(Inlexso Innovative Legal Services) ##

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 2080/2021

DATE: 25 FEBRUARY 2022

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES : YES / NO
(3) REVISED

In the matter between

SNR ELECTRICAL AND MECHANICAL SERVICES

and

V MBIZA AND ANOTHER

J U D G M E N T

BESHE, J:

REGISTRAR: Calling case 2080/2021, SNR Electrical and Mechanical Services versus Mbiza V and Another.

COURT: Thank you. Having heard Mr Skoti for the applicant and Mr Knott for the 1st respondent yesterday and having reserved judgment, I now deliver the judgment having had time to consider their submissions and the documents filed of record.

The applicant approached this court by means of a rei vindicatio application on an urgent basis for the return of his motor vehicle, or its motor vehicle because it's a company. It appears to be common cause that the motor vehicle was returned by the 1st respondent at day or two preceding the hearing of the application. The issue that remains for consideration is that of costs. The reading of the papers seems to suggest that the applicant was justified in bringing the application and that it was justified to do so on an urgent basis.

I am also of the view that, on the papers at least, the applicant did make out a case for the granting of the order that they were seeking in the notice of motion. However, the matter does not seem to be as simple as all that. The crucial question is, in view of the timing of the hearing of the application, whether the applicant is entitled to costs, and if so to what extent.

The matter was set down for hearing on the 15th July 2021 as per the notice of motion. The timeframes suggested in the notice of motion were as follows: The respondents were given until 13th July to signify their opposition and until the 15th July to file their answering affidavit. The applicant was to file their replying affidavit on 20th July 2021. This is despite the fact that the application was to be heard on 15th July according to the same notice of motion. This anomaly was rectified by

directives issued by Lowe J on 12th July 2021 directing that the matter be set down for hearing on 16th July, that the papers be served on the respondents forthwith (and I underline that), the respondents were to file answering papers on 15th July, with the applicant to file its reply by 9 o'clock on 16th July. It transpires that the papers were not served on 1st respondent as per Lowe J's directive. There is a dispute as to when service, if at all, was effected. More about this later.

It is common cause that no opposing papers were filed by any of the respondents. In fact the 1st respondent had indicated that he would not be opposing the application.

On 16th July 2021 Lowe J issued an order in which it was noted (and I underline that once again) that the 1st respondent had by agreement delivered the subject matter of the application being the motor vehicle at 21H16 on 14th July, 2021. Not being amenable to making a costs order, Lowe J issued a *rule nisi* calling upon the 1st respondent to show cause on 3rd August 2021 why he should not be ordered to pay the costs of the application. The applicant was ordered to file an affidavit by the relevant Sheriff regarding service to supplement the founding affidavit on or before 21st July 2021.

In response to the order of 16th July the parties filed affidavits

in relation to costs. The 1st respondent resists the granting of a costs order against him on the basis *inter alia* that he was served with the papers at the stage when he was no longer in possession of the motor vehicle having returned or handed the motor vehicle to the police on 14th July. Preceding that on 12th July he was advised by his attorneys of record that an urgent application had been sent to their email address wherein it was intimated that he would be served with the original papers by the sheriff the following day, being 13th July. On 15th July having arranged to meet with the sheriff, he was served with the papers on 16th July.

To cut a long story short it appears that the 1st respondent was served with the papers on 16th July 2021 although I have not seen a return of service in this regard. He denies that the sheriff attended at his place of residence as the rules prescribe or in any manner prescribed by the rules. It would appear that the aspect of non-service of papers on the respondent was brought to the attention of the applicant or those representing it. This was apparently met by the return of service indicating a refusal to take court documents at 15H30 on 15th July, 2021. It is not clear though who refused to accept court documents. The narrative relating to the service by the sheriff according to the applicant is as follows as would appear from the supplementary affidavit filed on behalf of the

applicant in this regard relating to the issue of costs. That the founding papers were delivered to the sheriff on 14th July. It is contended that the sheriff advised the applicant's attorney that the 1st respondent was evading service by refusing to give the sheriff his whereabouts. An attempt by the sheriff on 15th July at about 3:00 also came to nought where the 1st respondent is said to have refused to take the court documents. No confirmatory affidavit was filed by the sheriff in this regard. This is over and above the fact that the order of the 16th July 2021 directed that the applicant should file an affidavit by the relevant sheriff on or before 21st July.

In an affidavit filed by the applicant's attorney, Mr Ndila, on 18 February 2022 an explanation is proffered as to why such an affidavit was not filed. The explanation being that attempts to get the sheriff to depose to an affidavit in this regard came to nought. What then is the Court to make of the issue of service in the circumstances where the 1st respondent denies that an attempt was made to serve him with the papers and that he denies that he refused to accept same? The dispute falls to be dealt with by applying the *Plascon Evans* rule a well-known dictum which is to the effect that in these circumstances the issue should be decided on respondents' version. In my view this is a genuine, real and *bona fide* dispute of fact. I am inclined to agree with the suggestion that

the refusal by the sheriff to depose to an affidavit regarding service lends credence to the 1st respondent's version.

It is apposite to point out that the applicant did not approach the court for an order as sought in the notice of motion and no order was issued in his favour in this regard. And there could not have been an order granted to him as sought in the notice of motion because the vehicle had already been delivered to it. It would appear the court was approached for the purpose of a costs order and the applicant cannot be faulted for having done so. It was quite entitled to do so. After acknowledging the agreement between the parties, as I have indicated earlier on, regarding the delivery of the motor vehicle, the court issued a *rule nisi*, not an order in terms of what is sought in the notice of motion. It is implicit therefore from Lowe J's order that the court was called upon to consider the issue of costs only. The court therefore issued as I have said a *rule nisi* for the purpose of having the 1st respondent show cause why he should not pay the costs of the application. No judgment or order on the merits was rendered by the court and I am of the view that there could be no question of success in the true sense of the word by the applicant or of applicant being successful.

I have already alluded to the points raised by the

1st respondent as to why he should not be ordered to pay costs, one of them being that he had not been served with the papers initiating the proceedings. In the affidavit deposed to by the 1st respondent in relation to costs, he states that he was only served with the papers on 16th being the date on which the matter was to be heard. From Lowe J's order it appears that the 1st respondent was represented by Miss Maketa on that date and it stands to reason that the issue of service was raised otherwise a *rule nisi* in the terms that I've already mentioned would not have been issued requiring the applicant to file an affidavit by the relevant sheriff in this regard.

As stated above the applicant was justified in launching the proceedings against the 1st respondent but in light of what I have said above, I am satisfied that the 1st respondent has made out a case for the discharging of the *rule nisi* issued by Lowe J by showing on a balance of probabilities that it was not served with the papers initiating the proceedings as provided for in Rule 4 of the Uniform Rules of this Court. Accordingly the *rule nisi* is discharged. In my view the appropriate order to make in the circumstances would, as far as costs are concerned be that each party is to pay their own costs. It is so ordered.

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BESHE, J

JUDGE OF THE HIGH COURT

DATE: 25 FEBRUARY 2022

APPEARANCES

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	Instructed by	:	JZ NDILA ATTORNEYS C/o NOLTE SMIT ATTORNEYS 51A High Street GRAHAMSTOWN Ref: Tyne Tel.: 046 – 622 7209
	For the Respondents	:	Adv: Knott
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	Date Heard	:	24 February 2022
	Date Reserved	:	24 February 2022
	Date Delivered	:	25 February 2022