IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 11/2014

In the matter between

PRESIDENT STREET PROPERTIES (PTY) LTD	**APPELLANT**
And	
MAXWELL UCHECHUKWU	**1ST RESPONDENT**
THE DEPUTY SHERIFF FOR THE DISTRICT OF MANZINI	**2ND RESPONDENT**

Neutral citation: **President *Street Properties (Pty) Ltd vs Maxwell Uchechukwu and Another (11/2014)* [2014] SZSC *54* (3 December 2014)**

Coram: **EBRAHIM JA, OTA JA AND DR ODOKI JA**

Heard: **10 NOVEMBER 2014**

Delivered: **3 DECEMBER 2014**

Summary: **Civil Procedure: service on a company in terms of Rule 4 (2) (e) of the High Court Rules; Service of action effected on a director of the Appellant company; Appellant defaulting in appearance; default judgment granted; application to rescind**

the default judgment refused by the court *a quo*; appeal against this refusal; held: service on a director of company which was not effected at the company's registered office or principal place of business though construed as irregular is not a nullity; the whole essence of service of summons being to bring to the notice of the company the fact of the pending proceedings; the Appellant company suffered no real prejudice in these circumstances; appeal dismissed with costs.

JUDGMENT

OTA. JA

[1] This is an appeal against the decision of the High Court per **M.S. Simelane J,** dismissing the Appellant's application to rescind a default judgment granted by the High Court on 12 July 2013.

[2] The default judgment which was granted by His Lordship **SB Maphalala PJ,** awarded to the 1st Respondent a total sum of E528,331.07 being damages for the unlawful eviction of the 1st Respondent from his business premises, goods confisticated therefrom as well as interests and costs. The award was made after **Maphalala PJ** heard evidence in proof of damages.

[3] In granting the default judgment, the court a quo relied on a return of service by the deputy sheriff, the 2nd Respondent, attesting to the fact that one of the directors of the Appellant company, Arshad Mansoor, was served with the summons. This notwithstanding, the Appellant defaulted in appearance.

[4] In the wake of this award, the Appellant sought a rescission of the default judgment predicated on Rule 42 (1) (a) of the Rules of High Court as well as the Common Law. This application was dismissed by **Simelane J** on 9 April 2014.

[5] Dissatisfied with this decision of the court *a quo*, the Appellant launched the present appeal to contest it. The notice of appeal bears one lone ground of appeal which is couched in the following terms:-

> **"I. That the Honourable Justice erred in law and in fact in holding that a legal entity must not be served at its principal place of business or registered office."**

[6] I find a need to comment on the notice of appeal which is the foundation of this whole appeal. Rule 6 (4) of the Rules of this Court, dictates that the notice of appeal shall contain grounds of appeal, setforth concisely under distinct heads and numbered consecutively. The purpose of the grounds of appeal is to define the issues in controversy between the parties, thus affording the opposing party adequate notice of the case he is brought to court to answer. Therefore, the grounds of appeal must be circumscribed within an issue in controversy between the parties and must not be made in general terms. It must set out in clear and unambiguous terms what constitutes its complaint against the impugned judgment.

[7] Indeed, in the case of **Thabiso Fakudze v Silence Gamedze and Others Civil Appeal Case No. 14/2012, para [19] – [21],** I had occasion to adumbrate on the role of the grounds of appeal to an appeal and I made the following condign remarks-:

> **"[19] Grounds of Appeal are to the appeal what pleadings are to the parties at the trial *nisi prius.* The requirement that the Notice of Appeal contains grounds of appeal is not merely cosmetic. It is underscored by the fair hearing rule which is expressed by the maxim *audi alteram partem*. This is because the object and purpose of the grounds of appeal, just like pleadings, is to give the Respondent adequate notice of the issues in controversy in the appeal. That is why rule 6 (4) requires that the grounds shall be numbered consecutively and shall be concise i.e be specific and clear not couched in general terms. This is to ensure that the element of notice is not defeated by vague and general statements of complaints. It is also for this reason that the grounds of appeal must relate to issues decided in the impugned judgment. They must be fixed and circumscribed within a particular issue in controversy, if not they cannot be said to be related to that decision. "**

[8] When the lone ground of appeal in this case is juxtaposed against the foregoing facts, it appears to me too nebulous. I am inclined to agree with learned counsel for the 1st Respondent, Mr Bhembe, that the ground of appeal is a general statement which does not accurately address the findings of the court *a quo* on the question of service at a company's registered office or principal place of business, though that is the complaint it seeks to advance.

[9] Admittedly, on the question of the service on the Appellant's director which took place outside the Appellant's registered office or principal place of business, the court *a quo* held as follows, in para [14] of the assailed decision,

> **"[14] In my view, the Deputy sheriff was quite entitled in law to serve any of the Directors of 1st Applicant wherever in these circumstances. This is proper service in terms of the Rules."**

[10] No matter how inelegantly crafted, it is obvious to me that the ground of appeal *in casu*, seeks to address this portion of the assailed decision. The

ground of appeal thus raises one question and one question alone, which is, whether or not the court *a quo* was correct to hold that the service of the summons on a director of the company outside the company's registered office or principal place of business is competent service. This, in my view, is the crux of this appeal and is the only enquiry this court is invited by the notice of appeal to embark upon.

[11] I notice that notwithstanding the fact that the notice of appeal addresses only the foregoing issue, the Appellant in its heads of argument proceeded to anxiously raise and canvass other issues, to wit, whether service was actually effected on one of the directors of the Appellant company, namely, Arshad Mansoor as well as the defences raised in aid of its rescission application in terms of the Common Law.

[12] The court *a quo* made specific findings that Arshad Mansoor was served with the originating process. To this end the court declared as follows in para [12] of the assailed decision:-

> **"[12] It is an established fact that Arshad Mansoor was served at Applicants principal place of business. Even though the Applicants allege that service was not effected as one of the Mansoors was out of the country. The Deputy Sheriff in his confirmatory affidavit says that it was Arshad that was served. In their replying affidavit the Applicants allege that Arshad was out of the country at this material time. They have however failed to show any evidence of this reducing it to a bare allegation of fact. I am inclined to accept the return of service and the Deputy Sheriff's confirmatory affidavit."**

[13] Similarly, in declining to deliberate on the issue of the defences raised by the Appellant in pursuit of rescission under the Common Law, the court *a quo* stated as follows:

"[22] On this ground of willful default the Appellants allege that they were not served but I have already found that they were served. Both the return of service and Deputy Sheriff's confirmatory affidavit show that the original process was exhibited and explained to Mr Monsoor. The nature and exigencies thereof were also explained as per High Court Rule 4 (2).

[23] The Applicants have not disputed that the summons were explained to them and they have not said they did not know what steps to take to avoid the consequences of such process. In my view they were clearly in willful default. They have thus failed to show reasonable or good cause for their default.

[24] In these circumstances, the question of *bona fide* defence falls away because the law states that they must satisfy all *the* requirements which are reasonable cause and *bona fide* defence to be entitled to the rescission."

[14] It is clear from the state of the notice of appeal, that the Appellant failed to urge any grounds of appeal against these portions of the decision of the court *a quo* and the conclusion extant therein.

[15] Put in plain language, the Appellant did not challenge or appeal against the findings of the court *a quo* that service of the summons was effected on Arshad Mansoor or that it did not need to deal with the issue of the defences advanced by the Appellant.

[16] This being so, the Appellant is precluded from raising these issues and arguing them in its heads of argument as it sought to do, without the leave of this Court having been first sought and obtained. This is in consonance with Rule 7 of the Court of Appeal Rules which states as follows:-

"Appellant confined to the grounds of appeal.

7. The appellant shall not, without the leave of the Court of Appeal, urge or be heard in support of any ground of appeal not stated in his notice of appeal, but the Court of Appeal in deciding the appeal shall not be confined to the grounds so stated."

[17] The learning is that where an Appellant has filed no ground of appeal against any part of the judgment of the court of trial which is adverse to him, it must be deemed that that part of the judgment stands and binds the Appellant. He must not in the appeal complain against the part and if it contains an order, he must comply with it except where there is a stay of execution of the order.

[18] This is because an Appellant is bound by his grounds of appeal which serves as notice to the opposing party. If the Appellant wishes to rely on errors or misdirections not contained in his grounds of appeal, he must either obtain leave to file additional grounds of appeal or obtain leave to amend the grounds already filed. An Appellant cannot therefore argue any ground of appeal not filed except with the leave of the Court having first been sought and obtained.

[19] This is not such a case. No leave of this Court has been sought or obtained to argue these issues raised in the Appellants heads of argument thus taking he Respondents completely by surpprise. They stand disregarded in these circumstances.

[20] Having put this whole appeal in perspective, as I have endeavoured to do above, let us now proceed to the enquiry at hand, which is ,whether the court *a quo* was correct to hold that the service of the summons which was effected on Arshad Mansoor outside the registered office or principal place of business of the Appellant is competent service.

[21] In the Appellant's heads of argument, learned counsel for the Appellant Ms Mazibuko contended, that the rescission ought to have been granted by the court *a quo* because the Appellant has satisfied the requisites of such an application in terms of Rule 42 (1) (a) of the High Court Rules and the Common Law.

[22] Ms Mazibuko maintained that there was no proper service of the summons as the return of service shows that service was not effected at the Appellant's principal place of business or registered office as is required by Rule 4 (2) (e) of the Rules of the High Court.

[23] Counsel further contended, that this state of affairs goes to show that the Appellant was not served. This, it is alleged, is the error that was not brought to the attention of the court *a quo* which would have compelled it to grant the rescission sought. The lack of service also goes to establish that the Appellant was not in wilful default and thus has good cause for the rescission in terms of the Common Law.

[24] Ms Mazibuko finally contended that in view of the totality of the foregoing, the Appellant made out a case for the rescission sought. The order of the court *a quo* dismissing the application for rescission ought to be set aside in the circumstances.

[25] Learned counsel relied on **Herbstein and Van Winsen – The Civil Practice of the Supreme Court of South Africa, 4th ed, pg 289,South African Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd 1977 (3) SA 703 (D), Federated Insurance Company Ltd v Jackson Magelekedele**

Malawana unreported Case No. 303/84, BP & JP Investments (Pty) Ltd v Hardroad (Pty) Ltd 1977 (3) SA 753 (W) at 760 A-B; to mention but a few.

[26] For his part, learned counsel for the 1st Respondent Mr Bhembe, argued that the court *a quo* was correct in its finding that the service that was effected on Arshad Mansoor who is a director of the Appellant company is competent service. This, he says is because the whole essence of service of the summons is to ensure that the Appellant was aware that action had been taken against it and had to defend such action if it wishes.

[27] Counsel drew the Court's attention to the fact that the Appellant did not challenge or appeal against the findings of the court *a quo* that service was effected on Arshad Mansoor, and then submitted, that the fact that Arshad Mansoor, a director of the company was served, renders the service competent service.

[28] Counsel relied on **Regent Projects (Pty) Ltd and Others Civil Case No. 46/2003, Federated Insurance Company (Pty) Ltd v Malwana 1968 (1) SA 751 (A).**

[29] Now, the power to grant a rescission is a discretionary measure that lies within the exclusive province of the trial court. Since the discretion belongs to the lower court, an appellate court is not at liberty merely to substitute its own exercise of discretion for that of the court below. It ought to be slow to interfere with such decisions.

[30] However, as is often stated, a discretion must be exercised judicially. In certain circumstances, therefore, an appellate court may reverse a discretionary decision. There are established precepts upon which this can be done. These include but are not limited to the following, where the lower court;

a. exercised its discretion wrongly in that no weight or sufficient weight was given to relevant consideration or
b. the decision is wrong in law or will result in injustice being done, or
c. the trial court had acted under a mistake of law, or
d. in disregard of principle, or
e. in misapprehension of the facts or
f. that the court took into account irrelevant consideration.

[31] In dealing with a decision grounded on the discretion of the lower court, this Court is guided by the material contained in the record. The record shows the reason or reasons the court considered. These reasons will be interrogated as against the aforementioned principles that guide this Court's intervention.

[32] Since the case before the court *a quo* was fought on the basis of Rule 42 (1) (a) as well as the Common Law, it is pertinent that we acquaint ourselves with the requisites of rescission under these heads, which were correctly articulated by the court *a quo* in paras 5, 6, 19-21 of impugned judgment as follows:-

> **"[5] <u>Rule 42 (1) (a)</u>**
>
> **Under Rule 42 (1) (a) of the High rules, it is provided as follows:-**

'The court may in addition to other power it may have *mero motu* or upon application of any party affected, rescind or vary (a) an order or judgment erroneously granted in the absence of any party affected.'

[6] **This rule of court was given judicial interpretation in the case of Bakoven v G. J. Howes (Pty) Ltd 1992 (2) SA 466 at 471 E-G, where Erasmus J declared as follows:-**

'Rule 42 (1) (a), it seems to me is a procedural step designed to correct expeditiously an obviously wrong judgment or order. An order or judgment is "erroneously granted" when the court commits an error in the sense of a "mistake in a matter of law appearing on the proceedings of a court of record" ---. It follows that a court deciding whether a judgment was erroneously granted is like a court of appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31 (2) (b) or under the Common Law, the Applicant need not show "good cause" in the sense of an explanation for his default and bona fide defence ---. Once the Applicant can point to an error in the proceedings, he is without further ado entitled to a rescission.'

[19] **<u>The Common Law</u>**
Under the Common Law the applicant must demonstrate

(1) good cause and
(2) *bona fide* defence
to be entitled to the rescission sought.

[20] **The term good cause was interpreted by the court in the case of Colyn vs Tiger Food Industries Ltd t/a Meadow Feed Mills (Capes) 2003 (6) SA 1 (SCA) at para 11 page 9 as follows:-**

'—the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default (b) by showing that his application is made *bona fide* and (c) by showing that he has *bona fide* defence to the Plaintiff's claim which *prima facie* has some prospects of success—'

[21] **What the court has to determine in ascertaining whether or not an applicant to a rescission has demonstrated a reasonable explanation for his default is whether in the applicant's affidavit he has shown that he was not in willful default. Moseneke J. in the case of Harris ABSA bank Ltd t/a as Volkskas 2006 (4) SA page 527 para 8 page**

520 stated the parameters that must guide the court in determining whether the applicant was in willful default in the following terms:-

> **'Before an Applicant in a rescission of judgment application can be said to be in "willful default" he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an Applicant must deliberately being free to do so, fail or omit, to take the step which would avoid the default and must appreciate the legal consequences of his or her actions."**

[33] I respectively subscribe to the foregoing exposition on the principles that should guide the court in granting rescission pursuant to Rule 42 (1) (a) as well as the Common Law.

[34] The question here is, whether the Appellant is entitled to rescission under any of these heads?

[35] The issue of service of a company or corporation, which is the axis upon which this whole appeal revolves, is statutorily derived from Rule 4 (2) (e) of the Rules of the High Court, which postulates as follows:-

> **"(2) Service under sub-rule (1) shall be effected in one or other of the following manners:**
>
> **(e) in the case of a corporation or company, by delivering a copy to a responsible person at its registered office or a responsible employee thereof at its principal place of business within Swaziland, or if there is no such person willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law."**

[36] It cannot be gainsaid that by this Rule of court, service on a company or corporation shall be competent if it is effected in any of the following respects:-

a) by delivery of a copy to a responsible person at its registered office or

b) by delivery of a copy to a responsible employee thereof at its principal place of business within Swaziland, or

c) if there is no such person willing to accept service, by affixing a copy to the main door of such office or place of business, or

d) in any manner provided by law.

[37] In our present case the return of service shows that on 12 December 2012, the 2nd Respondent who is the deputy sheriff, Mancoba Ndlangamandla, served the original summons on Mr Mansoor, Appellant's director, at Buy and Save Power Trade Manzini, after having exhibited the original and explaining the nature and exigency thereof as per High Court Rule 4 (2). The deputy sheriff also noted that Mr Mansoor advised that he serves the same summons on another director of the company identified therein as one Ms Silva Mthethwa at her place of business, Progress Stationary Manzini, which was done through her Personal Assistant Mrs Carolina Masina, on the same day.

[38] In coming to its conclusion that the service as detailed in the return of service is competent service, the court *a quo* considered the following facts:-

a. The return of service shows that service of the summons was effected on a Mr Mansoor who is a director of the company. It is an established fact, as admitted by the Appellant, that there are two Mansoors who are directors of the company, one of which was alleged to be out of the jurisdiction at that time. However, the other Mansoor, Arshad was in Swaziland and was served. The court *a quo* also took the view that the allegation of the Appellant in the replying affidavit

that it was Arshad that was out of the jurisdiction remained an unsubstantiated bare allegation.

b. The confirmatory affidavit deposed to by the deputy sheriff confirms the content of the return of service. The court *a quo* regurgitated the content of the confirmatory affidavit as follows in para [11] of the assailed decision.

> **"[11] 1. I am an adult male Deputy Sheriff for the Manzini District, 2nd Respondent herein and facts deposed to herein are within my personal knowledge and belief and are true and correct**
>
> **2. On the 12th December 2012 at 13.00hrs, I served 1st Applicant being President Street Properties through its Managing Director Mr. Mansoor, at Buy and Save Power Trade Manzini after exhibiting the original summons and explaining what the summons meant and what was required of him.**
>
> **3. After I had served 1st Applicant Mr. Mansoor whom I learnt was Arshad Mansoor, they requested that I should serve his co-director being Silvia Mthethwa at Progress Stationery at Manzini.**
>
> **4. When I served Mr. Arshad Mansoor, I found him at his other business Buy and Save Power Trade Manzini as President Street Properties does not have any physical address (offices) known to either myself or the instructing Attorneys then Mssrs Mabila Attorneys.**
>
> **5. Mr. Arshad Mansoor perused through the summons and directed that I serve Sylvia Mthethwa as well at Progress Stationers whom I was meant to believe was a co-director of same company and the other copy to be served on 2nd Defendants being Motsa Manyatsi Associated Attorneys.**

6. When I served the summons on 1st Applicant, Maxwell Uchechukwu was present and he actually drove me to Arshad Mansoor, a person he knew very well.

7. It is therefore not correct that I did not serve the summons on 1st Applicant and that I served Progress Stationers."

c. The Appellant failed to controvert the allegation by the Respondents to the effect that it does not have any physical address known to the them.

d. The only address attributable to the Appellant *ex facie* the record as reflected in the annexed lease agreement between the Appellant and the 1st Respondent, details the Appellant's domicilium as a postal address described therein as "P.O. Box 361, Manzini branch of the Swaziland Property Market (Proprietary) Ltd. There is no physical address urged.

[39] It was after a careful and comprehensive assessment of the facts before it, as detailed above, that the court *a quo* concluded as follows in para [14] of the impugned decision which bears repetition at this juncture:-

'[14] In my view, the Deputy Sheriff was quite entitled in law to serve any of the Directors of the 1st Applicant wherever in these circumstances. This is proper service in terms of the Rules ."

[40] It was on the strength of this finding that the court *a quo* held that service having been effected on the Appellant through its director Arshad Mansoor, there was no error in the record of proceedings that entitled the Appellant to the rescission sought under Rule 42 (1) (a). The court also held that the fact

of this service also shows that the Appellant was in wilful default, which fact disabled rescission under the Common Law.

[41] Having carefully scrutinized the record, I find myself unable to fault the court *a quo* in its exercise of discretion.

[42] There is no doubt that in practice service on a company or corporation is validly effected where the process is delivered to a responsible employee, such as the Managing Director, Director, Company Secretary or any other responsible employee, at the registered office or principal place of business of the company or where such employee refuses to accept service, by affixing the notice to the main door of the company.

[43] The notion of Rule 4 (2) (e) that service on a company should be effected by delivery of the process to a responsible employee of the company, is salutary. I say this because a company does not consist of or function through a house labelled its registered office or principal place of business.

[44] A company consists of human beings, namely, its staff members and subscribes who carry out the day to day running of the company. These include the Managing Director, Directors, Company Secretary, General Manager or any other employees who carry out other responsible functions. Over the decades the law has come to view this group of people who form the upper echelons of the management cadre of the company, as responsible members of the company. That is why the law is now settled that service on any of these people or any other responsible employee of the company, is proper service on the company.

[45] The established facts of this case are that service was effected on one of the directors of the Appellant company, Arshad Mansoor, albeit at Buy and Save Power Trade Manzini. 1st Respondent alleged that Appellant does not have licenced premises but conducts its business from Buy and Save Power Trade Manzini, where he had always dealt with the Appellant via its directors.

[46] The 2nd Respondent, the deputy sheriff, who effected the said service confirmed that service was effected on Arshad Mansoor at Buy and Save Trade Manzini, as the Appellant company does not have any physical address (offices) known to either the 2nd Respondent or the then instructing attorneys, Messrs Mabila Attorneys.

[47] I notice that even though in para 23 of its founding affidavit before the court *a quo*, the Appellant had urged Portion 10 and 15 of Farm 125, Manzini, as its principal place of business, it however failed to controvert in any material particular the allegation by the 1st Respondent that he always dealt with the Appellant at Buy and Save Power Trade Manzini. All the Appellant alleged is that it conducted its business through Estate Agents, Swaziland Property Market. This is not an answer to the 1st Respondent's averment. In fact the Appellant completely failed to advance any facts to controvert the allegations of fact advanced by the deputy sheriff in his confirmatory affidavit setforth in para [38] (b) ante. The legal effect of this omission by the Appellant is that the facts as alleged by both the 1st Respondent and 2nd Respondent on this issue are deemed established.

[48] The take home message from the totality of the foregoing, is that the Appellant company was obviously conducting its business at different

locations, namely, portion 10 and 15 of Farm 125 Manzini, Buy and Save Power Trade Manzini, as well as through its Estate Agents, Swaziland Property Market. As of the time the said service was effected, the Respondents were not aware of any other place of business of the Appellant other than Buy and Save Power Trade Manzini where the 1st Respondent always dealt with the Appellant through its directors.

[49] Little wonder then the Appellant has not disputed that where it was served is not its usual place of business. What the Appellant is saying is that where it was served is not its principal place of business therefore the service is a nullity.

[50] To my mind, what Rule 4 (2) (e) emphasizes is the person to be served. The person must be a responsible officer of the company. It is beyond argument that a director of the company is a responsible officer of the company. By virtue of the provisions of the Rule he can be served at the registered office or at the principal place of business of the company or in any other manner the law permits.

[51] It is in evidence, that the 1st Respondent usually did business with the Appellant at Buy and Save Trade Manzini, where the service was effected. This allegation, as I have already demonstrated, was not controverted by the Appellant. It follows that Arshad Mansoor, the Appellant's director was served at the usual place of business of the Appellant company. This in my view is proper service within the Rules. Although it is contended that there is another place that is regarded as the principal place of business of the company, this is of no moment, as what is important is that the person who

was served is a responsible officer of the company and at the usual place of business of the company.

[52] Assuming that the director was served with the process in any other place other than the usual place of business of the company, it would still be valid service, because there is nothing in the Rules, or any other law prohibiting the service of a process on a company by serving same on its director in a place other than its registered office or principal place of business.

[53] The phrase **"in any manner provided by law"** allows for other ways of serving processes on a company, so long as the procedure adopted would bring the process to the notice and custody of the company thereby complying with the rule on fair hearing, which is one of the twin pillars of natural justice expressed in the maxim *audi alteram partem.*

[54] Speaking about this issue in my decision for the High Court of Swaziland in the case of **Regent Projects (Pty) Ltd v Steel and Wire International (Pty) Ltd and Others (Supra), para 11**, a decision which was appositively articulated by the court *a quo* in the impugned judgment, I remarked as follows:-

> '[11] --------I**t is also an established practice that service on the Managing Director, Director, Company Secretary or any other responsible employee of a company is competent service on the company. The rationale behind this practice and the principle that underpinnes rule 4 (2) (e) is to ensure that the company is aware that action has been taken against it and to prepare to defend such action if it so wishes. Therefore, service on a responsible member of the company as those detailed ante, is one that effectively ensures that the company has such notice. However service on these group of people is usually effected at the company's registered office or it's principal place of business. See**

Shiselweni Investments (Pty) Ltd v Swaziland Development and Savings Bank Case No. 2391/96."

[55] In the application of law the court must ensure that both the letter and the spirit of the law are given effect to. In this case both the spirit and the letter of the law support the use of other methods not expressly mentioned in the Rules to serve the process on the company.

[56] Where the weights of the provisions of the Rules do not contain any provision limiting the provisions to specific categories, the court is bound not to apply the provisions as if they contain such limiting words.

[57] Furthermore, where the provisions themselves have expressed an intention that they should not be applied in a limiting manner, the court has no business disregarding such words that allow for an expansive application of that provision.

[58] The court in the application of Rules of court must give it such meaning as would enable it do substantial justice in a case before it and adopt the interpretation that would facilitate the due process of the case, so far as injustice is not done to any of the parties.

[59] It has not been shown that the Appellant has suffered any prejudice by the service of the process on its director at its usual place of business instead of the principal place of business. So for the above reasons, I hold that the court *a quo* was correct to find that there was proper service.

[60] In any case, even if the said service on the company was irregular or in breach of the provisions of the Rules of the High Court, so long as the process had been received by the company through its director and there is nothing to show that the error occasioned any real prejudice against the company, the court can condone the non-compliance with the Rules by virtue of Rule 30 (3) of the Rules of the High Court.

[61] My above view is justified by a long line of judicial decisions from across jurisdictions, which emphasize, that once the process is received by the company to be served and there is no prejudice occasioned by the error, the court must recognize the service as valid in the interest of justice .

[62] It is of crucial importance and appropriate at this stage to discuss the case of **Federated Insurance Co Ltd v Malawana (Supra).** In that case the South African Court, Appellate division, construed the context of uniform Rule 4 (1) (a) (v) of the Rules of the High Court of South Africa, which is in *pari materia* with our own Rule 4 (2) (e).

[63] What appears to be the facts of that case, in sum, are that summons had been served on a company not at its principal place of business, or registered office, but on a branch manager of the company, and not at the branch office but at his home outside business hours. In an appeal against the decision of a Provincial Division refusing to set aside the service of the summons as irregular, the question arose whether the court *a quo* had erred in granting condonation of the irregularity of the summons in terms of uniform Rule 30 (3). The Court of Appeal held as follows at para F - J

> **"In the premises the judgment of the court *a quo* in finding that the branch office in East London has not been shown not to be the type of place referred to in the Rules of court, should not be disturbed. It is clear that such service is not in accordance with the Rules of court. However, such service is not a nullity and ought to be condoned. The wording of Rules 27 (3) and 30 (3) make it clear that the court has a discretion whether or not to condone such non-compliance with the Rules. In considering whether non-compliance results in a nullity and whether it can be, and ought to be condoned, the following factors will be taken into consideration (a) the discretion must be exercised judicially upon consideration of the circumstances to do what is fair to both sides (Northern Assurance Co Ltd v Somalaka 1960 1 SA at 596); (b) the purpose of rule 4 is to ensure that a summons or other process is brought to the attention of responsible members of the management of the company, or at least, to ensure that the best procedure is followed to ensure that a defendant has knowledge of the fact that an action has been instituted against, the company (see Wiehalin Toerusting Maatskappy v Potgieter 1974 (3) SA at 202C); the branch mananger of a company was probably the best person to serve a summons on, *in casu* Mr Donly; ie if the summons had been served at 17h00 or even later on the same day at 301 Allied Building, Buxton Street, East London, on Mr Donly, such service would have constituted proper service and further in terms of the Rules of court; (d) the appellant was not taken by supprise---- The prejudice, if any, that the appellant may suffer, will not persuade a court to exercise its discretion against the respondent ---------- the service on Donly is not a nullity----------"**

[64] I am mainly attracted and persuaded by the propositions of the court in the above recited passage, that the summons which were not served at the principal place of business of the Appellant company, but on the branch manager of the company not at the branch office but at his home and after official working hours, though irregular, was however not a nullity. The Appellant company having suffered no real prejudice thereby. This is germane to the facts and circumstances of this case.

[65] It seems to me that in the face of the established fact that the Appellant was served with notice of the summons, through its director Arshad Mansoor, there is no error in the record that entitled the Appellant to the rescission

sought in terms of Rule 42 (1) (a). The court *a quo* was thus correct to refuse rescission under this head as it did.

[66] Similarly, I cannot fault the court *a quo,* for also rejecting the rescission sought under the Common Law. This is because, as correctly found by the court *a quo,* the established fact that the Appellant was served with the summons which exigency was explained to him by the deputy sheriff, but failed to attend court to defend the process, defeats one of the cardinal rules of such an application, which is that the Applicant must show good cause for the application by demonstrating that he was not in willful default.

[67] For the above stated reasons, this appeal fails and is accordingly dismissed with costs.

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**E.A. OTA**
**JUSTICE OF APPEAL**

**I agree**

**A.M. EBRAHIM**
**JUSTICE OF APPEAL**

**I agree**

**DR B.J. ODOKI**
**JUSTICE OF APPEAL**

**For Appellants:** **N. Mazibuko**

**For Respondents:** **S. Bhembe**
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