



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A89/2016

In the matter between:

MEC FOR POLICE, ROADS AND TRANSPORT

Appellant

and

RORY DEAN MURRAY

Respondent

CORAM: RAMPAL, J et DAFFUE, J

HEARD ON: 17 OCTOBER 2016

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 27 OCTOBER 2016

- [1] These proceedings concerned an appeal from the district court. The respondent, as the plaintiff, obtained default judgment against the appellant, as the defendant in the court below. *Brevitas causa* I shall refer to the parties as in the court below. The defendant unsuccessfully applied to have the default judgment rescinded. The defendant was aggrieved by the order given by the district court, hence the appeal. The appeal was not opposed. In fact the plaintiff decided to abide.
- [2] An overview of the undisputed facts appeared to me to be necessary. The plaintiff, a civilian, sued the defendant, the Member of the Executive Council, responsible for the Department of Police Roads and Transport in the Free State Provincial Government. The summons was issued out of the Clocolan District Court on 16 July 2012. In the summons, the defendant's physical address was given as Perm Building, Maitland Street, Bloemfontein. The plaintiff alleged that his motor vehicle was damaged by a pothole on a public road at Clocolan on 24 November 2011. He claimed delictual damages in the amount of R 12 889.56 and ancillary relief.
- [3] On 22 August 2012 the sheriff served the summons on the defendant's specified employee on the 4th floor Perm Building 45 Maitland Street Bloemfontein.
- [4] On 6 September 2012 the defendant notified the plaintiff of his intention to defend. The notice was signed by Mr SS Jonase, Attorney for Defendant, State Attorney c/o Clerk of the Court, Private Bag x5 Clocolan 9735. The notice was faxed and mailed

to the plaintiff's attorneys, Barnard and Venter. On the same day the notice was faxed and mailed to the clerk of the court at the address as previously given.

- [5] On 8 October 2012 the plaintiff called upon the defendant to deliver the required plea. The notice of bar in terms of rule 12(1)(b) Magistrate Court Rules was addressed to State Attorney Bloemfontein 11th Floor, Fedsure House, 49 Maitland Street, Bloemfontein c/o clerk of the Court Private Bag x5 Clocolan 9735. There appeared no specific person's name or date or signature immediately below or next to the defendant's address. The notice was merely endorsed with the official rubber stamp of the Clerk of the Court Clocolan on 9 October 2012.
- [6] The notice of bar elicited no reaction from the defendant. On 22 February 2013 the plaintiff's request for default judgment against the defendant was filed. On 18 June 2013 default judgment was granted against the defendant in favour of the plaintiff. The plaintiff subsequently caused a writ to be issued. The sheriff attached the defendant's property by virtue of such writ.
- [7] The defendant reacted to the attachment. Two applications were filed on behalf of the defendant – one for the stay of the sale in execution and the other for the rescission of default judgment granted on 18 June 2013. The essence of the defendant's explanation was that his attorneys did not receive the plaintiff's notice of bar. On 17 November 2013 the court stayed the sale in execution with the consent of the plaintiff. Although the plaintiff initially made it known that he intended to oppose the defendant's

rescission application, the judgment was eventually rescinded on 4 March 2014 without opposition. On 25 March 2014 the defendant's plea was served and filed.

- [8] The following is a more relevant component of the factual background than the one outlined above. On 22 September 2014 the plaintiff enrolled the matter for hearing on 21 October 2014. Once again the notice of setdown was addressed to the State Attorney Bloemfontein ... c/o Clerk of the Court Clocolan.
- [9] On 21 October 2014 there was no appearance by or on behalf of the defendant. Once again the plaintiff took judgment by default. It was that judgment which was at the heart of the appeal before us.
- [10] The defendant applied to have the judgment granted on 21 October 2014 rescinded. The gist of the defendant's second rescission application was that the notice of setdown never came to his attention or his attorney's. The plaintiff opposed the rescission application one more time. The application was heard on 26 November 2015. The court reserved judgment. The court delivered judgment on 28 January 2015. The defendant's rescission application was dismissed with costs. It was that order which precipitated the present appeal.
- [11] The notice of appeal was filed on 14 March 2016. The defendant relied on 9 grounds of appeal. Among others, the defendant alleged that the court *a quo* erred in finding that the defendant

failed to prove that he was not aware of the notice of setdown – vide 1 notice of appeal dated 2 March 2016.

[12] In our view, the decisive issue in the appeal was whether the defendant was properly notified of the date of hearing, being 21 October 2014. The onus was on the plaintiff to show that the notice of setdown was duly served upon the defendant.

[13] The relevant notice of setdown prepared and signed by the plaintiff's attorneys at Clocolan on 15 September 2014 is reproduced below in order to illustrate its apparent shortcomings.

“

NOTICE OF SET DOWN

KINDLY TAKE NOTICE THAT the above matter is set down for hearing on **21 OCTOBER 2014** or so soon thereafter as the matter may be heard before the above Honourable Court.

DATED at Clocolan this 15 September 2014

PLAINTIFF's Attorneys
 Hardam & Associates Inc.
 4th FLOOR, BUILDING 3, OUTSURANCE
 CAMPUS 1241 EMBANKMENT ROAD
 ZWARTKOP EXT 7 CENTURION 0046
 Tel No.: (012) 336 3170, Fax No.:
 Email:
 Docex 426, PRETORIA
 Service address: BARNARD & VENTER
 1 CHARL CILLIERS STREET CLOCOLAN
 9735
 (Ref: NEW INSTRUCTON

TO: THE CLERK OF THE COURT
CLOCOLAN

AND TO: STATE ATTORNEY
BLOEMFONTEIN
Attorneys for DEFENDANT
11TH FLOOR, FEDSURE
HOUSE
49 CHARLOTTE MAXEKE
STREET
BLOEMFONTEIN
(Ref:
739/201201010/P10M/mem)
c/o CLERK OF THE COURT –
CLOCOLAN”

[14] It is obvious *ex facie* the notice of setdown that no provision whatsoever was made for anyone to receive, to date and to sign the notice of setdown for and on behalf of the defendant. Without such important details relative to acknowledgment of receipt, it cannot be readily ascertained that the plaintiff had duly effected proper service of the notice of setdown upon the defendant. It would appear that the notice of setdown was filed on 22 September 2014, some 29 calendar days before the hearing. However, as to when it was precisely served and at what time it was served appeared nowhere on the notice itself. Similarly it did not appear on the notice itself as to upon whom in the office of the clerk of the court, the purported notice was served.

[15] In the absence of proper service of such notice, there could have been no proper hearing. Before default judgment could be granted the district magistrate had to be satisfied that the defendant had been given proper notice of the date of hearing. All those material shortcomings strongly militated against the

conclusion that the plaintiff had duly given the defendant proper notice of setdown for the hearing of the dispute.

[16] The aforesaid irregularity of form or formal defect strengthened the reasonably innocent explanation that the defendant was unaware that 21 October 2014 had been allocated for the hearing of the matter and so enrolled. That was a material consideration. Obviously the district magistrate did not consider it. In my view the court erred.

[17] There is yet another important aspect relevant to this appeal. It is important to bear in mind that rule 13(3) Magistrate Court Rules delineates that:

- “(3) (a) When a defendant delivers notice of intention to defend –
 - (i) the defendant shall therein give his or her full physical, residential, business address, postal address and where available, facsimile address and electronic mail address;
 - (ii) the defendant shall also indicate and select therein the preferred address for service on the defendant thereof of all documents in such action, and service thereof at the address so given shall be valid and effectual, except where by an order or practice of the court personal service is required; and
 - (iii) if a physical address is given by the defendant in the notice of intention to defend as the preferred address for the purpose of such service, in places where there are three or more attorneys or firms of attorneys practicing

independently of one another, that address shall be situated within 15 kilometres of the courthouse.

- (b) The defendant shall indicate in the notice of intention to defend whether the defendant is prepared to accept service of all subsequent documents and notices in the suit through any manner other than the physical address or postal address and, if so, shall state such preferred manner of service.
- (c) The plaintiff may, at the written request of the defendant, deliver a consent in writing to the exchange or service by both parties of subsequent documents and notices in the suit by way of facsimile or electronic mail.
- (d) If the plaintiff refuses or fails to deliver the consent in writing as provided for in paragraph (c), the court may, on application by defendant, grant such consent, on such terms as to costs and otherwise as may be just and appropriate in the circumstances.”

[18] It was an undisputed fact that there were less than three law-firms of attorneys at Clocolan at all times material to these proceedings. It was also common cause that the defendant was represented by the State Attorneys whose only office or actual physical address in the province was in Bloemfontein, approximately 225km from the courthouse at Clocolan. In the notice of the defendant’s intention to defend, the full physical address, postal address, and facsimile address as well as telephone number of the State Attorney were given.

- [19] The notice of appearance was faxed and emailed to the plaintiff's attorneys. Therefore, the electronic address of the defendant's attorney was known to the plaintiff's attorney. The electronic mail address of the defendant's attorney was:

SJonase@justice.gov.za

Vide "anx mmp.1" being an email from "The State Attorney" dated 1 October 2013 and "anx mmp3" being an email from Barnard and Venter dated 18 October 2013.

- [20] Although the defendant did not explicitly indicate to the plaintiff that his attorneys' electronic address was his preferred address for the purpose of service, it was nonetheless tacitly recognised by both parties that, for obvious pragmatic exigencies, it was more reliable and expedient to exchange pleadings electronically than physically.
- [21] In the first place, the plaintiff knew that similar service of the notice of bar at the physical address had previously given rise to the first default judgment. In the second place the plaintiff also knew that the defendant had informally given the plaintiff his direct physical address, postal address, facsimile address, and electronic address. Given such constructive knowledge, the current circumstances could easily have been avoided.
- [22] In my view the plaintiff's dogmatic and persistent use of a physical address already shown to be unreliable was unreasonable. Similarly lamentable was the defendant's failure to file a written request in terms of sub-rule 3(c) for the exchange of service by

both parties of subsequent pleadings by facsimile mail or electronic mail.

[23] In view of the proven electronic mail communication between the parties one would have expected the plaintiff to have sent a notice of such importance not only to the defendant's physical address but also to the defendant's electronic address or to the facsimile address or even to the postal address by registered mail as the defendant had, for practical expedience, done in the past. Such speedy, efficient and reliable methods are increasingly used nowadays. I could find no reasonably sound and valid excuse as to why the plaintiff, who had such pragmatically useful and efficient facilities, had chosen to use them selectively.

[24] It must be readily appreciated that the personnel or public officials attached to any office of the clerk of the court are primarily trained and accustomed to receiving pleadings for filing purposes. That is their core responsibility. They know that attorneys first have to serve pleadings on their opponents before they take such pleadings to the clerk of the court to be filed. The idea of being used as "post boxes" for litigants is an unfamiliar practice to them. Consequently, they do not customarily identify themselves with the external process that concerns the serving of pleadings because their duties are ordinarily aligned with the internal process that concerns the filing of pleadings. This case illustrates the real pitfalls of using a clerk of the court as an intermediary in the litigation course of exchanging pleadings. It is a perilous tendency. It can easily be avoided by invoking the assistive, reliable and advanced methods of service created by rule 13(3).

[25] Given the peculiar circumstances of this particular case, I am of the view that the court *a quo* materially erred in granting judgment in the absence of the defendant. The notice of setdown was, in my view, fatally defective to sustain a proper hearing. The purported hearing of the matter on 21 October 2014 was, therefore, procedurally irregular and unfair. I would, therefore, uphold the appeal.

[26] There remains one more consideration. It concerns the costs of the appeal. I have adequately highlighted the formal defects of the notice of setdown delivered by the plaintiff. Such defects notwithstanding, the plaintiff unreasonably opposed the defendant's rescission application in the court *a quo*. The court *a quo* erroneously dismissed the defendant's application. The defendant, aggrieved by the court order, served and filed notice of appeal. In view of the unproven proper notice of setdown, the defendant should then have realized that the defendant had reasonably good prospects of success on appeal. It is so that he did not oppose the appeal. However, his decision to abide was not enough. He could have done more. He could have abandoned the default judgment. He did not. He thereby impelled the defendant to come this far on appeal. To do so he incurred costs. In view of all this, the defendant is entitled to recoup his costs from the plaintiff.

[27] Accordingly I make the following order:

27.1 The appeal succeeds with costs;

27.2 The order made by the district magistrate at Clocolan on 21 October 2014 is hereby set aside and substituted with the one below;

27.3 The defendant's application for rescission of judgment is granted with costs;

27.4 The defendant is granted leave to defend the action.

MH RAMPAI, J

I concur

JP DAFFUE, J

On behalf of the appellant: Adv. TL Manye
Instructed by: State Attorney
Bloemfontein

On behalf of the respondent: No appearance