

REPUBLIC OF SOUTH AFRICA



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

- 1) REPORTABLE: ~~YES~~
2) OF INTEREST TO OTHER JUDGES: ~~YES~~
3) REVISED.

CASE NO: 15432/2013

.....
SIGNATURE 23/5/2019 DATE

IN THE MATTER BETWEEN:-

SASFIN BANK LIMITED

First Plaintiff

VAN'S AUCTIONEERS, GAUTENG

Second Plaintiff

And

IOANNIS VARELTZIS

Defendant

JUDGMENT

Introduction

- [1] This is an application for leave to appeal against the whole of the judgment and order of Prinsloo J of the 17 August 2017 in which judgment the learned Judge found that the service of the summons in the action on the 15 March 2013 on the applicant was valid and in compliance with the rules of court.

Due to the unavailability of Prinsloo J this application served before me as contemplated in Rule 49(1) (e) of the Uniform Rules of Court.

Condonation

- [2] The application for leave to appeal was served one day out of time and there is an explanation under oath dealing with the circumstances that led to it being served late. There was no objection to the grant of condonation from the Respondents and condonation was accordingly granted.

The merits of the application

- [3] The issue in dispute which came before Prinsloo J arose out of a Rule 30 application which had been referred to oral evidence in the following terms :-
- ‘The issue regarding the validity of service of the combined summons on the applicant (defendant in the action) by the Sheriff, on the 15 March 2013, is referred to oral evidence for determination.’
- [4] The Court heard comprehensive evidence from four witnesses with regard to the disputed return of service including that of Ms Heyns from the office of the Sheriff who effected service and in a detailed judgment analysed both the law on the matter as well as the evidence
- [5] At the heart of the dispute appears to be an assertion by the Applicant that the evidence of Ms Heyns was not reliable in so far as it related to the actual physical location where service was effected. In this regard Ms Heyns evidence was that she effected service at Eastern Auto Body which according to her was in close proximity

to a business known as More Top Sport, The Applicant on the other hand sought to cast doubt on the reliability of this evidence. His evidence was that the 2 businesses were about 700m away from each other and therefore sought to suggest that if Ms Heyns effected service at a premises in close proximity to More Top Sport it could not have been at Eastern Auto Body as the latter premises was not in close proximity to More Top Sport.

- [6] This however was not the only evidence before the Court and the determination of the matter cannot be confined to that evidence alone but must be based on a conspectus of all the evidence. There was in the view of the Court other evidence including the existence of a security gate and blue sliding gate associated with Eastern Auto Body which in the Court's view creates the overwhelming probability that Ms Heyns did indeed attend the premises of the Applicant where she effected service. Even if there exists some uncertainty about the location of the Applicant's premises in relation to More Top Sport , that cannot be dispositive .

The Court also, having had the opportunity to observe all the witnesses before it concluded that Ms Heyns was a 'very good witness 'and further that there was in truth and reality not two conflicting versions regarding service but only one – that of Ms Heyns upon which the Applicant sought to cast doubt on.

- [7] Finally and importantly the Court referred to the work of the learned authors, *Nathan Barnett & Brink, Uniform Rules of Court*, 2nd edition, who say the following at page 670:

“Sub- section (2):

A sheriff's return is prima facie, but not conclusive, evidence of the matters stated herein. It can only be impeached on the clearest and most satisfactory evidence (Deputy- Sheriff v Goldberg, 1905 TS 680). In regard to the onus in proceedings to impeach a return of nulla bona see *Sussman & Co (Pty) Ltd v Schwarzer*, 1960 (3) SA 94 (O); *Nathan & Co v Sheonandon*, 1963 (1) SA 179 (N); *Moodly v Hedley*, 1963 (3) SA 453 (N) "[Emphasis added] .

In this regard the Court in *Sussman* affirmed that the party seeking to impeach a return of service carries the onus to show by clear evidence that the return is not a proper return.

[8] On this aspect the court concluded that the Applicant had failed to produce anything remotely resembling 'the clearest evidence' to persuade it not to exercise its discretion in favour of finding that there was no proper.

Given that this Court must be satisfied that any proposed appeal would have a reasonable prospect of success which the Court in *The Mont Chevaux Trust v Tina Goosen* (LCC 14R/2014) concluded raised the bar for a party seeking leave , no case has been made out for granting leave .

[9] The treatment and analysis of the evidence by Prinsloo J against the backdrop of the legal test to be applied is comprehensive, well-reasoned and in my view unassailable.

I therefore make the following order:-

The application for leave to appeal is dismissed with costs



J KOLLAPEN
JUDGE OF THE HIGH COURT,
PRETORIA

Date of hearing : 14 August 2019

Date of judgment : 23 August 2019

Appearances

Counsel for the plaintiffs : Ms S. Maritz

Instructed by : VFV Attorneys

Counsel for the Defendant : H.P West

Instructed by : Truckers Incorporated