

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 14855/2021

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 13/06/2023

SIGNATURE:

FORD MOTOR COMPANY AND MANUFACTURING OF SOUTHERN AFRICA

Applicant/Defendant

and

N T THOBAKGALE

First Respondent

S SHAKOANE

Second Respondent

G MASEMOLA

Third Respondent

G LEDWABA

Fourth Respondent

J LEDWABA

Fifth Respondent

K MEKWA

Sixth Respondent

E MEKWA

Seventh Respondent

NANDI TRANSPORT SERVICES CC

Eighth Respondent

T MOSHILE

Ninth Respondent

J SEBELELE

Tenth Respondent

MOSIA

Eleventh Respondent

M CHAUKE

Twelfth Respondent

*This judgment has been handed down electronically by circulation to the parties/legal representatives by email and uploaded to an electronical file of this matter on Caseline
This judgment is deemed to have been delivered on the at 13 June 2023 at 10h00*

JUDGMENT

MAKAMU AJ:

INTRODUCTION

[1] This is an application for rescission of judgment granted by Phooko AJ on 9 March 2022 in favour of the Respondents, who were the Plaintiffs in the main action. The Applicant who is the Defendant in the main action alleges that they were not served with the summons or notified when the Respondents applied for default judgment. They only became aware when the Sheriff came to attach property on the strength of the writ of execution that was issued. The main contention is about service, as the defendant relies on the return of service by the Sheriff who alleged that he served the summons by affixing at the main door. The Applicant stated that the application for default judgment was applied for, after expiry of six months after the alleged service, as such the Plaintiff was supposed to have issued a notice of set down and served the Defendant, its intention to apply for default judgment in accordance with practice directives issued by the Judge President of this Court. Failure to comply with the directives renders the judgment not to be lawful.

BACKGROUND

[2] The Applicant concluded a contract with individual Plaintiffs to ferry its employees up to 22h30. It is alleged that all the contracts were then ceded to M S Moffat Enterprise (Pty) Ltd who then became the only entity to interact with the Applicant.

[3] The Respondents then issued a letter of demand to the Applicant which was served by the Sheriff to the receptionist. The Applicant did not react to the letter of demand. The Respondents collectively issued summons against the Applicants and the return of service by the Sherriff indicates that he served the summons by affixing at the main door after he could not find anybody who could accept service and there was no other manner of service he could have effected.

[4] The Applicant did not react to the summons, which led the Respondents to seek and obtain default judgment against the Applicant on 9 March 2022. The Applicant became aware of the judgment and order on the 12 April 2022.

SUBMISSIONS

[6] The return of service by the sheriff stated as follows: *"It is hereby certified that on the 22 April 2021 at 10H00 AT Simon Vermooten Street, Silverton, Pretoria being the chosen domicilium citandi et executandi of Ford Motor Company of Southern Africa (Manufacturing)(Pty) Ltd (Registration number 1[...]) a copy of the combined summons, particulars of claim and Annexures "GTG1 to GTG 14" was served by affixing to the principal door; after a diligent search and enquiry at the given address, no other manner of service was possible .Rule 4(1)(a)(iv). Mr Adriaan Uys: Deputy Sheriff"*.

This is a standard return of service, where the sheriff could not find anybody to serve the documents. There is no indication that, the Sheriff made enquiries to specific people or employees of the Applicant. He does not say the security or any other employee refused to accept service but only say diligent search was done and there was no other manner of service.

[5] The Applicant stated that the service by the Sheriff was irregular as it did not comply with Rule 4(1)(a)(v) of Uniform Rules, when it comes to service to the company or corporate. Secondly that the Respondents did not serve notice of set down when they applied for default judgment against the Applicant. Thirdly the Applicant has bona fide defence and should be given an opportunity to defend the action. There will also be no prejudice against the Respondents.

[6] The Respondents stated in their heads of argument and also in their submissions in court that the service was in accordance with the Rules of court. Rule 4(1)(a)(v) of the Uniform Rules states as follows:

1(a) "Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:

"(v) in the case of a corporate or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law."

[7] Herstein & Van Winsen; The Civil Practice of the High Courts of South Africa fifth edition volume 1 page 354 4th paragraph (c) states that "The expression in any manner provided by law, Rule 4(1)(a)(v) is clearly meant to cover any other method of service which, in terms of any law, is open to a party suing a particular type of corporation or company". But the Sheriff must say that no employee refused to accept the service. This has been submitted by the Respondents that service was good as provided for, by law, yet the provisions of the rules are very clear.

[8] The Applicant stated that it is not enough, as the sheriff should go further in his return of service to explain what he meant by diligent search and if someone refused to accept service he should say so and it is impossible to say in a huge manufacturing company like Ford there was no one to try and serve him even the security who are in their multitudes manning all the entrances to the premises were not approached which is impossible. The service is not in compliance with Rule 4(1)(a)(v).

[9] The second ground is that in terms of the Directives of this Court issued by the Judge President with effect from 25 July 2011, if there was no notice of intention to defend and no pleadings were filed and the Plaintiff intend to apply for default judgment, they should serve the defendant with a notice of set down which was not done in this case.

[10] The third ground is that the Applicant has bona fide defence against the action. They should be given an opportunity to defend the action. The Applicant impressed to the Court

that, the Court does not have to go further as the service alone is irregular and on that basis alone rescission of judgments should be granted to the Applicant.

EVALUATION, THE LAW AND APPLICABLE AUTHORITIES

[11] It is very clear that the sheriff's return of service did not comply with the provisions of Rule 4(1)(a)(v) of Uniform Rules, as it is not imaginable that a huge company like Ford with such a lot of assets in the form of new cars could be left without employees in a form of security personnel and other employees who could have refused to accept service or at least direct the sheriff to the office where he could have served the documents on an individual representing the company. The Applicant said that there are many buildings and gates and at least the sheriff should have described the specific door that he affixed the summons. It is not conceivable that on 22 of April 2021 at 10h00 in the morning, which was during the week on a Thursday, there was no one on the entire premises or gates or doors.

[12] In *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (ECD) it was held that once an applicant can point to an error in the proceedings, he is without further ado entitled to rescission. The subrule accordingly makes the rescission of a judgment possible if it has been granted in the absence of any party affected thereby, if the judgment had been erroneously sought or granted. In this case the judgment was granted in the absence of the applicant and the applicant is affected by the judgment. The issue is whether the judgment was erroneously sought or erroneously granted. The applicant contend that there was error in the procedure that led to the judgment being granted against it in its absence without summons having been properly served on it, with the result that it had no knowledge that the respondent had instituted legal proceedings against it. The purpose of Rule 4(1)(a) is to correct the error in the procedure in obtaining the default judgment.

[13] When the Respondents realised that the Applicant did not enter a notice of its intention to defend and pleadings were not filed and six months had elapsed, they should have at least served its notice of set down to alert the Applicant of its intention to apply for default judgment. This was not done by the Respondents. The Respondents said that the directives may not be preferred over the Rules of Court hence there was no need to comply with the directives.

[14] The provisions of Rule 4(1)(a)(v) which deal with service by the sheriff of such process on a corporation or company, provides that such service shall be effected:

“In the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court’s jurisdiction, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law.”

There is no explanation in the return of service or by affidavit from the sheriff that there was no employee who refused to accept service.

[15] In *De Wet ND Others v Western Bank Ltd* 1979 (2) Sa 1031 (A) it was stated that the court must grant an application for rescission of judgment where it was erroneously sought or erroneously granted in the absence of the Applicant. It was also held in *Fraind v Nothman* [1991] 3 All SA 660 (W) that even though the Applicant was a fugitive who escaped to Israel fled the country but because summons were served at an address in which he was no longer staying, the judgment was sought and granted erroneously and rescission was granted to afford him an opportunity to defend his case. In this case the Applicant is juristic with huge establishment at his address, was not properly served with the summons.

[16] In *Masondo and Another v Nedbank Ltd* (1824/14) [2015] ZAGPPHC 461 (19 June 2015) it was held by Legodi J and said the following:

“I must say, experience had shown that service by affixing can sometimes be abused and when a red light is raised, it is incumbent on the court, to be cautious in accepting such service as a proper service. Failure to file the supporting affidavit of the sheriff on the challenge and allegations made, is my view, fatal. Just on this point alone, rescission of judgment ought to be granted. It is because of the serious nature of the allegations made against the sheriff, which allegations are not refuted, that I am unwilling to condone any such conduct as alluded to by the respondent.”

[17] In the applicant’s affidavit in support of their application for rescission of the default judgment, contend that the summons could not have been served by affixing to the main door of their *domicilium citandi* as there is always employees or at least there should have been allegations that no employee was willing to accept the service but all refused, and there is no such allegations. If there is an employee willing to accept service on behalf of

the company, there would have been good and valid service upon the company. Where no single employee amongst those present is willing to accept service on behalf of the company, there would be good and valid service upon the company if the sheriff were to affix the process to the main door of company's registered office or principal place of business.

[18] In *Chris Mulder Genote Ing v Louis Meintjies Konstruksie (EDMS) Bpk* 1988 (2) SA 433 (T) the Hartzenberg J said the following:

“Should the issue of service of the documents later be disputed, it would be of greater assistance to the litigants to know that a specific person received the documents than merely knowing that it had been attached to a door. Enquiries must therefore be made at a registered address to ascertain whether there are employees present of the business being conducted there. If that is then the registered address of the company upon whom service is to be made, a responsible employee, must be found and if such an employee is prepared to accept service on behalf of the company, then service must be on that person. It is conceivable that the employees at such an address are not prepared for some or other reason to accept service on behalf of the company. In that case, service may be effected by attaching it to a door as subrule (v) of Rule 4 (1) (a) of the Uniform Rules of Court allows the deputy-sheriff to do.”

[19] In *Arendsnies Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA) referred to *Brangus Ranching (Pty) Ltd v PLAaskem (Pty) Ltd* and said the following:

“Service at the registered office of a company, in the absence of a responsible employee thereof, by delivery of the document to be served to a person at such address (not being an employee of the company) willing to accept such service, has been recognised as good and proper service which is preferable to merely attaching the process, for instance, to the outer principal door of the premises.”

[20] In *ABSA Bank Ltd v Mare and others* 2021 (2) SA 151 (GP) the court found that the service was irregular where there was no building and the summons were left on the grass at the address which was listed as *domicilium citandi et executandi* and the default judgment was rescinded.

[21] Bloem J in *Magricor (Pty) Ltd v Border Seed Distributors CC* [2021] JOL 49372 (ECG) said the following:

“The fact that the subrule does not cater for the service of process on a company where its employees are absent to accept service, is a lacuna best dealt with by the drafters of the rules. In my view, the absence of employees of a company from the registered office or principal place of business does not permit the sheriff to effect service by affixing the process to the company’s main door at its registered office or principal place of business. For that kind of service to be effected the employees of the company must be unwilling to accept service.”

CONCLUSION

[22] The Applicant demonstrated that it did not fail to enter an appearance to defend wilfully as they never received the alleged summons.

The Applicant would have entered and appearance to defend and file pleadings on time. The default judgment was erroneously sought and erroneously granted.

[23] There is no reason to really burden this judgment with the other grounds.

I therefore make the following order:

Order: (1) The execution of the default judgment granted on the 9 March 2022 be stayed

(2) Judgment granted on the 9 March 2022 is rescinded.

(3) The first to the twelfth Respondents to pay costs of this application, jointly and severally, one paying the others to be absolved

M.S MAKAMU
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA.

APPEARANCES

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THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES ON..13
JUNE 2023.