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IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE

**CASE NO: HCA 43/2023**

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

Date: 30/07/2024

Signature:

In the matter between:

**A & F INVESTMENTS (PTY) LTD**

**APPELLANT**

**AND**

**D & L FAMILY PROJECTS AND  
MAINTENANCE (PTY) LTD**

**RESPONDENT**

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**JUDGMENT**

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**NGOBENI AJ**

INTRODUCTION

[1] The appellant is A & F Investments (Pty) Ltd, a private company incorporated in accordance with the laws of South Africa with registration number 81/06832/07, with

registered physical address as 1[...] C[...] Drive, Nirvana, Polokwane, Limpopo Province.

[2] The respondent is D & L Family Projects and Maintenance (Pty) Ltd T/A DLF Projects, also a private company incorporated in accordance with the laws of South Africa with registration number 2015/106469/07, with registered physical address as 6 D[...], 1[...] A[...] Street, Bendor, Polokwane.

[3] This is an appeal against the decision of the Magistrate of the Civil District Court sitting in Polokwane, who dismissed a request for default judgment, for the reasons that will be clearer in this judgment. The matter came before the court *a quo* by way of an action in which the appellant (plaintiff in the court *a quo*) claimed damages arising from arrear rental payments, which emanated from a written lease agreement that was entered into between the parties.

[4] The respondent (defendant in the court *a quo*) was absent in court on the trial date, hence the request by the appellant that the matter be proceeded with on a default judgment basis in terms of Rule 32(2) of the Rules Regulating the Conduct of Proceedings in the Magistrates' Courts of South Africa (the Rules).

#### GROUND OF APPEAL

[5] The grounds of appeal by the appellant are summarised as follows:

- (i) The court *a quo* erred in not accepting that the respondent was notified through e-mails about the trial date. The court *a quo* refused to be addressed from the bar by the legal representative of the respondent about the said e-mails. The court *a quo* even refused to see the e-mails that showed that the respondent was notified about the trial date, and the court *a quo* therefore erred in finding that the respondent did not know about the trial date,

- (ii) The court *a quo* erred in granting a final order by dismissing the request for default judgment without considering the merits of the case.

## IN ISSUE

[6] The issue is whether the court *a quo* correctly dismissed the request for default judgment, based on failure by the legal representative of the respondent to comply with the provisions of Rule 52A of the Rules, or whether an explanation that the respondent was notified about the trial date, in the absence of compliance with Rule 52A justified that the matter be proceeded with in the absence of the respondent. Rule 52A notice (Notice) pertaining to the withdrawal by the legal representative of the respondent was not served on the respondent. Rule 52A in the main makes provision for the procedure that must be followed by an attorney who withdraws from representing his/her client in a case.

## PROCEEDINGS IN THE COURT A QUO

[7] In the court *a quo* the matter was set down for trial on 27 October 2022. The respondent was absent, but its legal representative, Ms Mantjane was present. The legal representative of the appellant was also present. When the matter was called, Ms. Mantjane addressed the court to the effect that they are withdrawing as attorneys of record for the respondent due to the fact that the respondent was not cooperative. She told the court that the respondent knew about the trial date as that was communicated to the respondent through e-mails by her.

[8] It appears from the record of the proceedings that the Rule 52A Notice of withdrawal which was prepared was served on the legal representative of the appellant, in court on that day of trial. The legal representative of the appellant took no issue with the service of that Notice on them on the trial date, because her view was that the Notice served no purpose for the proceedings that were before court on 27 October 2022, due to the fact

that the matter was set down for trial, and the respondent knew about the trial date according to her.

[9] The court *a quo* did not accept the e-mail messages which Ms. Mantjane wanted to hand in from the bar, because the court was concerned about compliance with Rule 52A. It became clear from Ms. Mantjane's address that provisions of Rule 52A were not complied with, in as far as service of the Notice of withdrawal on the respondent is concerned.

[10] The court *a quo* raised the issue that the Rule 52A Notice should have been served on the respondent because its legal representative was withdrawing. Ms. Marais, for the appellant argued that irrespective of the fact that the appellant should have been served with the said Notice of withdrawal, the respondent should have been in court for trial purposes because the respondent was notified about the trial date.

[11] The legal representative of the appellant further addressed the court and argued that the provisions of Rule 52A are not applicable because the matter had already been set down for trial, and the respondent knew about the trial date. The argument by the appellant was that Rule 52A is applicable at any stage of the proceedings, but once the matter is set down for trial and the parties are notified, the said Rule cannot be applicable at that stage of the proceedings.

[12] There was a protracted discussion or rather exchange of views between the legal representative of the appellant and the Court as to whether the matter should be proceeded with in terms of Rule 32(2), or be dealt with on the basis that provisions of Rule 52A were not complied with. It is clear from the record of the proceedings that the legal representative of the appellant was so persistent with her argument that Rule 32(2) is the one that was applicable to the proceedings, to an extent that the court ended up acceding to the fact that the matter be proceeded with in terms of Rule 32(2).

[13] The court *a quo* proceeded with the matter well knowing that it was not satisfied about the fact that Rule 52A was not complied with. That is evident from the written reasons from the learned Magistrate which were requested and provided in terms of Rule 51(1) of the Rules for purposes of this Appeal. On paragraphs 9 and 10 of the reasons for judgment the court *a quo* stated that:

“(9) ...the fact that there was no delivery of notice of withdrawal on the defendant, there is no need for this court to consider whether plaintiff complies with Rule 32 or not.

(10) As a result of what I stated above, the court makes the following order:

10.1 Default judgment in terms of Rule 32(2) of the Magistrates' Court Rules is refuse. (*sic*).

10.2 No Costs order”.

#### APPLICABLE LAW

[14] Rule 52A reads as follows:

#### **52A Notice of withdrawal, appointment or substitution as attorney of record**

(1)(a) Where an attorney acting in any proceedings for a party ceases so to act, such attorney shall forthwith deliver notice thereof to—

(i) such party at the party's last known address, which address shall be stated in the notice;

(ii) the registrar or clerk of the court; and

(iii) all other parties to the proceedings:

Provided that the notice to the party for whom such an attorney acted shall be served in accordance with the provisions of rule 9(9).

(b) The notice contemplated in paragraph (a)(i) shall inform the said party to appoint an address for service of subsequent documents and notices on him or her, and to notify all other parties and the registrar or clerk of the court of such address within 10 days of the notice, such address being a—

(i) physical address, which address shall, in places where there are three or more attorneys or firms of attorneys practicing

independently of one another, be within 15 kilometres of the courthouse;

(ii) postal address; and, where available,

(iii) facsimile address and electronic mail address.

(c) The notice to the registrar or clerk of the court shall state the names and addresses of the parties notified and the date on which and the manner in which the notice was sent to them.

(d) Notwithstanding the withdrawal of an attorney as the attorney of record for a party in any proceedings, all subsequent documents in the proceedings shall be served on such party in accordance with the rules relating to service: Provided that the party whose attorney has withdrawn and who has failed to provide an address within the period of 10 days stated in paragraph (b) shall be liable for the payment of the costs occasioned by subsequent service on such party in terms of the rules relating to service, unless the court orders otherwise.

(2)(a) Save as may be otherwise provided for in rules 5 and 13, whenever an attorney acts on behalf of any party in any proceedings, such attorney shall notify all other parties of—

(i) the attorney's name and physical address, which address shall, in places where there are three or more attorneys or firms of attorneys practising independently of one another, be within 15 kilometres of the courthouse;

(ii) the attorney's postal address; and, where available,

(iii) the attorney's facsimile address and electronic mail address.

(b) The provisions of this subrule apply, with appropriate variations, to an attorney appointed as a substitute to a party's previous attorney.

(3) Upon receipt of a notice in terms of subrule (1) or (2), the address of the attorney or of the party, becomes the address of such party for the service of all subsequent documents in such proceedings, but any service duly effected elsewhere before receipt of such notice shall, notwithstanding such change, for all purposes be valid, unless the court orders otherwise.

[Rule 52A inserted by GN R1318 of 30 November 2018 (wef 10 January 2019).]

[15] The provisions of Rule 52A are to a large extent similar to those in Rule 16 of the Uniform Rules of Court<sup>1</sup> on the steps which legal practitioners must follow when

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**<sup>1</sup> 16 Representation of Parties**

(1) If an attorney acts on behalf of any party in any proceedings, such attorney shall notify all other parties of this fact and shall supply an address where documents in the proceedings may be served.

(2)(a) Any party represented by an attorney in any proceedings may at any time, subject to the provisions of rule 40, terminate such attorney's authority to act and may thereafter act in person or appoint another attorney to act in the proceedings, whereupon such party or the newly appointed attorney on behalf of such party shall forthwith give notice to the registrar and to all other parties of the termination of the former attorney's authority, and if such party has appointed a further attorney to act in the proceedings, such party or the newly appointed attorney on behalf of such party shall give the name and address of the attorney so appointed.

withdrawing from cases, and what is expected from a litigant whose legal representative has withdrawn from a case.

[16] Rule 52A is an insertion to the Rules, which was mainly enacted to give the issue of withdrawals by legal representatives to be more effective in terms of informing their clients, as well as other parties or their legal representatives, about the termination of their involvement in their cases, which came into operation on 10 January 2019. It is also mandatory to file the notice of withdrawal with the Registrar or Clerk of the Court with the information required in terms of Rule 52A(1)(c).

[17] Provisions of Rule 52A are an important and proper mechanism to help in reducing unnecessary backlog of cases because the legal representatives are compelled to inform their clients about their withdrawals, and also to guide them about the steps to follow thereafter. The parties must be timeously notified to ensure that they may instruct

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(b) If such party does not appoint a further attorney, such party shall in the notice of termination appoint an address within 25 kilometres of the office of the registrar and an electronic mail address, if available to such party, for the service on such party at either address, of all documents in such proceedings as well as such party's postal or facsimile addresses where available.

[Para. (b) substituted by GN R3397 of 12 May 2023 (wef 19 June 2023).]

(3) Upon receipt of a notice in terms of subrule (1) or (2), the address of the attorney or of the party, as the case may be, shall become the address of such party for the service upon such party of all documents in such proceedings, but any service duly effected elsewhere before receipt of such notice shall, notwithstanding such change, for all purposes be valid, unless the court orders otherwise.

(4)(a) Where an attorney acting in any proceedings for a party ceases so to act, such attorney shall forthwith deliver notice thereof to such party, the registrar and all other parties: Provided that notice to the party for whom such attorney acted may be given by facsimile or electronic mail in accordance with the provisions of rule 4A.

(b) The party formerly represented must within 10 days after the notice of withdrawal notify the registrar and all other parties of a new address for service as contemplated in subrule (2) whereafter all subsequent documents in the proceedings for service on such party shall be served on such party in accordance with the rules relating to service: Provided that the party whose attorney has withdrawn and who has failed to provide an address within the said period of 10 days shall be liable for the payment of the costs occasioned by subsequent service on such party in terms of the rules relating to service, unless the court orders otherwise.

(c) The notice to the registrar shall state the names and addresses of the parties notified and the date on which and the manner in which the notice was sent to them.

(d) The notice to the party formerly represented shall inform the said party of the provisions of paragraph (b).

[Rule 16 amended by GN R235 of 18 February 1966, by GN R2021 of 5 November 1971 (wef 15 November 1971), by GN R2164 of 2 October 1987

(subsequently repealed by GN R2642 of 27 November 1987 (wef 31 December 1987)), by GN R2642 of 27 November 1987 (wef 1 January 1988) and by

GN R960 of 28 May 1993 (wef various dates) and substituted by GN R1318 of 30 November 2018 (wef 10 January 2019).]

other legal representatives in time to proceed with their cases. It is not desirable that a legal practitioner may just abandon a case by not returning to court when expected in court and not even file a Notice of withdrawal as expected.

[18] The parties have the right to be formally notified by their legal representatives whom they would have appointed, that they are no longer appearing for them and what they need to do to proceed with litigation either on their own, or to appoint new legal representation. The withdrawal must not be done in court without the necessary Notice, because that might deprive other parties to the litigation to have information for further engagement with the party whose legal representative withdrew, and that might cause unnecessary delays in the finalisation of the case. The court may even make a cost order against the party who brought about the delay.

[19] The facts of the case at hand are distinguishable from the facts *in Thoka v Rickett*<sup>2</sup>, in that the defendant in the *Thoka* case could not be traced or found by its legal representatives at its last known address. The Full Bench found, understandably so, that if the plaintiff could not be traced, it would be prejudicial to the other parties not to proceed with the matter in the search of an absent litigant. In the case at hand the respondent could be traced, hence the address by its legal representative that the respondent was not cooperative. Case law dealing with this subject or similar related facts could not be detected.

[20] Rule 52A(iii) states that the Notice must be served in terms of Rule 9(9). Rule 9(9) reads thus:

### **9 Service of process, notices and other documents**

“(9)(a) Service of any notice, request, statement or other document which is not process of the court may be effected by delivery by hand at the address for service given in the summons or appearance to defend, as the case may be, or

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<sup>2</sup>(Case number HCA37/2022) [2023] ZALMPPHC 42 (15 June 2023)

by sending it by registered post to the postal address so given: Provided that, subject to rules 5 and 13, service of such notice, request, statement or other document may be effected by sending it by facsimile or electronic mail to the facsimile address or electronic mail address given in the summons or notice of intention to defend, as the case may be.

(b) An address for service, postal address, facsimile address or electronic address so given as contemplated in paragraph (a) may be changed by the delivery of notice of a new address and thereafter service may be affected as provided for in that paragraph at such new address.

(c)(i) Service by registered post under this subrule shall, until the contrary appears, be deemed to have been effected at 10 o'clock in the forenoon on the fourth day after the postmarked date upon the receipt for registration.

(ii) Chapter III, Part 2 of the Electronic Communications and Transactions Act, 2002 is applicable to service by facsimile or electronic mail.

(d) Service under this subrule need not be effected through the sheriff<sup>3</sup>.

[21] The party on whom Rule 52A Notice has been served has a duty to appoint a new address from which it will receive service of documents, and all the parties involved in the case and the Registrar or Clerk of the Court must be informed about the new address at which service would be received by notice within 10 days of the service of the Rule 52A Notice. The simple reason for that is that documents or process cannot be served at the address of the erstwhile legal representatives.

[22] Service by electronic mail is clearly adequate, as was in **Acqui 38 (Pty) Ltd and Blue Risk Management (Pty) Ltd**<sup>3</sup> where the Notice of withdrawal complied with Uniform Rule 16, as it was transmitted electronically to the respondent, and the court

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<sup>3</sup> (30443/2022) [2023] ZAGPPHC 1414 (22 December 2023).

found that the respondent was adequately informed of the withdrawal by its legal representative, and the respondent was therefore obligated to appoint a new service address within 10 (ten) days.

[23] It is also important to explain the issue of service in relation to the provisions of section 26 of Chapter III, Part 2 of the Electronic Communication and Transactions Act 25 of 2002 (ECTA), which reads as follows:

#### **Acknowledgement of receipt of data message**

“26. (1) An acknowledgement of receipt of a data message is not necessary to give legal effect to that message.

(2) An acknowledgement of receipt may be given by-

(a) any communication by the addressee, whether automated or otherwise; or

(b) any conduct of the addressee, sufficient to indicate to the originator that the data message has been received”.

[24] In the **Acqui 38** case, that was quoted above, the application of the provisions of section 26 of ECTA, was clearly applied where the legal representative of the respondent presented to the court the ‘read receipt’ messages which showed that the e-mails that were sent to the respondent containing the notice of withdrawal was read. The numbering in the **Acqui 38** judgment was clearly missed, and so was the last sentence on paragraph 21 of the judgment, but be that as it may the judgment is quoted for the logical reasoning on the issue of service, and circumstances under which a legal practitioner can rely on section 26 of ECTA, to show the court that there was service of the notice of withdrawal electronically, on the basis that the message was read.

## DISCUSSION

[25] The provisions of Rule 52A are peremptory in as far as service of the Notice on the party who is being renounced is concerned. Whenever a legal representative withdraws from assisting a party to the proceedings in a case, that litigant must be notified irrespective of the stage of the proceedings, so that that litigant can know as to how to continue with the case, and for the other parties not to communicate with legal representatives that are no longer acting for that litigant.

[26] Section 34 of the Constitution of the Republic of South Africa, 1996, guarantees access to courts, in that it states that everyone has the right to have any dispute that can be resolved by the application of law decided in a public hearing before a court or, where appropriate another independent and impartial tribunal or forum. The respondent in the case at hand is also entitled to such access.

[27] The importance of the service of the Notice was also evident when the matter came before this Court as well, in that the respondent was still not present and not represented in this Appeal proceedings. The respondent never appeared in this Appeal proceedings, nor represented. It is therefore imperative that Courts must enforce compliance with Rule 52A, irrespective of the stage of the proceedings, as long as the proceedings are not concluded.

[28] The appellant raised the applicability of Rule 32(2) instead of Rule 52A in the proceedings in the court *a quo*. This court has to deal with that aspect as well.

[29] Rule 32(2) reads as follows:

### **32 Non-appearance of a party - withdrawal and dismissal**

“(1) ...,

(2) If a defendant or respondent does not so appear, a judgment (not exceeding the relief claimed) may be given against him or her with costs, after consideration of such evidence, either oral or by affidavit, as the court deems necessary.

(3) ...,

(4) ... “.

[30] The court *a quo*, even though it was not satisfied with the compliance with the provisions of Rule 52A, it eventually allowed that the name of the respondent be called inside and outside court. The court *a quo* went further to allow that the proceedings be proceeded with in terms of Rule 32(2), and heard the submissions that were made by the appellant regarding the action. The legal representative of the appellant continued to address the court on the action in the absence of the respondent seeking an order by default. That was a misdirection by the court *a quo* to allow default judgment proceedings to continue despite non-compliance with Rule 52A.

[31] This court notes from the record of the proceedings in the court *a quo* the rather demeaning utterances of the legal representative of the appellant to the learned Magistrate on page 14. On paragraph 10 of the record she told the court that it seems that she had to repeat herself maybe ten times, because the question that the court was supposed to ask was why was the defendant not before court, and not ask technical things about what the Notice was saying and all those things. That was a rather disdainful manner of engaging with the court, showing no respect when addressing the court.

[32] The court *a quo* delivered a written judgment, and on paragraphs 6 and 9 of the judgment, the court *a quo* clearly indicates that the provisions of Rule 52A were not complied with, and as such there was no need for it to consider proceeding with the matter in terms of Rule 32(2). The court *a quo* after being addressed on the merits of the case, eventually refused the request for default judgment. In the reasons for

judgment, the learned Magistrate states that she never dealt with the application in terms of Rule 32(2) because there was no compliance with rule 52A.

[33] That is despite the fact that the learned Magistrate allowed the legal representative of the appellant to address her on the merits. Rule 32(2) gives the court the discretion to direct as to how the matter should proceed. The learned Magistrate allowed the plaintiff to address her on the merits of the case. The amount claimed was for arrear rental, and that amount was clearly ascertainable as that emanated from a written contract that the parties entered into. It is trite that no evidence under oath is necessary to be led if the claim is for a liquidated amount<sup>4</sup> in default judgment proceedings, unless if the court so orders.

[34] In the case at hand by calculation the amount allegedly owed could be easily ascertainable, and that is probably the reason why the legal representative of the appellant just addressed the court, and the court allowed that without directing differently as to how it wanted to hear evidence except to order the legal representative of the appellant to proceed by addressing it. One can safely say that the court was satisfied with just being addressed, and probably because the amount could also be clearly ascertainable.

[35] The learned Magistrate misdirected herself in that once addressed on the merits of the claim, which she allowed, then judgment should have been delivered on the merits. There was no need for the learned Magistrate to hear the merits of the action, if she was not satisfied that certain requirements or procedural aspects with regard to service of documents were not done in accordance with the Rules, the court *a quo* should have at least dealt with the matter in terms of Rule 60(2), by ordering compliance by at least giving the erstwhile legal representative of the respondent an opportunity to comply with Rule 52A, without excusing her.

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<sup>4</sup> Ramalephatsho Industries CC and Another v Nyumba Mobile Homes & Offices (Pty) Ltd (1719/2015) [2023] ZAFSHC 510 (29 December 2023).

[36] The legal practitioner who complies fully with Rule 52A need not come back to appear in court just to notify the court about their withdrawal as that would not be necessary, because it might be that a new legal practitioner has taken over the matter, and all the parties involved were notified and the matter is ready to be proceeded with. It might also be that the litigant has decided to proceed on their own, but that must be communicated to all the parties involved, and more importantly the address of service of subsequent documents and notices.

[37] In accordance with Rule 52A, an attorney may be allowed to withdraw from a case once the court is at least satisfied that:

- (i) the attorney has delivered a Notice of withdrawal to the last known address of the party he/she represented informing the party about his/her withdrawal, and that address must be stated in the Notice,
- (ii) the said Notice must have been served in terms of Rule 9(9) of the Rules,
- (iii) the said Notice must have also been delivered on the Registrar or Clerk of the Court, and all parties involved in the proceedings,
- (iv) the contents of the Notice shall inform the party whose attorney withdrew, to appoint an address for service of subsequent documents and notices on the said party. The Notice shall also inform the said party that he/she shall inform all the parties involved in the case, the Registrar and the Clerk of the Court about the new address, within 10 (ten) days of receipt of the Notice of withdrawal from the party's attorney,
- (v) the Notice shall also inform the said party that the physical address that is chosen by that party must be within 15 (fifteen) kilometers of the Court House, if

there are three or more attorneys practicing independently of each other in the area of his/her physical address<sup>5</sup>,

(vi) the Notice shall also inform the party to state in the Notice, his/her postal address, facsimile address and electronic mail address, and

(vii) the Notice filed with the Registrar or Clerk of the Court shall state the names and addresses of the parties that were notified, and the dates and manner in which they were notified.

[38] The above requirements are a guideline on withdrawals by attorneys, and responsibilities of litigants after such withdrawals, unless if the merits of the case dictate differently. The said guidelines may also be applicable to a legal practitioner who qualifies to get instructions directly from litigants.

## ORDER

[39] In the result, the following order is made:

(i) The Appeal is upheld,

(ii) The judgment granted by the learned Magistrate dated 16 November 2022 is set aside,

(iii) The matter is referred back to the Magistrates' Court for hearing, before another Magistrate,

(iv) The notice of set down in terms of Rule 22(3), must be served on the respondent with the date, time and place of hearing,

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<sup>5</sup> In the Uniform Rules of Court the address that is chosen by the party whose legal representative withdrew, must be within 25 kilometers of the court house if there are three or more attorneys practicing in that area independently of each other.

(v) No order as to costs.

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**J.T. NGOBENI**  
**Acting Judge of the High Court**

I agree

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**E. MASHAMBA**  
**Acting Judge of the High Court**

It is so ordered

**Appearances**

Counsel for the Appellant : Advocate W.H. Young

Instructed by : Tar Attorneys of Polokwane

Counsel for the Respondent : No appearances

Instructed by : No appearances

Date of the hearing : 24 May 2024

Date of judgment : 30 July 2024

**Judgment transmitted electronically**