IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 21852/2009

In the matter between:

THE CITY OF CAPE TOWN Applicant

and

RUSLAMERE TRADING (PROPRIETARY) LIMITED Respondent

JUDGMENT HANDED DOWN ON 6 SEPTEMBER 2010

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1. This is an interlocutory application to set aside a notice of objection (to a notice of intention to amend) (as well as an application for condonation for the non-compliance with the time period prescribed by Uniform Rule of Court 30(2)(c)), where the litigants were, procedurally, literally at cross-purposes.

2. The procedural history of the matter is as follows:

   (a) On 16 October 2009 the plaintiff issued summons claiming R512 023,16 in respect of municipal services. On 13 November 2009 the defendant delivered an objection. The plaintiff applied for summary judgment. On 2 December 2009 the defendant delivered its opposing affidavit. Summary judgment was refused and the defendant was granted leave to file its plea.

(b) On 15 February 2010 the plaintiff served notice in terms of Uniform Rule of Court 28 of its intention to amend its particulars of claim.

(c) On 26 February 2010 the defendant served a notice of objection to the proposed amendment.

(d) On 2 March 2010 the plaintiff's attorneys addressed a letter to the defendant's attorneys giving the defendant notice, as contemplated in Rule 30(2)(b),[1] that its notice of objection did not comply with the Rules of Court and afforded it 10 days to remove the cause of complaint. The defendant had to respond on or before 16 March 2010 and it did not do so.

(e) The plaintiff then launched an application in terms of Rule 30 to have the defendant's notice of objection dated 26 February 2010 set aside as constituting an irregular step contemplated by Rule 30 of the Uniform Rules of Court.

3. This application was vigorously opposed and counsel, equally vigorously, debated before me the parties' respective positions. The central dispute was factual. The defendant's attorneys denied having received the notice of 2 March 2010. The plaintiff's attorneys, on the other hand, contended that they had given written notice it by way of facsimile. Two issues arose from

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[1] *"(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 taken a further step in the cause with knowledge of the irregularity;
(b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;
(e) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2)."

this – was it permissible to have given notice by way of facsimile, and if it was, the question arose whether it was indeed sent, or received.

4. Though it was suggested that Rule 4(12)[2] would serve as a bar to the suggestion that the letter may be dispatched by facsimile, I am of the view that it is clear that the furnishing of the facsimile numbers in the notice of appointment as attorneys of record was also an invitation to accept service of notices by way of facsimile. This, I understand, takes place every day as between attorneys. Had the notice been dispatched, addressed to the active facsimile number, I have little doubt that no objection would have been received to the manner in which notice was given, and I, for one, would not have entertained such objection. Mr Schreuder, in argument, all but conceded that it was an everyday occurrence that attorneys would serve notices by way of facsimile. It must also be said that the defendant's attorneys invited, by appending the facsimile number to their notice, service on them by way of facsimile.

5. Moreover, I am of the view that rule 30(2)(b) does not require service of the notice, it merely requires "*written notice*" to be given. I would, accordingly, have been prepared to grant condonation for the service of the notice on 2 March 2010 by way of facsimile.

6. The resolution of the factual issue, namely what had happened to the faxed notice only became apparent during argument and only after I had

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[2] *"Service shall be effected by delivering to the person to be served one copy of the process or citation to be served and one copy of the translation (if any) thereof in accordance with the provisions of this Rule."*

addressed some questions to counsel. The facsimile number used was one that appeared on the notice of appointment as attorneys of record. On this notice appeared two facsimile numbers. The plaintiff's attorney chose to use the one to send the notice on 2 March 2010. Unfortunately, unbeknown to him, that number was no longer in use. He dispatched the facsimile and received confirmation of delivery. The plaintiff's attorney, accordingly, was under the erroneous impression that his notice had been delivered to the defendant's attorneys. The defendant's attorney, of course, oblivious to the notice, did not respond thereto. Ultimately this resulted in the launching of the Rule 30 proceedings which served before me. It was only after the application had been served on 1 May 2010 that the plaintiff's attorneys were informed that the defendant's attorneys had not received the notice of 2 March 2010. The non-receipt of the notice by the defendant's attorneys was not as a result of the dispatch thereof by facsimile, which, as I have already stated, was invited, but by virtue of the fact that an incorrect number was furnished by the defendant's attorneys.

7. The defendant proposed, immediately prior to the hearing, that it would deliver a notice of withdrawal and substitution of its notice of objection by Friday, 28 May 2010, *"which will provide for the delivery of a notice of objection, setting out the grounds for the objection"*.

8. In the circumstances this seems to me to be a sensible suggestion.

9. I have little doubt that had the defendant received the notice in terms of Rule 30(2)(a) and had it not responded, the plaintiff was perfectly entitled to

bring its application in terms of Rule 30 and that a proper case has been made out for the granting of the relief therein claimed. The notice of objection did not specify, as it was required to, the nature of the objection taken.

10. Given the facts set out above, it seems to me that it would be inappropriate to grant such relief. The necessary prerequisite to the application, namely the service of a notice in terms of Rule 30(2)(a) did not come to the notice of the defendant, also due to a mistake on its part.

11. It is clear that due to an unfortunate confluence of circumstances the defendant did not respond to the Rule 30(2)(a) notice, and the plaintiff thereafter, as it was entitled to, launched its application in terms of Rule 30.

12. In the premises it would seem to me that justice would be done by the granting of an order as was proposed by the defendant's attorney. At the hearing both Mr Schreuder and Mr Jansen de Villiers appeared to accept that this would be the most expedient manner of dealing with the application.

13. Having given careful consideration to the issue of costs, and the circumstances which gave rise to the applicant bringing this application, I am of the view that each party should pay its own costs.

14. In the premises I make the following order:

(a) The defendant is ordered to deliver its notice of withdrawal and substitution of its notice of objection by not later than Friday, 17 September 2010.

(b) Each party is ordered to pay its own costs.