REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **21375/2020**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 24 August 2022

In the matter between:

PHEPHA MV SECURITY SERVICES Applicant

and

COLLINS SEBOLA FINANCIAL SERVICES (PTY) LTD First Respondent

SHERIFF OF PRETORIA CENTRAL Second Respondent

SOUTH AFRICAN FORESTRY COMPANY SOC LTD Third Respondent

TSEPO MOHANENG Fourth Respondent

CLEMENT NHUVUNGA Fifth Respondent

THE CHAIRPERSON OF THE BID SPECIFICATION COMMITTEE OF THE TH IRD RESPONDENT IN RESPECT OF RFB 011/2019 Sixth Respondent

THE CHAIRPERSON OF THE BID EVALUATION COMMITTEE OF THE THIRD RESPONDENT IN RESPECT OF THE RFB 011/2019 Seventh Respondent

THE CHAIRPERSON OF THE BID ADJUDICATION COMMITTEE OF THE THIRD RESPONDENT IN RESPECT OF THE RFB 011/2019 Eighth Respondent

THE CHAIRPERSON OF THE AUDIT COMMITTEE OF THE THIRD RESPONDENT Ninth Respondent

THE CHAIRPERSON OF THE FINANCIAL COMMITTEE OF THE THIRD RESPONDENT Tenth Respondent

PHUTHADICHABA TRADING ENTERPRISE CC Eleventh Respondent

JUDGMENT

DE VOS AJ

Introduction

[1] The applicant and first respondent are involved in a tender dispute. The applicant and first respondent, together, were the successful bidders in respect of a tender for the supply of security and associated services to different forest plantations owned and operated by the third respondent across different regions in the country. The applicant received a substantial portion of the contract value for the supply of the relevant services to the value of R 62 193 884.32. The first respondent received approximately a third of the contract value to the order of R 18 285 386.01.

[2] The first respondent sought to review the portion of the tender awarded to the applicant. The review application was heard by this Court in October 2020 and decided on 14 January 2021 by Basson J.[1] The first respondent was successful in its review application.[2] The Court held that the award of the tender was fraught with

[1] Collins Sebola Financial Services (Pty) Ltd v South African Forestry Company SOC (Ltd) and Others (21375/20) [2021] ZAGPPHC 13 (14 January 2021)

[2] The order granted by Basson J provides -

irregularities and corruption. The recipient of these criticisms was the third respondent, however, the relief granted in the review application affected the first respondent's award.

[3] The applicant is dissatisfied with the review decision and has launched two attacks, an appeal and a rescission. The appeal is currently on the road to the Supreme Court of Appeal. The second is an application to rescind the review decision. It is the rescission application that is before this Court.

[4] The rescission application is brought in terms of rule 42(1)(a) of the Uniform Rules of Court. The applicant contends the judgment was erroneously granted in its absence as the first respondent had not properly served the review application. The dispute between the parties is a narrow one: whether the applicant had been properly served before the relief was sought.

[5] The review application was launched on a semi-urgent basis and the first respondent sought condonation for non-compliance with the rules in respect of service.[3] The review application was launched on 31 March 2020 at a time when South Africa experienced its first lock-down. In response, this Court issued a Directive dealing with service during the lockdown period. The Directive permitted service through electronic means in certain circumstances during the lockdown.

[6] It is in this context that the applicant contends electronic service was unlawful. The the applicant's complaint is that, legally, electronic service is impermissible. The applicant has not sought to make out a case that service had been ineffective or that it had not in fact received the application. In fact, the applicant never states that it did not receive electronic service of the application. Whilst the Court may be tempted to decide the case on a different ground, the case the applicant has asked the Court to

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1. The decision of the Board of the first respondent dated 24 February 2020 to award part of tender number RFB011/2019 to the seventh respondent is reviewed and set aside.
2. The first respondent is directed to award the part of tender RFB011/2019 that was awarded to the seventh respondent to the applicant at the price which the applicant has tendered for such part.
3. The first respondent is ordered to administer a reasonable and expeditious handover from the seventh respondent to the applicant.
4. The respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs, such costs to include the costs occasioned by the employment of senior counsel.

[3] CL 4-20 answering affidavit para 42

adjudicate is whether or not it was legally permissible for the first respondent to serve the review application on email.

Facts

[7] The parties agree that the application was sent by email on 31 March 2020. The application was emailed by the attorney of record of the first respondent (the applicant in the urgent proceedings) to the business email address of the applicant (the respondent in the urgent proceedings) on 31 March 2020.

[8] The respondent has provided the email of 31 March 2020[4] to the Court. The email was sent from the first respondent to info@superpro@telkomsa.net and cc'd to Mr TE Matumba. The email reads that -

> "attached hereto is an urgent application issued in the Pretoria High Court on even date for your urgent attention. Due to the national lockdown we will attend to electronic serving of the application (in terms of point 5 of the Judge President's directions). We therefor request that you acknowledge receipt of this e-mail. Take note that we await a copy of all documentation, as requested, within 15 (fifteen) days from date of receipt of this application. Trust you find the above in order."

[9] The applicant does not dispute that this email was sent.

[10] The parties further agree that the correct email address was used. The email address is the address used by the applicant.[5] The applicant does not dispute that it generally uses the email address. In fact the applicant states outright that it "must be emphasised that Phepha does not reject the authenticity and correctness of the said email address."[6]

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[4] CL 4-30 annexure AA3 to the answering affidavit

[5] CL4- 13 paragraphs 20 - 23 of the answering affidavit (which is admitted by applicant) -

> "20. Phepha MV Security Services trade under the name "Super Pro Alarms".
>
> 21. On pages 555, 559, 563 and 624 of the record in the main application, Mr Magagula on behalf of Phepha submitted such email address to SAFCOL as the email address of the tenderer.
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> 22. On pages 631, 632, 633, 636 and 637 of the tender document, such email address is recorded as the email address of Phepha on the Central Supplier Database of the National Treasury.
>
> 23. Page 682 of the record reflects that the Department of Science and Technology utilises such email address. The department had sent an email to such address and it was received."

[6] CL 5-16 replying affidavit para 16

[11] The parties further agree that the application was heard and decided on a semi-urgent basis. The parties accept Rule 6(12) finds application and that permits the Court to dispense with the requirements of service.

[12] Counsel for the applicant also confirmed that there was no outright statement that the applicant had not received the email. The applicant has not indicated that the means of service was ineffective or that it did not come to its attention.

[13] There is no contention before the Court that the service was not effective.

The applicant's case

[14] The applicant's case, rather, is that service via email is legally impermissible. The applicant's case is that: "the issue in dispute is a question of law, whether there was proper service in the context of Rule 4(1)(a) of the Uniform Rules read together with item 5 of the Judge President's Directive."[7] The applicant makes two submissions in this regard.

[15] First, service by email is not in accordance with Rule 4 of the Uniform Rules of Court. The applicant contends that nothing short of service by the Sheriff is acceptable. The applicant provided no legal basis for this submission. The applicant failed to produce any case law that supported this legal position. The position is at odds with the provisions of Rule 6(12) and the Directive. Rule 6(12)(a) specifically permits a court to dispense with service as provided for in the rule and to dispute of a matter in terms of such procedure as it deems fit.

[16] An urgent application is an application in terms of rule 6(5) and the provisions of the subrule apply to such applications subject to the qualification that an applicant may, to the extent that is necessary in the particular circumstances, deviate from the rules without asking prior permission of the court. The applicant must, of course, ask that non-compliance[8] with the rules be condoned. If the applicant requires the operation of any other rules to be dispensed with, such as rules relating to the service of any order made, an application and a case must be made out for dispensing with them.

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[7] Applicant's written submissions para 15

[8] RS 18, 2022, D1-86B

[17] Furthermore, the contention is unworkable in the context of urgent proceedings. The argument also ignores the Court's discretion in relation to service and the principled issue at play whether service was effective.

[18] The applicant's second argument, is that service was legally defective as it failed to comply with item 5[9] of a Directive of this Court.[10] The applicant's argument is that the import of item 5 of the Directive is that the first respondent could only serve via email if the parties had agreed to service via email.[11]

[19] The applicant's interpretation of the Directive is that service via email is conditional on an agreement by the parties. The applicant submits: "It is therefore clear that absent the agreement between the parties and no attorney on record, the only available form of acceptable service is that as provided for in terms of rule 4(1)(a)(v). "[12]

[20] The Directive does not create this condition. The Directive states that if there is agreement to serve via email, then "ipso facto" service through email will be condoned. The Directive does not state the inverse: that without agreement service through email will not be condoned.

[21] The applicant's case hinges on the inverse of the Directive - that absent an agreement there is no valid service via email. This is not what the Directive provides. Nor could the Directive provide that agreement is a requirement for service in urgent matters as that is not a requirement in Rule 6(12). The Directive does not prohibit service via email absent agreement in the context of urgent matters.

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[9] Item 5 provides:

> "Service of process in all urgent matters shall comply with the rules of court. Where agreement can be reached by the representatives of all parties to vary the requirements of the rules to facilitate a wholly electronic exchange of papers, condonation shall be granted ipso facto". [My emphasis]

[10] Dated 25th March 2020 titled 'Judge President's Directive – RE: Special Arrangements to Address COVID-19 Implications for All Litigation in the Pretoria and Johannesburg High Courts The applicant contends that this directive doesn't vary and/or substitute the requirements of rule 4(1)(a)(v), but rather, directs compliance with the rule, with the exception that, should the parties reach an agreement to facilitate a wholly electronic exchange of documents, the court shall ipso facto condone such an agreement.

[11] The applicant contents that the import of the directive is that absent the agreement between the parties and no attorney on record, the only available form of acceptable service is that as provided for in terms of rule 4(1)(a)(v).

[12] Applicant's written submissions para 25

[22] The applicant has cited four cases as authority for the proposition that service by email is not legally permissible. The cases are not helpful. First, *Esau v Debtsafe and Others; Shingange v Mare t.a Debt Rescue and Others*[13] deals with service in the unopposed court, not the urgent court where rule 6(12) applies. Second, *Investec Property Fund Limited v Viker X (Pty) Limited and Another*[14] deals with service on someone who was residing in Italy and the Court held that the core issue to decide is whether or not service was effective.[15] Three *Mutebwa v Mutebwa*[16] dealt with a case where factually the summons were not served.[17] Fourth, the case *Roux and Another v Groenewald and Others*[18] where the application was served on an email address that was no longer in use and the Court was not persuaded that there had been effective service.

[23] The applicant's case, that it was legally impermissible to use electronic service, has not been made out.

Respondent's case

[24] The first respondent invited the court to find that the proceedings are moot as the tender will be completed before the appeal against the review application is heard by

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[13] (85651/2017; 85650/2017) [2018] ZAGPPHC 741 (10 April 2018) which provides for the submissions that "our practice directives do not address service by email" and "the authorities are clear that the reference in sub-rule (1) to any document initiating application proceedings refer to notices of motion issued under the provisions of Rule 6 and Rule 6 of the Rules of the Supreme Court of Appeal".

[14] (2016/07492) [2016] ZAGPJHC 108 (10 May 2016) at paragraph 11 stated as follows:

> "If proceedings have begun without due notice to the defendant, the subsequent proceedings are null and void, any judgment is of no force and effect and may be disregarded without the necessity of a formal order setting it aside. If a summons had not been served on a defendant, a subsequent judgment may be set aside in terms of rule 42(1)(a)".

[15] Id at para 12: " However, in the present matter the second defendant suffers no prejudice. The service of the summons was effective."

[16] (2001)1 1 All SA 83 (Tk)

[17] The part relied on by the applicant is paragraph 23:

> ""The issue of non-service goes to the root of the validity of the proceedings before Kruger AJ. It has been held in the past that a proper service of the summons commencing an action is an act necessary for the defendant's due citation and such citation constitutes the foundation of the proceedings. Rule 4 of the Rules of Court lays down in clear terms the mode in which service should take lace and it is important to see to it that the directions laid down in the rule are adhered to. Second respondent's failure to serve the summons on the applicant rendered the proceedings wherein the order of 25 November was ranted null and void ab initio (Dada v Dada 1977 (2) SA 287 (T) at 288CD)."

[18] (18813/2020) [2020] ZAGPPHC 207 (3 June 2020)

the Court of Appeals. To make a determination on mootness would require information before the Court regarding the stage of the completeness of the tender. The Court does not have this information and is not in a position to make this determination.

[25] The first respondent also requested the Court to refer to oral evidence a dispute[19] regarding the service of the application. The Court has to consider whether there is a factual dispute on the papers relevant to the issue it has been requested to determine. The case the applicant requested the Court to consider was whether it was legally impermissible to serve via email in the circumstances of this case.

[26] The applicant's case was not that there was no effective service, to the contrary, the applicant does not unequivocally state that it did not receive the application. The highest the deponent states the applicant's case is -

> "However, the above proceedings took place without the knowledge and participation of the Applicant."[20]

[27] Not having knowledge that the proceedings were taking place is not an allegation that disputes the email was received. In fact, at no stage does the applicant state it did not receive the application. In fact, the applicant pleads around this fact -

> "**The Applicant has not received service** of any document initiating the application proceedings **effected by the sheriff** by delivering a copy thereof to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction.
>
> **On the basis** that the Applicant did not receive the application, no notice of intention to oppose was filed and the Applicant didn't participate in the proceedings."[21]

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[19] The basis for the dispute as explained by the first respondent is that -

> "CSFS' case is that Phepha had known all along of the application that had been instituted and in which Phepha was cited as a party. CSFS's case is that Phepha has purposively refrained from opposing such application and should, for that reason, be non-suited. In order to assist CSFS to prove that Phepha had knowledge, CSFS asks that the application be referred to evidence. Mr Magagula must be cross-examined in respect of his "grapevine" and knowledge and the months and months of inaction
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> Phepha is vague about how it came to know in November 2020 about the application. It refers to the proverbial "grapevine" as the source of the information."

[20] Founding Affidavit at para 27

[21] CL1-16 paras 48 and 49 of the founding affidavit

[28] The applicant qualifies, more than once, the statement that it had not received service as service on the basis that the application was not served by the Sheriff.

[29] The first respondent, in detail, sets how it had served the application on email. Yet, not once does the applicant dispute it received the electronic service or that it was not effective. Rather than a unequivocal denial in the replying affidavit, the applicant again responds vaguely. The replying affidavit contains vague statements that challenges the legality of service but does not deny that the email was sent and vitally does not state it was not received.[22]

[30] In fact, the replying affidavit contains an implicit acknowledgement that the email was in fact received, but that the applicant does not view it as legal service -

> "The contents of this sub-paragraph are disputed. I wish to state in no uncertain terms that the mere fact that service of court process (appears) to have been effected electronically does not necessarily mean that it was received by the intended recipient, viz Phepha. This is one of the reasons why the said Judge President's Directives specifically imposed an obligation on parties to reach consensus before service can be effected by way of email. In the circumstances, there is no proof whatsoever that agreement was reached by parties. For these reasons, **Phepha submit with respect that it did not receive service thereof albeit the email**."[23]

[31] The implication of this allegation is that service did not take place (as it would require the Sheriff to have effected service) although the email was received. The applicant's pleaded position is that it was not served even though it implicitly concedes it received the email. Counsel for the applicant did not provide an alternative interpretation of this allegation when asked by the Court.

[32] The applicant's case is not that factually the application was not served, but rather that service via email is improper. Whilst there is some strategic pleading on behalf

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[22] CL 5-11 replying affidavit para 8.3 provides -

> "It must be emphasised that neither agreement was reached between Phepha and CSFS in respect of electronic service as envisaged in paragraph 8.2 above nor did CSFS took any reasonable steps to ensure that Phepha was placed in receipt of the alleged electronic service. Therefore, in the absence of any agreement inter partes and acknowledgement of email service on the part of Phepha it will not be unreasonable (in light of the prevailing circumstances at the time) to infer that service was not effected to Phepha"

[23] CL 5- 13 para 11 of the replying affidavit

of the applicant, it never states that service was ineffective or that it did not receive the email. The applicant has not pleaded a case in factual opposition to the first respondent. To the contrary, the applicant has implicitly conceded that the email was received.

[33] In these circumstances, where the applicant has not asked the court to determine a factual dispute and has not pleaded a version that is in conflict with the first respondent's version, there is no need to refer the matter to oral evidence.

Order

[34] The Court has been invited to grant costs on an escalated scale as the applicant has been lax in the extreme in its dealing with this matter. The applicant was aware, even on its own express version, of the proceedings for months, and did nothing. The applicant has been dilatory. However, the applicant has sought condonation and explained this delay.

[35] In the result, the following order is granted:

1. The application is dismissed with costs.

I de Vos
Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	**ADV N THABALALA**
Instructed by:	Macbeth Attorneys Inc
Counsel for the Respondent:	**ADV Q PELSER SC**
Instructed by:	Matumba Attorneys
Date of the hearing:	03 August 2022
Date of judgment:	24 August 2022