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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 61844/21

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 14 JUNE 2023

SIGNATURE:

In the matter between:

MINISTER OF HEALTH

First Applicant

DIRECTOR-GENERAL, NATIONAL

Second

Applicant

DEPARTMENT OF HEALTH

and

SOLIDARITY TRADE UNION

First Respondent

ALLIANCE OF SOUTH AFRICAN INDEPENDENT

Second

Respondent

PRACTITIONERS ASSOCIATION

SOUTH AFRICAN PRIVATE PRACTITIONER FORUM

Third Respondent

BARBRA PRETORIUS

Fourth Respondent

CHRISTA ROLLIN

Fifth Respondent

ANJA HEYNS

Sixth Respondent

In re:

SOLIDARITY TRADE UNION

Applicant

and

MINISTER OF HEALTH

First Respondent

NATIONAL HEALTH COUNCIL

Second Respondent

**DIRECTOR-GENERAL, NATIONAL
DEPARTMENT OF HEALTH**

Third Respondent

NATIONAL DEPARTMENT OF HEALTH

Fourth Respondent

JUDGMENT

NEUKIRCHER J:

[1] This is an application brought by the first and third respondents in the main application,¹ to rescind the order granted by Bokako AJ on 15 June 2022 in the unopposed motion court. The rescission application is opposed by the applicants in the main application. In order to avoid confusion, I intend to refer to the parties as they are cited in the main application.

¹ The Minister of Health and the Director-General, National Department of Health

[2] The rescission application is brought in terms of:

- a) Rule 42(1)(a): that the judgment and order was erroneously sought and granted in the absence of the respondents; alternatively
- b) Rule 31(2)(b)²; alternatively
- c) In terms of the common law: good cause exists to rescind and set aside the judgment and order.

THE MAIN APPLICATION

[3] On 6 December 2021 the applicants launched an application in which they sought an order that s 36 to 40 of the National Health Act 61 of 2003 (NHA) be declared invalid in their entirety and be severed from the NHA.

[4] S 36 of the NHA has bearing on the requirements of a “Certificate of Need” when a health establishment is established, constructed, modified or acquired. They set out the manner in which it is valid, when it may be withdrawn and the appeal procedure to be followed³. S 39 of the NHA provides for the publication of Regulations by the Minister and s 40 for the offences and penalties relating to infringements in respect of s 36.

[5] On 9 December 2021 the applicants’ attorneys served the main application on the respondents, as well as on the State Attorney, by email. Read receipts were received inter alia from the office of the Presidency and the Director General.

[6] The application was then served by hand on the State Attorney, Pretoria on 14 December 2021 by Mr Fraser, the applicants’ attorney of record. Astoundingly, the State Attorney, Pretoria refused to accept service as there was no reference

² “(b) A defendant may within 20 days after he has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.”

³ S 38

number on the Notice of Motion (which would identify the State Attorney's specific client and instruction).

[7] As a result, on the same day, the applicants' attorney sent an email to the State Attorney⁴ to ask for the reference number for the case to enable service by hand - none was forthcoming.

[8] On 10 January 2022 a further email was sent to the State Attorney⁵ to enquire whether the respondents would oppose the matter. Despite both emails being read by the recipients, no response was forthcoming.

[9] On 12 January 2022 the Sheriff attempted service on the first and third respondents. The return of service for the Minister of Health reads as follows:

"Kindly be advised that on 12th day of January 2022 at 14:11 I attempted to serve the NOTICE OF MOTION, AFFIDAVIT TOGETHER WITH ANNEXURES in this matter at D[...] A[...] X[...] BUILDING 1[...] V[...] ROAD TOWNLANDS PRETORIA, however reception called legal department to come collect, but no answer, receptionist confirmed that staff is not back yet."

[10] Why the process was not served on the receptionist and a return rendered in terms of Rule 4 is a mystery. What is a bigger mystery is why service by the Sheriff was not effected on the State Attorney in terms of Rule 4(9)⁶. Be that as it may, it is without doubt that service was not effected on the Minister of Health by the Sheriff.

[11] However, on 12 January 2022 at 10h15, service was properly effected on the President by the Sheriff.

⁴ Addressed to the [S\[...\]](#) and to [I\[...\]](#)

⁵ To the same email addresses

⁶ Rule 4(9) states: "In proceedings in which the State or an organ of state, a Minister, a Deputy Minister, a Premier or a Member of an Executive Council in such person's official capacity is the defendant or respondent, the summons or notice instituting such proceedings shall be served in accordance with the provisions of any law regulating proceedings against and service of documents upon the State or organ of state, a Minister, a Deputy Minister, a Premier or a Member of an Executive Council."

[12] On 31 January 2022 another email was sent to the State Attorney - to the same email addresses. That email informs the recipients that the matter will be enrolled on the unopposed motion roll. Once again, read receipts were received by the applicants' attorneys and once again, the correspondence was ignored by the respondents.

[13] According to the respondents, on 24 February 2022 – being almost six weeks after service was effected on the President - Mr Lufuno Makhoshi⁷ received an email from Mr Geoffrey Mphaphuli⁸. He sought to establish whether the Department had received that application and attached a copy of the application to his email. According to the respondents, it was on this date that the Department came to know of this application.

[14] Three weeks later, on 16 March 2022 Mr Makhoshi then instructed the State Attorney to oppose the application on behalf of the President, and attached a copy of the application to his email. Bearing in mind that the Notice of Set Down informs the recipient that the application will be heard on 11 March 2022 at 10h00, by the time the email of 16 March 2022 was sent, the milk had been spilled. Ms Masia - at the office of the State Attorney - was allocated to the matter on 17 March 2022 and on the same day she delivered a Notice to Oppose. She was then informed by the applicants' attorney that the matter had been heard on 11 March 2022 and judgment had been reserved.

[15] Judgment was delivered by Bokako AJ on 15 June 2022 and she granted the following order:

“134.1 That Sections 36 to 40 of the Health Act 61 of 2003 are unconstitutional.

134.2 It is declared that sections 36 to 40 of the National Health Act 61 of 2003 are invalid in their entirety and are consequently severed from the Act.

⁷ The legal advisor for the Department of Health

⁸ The legal advisor in the Office of the President

134.3 In terms of section 167(5) of the Constitution and Rule 16 of the Rules of the Constitutional Court, the Registrar of this Court is directed to lodge a copy of the order and judgment, within 15 days of the order, with the Registrar of the Constitutional Court.

134.4 The respondents are ordered to pay the applicants' costs, including the costs of two counsel."

[16] The respondent's current attorney (Ms Qongqo) found out about the judgment on 23 June 2022. On 24 June 2022 she informed the legal advisors in the Department of Health and the Presidency of the judgment. She was then instructed to check the court file to see whether the application had been served and upon whom.

[17] On 24 June 2022 the Department instructed the State Attorney to instruct counsel. Counsel was appointed on 5 July 2022 but the brief was incomplete and a complete set of papers was provided on 7 July 2022 and a consultation arranged for 12 July 2022.

[18] The Notice of Motion in the rescission application is dated 28 July 2022 and it was served on that date.

[19] By then, the judgment had already been sent to the Constitutional Court for confirmation. In a Directive dated 26 October 2022 the Constitutional Court directed that it required written submissions in regards to two points, being:

"(a) Whether it is competent for the High Court to rescind its order of constitutional invalidity, where such an order has no force or effect in terms of section 172(2)(a) of the Constitution.

(b) Whether it is in the interests of justice to grant the stay application where the respondents can raise, in answering affidavits in the confirmation proceedings in this Court, the points they would have raised in the High Court."

[20] Those submissions were filed, and on 20 December 2022 the Constitutional Court informed the parties that the High Court may proceed with the rescission application.

THE GROUNDS

[21] As stated, the application is premised on three grounds, the first of which is that the judgment was erroneously sought and erroneously granted⁹.

[22] It goes without saying, that respondents were not in court on the date the application was argued and they argue that it was thus granted in their absence.

[23] But the argument is that the judgment/order should never have been granted. This is because s 2 of the State Liability Act 20 of 1957 provides

“(2) The plaintiff or applicant, as the case may be, or his or her legal representative must—

(a) after any court process instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that process on the head of the department concerned at the head office of the department; and

(b) within five days after the service of the process contemplated in paragraph (a), serve a copy of that process on the office of the State Attorney operating within the area of jurisdiction of the court from which the process was issued.”

[24] The argument is thus that the procedure is that the application must first be served on the actual respondents before it can be served on the State Attorney - this is so that the Department can formalise an instruction to its attorneys and provide a reference number. As no proper service in terms of Rule 4 took place, a court cannot simply assume that the Minister or the DG (as Head of Department and Accounting

⁹ Rule 42(1)(a)

Officer in terms of the Public Finance Management Act 1 of 1999) had knowledge of the proceedings. In any event, the service contended for by applicants creates an irresolvable dispute of fact on these papers and then in the exercise of its discretion, a court should favour the version of the respondents.

[25] Importantly, and whatever a court may ultimately decide regarding the applicability of s 2 of the State Liability Act, service by email is not proper service when proceedings are initiated.

[26] The applicants argue that the respondents knew of the impending proceedings as far back as August 2021 when the letter of demand was sent to them. The application itself was emailed to all the relevant role players, including the respondents and the read receipts clearly show that they opened those emails. Follow-up letters were sent by applicants but, once again, were met with no response. What this demonstrates is that the respondents clearly knew of the matter, knew when it was to be heard and yet elected not to appear or file papers. The argument is that they thus acquiesced.

[27] Even when the Notice to Oppose was received and the respondents informed that judgment had been reserved, they still did nothing. It was only on 23 June 2022 and after judgment was delivered that they were prompted into action.

[28] In **Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd t/a Altech Card Solutions and Others**¹⁰ Lamont J stated:

“[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

¹⁰ 2012 (5) SA 267 (GSJ)

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. In so far 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.”

[29] Furthermore, in **Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture**¹¹ the Constitutional Court stated:

“[56] Mr Zuma alleges that this Court granted the order in his absence as he did not participate in the contempt proceedings. This cannot be disputed: Mr Zuma did not participate in the proceedings and was physically absent both when the matter was heard and when judgment was handed down. However, the words “granted in the absence of any party affected thereby”, as they exist in rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent.”

[30] Courts have held that if a judgment or order was erroneously granted in the absence of a party affected thereby it should, without further enquiry, rescind or vary the order¹² and there is thus no requirement that the respondents must show a reasonable prospect of success.

[31] In **Lodhi 2 Properties Investments CC and Another v Bonder**

¹¹ 2021 (11) BCLR 1263 (CC)

¹² Tshabalala and Another v Peer 1979 (4) SA 27 (T) at 30C-E; Fraind v Nothmann 1991 (3) SA 837 (W)

Developments (Pty) Ltd¹³ it was stated:

“[24] I agree that Erasmus J in Bakoven adopted too narrow an interpretation of the words "erroneously granted". Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the Sheriff's return of service wrongly indicates that the relevant document has been served as required by the rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously. See in this regard Fraind v Nothmann 1991 (3) SA 837 (W) where judgment by default was granted on the strength of a return of service which indicated that the summons had been served at the defendant's residential address. In an application for rescission the defendant alleged that the summons had not been served on him as the address at which service had been effected had no longer been his residential address at the relevant time. The default judgment was rescinded on the basis that it had been granted erroneously.”

[32] The applicants' argument is based specifically on the **Prism Payment Technologies** and **Zuma** judgments *supra*. They argue that the respondents were given ample notice of the proceedings set down for 11 March 2022 and yet elected to remain supine until 16 March 2022. Even after this they failed to approach Bokako AJ to make submissions or file representations to be heard. This, they argue, constitutes an effective acquiescence in the judgment/order, means that it was not granted “in the absence of” and falls foul of the requirements of being erroneously sought or erroneously granted in terms of Rule 42(1)(a).

¹³ 2007 (6) SA 87 (SCA). Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 6 SA 1 (SCA)

[33] But where the argument fails is on the facts: in both the **Prism Technologies** and **Zuma** matters those applicants had been properly served - *in casu* it is without question that the Minister of Health had not. Whilst the Sheriff certainly made an attempt at service on 12 January 2022, it is clear from his return that none of the requirements of Rule 4 were met, with and therefore he effectively rendered a return of non-service.

[34] The service by hand by the applicant's attorney on the State Attorney must fall to a similar fate and, as an added issue, Rule 4(1)(a) provides:

“4 (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—

(i) by delivering a copy thereof to the said person personally: Provided that where such person is a minor or a person under legal disability, service shall be effected upon the guardian, tutor, curator or the like of such minor or person under disability;

(ii) by leaving a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than 16 years of age. For the purposes of this paragraph when a building, other than an hotel, boarding-house, hostel or similar residential building, is occupied by more than one person or family, “residence” or “place of business” means that portion of the building occupied by the person upon whom service is to be effected;

(iii) by delivering a copy thereof at the place of employment of the said person, guardian, tutor, curator or the like to some person apparently not less than 16 years of age and apparently in authority over such person;

(iv) if the person so to be served has chosen a domicilium citandi, by

delivering or leaving a copy thereof at the domicile so chosen;

(v) 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;

(vi) by delivering a copy thereof to any agent who is duly authorised in writing to accept service on behalf of the person upon whom service is to be effected;

(vii) where any partnership, firm or voluntary association is to be served, service shall be effected in the manner referred to in paragraph (ii) at the place of business of such partnership, firm or voluntary association and if such partnership, firm or voluntary association has no place of business, service shall be effected on a partner, the proprietor or the chairperson or secretary of the committee or other managing body of such association, as the case may be, in one of the manners set forth in this rule;

(viii) where a local authority or statutory body is to be served, service shall be effected by delivering a copy to the municipal manager or a person in attendance at the municipal manager's office of such local authority or to the secretary or similar officer or member of the board or committee of such body, or in any manner provided by law; or

(ix) if two or more persons are sued in their joint capacity as trustees, liquidators, executors, administrators, curators or guardians, or in any other joint representative capacity, service shall be effected upon each of them in any manner set forth in this rule: Provided that where service has been effected in accordance with subparagraphs (ii); (iii); (iv); (v) and (vii) of subparagraph (a), the sheriff shall in the return of service set out the details of the manner and circumstances under which such service was effected."

And Rule 4(aA) provides:

“Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings.”

[35] The point is that as at 12 January 2022, the respondents had not yet instructed the State Attorney and therefore the State Attorney was not yet on record therefore Rule 4(aA) cannot and does not find application here.

[36] Similarly the emails sent to respondents do not constitute proper notice in terms of the Rules, which is why Rule 4A(1) provides:

“4A(1) Service of all subsequent documents and notices, not falling under rule 4(1)(a), in any proceedings on any other party to the litigation may be effected by one or more of the following manners to the address or addresses provided by that party under rules 6(5)(b), 6(5)(d)(i), 17(3), 19(3) or 34(8), by—

(a) hand at the physical address for service provided, or

(b) registered post to the postal address provided, or

(c) facsimile or electronic mail to the respective addresses provided.”

[37] In my view, and given that Rule 4A(1) specifically excludes service by email of process initiating proceedings, the service by email of the application is not proper service, and while the judgment of Lamont J in the **Prism Technologies** matter may provide a ground on which service under Rule 4 may be excused, in my view, there is no evidence that the application came to the notice of the DG of Health other than via an email directed to that office by the Office of the Presidency on 24 February 2022¹⁴ – that does not in my view constitute proper service.

[38] The fact that the Presidency received timeous notice does not cure the defect

¹⁴ This also being the respondents' version

- an interested party, who is directly affected by the outcome of the order sought, was not given proper notice and was therefore not in a position to oppose the relief sought timeously or at all.

[39] I am therefore of the view that the judgment and order was erroneously sought and/or erroneously granted. Given this, it is unnecessary to discuss the provisions s 2 of the State Liability Act.

[40] A further fact is that it is clear that the respondents had intended to oppose the main application - this is demonstrated by the filing of the Notice to Oppose (albeit late) and this rescission application. The fact that, as the applicants contend, the order of 15 June 2022 is not final until confirmed by the Constitutional Court and that the respondents will have ample opportunity to file papers and make their arguments there, is not a reason to overlook the procedural irregularity that has occurred thus far.

COSTS

[41] The respondents have argued that if successful, costs of this application should be costs in the cause of the main application. The applicants argue that, if unsuccessful, they should be awarded the wasted costs of the main application.

[42] I disagree with both parties: the original judgment/order being erroneously sought and granted as the applicants failed to serve on a crucial party who has a direct and substantial interest in the proceedings certainly attracts some culpability in the present application. The respondents however are also not without blame - the President was properly and timeously served with the application and yet remained supine until 24 February 2022 when an email was sent to Mr Mphaphuli.¹⁵ The President only instructed the State Attorney on 16 March 2022. In my view, these facts being so, there should be no order as to costs.

ORDER

[43] The order I therefore make is:

¹⁵ Par 3 supra

1. The judgment and order of Bokako AJ dated 15 June 2022 is hereby rescinded and set aside.
2. The respondents in the main application are ordered to file their answering affidavit within 30 days of date hereof.

B NEUKIRCHER
JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 June 2023

Appearances:

Applicants:	Advocate ZZ Matebese SC with Advocate NS Mteto Instructed by the State Attorney
Respondent:	Advocate MJ Engelbrecht SC with Advocate M Dafel Instructed by Serfontein Viljoen & Swart
Date of hearing:	10 May 2023