

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

CASE NO. 2674/21

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 10 JANUARY 2022

SIGNATURE

In the matter between:

PHATHUTSHEDZO TSHAVHUNGWE

Applicant

And

FAST ISSUER SPY (RF) LTD

Respondent

IN RE:

FAST ISSUER SPY (RF) LTD

Plaintiff

And

PHATHUTSHEDZO TSHAVHUNGWE

Defendant

JUDGMENT

Delivered: This judgement was prepared and authored by the Judge whose name is 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 10 January 2022.

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MOTHA AJ

INTRODUCTION

1. This is an interlocutory application in terms of Rule 30(1) of the Uniform Rules of this Court. The Applicant seeks in his notice of motion to have the service of the summons declared an irregular step, incorrectly served and null and void.
2. The second application is for *de bonis propriis* costs against the Respondent's Attorney, Mr. Roland Fabricius. At the outset of the proceedings the Applicant abandoned its action against Mr. Roland Fabricius. Now the shoe is on the other foot, Mr. Fabricius seeks punitive costs order for having been dragged to Court.

THE FACTS

3. Following a motor vehicle instalment sale agreement entered on/or about 7 September 2016, the Respondent issued summons against the Applicant on 22 January 2021 for his failure to make payment of the monthly instalments.
4. On 26 January 2021, in terms of Rule 4 (1) (a) (iv), summons was served at an incorrect *Domicilium citandi et executandi*, namely: 1[...] K[...], O[...] Avenue, Val de Grace.
5. With the *dies* to enter appearance to defend having expired, on 13 March 2021 the Respondent applied for Default Judgment. The Applicant learnt of the Application on 14 April 2021 when the Respondent invited him on Caselines. He immediately called the Respondent's Attorneys and alerted them that the summons had been served at an incorrect *domicilium*.
6. On 21 April 2021 the Applicant wrote an email to the Respondent's Attorneys informing them that the *domicilium* had been changed way back on 17 July 2019.

Seeing that there was no response forthcoming, on 5 May 2021 the Applicant appointed Attorneys; who immediately served the Respondent with the notice in terms of Rule 30(2)(b).

7. The core of the cause of complaint was the irregular step of serving the summons at an incorrect *domicilium*. This will become decisive later in this judgment.

8. Rule 30 of the Uniform Rules of Court deals with irregular proceedings. In short it reads as follows:

“(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if –

(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;

(b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;

(c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).”¹

9. On 18 May 2021 the Respondent’s Attorneys of record informed the Applicant that the summons would be re-served at the new *domicilium* and that the

¹ Erasmus Superior Court Practice D1-351

application for the default judgment would be removed from the roll. On 19 May 2021 the Applicant demanded that the Respondent should withdraw the action because the re-service of the summons would amount to a further irregular step.

10. On 19 May 2021 the Respondent attended to the removal of the cause of the complaint by inserting on the summons the Applicant's correct *domicilium*, namely:1[...] S[...] Avenue, Die Wilgers, 0157, the Registrar's signature and stamp.
11. On 24 May 2021 summons was duly served on the Applicant's new *domicilium*. I am in agreement with Counsel for the Respondent that this should have been the end of the Rule 30 notice.
12. The Respondent had, therefore, removed the cause of complaint by approaching the Registrar on 19 May 2021 and altered the *domicilium* address. To the extent that this approach is questioned, it is apt to refer to *Harris v De Meillon* where the Court held the following:

"It is abundantly clear that the additions to the summons were never authorised by the signature of the Registrar; and it may be assumed that the Registrar if approached would not have sanctioned the additional claims in the absence of authority for the prosecution of these claims in the power of attorney to sue. Rule 15(1) requires the signature of the Registrar on all civil process. It is obvious that any amendment or addition to a summons after issue and before service must be signed by the Registrar and the plaintiff or his attorney. The addition of matter to duly issued process of the Court, without the authority of the Registrar, constitutes a grave irregularity; and process so altered must be regarded as not having been issued at all".²

13. The Respondent's Counsel submitted that the cause of the complaint was never the default judgment application. As mentioned in paragraph 7 *supra*, the cause

² *Harris v De Meillon* 1959 (4) SA 272 (E) at 273

of complaint in terms of the peremptory Rule 30(2)(b) was the service at an incorrect *domicilium*. Therefore, it is self-serving to argue during the Rule 30(1) application that the cause of complaint had not been removed if the default judgment had not been dealt with. It is not open to a party to file Rule 30(2)(b) alleging one cause of complaint and yet in the Application rely on a different one.³

14. Furthermore, in this Application the Applicant, argued the Respondent's Counsel, had not alleged nor proven any prejudice. The proof of prejudice is a prerequisite to succeed in an application in terms of Rule 30(1)⁴. I cannot find any prejudice suffered by the Applicant as a result of the re-service of the summons. In *Brenners Service Station and Garage (Pty) Ltd v Mine and Another* the Court stated the following:

*"I think it emerges from the passage quoted that in appropriate cases, the court is entitled to refuse to take heed of technical irregularity in a procedure which does not cause prejudice to the other party."*⁵

15. However, the Applicant's Counsel submitted that a notice of withdrawal of the Application for default judgment was supposed to be served before the summons was amended and re-served. An answer was not forthcoming from the Applicant's Counsel as to what difference it would have made if the entire action was withdrawn and started afresh and the manner in which the Respondent handled the matter.

16. The Court in *Trans-African Insurance Co Ltd v Maluleka* held the following:

"Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice to interfere with the expeditious and if

³ TJ v TA (Unreported, GJ case no 2019/22224 dated 31 March 2021) at paragraph [12]

⁴ *SA METROPOLITAN LEWENSVERSEKERINGSMAATSKAPPY Bpk v Louw* NO 1981 (4) SA 329(O) at 333G-334G

⁵ *Brenners Service Station and Garage (Pty) Ltd v Mine and Another* 1983 (4) SA 233(W) at 238 G -H

*possible in expensive decision of cases on their real merits.*⁶

17. At this stage it is important to distinguish between a matter that is properly issued and served and this matter which was properly issued but improperly served . A properly issued and served matter can only be amended in terms of Rule 28. Since this matter was not properly served Rule 28 does not apply. In this regard both parties were in agreement.
18. Accordingly, there was never a properly served case before court. Hence, it was open to the Respondent to approach the Registrar for his signature and insert the correct *domicilium*. The default judgment application was not proceeded with.
19. When asked why the Applicant did not file the notice of intention to defend following the proper service, it is telling that the Applicant's Counsel retorted that the Respondent threatened to bring a summary judgment Application. The Applicant should have filed his notice of intention to defend and not fear any further steps taken by the Respondent.
20. The Applicant's submission that the Respondent went about the incorrect way in rectifying the irregular step raised in its Rule 30(2)(b) is not sustainable. Accordingly, this Application is without merit and falls to be dismissed. The cause of complaint was attended to and removed.
21. The Applicant in its replying affidavit indicated that he would seek *de bonis propriis* costs order against Mr. Fabricius. This was completely unnecessary. Hence, at the beginning of the proceedings this cause of action was quickly abandoned. However, this was tantamount to shutting the stable door after the horse has bolted.
22. On 26 October 2021 Mr. Fabricius filed his Notice of Intention to Oppose the Application for costs *de bonis propriis* and dispatched an email advising the

⁶ *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273(A) at 278F-G

Applicant that Advocate Dale Hinrichsen had been briefed. The Applicant did not reply to this email and only beat a hasty retreat in Court.

23. Accordingly, the Applicant has made his bed and must lie in it.

COSTS

24. The well-established principle on costs was reiterated in the case of *Intercontinental Exports (Pty) Ltd v Fowles* when the Court held the following:

*“The basic rule is that, statutory limitations apart, all costs awards are in the discretion of the court (Kruger Bros & Wasserman v Ruskin **1918 AD 63** at 69, a decision which has consistently been followed). The court’s discretion is a wide, unfettered and equitable one. It is a facet of the court’s control over the proceedings before it. It is to be exercised judicially with due regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done, as a mark of its displeasure at such party’s conduct in relation to the litigation.”⁷*

25. It is trite that costs *de bonis propriis* are costs ordered to be paid by a representative out of his or her own pocket as a result of either negligent or improper conduct.⁸ These costs are not indicated in this matter.
26. In my view the costs between the Applicant and the Respondent should be reserved to be determined in the main Application.
27. There was no need to threaten the Respondent’s Attorney with *de bonis propriis* costs order. If the Applicant had responded to the email dated 26 October 2021 there would have been no need for the Respondent’s Attorney to come defend

⁷ *Intercontinental Exports (Pty) Ltd v Fowles* (85/98) [1999] ZASCA 15; [1999] 2 All SA 304 (A) (23 March 1999) para 25

⁸ *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* **[2015] ZACC 10** para 51

himself in Court; especially since the Applicant was not proceeding with the Application.

28. The tardy way the Applicant handled this matter justifies being burdened with costs on a party and party scale from Friday the 5th November 2021 to the 8th of November 2021 including the costs of Counsel.

ORDER

In the result, the following order is made:

1. The Applicant's Application is dismissed.
2. Costs are reserved.
3. Costs on a party and party scale against the Applicant in favour of Mr. Fabricius from 5 November 2021 to 8 November 2021 including costs of Counsel.

MOTHA AJ

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Date of hearing: 08 November 2021

Date of judgment: 10 January 2022

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