IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 3074/2016

In the matter between:

TILANA ALIDA LOUW Plaintiff

and

DR STEPHEN PAUL GROBLER 1st Defendant

NETCARE UNIVERSITAS HOSPITAL 2nd Defendant

CORAM: RAMPAI, J

HEARD ON: 20 OCTOBER 2016

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 15 DECEMBER 2016

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[1] These were interlocutory proceedings. The applicant applied in terms of Rule 30(1) to have the respondent's summons set aside

or struck out as an irregular step. The foundation of the objection was that the summons offended the certain rules of the court. The respondent opposed the interlocutory application.

[2] I think a brief factual background is necessary. The respondent, as the plaintiff, initiated actions proceedings against one Dr SP Grobler and the applicant. The latter was cited as the second defendant. The registrar issued the summons on 1 July 2016. The plaintiff, employed as a theatre unit manager by the defendant, alleged that the first defendant continually and racistically abused, threatened, degraded and humiliated her at workplace. The defendants denied her allegations and defended the action. In the summons the plaintiff averred that the second defendant had two physical addresses, one in Bloemfontein and the other in Sandton. The summons and the particulars of claim attached to it were signed by an attorney called Mr J Nortje.

[3] The sheriff served the summons on the second defendant in Bloemfontein on 5 July 2016. Six days later, on 11 July 2016, to be precise, a second copy of the summons was served by the sheriff on the second defendant in Sandton.

[4] On 18 July 2016, seven days after the second service and thirteen days after the first, the second defendant's notice of intention to defend was drawn up and signed by a certain Pieter, seemingly an attorney in Sandton. It was then emailed to Mr P du Toit of McTyre van der Post in Bloemfontein. On the same day it was served on Kramer Weihmann & Joubert in Bloemfontein. The next day, on 19 July 2016 the notice was filed.

[5] Still on 19 July 2016 the second defendant filed a notice of objection in terms of Rule 30(2)(b). The second defendant complained that the plaintiffs combined summons constituted an irregular step. The alleged objectionable irregularities were then specified and ventilated. The first cause of the complaint concerned the signing of the combined summons. The second cause of the complaint concerned the number of days afforded to the second defendant for delivering notice of intention to defend.

[6] The second defendant then called upon the plaintiff to remove the aforesaid causes of the complainant. The notice was served on the plaintiff a day before it was filed. Such service and call notwithstanding, the plaintiff did not respond within the 10 day period as stipulated in the notice.

[7] Aggrieved by the plaintiff's refusal to remove the causes of its complaint, the second defendant moved the current proceedings on 10 August 2016. The plaintiff filed her opposing papers on 25 August 2016. She contended that the second defendant's complaint was without merit. The interlocutory application was initially enrolled for hearing on 1 September 2016. On that day Moloi J postponed it to 13 September 2016. On that day I heard the matter.

[8] The first issue in the application was whether the plaintiff's combined summons was signed in a manner that offended the rules of this court.

[9] Ms Van der Merwe, counsel for the applicant, in other words the second defendant, contended that the combined summons was irregular in that the plaintiff's attorney did not, on the particulars of claim, state, in terms of Section 4 Act No 62/1995, that he has a right of appearance in the high court. The omission, so counsel submitted, rendered the entire combined summons irregular and thus objectional. Arguing that the defective and irregular signing offended Rule 18(1), counsel urged me to uphold the objection and to set the summons aside.

[10] Mr Van Aswegen, counsel for the respondent, in other words the plaintiff, sharply differed. He contended that the combined summons was properly signed by the plaintiff's attorney and that there was nothing irregular about the way the attorney had signed the particulars of claim. Therefore, counsel submitted that the manner in which the attorney signed the particulars of claim was perfectly regular – and thus did not offend Rule 18(1). He urged me to dismiss the second defendant's complaint.

[11] We know that Rule 30 delineates that an applicant who lodges a complaint by virtue of this particular rule must give notice to all the parties whereby the particulars of the alleged irregularity are specified. Such an application may be made only if:

(a) The applicant has not himself or herself or itself taken a further step in the proceedings with the knowledge of the irregularity;
(b) The applicant has, within 10 days of becoming aware of the irregular step by written notice afforded the opponent an

opportunity of removing the cause of the complaint within 10 days and

(c) The application to set aside is delivered within 15 days after the expiry of the 10 day period within which the opponent was supposed to have removed the cause of the complaint.

[12] The rule applies to irregularities of form only and not to matters of substance. It is not practically possible to draw up an exhaustive list of what constitutes an irregular step. However, the words "an irregular step" would embrace, for instance:

Failure by qualified practitioners to sign particulars of claim renders the summons irregular **Suliman v Karodia** 1926 WLD 102.

[13] The provisions of rule 18 are applicable. It delineates that a combined summons, and every other pleading except a summons, shall be signed by both an advocate and an attorney or, in the case of an attorney who, under sec 4(2) Right of Appearance Act, Act No 62/1995, has a right of appearance in the Supreme Court, only by such attorney or, if a party sues or defends personally, by that party – vide subrule (1)

It further delineates that non-compliance with the provisions of the rule is deemed to be an irregular step and that the opposite party shall thereby be entitled to act in accordance with rule 30 – vide subrule (12).

[14] In this instance, the summons consisted of the prescribed standard form together with the unprescribed peculiar declaration attached to it. The declaration contained the particulars of the plaintiff's claim. It is usually called "particulars of claim". As regards the standard form, it was common cause that it was signed by Attorney J Nortje and that below his signature or rather name, he appended no certificate in terms of section 4(3) Act No 62/1995. He however stated that he was qualified to appear in the high court.

[15] As regards the particulars of claim, it was also undisputed that the document which embodied them was also signed by the same person, Attorney J Nortje and that below his signature no certificate in terms of section 4(3) Act No 62/1995 had been appended. Further, he did not state that he was qualified to appear in the high court. It was precisely that omission which caused the second defendant to complain.

[16] The word "pleading" as used in rule 18 has not been legislatively defined in the rules. Absent such definition, however, a document that embodies particulars of claim is regarded as a pleading in addition to what is usually understood by the term, namely: declarations and indendits. It follows, therefore, that because they are regarded as pleadings, particulars of claim have to be properly signed in accordance with either subrule (1) - Herbstein Van Winsen: The Civil Practice of the High Court of South Africa, Fifth Edition Volume I p562 par 11.

[17] In Ex parte Vally: In re **Bhoolay v Netherlands Insurance Co of SA Ltd** 1972 (1) SA 184 (W) at 185 Galgut J in an attempt to unpack or elucidate the term pleading, said:

> "I have always understood a pleading to be a document which contains distinct averments or denials of averments. If I am correct in that view and in the view that Rule 18 (3) purports to describe a pleading, a request for further particulars cannot be said to be a pleading."

[18] The purpose of the uniform court rules is to regulate the litigation process, procedures and the exchange of pleadings. The entire process of litigation has to be driven according to the rules. The rules set the parameters within the course of litigation has to proceed. The rules of engagement, must, therefore, be obeyed by the litigants. However, dogmatically rigid adherence to the uniform court rules is as distasteful as their flagrant disregard or violation. Dogmatic adherence, just like flagrant violation, defeats the purpose for which the court rules were made. The prime purpose of the court rules is to oil the wheels of justice in order to expedite the resolution of disputes. Quibbling about trivial deviations from the court rules retards instead of enhancing the civil justice system. The court rules are not an end in themselves.

[19] In the instant matter, the particulars of claim were actually signed. The signatory's name was given as J Nortje who described himself as attorney for the plaintiff. The gist of the second defendant's complaint in terms of rule 30 was that the signatory

did not indicate anywhere on the pleading, termed particulars of claim, that he had a right in terms of section 4 Act No 62/1995 to appear in the high court on behalf of the plaintiff. Indeed the contention was correct. But that was not where it all ended.

[20] The pleading which was at the heart of the matter or complaint was no ordinary pleading. It was not a district and separate pleading. It was not drawn up alone, served alone and filed alone like any other pleading such as defendant's plea, plaintiff replication or plaintiff's plea. Particulars of claim, or statement of claim, or indendits according to English Law and Dutch Law respectively, constitute some kind of special pleading. They first have to be issued before they can be served. But even before they can be issued by the registrar, they require a prescribed covering sheet technically termed a summons to which they have to be attached. It is peremptory to have them attached to such prescribed and standardized legal document. These then are the peculiar hallmarks of the special pleading domestically termed particulars of claim.

[21] The particulars of claim in the instant matter were duly attached to the summons. The two legal document put together are termed combined summons. It was undisputed that the summons was properly signed. The signatory's name was given as J Nortje who described himself as attorney for the plaintiff. The signature was substantially the same as the one on the particulars of claim. But the description of the signatory did not end there. The signatory

went a step further. The signatory qualified himself further by indicating that he was an attorney with a right of appearance conferred on him in terms of section 4 Act No 62/1995.

[22] The second defendant did not challenge the way the summons had been signed as explained in the preceding paragraph. Consequently, it has to be accepted that the summons, as prefixed to the particulars of claim, was duly signed by an attorney lawfully certified to appear in this court. That was not the case in **Fortune v Fortune** [1996] 2 ALL SA 128 (c). As regards the summons, therefore, the provisions of rule 18(1) were complied with. There was no complaint of any irregularity raised.

[23] It was never the second defendant's case that the particulars of claim on the one hand and the summons to which they were affixed on the other hand were not signed by one and the same person. It must accordingly be accepted that the same attorney who has a right of appearance in terms of section 4 and competent to sign a combined summons alone in terms of rule 18(1) also signed the particulars of claim. The mere omission, *ex facie* the signed particulars of claim, to expressly qualify his right in terms of section 4 did not, in my respectful view, have an adverse impact on the combined summons as a whole. After all, a combined summons is a single legal document which is why it has to be issued and served as such. The omission complained of did not render it an irregular step as it was submitted. It has to be accepted, therefore, that the proper signing of the summons

redeemed the cosmetically defective signing of the particulars of claim.

[24] I would, therefore, dismiss the first cause of the complaint and decide the first issue in favour of the respondent. The facts in **Suliman v Karodia**, *supra*, were clearly distinguishable. There unlike here, the particulars of claim were not signed at all.

[25] The second issue in the application was whether the second defendant was given an inadequate time within which to file the required notice of its intention to defend the action. To that issue I turn now.

[26] Ms Van der Merwe contended that the plaintiff's summons constituted an irregular step in that it did not afford the second defendant the time as contemplated by rules and the statute. The inadequate time the plaintiff afforded the second defendant, rendered the service of the summons irregular and thus objectionable. Since a service of a defective summons does not cure an irregular step, rule 17(1) was offended by the inadequate time of 10 days afforded to the second defendant. Therefore, counsel urged me to uphold the second objection of the complaint.

[27] On the contrary, Mr Van Aswegen, contended that the moment the second defendant entered an appearance to defend the

action, the object of section 24 Superior Court Act, 10/2013 was achieved and that whatever non-compliance there was with the provisions of the act or the rules by the plaintiff became an irrelevant consideration.

[28] According to rule 17(1) a combined summons shall specify a time period as stated in the rule within which a defendant has to give notice of intention to defend the action.

[29] According to rule 19(1) a defendant in every civil action shall be allowed ten days, after service of a summons, to deliver a notice of intention to defend. The rule pertinently provides further that it is subject to the provisions of section 24 Superior Courts Act 10/2013.

[30] Section 24 Act No 10/2013 in turn provides that the time allowed for the entering of appearance to defend a civil summons, served outside the area of jurisdiction of the high court division in which such summons was issued, shall not be less than one month if the summons is to be served at a place more than 150km from the court out of which it was issued.

[31] It was common cause in this matter the summons was served in Sandton. Gauteng Province outside the jurisdiction of this high court division. I cannot be disputed that Sandton is approximately 450km from Bloemfontein Free State where the summons was

issued. It follows, therefore, that the second defendant was entitled to a period of one month from 17 July 2016. Instead the second defendant was given no more than ten days within which to file notice of intention to defend. On those facts the summons, at glance, appeared to be irregular. Was it?

[32] The first difficulty I had concerned the second defendant's response. Aware of the irregularity, the second defendant proceeded to take a constructive step in the action proceedings that were irregular *ab initio.* It filed a notice of intention to defend. That, the second defendant could not do because it was fully aware of the irregularity and it had already even taken a decision to attack the plaintiff's summons. The ground of the contemplated challenge in terms of rule 30 was violation, by the plaintiff, of the second defendant's 30 day statutory right to consider the claim in a peaceful and undisturbed atmosphere. The second defendant, therefore, ignored the forewarning in rule 30. It did so at its own peril. Now it is precluded from invoking the remedy it had in terms of the rule. On its own accord, it abrogated its procedural right to invoke the rule. It shot itself in the foot the moment it filed notice of its intention to defend. It should have filed its application straight away.

[33] The second hurdle on the path of the second defendant was not apparent on the papers. In the combined summons the plaintiff averred:

> "The second defendant is **UNIVERSITAS PRIVATE HOSPITAL** (the Hospital), a hospital situated at **1 Loggeman Street, Universitas, Bloemfontein**, operated in terms of a public private partnership under the auspices of Netcare Ltd, a public company with its principal place of business situated at **76 Maude Street, Corner West Street, Sandton, Gauteng Province**."
> (my emphasis)

[34] In keeping with those averments the plaintiff caused two copies of the combined summons to be served upon the second defendant. In Bloemfontein, the sheriff served the combined summons upon one Ms C Grant, a receptionist, ostensibly an employee of the second defendant, at Netcare Universitas Hospital on 5 July 2016. It was undisputed that the second defendant carried and still carries on business at 1 Loggeman Street, Universitas, Bloemfontein within the jurisdiction of this court. That place of business, commonly known as Universitas Hospital from where the second defendant ordinarily operates within the jurisdiction of this court, is hardly 10km from the seat of this court.

[35] As regards the first service in Bloemfontein, the summons was perfectly regular. The 10 day period as specified in rule 19(1) and afforded to the second defendant was, therefore not an irregular step. Commonsense dictates that the subsequent second service in Sandton was really unnecessary. It was clearly done *ex abudandi cautela* – out of abundance of caution indeed.

[36] In my view it was not open to the second defendant to selectively rely on the second service in Sandton in total disregard of the

legal effect of the first service in Bloemfontein. In the light of all these considerations, I am also inclined to determine the second issue as well in favour of the plaintiff.

[37] I am persuaded that even if the summons was served only once upon the second defendant in Sandton; that even if the second defendant was erroneously afforded insufficient time of 10 instead of 30 days to enter an appearance to defend – such an irregularity would have been neutralized the moment the second defendant served on the plaintiff its notice to defend as it actually did on 18 July 2016 because then the object of section 24 Act No 10/2016 and indeed the rules was achieved. See **Consani Engineering (Pty) Limited v Anton Steinecker Maschinenfabrik** 1991 (1) SA 823 (T) at 824. Although that case was decided before the promulgation of the statute, the principle remains the same even after the promulgation. It is, therefore, as valid now as it was then.

[38] Assuming in favour of the second defendant that there was substance in the causes of its complain, then the third issue in the application concerns the question of prejudice.

[39] I hasten to point out that it has been held on more than two occasions, that it was never the intention of the supreme legislative organ, in formulating rule 30, that every irregular step, however big, should necessarily be visited with the extreme

remedy of nullifying the pleading concerned even where there was no proven prejudice to the complainant.

Gardiner v Survey Engineering (Pty) Ltd 1993 (3) SA 549 (SE); **Sasol Industries (Pty) Ltd v Electrical Repair Engineering (Pty) Ltd** 1992 (4) SA 466 (W); **SA Metropolitan Lewensversekeringmaatskappy Bpk v Louw N.O.** 1981 (4) SA 329 (O) and **Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik** 1991 (1) SA 823 (T).

[40] The word prejudice appeared nowhere in the second defendant's supporting affidavit. The salient principle of our law is that in a case where any proven irregularity does not cause any substantial prejudice to the complaining party the court is entitled to overlook it. This is so because the court rules are designed to ensure fairplay and thereby prevent injustice. The court rules are not an end in themselves. See: **Minister van Wet of Orde v Jacobs** 1999 (1) SA 944 (O), **Northern Assurance Co Ltd v Somdaka** 1960 (1) SA 588 (A) and **Protea Assurance Co Ltd v Vinger** 1970 (4) SA 663 (O).

[41] If, and only if, I was wrong in my earlier conclusion in connection with the first and the second issues, I am nonetheless satisfied that, such irregularities notwithstanding, there has been substantial compliance, in this matter, with the provisions of the rules as regard the signing of the combined summons and the

time afforded to the second defendant to consider the claim before entering an appearance to defend.

[42] There being no prejudice to the second defendant, I am inclined to determine the third and last issue in favour of the plaintiff. I do so by condoning such inconsequential irregularities and by upholding the summons despite its shortcomings. I am not inclined to allow a purely technical defence to frustrate the plaintiff's summons since doing so would defeat the noble objectives of the norms and standards of the caseflow management system. This is particularly true in a case where the defendant will suffer no prejudice as a consequence of the irregularity complained of. In such a case, the courts use their discretionary powers to condone the irregularity. **Liberty Group Ltd v Singh and Another** 2012 (5) SA 526 (KZD) pars [43] and [44].

[43] Given all the peculiar circumstances of this particular case, I would, therefore, entirely dismiss the second defendant's complaint. None of the causes of such complaint had any substantive merits. None of the objections underlining the complaint was well taken. The plaintiff's opposition is sustained.

[44] In the result I make the following order:

44.1 The second defendant's application in terms of rule 30 is dismissed.

44.2 The second defendant is directed to pay the plaintiff's costs of opposition.

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M.H. RAMPAI, J

On behalf of plaintiff:	Adv. W.A. van Aswegen Instructed by: Kramer Weihmann Joubert Inc. Bloemfontein
On behalf of defendant:	Adv. C van der Merwe Instructed by: Oosthuizen Du Toit Berg & Boon Attorneys Randburg and McIntyre van der Post Attorneys Bloemfontein