

SOUTH AFRICA / JUDGMENT

Msimango v Peters (2021/A3026) [2022] ZAGPJHC 418 (21 June 2022)

[2022] ZAGPJHC 418**COURT**

South Gauteng High Court, Johannesburg

BEFORE

T Ossin, G Malindi

CASE / FILE NUMBER

2021/A3026

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****GAUTENG****DIVISION, JOHANNESBURG****APPEAL****CASE NO: 2021/A3026****REPORTABLE:**NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
In**the matter between:**SANDILE
MSIMANGO
Appellant
(Applicant
(Defendant) a quo
[‘Defendant’]
and
FRANCIS
PETERS
Respondent
(Respondent
(Plaintiff) a quo
[‘Plaintiff’]

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 21 June 2022.

JUDGMENT

OSSIN AJ (MALINDI J concurring):

Introduction

- [1] This is an appeal against a judgment of the Magistrates' Court, Randburg, in relation to an action instituted by the respondent, as plaintiff, against the appellant, as defendant in July 2019 ['the July action']. The parties will be referred to as in the July action – appellant as defendant and the respondent as plaintiff.
- [2] The July action was instituted by way of a combined summons ['July summons'] served on 9 July 2019. The July action was based on a settlement agreement concluded between the parties in respect of a previous action instituted by plaintiff against defendant in March 2019 ['the March action'].
- [3] The subject of the judgment before us was an interlocutory application brought by the defendant in July 2020, about a year after service of summons. In that application, brought in terms of rule 60, alternatively rule 60A of the Magistrates' Court, the defendant contended that the July summons had not been served at his residence in terms of rule 9(3)(b) as at the time he was resident in the United Kingdom. The defendant refers to this application as the irregular step application. I will likewise do so from now on.
- [4] In his summons, plaintiff cited the defendant as follows: "...an adult male whose full and further particulars are to the Respondent unknown, presently residing at...Unit 1 Les Maisons on Fifth, Fifth Road, Hyde Park, Johannesburg." According to the deputy sheriff's return of service, summons was served on 9 July 2019 at the defendant's residence in Hyde Park, Johannesburg on his employee.
- [5] Although the defendant and his family were living in the United Kingdom, after summons had been served in Johannesburg, his attorneys of record delivered a notice of intention to defend on 23 July 2019. This was followed the next day, 24 July 2019, with a notice to remove cause of complaint ['the complaint notice'], in terms of rule 60, alternatively rule 60A.

- [6] Although the defendant titled the complaint notice as being a notice in terms of rule 60 alternatively rule 60A, the substance of the notice itself is formulated with reference to the provisions of rule 60A and not rule 60. In my view the complaint notice is clearly a notice brought in terms of rule 60A and not rule 60.
- [7] The plaintiff did not remove the cause of complaint within the 10 days' notice period afforded to the plaintiff in terms of rule 60A(2)(b).
- [8] The defendant did not apply for the setting aside of the service of summons within 15 days after expiry of the notice period, as provided in terms of rule 60A(2)(c). What he did instead was to launch the irregular step application on 1 July 2020, almost a year after his complaint notice. The basis for the orders sought in this application primarily revolved around the defendant's contention that there had not been valid service, coupled with his complaint notice. The relief sought in this application was not for the setting aside of service of summons (which was the consequence envisaged by the complaint notice), but for setting aside the summons itself.
- [9] The orders sought by the defendant in his notice of motion read as follows:
1. the [plaintiff's] summons be set aside pursuant to his failure to comply with the Court Rules having failed to remedy such failure after receiving the Applicant's Notice in terms of Rule 60, alternatively Rule, 60A, and being ordered to do so by this Court on 29 and 30 October 2019;
 2. Alternatively, the Respondent be afforded a further five days to comply with the orders of this Court of 29 and 30 October 2019, failing which the Applicant may apply for the setting aside of the summons based on these papers
 3. Further alternatively, the summons be set aside for non-compliance with Rule 9(3)(b);
 4. Costs of this application de bonis propriis, alternately against the Respondent on the scale of attorney and own client, further alternatively attorney and client;
- [10] The plaintiff opposed the irregular step application, and simultaneously delivered a counter application. These applications came before the learned Magistrate Sewnarain for argument on 17 November 2020. At the commencement of argument defendant withdrew the punitive costs order initially sought by him, and plaintiff withdrew his counter-application.
- [11] After hearing argument, the learned Magistrate handed down an ex tempore judgment. The learned Magistrate dismissed the irregular step application and ordered the defendant to pay the plaintiff's costs on the attorney-client scale including the costs of counsel on the Magistrates' Court tariff.

- [12] The judgment against which the defendant appeals is set out in the transcript of the proceedings before the learned Magistrate at Vol 3 of the appeal record from page 41 line 10 to page 54, line 5. The order itself appears at Vol 2, page 223.
- [13] In dismissing the irregular step application, the learned Magistrate found against the defendant on procedural and substantive grounds. The procedural grounds included a finding that the irregular step application was fatally defective as it had been served out of time, and no condonation had been sought by defendant as required by rule 60(9). The substantive grounds included a finding that summons had been validly served.
- [14] The learned Magistrates' reasons for the punitive costs order appears to stem from findings which include the fatally defective nature of the irregular step application, and the fact that, at the end of the day, the defendant had received the summons.
- [15] There is another aspect of this appeal and the irregular step application which concerns me. I raise it at this point before diving into the details of this matter.
- [16] The plaintiff, in his July action, claims R39 000.00 from the defendant. Summons was served in July 2019. The defendant took exception to service but only launched his irregular step application about a year later. The application was argued in November 2020. Instead of viewing the dismissal of the application as the end of the road in so far as summons was concerned, the defendant noted this appeal. Its hearing took place on 11 October 2021 before us.
- [17] In the face of having received the summons (which I deal with later in this judgment), the defendant decided not to plead but rather to embark on a long, arduous, and costly exercise. This has not only unduly delayed the July action and its finalisation, but also took up the time of the learned Magistrate and now, because of this appeal, a full bench of the High Court. In my view, and as will become clearer when dealing with the background facts, the manner in which defendant approached the litigation in the Magistrates Court and now this appeal, leaves much to be desired.
- [18] An example of this was on display at the commencement of the hearing before this court. The plaintiff had not filed his heads of argument timeously. He did so on 6 October 2021 and sought condonation for this failure in his heads of argument.
- [19] At the commencement of proceedings, defendant was requested to advise this court of his position in respect of the late filing of plaintiff's heads of argument. The defendant advised that he would be willing to condone the late filing of plaintiff's heads of argument if plaintiff condoned the late filing of defendant's irregular step application. Bearing in mind that the late filing of defendant's irregular step application was a material basis upon which plaintiff had opposed that application and upon which the learned Magistrate found against the defendant, the attempt to link what is a substantive aspect of this appeal, with something

that has nothing to do with the learned Magistrate's

judgment, to me, smacked of opportunism. The defendant did eventually unconditionally condone the late filing of plaintiff's heads of argument.

[20] The defendant's aforesaid approach also highlighted to me that he was more than cognisant of the fact that his irregular step application was fatally defective for want of compliance with the time frames set out in rule 60A. Yet for some inexplicable reason, the defendant in neither his notice of appeal nor heads of argument

before this appeal court sought to challenge the learned Magistrates' findings to this effect. It also begs the question as to why this matter is before us on appeal at all. In other words, why is this appeal being pursued when this ground of its dismissal by the learned Magistrate is not contested?

[21] Finally, and as highlighted by the learned Magistrate in his judgment, practitioners would do well not to overlook Rule 1 which is headed "Purpose and application of rules". It provides as follows:

(1) The purpose of these Rules is to promote access to the courts and to ensure that the right to have disputes that can be resolved by the application of law by a fair public hearing before a court is given

effect to.

(2) These Rules are to be applied so as to facilitate the expeditious handling of dispute and the minimisation of costs involved.

[22] Practitioners ought to ensure that the manner in which they conduct litigation on behalf of their clients, or the manner in which they are instructed to conduct litigation on behalf of their clients, does not disrespect these foundational rules, and promotes the important principles upon which these rules are founded.

[23] I raise the above matters in the hope that practitioners will, when confronted with a technical issue such as the one in question

which does not and cannot prejudice their client, not only be cognisant of the possible consequences and ramifications for their

client but also of the unnecessary burden which actions such as the present place on the courts. I return to this issue in the portion of this judgment dealing with the appropriate costs order of this appeal.

Grounds of appeal and issues in the appeal

[24] The defendant's broad grounds of appeal may be gleaned from his notice of appeal read with his heads of argument.

- [25] The first ground of appeal relates to the validity of service of the summons. The learned Magistrate found that summons had been validly served in terms of rule 9(3)(b). The defendant contends that the learned Magistrate should have found that service of summons was invalid because the summons had not been served at defendant's residence as required by rule 9(3)(b), even though the deputy sheriff certified service as such at his residence in Johannesburg. He contends that because summons was not validly served, the July action against him has not validly commenced.
- [26] The second ground of appeal relates to the status of notes made by various Magistrates on the cover of the court file of the July action ['the file cover'] pursuant to appearances made by the plaintiff's attorneys in respect of applications for substituted service. The file cover reflects several appearances from 29 October 2019 to 18 February 2020. Prayers 1 and 3 of the notice of motion reference the appearances and notes made on 29 October and 30 October 2019. I will refer to these notes as the October notes. The learned Magistrate found that these notes were only queries or informal requests. The defendant contends that the learned Magistrate should have found that the October notes have the status of orders, and that the plaintiff was obliged to give effect to them.
- [27] The third ground of appeal relates to the punitive costs order awarded by the learned Magistrate against the defendant. The learned Magistrate found that circumstances justified a punitive costs order. The defendant contends that there were no exceptional circumstances justifying such a costs order, and that in making such an order the learned Magistrate did not exercise his discretion judicially.
- [28] The defendant contends that the summons fell to be set aside either because summons was not validly served or because the plaintiff did not give effect to the October notes. The defendant argues that the learned Magistrate erred in not granting such an order as sought in the irregular step application.
- [29] There is a further issue which neither the defendant's notice of appeal nor his heads of argument address. This issue relates to the procedural competency of the irregular step application. The learned Magistrate found that the irregular step application was, for several reasons, incompetent and fatally defective. This was one of the reasons why the learned Magistrate awarded punitive costs against defendant. Although the defendant has not addressed this aspect in his written documentation submitted on appeal, it would, I believe, be proper and appropriate to deal with this issue in the judgment.
- [30] A secondary issue unconnected to the merits of this appeal, but by no means less important, is the appealability of the judgment. Whilst conceding that the irregular step application is interlocutory in nature, the defendant contends that the judgment is final in effect, and hence appealable. This issue is addressed towards the end of this judgment.

The relevant rules

[31] As alluded to above, the rules which are of immediate relevance to the merits of this appeal are rule 9(3)(b), rule 60 and rule 60A.

[32] Rule 9(3)(b) provides as follows:

All process shall, subject to the provisions of this rule, be served upon the person affected thereby by delivering a copy thereof...at the residence ... of the said person, ... to some person apparently not less than 16 years of age and apparently residing or employed there...

[33] Rule 60(1), (2) and (9) provide as follows:

- (1) Except where otherwise provided in these Rules, failure to comply with these Rules or with any request made in pursuance thereof shall not be a ground for the giving of judgment against the party in default.
- (2) Where any provision of these Rules or any request made in pursuance of any such provision has not been fully complied with the court may on application order compliance therewith within a stated time.
- (9) The court may, on good cause shown, condone non-compliance with these Rules.

[34] Rule 60A provides as follows:

- (1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if —
 - (a) the applicant has not himself or herself taken a further step in the cause with knowledge of the irregularity;
 - (b) the applicant has, within 10 days of becoming aware of the step, by written notice afforded his or her opponent an opportunity of removing the cause of complaint within 10 days; and
 - (c) the application is delivered within 15 days after the expiry of the second period mentioned in subrule (2)(b).
- (3) If at the hearing of an application in terms of subrule (1) the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as it deems fit.
- (4) Until a party has complied with any order of court made against him or her in terms of this rule, he or she shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.

Relevant background facts

[35] To fully appreciate the various aspects and nuances of the appeal, I will now set out, in some detail, what I believe to be relevant background facts as gleaned from the record.

The defendant's situation

[36] The defendant is married with two young children. He owns a house in Hyde Park, Johannesburg [‘the Hyde Park house’]. This is where the deputy sheriff effected service of summons in terms of rule 9(3)(b).

[37] The defendant and his family lived in the Hyde Park house until 2015 at which time the family “permanently moved to the United Kingdom”. According to the defendant he formally became resident in the UK in 2016 through a European Union Residence Card issued to him in

2016. This card, prima facie, is a work permit which allows the defendant to reside in the European Union for such purpose until 25 October 2021.

[38] Since moving to the UK, the defendant and his family visit the Hyde Park house “a couple of times a year.” There are no details supplied on the record as to the length and frequency of these visits.

The repair agreement

[39] Sometime in either September or October 2018, defendant and plaintiff concluded an oral agreement in terms of which the defendant contracted the plaintiff to carry out certain repair and paint works to the Hyde Park house [‘the repair agreement’]. This agreement was concluded whilst the defendant was in South Africa since the defendant states that he and the plaintiff “physically walked the site,” and the defendant showed the plaintiff “the repairs that [the defendant] sought done.” There is a dispute on the papers as to whether the agreed contract sum was R300 000.00 (as asserted by the defendant) or R359 200.00

(as asserted by the plaintiff). Nothing of relevance turns on this dispute.

[40] The defendant appears to have departed South Africa sometime after the conclusion of the repair agreement, and the plaintiff commenced the scope of works soon thereafter.

[41] The defendant returned to South Africa on or about 21 November 2018 with the intention of staying at the Hyde Park house from that night. The papers do not disclose whether the defendant was with his family at that time, and his length of stay in South Africa.

[42] The defendant was not, however, able to stay at the Hyde Park house that night, instead staying over at a hotel in the area (as appears from an invoice for that night). The reason for this appears from defendant’s texts to the plaintiff in which the defendant complained that plaintiff had painted the inside of “my bedrooms” and “I can’t sleep here now.” In addition, defendant’s attorneys’ letter of 16 May 2019 asserts plaintiff’s liability for “R2 500.00 for hotel accommodation on the night that [the defendant] came home but could not sleep there because of the [plaintiff].”

- [43] The defendant's text messages also requested the plaintiff to contact him urgently, expressing consternation that the plaintiff, contrary to the repair agreement, had painted the entire interior of the Hyde Park house as opposed to "The rooms with damp on the ground floor only..."
- [44] On the morning of 22 November 2018, the defendant texted the plaintiff enquiring whether the plaintiff would be stopping by the site that morning. In this text the defendant advised the plaintiff that "I am going home now from the hotel." The defendant's reference to "home" is clearly to the Hyde Park house.
- [45] Further subsequent texts from the defendant to the plaintiff raise complaints about damage caused by the plaintiff to an expensive painting and a general failure by the plaintiff to supervise the repair and paint work.

The March action

- [46] The plaintiff's March action was also instituted by way of a combined summons ['the March summons'].
- [47] On 5 April 2019, and as with the July summons, the March summons was served on the defendant's employee in his absence in terms of rule 9(3)(b).
- [48] Although the pleadings in the March action do not form part of the record before us, it appears that, in the March summons, the plaintiff claimed payment of an amount of R119 200.00 as the balance owed by the defendant to him in terms of the repair agreement. Since the plaintiff's version is that the agreed amount for the repair and paint works was R359 200.00, on the plaintiff's version the defendant had paid R240 000.00 at that stage. This accords with the defendant's version (i.e., payment of R240 000), save that the agreed amount alleged by the defendant was R300 000.00. Accordingly, the defendant's version was that there was a balance still owed by him of R60 000.00.
- [49] After receiving the March summons, the defendant's employee contacted defendant in the UK and informed him of the summons. The defendant thereafter telephoned his attorneys (the same firm of attorneys who are the defendant's attorneys of record in the present matter) and instructed them to oppose the action.
- [50] It is apparent from the papers that defendant's attorneys were placed in possession of, at least, a copy of the March summons, since they, on 23 April 2019, delivered a notice of intention to defend. This may also be readily inferred from the contents defendant's attorneys' letter of 13 May 2019 (see paragraph [52] below).
- [51] The plaintiff then made application for summary judgment, the hearing date being 4 June 2019.
- [52] On 13 May 2019, the defendant's attorneys addressed a letter to the plaintiff's attorneys. In this letter the defendant's attorneys referred to the plaintiff's particulars of claim and alleged that the contractually agreed amount for the repair and paint work was R300 000.00. The

defendant's attorneys then alleged that the plaintiff's claim exceeded the contractually agreed amount, and that the defendant was prepared to offer the plaintiff an amount of R60 000.00 in full and final settlement of the plaintiff's claims. The offer was open for acceptance by 17h00 on 13 May 2019.

[53] The letter recorded the following:

Our client is not resident in this country and was therefore not in the country when your client conducted the repair work.

[54] The letter did not, however, raise as a complaint, that service of the summons was invalid, and that the Hyde Park house did not constitute the defendant's residence for purposes of rule 9(3)(b). Instead, the letter concluded by advising that in the event of the matter not settling, the plaintiff should not apply for summary judgment as he is "fully aware of our client's defence", and that if the plaintiff did decide to proceed with that application "our client will oppose it and ask for a punitive costs order against your client in the circumstances." The defendant accepted that he had received proper service of the summons on this occasion.

[55] The plaintiff's attorneys responded to the aforesaid letter later that same day, accepting the offer and requiring that payment be made by 17 May 2019.

[56] It appears that on 15 May 2019, the plaintiff signed the defendant's attorneys' 13 May 2019 letter. The defendant regarded this signature as acceptance by the plaintiff of the settlement terms

contained in the 13 May 2019 letter.

[57] On 16 May 2019, defendant's attorneys sent a further letter to plaintiff's attorneys. In this letter defendant's attorneys stated that the March action had "become settled on the basis of the offer outlined in our letter of 13 May 2019."

[58] Recalling that plaintiff's attorneys had in their letter of 13 May 2019 set out the parameters for the settlement and that payment was to be made into their trust account (my comment!), the defendant's attorneys then advised that defendant had paid an amount of R21 000.00 into the plaintiff's attorneys trust account.

[59] An explanation for the omission to pay the balance of R39 000.00 was then provided in the form of alleging set-off. The defendant's attorneys alleged that the plaintiff had caused the defendant to suffer damages in the amount of R39 000.00. This amount comprised

- (1) restoration costs to the tune of R35 000.00 in respect of one of the defendant's paintings which the plaintiff had allegedly damaged with paint, (2) transportation costs of the painting for purposes of restoration, and (3) hotel accommodation costs of R2 500.00.

[60] Regarding these alleged damages, it will be recalled that when the defendant returned to South Africa on 21 November 2018, his texts to the plaintiff complained of damages to a painting and the necessity of him having to sleep at a hotel that night as opposed to the Hyde Park house.

[61] With reference to the defendant's attorneys' 16 May 2019 letter, the plaintiff's attorneys in their letter of 22 May 2019, then expressed dissatisfaction at the defendant's invoking of set-off of his alleged damages against payment of the full amount of R60 000.00. They alleged that the settlement was negotiated by the defendant in bad faith, and defendant's

reliance on set-off was "to avoid him having to prove his alleged claim as against our client."

[62] In a letter dated 29 May 2019 defendant's attorneys' advised plaintiff's attorneys that the set-off amounts (the R39 000.00) were liquidated, and that plaintiff had acknowledged his liability to the defendant in principle albeit not the actual amounts involved. Bad faith on the part of the defendant was denied. To put the defendant's position beyond doubt,

defendant's attorneys then stated as follows:

The settlement agreement was confined to your client's claims, and excluded our client's claims against your client for which your client acknowledged liability.

[63] The letter concluded as follows:

In the event that your client fails to withdraw the summary judgment application by 12h00 tomorrow, 30 May 2019, our client will file an affidavit resisting summary judgment on the basis that inter alia your client's claims as pleaded in the summons has become settled and that, despite that, your client has forced him to file such affidavit, as a result of which he will ask for a punitive cost order on the attorney and own client scale.

[64] This appeal is not concerned with whether the settlement agreement settled all claims between the parties (as appears to be the plaintiff's position) or just the plaintiff's claim thereby leaving defendant's claims unsettled (as appears from the defendant's position). However, it appears to me that the stance taken up by the plaintiff is reasonable especially where the plaintiff's attorneys' 13 May 2019 letter made it clear that the R60 000.00 would be in full and final settlement of both parties' claims, and defendant's attorneys must have realised that this was the basis upon which plaintiff counter-signed their letter of 13 May 2019.

[65] The defendant seems to have deliberately held back on raising his alleged damages during the negotiation of the settlement agreement. Moreover, the alleged damages suffered by defendant appear to me to have been inappropriately set-off against the R60 000.00 because they were not liquidated. The plaintiff's attorneys' theory that the alleged damages were strategically not referred to by the defendant during the negotiation so as to allow the defendant to later on 'recover' these alleged

damages through a mere set off, as opposed to instituting action for their recovery, appears to me to hold some water. The way the defendant appears to have approached the settlement agreement bears some commonality with the defendant's approach to the present litigation and this appeal.

[66] Faced with the position taken by the defendant to the settlement, the plaintiff withdrew his March action and instituted the July action for payment of the balance of the R60 000.00, corresponding to the defendant's set-off amount of R39 000.00.

The July action

[67] As I have stated above, in the July action, the plaintiff claims payment of an amount of R39 000.00. The pleaded basis for this payment is the settlement agreement concluded between the parties which is referred to above. The plaintiff's

pleaded case is that of the agreed R60 000.00, only an amount of R21 000.00 has been paid.

Receipt of the July summons

[68] Regarding receipt of the July summons, defendant's founding affidavit discloses that the security guard who received the summons informed the defendant of the summons. In defendant's letter to his attorneys which was attached to the founding affidavit,

the defendant states that the security guard informed him of "something in an envelope having been delivered."

[69] The defendant then contacted his attorneys of record and gave them instructions to defend the action.

[70] It is probable that the envelope referenced in the sheriff's return of service accompanied the July summons, and it is also

probable that arrangements were made to have the July summons delivered to defendant's attorneys for them on 23 July 2019

delivered a notice of intention to defend on defendant's behalf, and the next day delivered the complaint notice, that is, the rule 60, alternatively rule 60A notice.

[71] Having delivered the complaint notice, it would have been expected from the defendant to apply for the setting aside of service of summons after expiry of the notice period. However, the defendant did not do so. On this basis, the complaint notice became a nullity, and defendant would have then been required to deliver his plea. The

defendant's founding affidavit does not deal with this aspect.

[72] Nevertheless it appears to me that out of extra caution the plaintiff brought an application for substituted service ['the ex parte application'] towards the end of October 2019 in response to the complaint notice issued on 25 July

2019. By that stage, the appellant had not prosecuted his complaint notice, and was well out of time within which to do so. The next litigation step was for the appellant to deliver his plea, or for the respondent, in the absence of such plea, to place the appellant under bar. From my reading of the papers and the correspondence exchanged between the two sets of attorneys thereafter (dealt with in detail

further below), the respondent was attempting to progress the matter and misguidedly believed that the ex parte application was the appropriate way in which to do so.

[73] That delivery of a plea was the foreseeable next stage in the litigation appears to be confirmed from paragraph 10 of appellant's founding affidavit, which states as follows:

On 21 October 2019, unbeknown to the [Appellant], the Respondent brought an ex parte application for substituted service in response to the [complaint notice].

[74] There was no expectation at that stage that respondent would bring or was expected to bring an application for substituted service. The appellant appears to have accepted this to be the case. Having not prosecuted the rule 60/60A application after the complaint notice, the defendant was accordingly then under an obligation to deliver his plea.

[75] The ex parte application itself does not form part of the appeal record. It does, however, appear that it served before various Magistrates between 29 October 2019 and 16 February 2020, and that a second application for substituted service served before various Magistrates on 17 and 18 February 2020. It appears from the papers that the plaintiff went this route because of the defendant's refusal to cooperate by providing his address in the UK so that the summons could be served there, and thereby to the extent that the complaint had merit, curing the complaint.

[76] The ex parte application makes its first appearance before Magistrate Tau on 29 October 2019. The relevant portions of the learned Magistrate's notation in respect of this appearance reads as follows: "Pp [postponed] for specific details of address of United Kingdom."

[77] It may be gleaned from the respondent's attorneys email sent to appellant's attorneys later that same day, that the ex parte application was postponed because the respondent's attorneys had been requested by "Magistrate Tau at the Randburg Magistrates' Court, in chambers, to provide your client's last known physical address in the United Kingdom." In this email the respondent's attorneys requested the appellant's attorneys to provide them with the appellant's

UK address if "possessed of this information." As alluded to above, the appellant had been unaware of the ex parte application.

[78] The appellant's attorney's response later that day to the aforesaid request, was to the effect that he did not have instructions to positively respond to respondent's attorney's email. This is a surprising response. I pause to note that the appellant's founding affidavit, whilst referring to the respondent's attorneys request, fails to disclose the

appellant's (negative) response.

- [79] The remedial action required by the complaint notice in order for there to be valid service (at least on appellant's view) was for the respondent to obtain the appellant's address in the UK, and to then seek an order for substituted service. Having now been requested by respondent's attorneys to provide them with appellant's address, the refusal to do so (whether because of appellant's instruction or otherwise) is inexplicable, more so since appellant's attorneys were aware that the request had come from a Magistrate.
- [80] Even in his irregular step application, the defendant remained coy about his UK address. For example, in the letter to his attorneys which was attached to the founding affidavit, the defendant merely states that he is resident in the UK, and that his children go to in the UK. His letter gives no information as to exactly where in the UK he resides, whilst stating in his confirmatory affidavit to the replying affidavit that he lives "on Warren Cutting, Kingston Upon Thames, KT2 7HH.", but without stating where exactly on Warren Cutting he lives.
- [81] It appears to me that defendant was and has at all times tried to make it as hard as possible for the plaintiff to prosecute the July action.
- [82] The ex parte application returned to court the next day (30 October 2019) before Magistrate Persence in chambers. The learned Magistrates' notation in respect of this appearance reads as follows: "Kindly comply with the instructions dated 29.10.19 and attach the return of service."
- [83] As I have said in the introduction to this judgment, the appearances before Magistrates Tau and Persence on 29 and 30 October 2019 respectively, and the notes made by them pursuant to such appearances, the October notes, are referenced in appellant's notice of motion.
- [84] On 10 December 2019, the plaintiff's attorneys emailed defendant's attorneys in the following terms:

Please be advised that we have attended at the Randburg Magistrates Court regarding the Application for substituted service, however, same was not granted as the court was of the opinion that the appellant is aware of the action in light of the service and filing of the Notice of Intention to Defend.

Should your client maintain that proper service has not been effected, we request that you proceed to set down the Notice in terms of Rule 60 alternatively Rule 60A.

- [85] According to the aforesaid email the learned Magistrate who was seized with the application for substituted service on that day, was of the opinion that the application could not be granted because defendant had delivered a notice of intention to defend the July action and was obviously then aware of it.

[86] After receiving the above email, defendant's attorneys then requested a copy of the "Court Order in which the [plaintiff's] ex parte application for substituted service was refused." This email did not deny that defendant was not aware of the July action.

[87] On 11 December 2019, the plaintiff's attorneys emailed the defendant's attorneys in reply as follows:

The application was heard in chambers and no court order was handed down. The Magistrate in all likelihood reflected the order on the face of the court file should you wish to draw same.

Further to this, we request that you confirm that you shall be setting your client's Rule 60 down for hearing.

[88] By this stage, the plaintiff had attempted to progress the July action by making application for substituted service. In the face of the learned Magistrate's view that the application could not be granted because defendant was aware of the July action, it is unclear what further steps plaintiff was required to take in relation to the service issue.

[89] Nevertheless, on 17 December 2019, defendant's attorney emailed plaintiff's attorney. The relevant portion of this email is as follows:

We have accessed the court file and made a copy of its cover, which is attached. First, we do not see the court's decision on your client's application for substituted service. To this end, we request that you indicate how you were informed that the application was not granted, and what the details of that ruling were – this is relevant to any application which our client may bring. Your coyness regarding this issue is perplexing. Second, on the court file cover, there is reference to a requirement to comply with instructions dated 29 October 2019. What instructions are these? And were they complied with?

[90] I view this email as an attempt by the defendant to unjustifiably turn the tables on plaintiff in regard to the service issue. The defendant had taken no steps to set aside service of summons and was obliged to file his plea. Fortuitously for him the plaintiff then made the running, as it were, to progress the matter, and the defendant now sought to take full advantage of an apparent benefit to which he was not entitled.

[91] It is also not readily apparent to me why the appellant's attorneys made the enquiry in relation to the instructions of 29 October 2019 reflecting on the file cover. This is because not only had the respondent's attorneys already in their email of 29 October 2019 made appellant's attorneys aware of the appearance on that day and the learned Magistrates' request for the respondent's address in the UK, but the appellant's attorneys had declined to assist respondent with such address.

[92] Presumably because the respondent from his perspective had done everything in his power to progress the matter, and with his position regarding the validity of service having been confirmed through the appearance on 10 December 2019, on 13 February 2020, the plaintiff's attorneys served a notice of bar on the defendant's attorneys.

[93] The notice of bar prompted an indignant letter from the defendant's attorneys to the plaintiff's attorneys later that same day. The letter starts by taking exception to the service of the notice of bar without warning and refers to the previous emails that had passed between the attorneys. It then berates the plaintiff's attorney for not having attended to the other orders and remarks of the Court in the court file. The balance of this 13 February 2020 letter is scathing of the plaintiff's attorneys. The last portion of this letter reads as follows:

Accordingly, when you wrote to us on 10 December stating that your client's application was not granted as the court was of the opinion that the appellant was aware of the action in light of the service and filing of the Notice of Intention to Defend, this was blatantly false. Equally, when you wrote to us on 11 December, that was false. Said continuing falsity was designed to deceive us and the appellant into taking action to legitimise the fact that your client's service of the summons was irregular, concealing that your client was in fact ordered by the Magistrate to obtain details of, and serve, on the appellant's residential address of appellant (sic) in the United Kingdom, which he failed to do. Instead on 30 January 2020, after we had been asking, unanswered to date, after the details of how you were informed of the alleged decision not granting your client's ex parte application, you purported to withdraw such application, without informing us of same, and proceeded on 10 February 2020 to serve the uncolleagial Notice of Bar.

Your firm's conduct outlined above is highly irregular, is a gross abuse of the court rules, and is gravely unethical. Furthermore, it is simply incompetent to withdraw an application in which orders were given by the Magistrate merely to avoid complying with those orders.

In the event that your firm does not satisfactorily redress this conduct by noon tomorrow, 14 February, we will proceed not only to write to the Chief Magistrate to ensure that your client does not continue with its deception by applying for default judgment based on the Notice of Bar, but we will also report your firm's conduct to the Legal Practice Society. Any costs that our client will incur pursuant to the said conduct, your firm is hereby put on notice that he will seek costs *de bonis propis*.

[94] I highlight that the above letter from the defendant's attorneys accuses the plaintiff's attorneys of falsity and threatens to report them to the Chief Magistrate. These accusations are not based on the facts that I have so far gleaned and constitute harassment of the plaintiff's attorneys.

[95] The plaintiff's attorneys' response to the aforesaid letter came on 17 February 2020. After acknowledging that the absence of a warning prior to issuing the notice of bar was not collegial, the plaintiff's attorneys noted that "the principle of collegiality is reciprocal, which principle has unfortunately not been extended by you." In justifying this response, the plaintiff's attorneys contended that the settlement of plaintiff's claim had been negotiated by the defendant in bad faith based on the defendant's attorney's advice, and in a manner to "avoid [the defendant] having to prove his alleged claim" against the plaintiff.

[96] The plaintiff's attorneys letter then proceeds to set out the lack of cooperation and collegiality on the part of the defendant in several instances. One could say that this was a gloves' off response:

5. As a result, our client who is of limited means (whilst as you put it, your client who "is one of significant means") was forced to launch a further action for the balance of the settlement amount. The manner of service of the second action was precisely the same as that of the first action, however in this instance your client caused to be served a Notice in terms of Rule 60, alternatively Rule 60A on our office on 24 July 2019.
6. On 2 August 2019, we were instructed to request that you inform us where your client resided during service of the first action on you to which you responded, on 6 August 2019, that your client had been living in the United Kingdom for the last few years. Despite this, there were no issues whatsoever with service of the first at your client's address in Hyde Park, Johannesburg.
7. On 7 August 2019, our client denied that he was aware that your client had been living in the United Kingdom for the last few years and in an attempt to accelerate and bring the matter to finality we requested that you accept service of the summons on your client's behalf. Your one liner response on 7 August 2019 was that you did not have the requested mandate.
8. Magistrate Tau requested your client's last know (sic) physical addressed in the United Kingdom on 29 October 2019. On even date we requested this from you however on 30 October 2019, you informed us that you do not have instructions to positively respond to our email.
9. Regarding your email of 17 December 2019, this did not require a response as we advised you in our email of 11 December 2019 that the Application was heard in Chambers and no Order was handed down. Further, the instructions given were to obtain your client's address in the U.K, which request was refused by you and secondly to comply with the first instruction and to attach the return of service of the second action. This was not an instruction to serve on your client's U.K address, which in any event would not have been possible, but to hand a copy of the return of service of the second action to the Magistrate.
10. Your allegation that when we advised you that our client's Application was not granted as the Court believed that the Appellant was aware of the action in light of the service and filing of a Notice of Intention to Appellant was blatantly false has been treated with the contempt that it deserves and we invite you to take this up with the learned Magistrate Tau.
11. We request that when you write to the Chief Magistrate and the Legal Practice Council, as it is now called, that you attach this correspondence.

12. Notwithstanding the above, we will not tolerate your client's attempts to delay this matter any further. The notice of withdrawal of the bar will be served on your offices this morning and we hold instructions to issue afresh our client's application for substituted service thereafter.
- [97] I have several difficulties with the approach taken by the defendant as set out in his attorneys' 13 February 2020 letter, and for the most part agree with the views expressed in plaintiff's attorneys' letter of 17 February
2020. After his complaint notice, the defendant sat back and took no steps to prosecute the complaint. He then, through his attorneys, sought to take unjustifiable advantage of the plaintiff's desperation to progress the matter, whilst ignoring the fact that it was he, not the plaintiff, who had been supine. And on top of all that the defendant had refused to disclose his address in the UK.
- [98] It appears that later that same day (17 February 2020), the plaintiff's attorneys attended at the Magistrates' Court with another ex parte application for substituted service. The file cover notes this appearance before Magistrate Mathopa, and the following query from the learned Magistrate: "Why substituted service- Already Notice of Intention to Defend delivered."
- [99] On 18 February 2020, the plaintiff's attorneys again attended at the Magistrates' Court, appearing before Magistrate Booysen. After noting this appearance, the court file cover reflects Magistrate Booysen's written notes as follows:
- Y Application for Substituted Service Refused.
- Y Nothing wrong with service effected by the Sheriff on 9/7/2019
- [100] After this appearance and outcome of the ex parte application, the plaintiff's attorneys addressed a further letter to defendant's attorneys. In this letter the defendant's attorneys were advised that the "Application for Substituted Service was issued yesterday, 17 February 2020". Details of the appearances on 17 and 18 February 2020 before Magistrates Mathopa and Booysen were also provided together with photograph
- copies of the file cover. On the basis that the substituted service application had been refused, plaintiff's attorneys then
- advised that "As such, we are notifying you in advance that a Notice of Bar shall be served on your offices during the course of tomorrow morning."
- [101] In my view, the plaintiff was justified in serving the notice of bar in the circumstances: the Rules allow it and there had been an absence of collegial engagement on the part of the defendant.

[102] On 26 February 2020, the defendant's attorneys addressed a letter to the Acting Chief Magistrates, Randburg (the plaintiff's attorneys were copied in on the letter). The letter commenced with the following: "It is regrettable that we have to address this letter to you regarding the conduct of the Respondent and his attorneys, as outlined below:" The letter then went onto summarise what had transpired after 4 July 2019 in respect of the July action and up until the 18 February 2020.

[103] The letter concluded as follows:

4.1 We address this letter to you to respectfully and humbly request that you intervene in the matter to ensure that the Plaintiff's attorneys comply with the initial ruling and to ensure that no default judgment is entered against our client pursuant to a Notice of Bar as contemplated in their 19 February 2020 letter, without their first complying with the Initial Ruling.

4.2 We foresee a situation where the Plaintiff's attorneys deliver a Notice of Bar without complying with the initial Ruling and on its strength applying for default judgment. It simply cannot be that their way of dealing with the Initial Ruling is simply to shop around for another ruling from different Magistrates, This makes a mockery

of your Court, its process and Rules, which we implore you not to condone or countenance but to strongly show your disapproval and dismay.

[104] The defendant's approach to the Chief Magistrate, was, in my view, not only unjustifiable in and of itself, but if regard is had to the allegations of impropriety made against plaintiff's attorneys (such as forum shopping), wholly inappropriate. The defendant was also wrong in demanding compliance with orders that had been overtaken by two orders that service on him was valid.

Procedural competency of the interlocutory application

[105] Rule 60A affords a party, who believes that the other party has taken an irregular step, the opportunity to have that step set aside. To do so, the complaining party (in this instance the defendant) must first afford the other party an opportunity to remedy the irregular step within 10 days of laying the complaint (through the notice envisaged by rule 60A(1)). Where the 'offending' party does not remedy the complaint within the requisite 10 days, the complaining party is obliged to make application to set aside the irregular step (if still of mind) within 15 days from the expiry of the 10 days' notice period. An application made later than the 15 days is incompetent, and a complaining party who does so is required to seek condonation for such failure.

- [106] At the commencement of his argument before us, defendant submitted that the irregular step application fell properly within the provisions of both rule 60 and rule 60A. Following debate with this court, defendant correctly conceded that prayers 1 and 3 of his notice of motion could only be viewed as seeking relief in terms of rule 60A but maintained that the relief sought in terms of prayer 2 was properly sought in terms of rule 60.
- [107] Prayer 2, it will be recalled, was couched as an alternative to prayer 1. This prayer sought an order that plaintiff be given 5 days within which to comply with the October notes, and that if the plaintiff did not so comply then application could be made for setting aside the summons. Assuming that prayer 2 was properly viewed as falling within the provisions of rule 60, it still is not appropriate relief to set aside the summons itself. In any event, I do not believe that defendant's reliance on rule 60 for this prayer was appropriate not least because (1) the October notes were not orders, and (2) rule 60 does not empower the Magistrate Court to set aside any proceeding not least a summons. All that rule 60(2) allows is for a court to order compliance with "any provision of these Rules".
- [108] For the irregular step application to be procedurally competent, defendant was obliged to show in his founding papers that a notice removing cause of complaint was given to the plaintiff, that the complaint was not removed within the notice period, and that his application was brought within 15 days thereafter.
- [109] There are two fundamental problems with the irregular step application. First, the complaint notice upon which the application necessarily relies, and which is referred to in the first prayer of the notice of motion, was served on 24 July 2019. The irregular step application was served almost a year later on 1 July 2020, was clearly out of time, and defendant never sought condonation for its lateness.
- [110] Second, the complaint identified in the complaint notice was that service of summons was incompetent. Following from that, the complaint notice correctly linked a failure to remedy service to an entitlement to apply for setting aside such service. However, this is not what was sought by the defendant. He sought the setting aside of the combined summons itself. There is no evidence that the defendant caused to be served a notice complaining about the validity of the summons itself, nor did the complaint notice itself identify setting aside the summons itself as arising from it. Simply put there was and is no suggestion that the issuing of the summons was irregular. There is no basis laid in the irregular step application for setting aside the summons itself.
- [111] For either of the above two reasons (alone or together) the irregular step application fell to be dismissed and was correctly dismissed by the learned Magistrate.

Validity of service of July summons

- [112] It is common cause that summons was served at the defendant's Hyde Park house, and on a person employed by the defendant at that property (in this case, a security guard). The deputy sheriff certified service of the summons in terms of rule 9(3)(b), more specifically relying on the residence portion of the sub-rule.
- [113] The defendant contends that the service in terms of rule 9(3)(b) was invalid because he had been residing in the United Kingdom since 2015 and was accordingly not resident in South Africa at the time of service.
- [114] I point out that the defendant did not and does not assert that the Hyde Park house is not his residence but rather that he is not resident in South Africa. I nevertheless proceed on the basis that the question for decision is whether in the circumstances of the particular facts in this matter, the Hyde Park house fulfils the requirement of being defendant's 'residence' for purposes of rule 9(3)(b).
- [115] In argument before us defendant relied on an extract from *Hoosein v Dangor*.^[1] *Hoosein* was a judgment handed down in the context of a rule 43 application. The extract relied upon by defendant, and particularly the underlined portions which is the defendant's underlining, is as follows:

The concept "residence" has been considered in a number of court decisions in the past, notably *Ex parte Minister of Native Affairs* 1941 AD 53; *Cohen v Commissioner for Inland Revenue* 1946 AD 174 to name but few such decisions. In *Robinson v Commissioner of Taxes* 1917 TPD 542 at 547–548 Bristow J observed that perhaps the best general description of what is imported by the term "residence" is that it means a man's home or one of his homes for the time being, though exactly what period or what circumstances constitute home is a point on which it is impossible to lay down any clearly defined rule. Physical presence at a place for a prolonged period would constitute residence. Bristow J further observed that when the intention is to prolong one's presence beyond the possible limits of a casual visit,

and that intention is not abandoned, it would seem that the intention to prolong one's presence beyond the possible limits of a casual visit, that intention would constitute residence, the intention of course being gleaned from all the circumstances of the case. A person's intention is not necessarily conclusive. The objective facts must be looked at to decide the question of factual evidence.

- [116] The question in *Hoosein* was whether the court had jurisdiction to entertain the rule 43 application that served before it. The plaintiff had claimed that the court did not have jurisdiction because the applicant was not ordinarily resident in the court's area of jurisdiction at the relevant time as required by section 2(1)(b) of the Divorce Act.^[2]

- [117] Whilst Hoosein dealt with the meaning of ‘ordinarily resident’ as it pertains to jurisdiction in the context of divorce matters, the question for decision by a full bench of three judges in *Barens en ‘n Ander v Lottering*[3] was whether service of summons had interrupted prescription. As in the present matter, summons was certified as being served in terms of rule 9(3)(b) at the defendant’s residence.
- [118] In *Barens*, the evidence concerning the defendant’s residence was as follows. The defendant’s family lived in Wellington. It appears that the defendant lived with them until July 1994, at which stage the defendant relocated to Calvinia to take up a temporary teaching position. During this time the defendant visited his family regularly and had also, in official documentation, noted that he resided in Wellington. In February 1996, summons was served on the defendant at the family home in Wellington. In April 1996 defendant was granted a permanent teaching post in Calvinia. Based on these facts, Lottering (the defendant in *Barens*), contended at the time when summons was served, his residence was in Calvinia and not Wellington, and that accordingly prescription had not been interrupted.
- [119] The full bench held that for purposes of rule 9(3)(b) a person may have more than one residence, and that service of process at any one such residence would be valid. On the facts the full bench found that the defendant had two residences, one in Calvinia and the other in Wellington. It accordingly held that service of summons at the Wellington address constituted valid service in terms of rule 9(3)(b). Since service was valid, prescription had been interrupted.
- [120] Relying heavily on Hoosein, defendant’s argument appears to be that even though a person may own several residences, only that person’s primary residence qualifies as residence for purposes of rule 9(3)(b). According to the defendant a person’s holiday home would not fall within the meaning of residence for purposes of rule 9(3)(b).
- [121] In my view, the position expressed by the full bench in *Barens* is more appropriate to the issues raised by the facts in the present matter, than those that pertained in Hoosein. Hoosein revolved around the jurisdiction of the court to entertain a rule 43 application, more particularly in the context of the meaning of “ordinarily resident”, whereas the issue in *Barens* related to very question being dealt with in this matter: service of process and the meaning of “residence”.
- [122] There is another reason why I do not believe that Hoosein is appropriately applied to this matter. The extract from the Hoosein judgment dealing with the concept of ‘residence’ and upon which the defendant relies, was noted by the court itself as

being not particularly helpful:

There is normally no difficulty in determining where a natural person resides. It is a factual question, little helped by what a definition of the concept “residence” ought to be. All that can be said about “ordinarily resident” is that it denotes a residence that is not casual or occasional. (See *Bisonboard Ltd v K Braun Woodworking Machinery Ltd* 1991 (1) SA 482 (A) at 504A)

- [123] The defendant appears to place store on the underlined portions of the extract in support of a suggestion that residence requires a prolonged stay in order to be constituted as such. Whilst this may be correct when examining the question of ‘ordinarily resident’, it does not follow that a person’s residence is one in which that person stays over a prolonged period. It was for this reason that the court in Hoosein examined the concept of residence and drew from it the principle. In my view, whilst the place where a person is ordinarily resident would also be regarded as the person’s residence, it does not follow that a person’s residence is limited to the place where the person ordinarily resides.
- [124] Rule 9(3)(b) makes it clear that service at the residence of a person is valid. Barens holds that for purposes of rule 9(3)(b) a person may have more than one residence. This approach allows for flexibility when it comes to service of process and fulfils the aim of rule 9 which is to bring the process to the attention of the defendant.
- [125] At the end of the day, both Hoosein and Barens hold that the question as to what constitutes a person’s residence is a factual inquiry, and that whilst a place of permanence would be regarded as a person’s residence, that does not exclude other places as also constituting a person’s residence.
- [126] The relevant facts pertaining to the inquiry into whether the Hyde Park house constitutes defendant’s residence for purposes of rule 9(3)(b), include, as I see them, the following:
- 126.1 The defendant owns the Hyde Park house.
- 126.2 The defendant is married with two children.
- 126.3 Up until sometime in 2015, the defendant and his family resided in the Hyde Park house.
- 126.4 Sometime in 2015, the defendant and his family moved to the UK. The defendant states that this was a permanent move.
- 126.5 The defendant became a resident in the UK in 2016 by virtue of an EU Residence Card. This card is a work permit which allows the defendant to live in the EU for such purpose until October 2021.
- 126.6 The defendant and his family visit the Hyde Park house “a couple of times a year,” for an unstated length of time.
- 126.7 During the last quarter of 2018, the defendant contracted the plaintiff to carry out maintenance and repair work at the Hyde Park house. The defendant was present at the Hyde Park house when this contract was concluded.
- 126.8 The defendant then departed South Africa.
- 126.9 About a month later he returned to South Africa with the intention of staying in the Hyde Park house, although for reasons dealt with above, he was unable to sleep in the house. One of the defendant’s texts to the plaintiff at that time referred to the Hyde Park house as “home.”

126.10 There is a security guard who is employed at the Hyde Park house.

126.11 The security guard accepted the March 2020 summons on behalf of the defendant and thereafter contacted the defendant to advise him of receipt.

126.12 The defendant then contacted his attorneys with instructions to oppose the March action and they represented him fully in this leg of the dispute without objecting to the service of the summons.

126.13 The security guard accepted the July summons on behalf of the defendant, and again contacted the defendant to advise him of receipt.

126.14 As with the March summons, the defendant contacted his attorneys, and they were likewise placed in possession of the July summons and represented him fully.

[127] To be fair to the defendant, he does state in his confirmatory affidavit that he did not raise the invalidity of the March summons in that action because it was settled when it was and did not proceed. He states in his confirmatory affidavit that if that matter had not settled, he would have taken issue with what he regarded as defective service. In my view this is an ex post facto explanation for the defendant's omission. The March action was settled during the middle of May 2019, but its summons was served on 5 April 2019. Having regard to the fact that the notice of intention to defend was served on 24 April 2019, at best for defendant his entitlement to submit a notice to remove cause of complaint in terms of rule 60A would have expired prior to the date upon which the matter became settled.

[128] Whilst, on the papers it appears that the defendant's residence is also in the UK, this does not exclude the Hyde Park house from also being the defendant's residence. In *Barens* the court held that even though the defendant lived and worked in Calvinia, his return to the family home in Wellington for visits

(where he had previously permanently resided) and utilisation of that address for formal documentation, justified a finding that the Wellington home also constituted the defendant's residence for purposes of rule 9(3)(b).

[129] The defendant submits that the plaintiff, by bringing applications for substituted service, conceded, and accepted that summons had not been validly served. Taken in context, I do not believe that the plaintiff's substituted service applications give rise to such an inference. In any event, even if that was the case, the learned Magistrates dismissal of the substituted service

application on 18 February 2020, amounted to a court sanctioned acceptance that summons had been validly served. As I have stated

previously, these ex parte applications appear to have been instituted out of extra caution.

[130] I am of the view, therefore, that, for purpose of rule 9(3)(b), the Hyde Park house is to be regarded as defendant's residence.

[131] There is, however, an additional basis which supports the learned Magistrate's dismissal of the irregular step application.

[132] In *Investec Property Fund Limited v Viker X (Pty) Ltd*,^[4] the court held that where summons had come to the knowledge of the defendant through service that had not taken place as envisaged by the rules of court and defendant had given a notice of intention to defend, the purpose of the rule had been fulfilled. In the absence of prejudice to the defendant, summons would be regarded as having been validly served.

[133] Uniform rule 30(3) ("Irregular proceedings") and rule 60A(3) are identical in formulation. A High Court, when seized with an application to set aside an irregular proceeding/step, may exercise a discretion not to set aside the irregular proceeding/step if the irregularity has not caused the complaining party substantial prejudice. Although *Viker X* was decided in the context of the High Court rules, in my view the principle is appropriately applied to proceedings in the Magistrates

Court. When dealing with irregular proceedings, there ought to be no distinction in principle between proceedings in the Magistrates Court and High Court. I am fortified in this view when regard is had to the provisions of rule 1(2) of the Magistrates' Court. I am not of the view that the often-cited principle that the Magistrates' Court is a creature of statute bears any relevance to this debate. This is because what is at play here is an interpretation of the rules themselves. To the extent that my view is contrary to the full bench judgment of the Eastern Cape Local Division in *Kondlo v Eastern Cape Development Corporation*^[5] which was an appeal from the Magistrates Court, and I am not convinced that it is, I respectfully beg to differ with the learned

Judges in that division.

[134] Accordingly, I am of the view that the learned Magistrate was correct when he found that summons was validly served on the defendant as required by rule 9(3)(b).

Status of the notes appearing on the court file

[135] It may be recalled that the alternative basis upon which the defendant sought to set aside the summons, as formulated in his notice of motion, was because of the plaintiff's failure to abide by the October notes (the notes made by Magistrates Tau and Persence on 29 and 30 October 2019 respectively on the court file).

[136] In his heads of argument, the defendant refers to the October notes as rulings or directives and argues that they constitute court

orders.

[137] In my view the defendant faces several challenges in the context of this alternative basis to set aside the summons.

Whether summons can be set aside for failure to abide by the October notes

- [138] Assuming that the October notes are to be regarded as court orders, on what basis would a failure to abide by these orders justifiably result in an order setting aside the summons?
- [139] Various magistrates were seized with an application for substituted service. At best for the defendant, a failure by plaintiff to abide by the orders granted pursuant to that application, would result, not in the setting aside of the summons, but rather a dismissal of the application for substituted service. In other words the application for substituted service would be dismissed for non-compliance with those orders. It being so, the question would remain whether the service was valid.
- [140] Moreover, and as with the first problem identified in the context of the main basis upon which defendant asserts that the summons falls to be set aside, it is not readily apparent why a failure to abide by the court orders should result in an order setting aside the summons, as opposed to an order setting aside service of the summons. As discussed above, the defendant failed to prosecute the complaint notice in accordance with rule 60. It lapsed and there was no application for its revival by way of condonation.

Whether the rulings are

orders

- [141] A further challenge faced by the defendant is whether the October notes have the status of orders.
- [142] As a starting point defendant submits that whilst the October notes do not constitute judgments as envisaged by section 83 of the Magistrates' Court Act, "these rulings or directives do amount to orders which have been granted by courts of law."^[6]
- [143] The defendant then submits that plaintiff was required to comply with these rulings for two separate reasons. In my view neither of these reasons support defendant's submission. I consider them below.

Applicability of the Oudekraal principle

- [144] The first reason relies on the following principle stated in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*:^[7]

Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.^[8]

- [145] Based on the aforesaid principle, defendant submits that a statutory functionaries' decision, even if unlawful, is binding and of legal effect until such time as it has been set aside. The defendant submits that the notes made by Magistrates Tau and Persence on 29 and 30 October 2019 amounted to rulings in their capacity as statutory functionaries, and that for as long as these rulings existed, the plaintiff was bound to comply with them.
- [146] It is not clear to me what meaning defendant seeks to attribute to "statutory functionary", and why the Magistrates in giving their rulings are to be regarded as statutory functionaries. Guidance might however be gleaned from statute.
- [147] The Promotion of Administrative Justice Act ['PAJA'],[9] does not define "statutory functionary". However, it seems to me that, at least within the context of that Act and having regard to PAJA's definition of "administrative action", a statutory functionary would be an organ of state or person exercising a power in terms of legislation.
- [148] The Constitution itself may also provide some guidance. Section 43 provides that legislative (i.e., statutory) authority is vested in parliament, provincial legislatures, and municipal councils. In terms of section 168, judicial authority is vested in the courts. Courts and judicial officers are expressly excluded from the definition of "organ of state" in section 239.
- [149] The Disaster Management Act[10] (which, unfortunately, is currently at front and centre of our daily lives), redeemably defines "statutory functionary" as "a person performing a function assigned to that person by national, provincial or municipal legislation".[11]
- [150] It appears to me that defendant's categorisation of the Magistrates as statutory functionaries can only be in the sense set out above. In my view the Magistrates in their capacity as judicial officers are not statutory functionaries, and since the rulings were made by them in the former capacity, their rulings cannot be regarded as being made in an administrative capacity. In my view the Oudekraal principle is not applicable to this matter. More importantly PAJA excludes judicial functions from the purview of review.

Whether the rulings are equivalent to court orders

- [151] The defendant's second reason is that "the rulings are equivalent to court orders".[12] The question is therefore what is the status of the October notes?
- [152] Before turning to this question, even if the October notes were to be regarded as court orders, I once again rhetorically ask on what basis a failure to abide by these orders justify a setting aside of the summons, as opposed to dismissal of the application for substituted service or setting aside of service of summons. My answer is that there would be no such justification.

- [153] The defendant's reason that the rulings are equivalent to court orders begs the question as to whether this is indeed so. No argument was presented to us as to why this should be the case. What defendant emphasises are principles which state that court orders must be carried out and given effect. In my view these principles are only relevant if the October notes have the same status as court orders.
- [154] In his judgment the learned Magistrate characterised the October notes as "queries or requests of the magistrates that had minuted their requirements when the application was presented to them." He held that these queries or requests were not binding on subsequent Magistrates seized with the same application for substituted service. In other words, they were merely minutes on a cryptic record of proceedings.
- [155] The defendant contends that the October notes were binding on subsequent Magistrates seized with the application for substituted service and were not 'mere queries.'
- [156] Both before the learned Magistrate and on appeal, the defendant contended that the plaintiff's appearances before different Magistrates in respect of the application for substituted service amounted to 'forum-shopping' in order to obtain a favourable outcome.
- [157] In defendant's founding affidavit, which was deposed to by defendant's attorney, the plaintiff's attorneys were accused of grossly abusing the court rules and behaving in a "highly irregular...and gravely unethical" manner by virtue of the various appearances before different Magistrates. The plaintiff's attorneys were accused of doing this in order to avoid complying with, what the defendant viewed as, court orders.
- [158] In his judgment the learned Magistrate explained the process of rotation of presiding officers in the Magistrates court such that the Magistrates hearing ex parte applications on day 1 might well not be the same as those on day 2. The learned Magistrate rejected the defendant's accusation of forum shopping when he stated that "So, to assert that the respondent, plaintiff's legal representatives had gone forum shopping is far fetched."
- [159] In my view the learned Magistrate correctly rejected the accusation of forum shopping. Rotation of presiding officers is well known to lawyers, or at least in my view, ought to be well known. The accusations levelled against plaintiff's attorneys were, in my view, unfounded and gratuitous.
- [160] In so far as the defendant's attorneys expressed consternation to the Chief Magistrate with what they perceived to be irregular conduct by the various Magistrates, the defendant ought to have taken whatever appropriate litigation steps might have been available to him as opposed to trying to side-step court process through an unjustified extra curial approach to the Chief Magistrate.
- [161] In my view the October notes are correctly categorised as queries or requests. In context, and as alluded to in the learned Magistrate's judgment, the first Magistrate seized with the application for substituted service, Magistrate Tau, did not appear to be satisfied that a case for substituted service had been made out and requested the plaintiff to provide the court

with the defendant's address in the UK. The query or request appears to have been made on the basis that absent such information, the learned Magistrate was not minded to grant the application. No more is to be read into it than that.

The same applies to the note made by Magistrate Persence on 30 October 2019.

The punitive costs awarded by the learned Magistrate

[162] The defendant submits that there was no basis for the learned Magistrate to grant a punitive costs order against him. He contends that, in the court a quo, the plaintiff sought a punitive costs order on the basis that the interlocutory application was vexatious.

[163] The defendant submits that the interlocutory application was not actuated by malice and that it was brought on the "bona fide belief that service of the summons was defective" and that there is "no nefarious purpose underlying these proceedings." He submits that there were no exceptional circumstances justifying the punitive costs order, and that in making such an order the learned Magistrate failed to exercise his discretion judicially.

[164] The reasons advanced by the learned Magistrate for awarding punitive costs against the defendant included that the interlocutory application was "a non-starter from the outset." In this regard the learned Magistrate pointed to the fact that the interlocutory application (1) was brought well outside the time

limits imposed by the rules with no condonation having been sought by the defendant, (2) was convoluted in that it was not at all clear upon which of two rules defendant relied for its application, and (3) the issue as to whether summons had been validly served ought preferably to have been raised as a special plea.

[165] From the defendant's heads of argument, it is apparent that the defendant accepts the principle that a court of appeal is not at liberty to overturn a costs award merely because it believes the award was wrong. Since the award of costs is a matter for the discretion of the court of first instance (in this case the learned Magistrate), a court of appeal may only interfere with a cost award if, taking into account all the circumstances of the case, it finds that the court of first instance did not exercise its discretion judicially.

[166] Although plaintiff sought a punitive costs order based on vexatiousness, the learned Magistrate's judgment did not expressly rely on this as a basis for the costs award. I say not expressly because, on a reading of the judgment as a whole, there are indications that the learned Magistrate viewed some of the defendant's conduct as wanting.

[167] Whilst vexatiousness is a justifiable basis for punitive costs, it is not the only basis. Indeed, there is not an exhaustive list of circumstances under which punitive costs.

[168] In my view, the learned Magistrate exercised his discretion judicially, and the defendant has not demonstrated a sufficient basis to overturn the costs award made by the learned Magistrate.

[169] In any event, in my view, there was on the papers that served before the learned Magistrate sufficient basis to grant punitive costs against the defendant. This includes (1) defendant's unjustifiable attack on plaintiff's legal representatives; (2) defendant's supine attitude to prosecuting his complaint; (3) defendant's still borne irregular step application; (4) defendant's attitude to the litigation as a whole which appears to be to delay the finalisation thereof and to out-litigate the plaintiff; (5) defendant's reliance on a highly technical point, and especially where the defendant was not able to demonstrate any prejudice as a result of the supposed invalidity of the summons; (6) defendant's not having raised this same technical point in the March action where service took place in exactly the same manner, and where the defendant was represented by the same firm of attorneys in both actions; (7) defendant's full knowledge of the July summons; (8) defendant's delivery of a notice of intention to defend the July action, his complaint thereafter that the July summons was invalid, and the very late prosecution of his complaint almost a year later.

Costs of the appeal

[170] Before us, and on the basis that the appeal would be upheld, the defendant sought costs of the appeal.

[171] I have found that the appeal is to be dismissed. This then leaves the question of the costs of this appeal.

[172] In these proceedings the plaintiff asks us for a punitive costs award, viz attorney and client costs.

[173] In my view such an award is justified. I say this for the reasons set out in paragraph [169] above, coupled with the defendant's persistence on appeal with a still borne application, accusations of impropriety on the part of plaintiff's legal representatives, and the inordinate unjustifiable delay to the finalisation of the July action brought about first by the irregular step application and then this appeal.

Order

[174] I accordingly make an order in the following terms:

1. The appeal is dismissed.
2. The defendant is ordered to pay the plaintiff's costs on appeal on the scale as between attorney and client.

T OSSIN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

I agree:

G MALINDI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Electronically submitted therefore unsigned

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DATE OF THE HEARING:

11 October 2021

DATE OF

JUDGMENT:

21 June 2022

[1]

[2010] 2 All SA 55 (WCC)

[2] 70 of 1979

[3] 2000 (3) SA 305 (C)

[4] [2016] JOL 36060 (GJ)

[5] [2014] 2 All SA 328 ECM

[6] Defendant's heads of argument: paragraph 17

[7] 2004

(6) SA 222 (SCA)

[8] At 242A-C

[9] Act 3 of 2000

[10] Act 57 of 2002

[11] Section 1 (Definitions)

[12] The defendant's heads of argument: paragraph 20

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