

SOUTH AFRICA / JUDGMENT

L.R v T.S (2023/123933) [2024] ZAGPJHC 336 (5 April 2024)

[2024] ZAGPJHC 336

COURT

South Gauteng High Court, Johannesburg

BEFORE

Wadee

CASE / FILE NUMBER

2023/123933

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FLYNOTES: FAMILY – Divorce – Service of summons – Defendant in Australia and summons served at place of business of defendant – Plaintiff misrepresenting that service properly effected despite absence of personal service in divorce action – Not bringing an application nor laying a valid basis for substituted service – Non-compliance with Practice Directive – Despite being placed on terms by defendant, plaintiff elected not to remove matter from roll – Matter removed from unopposed divorce roll – Plaintiff ordered to pay wasted costs occasioned by removal.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2023-123933

In the matter between: -

L[...] R[]

PLAINTIFF

(IDENTITY NUMBER: 77[...])

And

T[...] C[...] S[]

DEFENDANT

(IDENTITY NUMBER: 75[...])

REASONS

FOR JUDGEMENT

WADEE AJ:

The court was requested to provide reasons for the judgement delivered on the 15 March 2024 in respect of a costs argument heard in the Unopposed Divorce Court. The Defendant having entered an appearance to Defend after the matter had been set down for hearing. The reasons are as set out hereunder: -

- [1] The Plaintiff had instituted action for Divorce and proceeded to set this matter down for hearing on the Unopposed Divorce Court roll.
- [2] The Plaintiff and the Defendant had entered into a civil union on the 16 December 2017, at Muldersdrift.[1]
- [3] On the 28 November 2017, the parties concluded an Antenuptial Contract, governing their marital regime, which contract was entered out of community of property with the inclusion of the Accrual System.

SERVICE OF SUMMONS

- [4] In support of the Plaintiff's Evidence Affidavit, the Plaintiff attached an affidavit by Rochelle Studley Weimer, a candidate legal practitioner. Ms Weimer confirms that the Defendant was duly and properly served with the summons on 14 December 2023.[2]
- [5] The Sheriff's return of service, confirms that on the 14 December 2023 at 13h35 at "THE UMS GROUP, BUILDING 1[...] W[...] O[...] P[...], SANDTON" being the place of employment of the Defendant a copy of the Combined Summons, Particulars of Claim and Annexures was served on "M[...] G[...] -RECEPTION" after the original document was displayed and the nature and contents thereof was explained to her. M[...] G[...] apparently not less than sixteen years of age and apparently in charge of the Defendant's place of employment, accepted service in the temporary absence of the Defendant. Rule 4(1) (a)(iii).
- [6] The Return of Service confirms that the Sheriff's first attempt to serve the Combined Summons on the 12 December 2023 at 12h10 was unsuccessful, "Defendant not available".
- [7] The Sheriff clearly notes the following on the Return of Service, (typed in bold and capital letters): -

"NB: KINDLY TAKE NOTE THAT M[...] G[...] SAID THE DEFENDANT IS IN AUSTRALIA, THE COMPANY NOW CLOSED TILL 5 JANUARY 2024 AND THE DOCUMENTS IS IN THE SAFE."[3]
- [8] On the 6 March 2024, H Du Plooy Inc Attorneys representing the Defendant, addressed correspondence to the Plaintiff's

Attorneys, marked “Urgent”. It is important to note that the Defendant’s Attorneys placed the following on record: -

[8.1] “Our client informed us that she was not served with a Summons and therefore she could not give any instructions to us in the matter. Your office has contacted our client prematurely and interacting with our client by sending her court documents and inviting her to Court Online.

[8.2] We do not appreciate your client intimidating our client by sending her court documents while you know you have not served a summons on her. We therefore request that you remove the matter from the roll and tender the wasted cost.

[8.3] It is further our instruction should you not provide our client with a “Notice of Removal” and tendering the wasted cost, we will instruct our Adv. to oppose the matter on 15 March 2024, and request a cost order against your client.

[8.4] You have until 13h00 today, the 6 March 2024, to provide us with proof that the matter was removed from the roll. If we have not received same, we will instruct our Adv. to oppose the matter on the 15 March 2024 and request the court to award a cost order against your client for the wasted costs, including cost of counsel.”[4]

[9] The Plaintiff’s Attorneys in their correspondence dated the 7 March 2024, replied as follows:

-

[9.1] “That it is incorrect that the Defendant has not been served with the Divorce Summons.

[9.2] A copy of the Summons was served on your client’s place of work. A copy of the Return of Service is attached hereto, marked “A”. The employee upon which the summons was served, later confirmed to our offices that same had been handed over to your client upon her return to work in January 2024.

[9.3] A copy of the issued summons was also served on your client by e-mail on 29 November 2023.

[9.4] Our offices then contacted your client directly, during which call your client again confirmed receipt of the summons.

[9.5] On 28 February 2024, our offices contacted your client again in confirming that no opposition to the Summons has been received, during which call, your client again confirmed receipt of the Summons and in particular, that she did not wish to oppose the matter.

[9.6] A copy of the service affidavit, together with the correspondence of 28 February 2024, confirming above is attached hereto, marked “B” and “C” respectively.

[9.7] We will also not be removing the matter from the roll as no opposition has been filed and our client is well within her right to proceed in obtaining default judgement.

[9.8] In the event that your client now elects to file a notice of intention to defend, which is well out of time, take note that our client will be seeking costs against her. Her dilatory conduct will not be tolerated.

[9.9] Should she therefore wish to defend the divorce summons, it is advisable that she files her notice by no later than close of business on 11 March 2024 and tenders the wasted costs for the hearing of 15 March 2024.”[5]

[10] In reply on 8 March 2024, the Defendant’s Attorneys addressed the following:-

[10.1] “All matters which affect Sheriff’s return of service, the service was not affected personally. We have requested you on the 6 March 2024 to remove the matter from the roll and tender the wasted cost. Again, we request you to remove the matter from the roll and tender the wasted costs.

[10.2] As no personal service was affected by the Sheriff, and under protest, we attach hereto our Notice of Intention to Defend which Notice will be served on you today. We therefore serve your client with our Plea on or before the 11 April 2024.

[10.3] Should you not remove the matter from the roll by 12h00 on the 12 March 2024 and provide us with proof thereof, we will argue that the matter should not be on the roll as no personal service had been affected as set out in the return of service and wasted cost.”[6]

[11] A Notice of Intention to Defend was served on behalf of the Defendant appointing H Du Plooy Inc as the attorneys of record, which notice was served on the 11 March 2024.[7]

[12] At the hearing, the Plaintiff and Defendant were represented by Counsel who persisted with their arguments as depicted by their respective attorneys of record as detailed above.

[13] Service of any process through which a divorce action is instituted shall only be effected by the sheriff on the defendant personally. It is advisable also to do so in other matters affecting a person’s status. Only if the defendant or respondent cannot be found after a diligent search should an alternative form of service be adopted.

[14] As mentioned above, the Plaintiff has not brought an application nor laid a valid basis for substituted service. The Plaintiff has intentionally or negligently failed to comply with the Practice Directive of this division, by misrepresenting that service has been properly effected despite the absence of personal service in a Divorce Action. This is a requirement when applying for a date on the Unopposed Divorce roll[8].

The Defendant was in Australia when the sheriff attempted service. The sheriff correctly on the first attempt on the 12 December 2023 regarded the service as incomplete as the “defendant not available”.

The Sheriff after the first failed attempt, once again attends the Defendant’s place of employment on the 14 December 2023. The sheriffs return clearly confirms that no personal service was effected on the Defendant on the 14 December 2023, that the company

would only be opened on the 5 January 2024 and that the Combined Summons and Particulars of Claim and annexures were nevertheless

served on the Defendants place of employment in abstentia.

The Plaintiff and her legal team had a duty to ensure that the Sheriff had effected personal service, and it is evident that they

intentionally or negligently have failed to do so.

[15] The court is faced with no reasonable grounds or explanations as to why personal service could not have been effected by the Sheriff on the Defendant's return from Australia, as both her residence and place of employment are known. In absence of any formal application for substituted service before this Court, or Court Order, it need not be considered.

The alternative attempts of service do not cure the Plaintiff's failure to ensure personal service by the Sheriff in these

circumstances. Accordingly, the service by the sheriff in this matter is deemed irregular.

[16] The Plaintiff is dominus litus and has a duty to ensure that service of the Combined Summons or any process through which an action claiming a divorce is instituted

shall be effected by the Sheriff at the request of the Plaintiff or the Applicant, personally on the Defendant.[9]

[17] The Court finds that a reasonable attorney in the Plaintiff's position would have ordinarily re-instructed the Sheriff to effect service of the Combined Summons on the Defendant personally, on her return from Australia. This was not done.

[18] The Plaintiff deviated from the norm, and opted to circumvent personal service on the Defendant, without any justifiable reason, nor any application to a Court. The Plaintiff failed to re-instruct the Sheriff to re-serve the Combined Summons personally on the Defendant, and without the leave of the court ventures on an elaborate campaign of substituted service to cure the defect, as opposed to instructing the Sheriff to re-serve the Combined Summons and particulars of claim personally on the Defendant. These steps that the Plaintiff undertook are more fully set out under oath, in the affidavit of Rochelle Studley Welmer.

[19] The court finds the deviation from proper service in this matter as an abuse of the process, wherein the Defendant's residence and place of employment are clearly known to the Plaintiff, and compliance with proper service is easily achievable. There is no formal application brought for substituted service before any Court to condone the method of service on the Defendant prior to this matter being set down on the Unopposed Divorce Roll.

[20] There are clearly no justifiable reasons why the court would order the deviation of the formal rule of personal service in this case on the Defendant. The Plaintiff in her papers does not establish any factual evidence which can substantiate the reason for their attempted substituted service. Accordingly, this court is of the considered view that

summons was not served personally on the Defendant, which is irregular. The Trial court will have to determine whether irregular service has been properly effected in terms of the Rules.

- [21] This trend and stratagem must be dealt with strictly by the courts, to ensure compliance with personal service in Divorce proceedings as the rule envisaged and to avoid prejudice to the Defendant. The Plaintiff does not have leave from any court for substituted service yet elects to set the matter down on the Unopposed Divorce roll.
- [22] The Court notes its disappointment that the principal of Rochelle Studley Welmer who did not sufficiently supervise this candidate legal practitioner and allowed her to depose to an affidavit under oath, confirming that the Defendant was duly and properly served on the 14 December 2023. This despite the Return of Service clearly confirming that no personal service was made on the Defendant, and whilst the Defendant was in Australia at the time of service.
- [23] The Plaintiff's practice note uploaded to CaseLines at paragraph 8, further confirms the Plaintiff's incorrect

submission that proper service has been effected.

- [24] In Mitchell, Wendy Lee v De Waal, Rene Juan, a Rule 43 application was brought before the Honourable Africa AJ. The Honourable Court noted the following:[10]

"[19] "This court is unable to mero moto condone that because the respondent acquired knowledge of the summons, by way of e-mail and via service on his niece, or the fact

that he entered an appearance to defend, that the applicant is automatically absolved or relived from her obligation to comply with the court order, which specified the manner of service.

- [21] It is the considered view of the court, that the summons in the present case was not properly served on the Respondent.
- [22] It is my considered view that the instances where a summons is issued and "properly" served later, cannot avail an Applicant seeking relief. On this ground alone the application falls to be dismissed.

[1.2] The application was dismissed with costs."

- [25] According to section 14.8 of the Practice Directive, when applying for a hearing date or enrolment of a matter in this division, it states[11]:

"[14.8] In the event that any misrepresentation is made in the date application process, whether intentional or negligently, the date allocation shall automatically be invalid, and the attorney and/or counsel responsible for the application shall be referred to the DJP for an investigation into the misrepresentation and may be referred to the Legal Practice Council for a further investigation into whether or not professional misconduct has been committed."

[26] In terms of the previous Revised Practice Directive 1 of 2021: -

“[39] A party who contends that a matter categorised C, F, D or P, is ripe to be allocated a trial date shall apply in the prescribed form, to the Registrar for a certificate of trial readiness and together with such application, shall further provide the following in a statement, signed by the attorney for the party applying for the certificate, confirming that:

[39.1] he or she has personally verified full compliance with the prescripts of this directive, in particular, paragraph 8.4.1 herein.

[39.2] that no interlocutory applications are outstanding or anticipated.

[40] Upon receipt of an application that is fully compliant with these prescripts the Registrar shall issue a certificate in the prescribed form.

[42] In the event that any misrepresentation is made in such application, whether intentional or negligently, the certificate shall automatically be invalid, and the attorney and/or Counsel responsible for the application shall be referred to the DJP for an investigation into the misrepresentation and may be referred to the Legal Practice Council, for a further investigation into whether or not professional misconduct has been committed.”

[27] According to uniform rule 6, the courts have considered: -

“It is the duty of legal practitioners appearing in motion court to draw the presiding Judge’s attention to any deviation from the standard forms and orders in the papers and to offer an explanation therefor.” [12]

[7] The Honourable Fabricious J stated:

“I do agree with Mr Bham SC’s submission that certain general standards apply in the context of whether or not Counsel are obliged to bring an authority, which precluded the granting of an order sought, to the courts attention.”[13]

[28] According to section 10 of the Divorce Act: -

“the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in, as far as may be relevant, make such an order as it considers just.”

Discussion on the Effectiveness Test: -

[29] The Plaintiff’s conduct in refusing to ensure that personal service is effected is unacceptable in these circumstances, and a stratagem that needs to be condemned to ensure such blatant disregard of compliance of the Divorce Act does not become the norm.

- [30] The court finds that the service by the sheriff was irregular, and the Plaintiff's Attorneys were well aware of the defective service, but elected not to take any measures to remedy the irregularity, either by re-service of the Combined Summons and Particulars of claim personally on the Defendant, or by any attempt to bring an application to a court for substituted service, prior to setting the matter down on the Unopposed Divorce Roll.
- [31] The Defendant has appointed attorneys of record, who are now in a position to act in the best interest of the Defendant. This intervention does not cure the defect of the irregular service. This matter has been removed from the unopposed Divorce Court Roll and will be required to be enrolled at the relevant stage as an "opposed divorce trial", which will heard as part of the general Civil Trial Roll[14]. The Trial Court will consider evidence and make a finding whether service by the sheriff can be considered effective alternatively whether to set aside the service of the summons on the basis of the irregularity or nullity.
- [32] The Defendant's prejudice caused by the conduct of the Plaintiffs who are dominus litus, their non-compliance with the practice directive and misrepresentation in respect of personal service which is required in terms of the Divorce Act, their failure to consider the court file found on CaseLines as incomplete and non-compliant, and despite being placed on terms by the Defendant elected not to remove the matter from the roll necessitating Counsel for the Defendant to be briefed for this appearance. This court is of the opinion that such prejudice can be cured by an appropriate costs order against the Plaintiff.
- [33] Accordingly, the court has considered the irregular service of the Combined Summons, the Registrars unsigned Combined Summons with no case number before this Court, and the "irregular service" in order to make a decision in respect of costs.
- [34] The Plaintiff sought costs of the application, on the basis that the Defendant had served its Notice of Intention to Defend only the 11 March 2024 when the matter was to be heard on the 15 March 2024. The Plaintiff noted that the Defendant was dilatory and made submissions in terms of its filed practice note.
- [35] The Defendant however, made a strong and convincing argument that service of the Combined Summons on the Plaintiff's employer whilst she was in Australia, did not constitute personal service in terms of the Divorce Act. The Defendants submission was that the Plaintiff should be ordered to pay costs due to their conduct herein.

COSTS OF THE APPLICATION

- [36] The court faced with an argument in respect of costs had to evaluate the Plaintiffs conduct, failure to effect personal service in a Divorce Action, the condition of the court file on CaseLines, and failure to comply with practice directives. The court records the following conduct of the Plaintiff, who is dominus litus and set this matter down: -

[36.1] Misleading the court under oath that the Defendant was duly and properly served with the summons, despite the knowledge that the sheriff failed to effect personal service on the Defendant[15];

[36.2] Paragraph 8 and 9 of the Plaintiffs Practice Note which misleads the court by confirming that proper service has been effected, and failing to bring to the attention of the court the fact that no personal service was effected by the Sheriff on the Defendant in terms of the Divorce Act¹⁶;

[36.3] The Combined Summons before this Court has no case number and has not been signed by the Registrar of the High Court¹⁶. There is no other completed Combined Summons and Particulars of Claim on CaseLines.

[36.3.1] In absence of any explanation in the Plaintiffs Affidavit, Plaintiffs' Attorneys Affidavit, and the Practice Note addressing non-compliance with rule 17(3) of the Combined Summons which constitutes a nullity, and naturally service of a nullity would not constitute an action. In *O Donoghue v Human*¹⁷, Kannemeyer J concluded:

"Service was, on the authorities quoted above, irregular and proceedings against the applicant were thereby rendered ineffectual. There was no service as envisaged by the Rules. Such service as there was a nullity and I cannot, by way of condonation, rectify a nullity."

[36.3.2] In *Jone J Motloun (First Plaintiff), Mosele M Moloi (Second Plaintiff) v The Sheriff Pretoria East (Defendant) and Others*, Case Number: 13249/2014, Gauteng Division, Pretoria, the court held:-

"having considered the facts and the authorities referred to above, it can be safely concluded that if a summons is a nullity for a lack of a signature by the Registrar, service of the same would not constitute the institution of an action and would not result in the suspension of prescription."

[36.4] Failing to take the necessary measures to ensure personal service by the Sheriff on the Defendant in terms of section 17 of the Divorce Act 70 of 1979, where the details of her residence and employment are known to the Plaintiff;

[36.5] Failing to secure a court order confirming that substituted service is approved in absence of compliance with section 17 of the Divorce Act, prior to setting the matter down on the unopposed roll;

[36.6] Non-compliance with sections 7.7¹⁸ of the Practice Directive, as follows:

[36.6.1] The Plaintiff failed to create a separate section for compliance statements and failed to upload the statement by the attorney applying for unopposed divorce date in terms of section 5 of the Practice Directive¹⁹. Where no such statement is filed, the registrar shall not allocate a hearing date.

[36.6.2] Failed to create and upload a full set of Pleadings by uploading an incomplete Combined Summons with no case number and no signature by the Registrar, rendering the only interpretation at this stage service of the Combined Summons a nullity.

[36.7] Breach of par 14 of the Practice Directive failing to advise the registrar that no personal service by the sheriff has been effected, and that and thereby misrepresenting the facts during the date application process, when applying for a set down date.

In terms of paragraph 14.5 the office of the registrar is specifically instructed not to allocate dates for matters that are non-compliant with the requirements set out in this directive.

[37] The court accordingly orders that the Plaintiff pay the wasted costs.

ORDER:

After hearing Counsel for both sides, the following order is made: -

- (a) The matter is removed from the Unopposed Divorce Roll;
- (b) The Plaintiff is ordered to pay the wasted costs occasioned by the removal of the matter.

WADEE AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

DATED OF HEARING:

15 MARCH 2024

REASONS

FOR JUDGEMENT: 5 April 2024

APPEARANCES:

FOR THE PLAINTIFF/APPLICANT: ADV LYNN- MARIE NIGRINI

INSTRUCTED BY:

ULRICH ROUX AND ASSOCIATES

FOR THE DEFENDANT:

ADV DAMIAN WADE CLOETE

INSTRUCTED BY:

H DU PLOOY INC ATTORNEYS

[1] CaseLines. Section 02, item 6, paragraph 4 of the particulars of claim.

[2]CaseLines section 02, item 14, page 02 -59 to 02-61 [3] CaseLines Section 2, Item 8, page 02-34

[2]CaseLines section 02, item 14, page 02 -59 to 02-61

[3] CaseLines Section 2, Item 8, page 02-34

[4] CaseLines Section 2, Item 23, page 02-83. [5]CaseLines Section 2, Item 24, page 02-85 to 02-87.

[4] CaseLines Section 2, Item 23, page 02-83.

[5]CaseLines Section 2, Item 24, page 02-85 to 02-87.

[6]CaseLines Section 2, item 25, page 02-92 to 02-91

[7] CaseLines Section 2, item 28, page 02-98 to 02-100

[8] Section 14 and 29.8 of the Practice Directive 1 of 2024,

[9] Section 17 Divorce Act 70 of 1979: service of process, notices, etc. (1)(a) Services of any process through which action claiming a divorce is instituted shall be effected by the Sheriff at the request of the Plaintiff or the applicant, on the defendant or the respondent personally.

[9] Section 17 Divorce Act 70 of 1979: service of process, notices, etc.

(1)(a) Services of any process through which action claiming a divorce is instituted shall be effected by the Sheriff at the request of the Plaintiff or the applicant, on the defendant or the respondent personally.

[10] Mitchell, Wendy Lee v De Waal, Rene Juan, Case Number 1252/2022, Free State Division, Bloemfontein.

[11] Consolidated Practice Directive 1 of 2004, Court Operations in the Gauteng Division with effect from 26 February 2024.

[12] Erasmus, Superior Court Practice, at page D1-51, Ex Parte Satbel (EDMS) Bpk: In re Meyer v Satbel (Edms) Bpk 1984 (4) SA 347 (W) at 326 G

[13] Erasmus, Superior Court Practice, at page D1-52: In Multi -Links Telecommunication LTD v Africa Prepaid Services Nigeria Ltd 2014 (3) SA 265 (GP), at 289 E-290 A.

[13] Erasmus, Superior Court Practice, at page D1-52: In Multi -Links Telecommunication LTD v Africa Prepaid

Services Nigeria Ltd 2014 (3) SA 265 (GP), at 289 E-290 A.

[14] Section 29.7.1 of the Consolidated Practice Directive 1 of 2004, Court Operations in the Gauteng Division with effect from 26 February 2024.

[14] Section 29.7.1 of the Consolidated Practice Directive 1 of 2004, Court Operations in the Gauteng Division

with effect from 26 February 2024.

[15] CaseLines, Section 02, Item14, page 02-59 to 02-61.

[16] CaseLines, Section 1, item 1, page 02-3,

[17] O Donoghue v Human 1969 (4) SA 35(E)

[18] 1 of 2024

[19] Page 132 and 133 of the Practice Directive 1 of 2024.

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