30/85

CASE NO.
246/83 /CC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

THE HONOURABLE THE MINISTER OF PRISONS FIRST APPELLANT

and

WINARD MACABELA SECOND APPELLANT

and

MABHULU JONGILANGA RESPONDENT

CORAM: JANSEN ACJ, CORBETT, KOTZé, JJA et ELOFF, VIVIER AJJA

HEARD: 21 FEBRUARY 1985

DELIVERED: 27 MARCH 1985

J U D G M E N T

ELOFF/ .....

ELOFF, AJA

In June 1982 the respondent (plaintiff) caused an action to be instituted against the appellants (first and second defendants) in the East London Circuit Local Division, in which he claimed damages in the sum of R3 000 for unlawful arrest and imprisonment, and for malicious prosecution. The only address specified in the summons as that of the attorney acting for the plaintiff was "Rooms 31, 34 and 36, Lennox Sebe Building, Mdantsane." That was not an address within eight kilometres of the office of the Registrar of the division concerned. It was moreover an address outside the borders of the Republic of South Africa - it was within the Republic

of Ciskei. The provisions of Rule 17(3) of the Rules of court were to that extent not observed. The relevant portion of that subrule provides -

> "Every summons shall be signed by the attorney acting for the plaintiff and shall bear an attorney's address, within eight kilometres of the office of the registrar ...."

The defendants thereupon brought an application in terms of Rule 30(1) for the setting aside of the summons. That subrule and Rule 30(3) are as follows -

> "(1) Any party to any cause in which an irregular or improper step or proceeding has been taken by any party, may within fourteen days of the taking of such step or proceeding apply to court to set it aside. ....

(3)/ .....

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet."

In answer to the application the plaintiff's attorney filed an affidavit in which he stated that Mdantsane was within the area of jurisdiction of the court a quo until 4 December 1981, when it became part of Ciskei; that a practice existed amongst attorneys of East London and Mdantsane not to insist on strict compliance with the "eight kilometre rule"; and that on attainment by Ciskei of independence the East London attorneys' association

(of which he and other Ciskei attorneys remained members after Ciskei became independent) made an arrangement to ease a number of resultant practical problems concerning the issue of process in the Ciskei. They omitted however to provide for arrangements in regard to the issue of process by Ciskeian attorneys in the area of the East London Circuit Division. On the mistaken assumption that the arrangements in question allowed for a departure from the "eight kilometre rule" in a case such as the present, he did not comply with Rule 17(3). On behalf of the plaintiff he asked for condonation. It can be assumed that the rule under which condonation was sought is Rule 27(3), which provides -

"The/ .....

"The court may, on good cause shown, condone any non-compliance with these rules."

He also asked that the application be dismissed with costs.

In a replying affidavit the defendants' attorney denied that the arrangement referred to by the plaintiff's attorney continued to operate after Ciskei became independent. He did not however complain that the irregularity caused any prejudice, nor could he, for the notice of appearance to defend and the notice of motion to have the summons set aside,were sent to the address mentioned in the summons by registered post, and were duly received by the plaintiff's attorney.

The defendants' application was heard by

Van Rensburg, J, who found that while the omission complained of was irregular, condonation could and should be granted. He made an order dismissing defendant's application for the setting aside of the summons, and whereby -

> "The irregularity in the summons is condoned provided that the respondent gives notice of his intention to amend his summons so as to furnish an address for service which complies with Rule 17(3) within 14 days from the date on which this judgment is delivered;"

No order was made as to costs. Leave to appeal to this court was subsequently granted.

The main contention advanced in this court on behalf of the defendants, is that the shortcoming in question, having occurred in breach of a peremptory

provision, was so serious as to render the issue of the summons a nullity, and that the court for that reason lacked the power to grant condonation.

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 Rules 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 Ch. 379) 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 the 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 construed.' "

(Foster v Carlis and Houthakker, 1924 TPD 247 at p 252, approved in Northern Assurance Co. Ltd v Somdaka 1960(1) S A 588 (A) at p. 595).

The reasoning of this court in Somdaka's case (supra at p. 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/ .....

> "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 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) S A 773(A), of a summons not issued by a registrar.

Rumpff JA said (at p. 780 G) -

> "Dagvaarding 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.

The present is however a far cry from such a situation. Rule 17(3) does not set a requirement concerning any of the essential elements of an action; it relates to an ancillary feature of the summons. It was, in my view, merely intended to serve the purpose of facilitating exchanges between the litigants. Although the rule is couched in mandatory terms, the court has a discretion to condone a breach of its requirements. In the present case all the other basic

elements/ .....

elements of a proper action were present. I think that the court a quo had the power to make the order which it did.

As to the manner in which Van Rensburg J exercised his discretion, I share his view that the mistake of the plaintiff's attorney was understandable, and that the defendants' attorney was only slightly inconvenienced. There is in my opinion no ground for interfering with the conclusion reached.

It remains to deal with the contention that the court should have awarded defendants their costs of the application to set the summons aside. It has of course to be borne in mind that "an appeal tribunal will

not/ .....

not readily interfere with an exercise of discretion by the Court a quo in awarding costs" (Merber v Merber 1948(1) S A 446 at p. 452). "It will not interfere merely because it might have taken a different view." (Ward v Sulzer 1973(3) S A 701 (A) at p. 707(A)).

Defendants' counsel urged that the court a quo took inadequate account of the fact that they were entitled to come to court to have the irregularity set aside. The court bore that in mind, but balanced that factor against the consideration that defendants themselves were procedurally remiss, in that they had first of all to seek condonation of their failure to bring their application timeously. The court also

properly/ .....

properly had regard to the fact that the plaintiff achieved substantial success in the matter. There is in my opinion no ground for stating that the court failed to exercise a proper discretion.

The appeal is dismissed with costs.

ELOFF, AJA.

JANSEN, ACJ)
CORBETT, JA)
KOTZé, JA) CONCUR
VIVIER, AJA)