REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

11 December 2023 [redacted]
DATE SIGNATURE

CASE NO: 70992/2018

In the matter between:

ALETTA JOHANNA BARNARD **Plaintiff/Applicant**

and

ESTELLE GOUWS **Defendant**

JUDGMENT

(The matter was heard in open court but judgment was handed down electronically by uploading onto CaseLines to the electronic files of the matter and to the representatives of the parties by uploading onto CaseLines. The date of judgment is deemed the date of uploading thereof onto Casellnes)

Before: **HOLLAND-MUTER J**

[1] The plaintiff issued summons against the defendant for the alleged negligent performance of acupuncture procedures on the plaintiff on or about 23 September 2015 and/or 30 September 2015.

[2] The matter was heard on 16 and 17 August 2023 and postponed for finalization on 13 and 14 September 2023.

[3] The defendant raised prescription by way of a special plea and the court was requested only to determine the issue of prescription. Evidence was finalized on 14 September 2023 and the parties agreed that written heads of arguments would be filed on behalf of the plaintiff by 14 October 2023 and on behalf of the defendant by 28 October 2023.

[4] The applicant, before filing heads of arguments, filed an application in terms of Rule 27 (3) of the Uniform Rules for condonation of service of the plaintiff's summons as set out in the Return of Service dated 28 September 2018. This application was filed on 10 October 2023, shortly before the defendant's written heads of arguments were due. No heads of arguments was filed by the plaintiff on 14 October 2023 in view of the Rule 27(3) application, the plaintiff requesting court to decide on the filed application, anticipating a Rule 30 application on behalf of the defendant. Such notice followed.

[5] The parties thereafter exchanged various E-mail letters between, the defendant objecting to and raising its concern about the conduct of the plaintiff to contact the office of the presiding judge without obtaining the prior consent of the defendants' attorneys. I requested my registrar to inform the

parties that the court will deal with all the issues after all heads of arguments were filed.

[6] I deemed it appropriate that all answering and replying affidavits with regard to the Rule 27(3) and Rule 30 applications and heads be filed before 29 October 2023.

[7] Having received the requested heads of arguments, the court viewed it unnecessary for hear further oral arguments and proceeded with the further adjudication of the matter on paper.

[8] The defendant called five witnesses and the plaintiff only one witness. The defence witnesses were *Annelize Hefer* (erstwhile attorney of the defendant); *Francois Kotze* (present chair of the Ireland Hill Security complex where the alleged service of process was performed by the deputy sheriff Rhinus Koen); *Phillip Hertzog* (husband of the defendant); *Dr Estelle Gouws* (the defendant) and *Dawie Beyers* (present attorney of the defendant). The defendant called Mr *Rhinus Koen* (the deputy sheriff who served the summons). Mr Eia (counsel for the plaintiff) did during cross-examination of Kotze indicated that a Mr Badenhorst (attorney in the office of the plaintiff's attorneys) will be called to testify on the photos he took at the security complex to explain how he gained entrance to the complex, but declined to call Badenhorst later. Both parties used the photos during the trial.

[9] The court will concentrate on the evidence relevant to the issue of service of the summons on 28 September 2018 and of the other witnesses where relevant to the issue of service. The extended evidence about personal and E-mail engagement between the parties and later the attorney of the plaintiff and the defendant prior to legal engagement has little if any impact on the special plea.

[10] **Hefer's** evidence sheds no light on the actual service of the summons. She testified about what transpired prior the service and has no bearing on the outcome of the special plea. I deem if not necessary to make any finding on her version in this regard.

[11] **Kotze** explained how the intercom system at the complex operates when a visitor wants to gain access into the complex. He knows that the defendant and her husband resided at unit 28 in Ireland Hill since 2017. The resident(s) in each unit receives a remote control to access or leave the complex by merely pressing the buttons on the remote. This will electronically be stored on the complex's record system as prove of entering or leaving the complex by the residents. He explained the record keeping from a printout produced by the complex's computerised records.

[12] Kotze explained the process to be followed by a visitor from outside requesting to enter the complex to visit a resident or enter for other reasons. There is a keypad at the main entrance of the complex and the visitor presses the resident's unit number on the keypad. Above the digital keypad is a screen where two options will appear after the unit's number is entered.

[13] The residents chose their preferred options to appear on the digital board at the main gate and the defendant and her husband chose the first three letters of the first names with their respective cell phone numbers as the two options. The first option is ***"PHI"*** and the second option is ***"IST".*** The first option will display the cell phone number of Mr Hertzog and the second option that of the defendant, the *PHI* for Phillip and the *IST* for Estelle. Should the visitor elect to phone any of the displayed numbers, the call will go to the cell phone of either the husband (option 1) or of the defendant (option 2). The system only allows three digits on display. The system stores the numbers of all made or received and the information can be requested on a printout.

[14] Kotze testified that there was no record on the system that the defendant and/or her husband were phoned on that particular day or that their unit's number was entered on the keypad. This was confirmed by both during their respective evidence and on the presented electronic printouts of the system. The plaintiff could not deny this. The significance hereof will be clear infra when discussing the version of Koen.

[15] Kotze also confirmed that there was no call towards unit 6, the unit of the caretaker Tannie Rika, on that day. The caretaker's information appears at the main gate. Visitors who could not contact the particular resident would normally contact the caretaker for assistance, but there was no record that anyone contacted the caretaker that day. Kotze testified that there was no resident in the complex with the surname of Phiri at that stage and that the defendant and her husband were the residents in unit 28 since 2017.

[16] **Hertzog** testified that the defendant was abroad to Malaysia during end September 2018 and returned home on 8 October 2018. Hertzog returned home at about 15h45 on that Friday afternoon of 28 September 2018 to go on a hunting trip in North West. He received no phone call(s) that afternoon from anyone requesting access to the complex on that afternoon. When arriving at their unit, he did not found any document or legal papers of kind purporting to be a summons. He denied that any documents were annexed to the outside of the main door of their unit or the side entry gate of the unit.

[17] He returned from the hunting trip on Tuesday 2 October 2018. On route home when he regained cell phone signal, he retrieved various messages from his wife abroad inquiring about any documents served at their unit on 28 September 2018. He told her that there was no documents left at their unit but on return will search and inform her should he find any documents. He testified that after arriving home he searched their court yard and vicinity but did not find any summons there.

[18] He confirmed Kotze's evidence how the system operated and the absence of any recorded notification on the printout forms for 28 September 2018. No calls were made to their numbers or unit that afternoon. The balance of his evidence has no direct bearing on the dispute regarding service and it is not necessary to summarise it further.

[19] The defendant (**Dr Estelle Gouws**) testified and confirmed her absence from South Africa on 28 September 2018 on visit to Malaysia. She confirmed her phone calls to her husband during her visit abroad and her request to him to search for any possible summons served at their unit.

[20] She explained her involvement with medical treatment of the plaintiff during 2015 and that she received several telephone calls from attorney Johan Roux on behalf of the plaintiff earlier. She also testified that she exchanged several letters/Emails with Roux before Hefer became her attorney, but denies receiving any summons at all until her present attorney, Mr Beyers contacted the plaintiff's attorneys during April 2019, requesting a copy of the summons. This was the first time she saw the summons.

[21] The balance of her evidence does not relate to the special plea and is not summarized further.

[22] Mr Dawid Beyers, the present attorney of the defendant testified to confirm her version that he became her attorney after September 2018 and that he later received a copy of the summons from the plaintiff's attorneys. His evidence does not take the issue of service further.

[23] **Rhinus Gerhardus Koen** ("Koen") was the only witness called on behalf of the plaintiff. Koen has been a sheriff since 2014 but testified that it was his first time testifying in a court case. He grew up in a sheriff's environment because

his grand farther was a sheriff for 40 years in Johannesburg. He started training as a sheriff in 2012 in the offices of his father, his father the sheriff for Orlando West for 25 years. He was trained in the duties of a sheriff, in particular the service of process, ranging on average 25 to 30 documents served daily. He is no novice in the work of a sheriff.

[24] He was a sheriff in the office of the Sheriff of Centurion West during September 2018. He is at present the sheriff for Boksburg in Gauteng.

[25] He stated that he has encountered various kinds of people as sheriff, some violent and aggressive awhile some would be evasive. He has been assaulted on several occasions preforming sheriff work. He has experience serving process at security complexes and that the complex where the defendant was well known to him. He knows the caretaker by name. He described a method to enter a complex by so-called *"tailgating"* when residents refuse entry to a complex. This was to wait for a resident to enter of leave the complex and that he would side pass such resident while the gates were open to enter. He testified that he did in the past phone the caretaker for access when a resident was evasive/absent.

[26] Koen described how service normally takes place when the resident was absent and could not be contacted. He would knock on the gate/door and if nobody appears, he affixes the document by placing it between the framework of a gate or roll it and attach it to the door. He will only enter a premises when no dogs are present.

[27] Koen testified that he would make notes on the job card from the office what transpired when serving process and when returning to office give the job card to the administrative personnel who then complete the return of service from the information on the job card. The office worked on a template to complete the returns of service and other documents and that the office

uses certain codes according the notes made on the job card. He will normally retrieve the completed return the following day at office to sign it.

[28] His recollection of the Centurion office was that admin used three different templates but he could not explain the codes or the templates. The Sheriff chooses the templates and he as a deputy has no say in the templates. A deputy signs almost 80 returns a day at Centurion office.

[29] Koen testified that on the 28th of September 2018 he had instruction to serve the summons on that particular day. When arriving at the complex, he drove up to the pillar where the key pad board was. He was in his 4x4 vehicle (Ford Ranger Bakkie) and though the open window looked down on the keypad. He gained access to the complex but when asked to explain how he gained access, he could not remember how. He is known to what is called *"tail gating"* but could not remember whether he tailgated that day to gain access. He however remembers that he did not call the caretaker.

[30] He was vague of what happened at unit 28 whether he affixed the summons to the outer gate or the main entrance to the unit. He stated that he had no recollection how he served the summons on that day and the job card would indicate what he noted. Unfortunately the job card was not retrieved from the Centurion office to give any indication what happened.

[31] Koen remembers that when he found nobody at the unit he called the attorney for directions who then instructed him to serve by affixing the summons to the main entrance of the unit. He cannot recall whether service was by affixing to the gate of the main door or at the main gate of the complex. He could not explain why affixing did not take place on the garage door of the unit.

[32] Mr Lamey, counsel for the defendant, questioned Koen on the face value of the return of service and other aspects regarding service if the summons. This resulted in further questionable aspects of the process followed in office and the value to be attached to the return of service.

[33] The following issues became apparent during cross-examination of Koen. The return of service (CaseLines 005-12) revealed the following problems when tested to the evidence by Koen;

33.1 The outdated heading on the return of service refers to the Supreme Court Act, 59 of 1959. A clear misnomer because that act was repealed in 2013;

33.2 The summons was affixed to the principal door but Koen has no recollection of where he served the summons, on the principle door or the outer gate of the unit or the main entrance of the complex, but on the return of service reference is made to the main entrance of the complex. If it was at the main gate to the complex, was it necessary to enter complex?

33.3 The return of service indicates that Koen conducted a diligent search and enquiry to the presence of the defendant. Koen's evidence was silent on this aspect; he remained in his vehicle at the main entrance with a skewed vision to the control panel as he looked down towards the control panel through the window of his bakkie. He does not mention what diligent search was conducted by him to corroborate the entry on the return of service;

33.4 The return of service states that at the main entrance of the complex, the intercom says *"Mr Phiri on intercom could not confirm if the defendant still resides at the unit"*. Koen has no recollection of a Mr Phiri in his evidence;

33.5 If Phiri informed Koen as stated on the return, Koen could not explain why he did not enquire form the caretaker (known to him) about the presence of the defendant and whether she is still resident in unit 28.

33.6 The return of service indicates that service took place in terms of Rule 4(1)(a)(v) of the Uniform Rules. Rule 4(1)(a)(v) applies to service on a corporation or company. The defendant is a private person and service could not be affected in terms of this sub-rule.

[34] The return of service is in the ordinary sense accepted as *prima facie* evidence of what has been done by the sheriff/deputy sheriff, but when sufficient evidence contrary is produced, the presumption of *prima facie evidence* may be rebutted. There was no waiver by the defendant with regard to proper service. See **Deputy Sheriff for Witwatersrand District v Harry Goldberg & Associates of Goldberg Bros & Gerson 1905 TS 680 at 684; Herbstein &Van Winsen Civil Procedure of the Suprior Court of South Africa 4th ed 303.** Rule 4(6) provides that service of process will be regarded as evidence of its contents. It is therefore *prima facie proof* but can be rebutted by sufficient evidence to the contrary.

[35] The return of service clearly contradicts the evidence by Koen. It is of concern that if this is the normal way of service by Koen and /or the Office of the sheriff for Centurion West, serious doubt exists as to the reliance on return of service originating there.

[36] The Rule 27(3) application for condonation with regard to the acceptance of the return of service is in my view problematic. Rule 4 (6) provides for the contents of a return of service to be *prima facie evidence* but that the *prima facie* value of the return of service can be rebutted with the satisfactory evidence. See **Herbstein & Van Winsen supra and Deputy Sheriff for Witwatersrand District supra.**

[37] Service of process on a private person is regulated by Rule 4(1)(a) or (b). Rule 4(1)(a)(ii) requires that service be affected by leaving a copy of process with someone identified over the age of sixteen years. Service at a chosen *domicilium citandi* takes place by affixing to the principle gate or door in terms of Rule 4(a)(1)(iv). Rule 4(1)(b) does not provide for the affixing of process where nobody is found after a diligent search. In such instance directions should be obtained from court as to the way of service. See **Herbstein & Van Winsen supra 286 and Erasmus, Superior Court Practice Vol 2 D1-24.**

[38] The plaintiff requests for condonation in the application filed on 10 October 2023 from the court that the service by affixing to the door of the defendant's residence be sufficient and effective as would be required by Rule 4(a)(ii). It is clear that the service does not comply with the Rule.

[39] Rule 27 provides for the court to condone the non-compliance of the rules with reference to abridgment of time periods prescribed in the Rules. The court may, on good cause shown, condone any non-compliance with the rules, but there must be a valid and justifiable reason for the non-compliance. See **Herbstein & Van Winsen supra 549.** Condonation is an indulgence which may be refused in cases of flagrant breaches of the rules. **Tshivhase Royal Council & Another v Tshivhase & Another; 1992 (4) SA 852 (A) at 859E –F.** Condonation may be refused where it would defeat the purpose or object of the rule of which the applicant is in breach. See **Small Business Development** Corporation Ltd v Kubheka 1990 (2) **SA 851 (A) at 854 B-855 B.**

[40] The court will also be reluctant to grant any condonation where such condonation is seriously prejudicial towards the other party. The defendant opposed the application and simultaneously filed a Rule 30 application. The granting of condonation under these circumstances would seriously prejudice the defendant. The Rule in my view does not assist a party to do damage control of the evidence produced by a witness. I deemed it prudent to

adjudicate both on paper without any further affidavits. The defendant moved for a punitive cost *de boniis propriis* order against the plaintiff's counsel.

[41] It is clear from the evidence by the defendant that there was ongoing correspondence between attorney Roux on behalf of the plaintiff and herself during March and April 2018, Roux informed the defendant that the plaintiff will be proceeding to issue summons against her, and Roux requested Hefer to confirm the defendant's address. Hefer's response to Roux on 9 April 2018 was that summons should be served on her office. Roux however issued summons in the Kimberly High Court. It is unclear what happened to this matter.

[42] The matter did not proceed in Kimberly and during September 2018 summons was issued in the Pretoria High Court. The plaintiff probably then realised that prescription could become an issue and that caused the urgent service of the summons on 28 September 2018.

[43] The question is whether the court should condone the non-compliance of Rule 4(1)(a)(ii) under the circumstances. It is clear that the return of service does not comply with the rules for reasons set out above. The evidence of Koen was poor and evasive. He did not impress at all. He could not recall critical issues such as where the summons was affixed, did he and it, how did he gain entrance to the complex, where did he obtain the name of a Mr Phiri and why he did not conduct a diligent search to the whereabouts of the defendant from the caretaker known to him. The evidence on behalf of the defendant was clear and to the point and no serious criticism can be levelled against the evidence. Taken into account the above, it is clear that the relief sought in terms of Rule 27(3) is not competent and there is no good cause to come to the aid of the plaintiff.

[44] Roux cannot "instruct' the sheriff to serve summons outside the ambit of the Rules. Rule 4(1)(a)(ii) does not permit affixing as a mode of service. The

plaintiff and/or her attorney are to blame for the effluxion of time causing the late attempt to serve.

[45] The failure to produce the job card is further insult to injury to the plaintiff. There is no reason why the job card was not retrieved and discovered and used during the trial. The apparent contradictions between the alleged notes made on the job card and the return of service are further indicative of the confusion and below quality service rendered by the sheriff. The inadequate templates used resulting in the mistakes on the return of service is neither bona fide nor an oversight. It is negligent and not what is required from the office of a sheriff. In my view Rule 27 (3) cannot aid any party to do damage control to the evidence by Koen.

[46] The application for condonation is refused. The question of costs is within the discretion of the court. The court will consider various factors before ordering costs. The normal is that costs follow success. See **Herbstein & Van Winsen supra chapter 29 p 701.**

[47] I am of the view that the ordinary rule should be followed with regard to success. It is a question of on what scale the costs is awarded after considering all the applicable factors. I considered the conduct of the plaintiff's counsel and the way the application for condonation was brought. I do express my dismay with the conduct of counsel for the plaintiff in par [48] below. I am of the view that the appropriate scale of costs ought to be on an attorney-and-client-scale and that the Rule 30 application to be dealt together with the Rule 27 (3) application. The two applications are intertwined and therefore one cost order will suffice.

[48] There was a previous Rule 30 application during 2021 but the parties resolved to settle the matter and to separate the special plea from the rest of the trial to be adjudicated first.

[49] I am obliged to remark on the conduct on behalf of the plaintiff who, without prior notice to the opposition, contacted the office of the presiding Judge via the registrar of the judge. It is not in the spirit of collegial conduct and should be discouraged. This also resulted in the matter to be finalised some time after evidence was presented. The application resulted in a postponement of the agreed dates for filing of heads of arguments and delayed the judgment.

ORDER:

1. The Rule 27(3) application is dismissed while the Rule 30 application is upheld.

2. The special plea is upheld with costs.

3. The plaintiff is to pay the defendant's costs on an attorney-and-client-scale.

[redacted]

HOLLAND-MUTER J

Judge of the Pretoria High Court

Matter was heard on: 16 & 17 August 2023; 13 & 14 September 2023.

Application for Condonation uploaded onto CaseLines on 10 October 2023.

Rule 27(3) application filed on 19 October 2023.

Rule 30 application filed on 10 October 2023.

Written heads filed subsequently thereafter.

Judgment handed down on 11 December 2023

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