IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Appeal Case Number: A119 / 2022

In the matter between:

TEODORIN NGUEMA OBIANG Appellant

and

DANIEL WELMAN JANSE VAN RENSBURG First Respondent

SHERIFF, CAPE TOWN WEST Second Respondent

THE REGISTRAR OF DEEDS WESTERN CAPE Third Respondent

Coram: Le Grange J *et* Wille J (majority) *et* Thulare J (dissenting)

Heard: 16 January 2023

Delivered: 3 February 2023

JUDGMENT

WILLE, J: *(majority)*

Introduction

[1] This is an appeal piloted against dismissing the appellant's application for a rescission of judgment. The appellant is the vice president of the Republic of Equatorial Guinea. The first respondent was imprisoned at the command of the appellant in Equatorial Guinea. He was incarcerated for four hundred and twenty-three (423) days at a prison in Equatorial Guinea.[1] The second and third respondents take no part in these proceedings.

[2] The first respondent instituted action proceedings and obtained a judgment against the appellant for damages for his unlawful incarceration, torture and assault in prison. In dealing with the application for rescission of judgment, the court of first instance held that the appellant deliberately turned his back on the extensive then-current litigation by terminating the services of his then-attorneys of record. The appellant should have appointed new attorneys and only did so after eleven (11) months and adopted a head-in-the-sand approach to the action proceedings which were continuing against him. The appellant resurfaced when a warrant was executed upon his immovable properties situated in Cape Town.[2]

[3] The appellant's application for rescission of judgment consisted of two parts, namely: (a) he sought a rescission of the order in terms of which the appellant's defences to the action proceedings were struck out, and (b) he sought a rescission of the order awarding damages in favour of the first respondent in the total sum of R39 88 2000,00 plus interest and costs.

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[1] At 'Black Beach' prison in Malabo.
[2] A property in Clifton on the Atlantic Seaboard and in Bishop's Court in the Southern Suburbs.

[4] In addition, the appellant applied to have specific allegations and annexures struck out from the first respondent's answering affidavit, which affidavit was filed in opposition to the application for the recission of the judgment.[3]

Overview

[5] After the hearing of the rescission application (in the court *a quo*) and the second application to strike out, an order was granted in the following terms, namely: (a) that the appellant's application to rescind the order made in connection with the striking out of his defences was dismissed; (b) that the appellant's application to rescind the order made in connection with the judgment and damages award granted against him was dismissed; (c) that the appellant was partially successful in his second striking-out application in that some of the averments in the first respondent's answering affidavit were struck out with the balance to remain, and (d) that the appellant was ordered to pay the first respondent's costs.

[6] The appellant sought leave to appeal, which was granted on limited grounds. The appellant took no issue with any of the findings dealing with the common law grounds of the application for the recission of the orders. The appellant squarely challenged the results of the rescission application in terms of the court rules.[4] The appellant now contends for the scope of his appeal to include an appeal against the order made in connection with the application to strike. This was impermissible as leave to appeal in this connection was not granted, and this latter issue was not before us on appeal. This much was wisely conceded by the appellant's counsel at the outset of the hearing of the appeal.

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[3] For the purposes of convenience this will be referred to as the second striking out application.
[4] Uniform Court Rule 42(1)(a).

[7] After that, an application for a stay of the execution proceedings against the appellant's two (2) immovable properties was launched by the appellant, pending the outcome of these appeal proceedings, and this stay was granted.

[8] The appellant's non-compliance with the court rules featured heavily in this appeal. The first respondent argued that the appeal piloted by the appellant had lapsed. Despite being acutely aware of his failure to comply with several court rules regarding the prosecution of his appeal, the appellant initially failed to apply for condonation. It is trite that it is incumbent upon a party who knows that a court rule has not been complied with to seek condonation for such non-compliance without delay.

[9] The first respondent advances the following irregularities and difficulties with the appeal proceedings. Firstly, the appellant's notice of appeal was not delivered in time. Secondly, the appellant did not comply with the period for delivering the record of appeal. Thirdly, the appellant failed to comply with the correct format required for an appeal record, which requires every tenth line on every page to be numbered. Fourthly, the appellant failed to lodge the necessary security for the first respondent's costs of the appeal. Fifthly, the appellant's heads of argument were not filed timeously. Finally, the appellant's attorney had neglected to file a power of attorney authorising his attorney to prosecute the appeal.

[10] These alleged defects initially seemed to have primarily been left uncured save for the fact that in the appellant's practice note, he refers to an application for condonation concerning certain aspects intended to regularise his intended appeal and also indicates that 'other' heads of argument would be filed, once further affidavits had been exchanged. A belated condonation application was subsequently filed to deal with the procedural difficulties regarding the appeal and the record filed. Condonation was also sought for the late filing of the appellant's heads of argument.

Background

[11] Before the action proceedings commenced, the first respondent attached the appellant's immovable properties to found jurisdiction. A final order of attachment was obtained in connection with one of the appellant's immovable properties.[5] The appellant unsuccessfully attempted to appeal this attachment order. The appellant's application for special leave to appeal was refused, and the appellant's application to our apex court for leave to appeal was also dismissed.

[12] The appellant should have made complete 'documentation discovery', which he did not do, leading to his defences being struck out.[6] Of prime importance is the fact that the order compelling the appellant to file his discovery affidavit was made before the mandate of his erstwhile attorneys of record was terminated at the instance of the appellant.[7] More importantly, this order was granted by agreement between the parties. Put another way, the appellant undoubtedly knew that he had to file his discovery affidavit by 26 June 2020. This he did not do. No explanation was offered for this failure. Approximately a month later, after this period had expired and unbeknown to the first respondent, the appellant terminated his mandate with his then attorneys of record.

[13] It is common cause that the appellant was aware that his former attorneys of record did not represent him since his unilateral termination of their services. This is significant because the appellant contends that the first respondent should have been aware that the appellant was an unrepresented foreigner. This in the context of the appellant terminating his mandate with his erstwhile attorneys and not *vice versa.*

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5 The immovable property situated in Clifton on the Atlantic Seaboard.
6 The first striking-out application.
7 The order to compel discovery was granted on 19 June 2020.

[14] Some cause for concern is that the appellant, in his letter of termination, refers to the actual appointment of his new lawyers. However, he simply failed to do this for about eleven (11) months. The appellant now advances that he was hoping to appoint attorneys. This is in total contrast to the terms of his letter, which stated that he had already appointed a new legal representative. As a direct result of the appellant's termination letter, the appellant's erstwhile attorneys of record filed various notices of withdrawal.[8] They indicated that the 'Embassy of Equatorial Guinea' was the appropriate reachable address for delivery of further court processes on the appellant. Reference was also made explicitly to the 'Second Secretary' at the embassy as the person through which the appellant would be reachable, as stated in the notice of withdrawal.[9] The appellant's erstwhile attorneys of record also sent an email to no less than three (3) email addresses at the embassy in July 2020, attaching the notices of withdrawal as attorneys of record and requesting (as a matter of urgency) which attorneys would be dealing with the litigation on behalf of the appellant. The appellant does not engage with this at all.

[15] Out of caution, the appellant's erstwhile attorneys also communicated with the 'Director General of Foreign Security' of Equatorial Guinea, recording their withdrawal as attorneys of record and again sought the identity of the new attorneys of record who would be acting on behalf of the appellant.[10] The first striking-out application was delivered to the embassy following the reachable address provided and served on the appellant's erstwhile attorneys of record. It was also sent via email to the address provided by the appellant's erstwhile attorneys of record, as indicated in their notice

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[8] This on 23 July 2020.
[9] The notice of withdrawal listed the physical address to be 4[…] F[…] Street, C[…], Pretoria.
[10] Again, this is never dealt with or engaged with by the appellant.

of withdrawal as attorneys of record.[11] The appellant attempted vainly to explain that these latter notices may or may not have come to his attention.

[16] The appellant says nothing more and nothing less. This issue bears further scrutiny as a warrant of execution against the appellant's immovable properties was brought to his attention on the same day that service thereof was effected on the same addresses provided by the appellant's erstwhile attorneys of record. Again this is not engaged with and left unexplained by the appellant.

[17] The first striking-out application was unopposed, and the appellant's defence was struck out.[12] The judgment sought by the first respondent was postponed for hearing to a date to be determined by the registrar of the court. This last order was similarly served at the last known address as provided by the appellant's erstwhile attorneys. After that, the registrar issued a notice of set-down, and the matter was set down for hearing in March 2021. This latter notice was also served at the last known address as provided by the appellant's erstwhile attorneys.

[18] In addition, an associate of the first respondent's attorneys sent an email confirming service, among other things, of the notice of set-down. Moreover, certain amendments were effected to the first respondent's claims. Since no objection was received, the appropriate amended pages were similarly served and filed at the appellant's last known address. This aspect is of vital importance. An admitted attorney from the first respondent's offices personally served on the delegated embassy official the notice of intention to amend with the proposed amended pages as early as 9 February 2021.[13] This attorney deposed to a service affidavit in this connection. The

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[11] This is also not engaged with by the appellant.
[12] This was served on the correct reachable address, on the appellant's erstwhile attorneys of record and via email.
[13] This was about four (4) months prior to the trial action.

delegated embassy official signed for the court process and indicated that she was the appellant's personal assistant and that she bore knowledge of the matter. The proposed amendment highlighted the potential liability of the appellant in the sum of R 70 200 000,00.[14]

[19] The trial action commenced, and a judgment was delivered in June 2021. A copy of the judgment was similarly emailed to the last known address provided, which eloquently summarised the narrative detailing the sequence of events from the initial unlawful arrest of the first respondent, his multiple periods of detention and all the attempts to secure the first respondent's release from his unlawful incarceration.

[20] This judgment also referenced the *sequelae* of the first respondent's torture and detention, including his inability to work, resulting from the post-traumatic stress syndrome from which he suffers. The appellant pinned his hopes on a single return of service by the sheriff early in the proceedings indicating that the sheriff affected service on the embassy at a different address on the same street in Pretoria.[15] The sheriff does say that service was at the correct embassy and correctly identifies the person upon whom he served the court process. I am of the view that this is a red-herring and is opportunistic, to say the least. This, in my view, makes no difference at all.

Execution

[21] The first respondent initiated execution proceedings against the appellant's two immovable properties. Upon receipt thereof, the appellant had no problems urgently instructing his current attorneys of record. Service was effected in essentially the same manner as all the prior procedural notices were served and filed. This level of alacrity

[14] The record contained no less than four (4) service affidavits of a similar nature deposed to by officers of the court.
[15] The sheriff went to 3[…] F[…] Street, C[…], Pretoria and served on the Secretary of the identified Embassy.

casts some serious doubt upon the appellant's versions about his alleged failure to receive a host of the prior procedural notices, including the notice of set-down for the hearing. Curiously, the appellant's erstwhile attorneys were again appointed as the local attorneys of record and remained so appointed even for this appeal. In addition, many emails were sent to the embassy email addresses, which are left unexplained by the appellant.

Consideration

[22] A court cannot set aside or alter its final order as a general proposition. This must be so because once a court has pronounced a final judgment, it becomes *functus officio* and its authority over the subject matter ceases. Further, as a matter of pure logic, is the principle of the finality of litigation.

[23] This principle of finality has been expressed as follows in our apex court:

'...Like all things in life, like the best of times and the worst of times, litigation must, at some point, come to an end…for the principles of legal certainty and finality of judgments are the oxygen without which the rule of law languishes, suffocates and perishes…'[16]

[24] No doubt, there are limited exceptions to this rule created by legislative intervention. The appellant has wisely abandoned his reliance on the common law grounds for the rescission of the judgment of the court of the first instance. Further, leave to appeal was only granted concerning a specific rule created by legislative intervention. In this connection rule 42(1)(a) indicates as follows:

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[16] *Zuma v The Secretary of the Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28. ("*Zuma"*).

'….(1) The court may….rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby….'

Absence

[25] Our apex court in *Zuma* emphasised that one of the most important factors to be taken into account in the exercise of this residual discretion, given to a court when dealing with an application for rescission, was to determine whether the applicant had demonstrated that the 'default' was neither wilful nor due to gross negligence. If this cannot be demonstrated, the court should not come to an applicant's assistance. The applicant's specific conduct in this connection bears further scrutiny and this involves a number of discrete enquiries.

[26] The first enquiry is whether the applicant was 'legally' absent from the court when the matter was determined. Undoubtedly, the appellant's ongoing pattern of defiance and obstruction portrays an assumption that he is somehow above the law, a sentiment alien to our constitutional order. The words *'granted in the absence of any party affected thereby'* must, as a matter of logic, exist to protect litigants whose presence was precluded rather than those whose absence was elective.

[27] The appellant did not work in ignorance of the proceedings against him but consciously turned his back on the proceedings. Shortly before his erstwhile attorney's mandate terminated, an order was granted compelling the appellant to file a discovery affidavit. After that, in a letter, the appellant indicated to his erstwhile attorneys that he had found new attorneys whom he suggested would better defend his interests than his former attorneys. In these circumstances, the appellant acquired a duty of vigilance.

[28] This duty of vigilance has been eloquently formulated as follows:

'...A litigant is not entitled to sit back indefinitely without proactively enquiring as to progress in the matter or preparation for trial. On the applicant's version, he made no attempt to speak to his former attorney of record or any other attorney until he realised for the first time that default judgment had been granted against him...'[17]

[29] The appellant primarily advances that he was ignorant of the law and that his staff at the official embassy let him down. He also alleges that his attorneys left him in the lurch. Further, as far as he was aware, he may have received the striking-out application from his erstwhile attorneys. This is a highly vague and ambiguous allegation. Put in another way, this either did or did not happen.

[30] His erstwhile attorneys could have efficiently handled this in their affidavit filed of record. For the appellant to make out a case for rescission, the appellant must come forward with all the necessary affidavits from the relevant core third parties supporting his case. By elaboration, at one stage and many months before the trial action, the appellant received a 'consolidated bundle' consisting of a host of procedural notices, expert notices, and expert summaries. The appellant did nothing and was obliged to do something or speak in the circumstances.

[31] Our jurisprudence dictates that there is no place for equivocation and the withholding of readily available information in a rescission application. The appellant must play open cards with the court and reveal his full hand. The appellant was fully aware that the relevant address of the embassy was stipulated in the withdrawal notices.

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[17] *Pikwane Diamonds (Pty) Ltd v Anro Plant Hire (Pty) Ltd* 2019 JDR 1861 (GP) at para [38].

[32] The position adopted by the appellant is strikingly similar to that adopted by the main character in the celebrated novel '*The Catcher in the Rye'*.[18] The appellant resolves not to tell the whole story, which mixes one up more than you were before. I say this because the appellant claims uncertainty as to whether the embassy officials forwarded to him the court documents received by them from time to time. Surprisingly he suggests that such documents may have been so forwarded and that he regrets that these documents were not brought to his attention. Thus, he was reachable at the address provided.

[33] These mere averments, in isolation, are entirely unsatisfactory. Many emails and documents were sent and delivered to the various officials at the embassy. No explanations regarding what was done with these emails and the documents so delivered were ever forthcoming. Further, no affidavits were filed in support of the appellant regarding how the officials at the embassy dealt with these emails and documents.

[34] In this regard, the court *a quo* found that the officials at the embassy were silent on whether or not they received the application to strike out the appellant's defence. They were also silent on whether or not they received the notice of set down delivered to the embassy. This notwithstanding, when the warrant of execution was brought to the appellant's attention, the appellant elected to respond without delay. Undoubtedly, this was so because the appellant made a positive election not to ignore the warrant of execution.

[35] By elaboration, there are no facts to show that the service of the application to strike out and the notice of set down should be declared not to be good service. There is abundant authority supporting the principle that a litigant cannot benefit from his

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[18] *J D Salinger*, 1951.

negligence. It was not open for the appellant to adopt a supine position and sit passively by while the litigation unfolded around him for almost one (1) year.

[36] In these circumstances, the appellant was obliged to approach the first respondent's attorneys or appoint his attorneys (as he said he had done), to establish the status of the pending litigation against him.[19] It would have been a relatively simple exercise and a crucial one bearing in mind that two (2) of his immovable properties were being held under attachment by the first respondent.

[37] In my view, the appellant's failure to do anything about this matter for nearly one (1) year did not render him absent as envisaged by the legislative intervention rule. In this connection, the court of first instance correctly held that the appellant:

'…elected not to appoint a new legal representative nor to stay abreast of developments in his active litigation, it can be said that he seeks to rely on his own conduct (or lack thereof) to plead the "absent victim" and thus to scupper the legal process, which in all other respects has been carried out with the utmost degree of regularity…'[20]

[38] Put in another way, the issue of presence or absence for the rule has less to do with the actual presence of the appellant and more with the procedures followed to ensure the appellant's presence. None of the procedures followed by the first respondent had the effect of precluding the appellant's presence. To the contrary, all reasonable steps were taken to encourage the appellant to participate fully in the proceedings.

Erroneous

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[19] *Scholtz and another v Merryweather and others* 2014 (6) SA 90 (WCC) at para [103].

[20] The judgment of Judge Slingers at para [21].

[39] The appellant advances that the orders against him were erroneously granted. The rescission rule is used to rescind judgments granted due to a mistake in the proceedings. Ultimately, an applicant seeking to do this must show that the judgment against which they seek a rescission was erroneously granted because:

'...there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment…'[21]

[41] The core complaint by the appellant is that he did not receive notice of any court process or document following the termination of his erstwhile attorney's mandate to represent him. The appellant contends that after this termination by him, the first respondent was obliged to effect service on him strictly following the court rules.[22] It is necessary to consider the provisions of the court rule in this connection as this is the only peg on which the appellant hangs his coat.

[42] Rule 16(2) provides for the scenario where the mandate of an attorney is terminated as follows:

'...Any party represented by an attorney in any proceedings may at any time, subject to the provisions of rule 40, terminate such attorney's authority to act, and may thereafter act in person or appoint another attorney to act in the proceedings, whereupon such party or the newly appointed attorney on behalf of such party shall forthwith give notice to the registrar and to all other parties of the termination of the former attorney's authority, and if such party has appointed a further attorney to act in the proceedings, such party or the newly appointed attorney on behalf of such party

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[21] *Selota Attorneys and Another v ONR and Others* [2020] 4 All SA 569 (GJ) (21 August 2020), at para [7].

[22] This in terms of court rule 4 and/or rule 5 and/or by edictal citation.

shall give the name and address of the attorney so appointed…'

[43] Of crucial importance is the fact that the appellant terminated his erstwhile attorney's mandate. This is on 16 July 2020. Pursuant to this termination, the appellant was obliged to elect whether to act in person or appoint another attorney. According to the appellant, he did not, for a period of eleven (11) months, appoint a new attorney despite his letter, which said he had already appointed alternative legal representation. This he does not engage with or explain in any significant manner.

[44] This is precisely why the court of first instance held that the appellant needed to set out reasons and explanations in his founding affidavit why he took no steps to appoint new legal representatives following the termination of the mandate of his erstwhile attorneys'. The only possible explanation by the appellant surfaces in reply where he alleges that he ultimately chose not to appoint new attorneys and proceeded unrepresented. This is highly improbable and difficult to believe as his two (2) luxurious immovable properties remained under threat and attachment during this time. The appellant remained obliged to stipulate an address in his notice of termination for service of all future documents in the proceedings.

[45] Moreover, rule 16(3) specifically caters for the situation where a party does not appoint a new address in these circumstances as follows:

'…Upon receipt of a notice in terms of subrule (1) or (2), the address of the attorney or of the party, as the case may be, shall become the address of such party for the service upon such party of all documents in such proceedings, but any service duly effected elsewhere before receipt of such notice shall, notwithstanding such change, for all purposes be valid, unless the court orders otherwise…'

[46] Thus any service duly effected by the first respondent elsewhere before receipt of the notice from the appellant would be valid unless the court ordered otherwise. This must be so. Otherwise, a litigant could unilaterally change the address for service without notice to the other litigants, thereby rendering himself immune from service by unilaterally changing his attorney from time to time and at a whim. The effect would be to unravel the framework created under the rules to allow litigation to continue smoothly if a litigant elected to switch jockeys midstream. This as a matter of pure logic could never have been the intention for the existence of the applicable court rule.

[47] Notwithstanding the appellant's termination of authority of his erstwhile attorneys, they correctly performed acts necessary to prevent harm to the appellant by providing a reachable address for the appellant.[23] In their notices of withdrawal, the appellant's erstwhile attorneys provided an address where the appellant was reachable. I am confident that service on the address stipulated in the withdrawal notices constitutes service duly effected elsewhere for three (3) discrete reasons.

[48] Firstly, the appellant was fully aware of the embassy address stipulated in the withdrawal notices. The appellant argues that this was done without his input or instruction. This explanation is made in isolation without supporting evidence, even though the appellant received the withdrawal notices. Moreover, an error caused by the internal affairs of the appellant's erstwhile attorneys is not a mistake in the proceedings. Manifestly, this is not a procedural irregularity and cannot be a mistake.[24]

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[23] Unidroit Principles of International Commercial Contracts (Article 2.2.10).

[24] *Van Heerden v Bronkhorst* 2020 JDR 2363 (SCA) at para [18].

[49] Secondly, the embassy official cited as the contact person in the withdrawal notices was a link in the communication channel to the appellant. Accordingly, service on her was a method of bringing the other process to the appellant's attention. This view is fortified by the service of the warrant of execution which was brought to the appellant's attention within twenty-four (24) hours.

[50] Thirdly, when the judgment was granted against the appellant in connection with the claims founded in delict, the court was manifestly alive to the fact that embassy officials were the extant links in the communication channel to the appellant. Even though the appellant's erstwhile mandate was terminated and they did not withdraw of their own volition, they nevertheless filed notices of withdrawal, explicitly drawing the appellant's attention to the fact that he was obligated to send out a notice in terms of the court rules.

[51] The rescission court of the first instance found that the appellant had disputed that he received the notices of withdrawal of attorneys of record. It matters not, as it was he who terminated his attorney's mandate; therefore, he was at all times aware that they had ceased acting for him. There was no reason for the first respondent to doubt that the delivery of further process on the embassy officials would not come to the appellant's attention. Thus, there was no reason to seek any further assistance from the court.

[52] The appellant concedes the default of his obligations under the court rules but, in the same breath, wishes to leverage this delinquency to his advantage to the manifest detriment of the first respondent. The service of the process was not geared at initiating

proceedings as the appellant had been party to this litigation for more than five (5) years by the time he terminated the mandate of his erstwhile attorneys.[25]

[53] The principle that an applicant for rescission may not shift the blame to his attorney also applies to errors arising from non-compliance with the court rules. The general principle is that parties cannot avail themselves of the fact that their attorney needs to comply with all the requirements of the rules.[26]

[54] In summary, the appellant contends that subsequent court papers should have been directly served on him from the termination date of his erstwhile attorney's mandate by him. Having received none, he still needed to engage another attorney despite his unequivocal statement in his letter of termination that he had done so. This was not attended to for eleven (11) months and only when the warrant of execution was served. .

[55] This shield is very similar to the shield raised in *Mkwananzi*. [27] On this score, it was held as follows:

'...If the applicant terminated his mandate of the attorney…he should nevertheless have enquired… as to what the status of the claim against him was. Applicant does not, in any way, explain his own omission not to have taken steps in the appointment of a new attorney. He simply accepted that papers would in future be served upon him. I am of the opinion that the applicant has not succeeded in showing, on a balance of probabilities, that he was not acting in a manner which could only be described as totally indifferent to the consequences of what was happening to the case against

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[25] *Tshabalala and Another v Peer* 1979 (4) SA 27 (T)

[26] *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) (1038D-H)

[27] *Mkwananzi and Another v Manstha and Another* [2003] 3 All SA 222 (T).

him…'[28]

Discretion

[56] The court has the discretion not to order a rescission under the legislative rule. As pointed out in our apex court, the wording of the rule postulates that a court may rescind or vary its order. The rule is an empowering provision, and the court's discretion must be exercised judicially. The court retains its inherent jurisdiction.

[57] One factor a court will consider in exercise of its discretion is the prejudice accruing to the first respondent if rescission is granted. The granting of the rescission sought by the appellant will run up substantial further costs in addition to the long series of appeal costs connected to the initial attachment to confirm jurisdiction which are estimated to be in excess of millions of rands.

[58] Service is a matter within the discretion of the court. This was made abundantly clear in *Kemp*[29], where service was affected by serving the summons on the security guard of a residential complex as the sheriff could not obtain access to the complex. The court found that although the service was not strictly in terms of the rules, it was not automatically void.

[59] After discussing the difference between no service and defective service, the court found that even defective service could be condoned and that, given the arrangement that the defendant lived in a security complex where access to his specific front door was blocked, it was a case where defective service should be condoned. The court noted that handing the summons to a security guard who is familiar with the residents is much more likely to be effective than affixing the summons to an outside

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[28] *Mkwananzi and Another v Manstha and Another* [2003] 3 All SA 222 (T) at para [25].

[29] *Kemp v Knoesen* [2007] JOL 19194 (T).

gate or door. In this case, most of the court processes were delivered to the embassy official, who stated that she was aware of the litigation between the parties. This was good service following the rules and our jurisprudence. The reasoning in *Kemp* has also very recently been re-affirmed in *Sibeko.*[30]

[60] The court adjudicating the first striking-out application and the court adjudicating damages in the action proceedings exercised their discretion by condoning (consciously or unconsciously) any defect that there may have been in the service because they granted the default orders. Therefore, the orders were not granted erroneously because the service needed to be validated. While the first respondent does not concede that any service was defective, even if it was defective, it was not invalid.

[61] It should be condoned, given the circumstances of the appellant's non-compliance with the court rules. No formal condonation application is required to condone any defects in service. Service is at the court's discretion, and the court has the inherent jurisdiction to regulate its process. Whether or not the appellant was present at the embassy at the time of service is irrelevant because the service was at the embassy address and on the designated embassy official. There is nothing suspicious in the manner of service of the other process by the first respondent, this after the termination of the services of the appellant's erstwhile attorneys of record at the instance of the appellant.

[62] It must be stressed that the appellant tries to cast doubt on whether he received the first striking-out application by saying that he may or may not have received it.

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[30] *Sibeko vs Shackleton Credit Management (Pty)Ltd and Another* (3664/2015) [2022] ZAGPJHC 1036 (21 December 2022).

There needs to be more. There is nothing advanced to doubt the first respondent's evidence, and the first respondent's version must stand.

[63] Simply put, the appellant cannot succeed in rescinding the extant orders because the rule is designed to correct an 'obviously' wrong judgment or order. All the previous orders in this matter must have been correctly granted within the meaning and scope of the rule. This must be so, mainly because there is no objective evidence on behalf of the appellant to gainsay this position which carries any probative weight.

Costs

[64] The appeal 'record' is unfortunate. It has been incorrectly put together and paginated with missing pages of documents, copies of unsigned affidavits and illegible documents. I mention but one document that raises an issue of concern. The appellant put up a document styled a power of attorney that consists of one page and is undated and unsigned.

[65] The document purports to be a power of attorney in favour of the appellant's current attorneys of record. The document is for the appellant's current attorneys of record to approach the Supreme Court of Appeal and the Constitutional Court on appeal. A better 'copy' was handed up to the court during the hearing, dated June 2021. This muddied the waters even further for the appellant. This is because these avenues of appeal had already been exhausted when the appellant (on his version) approached his current record of attorneys for the first time in June 2021 and signed a power of attorney. No explanation on this issue was forthcoming, and no supplementary affidavit or further note was filed to explain this anomaly. This is left entirely unexplained on the papers.

[66] The first respondent filed a substantive application to strike the appeal from the court roll based on the cumulative significant procedural defects and averred that the appeal had lapsed accordingly. The appellant countered this by filing a belated substantive application seeking condonation. At the inception of the hearing, it was agreed that the appeal should be disposed of without further delay, save that the first respondent reserved his rights to address these procedural defects under the flag of costs. Undoubtedly, the appellant sought to postpone his day of reckoning indefinitely through repeated default and strategic avoidance. Once these evasive tactics failed, he terminated the mandate of his attorneys. The appellant simply walked away from the lawsuit, with his two (2) multimillion-rand properties still under attachment.

[67] All of this is characteristic of what our courts have dubbed a strategy increasingly employed by litigants who, like the appellant, have the advantage of almost unlimited wealth at their disposal to fund their dilatory strategy in the hope that their opponent runs out of money.[31]

[68] Only once his two properties were on the verge of being sold in execution did the appellant suddenly reappear, appointing new attorneys to replace those he had terminated one (1) year before to apply for a stay of execution. The appellant seemed to place reliance on the alleged defects in the appellant's erstwhile attorney's notice of withdrawal. In my view, this was a red herring. I say this because the appellant terminated the mandate of his erstwhile attorneys, and the onus was on him and solely on him to comply with the court's rules. The appellant advanced a highly technical argument that the appellant's erstwhile attorneys of record filed a notice of withdrawal in terms of the old rules and not the new rules. This argument is difficult to follow as the only important part of the notice of withdrawal was the last known reachable

[31] The 'Stalingrad' strategy.

address of the appellant that was provided, coupled with gratuitous information given to him regarding the appointment of a new attorney of record.

[69] That having been said, the core issue in connection with costs remains the manner and form in which this appeal 'record' was compiled and presented, read together with all the numerous other defects raised in the application to strike the appeal from the roll. These cumulatively warrant a costs order on a punitive scale in respect of certain aspects of the litigation advanced by the appellant on appeal.

Order

[70] Thus, I would propose an order in the following terms, namely:

1. That the application to strike the appeal from the court roll is dismissed.

2. The appellant shall be liable for the costs of and incidental to the application to strike the appeal from the court roll (including the costs of two counsel, where so employed) on the scale between attorney and client, as taxed or agreed.

3. That the application for condonation is granted.

4. The appellant shall be liable for the costs of and incidental to the condonation application (including the costs of two counsel where so employed) on the scale between attorney and client, as taxed or agreed.

5. That the appeal is dismissed.

6. The appellant shall be liable for the costs of and incidental to the appeal (including the costs of two counsel where so employed) on the scale between party and party, as taxed or agreed.

WILLE, J

I agree, and it is so ordered.

LE GRANGE, J

THULARE, J:

[71] I have read the judgment of Wille J, and with respect, I am unable to agree only with terms 5 and 6 of his proposed order, which are simply the dismissal of the appeal and the order as to costs thereon. He has summarized the facts and as such I will deal with the facts in so far it is necessary for this judgment. It is apposite to start where he ends. In their article *"The sanctity of secrecy, the arbitrators' deliberations and the administration of justice",* Frank Snyckers SC and Daniel Sive said:

"There is a strong policy axiom in our legal culture that the products of the threatre of justice that carry the force of law, namely judgments, must speak for themselves and not be seen to comprise of elements other than what they contain." [*Advocate*, Volume 35, number 2, August 2022 at p. 29].

The authors refer to the Constitutional Court judgment in *Hellen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at para 126 where it was said:

"[126] Reasons for a decision are a crucial indicator to why a particular decision was taken. The light they shed on the decision far exceeds any light flowing from the record, which may merely be reflective of the information that was placed before the decision-maker. The record, in contradistinction to the reasons, does not show why, on the facts, a particular decision was taken. Unless, of course, a record incorporates reasons. The significance of reasons may be underscored with reference to a judicial process

pertaining to leave to appeal. Ordinarily an application for leave to appeal is not required to include the entire record of the proceedings but a copy of the judgment appealed against must be incorporated. This is because such judgment must contain the full reasons for the court's decision. And the validity of that decision is evaluated with reference to the judgment only. Usually it is not permissible for a judicial officer to augment the reasons in the judgment by pointing to a separate document."

[72] In a later edition, Tembeka Ngcukaitobi SC wrote:

"The essence of judicial functions is to protect and promote the Constitution. This is to be achieved by speaking forcefully, clearly and plainly in judgments. Ordinarily – and this is not an absolute rule – judges are not at liberty to defend or even to debate their decisions in public: "judges speak in court and only in court. They are not at liberty to defend or even debate their decisions in public. It requires little imagination to appreciate that the alternative would be chaotic." Arthur's Constitutional Court explained the need for public confidence in the judiciary: "In the final analysis it is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly; and where the judiciary cannot function properly the rule of law must die." Because of this, in political cases, judges must provide clear, logical reasons. Providing reasons is also about accountability to the political process. This means that a judge's decision must be accessible, deliberative and illustrate that the arguments have been seriously taken into consideration. Judges should not bend their judgments, the timing of their judgments, or their rules according to the prevailing political climate." [*The rule of law in times of political crisis, Advocate,* Volume 35, number 3 December 2022 at p. 66].

[73] The appellant terminated the relationship between him and his then attorneys of record on 13 July 2020. On 20 July 2020 the attorneys filed notices of withdrawal.

When the first respondent instituted his application for the striking out of the appellant's defences and served that application on the erstwhile attorney, he was simply kicking dust to becloud the manner of service. The first respondent was legally represented and his representatives ought to have been aware that the appellant's erstwhile attorneys were neither entitled nor obliged to accept service of any document in the case and that such service on the attorneys would not be valid and effectual service on the appeIlant [*Pugin v Pugin* 1963 (1) SA 791 (W) at 793H; *Barclays Bank D.C.O. v Van Niekerk* 1965 (2) SA 78 (O) at 78H-79A]. I am not aware of any logical explanation for this step, other than to becloud the question of service, deliberately, designed to acquire an advantage to which the first respondent is not entitled. He was busy with nothing.

[74] The further dust into the service question is kicked by the sheriff's return of service on the striking application before Dolamo J. The relevant parts of the return of service read as follows:

"IT IS HEREBY CERTIFIED:

That on 27 July 2020 at 14H00 at MARIA DEL PILAR SOLSONA HOMBRIA SECOND SECRETARY, EMBASSY OF EQUITORIAL GUINES, 3[…] F[…] STREET, C[…] PRETORIA GAUTENG being the place of employment of the Respondent a copy of the Notice of Motion Affidavit –Amish Chandrakant Kika, Annexure "A-J" was served upon MRS UNCHANA ABESO (MANAGER), after the original document was displayed and the nature of the contents thereof was explained to her. MRS ABESO apparently not less than sixteen years of age and apparently in authority at the Respondent's place of employment, accepted service in the temporary absence of the Respondent. Rule 4(1)(a)(iii)."

It is common cause that the address of the Embassy of Equitorial Guinea is at 4[…] F[…] Street, C[…], Pretoria. It is further common cause that the embassy is not the

appellant's place of employment. This return, without more, is problematic to qualify as duly effected service on the appellant.

[75] I will just highlight one material problem each with the order of Dolamo, J and judgment of Lekhuleni, J respectively. An elementary check on the internet, publicly accessible, showed that 3[…] F[…] Street, C[…], Pretoria is a private house, a residential dwelling in the same street and not far from 4[…] F[…] Street, C[…], Pretoria which is the address of the Embassy of Equatorial Guinea. If Dolamo J condoned service at this private dwelling as service on the appellant, he did not have a right to remain silent under the circumstances. He had a reputational duty to himself and a Constitutional duty to other Judges and the Republic of South Africa, on whose behalf he spoke as an arm of the State, the Judiciary, to articulate his reasons for such a conclusion. On the other hand, on 7 January 2021 the first respondent caused the Registrar of the High Court to issue a notice titled: "NOTICE OF SET DOWN (EXCEPTION)" for Monday 8 March 2021 at 10H00. Nothing on this notice alerts anybody that this is a set down for the hearing of the main action. The evidence before us showed that after service on the erstwhile attorneys of this notice, they were taken aback about a set down of an exception and actually enquired from the first respondent's attorneys whether there was an exception in the matter, and the answer was in the negative. If these facts were before now Lekhuleni J, when he considered the main action, and he had found that irrespective of these facts, this was a proper notice of set down of the hearing of the main action, he had a duty to speak, under the circumstances, and to say so publicly in his judgment.

[76] Against this background, I am not at liberty to attribute any discretion exercised by both Dolamo J and now Lekhuleni J, as regards any defects in the service of process, or their condonation thereof. The order of Dolamo J does not have any reasons. The

judgment of Lekhuleni J is not deliberative and illustrative that the defects in the service were placed before him for judicial consideration. The records and both the order of Dolamo J and the judgment of Lekhuleni J does not leave me with the impression that the two judges individually deliberated upon and considered service of process and responded thereto. I am unable to share in the conclusion that they condoned any defects on the service of the processes before them. If they did, in my view, they would have said so.

[77] The issue that then remains on the facts, in my view, is whether, service at the embassy constituted "duly effected service elsewhere" on the appellant and was "valid, unless the court ordered otherwise." The two questions that now need to be answered is whether there was a valid service duly effected elsewhere, and whether there are reasons for the court to order otherwise. *The Concise Oxford English Dictionary,* Tenth Edition, Revised, Edited by Judy Pearsall, 2002 (the Dictionary) defines the word "duly" as an adverb which means "in accordance with what is required or appropriate or as might be expected".

[78] I have carefully considered Rule 16 of the Uniform Rules of Court, and I am unable to trace any authority for the address provided by the attorney whose authority to act was terminated, or who ceases to act for a party, to become the address of the former client for the service upon such former client, of all documents in such proceedings. The provision of the last known address or in the terminology employed in this matter, where the former client was reachable, is generally a practice out of courtesy to assist the other party with the contact details of an erstwhile client. Contrary to Slingers J and Wille J, I do not regard the provision of a former client's contact details by an erstwhile attorney as sufficient to impute any adversity for the erstwhile client. I regard this as a noble practice in law necessary for collegiality, simplicity, accountability and

progressive responsiveness far removed from a client's instructions. It has to do with the integrity of the erstwhile attorney and the decorum of court litigation. I am unable to support a proposition that the contact details so given must somehow be elevated to an address chosen by the erstwhile client for service of all documents in court proceedings on such erstwhile client.

[79] The applicable portion of the appellant's erstwhile attorneys' notice of withdrawal reads:

"KINDLY TAKE NOTICE FURTHER that the appellant is reachable through MS MARIA DEL PILAR SOLSONA HOMBRIA, SECOND SECRETARY, EMBASSY OF EQUITORIAL GUINEA, PRETORIA, 4[…] F[…] STREET, C[…], PRETORIA."

Amongst others definitions, the word 'reach" is defined as to "make contact with". "Reachable" is indicated as an adjective and derivative. None of the definitions come closer to what the first respondent sought the word "reachable" to mean, to wit, the appellant's appointed address for the service upon appellant of all documents in such proceedings. In my view, to suggest that there could be an inference that this was an address given by the appellant for purposes of service on him of all documents in the proceedings, is simply to attempt to stretch the facility of the word "reachable". Nothing suggests that the provision of the address where he was "reachable" was his instructions. I have already indicated why it was noble for the erstwhile attorneys to demonstrate fine personal qualities and high moral principles by providing the address out of own volition. Nothing that the erstwhile attorney said, can lead anyone, let alone a court, to conclude that this was the appellant's appointed address for service.

[80] I do not understand Rule 16(3), read with Rule 16(1) and 16(2) to mean anything more than that before receipt of notice, in particular of the address of the new attorney or of such former client, the appellant in this instance, for the service on appellant of all

documents in the applications, any service on him in accordance with the rules was valid, unless the court ordered otherwise. This view is fortified by the provisions of Rule 16(4)(b) which reads:

"16 Representation of parties

(4)(b) The party formerly represented must within 10 days after notice of withdrawal notify the registrar and all other parties of a new address for service as contemplated in sub-rule (2) whereafter all subsequent documents in the proceedings for service on such party shall be served on such party in accordance with the rules relating to service: Provided that the party whose attorney has withdrawn and who has failed to provide an address within the said period of 10 days shall be liable for the payment of the costs occasioned by subsequent service on such party in terms of the rules relating to service, unless the court orders otherwise."

For the service to be valid as envisaged in in Rule 16(3), it should be duly effectively served in accordance with the rules. I understand the last part of Rule 16(3) to make provision for circumstances where the service was in accordance with the rules, but the facts showed that it was not effective in that it clearly did not come to the knowledge of the party, and in such circumstances for the court to order otherwise than that the service was valid.

[81] I am not inclined to rely on the comments of Gamble J in para 103 of *Scholtz v Merryweather* 2014 (6) SA 90 (WCC) in the context that Wille J does, for the simple reason that in that matter, *Merryweather* did what the first respondent did not do in this matter, which is to approach the court for an order for substituted service on *Scholtz.* The high water-mark of the distinction on the facts was that *Scholtz* knew, whilst in the United Kingdom, that the summons claiming R15,5 million from him had been served on his father in Constantia, Cape Town, following a court authorized service at the

Constantia address and publication in a newspaper in the United Kingdom. It is this basic distinction, including the nothingness of the service on the erstwhile attorney and at a different address than the embassy address, which renders me unable to agree with the finding that none of the procedures followed by the first respondent had the effect of precluding the appellant's absence and that he took all reasonable steps to encourage the appellant to participate in the proceedings.

[82] The following does not constitute reasonable steps to effectively serve, in my view:

(a) Serving process on an attorney who no longer has the authority to represent the appellant;

(b) Serving a process at a private residence whose connection to the appellant is unknown save that it is in the same street as the address of the embassy of the appellant's country;

(c), Serving a notice of exception and then arguing the main action on the day of set down, and

(d) Unilaterally electing an address in South Africa without the authority of the court whilst aware that where you serve, the appellant is not ordinarily present and is in a foreign country.

In my view, these actions do not demonstrate an honest and earnest attempt to make another aware of the proceedings against them.

[83] In *Steinberg v Cosmopolitan National Bank of Chicago* 1973 (3) SA 885 (RA) at 892C it was said:

"It is a cornerstone of our legal system that a person is entitled to notice of legal proceedings instituted against him."

I am unable to share in the distinction that Wille J seeks to draw on the nature of the process. The service was indeed not geared at initiating proceedings. It was respectively to strike out his defence, and for default judgment against him. These are court proceedings with serious consequences.

[84] I am unable to follow the reasoning of Wille J' on the reliance on *Tshabalala and Another v Peer* 1979 (4) SA 27 (T). For the sake of completion I will set out my understanding. Unlike in the present matter, Geffen and Belnick had not served a notice of withdrawal as attorneys of record at the time of the service of the set down in the *Tshabalala* matter, although they had informed the other side about such withdrawal. Furthermore, although there had not been any formal substitution of attorneys, the other side engaged the attorneys Oosthuizen who were pointed out by communication as the new attorneys, as well as Geffen and Belnick in ensuring that they were aware of the set down. The two sets of attorneys had deposed to affidavits, not in support of the former client, but in favour of the other side relating to the party's knowledge of the proceedings. This is a material distinction with this matter. Geffen and Belnick had confirmed that they had withdrawn as attorneys for the applicants and that they had learnt that Oosthuizen attorneys were acting for the applicants. Oosthuizen attorneys in their affidavit averred that they had notified, *inter alia*, the applicant who was the father to the other applicant, that the action was due to be heard on 10 April 1978. The father defendant undertook to go into the matter but did nothing. He was found to be grossly-negligent about the whole matter. The son, having chosen to leave his father in charge of the litigation, it was found, must suffer the consequences of his father's negligence.

[85] It is against this background that I understood when the majority said at p. 30E-F:

"I cannot however accept the submission that the order of MARGO J was "erroneously sought or erroneously granted." The plaintiff was fully within his rights in pressing for judgment at the hearing. He had done all that the procedural Rules required of him. Even if the defendants had changed their attorneys (a matter on which I share the doubts entertained by KRIEGLER AJ), plaintiff was entitled to adopt the attitude that, until there was compliance with Rule 16, service of the notice of trial on Geffen and Belnick was adequate."

In the matter before us, there is no evidence from anyone who the first respondent unilaterally elected to serve the process on, which service was outside the regulation of the Uniform Rules of Court on the Vice-President of the Republic of Equitorial Guinea who was ordinarily resident in Malabo, Equitorial Guinea. There is no basis on which it can be found that the appellant had been aware of the application and the trial date that had been issued against him, respectively, before the respective judgments were granted. In my view there had not been service of the application and the trial dates on the appellant and the two judgments respectively should not have been granted against him and consequently the judgments were erroneously granted in the absence of the appellant and both are liable to be set aside [*Fraind v Nothmann* 1991 (3) SA 837 (WLD) at 839H.

[86] The comments of Van Rooyen AJ in *Mkhwanazi and Another v Manstha and Another* [2003] 3 All SA 222 (T) are not on point. This is simply because especially around and in para [25] the Judge was dealing with the decision as to whether a reasonable explanation for the default was given. This question, in my view, only arises if it is shown that there was a service duly effected. In *Mkhwanazi* there was some doubt

whether the attorney's mandate was terminated. There is no such doubt in the matter before us. The cornerstone of our legal system that a person is entitled to notice of legal proceedings instituted against him, is unlike a golden star sticker on the forehead at a nursery school. It is not reserved for good behaviour in litigation. There is no reason in this case to conclude that although the service was not in accordance with the Rules, it was nevertheless effective. This is so because the appellant did not receive the application or the notice of set down for trial, as a result of which he suffered prejudice in that judgments were granted against him striking out his defence and denying him the opportunity to be heard before he was condemned.

[87] Insofar as the substantive law is concerned, the requirement is that a person against whom legal proceedings are initiated should receive notice of that fact. If the person has knowledge of the process, albeit not in terms of the rules, there has been proper service. The court should take into account the true intention of the fairness of the rules of court and the realities of the situation [*Protea Assurance Co Ltd v Vinger* 1970 (4) SA 663 (O); *Wiehahn Konstruksie Toerustingmaatskappy (Edms) Bpk v Potgieter* 1974 (3) SA 191 (T); *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A) at 595. The effectiveness issue, that is, knowledge of the process, is the central underlying purpose of service [*Investec Property Fund Limited v Viker X (Pty) Limited,* the unreported judgment of the South Gauteng High Court, Case No. 2016/07492 dated 10 May 2016 at paras 7-19]. Failure to comply with the rules should not necessarily be visited with nullity. The court has a discretion to condone a breach of the Rules [*Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A) at 594H-595B]. In this case, where the service was not effective, I am unable to support condonation of the breach of the Rules.

[88] In advancing a principle, the Setswana commentator for Motsweding FM and SABC TV Sport, the late Cebo Manyaapelo, used to say: “There is no ‘therefore’ in soccer.” The principle is simply that whether this was between the same teams or different teams, the past games were not a measure for what would happen in the next game between two teams in a soccer match. In further exposition of the principle, in judicial decision-making, different disciplines may lead to different outcomes, the context and the facts being the relevant factors. It is not inconsistency for a Judge to agree with a mathematician when they say 1 plus 1 is 2 in mathematics, and the next day agree with a theologian when they say 1 plus 1 is 1 in a marriage. 1 plus 1 is not always 2 as judgment is not a scientific theorem in the natural law. This principle, that what happened one day does not therefore become a conclusion that it is what will happen the next day, even within the same parties on the same subject-matter, is in my view a rule within the principle that each case is judged on its own merits.

[89] The appellant under oath said that the sheriff attended to his house in Clifton on 23 June 2021 and provided his caretaker with a copy of the writ which directed the sheriff to attach, remove and take into execution the appellant’s movable property to realise by public auction the sum of R39 882 000-00. Ms Benbeche took photographs of the writ and sent them to Ms Hombria who is s secretary employed at the Embassy of Equitorial Guinea in Pretoria at the address of the Embassy. Ms Hombria forwarded the photographs of the writ to Mr Medja in Equitorial Guinea, who was the Director-General of Foreign Security and reported to the Minister in the Presidency, Mr Nchuchuma. Mr Medja alerted Mr Nchuchuma to the writ and Nchuchuma brought the writ to the attention of the appellant who then engaged his new attorneys of record on 24 June 2024. It was subsequent to the investigation by the current attorneys that the appellant became aware of the order by Dolamo J and Lekhuleni J and the reasons for the writ. Hombria and Medja deposed to confirmatory affidavits of his evidence.

[90] The first respondent's answering affidavit, does nothing more than to suggest that the processes were served at the Embassy of Equitorial Guinea. From that point onwards, the respondent present arguments and opinions, and not facts which may lead me to conclude that the appellant knew about the proceedings against him, and find that there was effective service. It is the first respondent's case that the appellant knew about the proceedings against him. I struggle to understand how it becomes the duty of the appellant to set out the trail of the processes once they were sent to the Embassy, which he did not appoint as his address for service of process upon him. The first respondent elected to serve the process not in accordance with the Rules where the assistance of the court was one avenue and resource available. With open eyes he elected to throw his processes against a private person within a government system where some decisions are taken by State officials and others by elected representatives.

[91] It is a fact of life that government systems have excessively complicated administrative procedures which include administrative, social impact, legal and political considerations. Hombria has no overall authority of these realities. The first respondent elected to throw his processes into that complex and it was up to him to show the thread of his proceedings to the knowledge of the appellant, not up to the door of the Embassy, but through the complexity of governance up to the appellant. I am unable, like my sister Slingers J in the court *a quo* and Wille J in this appeal, to shift the obligation through the excessively complicated administrative procedures of the service of the process to the appellant. I am unable to use what happened with the writ to conclude that it happened with the other processes, without any factual basis.

[91] With respect, in my view, except a strong suspicion, there are no facts on the processes trail, after the delivery of the processes at the Embassy, on the basis of which Slingers J could conclude that the appellant probably received the processes. What I can

see, is the entry point through the Embassy and I am unable to follow the path, through the Equitorial Guinea's government administrative maze, leading up to the appellant for me to conclude that he knew of the processes. The object of service is knowledge. From the Embassy to the appellant, as regards the processes, I am in what Bapedi call "*Kua Sethokgeng*". The English equivalence may be "a pathless wilderness".

[92] As regards costs my approach would be that the appellant did not provide an address as required by the Rules. The first respondent did not effectively serve in accordance with the Rules. For these reasons I would make the following order:

The appeal is upheld.

No cost order is made in respect of the appeal.

THULARE, J