IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION) **CASE NO.: EL 790/10**
ECD 1590/10

In the matter between:

DIAMOND IGODA VIEW (PTY) LTD **First Applicant**

CHARLES ROBIN DIAMOND **Second Applicant**

And

IGODA FARMS CC **RESPONDENT**

JUDGMENT

BESHE J:

[1] This is an application for an order in terms of Rule 30 of the Uniform Rules of this court setting aside as irregular the service of summons purportedly served upon the applicants (defendants in the main action).

[2] Respondent issued summons against the applicants on the 28th of August 2010 claiming:

(a) An order declaring the sale agreement entered into between the plaintiff who is the respondent in this application and the defendants who are applicants in this application, to be null and void and of no further effect.

(b) An order directing the plaintiff to repay to the defendants the purchase price and such monies as may become owing in terms of the

provisions of section 28(1)(a) after the deduction of such monies as may be due to it in terms of section 28(1)(b).

Alternatively:

(c) Payment of the sum of R1 230 000-00, together with interest thereon at the prescribed legal rate calculated from date of service of the summons to date of payment.

(d) Cost of suit, together with interest thereon at the prescribed legal rate calculated from a date 14 days after allocatur to date of payment.

(e) Further and or alternative relief.

[3] The applicants are described as follows in the summons:

Diamond Igoda View (Pty) Ltd, a Company duly incorporated in terms of the Company Laws of the Republic of South Africa, with its registered office and chosen *domocilium citandi et executandi* at Bate Chubb & Dickson Inc, No 3 Norvia House, Western Avenue, Vincent, East London (hereinafter called the First Defendant); and

Charles Robin Diamond, an adult male businessman of Hennerton, Wargrave, Berkshire, England, has appointed Bate Chubb & Dickson Inc, at No 3 Norvia House, Western Avenue, Vincent, East London AND/OR Bax Kaplan Inc, No 2 Clevedon Road, Selbourne, East London; as his authorised agents in respect of the administration of his financial and commercial interests and related legal affairs. There will accordingly be service of these proceedings upon the aforesaid agents.

[4] It is common cause that service was indeed effected upon the said agents.

[5] Applicants contend that there has not been proper service in that first applicant's registered address is 21 A Western Avenue, Vincent, East London and not 3 Norvia House, 34 Western Avenue, Vincent, East London which is the address of Chubb & Dickson Inc.

[6] In so far as second applicant is concerned, applicants contend that neither Bate Chubb & Dickson Inc. Or Bax Kaplan Inc. are authorised to accept service of summons nor are they "authorised agents in respect of the administration of his financial and commercial legal affairs".

[7] Before I deal with the merits of this application, I will deal with the two points that have been raised by the respondents *in limine*, they are that:

1. The original returns of service of copies thereof being the subject matter of the complaint are not attached to the papers;
2. The application having been brought in terms of Rule 30 of the Uniform Rules of Court, the applicants have not complied with Rule 30 (2) before resorting to the utilisation of the Rule.

[8] It is indeed so that that the return of service is not attached to the papers.

[9] In my view however nothing turns on this point because the fact that the summons were served upon the agents aforementioned, is not in dispute, it is the manner of service that is the subject matter of the application.

[10] Regarding the second point raised *in limine*, namely failure by applicants to comply with Rule 30 (2):

> Rule 30 which deals with an Irregular Proceedings provides:
>
> 1) A party to a cause in which an irregular step has been taken by another 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 10 days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complainant within 10 days;
>
> c) the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of subrule (2).

[11] *In casu,* summons having been served on the 26th of October 2010, at the offices of attorneys Bax Kaplan Incorporated, the latter attorneys, addressed a letter to respondent's attorneys – Squire Smith and Laurie Incorporated dated the 30th of October 2010.

[12] The letter reads as follows:

> "Dear Madam,
>
> We refer to the summons which was served at our offices on the 26 August 2010 and are instructed to record the following:-
>
> 1. The Particulars of Claim amount to an irregular step entitling our client to act in accordance with the provisions of Uniform Rule 30 inasmuch as

they do not comply with the provisions of Rule 18(1) in that they have not been signed by an Advocate or by an Attorney with right of appearance in terms of Section (2) of the Right of Appearance in Courts Act, 1995. It is trite law that where an attorney purports to sign pleadings in the High Court in compliance with Rule 18(1), such attorney is obliged to sign twice, once as an attorney representing the Plaintiff's firm and secondly as an attorney who has been duly certified in terms of Section 4(2) of the aforesaid Act. The Particulars of Claim also require to state that the attorney who is signing is so duly certified.

2. This firm has not been and is not authorised to accept service of summons on the Second Defendant and accordingly the service at our offices is defective and of no effect.
3. Our clients deny that the offices of Bate Chubb & Dickson Inc have been chosen as the *domicilium citandi et executandi* for purpose of service of any summons. The domicilium clause apparently relied upon by the Plaintiff which appears in the Deeds of Sale attached to the Particulars of Claim clearly relates to the delivery of notices in terms of the Deeds of Sale and cannot in any manner be construed as relating to the service of legal process some six years later.
4. A Deeds Office Search has revealed that the Plaintiff is not possessed of any fixed property and our clients have reason to believe that the Plaintiff does not have the funds necessary to settle any adverse costs orders which may be obtained against the Plaintiff and if this matter is to proceed our instructions are to make application for security costs.
5. We believe, with respect, that the Particulars of Claim are excipiable for reasons which we believe will be apparent to you upon a careful consideration thereof.

For, inter alia, the aforesaid reasons, we invite you to withdraw the action and

to tender payment of our clients' costs before your client becomes mulcted in substantial legal costs in attempting to pursue this action.

Any attempt to rectify the aforesaid defects by amendments will be opposed, inter alia, on the grounds that the claims have become prescribed as the summons is defective for the aforesaid reasons, and an amendment cannot be allowed to resuscitate a prescribed action.

Our clients believe that the summons was served in order to avoid prescription and on order to satisfy the Development Facilitation Tribunal.

Would you please urgently revert to us before we take the appropriate steps in regard to the aforesaid deficiencies and/or defects."

On the 20th of October 2010 the applicants served a notice of the present application.

[13] *Mr Kincaid* for the respondent argued that this letter is not a notice as envisaged in Rule 30 (2) (b) but a letter of persuasion.

[14] In ***Chelsea Estates and Contractors CC v Speed-O-Rama 1993 (1) SA 198 ECD at 202 E*** *Mullins J* stated that: "All that Rule 30 (2) requires is that the notice must specify the particulars of the irregularities complained of." In my view this also applies to Rule 30 (2) (b).

[15] I have not been referred to any authorities that suggest in what form the notice envisaged in Rule 30 (2) (b) should be. I have not been able to find any such authorities.

[16] However my understanding of the written notice – is to warn or give

notice in advance of ones intention in writing to another.

[17] In the letter dated the 30th of August 2010 the applicants state clearly what their causes of complaint are. The first line of paragraph one of the letter makes reference to Rule 30.

[18] The remarks of *Leach J* as he then was in ***Ex Parte Monnie et Uxo 1996 (3) 97 SECLD*** in a case counsel for the respondent referred this court in regard to the merits of this application, appear to be opposite in regard to the question whether the letter aforementioned served the purpose envisaged in Rule 30 (2) (b). He had this to say at page 99 D-E:

> "Insofar as procedural matters are concerned, our law today inclines towards flexibility rather than rigidity as substance, rather than form, is of primary importance – see the remarks of *Didcott J* in ***Ex Parte Mason 1981 (4) SA 648 D at 651 E-F.***"

[19] In my view the letter in question made it clear than an intention exists to utilise the Rule 30 mechanism should the respondents not remove the causes of complaint. It is for these reasons that I am unable to uphold the two points raised by the respondent *in limine*.

[20] Coming to the merits of the application, namely whether the service of summons was proper as provided for in Rule 4 of the Uniform Rules of this Court.

[21] Rule 4 provides for the manner in which notice of legal proceedings or

process should be brought to the attention of the person against whom legal proceedings are sought to be instituted.

Rule 4 service provides:

> (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 sixteen years of age. For the purposes of this paragraphwhen 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 sixteen years of age and apparently in authority over him;
>
> (iv) if the person so to be served has chosen a *domicilium citandi,* by delivering or leaving a copy thereof at the *domicilium* 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 authorized in writing to accept service on behalf of the person upon whom service is to be effected;

(vii) … … .

[22] As indicated in paragraphs 5 and 6 above, applicants contend that the purported service upon the applicants is not in compliance with Rule 4 and the law and therefore of no effect.

[23] According to the applicants, first applicant has its registered office at 21 A Western Avenue, Vincent, East London and not Bate Chubb & Dickson Inc, No 3 Norvia House, Western Avenue, East London. This is not denied by the respondent.

[24] It is however not clear on what basis respondent's claim that first applicant chose Bate Chubb & Dickson Inc. as its *domicilium citandi et executandi.*

[25] The subject matter of the main application is an agreement of sale entered into between the respondent (the seller) and the second applicant (the purchaser) on the 27th of August 2004 as would appear from Deed of Sale marked annexure "A".

[26] *Domicilium* is dealt with in clause 4 of the Deed of Sale which reads as follows:

> "All notices intended for the Purchaser shall be sent to him by registered mail to c/o Bate Chubb & Dickson Inc, Suite 3, Norvia House, Western Avenue, East London, which address he selects as his *domicilium citandi et executandi* and any such notices shall be deemed to have been duly delivered to the Purchaser 5 (five) days from date of posting thereof by the Seller or his agent." (my underlining)

[27] According to the Trilingual legal dictionary, 2nd edition by V A Hiemstra and H L Gonin; *domicilium citandi et executandi* means: plek van dagvaarding en eksekusie, domicile of summons and execution.

[28] In its particulars of claim respondent alleges that:

> 7. After the execution of annexure "A" and without the knowledge and or agreement of the plaintiff, a corporate entity described as *Shell Case 91 (Pty) Ltd* was substituted as the purchaser.
>
> 8. But for the substitution of the purchaser, no further amendments were effected.
>
> 9. A copy of the "substituted deed of sale" is annexed hereto marked "B".

[29] It is indeed so that in annexure "B" the *domicilium* is the same as it appears in annexure "B".

[30] It is clear from what I have stated above that the name of first applicant does not appear on any of the two annexures. As indicated in paragraph 23 above, first applicant has its registered office at 21 A Western Avenue,

Vincent, East London. No allegation is made in the respondent's particulars of claim that second defendant authorised Bate Chubb & Dickson Incorporated and or Bax Kaplan Incorporated in writing to accept service of the summons as envisaged in Rule 4 (i) to (vi).

[31] This being the case I am of the view that there has not been a proper service insofar as first applicant is concerned in the event of the first applicant not being a party to the Deed of Sale (Sale Agreement).

[32] Insofar as second applicant is concerned, *Mr De La Harpe* argued that upon the plain reading of clause 4 of annexures "A" and "B" the obvious and patent intention of the parties was that the *domicilium* nominated was effective only in respect of "all notices intended for the purchaser" and no more. He further argued that even if the phrase "*domicilium citandi et executandi*" were to be given a broader meaning encompassing service of process, such a nomination cannot remain valid/effective three years later and well after transfer of the immovable property that was the subject of the agreement of sale.

[33] In my view, bearing in mind, the meaning of *domicilium citandi et executandi* there is no reason why the nomination should be read to be limited only to notices intended for the purchaser. More so that these proceedings arise from that agreement.

[34] It is a feature of this application that it was made outside of the time limits

stipulated in Rule 30 (2) (c). In an affidavit, applicant's attorney, *Lesley Nelson Clarke,* explains the reasons for the non-compliance and request condonation of same.

[35] In the result the following order is made:

(i) Condonation of non-compliance by the applicants with time limits laid down by Rule 30 (2) (c) is granted.

(ii) The service of summons issued by the respondent on the first applicant, in the event that he is not a party to the agreement of sale entered into in respect of portion 1 of farm number 1009 Igoda Mouth, East London entered into on the 24th of August 2004 is declared to be of no effect and is set aside.

(iii) The respondent is directed to take steps to re-serve the summons on the first applicant at its registered office or principal place of business within the court's jurisdiction.

(iv) The application for the setting aside of service in respect of second applicant is dismissed.

(v) Respondent is ordered to pay 70% of the costs of this application.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For Applicant	ADV: D H De La Harpe
Instructed by	BAX KAPLAN INC.
For Respondent	ADV: Kincaid
Instructed by	SQUIRE SMITH & LAURIE INC.
Date Heard	16 November 2010
Date Reserved	16 November 2010
Date Delivered	14 June 2011