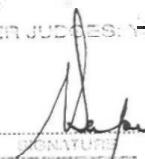


6/12/2010  
NOT REPORTABLE  
IN THE NORTH GAUTENG HIGH COURT, PRETORIA  
(REPUBLIC OF SOUTH AFRICA)

Case No: 11213A/2009

|                                                                      |                                                                                     |
|----------------------------------------------------------------------|-------------------------------------------------------------------------------------|
| DELETE WHICHEVER IS NOT APPLICABLE                                   |                                                                                     |
| (1) FOREIGN CURRENCY/NO.                                             |                                                                                     |
| (2) OF INTEREST TO OTHER JUDGES: <input checked="" type="checkbox"/> |                                                                                     |
| (3) REVISED.                                                         |                                                                                     |
| 6 <sup>th</sup> Dec. 2010                                            |  |
| DATE                                                                 | SIGNATURE                                                                           |

In the matter between:

**GREEN-CHEM (PTY) LTD**

Plaintiff

and

**ALBION ADMINISTRATION (PTY) LTD**

Defendant

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

**SAPIRE, A J:**

Plaintiff and Defendant are the owners of adjacent rural lands. On the 20<sup>th</sup> of March 2006 a dam situated on Defendant's land collapsed. The ensuing onrush of water onto Plaintiff's land caused substantial damage to Plaintiff's property in respect of which the Plaintiff claims damages, attributing blame therefor to the Defendant.

The Plaintiff issued a Summons on the 3<sup>rd</sup> of March 2009 in which the damages are claimed and on the 2<sup>nd</sup> of March 2009 delivered the process to the Sheriff at Nelspruit

for service. A Deputy Sheriff, Martin Swart, received the Summons on the 3<sup>rd</sup> of March 2009 with instructions to serve it urgently according to a document produced by Swart when he gave evidence. He served the Summons by delivering the same to the Defendant's registered office. He made a Return which he gave to the Plaintiff's attorney reading as follows:

**“DAGVAARDING: RELAAS VAN BETEKENING**

Hiermee sertifiseer ek, MARTIN SWART, Adjunk Balju vir die Hooggeregshof in Nelspruit, Mpumalanga, dat op hierdie 4de dag van MAART 2009 OM 9:10 te PROFORUM, VAN RENSBURG STRAAT 5, NELSPRUIT, MPUMALANGA, die geregistreerde adres van die Verweerder, het ek HENNIE GROBLER ontmoet, 'n persoon oënskynlik ouer as 16 jaar en in beheer tydens betekening.

Die oorspronklike Dagvaarding en Besonderhede van Vordering met genoegsame afskrifte is aan synde oorhandig vir insae waarna die inhoud, aard en erns aan synde verduidelik is.

Daarna is 'n afskrif van die Oorspronklike Dagvaarding met Aanhangsels op HENNIE GROBLER persoonlik beteken, wie 'n afskrif daarvan ontvang het namens die Verweerder.”

No Notice of Intention to Defend was given.

In October 2009 the Plaintiff made application for Default Judgment. To this end Plaintiff served the appropriate notice. Service was effected once again by Martin Swart, who made a Return reading as follows:

“Hiermee sertifiseer ek, MARTIN SWART, Adjunk Balju vir die Hooggeregshof in Nelspruit, Mpumalanga, dat op hierdie 16de dag van OKTOBER 2009 te 14:35 te PROFORUM GEBOU, VAN RENSBURGSTRAAT NO 5, NELSPRUIT MPUMALANGA, die geregistreerde adres van die Verweerder het ek CAROL TOPHAM ontmoet.

Die oorspronklike Aansoek om Verstekvonnis en aanhangsels met genoegsame afskrifte is aan haar oorhandig vir insae waarna die inhoud, aard en erns aan haar verduidelik is.

Daarna is ‘n afskrif van die Oorspronklike Aansoek om Verstekvonnis met Aanhangsels op CAROL TOPHAM beteken.”

The service of this Notice elicited a response from the Defendant and there is no doubt that the Defendant received this Notice. The parties apparently agreed that the Application for Default Judgment would not be proceeded with and the Defendant gave Notice of Its Intention to Defend. It then filed a Plea. The Plea contains two Special Pleas together with a Plea on the Merits. The two Special Pleas amount to raising a defence of prescription. It is alleged that the Summons was not served on Hennie Grobler as certified.

The parties have agreed that the issue of prescription should be dealt with apart from the other issues in the case and the hearing before me proceeded on that basis.

The Defendant without conceding anything with regard to the onus produced its evidence first. Hennie Grobler testified that he did not receive service of the Summons and was not in office at the time and on the date stated in the Return. He tendered his Passport to show that he was not in the country having gone to a neighbouring territory to fish. The Plaintiff's counsel in cross examining him conceded that the Return made by Swart in regard to the Service could not be proof that service did take place. He also put it to the witness that Swart would testify that service was in fact effected on one Carol Topham.

Grobler was adamant that he did not receive the Summons and he did not pass any information in regard thereto to his client.

Because Topham was mentioned in cross examination the Plaintiff wish to call her as a result of which the trial was adjourned to the following morning so that Topham who resides and works in Nelspruit could be present.

When she testified Topham could not remember the receiving the Summons and she inferred from the fact that the receipt of the Summons was not recorded in the Register of Documents Received that the Summons had not been delivered to the office. She also testified in regard to the second Return of Service which I quoted above that at that time she was on sick leave and on the day in question she underwent

an operation. She produced a copy of a Medical Certificate to substantiate what she said.

Although not directly relevant this evidence were tend to show that the first Return was not the only one which was incorrect and produced as a result of slovenly work. Over all, however, she conceded that she did not remember independently of the Register what had taken place.

The Defendant also called one of its Directors to testify that the attorney had phoned to enquire from him who the Defendant's accountant was. This telephone conversation took place long after March 1990 and does not affect the outcome of the case.

The Plaintiff called the Deputy Sheriff Swart who conceded that his Return regarding service of the Summons was not correct and could not be relied on. He maintained steadfastly that he had gone to the registered office of the Defendant with the Summons and a copy thereof and had served it on someone who he believe was Miss Topham.

His explanation for his Return is that he must have been at the office where he obtained the name of Hennie Grobler and he wrote this name on the "Adjunkblad" which he attached to the original of the Summons. This was given to the typists to compose the Return of Service which was not his wording. He admits however that he signed the completed Return. Clearly he could not have checked it before it was issued to the Plaintiff's attorney.

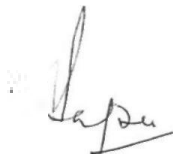
The explanation is so bad as to be probably true. I take strength in this view because the second Return was equally inaccurate but none the less the document served came to the attention of the Defendant and its attorneys. It is clear that on these two occasions the Returns do not reflect what really happened.

Swart's memory of the events seems to have been no better than that of Carol Topham.

The evidence on both sides is hazy but I find that on a balance of probabilities that Swart would have gone to serve the Summons and that he would not have left the office until he had done what he had set out to do namely serve the Summons.

The Summons may have gone astray thereafter. This explanation is more acceptable than the suggestion that the Deputy Sheriff fabricated his whole account of the fate of the Summons. The circumstances surrounding the second Service and the incorrect Return in respect thereof are consistent with the view to which I have come.

I therefore rule that the Summons was served timeously to interrupt prescription and that the Pleas of Prescription must fail.

A handwritten signature in dark ink, appearing to be 'L. J. P.' or similar, with a stylized flourish at the end.

**PLAINTIFF'S COUNSEL:**      **Adv A F Arnoldi, SC**

**APPLICANT'S ATTORNEYS:**      **COUZYN, HERTZOG & HORAK**  
  
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**PRETORIA**  
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(VERW: MNR OOSTHUIZEN/AK/D5858)

**DEFENDANT'S COUNSEL;**      **Adv B H Swart SC**

**DEFENDANT'S ATTORNEYS:**      **STRYDOM BRITZ MOHULATSI ING**

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Glenwood Kantoorpark  
Spritelaan 266  
**FAERIE GLEN**  
**PRETORIA**  
(VERW: W NOLTE/mj/SK45508)