

SOUTH AFRICA / JUDGMENT

Winter v Peter Tormahlen Safari CC t/a Tormahlen & Cocran Safaris (60276/2017) [2019] ZAGPPHC 550 (31 October 2019) [2019] ZAGPPHC 550

COURT

North Gauteng High Court, Pretoria

BEFORE

Francis-Subbiah

CASE / FILE NUMBER

60276/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED

Case No 60276/2017

31/10/2019

In the matter between:

CHRISTIAN FRIEDRICH WINTER RESPONDENT/PLAINTIFF

And

PETER TORMAHLEN SAFARI CC T/A TORMAHLEN & COCRAN SAFARIS

APPLICANT /DEFENDANT

REASONS

FOR JUDGEMENT

Compliance with Uniform Rules of Court

FRANCIS-SUBBIAH, AJ:

- [1] This is an opposed motion where the applicant, (defendant in the main action), raises as an objection to the respondent's non-compliance with Rule 17(3)(c) and the consequence of a summons not signed by the Registrar. Orders for compliance with sub-rules 18(6), 18(4) and 18(10) were also sought as the second, third and fourth objections respectively. Further hereto if the respondent did not comply with rule 17(3) within 15 days of the grant of the order, the applicant be entitled to approach the court on amplified papers to have the entire cause of action of the respondent, (plaintiff in the main action), struck out.
- [2] Uniform Rule 17 provides as follows:-
- (1) Every person making a claim against any other person may, through the office of the registrar, sue out a summons or a combined summons addressed to the sheriff directing him to inform the defendant *inter alia* that, if he disputes the claim, and wishes to defend he shall...
- (2)(a) In every case where the claim is not for a debt or liquidated demand the summons shall be as near as may be in accordance with Form 10 of the First Schedule, to which summons shall be annexed a statement of the material facts
- relied upon by the plaintiff in support of his claim. which statement shall *inter alia* comply with rule 18.
- (3)(a) Every summons shall be signed by the attorney acting for the plaintiff and shall bear an attorney's physical address, within 15 kilometres of the office of the registrar, the attorney's postal address and, where available, the attorney's facsimile address and electronic mail address.
- (b).....
- (c) After paragraph (a) or (b) has been complied with, the summons shall be signed and issued by the registrar and made returnable by the Sheriff to the court through the registrar.
- (emphasis underlined)
- [3] The essence of uniform rule 17 is for the plaintiff to comply with the strict provisions of having a summons issued out of court. The registrar retains the discretion to refuse to issue summons where there is non-compliance with the prescribed requirements. Upon satisfaction the registrar allocates a case number, affixes the office and date stamp, appends her signature to the summons and then instructs the sheriff to effect service of the summons upon the defendant.
- [4] The complaint of the applicant is an unsigned summons was served. It was averred that the original summons was not signed by the Registrar at all as a consequence of which the summons was not irregular, but a nullity.[1] Therefore the Registrar's failure to sign the summons resulted in the summons lacking legality for instruction to the sheriff to execute upon it. It was emphasized that non-signature of the Registrar amounts to a nullity and not merely an irregularity. For this reason the applicant contends that the Registrar cannot sign a previously unsigned summons without the intervention of the court condoning this

oversight.[2]

- [5] In response to this objection Mr Wesley, counsel for the respondent, handed up a copy of a summons at the hearing that was signed by the Registrar on 30 August 2017. As a result it became evident that the summons was in fact signed by the Registrar prior to service by the Sheriff. This was contrary to what the applicant asserted that the summons was never signed. Hence the first ground of objection fell away and the validity of the issued summons was confirmed. Counsel for the applicant, Mr Basson did not raise further opposition on this ground.
- [6] The opposing affidavit by David Hofmeyr Macgregor, referred to a letter marked "DHMI" indicating that the Registrar had signed the summons. It explained that the practice of the Registrar is to sign the original summons and only stamp the copies. In spite of these submissions the applicant persisted with the current application. On the basis of factual proof that the summons was signed by the Registrar prior to service the application was accordingly dismissed with costs.
- [7] The relief sought by the applicant as per prayer 1 and 2 of the notice of motion made it untenable to proceed further to adjudicate the second, third and fourth objections of the applicant due to the dismissal of the relief claimed in terms of Rule 17(3). Adjudication of the second, third and fourth grounds of objection where sought by the applicant only if the court condoned the irregular service of the summons on 17 October 2017. However the court did not have to condone any irregular service of the summons on the said date because the summons was properly issued and served. Therefore in terms of the notice of motion the second, third and fourth grounds of objection did not arise for adjudication.
- [8] Further it was apparent from prayer 2 of the notice of motion that the applicant was only concerned with the enforcement of compliance with rule 17(3) and not also rules 18(6), 18(4) and 18(10). Prayer 2 read as follows:-

"That, if the Respondent fails to comply with the provisions of Rule 17(3), as set out by the applicant's Notice in terms of Rule 30 read together with Rule 30A, within 15 days of the order, that the Applicant be entitled to approach the Court on papers duly amplified to have the Respondent's entire cause of action struck out;" As a result rules 18(6), 18(4) and 18(10) simply falls away without any further necessity for consideration. In addition the relief sought under prayer 2 became superfluous and also not sustainable in law. Both Counsels sought clarity on the court order but did not take the opportunity to proceed to present argument on these further objections.

- [9] It became apparent that the relief sought by the applicant in the heads of argument differed from what was being claimed in the notice of motion. The applicant sought new relief in paragraphs 4.14, 11, 15, 19 and 20 of its heads of argument. Such a variation could not be adjudicated upon without an amendment to the notice of motion.

- [10] In my view there is no prejudice to be suffered by the applicant. The issues giving rise to the second, third and fourth complainants were factual in nature and could be objectively proved by the leading of evidence - *facta probantia*. In any event the parties are obliged to put facts before the trial court. However where the applicant faced subjective difficulty in pleading it would be appropriate to request further particulars especially in terms of its third ground of objection which referred to non-compliance of Rule 18(4) that provides for pleadings to contain sufficient particularity to enable the opposite party to reply thereto.
- [11] The fourth ground of objection raises compliance with rule 18(10) in regard to a claim for damages. However the claim in this matter is for a reduced contract price and not a claim for damages. Therefore rule 18(10) is not applicable in these circumstances and the reasonableness of a reduced contract price is proved by way of evidence.
- [12] In so far as rule 18(6) requirement to annex a copy of the written part of the agreement this fell away as the plaintiff had given notice on 12 February 2018 of his intention to amend the particulars of claim by deleting the words "alternatively partly oral and partly written". The applicant did not object to this amendment and hence the second objection also fell away.

Order

- [13] As a result the application is dismissed with costs.

FRANCIS-SUBBIAH, AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

Counsel for the Applicant : Adv JGW BASSON

Counsel for the Respondent : Adv C P WESLEY

Date of Reasons: 31 October 2019

- [1] Minister of Prisons V Jongilanga 1985 (3) SA 117 (A) at 123H.

- [2] Minister of Prisons v Jongilanga 1983 (3) SA 47 (E)

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