THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 714/2023

In the matter between:

TEODORIN NGUEMA OBIANG	**APPELLANT**
and	
DANIEL WELMAN JANSE VAN RENSBURG	**FIRST RESPONDENT**
SHERIFF, CAPE TOWN WEST	**SECOND RESPONDENT**
THE REGISTRAR OF DEEDS, WESTERN CAPE	**THIRD RESPONDENT**

Neutral citation: *Obiang v Janse van Rensburg & Others* (714/2023) [2025] ZASCA 30 (31 March 2025)

Coram: NICHOLLS, MEYER and KATHREE-SETILOANE JJA, COPPIN and CHILI AJJA

Heard: 22 November 2024

Delivered: 31 March 2025

Summary: Civil Procedure – rescission of orders in terms of rule 42(1)(*a*) of Uniform Rules of Court – Service of legal process in substantial compliance with

the Uniform Rules of Court (the rules) – service valid as legal process brought to the attention of the appellant – purpose of service achieved.

Rule 16(2) of the rules – party terminating attorney's mandate and electing not to appoint a new attorney – obliged to file a rule 16(2)(*b*) notice appointing an address for service – purpose of rule 16 – to curb conduct that frustrates litigation from continuing smoothly.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Wille and Le Grange JJ concurring and Thulare J dissenting, sitting as court of appeal):

The appeal is dismissed with costs, including those of two counsel where so employed.

JUDGMENT

Kathree-Setiloane JA (Nicholls and Meyer JJA, Coppin and Chili AJJA concurring):

[1] The question that is central to this appeal, is whether it is legally permissible to serve legal process, intended for an unrepresented foreign litigant, on an address appointed by a former attorney, after its mandate to act for the litigant in the proceedings had been terminated.

[2] The appellant, Mr Teodorin Nguema Obiang, is the President of the Republic of Equatorial Guinea (Equatorial Guinea). The first respondent, Mr Daniel Welman Janse van Rensburg (the first respondent) was detained for 423 days at Black Beach Prison in Malabo, Equatorial Guinea. His arrest and detention was on the purported instructions of the appellant who, at the time, was the Vice President of Equatorial Guinea. The first respondent was allegedly impaired physically and psychologically as a result of being assaulted and tortured during his incarceration.

[3] The first respondent instituted a damages action against the appellant for wrongful arrest and detention (the main action) in the Western Cape Division of the High Court, Cape Town (the high court). Jurisdiction was founded by attaching the appellant's property in Clifton, Cape Town. The appellant challenged the attachment of this property to the Constitutional Court, but was unsuccessful.

[4] On 13 July 2020, the appellant terminated the services of his attorneys, Abraham and Gross Inc (A&G). In the letter of termination, he wrote:

'I have decided to terminate our current legal relationship and accepted legal counsel elsewhere because your work has had no positive result to resolve my case. I believe there is more progress that can be made with the alternative legal counsel I have obtained. I also believe that it will best suit the need of my case, based on their level of expertise and my needs as a client. My new legal counsel will communicate with your firm to handle the case, nonetheless I appreciate the time and attention you have spent attending to my case.'

[5] On 22 July 2020, A&G filed notices of withdrawal as attorney of record, in the matters in which it represented the appellant. The notices of withdrawal were erroneously formulated in terms of former rule 16(4)(*b*)[1] of the Uniform Rules of Court (the rules) instead of the current rule[2] which, at the time, had already come into effect. A&G recorded in the notices of withdrawal that the appellant was 'reachable through Ms Maria Del Pilar Salsona Hombria, Second Secretary, Embassy of Equatorial Guinea (the Embassy), 48 Florence Street, Colbyn, Pretoria'. It quoted former rule 16(4)(*b*) in the notices of withdrawal which read:

'(*b*) After such notice, unless the party formally represented within 10 days after the notice, himself notifies all other parties of a new address for service as contemplated in sub-rule (2), it shall not be necessary to serve any document upon such party unless the court otherwise orders:

[1] Former rule16(4)(*b*) of the rules is set out later in the judgment.
[2] Current rule 16 of the rules is set later in the judgment.

Provided that any of the other parties may before receipt of the notice of their new address for service of documents serve any documents upon the party who was formally represented.'

[6] A&G also drew the appellant's attention to former rule 16(2) in the notices of withdrawal. It read as follows:

'(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 for him, and thereafter act in person or appoint another attorney to act therein, whereupon he shall forthwith give notice to the registrar and to all other parties of the termination of his former attorney's authority and if he has appointed a further attorney so to act for him, of the latter's name and address.

(*b*) if such party does not appoint a further attorney, such party shall in the notice of termination appoint an address within eight kilometers from the office of the registrar for the service on him of all documents in such proceedings.'

[7] Despite his attention being drawn to this rule, the appellant did not file a rule 16(2) notice appointing an address for service on him of all documents in the proceedings. Although not obliged under the rules to do so, on 20 July 2020, Mr HF Bothma, an attorney at A&G, sent an e-mail to Mr AN Medja, the Director General of Foreign Security in Equatorial Guinea (based in Malabo). In addition to recording A&G's withdrawal as attorney of record in the e-mail, he queried whether the appellant had appointed a new attorney. Mr Bothma copied this email to Ms Hombria at the Embassy.

[8] When the first respondent's attorney, Fairbridges Wertheim Becker Attorneys (FWB) received A&G's notices of withdrawal, it was in the process of preparing an application to strike out the appellant's defences due to his failure to deliver a discovery affidavit by 26 June 2020. This application was issued on 23 July 2020 and served by hand on A&G on 24 July 2020. On the same day, FWB sent an email

to Ms Hombria recording that A&G had withdrawn as the appellant's attorney of record. It attached, to this email, a copy of the application to strike out the appellant's defence, and specifically drew Ms Hombria's attention to the date of set down of the application being 17 August 2020. On 27 July 2020, the Sheriff, Cape Town West (the Sheriff) served the application to strike out and the notice of set down on Ms Hombria. It was received by Mrs U Abeso, a manager at the Embassy. The address of the Embassy was, however, entered on the return of service as 39 Florence Street, Colbyn Pretoria instead of 48 Florence Street, Colbyn Pretoria.

[9] The appellant did not oppose the application to strike out his defence. On 17 August 2020, Dolamo J struck out the appellant's defence ('the Dolamo order').

[10] On 7 January 2021, the Registrar of the high court (the Registrar) issued a notice of set down for the hearing of an exception, when this was the date of set down for the commencement of the trial in the main action. The next day, FWB sent the notice of set down to A&G. However, unbeknown to FWB, the appellant had terminated A&G's mandate some six months earlier. On receipt of the notice of set down, A&G wrote to FWB querying, amongst other things, whether the appellant had appointed another attorney. On 13 January 2021, Mr C Kika, an attorney at FWB, replied saying that no exception was filed in the matter.

[11] On 26 January 2021, FWB served the notice of set down on the Embassy. On the same day FWB, also served on the embassy, a rule 28(1) notice notifying the appellant of the first respondent's intention to amend his particulars of claim, the Dolamo J order, rule 36(9) expert witness notices and the index to the trial bundle. On 28 January 2021, Mr E Melamu, an attorney at FWB, deposed to a service

affidavit confirming that these documents were signed for by Mr G Ngobeni, a security guard on duty at the Embassy.

[12] In addition, on 28 January 2021, Ms N Matsebula, an associate at FWB, sent an email to Ms Hombria confirming that on 26 January, FWB had served the documents referred to above on the security guard at the Embassy. She attached each of these documents to the email. The attached documents included the notice of set down. FWB did not receive any objection from the appellant following service of the rule 28(1) notice. On 9 February 2021 it, therefore, served a rule 28(7) notice with the amended page, by hand on Ms Hombria at the Embassy. She signed for it. This notice specifically states that the main action is set down for trial on 8 March 2021.

[13] The trial came before Lekhuleni AJ on 8 March 2021. On 18 June 2021, Lekhuleni AJ granted default judgment against the appellant and awarded the first respondent damages ('the Lekhuleni order'). On 23 June 2021, a writ of execution (the writ) was issued against the appellant's moveable assets. Within twenty-four hours of service of the writ on his house in Clifton, the appellant instructed Victor Nkhwashu Attorneys (VNA) to bring an application to suspend the operation of the Lekhuleni order and to rescind both that order and the Dolamo order. On 5 August 2021 the high court, by agreement between the parties, made an order suspending the Lekhuleni order pending the outcome of the rescission application.

[14] Slingers J heard the rescission application against the Dolamo and the Lekhuleni orders. He dismissed it on 13 December 2021. He concluded that the appellant's absence from the two hearings did not fall within the scope of the

requirements of rule 42(1)(*a*) of the rules, as he had elected not to participate in the litigation after terminating his attorney's mandate to act for him.

[15] On 22 February 2022, Slinger's J granted the appellant leave to appeal to the full court of his Division on the limited basis of this conclusion vis à vis rule 42(1)(*a*) of the rules. In a majority judgment written by Wille J with Le Grange J concurring, the full court dismissed the appeal on 3 February 2022. In doing so, it found that even if the service of legal process on the appellant in the striking out application and the main action was defective, it was not invalid. It held that:

'No formal condonation application is required to condone any defect in service. Service is at the court's discretion. Whether or not the appellant was present at the Embassy at the time of service is irrelevant because the service was at the Embassy address and on the designated Embassy official. There is nothing suspicious in the manner of service of the other process by the [first respondent], this after the termination of the services of the appellant's erstwhile attorneys of record at the instance of the appellant.

Simply put, the appellant cannot succeed in rescinding the [Dolamo and Lekhuleni orders] because [rule 42(1)(*a*)] is designed to correct an 'obviously' wrong judgment or order…. All the previous orders in this matter must have been correctly granted within the meaning and scope of the rule. This must be so, mainly because there is no objective evidence on behalf of the appellant to gainsay this position which carries any probative weight.'

On 23 June 2023, this Court granted the appellant special leave to appeal against the judgment and order of the full court.

[16] Rescission is a remedy available only in exceptional cases. Where the order is made in the absence of a party due to the omission of the other party to serve legal process on it, the party in whose absence the order was made may apply for rescission of the judgment in terms of rule 42(1)(*a*) of the rules. That party would bear the burden to justify the default that led to an adverse decision being made

against him or her. The words 'absence of any party affected thereby' in rule 42(1) are intended to protect a litigant whose presence was precluded as a result of a procedural irregularity in the proceedings. A litigant who elected to be absent will enjoy no protection under the rule. The order sought to be rescinded must have been erroneously granted because, at the time of its issue, there existed a fact the judge was unaware of which would have precluded the granting of the order, and would have induced the judge if aware of it, not to grant the order.[3] Even where the requirements for recission are met, a court retains the discretion to refuse an order for recission.

[17] The appellant argued that the full court ought to have upheld his appeal against the order of Slingers J, as the Dolamo and the Lekhuleni orders were made in his absence, due to the first respondent's omission to serve legal process on him. In support of his case for rescission in the high court, the appellant made, *inter alia*, the following allegations in his founding affidavit: The first time he became aware of the Dolamo and the Lekhuleni orders was on 23 June 2021 when the Sheriff served the writ at his house in Clifton. He only received the writ because the Sheriff handed it to his caretaker, Ms H Benbeche. She took photographs of the writ and sent them to Ms Hombria at the Embassy. Ms Hombria forwarded them to Mr Medja in Malabo, who reported to Mr JAB Nchuchuma, the Minister of State (Foreign Security). Mr Medja alerted Mr Nchuchuma to the photographs of the writ and he then brought them to the appellant's attention. The appellant engaged the services of VNA. It established that he had not received the notices of set down in the striking out application and the main action, respectively.

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[3] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263; 2021 JDR 2069 (CC) paras 56, 62 and 79.

[18] In answer, the first respondent advanced the following argument: There was proper service, on the appellant, of the notices of set down in the application to strike out his defence and in the main action, as his attorney had served them on the Embassy, and for the attention of Ms Hombria specifically. This was in accordance with the address for service on A&G's notice of withdrawal. The service on the Embassy was valid as it came to the attention of the appellant. The appellant was aware of his obligation to file a rule 16(2)(*b*) notice appointing an address for service of all court documents on him. His former attorney's notices of withdrawal specifically drew this to his attention.

[19] The appellant neither denied receiving the notices of withdrawal, nor having filed a rule 16(2) notice notifying the parties and the registrar of the termination of A&G's mandate and appointing an address for service on him. Nonetheless, he argued that subsequent to the termination of its mandate, A&G had no authority to appoint the Embassy (and Ms Hombria) as the address for service of legal process intended for him. He argued that this is impermissible as A&G was obliged to serve all legal process on him in accordance with rule 4 of the rules which provides for a process of edictal citation in circumstances where, as in this case, the appellant was an unrepresented foreigner. Alternatively, the first respondent should have approached the high court, in accordance with rule 5, for leave to serve on him by way of substituted service.

[20] These contentions raise an important point of law, namely the import of the address designated in a rule 16(4)(*b*) notice of withdrawal by a former attorney of record. Before considering this question it is necessary to establish which iteration of rule16 applies in this matter. In its notices of withdrawal, A&G quoted rule 16 as

it was prior to its substitution by GN R1318 of 30 November 2018.[4] However, on 22 July 2020, the date on which the notices of withdrawal were filed by A&G, the current rule 16 was already in place, having come into effect on 19 January 2019.[5] It is this iteration of rule 16 that applies and not the former one.

[21] The current rule 16(4)(*a*) regulates the scenario where an attorney ceases to act and withdraws of its own volition - as opposed to having its authority terminated. In this scenario, the attorney is required to immediately deliver a notice of withdrawal to the party it formerly represented, the registrar and all other parties in the matter. In terms of rule 16(4)(*b*) the formerly represented party must within

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[4] Referred to as 'former rule' earlier in the judgment.

[5] Rule 16 of the rules provides:

'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.

(*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 of such party at either address, of all documents in such proceedings as well as such party's postal or facsimile addresses where available.

(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 sub-rule (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 name 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*).'

10 days of receipt of the withdrawal notice, notify the register and all other parties of a new address for service as contemplated in rule 16(2)*(a)* of the rules. After that, all subsequent documents in the proceedings for service, on the formerly represented party, must be served on that party in accordance with the rules relating to service, for example, by means of substituted service in terms of rule 5. However, this is followed by the proviso to the effect that, where the party whose attorney has withdrawn fails to provide an address for service, that party shall be liable for the costs occasioned by the subsequent service on him or her in terms of the rules relating to service, unless the court orders otherwise.

[22] Rule 16(2), on the other hand, applies to the scenario where a party terminates the mandate of his or her attorney. In terms of rule 16(2)(*a*), the party formerly represented may thereafter act in person or appoint another attorney to act for him or her and immediately deliver a notice of termination to the registrar and all other parties, notifying them of the termination of his or her former attorney's authority. And if the party has appointed a new attorney to act for him, to give notification of the latter's name and address. Rule 16(2)(*b*) provides that if the party formerly represented does not appoint a new attorney, he or she is required in the notice of termination to appoint an address within 25 kilometres[6] from the office of the registrar for the service on him or her of all documents in the proceedings.

[23] It is apparent from rules 16(2)*(b)* and (4)*(b)* respectively, that where a party terminates his or her attorney's mandate and where an attorney ceases to act of its own volition, the attorney is not obliged to provide the registrar and the other parties with a new address for service on the party it formerly represented. In both scenarios

[6] Old rule 16(2)(*b*) stated 8 km (GN R960 of 28 May 1993). The current iteration of the rule states 25 km. Rule 16(2)(*b*) was substituted by GN R3397 of 12 May 2023 in terms of which 15 km was changed to 25 km.

that obligation falls upon the party that was formerly represented by the attorney. Similarly, where an attorney's mandate is terminated by a party, in terms of rule 16(2)(*a*), the attorney is not obliged to deliver a notice of termination notifying the other parties of the termination of its mandate. That obligation falls on the formerly represented party.

[24] Turning to the appellant's omission to deliver a rule 16(2) notice to the registrar and the first respondent, inter alia, appointing an address for service of court documents on him. Although strictly speaking not obliged to do so, on the termination of its mandate, A&G delivered rule 16(4) notices of withdrawal to the appellant, the registrar and the first respondent. Although these notices of withdrawal were supererogatory, they were important as they drew the appellant's attention to rule 16(2).

[25] The appellant confirmed in his founding affidavit that A&G filed the notices of withdrawal, but he does not say why he did not act in accordance with rule 16(2), despite it being brought to his attention. The appellant was fully aware that the Embassy was the address appointed in the notices of withdrawal, and yet did nothing to correct this. Having failed to deliver a rule 16(2) notice appointing an address for service on him, it is untenable for the appellant to contend that service on the Embassy was invalid, as his former attorney (A&G) had no authority to designate the Embassy as the address for service. That the appellant had terminated A&G's mandate to act for him, does not negate service of legal process, intended for him, on the designated address, provided it came to his notice. As will be demonstrated later in the judgment, it did.

[26] In the circumstances, the full court's finding that the appellant had never explained why he ignored the supererogatory communications sent to him by both his erstwhile attorneys and FWB (the first respondent's attorneys), cannot be faulted. As held by the full court, it was of crucial importance that the appellant terminated the mandate of his former attorney. Having done so, he was obliged to elect whether to act in person or appoint a new attorney. But he did not do so for a period of eleven months, despite informing Mr Bothma in the letter terminating A&G's mandate that he had appointed 'new counsel'. This called out for an explanation as to why he elected not to appoint a new attorney following the termination of A&G's mandate to act for him. The full court correctly found that:

'The only possible explanation by the appellant surfaces in reply where he alleges that he ultimately chose not to appoint new attorneys and proceed unrepresented. This is highly improbable and difficult to believe as his two luxurious immovable properties remained under threat and attachment during this time. The appellant remained obliged to stipulate an address in his notice of termination for service of all future documents in the proceedings.'

[27] Significantly, in this regard, rule 16(3) provides that upon receipt of a notice in terms of subrule (1) and (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 him of such documents in such proceedings, but any service duly effected elsewhere before receipt of such notice, notwithstanding such change, shall for all purposes be valid, unless the court orders otherwise. There was much debate on the meaning of 'duly effected' during the hearing of the appeal. According to Black's Law Dictionary 'duly effected' means 'in a proper manner, in accordance with legal requirements'. Construed in context, this would mean service in accordance with the rules of service.

[28] It has long been established in our law that service in strict compliance with rules of service is not the test for effective service. That approach is formulaic and mechanical and has been rejected by our courts.[7] The test is rather, despite non-compliance with the rules of service, whether the other party received notice. This gives effect to the purpose of the rules of service which is that a person who is being sued must receive notice. Provided that this purpose is achieved there will be proper service, even though not in strict compliance with the rules.[8]

[29] Was the purpose of service achieved in this matter, albeit that it was not done in accordance with rules 4 and 5 of the rules? The appellant's argument proceeds from the premise that there is no dispute of fact on the question of whether there was effective service on him. In support of this proposition, he relies on *Wightman t/a JW Construction v Headfour (Pty)(Ltd) and Another* (*Wightman*).[9] There, this Court confirmed that a bona fide dispute of fact exists only where the party who purports to raise the dispute 'seriously and unambiguously addressed the fact said to be in dispute'. However, what this Court made clear in *Wightman* is that there are situations:

'…[W]here a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.'

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[7] *Prism Payment Technologies v Altech (Pty) Ltd* 2012 (5) SA 267 (GSJ) para 23; *Prism Standard Bank Namibia Ltd and Others v Maletzky and Others* [2015] NASC 12 para 22.
[8] Ibid para 21; *Investec Property Fund Limited v Viker* [2016] ZAGPJHC 108 para 14; *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 at 463B-463C.
[9] *Wightman t/a JW Construction v Headfour (Pty)(Ltd) and Another* 2008 (3) SA 371 (SCA) para 13.

[30] Where, as in this case, an averment in an applicant's affidavit does not set out the detail and particularity that the circumstances demand, then the disputing party would be entitled to respond with a bare denial. This case is certainly not one 'where the disputing party must necessarily possess knowledge of the relevant facts'. Quite the opposite. As I see it, the inner workings, practices and protocols of the Embassy, and its lines of communication with the government offices in Equatorial Guinea, fall quintessentially within the knowledge of the appellant. Yet the appellant sought to address this, in his papers, in equivocal and tentative terms by saying that Ms Hombria 'may have' forwarded some of the court documents she received from the first respondent to Malabo and he 'regrets' that some documents were ultimately not brought to his attention. In a similar vein, he says that 'as far as I am aware, A&G did not bring the striking out application to my attention'.

[31] These are facts that the appellant was able to establish. He could have readily obtained affidavits from Embassy staff, state officials in Malabo, and perhaps others, with the workings, practices, protocols and lines of communication within the Embassy and the relevant department of state in Equatorial Guinea - all of whom he would have had easy access to. However, all that the appellant filed in support of his version is a scant confirmatory affidavit of Mr Medja with the usual refrain. It sheds no light on why the legal process served on the Embassy was not channeled to the appellant in Malabo. It also strikes me as peculiar, that the appellant was content to annex an unsigned confirmatory affidavit of Ms Hombria, to his founding papers, when an explanation from her was critical to his version.

[32] Crucially, the appellant fails to explain how Ms Hombria and Mr Medja were able to bring the writ of execution to his attention within twenty-four hours of its service at his property in Clifton. Yet, on his version, they were incapable of bringing

to his notice a single court document that was served on the Embassy. The expedition at which the writ of execution was brought to his attention, calls into question the appellant's version that he did not receive a single document that was served on the Embassy, in the 11 months prior to engaging the services of a new attorney.

[33] The appellant's founding affidavit fails to disclose relevant and material information which peculiarly fell within the knowledge of the appellant or those that formed the communication lines in government. It was incumbent on him to support his case with affidavits of Ms Hombria and Mr Medja, who had personal knowledge of what had transpired with the documentation that they received from the first respondent's attorney. The appellant could have also obtained an affidavit from Mr Botha of A&G. It turned out that although the appellant terminated the mandate of A&G to act for him in the matter, he subsequently engaged its services as his correspondent attorneys. Mr Botha's supporting affidavit could have answered the question that cries out for an answer: How did A&G know to designate Ms Hombria at the Embassy as the person through whom the appellant could be reached?

[34] The appellant's failure to provide evidence in support of his version that he did not receive effective service, coupled with the first respondent's denial thereof, gave rise to a material dispute of fact on the papers. These were motion proceedings. Therefore, in so far as he was unable to provide a cogent explanation on the papers, the proper course was for the appellant to have applied for a referral to oral evidence before argument was heard on the merits of the application.[10] By calling Ms Hombria, Mr Medja, and perhaps others at the Embassy to testify, the appellant could have shed light on why the material served at the Embassy did not make its

[10] *Law Society, Nothern Provinces v Mogami* 2010 (1) SA 186 (SCA) at 195C-D.

way to his attention in Malabo. However, considering his failure to do so, Slingers J was justified in deciding the matter on the first respondent's version.

[35] Two further points require consideration. The first is the appellant's contention that the return of service in the application to strike out was flawed because it listed an address different to that of the Embassy. Critically, the appellant does not deny that service of legal process was effected on the Embassy. The return of service makes clear, on its face, that the application to strike out was served on the Embassy for the attention of Ms Hombria, albeit that the Embassy address was erroneously listed as 39 Florence Street, Colbyn instead of 48 Florence Avenue, Colbyn. Notably, FWB also emailed the application to strike out and the notice of set down to Ms Hombria the day before. In any event, a flawed return of service does not render the underlying service of the court documents invalid, provided they came to the attention of the party in question - which in this case - it did.

[36] The final contention raised by the appellant is that the notice of set down in the main action was defective as it announced the date of set down for the hearing of an exception rather than the trial. The appellant is again clutching at straws as the date of set down of the trial had been brought to his attention. This is clear from the first respondent's rule 28(7) notice dated 9 February 2021, pursuant to which he delivered the amended pages of his particulars claim to the appellant. This notice states that the matter is set down for trial on 8 March 2021. Moreover, the first respondent's attorney hand delivered this notice to Ms Hombria at the Embassy and she personally acknowledged receipt thereof. The appellant does not deny this.

[37] I accordingly conclude that the full court did not err in upholding the appeal against the order of Slingers J dismissing the rescission application. The appellant

received the court documents which were served on the Embassy through essentially the same channels that the writ of execution came to his attention. He understood fully well that the litigation would have proceeded after he terminated the mandate of A&G to act for him, yet he did not deliver a rule 16(2)(*b*) notice appointing an address for service on him.

[38] This did not render him immune from service. He remained duty-bound to take proactive steps to inquire about the status of the proceedings against him from the first respondent's attorney.[11] He was, however, content to remain supine and passively sit by, as the proceeding unfolded. By terminating the mandate of his former attorney, failing to appoint a new attorney, omitting to appoint an address for service of legal process on him, and ignoring multiple attempts to reach him, the appellant sought to frustrate the framework created under rule 16 to ensure that litigation continues smoothly in the event of such conduct by a party. Compliance with rule 16(2) is required to curb precisely the kind of abuse of process which the appellant is guilty of.

[39] In the circumstances, I am unable to conclude that the Dolamo J and the Lekhuleni AJ orders were made in the appellant's absence. He was, thus, not entitled to an order rescinding them in terms of rule 42(1)(*a*) of the rules. The appeal against the order of the full court must, therefore, fail.

[40] In the result, I make the following order:
The appeal is dismissed with costs, including those of two counsel where so employed.

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[11] *Mkhwanazi v Mantsha* [2003] 3 All SA 222 (T) para 25.

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F KATHREE-SETILOANE

JUDGE OF APPEAL

Appearances:

For the appellant	N G D Maritz SC with T Govender
Instructed by:	Lawtons Africa, Johannesburg
	Symington de Kok Attorneys, Bloemfontein
For the first respondent:	H Epstein SC with R Graham
Instructed by:	Malatji & Co Attorneys, Sandton
	Phatsoane Henney Attorney, Bloemfontein.