



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: Electronic reporting only.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

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DATE

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P.A. MEYER

Case no: 3128/17

In the matter between:

AKSHARDHAM (PTY) LTD

Plaintiff

and

**JSR 108 INVESTMENTS CC
CITY OF JOHANNESBURG
REGISTRAR OF DEEDS, JOHANNESBURG
LOURO & TIAGO INCORPORATED**

First Defendant
Second Defendant
Third Defendant
Fourth Defendant

Case Summary: Practice – Pleadings – Summons – Service – Uniform Rules of Court, rule 4(1)(a) - Process not served as required by r 4(1)(a) – Effective service of summons constituting regular service regardless of the manner thereof and the non-compliance with the Uniform Rules of Court becomes irrelevant.

JUDGMENT

MEYER J

[1] The plaintiff, Akshardham (Pty) Ltd (Akshardham), claims specific performance of a written agreement of sale of an immovable property (the deed of

sale) from the first defendant, JSR 108 Investments CC (JSR), and, in the alternative, an order directing the sheriff to perform all acts necessary on behalf of JSR and directing the fourth defendant conveyancing attorneys, Louro & Tiago Inc. (L&T), to deduct from the purchase price and to pay to the sheriff all fees, expenses or disbursements as may be required in the performance of such acts. No relief is claimed against the second defendant, the City of Johannesburg (the City), or the third defendant, the Registrar of Deeds.

[2] On 3 September 2015, JSR and Akshardam concluded the deed of sale in terms of which Akshardam purchased from JSR Erf 439 Parkwood Township, Registration Division I.R., Province of Gauteng, measuring 1 179 square metres (the property) for a purchase price of R6 million payable against transfer. Akshardam paid the full purchase price into L&T's trust account during November 2015, and it tendered to comply with its other obligations arising from the deed of sale. Transfer of the property could not be passed due to the fact that JSR failed to obtain a clearance certificate from the City. Akshardam's attorneys of record, Webber Wentzel, addressed a letter dated 24 October 2016 to JSR wherein a demand was made on behalf of Akshardam for it to remedy its breach. By letter dated 15 November 2016, JSR's attorneys of record, Moodie & Robertson, responded to the Webber Wentzel letter on behalf JSR. Therein it was contended that the deed of sale was void *ab initio* for reasons that are not presently relevant.

[3] JSR refused to pass transfer of the property to Akshardam. Hence the present action. The combined summons commencing the action was issued on 31 January 2017. JSR entered an appearance to defend the action on 14 February 2017. In due course, on 13 December 2017, it caused a pleading to be filed, which pleading embodies a so-called 'SPECIAL PLEA' and a plea over to the merits. It now persists only with its special plea in which it seeks the dismissal of Akshardam's claim on the ground that the summons commencing the action had not been served upon it. The special plea reads thus:

'1. Uniform Rule 4(1)(a)(v), peremptorily prescribes that a summons commencing action shall, in the case of a corporation or company, be served by delivering a copy to the 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.

2. The summons commencing action was served on 3 February 2017, in terms of Uniform Rule 4(1)(a)(v), at 160 Johan Avenue, Raslouw Agricultural Holdings, Centurion, purportedly at the registered address of the first defendant.
3. At all material times hereto, the registered address of the first defendant was 44 Dudley Rd, corner Bolton Road, Rosebank, Johannesburg ("registered address").
4. The plaintiff's summons commencing action was not served at the registered address.
5. Service of the summons, commencing action, has accordingly not been effected upon the first defendant.

WHEREFORE the first defendant prays that the plaintiff's claim be dismissed with costs.'

[4] Akshardham delivered a replication to the special plea, which reads as follows:

'1. Ad paragraph 5

- 1.1 The contents of this paragraph are denied.
- 1.2 The summons was served by the sheriff at the first defendant's sole member's residential address.
- 1.3 At the time of service of the summons, the first defendant was represented by Moodie & Robertson Attorneys. The summons was sent electronically to the first defendant's attorneys of record, who acknowledged receipt thereof.
- 1.4 The summons came to the first defendant's knowledge.
- 1.5 The first defendant entered a notice of intention to defend on 14 February 2017.
- 1.6 The first defendant served a notice in terms of Rule 23(1) on 17 March 2017 and delivered an exception on 24 April 2017.
- 1.7 The first defendant elected not to raise the purported defective service by way of Rule 30 as an irregular step or to except to the summons on the basis of the alleged defective service.
- 1.8 The object of service is to bring the summons to the attention of the first defendant and the object of the Rule has been fulfilled.
- 1.9 The first defendant suffered no prejudice in the furtherance of its case.'

[5] JSR delivered a rejoinder to the replication. It reads:

'1. AD PARAGRAPHS 1.3, 1.4, 1.5 AND 1.6

- 1.1 The First Defendant admits the contents of these paragraphs.
- 1.2 The First Defendant joins issue with the Plaintiff in respect of the other allegations contained in the plaintiff's replication.

WHEREFORE the First defendant persists in its plea.'

[6] In response to JSR's notice in terms of r 37(4) of the Uniform Rules of Court, Akshardham admitted that the summons commencing action was served on 3 February 2017 in terms of r 4(1)(a)(v) at 160 Johan Avenue, Raslouw Agricultural holdings, Centurion (the Centurion address), purportedly at the registered address of JSR, that on the date of service of the summons at the Centurion address, both the registered address and the principal place of business of JSR were situated at 44 Dudley Road, corner Bolton Road, Rosebank, Johannesburg and that the summons commencing action was not served at JSR's registered address or principal place of business. Akshardham, however, persisted in its averment that the summons was served at JSR's sole member's residential address.

[7] In accordance with the legal maxim *audi alteram partem* every person is entitled to be heard before an order is granted against him and 'this explains why our courts meticulously enforce the requirement that an opponent should be notified timeously of the steps taken against him, and that he should be given an opportunity of replying to the case stated against him, and of placing his own version before the court'. (Stephen Peté *et al Civil Procedure A practical Guide* Oxford University Press, Southern Africa.) 'It is a corner-stone of our legal system that a person is entitled to notice of legal proceedings instituted against him.' (See *Steinberg v Cosmopolitan National bank of Chicago* 1973 (3) SA 885 (RA) at 892B-C.) 'Although an action is commenced when the summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made upon him.' (*Per Wessels JA in Marine and Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407 (A) at 413D.)

[8] The Uniform Rules of Court provide for different methods of service of any process of the court directed to the sheriff or of any document initiating application proceedings. Service on a corporation or company is, in terms of r 4(1)(a), to be effected-

'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'.

[9] In *Prism Payment Technologies v Altech information Technologies* 2012 (5) SA 267 (GSJ) at 271H-272A, Lamont J said the following about the purpose of r 4:

'The purpose of rule 4 is to provide for a mechanism by which relative certainty can be obtained that service has been effected upon a defendant. If certain minimum standards have been complied with as set out in the rule, then the assumption is made that the service was sufficient to reach the defendant's attention and his failure to take steps is not due to the fact that he does not have knowledge of the summons. The converse is not true – namely that if service is not effected as required by the rule, the service is not effective – in that the purpose for which service is required was fulfilled, namely the defendant came to know of the summons. The rules, as was pointed out by Roux J in *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W), set out procedural steps. They do not create substantive law. Insofar as the substantive law is concerned, the requirement is that a person who is being sued should receive notice of the fact that he is being sued by way of delivery to him of the relevant document initiating legal proceedings. If this purpose is achieved, then, albeit not in terms of the rules, there has been proper service.'

[10] The plaintiff in *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH* 1991 (1) SA 822 (T) had obtained leave to sue the defendant by way of edictal citation. The order concerned authorised service by means of facsimile transmission and granted the defendant 10 days to file its notice of intention to defend. The plaintiff sought summary judgment and the defendant, in turn, brought an application to set aside as an irregular step in terms of r 30(1) the edictal citation issued by the plaintiff and/or the service of such edictal citation, contending that the service authorised by the court was in conflict with the Uniform Rules of Court and that allowing it only 10 days to enter an appearance to defend breached the provisions of s 27 of the Supreme Court Act 59 of 1959. There, Goldstein J held as follows (824F-H):

'It seems to me, however, that, once a defendant has entered appearance to defend as it has done in the present matter, non-compliance with the Rules as to service and with s 27 becomes irrelevant. The purpose of service in terms of the rules is to bring the edictal citation to the attention of the defendant and the purpose of s 27 is to ensure that such defendant has sufficient time to defend it if it so wishes. Both of these objectives having been achieved and the particular statutory provision and Rule have been exhausted.

[11] In *First National bank of SA Ltd v Ganyesa Bottle Store (Pty) Ltd and others; First National Bank of SA Ltd v Schweizer Drankwinkel (Pty) Ltd and another* 1998 (4) SA 565 (NC), Horn AJ rejected 'the submission that service of a summons becomes unnecessary for the purpose of applying for summary judgment if a

defendant, having acquired 'knowledge' of the fact that a summons has been issued (but not served) citing him as a defendant, has entered an appearance to defend, and then withdraws his defence.' It was held that-

'[m]ere "knowledge" of the issue of a summons is not service and a plaintiff is not relieved of his obligation to follow the prescribed Rules.'

[12] In LTC Harms *Civil Procedure in the Superior Courts* Students' Edition Third Edition para B4.1 it is stated:

'When proceedings have begun without any notice, the subsequent proceedings are null and void and may be disregarded or set aside at the option of the other party. However, if the initiating document such as the summons was served incorrectly, the subsequent proceedings are not void, but may be voided: the summons may be set aside as an irregular step although the court may condone the irregularity.'

(Footnotes omitted.)

[13] Service *in casu* was effected by means of the sheriff on 3 February 2017 affixing a copy of the combined summons to the main door of premises that were found locked and *ex facie* the return considered to be JSR's registered office (it now being common cause that the premises were neither its registered address nor principal place of business), and by means of electronic transmission on 13 February 2017 to JSR's attorneys of record, Moodie & Robertson, who had already represented JSR in the dispute concerning the transfer of the property to Akshardham at the time of such transmission. Service of the combined summons, therefore, was not effected in a manner as required by the Uniform Rules of Court. This conclusion, however, is not the end of the enquiry. As was held in cases such as *Consani* and *Prism*, effective service of a summons constitutes regular service regardless of the manner thereof and the non-compliance with the Uniform Rules of Court then becomes irrelevant.

[14] This is not a case where the proceedings have begun without notice or where there was mere 'knowledge' of the issue of the summons. The summons was served incorrectly and the subsequent proceedings are, therefore, not void as JSR would have it. It is common cause that the summons came to JSR's knowledge and that it entered an appearance to defend the action on 14 February 2017, which was the next day after the incorrect service had been effected upon its attorneys of record. It thereafter delivered an exception to the combined summons, which was

argued and dismissed, whereafter it filed its special plea and plea and later on also a rejoinder. It filed discovery affidavits, participated in the pre-trial procedures and presented its defence to Akshardham's claim at the trial of this action. The ineluctable inference to be drawn from the common cause facts is that the methods of service employed by Akshardham were effective and that the object or purpose of service has been achieved, albeit not in terms of the Uniform Rules of Court. The summons was delivered to the attorneys representing JSR in the matter, who acknowledged receipt thereof, and it came to JSR's knowledge. JSR has been afforded, and has utilised, the opportunity to be heard. There has thus been proper service and the non-compliance with the Uniform Rules of Court becomes irrelevant.

[15] Finally, the matter of costs. No good grounds exist for a departure from the general rule that costs follow the event, in other words that the successful party should be awarded its costs. Akshardham as the overall successful party is clearly entitled to its costs. What has to be considered though, is Akshardham's request that costs should be awarded on the scale applicable as between attorney and client. The parties have not, in terms of the deed of sale, agreed to such a costs order in the event of litigation between them nor is an award of attorney and client costs lightly granted in the exercise of a court's discretion relating to an appropriate order as to costs. This, in my view, is not one of those 'rare' occasions where a deviation from the ordinary rule that the successful party be awarded costs as between party and party, is warranted. (See *LAWSA Vol 3 Part 2 Second Edition* para 320.)

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

- (a) The first defendant's special plea is dismissed.
- (b) The first defendant shall take all the necessary steps and sign all the necessary documents to pass transfer of Erf 439 Parkwood Township, Registration Division I.R., Province of Gauteng, measuring 1 179 square metres in extent and held under deed T1483/2001 (the property) to the plaintiff.
- (c) The sheriff is authorised to take such steps and sign all such documents on behalf of the first defendant as may be required to give effect to paragraph (b) of this order, if the first defendant fails to take any required step or sign any required document within 5 days of written demand.
- (d) The fourth defendant, or any other attorneys attending to the transfer of the property to the plaintiff, are authorised and directed to deduct from the purchase

price, and to pay to the sheriff, all fees, expenses or disbursements as may be required or incurred by the sheriff in giving effect to paragraph (c) of this order.

(e) The first defendant is to pay the costs of suit.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:
Date of judgment:
Plaintiff's Counsel:

13 March 2019
16 September 2019
Adv HC Bothma

Instructed by:
First Defendant's Counsel:
Instructed by:

Webber Wentzel, Sandton, Johannesburg
Adv T Ohannessian SC
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