REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG HIGH COURT
LOCAL DIVISION, JOHANNESBURG

CASE NO: A5066/2013

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

13 JUNE 2014 **FHD VAN OOSTEN**

In the matter between

GRETE SHEPARD **APPELLANT**

and

JACQUELINE EMMERICH **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] This appeal concerns the validity of the service of a summons at a contractually chosen *domicilium citandi et executandi*. The court a quo (Thompson AJ) found that the service was defective and for reasons that will become apparent, dismissed the appellant's claim with costs. The appeal is against this finding and is with its leave.

[2] The *domicilium* clause was contained in an addendum to a sale of business agreement, concluded between the appellant, as the purchaser, and the respondent as the seller (the agreement). In terms of the agreement the respondent chose the following address as *domicilium citandi et executandi* 'for all purposes hereunder':

'Routledge Modise Moss Morris, 2 Pybus Road, Sandton (Marked for D. Janks 2nd floor).'

The appellant issued summons against the respondent for payment of the sum of R123 867-06, based on the agreement. The summons was served by the deputy sheriff, which, according to the return of service, was effected on 'c/o Routledge Modise Moss Morris, 2 Pybus road, Sandown, Sandton being the chosen *domicilium citandi et executandi* of [the respondent]' by 'affixing a copy of the combined summons to the principal door' of the *domicilium* address. The service, absent service at the second floor of the *domicilium* address and not marked for the attention of Mr Janks, therefore, did not strictly comply with the provisions of the *domicilium* clause.

[3] It was accepted by the court a quo as not being in dispute that prior to the service of summons, Routledge Modise Moss Morris, a firm of attorneys, had moved offices from the *domicilium* address and further that Mr Janks had resigned from the firm. In the event the summons did not come to the attention of the respondent and judgment by default was subsequently sought and granted. A writ of execution was authorised and served on the respondent which, according to the respondent, was the first intimation she had received of the pending action. Pursuant thereto the respondent launched an application for rescission of the default judgment which was granted. The matter proceeded to trial and came up for hearing before Thompson AJ. At the commencement of the hearing the learned judge was asked, by agreement between the parties, to adjudicate on a point in *limine,* whether the service of the summons was proper, which, if decided in favour of the appellant, would have interrupted prescription. Having heard argument presented by both parties, the learned judge, as I have mentioned, found that the service was defective, that prescription had not been interrupted and accordingly dismissed the appellant's claim with costs. The only issue on appeal is whether the service of the summons was valid.

[4] The learned judge a quo considered the issue to be novel and with reference to three foreign authorities (see the judgment of the Court of Session (Outer House) Scotland in *McMullen Group Holdings Ltd v Harwood* [2011] CSOH; 201 GWD 32-600; the Queen's Bench decision in *Anglian Water Services Ltd v Lain O'Rourke Utilities Ltd* [2010] EWHC 1529 (TCC); [2011] 1 ALL ER (Comm) 1143; 131 Con LR

94; [2010] 3 EGLR 104; [2010] CILL 2873 and the judgment in *Argo Capital Investors Fund SPC for Argo Global Special Situations Fund SP v Essar Steel Ltd* [2005] EWHC 2587, concerning the application of the English Civil Procedure Rules) concluded that where a specific method of effecting service is contractually agreed, that method should be strictly complied with. The authorities relied on by the learned judge are persuasive and I am in agreement with the conclusion he has arrived at. I do not consider it necessary to revisit those judgments.

[5] The nature of the enquiry as to whether service was proper becomes apparent if the present matter is juxtaposed to the case of *Gerber v Stolze and others* 1951 (2) SA 166 (T). The issue relevant to the present matter in that case, which was an appeal heard by the Full Court, was whether a *nulla bona* had been properly served in order to effect valid execution against immovable property. The *domicilium* clause in the mortgage bond from which the indebtedness of the appellant arose, provided for service to the appellant's 'principal at c/o Mr LG Gerber, 21 Cullinan Buildings, Simmonds Street, Johannesburg'. Likewise to the present matter the *domicilium* clause provided for a double provision: firstly, at a particular place and secondly, on a named person, who happened to be the appellant's husband. Service of the provisional sentence summons was however, effected by affixing a copy thereof to the principal door of the premises at the *domicilium citandi et executandi*. The sheriff's return indicated that the premises were occupied by a certain company and that the sheriff was informed that the appellant's husband intermittently occupied no 126 on the third floor of that building. The sheriff further indicated that he was unable to find anyone at no 126. The court held that the *domicilium* was chosen at a particular place which the sheriff attended and the fact that the appellant's husband could not be found did not result in defective service. In the present matter nothing prevented service in strict compliance with the *domicilium* clause.

[6] The double provision in the *domicilium* clause we are here concerned with provided for service on the second floor, which was not effected. The second requirement was a reference to Mr Janks. This likewise was not complied with. The facts firstly, that the firm had moved and, secondly, that Mr Janks had resigned are of no moment: it did not and could not change the requirements for a proper service

(cf *Valentine v Wardon* (1929) 13 PH F31; *Hollard's Estae v Kruger* 1932 TPD 134 (service at the *domicilium citandi et executandi* held good despite the fact that the defendant was known to be resident abroad); *United Building Society v Steinbach* 1942 WLD 3 (service at *domicilium* address held good despite the defendant having abandoned the property); and, generally, *Amcoal Collieries Ltd v Truter* 1990 (4) SA 1 (A) 5J-6D). The significance of the changed circumstances is this: had the service been effected in accordance with the *domicilium* clause, even though the summons did not come to the attention of the respondent due to the changed circumstances, it would have constituted good service.

[7] Counsel for the appellant, with reliance on the judgment in *Scott and another v Ninza* 1999 (4) SA 820 (E), requested that the defective service be condoned by the court. The matter is clearly distinguishable in that the court dealt with condonation within the framework of the rules of court. Condonation where compliance with a contractual provision, in this instance the *domicilium* clause, is required does not arise. In my view the court a quo correctly found that the service was defective and it follows that the appeal must fail.

[8] In the result the following order is made:

1. The appeal is dismissed.
2. The appellant is ordered to pay the costs of the appeal.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

M VICTOR
JUDGE OF THE HIGH COURT

I agree.

G DAMALIS
ACTING JUDGE OF THE HIGH COURT

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