



**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: J404/20

In the matter between:

**UCIMESHAWU OBO NHLENGETHWA N.**

**Applicant**

and

**PARSONS TRANSPORT OPERATIONS (PTY) LTD**

**First Respondent**

**ALWYN PARSONS**

**Second Respondent**

**Heard:** 10 September 2024, 18 September 2024 and 28 October 2024

**Delivered:** 8 November 2024

**Summary:** Contempt of court – director of company evading personal service – substituted service discussed

(This judgment was handed down electronically by circulation to the parties' representatives by email. The date of hand-down is deemed to be on 8 November 2024.)

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## JUDGMENT

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### MYBURGH, AJ

#### Introduction

[1] The LRA's goal of providing an effective (and thus expeditious) dispute resolution system ultimately rests on the ability of this court to ensure that its orders are given effect to. The sharp edge of the process are applications to place employers in contempt of court, which consume much of the unopposed motion roll. The fundamental problem is that ex parte contempt applications and rule nisi's must – according to the Rules of this court and all prevailing case law – be served by way of personal service, which is often difficult to effect and easy to evade. The result of this is that time after time, employees return to this court trying to enforce an order in their favour, only for the rule nisi to be extended in the vain hope that they will be able to effect personal service the next time around. This case is an acute illustration of the problem.

[2] Mr Nhlengethwa (the employee) was employed by Parsons Transport Operations (Pty) Ltd (the company) and is a member of UCIMESHAWU (the union). One of the directors<sup>1</sup> of the company is Jan Alwyn Parsons.<sup>2</sup> On 26 November 2019, the parties entered into a settlement agreement in terms of which the company undertook to re-employ the employee on 2 December 2019, with the issue of backpay to be dealt with separately. And so the saga began.

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<sup>1</sup> This appears from the company letterhead.

<sup>2</sup> Although cited as Alwyn Parsons, Mr Parsons' full name appears from a boarding pass handed up during argument.

### The chronology of court orders

[3] In the last four years or so, this court has granted more than a dozen orders all in vein. The chronology is this:

- a) On 27 January 2021, Mahosi J granted an order making the settlement agreement an order of court.
- b) On 21 May 2021, Mabaso AJ issued the standard contempt rule nisi calling upon Mr Parsons to appear before court and show cause why he should not be held in contempt, etc. The last paragraph of the order contained the standard direction that “service of this court order must be effected personally on [Mr Parsons].”
- c) On 29 October 2021, the return day, Mangena AJ struck the matter from the roll due to the non-appearance of the parties. (There was apparently some issue here relating to Covid-19.)
- d) On 4 May 2022, Phehane J granted an order extending the rule nisi to 12 August 2022, with union being directed to serve the order of 21 May 2021 personally on Mr Parsons using the Sheriff.
- e) On 12 August 2022, the parties entered into another settlement agreement, in terms of which it was agreed that the employee would report for work on 15 August 2022, and again that the issue of backpay would be dealt with separately. The settlement agreement was made an order of court on the same day by Sethene AJ.
- f) On 27 July 2023, Phehane J issued another standard contempt rule nisi, again directing personal service on Mr Parsons – this of both the ex parte contempt application filed on 2 June 2023 and the rule nisi order of 27 July 2023.
- g) On 7 September 2023, the return day, Baloyi AJ extended the rule nisi to 9 November 2023. Instead of directing personal service of the order, Baloyi AJ ordered that “the respondent’s representative ... is directed to

hand a copy of this order to [Mr Parsons] and make him aware of the date of the hearing.”

- h) On 9 November 2023, Pehane J granted an order extending the rule nisi to 15 February 2024, and again directing personal service of the order (and that of 7 September 2024) on the respondents personally by way of the Sheriff.
- i) On 15 February 2024, Mahalelo AJ granted an order extending the rule nisi to 19 April 2024 “to enable personal service on the respondents.”
- j) On 19 April 2024, Daniels J granted an order extending the rule nisi to 14 May 2024.
- k) On 14 May 2024, an acting judge whose name I have been unable to decipher, granted an order extending the rule nisi to 14 June 2024 “to allow for personal service on [Mr Parsons].”
- l) On 14 June 2024, Nothse AJ granted an order extending the rule nisi to 15 August 2024 “to enable personal service on [Mr Parsons] as the Sheriff is still looking for him.”
- m) On 15 August 2024, Daniels J granted an order extending the rule nisi to 10 September 2024, “to allow for personal service (of the orders of this court dated 12 August 2022 and 27 July 2023) on [Mr Parsons]” by the Sheriff.
- n) On 10 September 2024, the matter came before me. As had occurred before, the company was represented by an attorney, Ms Kleynhans of Yusuf Nagdee Attorney. I made an order requiring the parties to exchange affidavits and postponed the matter to 18 September 2024 for argument. After hearing argument on that day, I reserved judgment.

What's the problem?

[4] So what is the problem and why could personal service not be effected year after year? The court file contains several affidavits in support of proof of service and returns of service by the Sheriff, but not personally on Mr Parsons.

[5] By way of illustration, the Sheriff's return of service dated 5 August 2022 reflects that he left messages (presumably telephonic) for Mr Parsons with a view to effecting service on him on 25 July 2022, 28 July 2022 and 2 August 2022.

[6] Likewise, the latest proof of service affidavit of John Ngubane (an official of the union) says this about his attempt at service on 4 September 2024 (following the order of Daniels J on 15 August 2024):

"I was told at the gate by Nico that Mr Alwyn Parsons was not available, then it [i.e. the court order] was handed to him however, he refused to sign it and suggested that it should be sent to company Mr Stan [Bosch] who is based in Pretoria and we were given his email address."

[7] Earlier in the year, on 19 January 2024, the same pattern of behaviour was demonstrated, with Mr Ngubane's affidavit reading:

"On 19/01/2024, I together with Nhlanhla Nhlengethwa, Applicant, accompanied with SAPS Witbank delivered rule nisi court order to Alwyn Parson however, Nico received the rule nisi at the gate without allowing us to enter the premises and without signing the document. He indicated that Mr Alwyn is not available and [he] is not allowed to sign it."

[8] Reverting to his latest proof of service affidavit, Mr Ngubane – understandably – considers that service must be taken to have been effected on Mr Parsons. As he puts it:

"Sheriffs have tried on several occasions without any success though they have been paid for such service. ... With the understanding of the definition of personal service means hand or physical delivery of notice to a person to whom it is directed or someone authorised to receive it on that person's behalf, we

submit that we have complied with personal service. ... Lastly, the 1<sup>st</sup> and 2<sup>nd</sup> respondent were represented by their attorney on the 15<sup>th</sup> August 2024.”

What does the company say?

- [9] After the hearing before me on 10 September 2024, the company’s attorney made a copy of the court file. So she – and thus the company – knows the full story.
- [10] The affidavit that was then prepared and filed is an affidavit from the first respondent (i.e. the company) deposed to by Hendrik Bosch. He describes himself as the respondent’s industrial relations official, and goes on to say that he is “an official of CATA and not a responsible person” (in relation to service).
- [11] Mr Bosch takes a number of points in his affidavit, including that: “there has been [no] personal service or ... compli[ance] with the Practice Directive in terms of contempt proceedings”; there has been no service of “the order dated the 27<sup>th</sup> July 2023 referred to in the order of the 15<sup>th</sup> August 2024”; and that “there has been no service of the contempt application on the respondent”.
- [12] At the end of his affidavit, Mr Bosch contends that the employee did not wish to be re-employed and wanted his backpay before taking up employment, but that backpay had not been agreed to. (This is “vehemently denied” in Mr Ngubane’s replying affidavit.)
- [13] Nothing is said about Mr Parsons in the affidavit, but a boarding pass was handed up reflecting that he flew internationally on 25 July 2024 and was apparently out of the country at the time of the hearing.

The requirement of personal service

- [14] Rule 58 of this court’s Rules deals with contempt of court. Sub-rules (1) and (2) provide:

“(1) An application for contempt of court must be launched on an ex parte basis in motion court, where the applicant must seek an order that the respondent be

ordered to appear at the court to show cause why it should not be held to be in contempt.

(2) An application which seeks for the court to make a finding that a party is in contempt of an order of the court must be made ex parte by way of a notice of motion accompanied by a founding affidavit. The notice of motion must seek an order in the following terms:

- (a) that the respondent, [chief executive officer/head of department/owner /proprietor/municipal manager of the respondent] (full names) appear in the Labour Court on (date) of (month) (year) at 10h00 to show cause why he/she should not be found guilty of contempt of court for failing to comply with the order of this court dated (date) that the respondent may explain its conduct by way of affidavit filed prior to the date of hearing, although this will not excuse him/her from being present in court;
- (b) that in the absence of providing an explanation to the satisfaction of the court, or failing to appear in court despite being properly served, the respondent(s) be found guilty of contempt;
- (c) that the respondent(s) be incarcerated for such period as the court deems appropriate; or for the respondent(s) to be fined in an amount the court deems appropriate; or other alternative relief; and
- (d) *that service of the application and order be effected personally upon the respondent [chief executive officer/head of department/owner/proprietor /municipal manager of the respondent] and on the state attorney, if the matter concerns an organ of state.* (Emphasis added.)

[15] This rule was copied from paragraph 13 of the old 2013 Practice Manual.

[16] I have been unable to find any judgment of this court where it has been prepared to relax the requirement of personal service when it comes to contempt proceedings.

What about substituted service?

[17] Rule 9(1)(a)(iv) of the Rules of this court provides for service by email if the party concerned has an email address. However, as stated above, when it comes to contempt of court, rule 58(2) prescribes personal service.

[18] In the High Court, when the defendant / respondent mala fide evades personal service, subject to meeting certain requirements, the court will allow service in some other manner.<sup>3</sup> This is done under Uniform Rule 4(2), which provides for what is known as “substituted service”. The rule reads:

“If it is not possible to effect service in any manner aforesaid, the court may, upon the application of the person wishing to cause service to be effected, give directions in regard thereto. Where such directions are sought in regard to service upon a person known or believed to be within the Republic, but whose whereabouts therein cannot be ascertained, the provisions of subrule (2) of rule 5 shall, mutatis mutandis, apply.”

[19] As appears from the rule, the person wishing to effect service must make application to the court for leave to effect substituted service. In order to succeed with such an application, the applicant must show that it is not possible to obtain service as is required (in this instance personal service); that the court has jurisdiction; that the applicant has a prima facie case; and that there is a reasonable likelihood that the alternative form of service suggested will come to the knowledge of the defendant / respondent.<sup>4</sup>

[20] The court may order any manner of service as is likely to bring the proceedings to the notice of the party to be served. This may be in the form of, amongst others, a registered letter, or by way of email or other electronic means.<sup>5</sup>

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<sup>3</sup> Cilliers *et al*, *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* (5<sup>th</sup> ed) vol 1, p 360.

<sup>4</sup> Van Loggerenberg *Erasmus Superior Court Practice* (2<sup>nd</sup> ed) vol 2 at D1-39.

<sup>5</sup> *Ibid*.

[21] The High Court has allowed substituted service in contempt proceedings where personal service is provided for, but could not be effected.<sup>6</sup> By way of example, rule 23 of the Eastern Cape Rules implicitly provides for substituted service in contempt of court proceedings, with such applications having been entertained in that Division.<sup>7</sup>

[22] The Rules of this court do not provide for substituted service. However, rule 71 deals with “[p]rocedures not specifically provided for in these rules”. It reads:

“If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances, and may act in any manner it deems expedient to achieve the objects of the Act, and in doing so may have regard to any appropriate rule in the Uniform Rules.”

[23] In the course of preparing this judgment, and given that the issue has not arisen to date, I directed the parties to file written submissions on the possibility of an order of substituted service (modelled on High Court rule 4(2)) being made authorising service on Mr Parsons by email at the company’s email address published on its website.<sup>8</sup> (Another option may be service on the company’s attorneys of record, albeit that I did not raise this with the parties.)

[24] For reasons unknown, the union failed to file submissions in response to this directive.

[25] The company’s submissions filed on 28 October 2024 make these four points in opposition to substituted service: (i) there is no provisions in either the common law or statute to effect service of a contempt application through substituted service; (ii) substituted service is a form of service created by the High Court Rules, with this court’s Rules being silent on the issue; (iii) to secure a contempt order through anything other than personal service would be

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<sup>6</sup> See for example, *Arcadia Residents and Ratepayers Association v Florap (Pty) Ltd and others* [2023] JOL 60105 (GP) at para 23, orders 1 and 2.

<sup>7</sup> See *Hayman N.O v Minister of Home Affairs N.O and others* [2018] JOL 39974 (ECP) at para 35.

<sup>8</sup> See generally, *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 (5) SA 604 (KZD).

unconstitutional; and (iv) a substantive application for substituted service is required and in the absence thereof, this court is not authorised to issue an order mero motu.

[26] I am not persuaded by the first three points. The High Court has allowed substituted service in contempt proceedings. And rule 71 of this court's Rules expressly authorises this court to have regard to, in this instance, Uniform Rule 4(2). There is, however, merit in the company's fourth point. Had the union filed submissions as directed, they may have formed the basis, at least informally, of an application for leave to effect substituted service, or such an application may have flowed from them. But in the absence of this, my hands are tied. There is no application for leave to effect substituted service before me, and I cannot issue an order mero motu.

[27] I do, however, intend to grant the union leave to bring an application for leave to effect substituted service on Mr Parsons (with it obviously being up to the court hearing any such application to decide on the merits thereof).

[28] This is, no doubt, cold comfort for the union and the employee who have fought tirelessly for years to enforce a settlement agreement that was made an order of this court, and are now faced with the prospect of having to bring a further and different application simply to get their contempt application heard. But this, unfortunately, is the product of Mr Parsons being, on the facts before me, a serial evader of personal service.

#### Order

[29] Accordingly, I make the following order:

1. The contempt application is postponed sine die;
2. The applicant is granted leave to bring an application for leave to effect substituted service on the second respondent.

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**Myburgh, AJ**

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: union official

For the respondent: Ms Kleynhans (Yusuf Nagdee Attorney)

LABOUR COURT