REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **37984/2017**

14/12/17

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

14/12/2017

SIGNATURE **DATE**

In the matter between:

REGINALD KHUMALO FIRST APPLICANT

FIKILE EUNICE KHUMALO SECOND APPLICANT

and

NEDBANK RESPONDENT

JUDGMENT

KUBUSHI J

[1] There are two applications before me which the parties agree should be heard simultaneously. One is an application for an order to determine a special plea and the other is a condonation application. I shall in this judgment deal first with the application for the special plea and thereafter turn on the condonation application. I opt do so on the basis that should the special plea be upheld it would not be necessary to consider the condonation application. For ease of reference and convenience, I refer to the parties in their respective names.

[2] To appreciate the two applications and to understand why it is necessary that they be heard simultaneously, it is important that I first set out the factual background.

[3] The two applications emanate from a combined summons ("summons") issued by Mr and Mrs Khumalo ("the Khumalos") against Nedbank. In the summons, the Khumalos are claiming damages occasioned when Nedbank caused their house to be sold on auction without any legal basis to do so. The gravamen in these proceedings is that the summons was signed by the Khumalos' attorneys of record in non-compliance with uniform rule 18 (1).

[4] Uniform rule 18 (1) requires a combined summons, and every other pleading except a summons, to 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 62 of 1995 ("the Right of Appearance Act"), has the right of appearance in the Supreme Court [High Court], only by such attorney or, if a party sues or defends personally, by that party.

[5] Upon entering its appearance to defend, and pursuant to the defect in the summons, Nedbank served the Khumalos with a notice in terms of uniform rule 23 (1) affording them an opportunity to remedy their non-compliance with sub-rule 18 (1). The notice included a caveat placing the Khumalos on terms to remedy the defect, failing which an exception to the particulars of claim would be taken. In an attempt to remedy the defect, the Khumalos filed a reply in terms of uniform rule 23 (1) in which they sought to amend the signature of their attorneys by including two signatures, being, the signature of the Khumalos' counsel who was said to be duly certified in terms of s 4 (2) of the Right of Appearance Act as well as the signature of the Khumalos' attorneys of record (Rakhudu Attorneys). At this juncture, a notice of substitution of attorneys was also filed, in which Rakhudu Attorneys were substituted by B Segoale Attorneys.

[6] Immediately thereafter, the Khumalos placed Nedbank under bar. Nedbank's response to the notice of bar was to deliver a notice in terms of uniform rule 30 which called upon the Khumalos to remove the notice of bar as it was an irregular step, which notice of bar was subsequently withdrawn.

[7] Ensuing from the withdrawal of the notice of bar, the Khumalos filed a notice of intention to amend in terms of uniform rule 28 which was objected to by Nedbank. Nedbank's objection was followed by another notice in terms of uniform rule 23 (1) in which the Khumalos were requested to remove a cause of complaint causing their particulars of claim to be vague and embarrassing. In this instance, the cause of complaint was the manner in which the Khumalos were cited in their particulars of

claim. Consequent thereto, the Khumalos filed another notice of intention to amend their particulars of claim in which they wanted to remove the new cause of complaint raised by Nedbank. The Khumalos eventually affected the amendments. The amendments, amended the Khumalos' summons as well as their particulars of claim in that firstly, the summons and particulars of claim were now signed by the Khumalos' attorneys of record with right of appearance in terms of s 4 (2) of the Right of Appearance Act and secondly, the Khumalos were properly cited.

[8] Having effected the amendments the Khumalos proceeded to place Nedbank under bar again. Nedbank filed its plea which included a special plea. The special plea raised two pertinent points of law. The first point is that the summons is a nullity due to its non-compliance with uniform rule 18 (1) and secondly that the Khumalos' claim has prescribed due to the fact that the amendment of its summons and particulars of claim was effected out of time. As will appear later in this judgment, I find the argument raised by Nedbank in this regard difficult to understand and confusing. The argument is that the summons is invalid and yet somehow it was rectified by an amendment which according to Nedbank was filed out of time, hence the plea of prescription. A nullity is something that can be treated as nothing, as if it did not exist or never happened.[1] A summons which is a nullity or is invalid cannot be resuscitated, let alone by an amendment. Nedbank seems to be contradicting itself by conceding that the Khumalos followed a wrong procedure in trying to rectify the defect by amending the summons and yet seems to labour under the impression that the amendment filed by the Khumalos cured the defective summons.

[1] Farlex: The Free Dictionary .

[9] Be as it may, Nedbank applied and was granted leave to institute the application for the special plea to be heard and determined as a separate issue in terms of uniform rule 33 (4). The remaining issues were postponed *sine die* pending final determination of the special plea. Pursuant to Nedbank's institution of the special plea, the Khumalos applied for an order condoning their non-compliance with the provisions of s 4 (2) of the Right of Appearance Act, alternatively the provisions of uniform rule 18 (1), hence the two applications before me.

[10] In its application to have the special plea heard and determined separately from the other issues, Nedbank is seeking an order in the following terms:

> 10.1 That the applicant's [Nedbank's] special plea be upheld;
>
> 10.2 That the respondents' [the Khumalos'] claim be dismissed on the basis that it has prescribed;
>
> 10.3 That the cost of this application be paid by the first and second respondents [the Khumalos] jointly and severally, the one paying the other to be absolved.

[11] At the hearing, the parties were agreed that the issue of whether a combined summons signed in non-compliance with uniform rule 18 (1) is a nullity or not, should be determined first as it may be dispositive of the two applications as well as the main action.

Is the summons in this instance a nullity?

[12] The question is whether a combined summons signed by an attorney in non-compliance with uniform rule 18 (1) is an irregularity or defect that can be condoned in terms of the rules of court or is a nullity which cannot be cured.

[13] The submission by Nedbank is that since the summons and particulars of claim were not signed by an advocate or an attorney with the right of appearance in the High Court, they are fatally defective and constitute a nullity.

[14] Uniform rule 18 provides for rules relating to pleadings generally. Sub-rule (1) thereof states as follows:

> 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 [High Court], only by such attorney or, if a party sues or defends personally, by that party.

[15] Section 4 (2) of the Right of Appearance Act states that:

> If the registrar is satisfied that an application referred to in subsection (1) complies with the provisions of this Act, he or she shall issue a certificate to the effect that the applicant has the right of appearance in the Supreme Court [High Court].

[16] Sub-rule 18 (1) requires that pleadings, if not signed by a party suing or defending personally, be signed by an advocate and an attorney, or by an attorney with a right of appearance in the High Court. For an attorney to be able to sign a combined summons she or he must first be issued a certificate by the registrar qualifying her or him as an attorney with the right of appearance in the High Court. The normal practice is that the particulars of claim must, if not signed by an advocate and an attorney, as was the case in this instance, indicate that the attorney signing the summons and particulars of claim is an attorney with right of appearance in the High Court, in accordance with s 4 (2) of the Right of Appearance Act. It is common cause that in this instance only the attorney of record signed the summons and as such the summons does not comply with uniform rule 18 (1).

[17] Uniform rule 18 (12) stipulates that –

> If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30.

[18] Uniform rule 27 provides for the extension of time and removal of bar and condonation. Sub-rule (3) thereof specifically provides for condonation of any non-compliance with the Rules. The sub-rule reads thus –

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

[19] It is worthy to note that sub-rule (12) renders non-compliance with uniform rule 18 an irregularity (an irregular step) and entitles the opposite party to act in accordance with uniform rule 30. Erasmus [2] takes it further and states that 'if a pleading fails to comply with rule 18 and is vague and embarrassing, the defendant has a choice of two remedies: she or he may either bring an application in terms of uniform rule 30 or raise an exception in terms of uniform rule 23 (1). Sub-rule 27 (3) on the other hand, provides the party who has not complied with any of the Rules with an escape route to approach court for condonation of non-compliance.

[20] From the aforesaid, it is evident that non-compliance with the provisions of sub-rule 18 (1) renders the summons or pleading concerned an irregular step (a defect). On the basis of the aforesaid, it is, thus, clear that non-compliance with uniform rule 18 (1) for which a remedy is provided in accordance with uniform rule 27 (3) cannot be regarded as a nullity as suggested by Nedbank. The very fact that the rules of court provide for a remedy in case of a defect indicates the validity of the summons rather than its nullity. If non-compliance with uniform rule 18 (1) was meant to be a nullity, as Nedbank wants me to believe, there would have been no remedy provided for in the Rules. Nedbank's argument, in this regard, stands to be rejected.

Has the Khumalos' claim prescribed?

[21] The question is whether the service of the original (defective) summons upon Nedbank interrupted the running of prescription.

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[2] Erasmus: Superior Court Practice Vol. 2 pD1-243.

[22] The submission by Nedbank is that the Khumalos' attempt to rectify the defect, by filing the amendment, was done more than three years after their debt arose, and as such the claim had by then prescribed.

[23] According to the provisions of the Prescription Act 68 of 1969 ("the Prescription Act"),[3] a debt is extinguished by prescription after the lapse of a period of three years from the date upon which the debt is due. 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.

[24] In their particulars of claim, the Khumalos' allege that they were granted the rescission of judgment against the default judgment obtained by Nedbank in an action which resulted in their house being sold on auction, on 1 June 2009. It is not in dispute that extinctive prescription started running on that date and that the period of three years would have elapsed on 31 May 2012. It is common cause that the summons was defective for want of compliance with uniform rule 18 (1) and was served on Nedbank on 8 May 2012. This was well before 31 May 2012. Did such a service interrupt the running of prescription? Yes it did.

[25] I could not, in my research, come across authority or judgment, none was provided, specific to the facts and issues in this instance, that is, wherein a defective

[3] Sections 10 (1), 11 (d) and 12 (1) thereof.

summons emanating from non-compliance with uniform rule 18 (1) or in particular where a combined summons was signed by an attorney without a right of appearance in the High Court, is dealt with. I am of the view that the principle enunciated in the following cases is of assistance in resolving the issue before me.

[26] In *CGU Insurance Limited* [4] the court dealing with an exception to the particulars of claim, had this to say:

> "[5] . . . It is settled law that a summons which sets out an excipiable cause of action can interrupt the running of prescription provided the debt is cognisable in the summons . . ."

[27] In *Aeronexus*[5], wherein the amendment of a defective summons was at issue, the court stated as follows:

> "[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 excipiable summons which does not set out

[4] CGU Insurance Limited v Rumdel Construction (Pty) Ltd 2004 (2) SA 622 (SCA).
[5] Aeronexus (Pty) Ltd v FirstRand Bank Ltd (249/2010) [2011] ZASCA 21 (17 March 2011).

a cause of action can nevertheless serve to interrupt prescription as long as it is not so defective that it amounts to a nullity." (my emphasis)

[28] In *Ramurunzi* [6] the court when dealing with the failure by the credit provider to deliver a notice in terms of s 129 of the Credit Act 34 of 2005, said the following -

> "[24] . . . This is in line with the principles of the common law that have developed in relation to prescription: a summons and particulars of claim can be cured where defective after the period of prescription has run [as long as it is not a nullity]. Even an excipiable summons or one that is amended so as to introduce a new cause of action (where substantially the same debt is being claimed) has the effect of interrupting prescription."

[29] I have already made a finding that the summons served on Nedbank is defective and not 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, 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.

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[6] Investec Bank v Ramurunzi (445/13) [2014] ZASCA 67 (19 May 2014).

[30] I hold, therefore, that in the circumstance of this case, the service of the summons, even though defective, interrupted the running of prescription and has not prescribed. The summons can still be rectified in terms of uniform rule 27 (3). It is worthy to note that in accordance with *Ramurunzi* the defect can be cured even if the period of prescription has elapsed.

[31] In an attempt to remedy the non-compliance with the Rules, the Khumalos have brought a condonation application in terms of uniform rule 27 (3). Nedbank has filed its answering affidavit thereto but the Khumalos have to date of hearing of the application not filed their replying affidavit. No heads of argument have been filed, by the Khumalos, as well. At the hearing, I was informed by counsel representing the Khumalos that he did not have the mandate to argue the condonation application. It was argued on behalf of Nedbank that on that basis alone the condonation application ought to be dismissed. But in considering whether to dismiss the application I have to consider all the evidence before me. Even though there was no appearance for the Khumalos I still have to consider their founding papers as to whether they have made out a case for the condonation for non-compliance with uniform rule 18 (1).

Should condonation be granted?

[32] In the condonation application the Khumalos seek an order for their non-compliance with the provisions of s 4 of the Right to Appearance Act alternatively the

provisions of uniform rule 18 (1) together with costs of suit on an attorney and client scale if the application is opposed.

[33] It ought to be said that, the Rules do not provide for the condonation of non-compliance with s 4 of the Right of Appearance Act. On the proper reading of the two provisions, the Khumalos have not complied with uniform rule 18 (1). There is no requirement to comply with s 4 of the Right of Appearance Act when issuing a summons. The section only lays down the mechanism used by the registrar in issuing the certificate to an attorney qualifying her or him as an attorney with the right of appearance in the High Court. The provisions of uniform rule 18 (1) are the ones that requires that an attorney with a right of appearance sign the summons and ought to be complied with. The Khumalos having not complied with the sub-rule they should apply for an order condoning the non-compliance. This is what they seek to do in this application.

[34] The Khumalos have correctly approached the court in terms of uniform rule 27 (3). To the contrary, Nedbank labouring under the misapprehension that the summons is a nullity contends that it cannot be condoned under uniform rule 27. I have already made a ruling that the defect, in this instance, is an irregularity and the Rules provide a remedy to cure such an irregularity. The remedy is provided for in uniform rule 27 which, amongst others, provides for the condonation of non-

compliance with the Rules. Sub-rule (3) thereof, specifically provides that the court may, on good cause shown, condone any non-compliance with these Rules.[7]

[35] The Khumalos' relies on three grounds why their condonation application should be granted. The first ground is that it is their previous attorney who did not comply with the sub-rule and did not inform them of the non-compliance; secondly that, Nedbank has not suffered any prejudice as a result of the non-compliance and if so prejudiced, a cost order will cure the prejudice; and lastly that, it is in the interest of justice that the condonation be allowed as it would allow all the issues between the parties to be thoroughly ventilated at trial. The contention is that the refusal to grant the condonation will result in the travesty of justice as they will not get a chance to air their case in court.

[36] The Khumalos are applying for condonation to comply with the requirements of uniform rule 18 (1). In other words, they are requesting to be allowed to rectify the defective summons. Uniform rule 27 (3) does not stipulate the time period within which to apply for the condonation but it should be within a reasonable time. What is required of the Khumalos is mainly to show good cause.

[37] In deciding whether sufficient cause has been shown for condonation of non-compliance with the Rules, the Court has a discretion, to be exercised judicially,

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[7] See the unreported judgment in House v Moss laboratories CC v Sparax Trading (Pty) Ltd case no. 32269/2014 SGHC.

upon consideration of all the facts, and in essence it should be a matter of fairness to both sides.[8]

[38] 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. I am inclined, in this instance, to also not penalise the Khumalos for their attorneys' ineptitude. It is obvious that the Khumalos 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. They, as such, could not be expected to proffer a reasonable explanation thereto. Those they instructed, the attorneys, should have provided the required explanation. I find myself constrained to hold the Khumalos liable for the non-compliance.

[39] On the other hand, it is obvious that their attorneys have all along wanted to rectify the defect once they became aware of it but followed the wrong procedure to do so. From the background sketched above, it is apparent that the Khumalos' attorneys, the past and the present, have been alive to the matter and seized with it. A number of wrong processes, on the part of the Khumalos and Nedbank, were filed. I refer in this regard to paragraphs [5] to [8] of this judgment. This also serves to explain why it took the Khumalos this long before they could bring the condonation application.

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[8] Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A).

[40] The non-compliance to me is trivial and/or immaterial and cannot prejudice Nedbank. There is no prejudice actually to be suffered by Nedbank. For all intents and purposes Nedbank has been aware of the claim against it, what is missing from the summons is only the signature which has no bearing on the contents of the claim itself. If the condonation is not granted, the Khumalos will be prejudiced in that the door will be shut and they will no longer be able to pursue their claim against Nedbank.

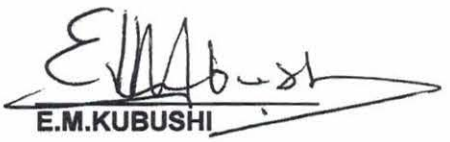
[41] The Khumalos have, in my view, shown good cause why the application should succeed. I am inclined, as such, to exercise my discretion in their favour and grant the condonation.

[42] I turn now to the issue of costs. As regards the special plea, the costs should follow the successful party. The Khumalos are the successful parties and are entitled to the costs of suit.

[43] As regards the condonation application, although the Khumalos are successful they had approached the court for an indulgence and should not be entitled to costs. They in any event tendered the wasted costs of the application in the event condonation is granted.

[44] I make the following order:

1. The special plea is dismissed with costs.
2. The condonation application is granted.
3. The first and second respondents are ordered to pay the wasted costs of the application for condonation.



E.M.KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE	**: 27 November 2017**
DATE OF JUDGMENT	**: 14 December 2017**
APPLICANTS' COUNSEL	**: ADV. R Loibner**
APPLICANTS' ATTORNEYS	**: Cliffe Dekker Hofmeyer Inc.**
RESPONDENTS' COUNSEL	**: ADV. D Strydom**
RESPONDENTS' ATTORNEYS	**: Larry Marks Attorneys**