

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 613/2011

In the matter between:

RUBIAMMA PADAYACHEE

APPLICANT

and

LUTCHMIAH NAIDU

1<sup>ST</sup> RESPONDENT

VICTOR GOUNDEN & ASSOCIATES

2<sup>ND</sup> RESPONDENT

THE SHERIFF OF THE HIGH COURT, DURBAN

3<sup>RD</sup> RESPONDENT

THE REGISTRAR OF DEEDS, KWAZULU-NATAL

4<sup>TH</sup> RESPONDENT

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J U D G M E N T

(delivered on: 22 March 2013)

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**BALTON J:**

[1] This is an application for a rescission of a default judgment granted on a provisional sentence summons on 19 April 2011.

[2] The first respondent instituted provisional sentence proceedings against the applicant as the fourth defendant, eThekweni Guniting Services as the first defendant, Raniamma Govender as the second defendant and Pregasen Govender as the third defendant. The summons was served on the applicant and

the first to third defendants on 25 January 2011 at the *domicilium citandi et executandi*.

[3] A notice of opposition was filed by attorneys Gosai and Company on 15 February 2011 indicating that the “respondents” oppose the application. Settlement negotiations ensued.

[4] The matter was then set down for hearing on the unopposed roll on 19 April 2011 on which date the relief sought in the provisional sentence summons was granted. The applicant and the first to third respondents were ordered:

- (a) To pay the first respondent the amount of R500 000,00, jointly and severally, the one paying the other to be absolved;
- (b) Interest at the rate of 15.5% per annum from the date of judgment to date of final payment;
- (c) Costs of suit.

[5] The present application was launched on 7 March 2012. The applicant, a pensioner, alleged that she only became aware of the action when she visited her family at the *domicilium* on 14 February 2012 and was advised by one Mr K Padayachee that the sheriff had served a Notice of Attachment of the immovable property and that the applicant was cited as one of the defendants in the action. The applicant was surprised and shocked and upon questioning her son-in-law, the third defendant, he said that he will attend to the matter.

[6] The applicant states in her founding affidavit that on 10 November 2009 the third defendant requested her to accompany him and the second defendant to the second respondent's offices to leave her title deeds to her immovable property situated at 20 Crownvale Place, Rydalvale, Phoenix, with the second respondent for safekeeping. She waited in the reception area while the second and third defendants consulted with the second respondent. She was then called into the second respondent's office and requested to sign a two page document which was not explained to her and to hand over her title deeds. She did not suspect anything untoward. At no stage was she advised that the title deeds were handed over as security for a loan.

[7] At the hearing of the matter Mr Chetty, who appeared on behalf of the applicant, submitted that the provisional sentence summons was defective in that it had not been signed by an attorney and that the Court had erroneously granted the provisional sentence.

[8] Further points were raised in the application papers and heads of argument, but having regard to what will be said hereunder, I do not deem it necessary to deal with all the points raised by the applicant in the application papers.

[9] Rule 8(2) of the Uniform Rules of Court provides for the procedure concerning a summons.

(2) Such summons shall be issued by the Registrar and the provisions of sub-rules (3) and (4) of rule 17 shall *mutatis mutandis* apply.

Rule 17(3) reads as follows:

(3) 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, or, if no attorney is acting, it shall be signed by the plaintiff, who shall in addition append an address within eight kilometres of the office of the registrar at which he will accept service of all subsequent documents in the suit; and shall thereafter be signed and issued by the registrar and made returnable by the sheriff to the court through the Registrar.

[10] It is clear that the provisional sentence summons does not comply with the Rules. The question arises whether this irregularity can be condoned in terms of Rule 27(3) which reads as follows:

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

[11] In **NORTHERN ASSURANCE CO LTD v SOMDAKA**<sup>1</sup> the Appellate Division considered the Court's discretion concerning the effect of Rule 54 of the Natal Rules which is similar to Rule 27(3) and held that -

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

[12] In **SMALL BUSINESS DEVELOPMENT CORPORATION LTD v KHUBEKA**<sup>2</sup> it was held that:

The use of the word shall in Rule 17(3), seems to indicate that it is intended that compliance with the Rule is imperative. Notwithstanding the language used the Court is empowered to condone any non-compliance with the Rules. I refer to Rule 27(3).

[13] It is not in dispute that the provisional sentence summons was only signed by the Registrar. The plaintiff's attorney, alternatively the plaintiff, failed to sign the

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<sup>1</sup>1960 (1) SA 588 (A) at 595A.

<sup>2</sup>1990 (2) SA 851 at 853H.

summons. However, the matter does not end there. There is non-compliance with Rule 17(3) in that no address within eight kilometres of the court is given.

[14] In **NATIONAL PRIDE TRADING 452 (PTY) LTD v MEDIA 24 LTD**<sup>3</sup>:

[27] It is often been held that, where the rules prescribe a particular procedure, and that procedure is not followed, then such procedural error renders the judgment sought and granted “erroneous” within the meaning of rule 42(1)(a). What is effectively being rescinded is the procedure in terms of which the judgment was granted, and therefore, by necessary implication, also the judgment. See *Fraind v Nothmann* 1991 (3) SA 837 (W); *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E); *Stander and Another v Absa Bank* 1997 (4) SA 873 (E); and *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA).

[15] It is clear to this Court that the provisional sentence summons did not comply with Rules 8 and 17(3) and there is no basis upon which this Court can condone the non-compliance in terms of Rule 27(3). The provisional sentence summons is defective and the judgment ought not to have been granted on the summons in the form in which it was presented.

[16] On that basis this Court has the discretion in terms of Rule 42(1)(i) to rescind the order granted and set aside the judgment granted on 19 April 2011. While this application has been brought by the applicant, the fourth defendant, I am of the view that in exercising my discretion, that the judgment against the first to third defendants should also be set aside for the reasons set out above.

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<sup>3</sup>2010 (6) SA 587 (EC) at 593.

[17] The applicant has not sought costs in paragraph 10 of the Notice of Motion and accordingly no order as to costs should be made in the circumstances.

[18] The following order is made:

- (a) The judgment granted on 19 April 2011 against the defendants is hereby rescinded and set aside.
- (b) A copy of this order is to be served on the first to third defendants.
- (c) There is no order as to costs.

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DATE OF ARGUMENT: 13 FEBRUARY 2013

DATE JUDGMENT HANDED DOWN: 22 MARCH 2013