

SOUTH AFRICA / JUDGMENT

Motlounge and Another v Sheriff Pretoria East and Others (13249/2014) [2018] ZAGPPHC 664; 2019 (3) SA 228 (GP) (5 September 2018) [2018] ZAGPPHC 664

COURT

North Gauteng High Court, Pretoria

BEFORE

S.A.M Baqwa

CASE / FILE NUMBER

13249/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

No: 13249/2014

In

the matter between:

JONE

J MOTLOUNG

First Plaintiff

MOSELE

M

MOLOI

Second Plaintiff

and

THE

SHERIFF PRETORIA

EAST

Defendant

STEINMANN

ATTORNEYS

First Third Party

CJ

VAN RENSBURG ATTORNEYS

Second Third Party

JUDGMENT

Bagwa J

Practice

- Summons - failure to serve by sheriff resulting in prescription of action against Road Accident Fund - whether sheriff liable for damages - Special plea
- nullity of summons raised - due to lack of signature by Registrar.

Summary

The plaintiffs alleged that on 9 December a Combined Summons under case number 70807/2011 was handed to the defendant for service. The defendant was required in terms of the Sheriff's Act 90 of 1986 to serve such summonses so as to ensure that prescription would not arise. The defendant did not serve the summons on the basis that it had not been signed by the Registrar as required by Rule 17(3) of the Uniform Rules of Court. Upon being sued by the plaintiffs for negligence which resulted in the plaintiffs' claim against the Road Accident Fund prescribing, the defendant raised a special plea that the Particulars of Claim did not disclose a cause of action because the Combined summons which was handed to him for service had not been signed by the Registrar in compliance with Uniform Rule of Court 17(3) and that it is only once a summons is signed by the Registrar. that it constitutes a direction to the Sheriff to serve same, and that the absence of the Registrar's signature on the summons results therein that the summons is a nullity.

Held, that the defendant's special plea be upheld.

Held, the plaintiffs' action be dismissed with costs.

Annotations:**Reported cases**

Republikeinse Publikasies (Edms) Bpk v AfrikaansePers Publikansies (Edms) Bpk 1972

(1) SA 773 (A)

Krugel v Minister of Police 1981 (1) SA 765

Minister of Prisons and Another v Jongilanga 1985 (3) SA 117 (A)

Noord Kaaop Lewendehawe Koop Beperk v Lombaard 1988 (4) SA 810 (NC)

Chasen v Ritter 1992 (4) SA 323 SE

Statutes

Sheriffs Act 90 of 1986

Introduction

- [1] This is an action for damages arising out of an alleged failure of the defendant to serve summons which had been issued by the plaintiffs against the Road Accident Fund in case number 70807/2011 for damages in the total sum of R440 980.00.

The Parties

- [2] The first plaintiff is Jone J . Motlounge an adult male of 978 Mphatlalatsane, Witsieshoek, Free State Province whilst the second plaintiff is Mosele Merriam Moloi an adult female of 931 Mphatlalatsane, Witsieshoek, Free State Province.

Background

- [3] The plaintiffs' claim against the Road Accident Fund arose out of an accident which occurred on 15 January 2007 at about 01:00 on the R57 between Kestell and Qwa-Qwa, Free State and which both plaintiffs were injured.
- [4] On 9 December 2011 a Combined Summons in pursuit of the abovementioned claim was handed to the defendant for service.
- [5] The plaintiffs allege that the defendant negligently failed to serve the summons and that such failure resulted in the plaintiffs' claim becoming prescribed in terms of the Prescription Act.

Defendant's Exception

- [6] The defendant excepted to the plaintiffs' Particulars of Claim on the basis that they did not disclose a cause of action. The exception was postponed on the basis that evidence should be first adduced before a finding could be made on the exception.
- [7] The defendant was ordered to file his plea within fifteen (15) days of the order. The exception was subsequently incorporated by way of special plea by the defendant.

Separation of Issues

- [8] At the commencement of the trial the defendant applied for the separation of issues on the basis that a finding by this Court regarding the special plea could be dispositive of the issues involved in the matter. After hearing arguments from both sides regarding the separation of issues I made an order that the special plea be separated from the rest of the issues in terms of Rule 33(4) of the Uniform Rules of Court and that the rest of the issues be postponed sine die.

Issues

to be Determined

- [9] The main issue to be determined is whether the special plea raised by the defendant is valid in law or not. If it is upheld it may be dispositive of the plaintiffs' claim and if not, the plaintiff's path to a positive outcome might be in sight.

Defendant's Special Plea

- [10] The plaintiffs rely upon the defendant's failure to serve the Combined Summons upon the Road Accident Fund as the basis for

alleging that the claim against the defendant became prescribed and unenforceable.

- [11] The plaintiffs plead that the defendant was required to immediately, alternatively, without delay, serve the summons and furnish a return of service as soon as he had done so.

- [12] The defendant pleads that the Particulars of Claim were not in compliance with Rule 17(3) of the Uniform Rules of Court in that they had not been signed and issued by the Registrar and that it is only once a summons is signed by the Registrar that it constitutes a court process which in turn constitutes a valid direction to the defendant to serve same.

- [13] The defendant further pleads that in the circumstances, the summons was a nullity and as such, the defendant was in law, neither

required, nor permitted to serve same.

- [14] The defendant also pleads that the summons which constituted a nullity would not have interrupted prescripton and that it cannot be said that the failure to serve a nullity caused the plaintiffs any loss.

The Law

- [15] Rule 17(3) of the Uniform Rules of Court provides as follows:

"Every summons ... shall thereafter be signed and issued by the Registrar and made returnable by the Sheriff to the Court through the Registrar."

- [16] The South African Board of Sheriffs has, with the approval of the Minister of Justice, in terms of section 16(k) of the Sheriffs Act, 1986 (Act 90 of 1986), framed the Code of Conduct for Sheriffs. The schedule thereto provides as follows:

"A Sheriff may serve or execute process only within the area of jurisdiction or the portion of an area of jurisdiction for which he has been appointed. A Sheriff entrusted with the service or execution of a process shall act without avoidable delay in accordance with the provisions of Rule 8(4) of the Magistrate's Court Rules or Rule 4(6)(a) of the Supreme Court Rules:

"provided that any process, requiring attention shall be dealt with forthwith."

- [17] In the matter of Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) at 780 E, Rumpff JA, as he then was, said the following:

"n Dagvaarding wat nie deur die Gn'ffier uitgereik is nie, sou 'n nulliteit wees en deur betekening van so 'n dagvaarding sou geen geding ingestel word nie."

[18] Further, in dealing with a similar matter Erasmus J in the matter of Noord Kaap Lewendehawe Koop Beperk v Lombaard 1988 (4) SA 810 (NC) at pp 816-1 817A with reference to the Republikeinse Publikasies decision (supra) said the following:

"Reel 17(3) vereis dat die Oagvaarding 'deur die Grieffier onderteken en uitgereik...' moet wees, 'met opdrag aan die Balju om deur die Griffier an die Hof relaas te gee...' Waar die Griffier, soos in die onderhawige geval, nie die oorspronklike Oagvaarding onderteken het nie, beteken dit dat die Balju of sy adjunk geen opdrag gehad het om daardie Oagvaarding te gaan uitvoer nie, want die mees basiese komponent van die Dagvaarding, naamlik die handtekening van die Griffier wat Jegaliteit (wettigheid) aan die proses verleen, dit in werking stel, wat die Balju opdrag gee, ens ontbreek. Eers nadat dit onderteken is en oorhandig is (vide Protea Insurance Co Ltd v Vinger 1970

(2) SA 663 (0) op 6648

- 665A)vir uitreiking, kan gese word dat aan voormelde vereiste van Reel 17(3)voldoen is"

[19] Evidently Rule 17(3) is unequivocal in requiring both a signature of the Registrar and that the Registrar should issue the summons. What can be gleaned from both the Republikeinse Publikasies and Noord Kaap Lewendehawe Koop decisions is that the signature and its issuing being joined by the conjunctive " and' are critical components of the Registrar's instruction. It goes without saying that absent one or two of those requirements, the document is visited with nullity.

[20] Burger JA adopted a different approach in the matter of Chasen v Ritter 1992 (4) SA 323 SE at p328 when he stated as follows:

"I have difficulty in describing a wrong proceeding as a nullity. Any material departure from the Rules renders a Summons or any other pleading defective and invalid... One must recognise it for what it is: a defective or irregular proceeding. But it is not nothing and cannot be ignored."

[21] Further, at page 329 Burger AJ states:

"The rule, if it does exist, that an irregularity, but not a nullity can be condoned is artificial and does not serve purpose."

[22] The general approach in our courts has been to distinguish between an irregularity which could be condoned and a nullity which could not be condoned. Thus, in the matter of Krugel v Minister of Police 1981

(1) SA 765

(T) Nestadt J said:

"It arises from submissions on behalf of the defendant that the summons is not only irregular, but it is a nullity and therefore not capable of being condoned. What has to be decided is the scope of the Court's power to condone non-compliance with the rules, and the nature of the irregularity complained of. That there exists a general discretion so as to condone, stems not only from Rule 27(3), but also from Rule 30..."

[23] At page 768 Nestadt J went on to say:

"The result as I see it, is the following: where what has been done amounts to a nullity, it cannot be condoned under Rule 27(3); nor is it necessary to set it aside under Rule 30. Where, however, there is a procedural step, albeit an irregular or improper one, it is capable of being condoned. This is so whether the particular rule which has not been complied with, is directory or mandatory and whether there has been substantial compliance or not. The distinction between an irregular proceeding and one that is a nullity or void, is one that has been recognised ..."

[24] Such a distinction was also recognised by Eloff AJA (as he then was) in the matter of Minister of Prisons and Another v Jongilanga 1985 (3) SA 117 (A), when he stated as follows:

"The question whether a procedural irregularity results in a nullity or not necessitates a consideration of the rule concerned in the context of the set of rules as a whole. In casu the positive language of Rule 17(3) has to be noted against the remedial provisions of Rule 27(3) and 30(3):

"But notwithstanding this emphatic language, the Courts have generally adopted the principles laid down by Lord Campbell in the Liverpool Bank v Turner (1861) 30 LJ ch379 where he said 'No universal rule can be laid down as to whether a mandatory enactment shall be considered as directory only or obligatory with an implied nullification of disobedience. It is a duty of Courts of justice to try to get at

the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered."

(Forster v Corlis and Houthakker 1924 TPD 247 at 252, approved in Northern Assurance Co Ltd v Somdaka 1960 (1) SA 588 (A) at E595).

The reasoning of this Court in Somdaka's case supra at 595 A - C is, I think to the effect that the existence in Rules of Court of remedial provisions, such as those now under consideration, significantly affects the criteria for deciding whether breaches of the Rules necessarily lead to nullities:

"Once it is seen that the Court has a discretion, it seems to follow inescapably that it was not intended that a breach of the Rules relating to actions should necessarily be visited with nullity."

It is for present purposes unnecessary to decide when a breach of the Rules will notwithstanding the powers of the Court under Rules 27(3) and Rule 30(3), lead to an irreparable nullity. One instance to which reference might be made is that mentioned in Republikeinse

Publikasies (Edms) Bpk v Afrikaanse Pers Publikansies (Edms) Bpk 1972

(1) SA 773 (A), of a summons not issued by a

Registrar Rumpff JA said at 780G:

"n Oagvaarding wat nie deur die Griffier uitgereik is nie, sou 'n nulliteit wees en deur betekening van so 'n dagvaarding sou geen geding ingestel word nie."

It stands to reason that when the basic component of an action, viz the issue of a summons by a registrar, is absent the Court will not condone the omission."

Nullity

[25] It seems abundantly clear from the authorities referred to above that if the summons is a nullity for lack of signature by a Registrar, the service of a nullity would not constitute an action and by necessary inference would not result in the suspension of prescription.

Duty of the Defendant

[26] It was argued on behalf of the plaintiff that it was not incumbent on the defendant to pronounce upon the validity of a process and that his duty was to serve same however irregular or defective it might be. I am not persuaded that this is the correct approach to how a Sheriff should execute his or her duties.

[27] Reference was made (supra) to the Code of Conduct under which the Sheriff operates. The Code specifically states that he is "entrusted with the service or execution of a process...in accordance with the provisions of Rule 8(4) of the Magistrate's Court Rules or Rule 4(6)(a) of the Supreme Court Rules.. ." It is therefore self-evident that he not expected to operate in a robotic fashion and without any consideration of what the Uniform Rules of Court provide. Put differently, a Sheriff is not expected to serve documents which may be said to be meaningless in that they do not constitute valid court process. The Sheriff therefore has to take cognisance of what the rules provide in the execution of is

duties and it is not a misdirection for him to do so. He does so in compliance with the Sheriff's Code of Conduct.

[28] The defendant's return of service stated that the summons could not be served as the summons was not issued by the Registrar. The plaintiff submits that that was legally incorrect as the summons had been stamped by the Registrar and allocated a case number before it was transmitted to the defendant.

[29] The plaintiff further submits that the stamp of the Registrar contains the name of the specific Registrar who authorised the direction to the Sheriff to serve and that the signature by the Registrar is not a direction to the defendant to serve the summons. The plaintiffs seek support from the provisions of Rule 4(1)(a) of the Uniform Rules of Court which instructs the Sheriff to serve any process of Court and states that service "shall be effected by the

Sheriff." These submissions by the plaintiff fly in the face of the clearly enunciated legal principles in *Noord Kaap Lewendehawe Koop Beperk v Lombaard and Republikeinse Publikasies* (Edms) Bpk v *Afrikaanse Pers Publikasies* (Edms) Bpk (supra) which need no further elucidation. Service by the Sheriff is not 'robotic' or 'mechanical in nature and it takes place within the ambit or parameters of the Rules of Court. It is therefore incorrect to suggest as the plaintiff does that the defendant was 'negligent or 'ignorant of the law' when he declined to serve a summons not properly issued by the Registrar.

[30] In the matter of *Minister of Prisons and Another v Jongilanga* 1983

(3) 47 at 54A van Rensburg J pronounced as follows:

"It would, however, seem that, if the defect in the summons is so serious as to visit it with nullity, the Court has no power to condone for a nullity is "a concept in law which comes within itself all the elements of irreparability. " *Simross Vintners (Pty) Ltd v Vermeulen; VRG Africa (Pty) Ltd v Walters t/a Trend Litho; Consolidated Credit Corporation (Pty) v Van der Westhuizen* 1978 (1) SA 779 (T) at 783H; *Krugel v Minister of Police* 1981 (1) SA 765 (T) at 7688 . An example of a summons which would be regarded as a nullity would be one which was never issued by the Registrar. *Republikeinse Publikasies* (Edms) Bpk v *Afrikaanse Pers Publikasies* (Edms) Bpk 1972

(1) SA 773 (A) at 780

G."

[31] Van Rensburg J continues at 54C:

" In the case of *Donoghue v Human* 1969 (4) SA 35 (E) service of a summons had been effected in terms of Rule 4(1)(a)(ii) by leaving a copy thereof with the defendant's wife, but the copy did not bear the signature of the assistant Registrar who had signed the original summons when it was issued, the space above the words "Registrar of the Supreme Court" having been left blank in the copy served. An application was made in terms of Rule 30 for an order setting the case aside. In *Donoghue's* case Kannemeyer J concluded that the copy of the summons was wanting in some vital information. In this regard Kannemeyer J says the following at 41A:

"Service was, on the authorities quoted above, irregular and proceedings against the applicant were thereby rendered ineffectual. There was therefore no service as envisaged by the Rules. Such service as there was a nullity and I cannot, by way of condonation, rectify a nullity,

[32] Further, in *Minister of Prisons and Another v Jongilanga* 1985

(3) SA 117 AD at 123 G - H Eloff AJA said:

"It is for present purposes unnecessary to decide when a breach of the Rules will, notwithstanding the powers of the Court under Rules 27(3) and 30(3), lead to an irreparable nullity. One instance to which reference might be made is that mentioned in *Republikeinse Publikasies* (Edms) Bpk v *Afrikaanse Pers Publikasies* (Edms) Bpk 1972

(1) SA 773 (A) of a summons not issued by a Registrar, Rumpff JA, said (at 780G):

'An Oagvaarding wat nie deur die Griffier uitgereik is nie, sou 'n nulliteit wees en deur betekening van so 'n dagvaarding sou geen

geding ingestel word nie." It stands to reason that when the basic component of an action, viz the issue of a summons by a Registrar, is absent, the Court will not condone the omission."

Conclusion

[33] Having considered the facts and the authorities referred to above it can be safely concluded that if a summons is a nullity for lack of signature by the Registrar, service of same would not constitute the institution of an action and would not result in the suspension of prescription.

[34] In the circumstances, I accept that the plaintiffs Combined Summons does not disclose a cause of action.

[35] In the result, I make the following order.

35.1 The defendant's special plea is upheld.

35.2 The plaintiff's action is dismissed with costs.

S.A.M BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on:

06 June 2018

Judgment

delivered:

05 September 2018

Appearances:

For the Plaintiff:

Advocate G. D. Lubbe

Instructed by:

Steinmann Attorneys

For the Defendant:

Advocate C. Dredge

Instructed by:

Van Zyl Le Roux Incorporated

For the Third Parties:

Advocate L. Uys

Instructed by:

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