no force and effect and may be disregarded without the necessity of a formal order setting it aside. If a summons had not been served on a defendant, a subsequent judgment may be set aside in terms of rule 42(1)(a). Mere knowledge of issue of summons does not constitute service and cannot relieve a plaintiff of the obligation to follow the prescribed rules.

[12]. However, in the present matter the second defendant suffers no prejudice. The service of the summons was effective.

[13]. The second defendant received the summons and the particulars of claim and was able to enter an appearance to defend. The fact that the second defendant 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. Moreover, in his affidavit resisting summary judgment, the second defendant's attorney confirms that he, presumably on behalf of the second defendant, has read the summons and the particulars of claim. In these circumstances I cannot begin to see in what respects the second defendant can possibly suffer prejudice. I just cannot see any possible prejudice. The simple fact of the matter is that the second defendant is not in a different position than the one he would have been in had the summons been served on him by edictal citation.

[14]. 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, 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.

[15]. In the present matter the non-compliance with the rules accordingly does not result in prejudice to the second defendant since the purpose of the substantive law has been fulfilled, namely that he be given notice of the process.

[16]. The second defendant alleges that the summons was not served on him. Therefore, summary judgment should not be granted against him on the basis of the plaintiff's failure to comply with the rules. In my view, this is an improper approach. I say so for the simple reason that the second defendant had knowledge of the summons and was able to enter an appearance to defend timeously.

[17]. 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); and *Northern Assurance Co Ltd v Somdaka*, 1960 (1) SA 588 (A) at 595.

[18]. 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. The effectiveness issue is the central underlying purpose of the rule.

[19]. In that regard, I am in agreement with the following views expressed by Lamont J in the matter of *Prism Payment Technologies (Pty) Limited v Altech Information Technologies (Pty) Ltd t/a Altech Card Solutions and Others,* 2012 (5) SA 267 (GSJ) at page 272I – J:

> *'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 since 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'.*

[20]. I would accordingly dismiss the first legal point raised by the second defendant.

JURISDICTION

[21]. The whole cause of action arose within the geographical area of jurisdiction of this Court, which would therefore have jurisdiction to hear

this matter if the second defendant is an *incola* of the Republic. If he is a *peregrinus*, the Court would not have jurisdiction over the second defendant in the absence of an attachment of his assets to found or confirm jurisdiction.

[22]. The central issue which I am required to decide therefore relates to whether or not the second defendant is a *peregrinus* of the Republic of South Africa.

[23]. The second defendant alleges in his affidavit resisting summary judgment that he *'does not reside within the jurisdiction of this court'.* At the date of service of the summons as well as at the time when the resisting affidavit was deposed to the second defendant was <u>residing</u> at an address in Italy. He also denies that he is at present or was at the time of service of the summons employed at the address at which the summons was served in Bryanston.

[24]. Second defendant does not say much more than this. I am in the dark as to whether the second defendant has any proprietary interest left in the Republic. I also do not know whether or not he has at present any movable or immovable property left in South Africa, or whether he has any more family ties and / or business relationships remaining here. No explanation is given by the second defendant, who is the one who signed the lease agreement on behalf of the first defendant, as to his present

interest in the first defendant. The following question remains unanswered: Is the second defendant at present a shareholder and / or director in the first defendant? I just don't know as the second defendant did not disclose this essential detail in his affidavit.

[25]. What I do know from the certificate of the resisting affidavit is that the second defendant is a South African national. Also, it is instructive to note that nowhere in his affidavits does the second defendant deal in any way with the issue of his place of domicile, which, in my view, is separate and distinct from the concept of residence. Importantly, the second defendant does not deny that he is domiciled within South Africa, nor does he deal with those aspects which constitute domicile, notably the country, as between South Africa and Italy, which he regards as his permanent home.

IS THE SECOND DEFENDANT A *PEREGRINUS*?

[26]. The legal principles relating to the notion of a *peregrinus* was discussed at length in the matter of *Tick v Broude and Another,* 1973 (1) SA 462 (T). In that matter the evidence showed that when the respondent came to South Africa, it was his intention at least initially to remain for a short time only. The true issue before the Appeal Court, as in the Court *a quo*, was whether the respondent was a *peregrinus* in the sense that he was not resident in the Republic of South Africa. In that matter the Court concluded that the respondent was a *peregrinus* notwithstanding his *ipse dixit* that he regarded South Africa as his home.

[27]. Galgut J in the *Tick* case made reference to the publication by C Pollak's *The South African Law of Jurisdiction*, at p. 23 says, where the learned Author set out the relevant principles as follows:

> *'... it would seem that in modern South African law the term* incola *is used with reference to a litigant who is either domiciled or resident in the area to which the court belongs, while the term* peregrinus *is used with reference to a litigant who is neither domiciled nor resident in such area.'*

[28]. He concludes by saying:

> *'... in modern South African law either domicile or residence is sufficient to constitute a person an* incola*. Any person who is not an* incola *is a* peregrinus*.'*

[29]. There have been a number of decisions and certain general principles have been laid down in construing the word *'resides'*, as follows:

29.1 The question to be considered is not one of domicile but of residence; a person may have his domicile in one place and his residence for the time being at another place.

29.2 A person may have more than one residence.

29.3 A person cannot be said to reside at a place where he is temporarily visiting, nor does he cease to reside at a place even though he may be temporarily absent on certain occasions and for short periods.

[30]. In *Hogsett v Buys*, 1913 CPD at p. 205 Seale J said:

> *'It has never been laid down what degree of permanence is required in residence; but at all events it ought to be shown that the person sought to be brought within the jurisdiction had some interest in the place where he was served, in the sense that there was some good reason for regarding it as his place of ordinary habitation at the date of service.'*

[31]. To put the matter in another way, the question whether a person resides at a particular place at any given time depends upon all the circumstances of the case read in the light of the general principles referred to above.'

[32]. In *Kallos and Sons (Pty.) Ltd v Mavromati*, 1946 WLD 312, De Villiers AJ held that for a person to be regarded otherwise than as a *peregrinus* and thus to be regarded as an *incola* his residence must be *'of some permanent or settled nature*'.

[33]. In *Klisser v McGovern*, 1963 (4) SA 483, Milne JP, at p 486 proceeded on the basis that to be resident in the Republic it was necessary to show the

kind of residence which is necessary to characterise an *incola*. At p 486 he points out that the fact that a person who is living in this country and who is a British subject and has a British passport is not by itself sufficient to prevent him from being an *incola* of this country, and at p 487 he says:

> *'I take the view, further, that if his residence in this country had such a character of permanency in a sufficient degree to make him an* incola*, he does not cease to be an* incola*, or a person who is resident in this country, merely because he declares his intention of terminating his residence at an early date. Ex hypothesi it has not been terminated, there has merely been a declaration of intention to terminate it.'*

[34]. In deciding what is meant by *'residence'* one bears in mind that the word *'domicile'* has acquired a well-defined technical meaning. The word *'residence'* has not acquired any technical meaning and is used in law with many shades of meaning ranging from mere physical presence to domicile. (See Pollak, p 44). The definition of *'residence'* which is most appropriate in this type of case is the one set out in *Hogsett v Buys*, 1913 CPD 200, and quoted by Centlivres JA in *Ex parte Minister of Native Affairs*, supra at p 59, namely, there must be *'some good reason for regarding it as his place of ordinary habitation at the date of service'*.

[35]. The facts detailed below were urged as showing that the second defendant was resident in the Republic and thus is an *incola*:

35.1 The second defendant holds a South African passport and is a South African National.

35.2 The second defendant does not give any indication that he is permanently resident in Italy. He also does not say whether or not he has any plans to return to South Africa at any time.

35.3 In his resisting affidavit he is notably quiet about whether he regards South Africa or Italy as his permanent home.

[36]. If one examines all the above grounds, coupled with the fact that as recently as the 10th February 2014, when he signed the Lease Agreement, he was seemingly still resident in the Republic, it can safely be inferred that at all times material to this matter he regarded South Africa as his place of residence.

[37]. Each case will fall to be decided on its own facts.

[38]. Having regard to what the second defendant says in his affidavit resisting summary judgment as well as what he does not say, I am left with the firm impression that the defendant is in fact a person who regards South Africa as his permanent place of abode. Moreover, the more one reads his affidavits the more one finds that one cannot have any confidence in what he says and that it cannot be said that there is *'some good reason'* for regarding Italy *'as his place of ordinary habitation at the date of service'*.

[39]. It follows, therefore, that the second defendant is an *incola* in the sense that he is domiciled in South Africa. His second point *in limine* therefore also stands to be dismissed.

[40]. In his resisting affidavit the second defendant has not demonstrated a defence on the merits of the plaintiff’s claim. In that event the plaintiff is entitled to summary judgment.

ORDER

Accordingly, I make the following order:

Summary Judgment is granted against the first and second defendants, jointly and severally, as follows:

AGAINST THE FIRST DEFENDANT

CLAIM 1

1. Ejectment of the first defendant and anyone claiming occupation through the first defendant from the commercial leased premises described as *Building 2, Comprising of a Showroom (measuring approximately 1010m^2) and a basement storage (measuring approximately 400m^2), Bryanston Boulevard Showroom (situate on Portion 73 of Erf 5597, Bryanston), William Nicol Drive, Bryanston, Gauteng.*

AGAINST THE SECOND DEFENDANT

CLAIM 1

1. Payment of the sum of R1,309,773.35 (one million three hundred and nine thousand and seven hundred and seventy three rand and thirty five cents).

2. Interest on the said amount of R1,309,773.35 (one million three hundred and nine thousand and seven hundred and seventy three rand and thirty five cents) at the rate of 11.75% per annum from the 2nd March 2016 to date of final payment.

3. Ejectment of the first defendant and anyone claiming occupation through the first defendant from the commercial leased premises described as *Building 2, Comprising of a Showroom (measuring approximately 1010m^2) and a basement storage (measuring approximately 400m^2), Bryanston Boulevard Showroom (situate on Portion [7……] of Erf [5…….], [B……]), [W…..] [N……] [D……], [B……..], Gauteng.*

4. Cost of suit on the attorney and own client scale.

CLAIM 3

1. Payment of the sum of R508,928.57 (five hundred and eight thousand nine hundred and twenty eight rand and fifty seven cents).

2. Interest on the said amount of R508,928.57 (five hundred and eight thousand nine hundred and twenty eight rand and fifty seven cents) at the rate of 11.75% per annum from the 2nd March 2016 to date of final payment.

3. Cost of suit on the attorney and own client scale.

L ADAMS
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	6th May 2016
JUDGMENT DATE:	10th May 2016
FOR THE PLAINTIFF:	Adv J G Dobie
INSTRUCTED BY:	Reaan Swanepoel Attorneys
FOR THE SECOND DEFENDANT:	Adv D J Winterton
INSTRUCTED BY:	Sim & Botsi Incorporated