IN THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA DIVISION, MIDDELBURG

(LOCAL SEAT)

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

…….	…….
SIGNATURE	DATE

CASE NO: 4712/18

In the matter between:

DAWIE VAN DER MERWE **APPLICANT**

AND

MARIETTE ODENDAAL **RESPONDENT**

JUDGMENT

JUDGMENT HANDED DOWN VIA EMAIL DUE TO COVID 19. JUDGMENT DEEMED TO HAVE BEEN HANDED DOWN ON 02 JULY 2020

BRAUCKMANN AJ

INTRODUCTION

[1] This is an application by the applicant for the following relief:

[1.1] condonation for the late launching of this application in terms of Rule 30 (2) and (3) of the Uniform rules of the High Courts ("The Rules");

[1.2] declaring the respondent's summons and particulars of claim to be materially defective, and accordingly an irregular step in the proceedings;

[1.3] setting aside the respondent's summons and particulars of claim; and

[1.4] that the respondent be ordered to pay the costs of the application.

[2] The respondent opposes the application and counter applies for condonation for her non-compliance with Rule 18 (1)[1] in return. She also asks the Court to dismiss the applicant's application, and order the applicant to pay her costs.

BACKGROUND

[3] The respondent issued a summons against the applicant for the recovery of damages allegedly suffered when the respondent's dog attacked and bit her, causing severe injuries, resulting in hospitalisation. The respondent claims that during the attack a portion of her nose was severed and she suffered lacerations to her face. She claims damages under different heads totalling R 600 000.00 and costs.

[4] The applicant was insured against risk (the attack described in the particulars of claim) and is represented by his insurer in terms of the principle of subrogation. The applicant entered appearance to defend on 24 January 2020, after having the summons was served on him on 01 January 2020. I pause to mention that respondent

[1] 18 (1) 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 section 4(2) of the Right of Appearance in Courts Act,

previously caused summons to be issued out of the North Gauteng Division of the High Court, but was met with a special plea of jurisdiction, and apparently an exception by the applicant's attorneys. The action in that division was withdrawn and issued out of this Court during December 2019. According to the respondent's particulars of claim the incident that gave rise to this action occurred on 09 January 2016 in eMalahleni, Mpumalanga.

APPLICANT'S APPLICATION

[5] First of all the applicant seeks, if applicable, condonation for his own non-compliance with this Court's rules. Rule 30 and the relevant sub sections thereof reads:

> "*(1) a party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.*
>
> *(2) An application in terms of sub rule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if —*
>
> > *(a) The applicant has not himself taken a further step in the cause with knowledge of the irregularity;*
> >
> > *(b) The applicant has, within ten days of becoming aware of the step, by written notice afforded his*

opponent an opportunity of removing the cause of complaint within ten days;

(c) The application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of sub rule (2)."[Own emphasis]

[6] It should be kept in mind that the applicant's attorneys have already received a previous summons in this matter in the North Gauteng Court, and raised technical defences there. The current summons was served on the applicant, according to the respondent's opposing affidavit, on 01 January 2019. Applicant served and filed his notice in terms of Rule 30 (20 (b) of "*ACT 59 of 1959 AS AMENDED*" (sic) on respondent's attorneys on *24 January 2019*, affording her 10 days to remedy his complaint which he described as:

> *"1.1 The Summons and Particulars of claim (Combined Summons) is defective to the extent that the pleading has not been signed by an Advocate or Attorney with Right of appearance in the High Court, alternatively, the pleading does not reflect the allegation of fact that the Attorney who signed the pleading has right of appearance to do so.*
>
> *1.2 Rule 18(1) of Act 59 of 1959 as amended specifically provides that and prescribes 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 section 4(2) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995), has the right of appearance in the Supreme Court, only by such attorney or, …"

1.3 The Combined Summons in casu is signed by an attorney only and reference to the right of appearance referred to in section 4(2) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995), is omitted.

1.4 The Defendant submits that the Combined Summons is materially defective and irregular.[2]"

[7] The respondent attempted to amend her particulars of claim in terms of Rule 28 (1) of the Rules, but after having received an objection to the proposed amendment from applicant's attorneys on *20 February 2019* she abandoned the amendment and also did not launch an application for an amendment of her summons. She filed so-called "*re-issue*" particulars of claim, duly signed by Adv S Strauss on 21 October 2019. It is for respondent's failure to comply with Rule 18 (1), and the application of the proper signatures to the particulars of claim that respondent seeks condonation from the court. In the meantime the applicant's attorneys sat idle and did not bring the application in terms of Rule 30 (2) (3) until 04

[2] Applicant's notice in terms of Rule 30 (2) (b), page 12 indexed and paginated bundle.

September 2019.That is eight months later. The applicant's attorneys now seeks condonation from the Court for their non- compliance with Rule 30 (2) (3). The application was supposed to have been launched within *15 days* after the second period mentioned in paragraph (b) of sub rule (2) expired. The explanation provided for the lapse of almost eight months instead of the 15 days as per the Rule falls far short of the requirements therefor.

[8] The applicant's attorney, who wisely deposed to the founding affidavit, states the following with regards to the condonation and late launching of the application:

12.

"In the event that the above Honourable Court is of the view that the Application was to be brought within 10 days of Respondent failing to formally apply for amendment of the Summons and Particulars of claim, the Application is brought out of time.

13.

I submit that the delay in enrolling the application originates from the Applicant providing the Respondent with time to investigate remedies and act thereon. I submit that Respondent was not prejudiced with the extra time to seek an

appropriate remedy and accordingly humbly request condonation for the late filing of this application."[3]

The applicant's attorney's statement in paragraph 12 of the founding affidavit is to say the least, startling. Not only was the application filed late, but also it was filed <u>*almost eight months*</u> out of time.

[9] I have noted that both the applicant's attorney and the respondent's attorney (who also deposed to the founding-, opposing -and replying affidavits in this application) still refers to *Act 59 of 1995* in the notices and affidavits. I wonder whether they are really not aware that the said act have long since been repealed and replaced with the *Superior Courts Act*[4] in 2013 already, or whether they made use of precedents when drafting the affidavits and notices. Whichever it may be, it is advisable that they should attend some workshop on High Court Practice and Procedures and update their precedents. Failing to do so might cause them or their clients to rake up punitive cost awards in future. Fortunately for the practitioners involved it appears as if they were still using the same version of the Uniform rules. Not only is the reference to the Act incorrect, but applicant's attorney even has the relevant period for filing this application as 10 days and not 15 days as per the rule. Not

[3] Page 35 of the indexed and paginated bundle.
[4] Act 10 of 2013.

even the longer period in the rules saves her from some embarrassment.

NON-COMPLIANCE AND CONDONATION –: RULE 27/THE LAW

[10] Whenever a party to litigation fails to comply with any of the Rules, or time-periods contained in such Rules, the Court may condone such failure on application to Court by the party that defaulted[5]. Condonation is not for the mere taking thereof. In *Du Plooy v Anwes Motors (Edms) Bpk*[6] the Court concluded that the sub rule (Rule 27 (3)) requires '*good cause*' to be shown. The court has a wide discretion[7] which must be exercised with regard also to the merits of the matter seen as a whole. This applies to all applications which may be brought under the sub rule[8]. What does differ is the quantum of the assurance required to the effect that there is indeed a defence, which may vary from case to case. The applicant should satisfy the court on oath that he has a bona fide defence or that his action is clearly not ill-founded, as the case may be. Regarding this requirement it has been held that the minimum

[5]" Rule 27 Extension of time and removal of bar and condonation
(3) The court may, on good cause shown, condone any noncompliance with these rules."
[6] 1984 (4) SA 213 (O) at 216H–217D.
[7] *Smith NO v Brummer* NO 1954 (3) SA 352 (O) at 358A
[8] *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at 307C–308A.

that the applicant must show is that his defence is not patently unfounded and that it is based upon facts (which must be set out in outline) which, if proved, would constitute a defence/cause of action[9]. The most important consideration however, as laid down by the Constitutional Court, is whether it is in the interest of justice to grant such condonation and lateness is not the only consideration. The Applicant's prospects of success and the importance of the issues to be determined are also relevant factors[10]

[11] Where there is a proceeding or step, albeit an irregular or improper one, it is capable of being condoned regardless of whether the rule which has not been complied with is directory *or mandatory* and *whether there has been substantial compliance or not*. The sub rule empowers the court to condone 'any non-compliance' with the rules, and the use of the word 'any' emphasizes the absence of any restriction on the powers of the court to do so. There must, obviously, be something to be condoned, an objective manifestation of an intention on the part of a litigant to cause a summons to be issued or to file a pleading or to take some other step in terms of the rules. Once there is such an act or objective manifestation of an intention, *any* non-compliance with the rules, *however serious*, can be

[9] Erasmus, Superior Court Practice, RS 7, 2018, D1-324; *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476–7; *Smith NO v Brummer* NO 1954 (3) SA 352 (O) at 358A.
[10] *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) at 43G–44A and the cases referred to therein.

condoned under the sub rule. In other words, by virtue of sub rule 3 none of the provisions of the Rules is peremptory[11]. An applicant for relief under this rule must show good cause; the question of prejudice does not arise if it is unable to do so. The court will refuse to grant the application where there has been a reckless or intentional disregard of the rules of court, or the court is convinced that the applicant does not seriously intend to proceed. The application must be bona fide and *not made with the intention of delaying the opposite party's claim*[12].

APPLICATION TO THE FACTS AND DISCUSSION.

[12] In truth, both parties' applications for condonation should be considered with regard to the legal position set out in the previous paragraphs. The applicant, in my view has an uphill struggle to convince me that he should be granted condonation for the extraordinary period that lapsed between the failure by the respondent, or her attorney in this instance, to remedy the applicant's complaint in the notice in terms of Rule 30 (2). Eight months is in my view an unreasonable period. The only explanation provided by the applicant's attorney for the delay is that she

[11] Erasmus, supra, RS 7, 2018, D1-327, and the authorities there quoted.
[12] Erasmus, supra, RS 7, 2018, D1-323.

afforded the respondent an opportunity to consider the remedy. I do not think this holds truth. Why would a party that went so far as to raise special pleas in respect of jurisdiction and an exception against the respondent's summons in the North Gauteng Division the previous year suddenly become so accommodative towards the respondent? No explanation is provided in this regard at all. The explanation also defeats logic. It seems as if applicant's attorneys' brief is to delay the matter as long as possible, and to raise technical defences in order to attempt to evade possible liability towards respondent.

[13] The applicant's only objection is against the respondent's particulars of claim and not the summons, as a summons may not be signed by counsel, and an attorney without right of appearance in the High Court may sign a summons in the High Court. Something both parties' legal representatives overlooked is the fact that the *Right of Appearance in Courts Act*[13] was repealed and replaced by the *Legal Practice Act*[14] ("The LPA") with effect from 1 November 2018[15]. Section 25(3) and (4) of the LPA, read with rule 20 of the rules of the South African Legal Practice Council[16], provides

[13] Act 62 of 1995.
[14] Act 28 of 2014.
[15] Proclamation R31 published in GG 42003 of 29 October 2018.
[16] The rules were published under GenN 401 in GG 41781 of 20 July 2018 and amended by GenN 812 in GG 42127 of 21 December 2018.

for a prescribed certificate by the registrar of the division of the High Court in which an attorney was admitted and enrolled as an attorney to the effect that the attorney has the right to appear in the High Court, the Supreme Court of Appeal and/or the Constitutional Court. In terms of rule 20.6 of the rules of the South African Legal Practice Council every attorney who, at the date of coming into effect of the rule, was in possession of a certificate issued in terms of s 4(2) of the (now repealed) Right of Appearance

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Rule 20 Information to be provided by attorney for appearance in High Court[section 95(1)(m) read with section 25(4)(a)]

20.1 An attorney who wishes to apply in terms of section 25(3) for the right of appearance in the High Court, the Supreme Court of Appeal and the Constitutional Court must apply to the registrar of the Division of the High Court in which he or she was admitted and enrolled as an attorney for the issue to him or her of the prescribed certificate.

20.2 The application must be in writing, must be dated and signed by the attorney and must be accompanied by20.2.1 documentary proof that he or she has satisfied all the requirements for a degree referred to in section 26(1) of the Act, or any other degree which, before the date referred to in section 120(4) of the Act, would have entitled the applicant to the right of appearance in the High Court, the Supreme Court of Appeal and the Constitutional Court;

20.2.2 a certificate issued by the executive officer of the Council to the effect that the applicant has been practising as an

attorney for a continuous period of not less than three years or for an aggregate of three years during the previous four years, or has been practising as an advocate;

20.2.3 a certificate issued by the executive officer of the Council that the applicant has not had his or her name struck off the Roll and has not been suspended from practice, and that there are no proceedings pending to strike the applicant's name from the Roll or to suspend him or her from practice;

20.2.4 A copy of the applicant's identity document, certified as true and correct by a notary public or by a commissioner of oaths.

20.3 If the applicant wishes to apply for the period of practice to be reduced as contemplated in section 25(3) (a) (i), he or she must provide the registrar with a certificate by the executive officer of the Council that he or she has undergone a trial advocacy training programme approved by the Council and that the Council has resolved that the three year period referred to in that section be reduced to such period as may be specified by the Council.

20.4 Where the applicant claims that he or she has gained appropriate relevant experience, as contemplated in section 25(3)(b) of the Act, full details of that experience must be provided in the application.

20.5 The applicant must serve a copy of the application on the Council not less than thirty days before he or she applies to the registrar in terms of section 25(3) of the Act.

20.6 Every attorney who, at the date of coming into effect of this rule, was in possession of a certificate issued in terms of section 4(2) of the Right of Appearance in Courts Act, 62 of 1995 shall, within six months of the date of coming into effect of this rule, lodge with the Council a copy of the certificate issued to him or her in terms of that Act.

in Courts. The requirements are similar, and the fact remains that if an attorney is not enrolled by the Registrar of the division in which he/she practice, she/he may not sign *pleadings* on behalf of parties. In such instance an advocate should be approached to sign the pleading.

[14] A person who is not an attorney is not entitled to draw up for reward a summons for and on behalf of a person who sues personally. By appending his signature to a pleading, an attorney (and advocate) confirms that he has been scrupulous in preparing the pleading. Consequently, pleadings drafted by an attorney (or advocate), as an officer of court, should not be a fabrication or contain allegations that are not the truth. Neither should such pleadings misrepresent facts to the court. An attorney (or advocate) who does not comply with the standards expected of him not only runs the risk of a costs order *de bonis propriis* being awarded against him, but also of being referred to the Legal Practice Council for an inquiry into his or her conduct. If the provisions of Rule 18 (2) are not complied with, application may be made to have the pleading set aside as an irregular proceeding. Condonation may, however, be granted[17].

[17] Erasmus, supra, RS 11, 2019, D1-230.

[15] Ms Strijdom, respondent's attorney, conceded in the opposing affidavit that the particulars of claim was not signed by an attorney who is by law entitled to sign pleadings in the High Court. She states that:

> *"…..herewith state that I have been unable to determine from the Registrar if I have right of appearance in terms of Section 4(2) due to the fact that the Registrar has not been keeping records of such rights of appearance. I am therefore unable to determine if I am admitted as such or has a certificate to sign particulars of claim in the High Court."*

It is almost not believable that an attorney would forget whether she/he was admitted and enrolled to appear in the High Court. Ms Kemp, applicant's attorney, rightfully criticizes Ms Strijdom. The Registrar of each Division keeps a register of attorneys enrolled accordingly. At the time that the summons in *casu* was issued and served on the applicant, this Court was not a separate division yet, but operated as a circuit Court of the Gauteng Division of the High Court. The attorneys would still have been able to sign pleadings issued from this Court if so enrolled in Gauteng. The version can however be true, but for the purpose of this application I will accept that neither Ms Strijdom nor Mr Pieterse had been admitted as such. The only issue is the particulars of claim that have now been signed

by the correspondent attorney on her behalf, not indicating that he is duly admitted to appear in the High Court. I am alive to the fact that it is not contained in any of the affidavits before me, but I am personally aware of the fact that Ms Strijdom's correspondent, Mr Pieterse was enrolled to appear in the High Court at that stage. I will however deal with the application as if he was not as such endorsement was not made on the particulars of claim.

[16] A particulars of claim, duly signed by counsel who has right of appearance in the High Court and who in her official capacity as counsel may sign particulars of claim was annexed to the opposing affidavit. According to the respondent's attorney the irregularity has been cured and there is no defect as to the particulars of claim anymore. This is not correct, as the particulars of claim must be signed by both attorney and counsel in the event the attorney does not have right of appearance in the High Court. It has been held that the failure to sign pleadings in accordance with the Rules or did not comply with the rules as to form may be cured and condonation may be granted. In *casu*, applicant applies to have the failure by respondent to comply with the requirement for signature of a particular of claim set aside as an irregular step. That the Court may only do if the applicant will be somehow prejudiced by the irregular step. The court is entitled, in proper cases, to overlook any irregularity

which does not cause any substantial prejudice to the other party[18]. Rule 30 applications are just like other applications. The applicant must make out his/her case in his/her founding affidavit[19]. No grounds for prejudice to be suffered by applicant should the summons and particulars of claim not be set aside are provided. The simple allegation and lip-service paid to the alleged prejudice to applicant is insufficient. Applicant states that Rule 18 (1) is peremptory. That may be so, but it still does not prevent this Court from coming to the assistance of the respondent.

[17] Rule 27 (3) gives a Court very wide powers, powers which might enable a Court to grant a plaintiff the opportunity to amend a summons which is so defective as to constitute a nullity. In terms of the sub rule the court may, inter alia, make any order as it deems fit. The Court has a discretion and it is not intended that an irregular step should necessarily be set aside. The discretion must be exercised judicially, on a consideration of the circumstances, and what is fair to both sides.

[18] *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 276F–H.

[19] *Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO* 1981 (4) SA 329 (O) at 333G–334G; *De Klerk v De Klerk* 1986 (4) SA 424 (W) at 426I; *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH* 1991 (1) SA 823 (T) at 824G–H; *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at 469G;; Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others G 1974 (4) SA 362 (T).

[18] The applicant can however not say the same. Although he does not have an irregular step to cure, he had to convince the Court that he was entitled to condonation for his non-compliance with the rules (Rule 30 (2) (c)). As discussed earlier, he failed to convince the Court. He does not deal with his bona fides, nor does he explain what happened between 24 January 2019 and 04 September 2019. His application for condonation must accordingly fail, and I therefore do not have to deal with the application in terms of Rule 30, although I have dealt with certain features thereof in the counter application by respondent. Our Courts have an inherent power to regulate their procedure and, in exceptional cases, to recognise procedural remedies not otherwise provided for[20]. In *Ncoweni v Bezuidenhout* [21] it was stated:

> *"The rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice. Of course if one is absolutely prohibited by the Rule one is bound to follow this Rule, but if there is a construction which can assist the administration of justice I shall be disposed to adopt that construction."*

[20] *Krygkor Pensioenfonds v Smith* 1993 (3) SA 459 (A) at 469G-I.
[21] 1927 CPD 130.

[19] A warning was sounded by our Courts in *Moulded Components and Rotor Moulding (South Africa) (Pty) Ltd v Coucourakis and another*[22]:

> *"I would sound a word of caution generally in regard to the exercise of the court's inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course. The rules are there to regulate the practice and procedure of the court in general terms and strong grounds will have to be advanced, in my view, to persuade the courts to act outside the powers provided for specifically in the rules. Its inherent power, in other words, is something that will be exercised sparingly. As has been said in the cases quoted earlier, I think that the court will exercise an inherent jurisdiction whenever justice requires that it should do so. I shall not attempt a definition of the concept of justice in this context. I shall simply say that, as I see the position, the court will only come to the assistance of an applicant outside the provisions of the rules when the court can be satisfied that justice cannot be properly done and relief is granted to the applicant."*

[22] 1979 (2) SA 457 (W) at 462E-463B). At 462H-463B.

[20] In the matter before me, the Summons was signed by the attorney, Mr Pieterse. He also signed the initial particulars of claim. The particulars of claim for "re-issue", annexed to the respondent's opposing affidavit was served on the applicant's attorneys, but according to the filing notice thereof, not yet filed with the Court. Rule 18 (1) states 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 section 4(2) of the Right of Appearance in Courts Act, has the right of appearance in the Supreme Court, only by such attorney or, if a party sues or defends personally, by that party. The particulars of claim must contain both the attorney and counsel's signatures if counsel signs and the attorney do not have right of appearance in the High Court. It should also, if only the attorney signs it, contain a reference to the fact that she or he is an attorney as provided for in Section 25 of the LPA, read with rule 20 of the rules regulating conduct of legal practitioners. In *casu* that has not been done, and I intend making an order dealing with that aspect as well.

IS THE SUMMONS IN THIS INSTANCE A NULLITY, AND MAY THE COURT CONDONE THE NON-COMPLIANCE OF RULE 18 (1) BY THE RESPONDENT?

[21] The answer is: no the summons is not a nullity and yes the Court may condone the non-compliance. In the judgment by Kubushi J in *Khumalo and Another v Nedbank*[23] the Court found that the non-compliance with Rule 18 (1) does not hold that the summons is a nullity. Sub-rule (12) renders non-compliance with Rule 18 an irregularity (an irregular step) and entitles the opposite party to act in accordance with Rule 30, but the Rules then provides in Rule 27 (3) an escape route to approach court for condonation of non-compliance. The fact that the Rules of court provide for a remedy in case of a defect (irregularity) indicates the validity of the summons rather than its nullity. If non-compliance with uniform rule 18 (1) was meant to be a nullity there would have been no remedy provided for in the Rules[24]. A nullity cannot be condoned, as it does not exist.

[22] The respondent, as soon as the applicant filed its notice in terms of Rule 30 (2) (b), attempted to rectify the applicant's concern by filing a notice of intention to amend her summons and particulars of claim on 19 February 2019. That, rightly or wrongly, was objected to by the applicant, and eventually the notice was withdrawn by respondent. The applicant's intention seems to be to attack the respondent with trivial and technical objections and notices in order to secure a

[23] (37984/2017) [2017] ZAGPPHC 1234 (14 December 2017).
[24] *Khumalo*, supra, at paras [16] to [21].

"*victory*" by default when the claim becomes prescribed, an event that was only 5 days away from transpiring when the summons was served.

[23] Without repeating the content of the Khumalo-judgment, I am in agreement with the conclusion reached by Kubushi J. The summons was served before the claim became prescribed. That much is common cause amongst the parties. According to the provisions of the Prescription Act[25] ("The Prescription Act") a debt is extinguished by prescription after the lapse of a period of three years from the date upon which the debt is due[26]. Section 15 (1) of the Prescription Act, on the other hand, provides that the running of prescription shall be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

[23] Kubushi J, after having traversed and discussed various judgments[27], concluded, in my view correctly so, that[28]:

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[25] Act 68 of 1969.

[26] Sections 10 (1), 11 (d) and 12 (1) of the Prescription Act.

[27] *Aeronexus (Pty) Ltd v FirstRand Bank Ltd* (249/2010} [2011) ZASCA 21 (17 March 2011).

[28] *Khumalo, supra*, paragraph [29]:

> "(15] There is no question that the original summons is defective. It should, preferably, have made it clear that the bank was being sued on the basis of the undertaking it had given under the guarantee. The amendment which introduced the guarantee therefore presented a different basis for the claim. But the attempt to clarify the claim properly (which is what the amendment sought to do) is not, in my opinion, tantamount to the introduction of a new debt in the circumstances of this case. It is well to bear in mind that 'it is inaction, not legal ineptitude, which the Prescription Act is designed to penalise' and that even an expiable summons which does not set out a cause of action can nevertheless serve to interrupt prescription as long as it is not so defective that it amounts to a nullity."

"*It is implicit in the reasoning of the aforementioned judgments that an otherwise valid summons, though defective, interrupts prescription when served. Although flawed, the summons, in this instance, once it was served on Nedbank [the applicant], it interrupted the running of prescription and cannot have prescribed.*

Whilst the judgments I have referred to are distinguishable on the facts and dealt with issues different from those dealt with in this instance, that is, not dealing with non-compliance with uniform rule 18 (1), the principle enunciated in those judgments finds application in this instance."

[24] The applicant intended all along to have her irregularity cured. The Summons is defective and there was non-compliance with Rule 18 (1), and that may be condoned. One should keep in mind that the now repealed Right of Appearance Act was enacted to regulate the appearance and conduct of attorneys, amongst other. If an attorney, for instance misrepresent the fact that he or she is entitled to act as provided for in the act, it will amount, amongst other, to misconduct, and the Legal Practice Council should investigate such[29]. It could never have been the intention of the legislator that

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[29]*California Spice and Marinade (Pty) Ltd and others in re: Bankorp v California Spice and Marinade (Pty) Ltd and others; Fair O'Rama Property Investments CC and others; Tsaperas; and Tsaperas* [1997] 4 All SA 317 (W) page 339

"Section 2 of the Right of Appearance in Courts Act provides:

"Any advocate shall have the right to appear on behalf of any person in any court in the Republic."

Section 3 enables an attorney to acquire the right to appear on behalf of any person in the High Court. These provisions confer rights on advocates and attorneys. No other persons have these rights. But, save as appears from what follows, the Act does not forbid appearance by anyone

non-compliance with Rule 18 (1) or the Act, would result in the summons being a nullity. The Act and LPA has as its purpose to protect the public against rogue attorneys, and not to penalise litigants.

[25] In Trans- African Insurance Company Ltd v Maluleka[30] Schreiner JA said the following:

> *"No doubt parties and their Legal advisers should not be encouraged to become slack in their observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."*

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else nor does it preclude a court from allowing an unqualified person to appear. The only prohibition is section 6(1) which reads:

"An attorney who has not acquired the right to appear on behalf of any person in the Supreme Court or any attorney whose right so to appear has been withdrawn or suspended, may not appear in the Supreme Court or hold him-self or herself out as, or pretend to be, or make use of any name, title, addition or description implying or rending to induce the belief that he or she is an attorney who has the right so to appear in the Supreme Court."

A contravention is an offence. This does not imply that any other person who, with the leave of the court, appears is guilty of an offence. It is designed to govern the conduct of attorneys."[Own emphasis]

[30] 1956 (2) SA 273 (A)

[26] The respondent states that if there is no prejudice and if the further conduct of the case is not affected by the irregular step, the irregular step can be simply ignored. I do not fully agree with the submission, but the irregular step may be condoned if a case have been made out by the respondent in her counter application. Thus, so the respondent argues, in this case the irregular step 'by omitting to inform the correspondent to note that he has appearance in the High Court 'was a bona fide mistake and does not go to the root of the merits of the plaintiffs claim. Ms Strijdom states that she was unaware of the fact that her correspondent does not have right of appearance in the High Court (whilst he actually had such right) and she is unsure whether she have right of appearance in the High Court to sign a particulars of claim. According to respondent the applicant will not suffer any prejudice if this Court condones the signing of the particulars of claim ex *post facto* by counsel and an attorney, or an attorney properly admitted enrolled to do so. The applicant is well aware of the claim against him and the grounds for such claim. The mere signing of the particulars of claim will not import a new cause of action, and therefore the applicant's objection with reference to the Prescription Act holds no prospects of success for the applicant.

[27] To the contrary, should I refuse to condone the non-compliance with rule 18 (1) by respondent, she will suffer tremendous prejudice. Her claim will become prescribed, she might not have recourse against the applicant for the injuries, and damages suffered. The applicant did not traverse this aspect at all. I am of the view that this is an important matter for the respondent, and definitely in the interest of justice to condone the non-compliance by respondent's attorney. The applicant also did not deal with the merits of the respondent's claim. I am not in a position to make conclusions about the strength of respondent's case, but accept that applicant's failure to deal with it speaks volumes. So too the attempts to have the case decided on technical defences.

[28] Although there is a limit beyond which a party cannot escape the results of its attorneys lack of diligence, depending on the circumstances of each case, courts are reluctant to penalise a party for its attorney's conduct [31]. I am going to penalise the respondent for her attorney's conduct, or lack thereof. The

[31] *Cavalinias v Claude Neon Lights SA* Ltd 1965 (2) SA 649 (T) at page 651 E to H.As this is a case involving fault of the litigant's attorney it is necessary to consider the cases bearing on that. In Rose and Another v. G Alpha Secretaries Ltd., 1947 (4) SA 511 (AD), TINDALL, J.A., said at p. 519:

'It seems to me undesirable to attempt to frame a comprehensive test as to the effect of an attorney's negligence on his client's prospects of obtaining relief under sub-rule (2), or to lay down that a certain degree of negligence will debar the client and another degree will not. It is preferable to say that the court will consider all the circumstances of the particular case in deciding whether the applicant H has shown something which justifies the court in holding in the exercise of its wide discretion that sufficient cause for granting relief has been shown.'

respondent could never have been able to make the decision that led to the service of the defective summons and could also not have known about it. She cannot provide this Court with an explanation of the cause for the conduct of her attorneys. It is never easy to determine when a court should punish a client (like Ms Odendaal) for the sins of its attorney. The explanation given by Ms Strijdom, although clumsy, is accepted. The time it took her to eventually secure the services of an advocate to sign the particulars of claim could have been curtailed by instructing her correspondent to endorse and sign the particulars of claim, but it is clear that the applicant would not have accepted it as he was set on arguing that condonation, in *casu,* is not possible.

[29] Both parties' legal representatives were guilty of tardiness and launched incorrect processes in the litigation. Respondent's attorney could have launched an application for condonation much earlier, and the applicant's attorney's conduct is also not exactly an example of diligence in prosecuting the Rule 30 application.

[30] The respondent have, in my view, shown good cause why her counter application should succeed. I am inclined to exercise my discretion in their favour and grant the condonation.

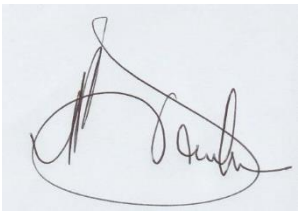
[31] The applicant was unsuccessful in his application in terms of Rule 30. On the flip side, the respondent was also not blameless before court, and sought an indulgence. To a large extent the parties' legal representatives are to blame for the unnecessary litigation; resultant wasted costs as well as the unfortunate delay in justice to be done to their respective clients. Respondent's attorneys are to blame for the non-compliance with Rule 18, and the applicant's attorneys for the delay to file the Rule 30 application and resultant lack of grounds for condonation thereof. I am of the firm view that each party should bear his or her own costs, and that I must accordingly make no order as to costs in the main or counter application. I hope the legal representatives will consider my conclusion and refrain from rendering invoices for the services and expenses incurred in this application. This is actually a matter suitable to penalise the attorneys for their conduct, or lack thereof in the litigation, but that might only lead to further delays in justice being seen to be done to the actual parties.

[32] I therefore make the following order:

[32.1] the applicant's application for condonation is dismissed and there is no order as to costs;

[32.2] the respondent's application for condonation is granted and there is no order as to costs;

[32.3] the respondent to file a particulars of claim in compliance with Rule 18 (1) of the Uniform Rules of Court on or before 17 July 2020.



HF BRAUCKMANN.
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

REPRESENTATIVE FOR THE APPLICANT: ADV NJ RAUBENHEIMER

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REPRESENTATIVE FOR THE RESPONDENT: ADV JJ STRIJDOM SC

INSTRUCTED BY: RIANIE STRIJDOM ATTORNEYS – rianie@rstrijdomprok.co.za & pieterkanp@mweb.co.za

DATE OF HEARING: **ENROLLED FOR *02 JULY 2020*, BUT DUE TO CVID – 19 REGULATIONS NO HEARING TOOK PLACE, BUT PARTIES AGREED TO DISPENSE WITH ORAL ARGUMENTS IN TERMS OF SWCTION 19 (a) OF THE SUPERIOR COURTS ACT, ACT 10 OF 2013.**

DATE OF JUDGMENT: **02 JULY 2020.**

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