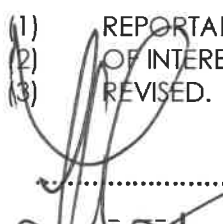
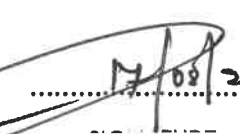


REPUBLIC OF SOUTH AFRICA



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 38548/2017

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
 	
<p>..... 17/08/2018</p>	

In the matter between:

PURPLE PRIMULA 80 CC

APPLICANT

and

VODACOM (PTY) LTD

RESPONDENT

JUDGEMENT

NKOSI - THOMAS AJ

Introduction

- [1] On 2 November 2017 Vodacom (Pty) Ltd (**"Vodacom"**) launched eviction proceedings against the applicant, Purple Primula 80 CC (**"Purple"**) and all such persons who occupy and use the commercial premises situate at Shop 70 Jabulani Mall (**"the premises"**) at its instance, within twenty-four hours from the date of the order (**"the eviction proceedings"**).
- [2] By way of background, in March 2009, Vodacom Service Provider Company (Pty) Ltd (**"VSP"**) concluded a franchise agreement with Purple (**"the agreement"**).
- [3] Vodacom, subsequently, amalgamated with VSP in 2012 resulting in Vodacom taking over the all the rights and obligations of VSP, hitherto. That is hence Vodacom is the entity that launched eviction proceedings against Purple.
- [4] In terms of the agreement:
- [4.1] Vodacom granted Purple a franchise licence for an initial period of 5 years, commencing on 26 October 2006, to conduct a specialised communication business selling, *inter alia*, Vodacom airtime packages, cellular telephone handsets and Vodacom pre-paid starter packs (**"the merchandise"**); and
- [4.2] Vodacom granted Purple the right to occupy the premises in order to conduct the business aforesaid.

- [5] As the agreement was not renewed at the end of the initial period of five years, it terminated by effluxion of time on 25 October 2011. Despite its termination, Purple remained in occupation of the premises.
- [6] Based thereupon, Vodacom launched eviction proceedings against Purple on 2 November 2017.
- [7] On 10 November 2017, Purple having remained in default, this Court entered default judgment in favour of Vodacom in the following terms:
- [7.1] That Purple and all such other persons who occupy and use the premises at the instance of Purple vacate the premises within twenty-four hours from the date of the order;
- [7.2] That in the event of Purple and the people occupying the premises at its instance refusing or failing to vacate the premises within twenty-four hours aforesaid, then the Sheriff for the district of Soweto-West is authorised forthwith to evict Purple and such persons from the premises and to take all such reasonable steps as may be necessary to give effect to the order of the Court; and
- [7.3] That Purple shall be liable for the costs of the application and such costs as may be incurred by the sheriff of this Court in giving effect to this order (*“the default judgment”*).

- [8] Consequently, Purple launched an application for the rescission of the default judgment and for leave, if successful, to file an answering affidavit in opposition to the main application (*“the rescission application”*).

In this Court

- [9] The rescission application is opposed by Vodacom for want of a showing of “good cause” as is required by Rule 31(2)(b).
- [10] It is not in dispute that the notice of motion in the eviction proceedings, the answering affidavit and the annexures thereto, were served by the Sheriff of this Court at the registered address of Purple by handing a copy thereof to one Fannie Roux, an accountant, a person apparently not less than sixteen years of age and apparently employed at the registered address (*“Purple’s accountant”*) after explaining the nature and contents thereof to him in terms of Rule 4(1)(9a)(v) of the Rules of this Court.
- [11] What this Court is called upon to determine is whether the failure by Purple’s accountant to alert members of Purple to the court process thus served, coupled with Purple’s assertion that it has a *bona fide* defence to the eviction application, entitles it to relief.
- [12] Purple urged upon me that it has shown “good cause” for purposes of Rule 32(1)(b).

- [13] Vodacom, for its part, urged that once it has been conceded that service in terms of Rule 4 has been effected, and in the absence of a showing of a *bona fide* defence, *cadit quaestio*.

Wilful Default

- [14] It was contended, on behalf of Purple, that the service at the registered address of Purple was defective inasmuch as it was effected at a place other than the contractually chosen *domicilium citandi et executandi*. The short answer to this argument is that there is a long line of authority for the proposition that the mere fact that a domiciliary address has been chosen does not preclude effective service through one of the other methods prescribed under the Rules of this Court.¹ There is, consequently, no merit in this contention.

- [15] Similarly, reliance on Purple's accountant's failure to draw Purple's attention to the served court process is unmeritorious. It, undoubtedly, fell upon Purple to ensure that its accountant was a responsible person who would diligently execute his tasks, including bringing the court process served upon him to the attention of the relevant people within Purple. In this regard, I was referred to the *dictum* in ***Arendsnes Sweefpoor CC v Botha 2013 (5) SA 399 (SCA) at 406 - 407*** where the SCA held that:

“[28] *Essentially service at the registered address of a corporation is sufficient to amount to service on the corporation. As was correctly conceded by counsel for the appellant, as a regular practice the courts accept as*

¹ Sandton Square Finance (Pty) Ltd v Biagi, Bertola and Vasco 1997 (1) SA 258 (W) at 260 B – D.

effective the service of a summons upon an employee of a firm of accountants or auditors whose office is used as a corporation's registered address... The importance is the fact that service at the registered address of the corporation, even if not on one of its employees, is regarded as substantial compliance with the rules.

[29] *In the present case the summons was delivered to a responsible person at the registered address of the appellant... In my view the action of handing it to a responsible person at the premises, after explaining the exigencies of the matter amounted to substantial compliance with the rule... a corporation -*

"which fails to ensure that there is a responsible person present at the premises appointed as its registered address, does so at its peril and should not be allowed to bemoan its lot should the process not come to its attention ..."

[16] I respectfully align myself with the above *dictum*. It, accordingly, follows in my judgment that service upon Purple's accountant amounts to effective service on Purple.

[17] That then takes me to the *bona fide* defence enquiry, that being the topic to which I now turn.

Bona Fide Defence

[18] Vodacom contends that the agreement terminated by effluxion of time during October 2011² whereas Purple contends otherwise.³

[19] It is not in dispute that Purple continues to occupy the premises without paying any consideration in regard thereto and that Purple, as at 8 May 2017, was indebted to Vodacom in the amount of R 4 874 007.11 made up as follows⁴:

[19.1] An amount of R 2 317 434.35 (including VAT) as consideration for the occupation and use of the premises;

[19.2] An amount of R 692 976.55 (including VAT) in respect of products and services supplied by Vodacom to Purple to enable Purple to conduct the franchise business;

[19.3] An amount of R 1 863 596.21 (including VAT) being the costs of spares, repairs supplied and effected by Vodacom to mobile instruments for and on behalf of Purple.

[20] Purple relies on the assertion that it took Vodacom a period in excess of 5 years to evict it from the premises as proof that an oral agreement renewing the agreement was concluded between the parties.

² FA, Page 15, para 7.9

³ FA, Page 15, para 7.10

⁴ AA, Page 195, paras 5.74-5.76

- [21] Vodacom denies that allegation and invokes the provisions of clause 22 as well as those of Clause 22.1 in support of its denial. Clause 22, on the one hand, provides that the agreement constitutes the entire agreement between the parties and that

“no amendment or other modification of this agreement shall be valid or binding on a party hereto unless reduced to writing and executed by both parties hereto”.

Clause 22.1, on the other hand, provides that:

“no waiver by a party of any breach, refusal or neglect by a party to exercise any right hereunder or to insist upon strict compliance with or performance of the other parties’ obligations under this agreement, shall constitute a waiver of the provisions of this agreement and a party may at any time require strict compliance with the provisions of this agreement.”

- [22] The SCA in ***Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash And Another 2015 (2) SA 118 (SCA)*** confirmed the efficacy of the Shifren principle⁵ in the following terms:

“[13] Before I consider these it is necessary to remind ourselves that when parties impose restrictions on their own power to vary or cancel a

⁵ SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A); Brisley v Drotsky 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229; [2002] 3 All SA 363). See generally RH Christie & GB Bradfield Christie's *The Law of Contract in South Africa* 6 ed at 464 – 6.

contract — as they did in this case — they do so to achieve certainty and avoid later disputes. The obligation to reduce the cancellation agreement to writing and have it signed was aimed at preventing disputes regarding the terms of the cancellation and the identity of the parties authorised to effect it. Our courts have confirmed the efficacy of such clauses.”

[23] It follows, in my judgment, that Purple has failed to show a *bona fide* defence to the eviction application.

Conclusion

[24] Although Vodacom seeks, in its written submissions, costs consequent upon the employment of two counsel Mr. Tsatsawane SC did not, quite properly, persist in this claim in argument before me.

[25] I therefore make the following order:

[25.1] This application for the rescission of the order of this Court granted on 10 November 2017 is dismissed with costs.

L.G NKOSI-THOMAS AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Heard: 31 July 2018

Judgment: 20 August 2018.

Appearances

For the Applicant: Advocate K Tsatsawane SC instructed by Danielle Bosch

For the Respondent: Ms. Keamongetse Nwala