

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. : A206/2006

In the appeal between:

SABATA JOHANNES SETLAI

Appellant

and

ROAD ACCIDENT FUND

Respondent

CORAM: H.M. MUSI J *et* VAN ZYL J

HEARD ON: 20 AUGUST 2007

DELIVERED ON: 30 AUGUST 2007

Summary: Civil procedure in the Magistrate's Court – fatally defective proceeding – Clerk of Court's powers limited to magisterial district for which he/she is appointed – where he/she purports to issue summons for a different court, such issue is a nullity and ineffectual.

JUDGMENT

H.M. MUSI, J

[1] This is an appeal against the judgment of the Magistrate's Court at Harrismith delivered on 12 October 2005, in terms of which the Magistrate's Court held that the summons issued

in this matter was invalid. The order of the court reads as follows:

“Daar is dus geen geldige dagvaarding voor hierdie hof nie en word die aangeleentheid van die rol verwyder. Onder die omstandighede is ek van mening dat die eiser verantwoordelik moet wees vir die koste en word dit so beveel.”

- [2] The notice of appeal was served on the respondent's attorneys in Harrismith and so was the notice in terms of Rule 51(4) of the Magistrates' Courts Rules. The respondent gave no indication whether it wished to oppose the appeal and appointed no correspondent in Bloemfontein whereat the documents in this court could be served on it. As a result the appellant sent the notice of set down of the appeal to the respondent's instructing attorneys in Durban by registered post, but they have not responded and no heads of argument have been filed on behalf of the respondent. We must therefore accept that the respondent does not oppose the appeal and will abide by the decision of this court.

- [3] The gist of the problem is that the summons was issued by the clerk of the court of the Magistrate's Court at Phuthaditjhaba which is a completely different magisterial district. Thereafter someone realised that the summons was supposed to be issued in the Magistrate's Court for the district of Harrismith. It was then, before service, presented to the clerk of the court at Harrismith who duly endorsed the same with his official stamp, signed it and allocated a Harrismith case number. The Phuthaditjhaba court case number was simply cancelled off. Thereafter the summons was served. The respondent entered an appearance to defend and the normal exchange of pleadings took place whereafter the matter was duly enrolled for trial.
- [4] On the date of trial, the presiding magistrate *mero motu* raised the question of whether he had in front of him a valid summons on the basis of the above developments. He gave the parties an opportunity to address him on the issue and written submissions were duly filed. At the conclusion of argument, the learned magistrate granted the order now

appealed against.

- [5] It has to be mentioned that the respondent at no stage raised an objection to the validity of the summons and never pleaded any prejudice. And in raising the point, the learned magistrate was aware of the provisions of Rule 17 of the Magistrates' Courts Rules which limit the grounds upon which exception may be taken and he specifically noted that the respondent had not excepted to the summons. However, the learned magistrate was of the view that this is not a case of an irregular step to which an exception can be taken, but rather the instance of a null and void summons. He referred to the matter of **DUSHEIKO v MILBURN** 1964 (4) SA 648 (AD). This judgment makes it clear at page 655 E – G that a plaintiff who relies on the fact that the cause of action arose within the area of jurisdiction of the court in order to establish jurisdiction, must make such averments as are necessary to establish this, failing which the summons would be defective and excipieble. It is an example of an irregular proceeding that can be condoned by the court.

- [6] There is ample authority on the difference between an irregular proceeding that can be cured by either amendment or the grant of condonation and one that is fatally defective and cannot be condoned. See *inter alia* **MYNHARDT v MYNHARDT** 1986 (1) SA 456 (TPD); **VON ZAHN v CREDIT CORPORATION OF SOUTH AFRICA LTD** 1963 (3) SA 554 (TPD); **WELKEN, N O v NASIONALE KOERANTE BPK** 1964 (3) SA 87 (OPD); **MINISTER VAN WET EN ORDE v MOLAOLWA** 1986 (3) SA 900 (NKA). An irregular step that is regarded as a nullity cannot be saved by the grant of condonation. This will be the case, for instance, where the defect relates to a basic component of an action as was stated in **MINISTER OF PRISONS AND ANOTHER v JONGILANGA** 1985 (3) SA 117 (AD) at 123H. A typical example of an irregular proceeding that amounts to an irreparable nullity is to be found in the case of **REPUBLIKEINSE PUBLIKASIES (EDMS) BPK v AFRIKAANSE PERS PUBLIKASIES (EDMS) BPK** 1972 (1) SA 773 (A), where it was held that a summons that has not

been issued by the Registrar of the High Court is a nullity and service thereof would be ineffectual. See also **BARENS EN 'N ANDER v LOTTERING** 2000 (3) SA 305 (CPD), where irregular service of a summons by the sheriff, was held to be fatally defective.

- [7] In dealing with the question whether the Magistrate's Court was correct in holding that the summons herein was a nullity, counsel for the appellant indicated that he could find no direct authority on the point, but suggested that guidance can be found in the cases dealing with condonation of irregular steps and cited *inter alia* **TRANS-AFRICAN INSURANCE CO LTD v MALULEKA** 1956 (2) SA 273 (AD) at 278 D – F; **NORTHERN ASSURANCE CO LTD v SOMDAKA** 1960 (1) SA 588 (AD) at 595 A – B; **BRITS v STADLER** 1963 (3) SA 551 (OPD) at 553. Counsel submitted that the alleged defect in the issuing of the summons could have been condoned given the fact that the respondent had not suffered any prejudice. The problem is that there is no provision in the Magistrates' Courts Rules that is equivalent to Supreme

Court Rules 27(3) and 30 that confer general powers of condonation. See **BARENS EN 'N ANDER v LOTTERING**, *supra* at 311. It stands to reason that if the summons herein was not validly issued, the Magistrate's Court could not have saved it.

- [8] To my mind the learned magistrate missed one crucial point. The summons clearly indicates that it relates to the Magistrate's Court for the district of Harrismith held at Harrismith and paragraph 4 of the particulars of claim annexed to it makes it clear that the cause of action arose within the area of jurisdiction of such court. At the top of the summons is inscribed the words "Uitgereik deur die Klerk van die Hof". That can be no reference to any clerk of the court other than that of the Harrismith court and he is the one who is empowered to sign the document and it "shall bear the date of issue by him" as required by Rule 5(2) of the Magistrates' Courts Rules. Rule 3(1) requires the clerk of the court to number the document with "a consecutive number for the year during which it is filed". This means that

he must allocate the case number that follows on the case immediately issued before it. Only the clerk of the court of the Harrismith court could issue such a number for a Harrismith case. In terms of section 13(1) of the Magistrates' Courts Act, No. 32 of 1944, clerks of court are appointed by the magistrate of the district in which such court is situated and for no other court. It stands to reason that the powers of a clerk of the court are limited to his magisterial district and he can have no power to issue a summons for another court.

- [9] The position of the clerk of the court is similar to that of the sheriff of the court. The latter is appointed for a specific magisterial district and can only serve process in that area. If he serves outside his area, the service is regarded as a nullity. See BARCLAYS NATIONAL BANK LTD v WENTZEL 1978 (3) SA 976 (O) at 978 A – B. Therefore I come to the conclusion that the clerk of the court at Phuthaditjhaba had no competence to issue the summons herein and whatever he did on it was ineffectual. That being the case, the clerk of the court for Harrismith was entitled to

ignore the earlier endorsements and to himself sign the summons, bring a date on it and allocate a case number as is required by Rule 5(1). He did all that was required by the Rules of the Magistrates' Courts to issue the summons.

- [10] It will be noted that the appellant was ordered to pay the costs of suit in the proceedings in the Magistrate's Court, ostensibly on the basis that the point raised was decided against him. He has, however, been successful on appeal and notwithstanding that the appeal was not opposed, he is entitled to his costs in this court. In view of our finding on the point in dispute, the costs order made by the Magistrate's Court has to be set aside. In this regard, account must be taken of the fact that the respondent never raised any objection and although it ultimately argued that the summons was invalid, it did so only in response to the invitation by the presiding officer to address him on the issue. Besides, the problem arose out of the failure on the part of the appellant's attorneys to properly apply their mind to their work. There can be no excuse for having issued the summons out of a

wrong court. And once the blunder was discovered, they could simply have drawn a fresh summons for issue by the proper court. In the premises, I would order that costs be costs in the cause.

[11] The appeal succeeds with costs and the decision of the Magistrate's Court is set aside and replaced with the following:
The summons in this case was validly issued by the clerk of the court for Harrismith. Costs shall be costs in the cause.

H.M. MUSI, J

I concur.

C. VAN ZYL, J

On behalf of appellant:

Adv. S.J. Reinders
Instructed by:
H W Smith & Marais
c/o Saffy & Partners
BLOEMFONTEIN

On behalf of respondent:

None

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