IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
30/09/14
DATE SIGNATURE

30/09/2014

CASE NUMBER: 14886/2012

In the matter between:

SOUTH AFRICAN RUGBY LEAGUE ASSOCIATION	**APPLICANT**
AND	
DAVE VAN REENEN	**FIRST RESPONDENT**
KOOS BLOMERUS	**SECOND RESPONDENT**
FRANS VAN DER MERWE	**THIRD RESPONDENT**
LOUIS FOURIE	**FOURTH RESPONDENT**
DIRKIE MATTHYSSEN	**FIFTH RESPONDENT**
KALLIE CLAASSEN	**SIXTH RESPONDENT**
JOHAN ROODT	**SEVENTH RESPONDENT**
MOSSIE PRETORIUS	**EIGHTH RESPONDENT**
ANDRE ADLEM	**NINTH RESPONDENT**

PHILIP KING **TENTH RESPONDENT**

BLACKIE SWART **ELEVENTH RESPONDENT**

JUDGMENT

LEPHOKO AJ

[1] On 13 March 2012 the applicant issued an application for an interdict against the eleven respondents in which it seeks an order, *inter alia*, that: "the Respondents are prohibited from representing in any manner whatsoever to any person, entity, body or sponsor whomsoever that they represent the Applicant or the South African Rugby League (hereinafter "the SARL"), together with certain ancillary relief and costs. The application was only served on the first and eight respondents. Only the first respondent is opposing the application.

[2] On 27 February 2014 Mgqibisa-Thusi J granted prayers 1 to 4 of the notice of motion as a provisional court order against the first respondent with a return date as 29 April 2014. The provisional order was granted in terms of a draft order which was signed by the court. The provisional order was subsequently extended to the week of 28 July 2014. The applicant now seeks a final order.

[3] An error occurred when the office of the registrar typed the provisional order granted by Mgqibisa-Thusi J on 27 February 2014. The typist omitted to make the

necessary changes to the prayers incorporated in the provisional order from the notice of motion so that the order would reflect that prayers 1 to 4 were granted only against the first respondent. The end result is that the order as typed by the typist and signed by the registrar stipulates that prayers 1, 2 and 3 were granted against all respondents and prayer 4 was granted only against the first respondent.

[4] The provisional order reads, *inter alia,* as follows: *That a provisional order in terms of prayers 1 to 4 of the notice of motion dated 13 March 2012 are granted against the first respondent with return day 29 April 2014:*

1. The Respondents are prohibited from representing in any manner whatsoever to any person, entity, body or sponsor whomsoever that they represent the applicant or the South African Rugby League (hereafter "the SAR").

2. The respondents are prohibited from:

2.1 Alleging that they are representing the applicant on the SARL in any official capacity such as chairman and/or any office bearer and/or official of the applicant or the SARL referred to above;

3. The respondents, jointly and severally are ordered to provide the following property to the applicant:

3.1 The financial statements of the applicant's predecessor in title for the 2009, 2010 and 2011 financial years;

3.2 All minutes of meetings of the applicant for 2009 to 2011, correspondence and other documents that belong to the applicant and/or its predecessor in title.

4. The first respondent pays the costs of the application on an attorney and client scale.

[5] At the hearing on the return date, the first respondent raised a point *in limine* that these proceedings and the provisional order granted on 27 February 2014 were null and void as nine of the eleven respondents were not before court, not having been served. The first respondent sought an order that the rule nisi be uplifted and the application be dismissed with costs. The first respondent's argument that the proceedings be declared a nullity is based on the court order as prepared by the registrar's office and not as actually ordered by the court.

[6] Our courts have in various decisions emphasized the importance of proper service of court proceedings on affected parties. In *First National Bank of SA Ltd v Ganyesa Bottle Store (Pty) Ltd* 1998 (4) SA 565 (NCD) at 589B-C the court expressed its agreement with the principle that it is a cornerstone of our legal system that a person is entitled to notice of legal proceedings against him and further stated that mere knowledge of the issue of summons is not service and the plaintiff is not relieved of his obligation to follow the prescribed rules with regards to service.

[7] In *Dada v Dada* 1977 (2) SA 287 (T) at 288C-E the court stated that. "*when proceedings have begun without due notice to the defendant, the subsequent proceedings are null and void, any judgment is of no force and effect and may be disregarded without the necessity of a formal order setting it aside*" See also *Sliom v Wallach's Printing And Publishing Co Ltd* 1925 (TPD) 650 at 656; *Todt v Ipser* 1993 (3)

SA 577 (AD) at 588H-J; *Minister Of Agricultural Economics And Marketing v Virginia Cheese And Food Co* 1961 (4) SA 415 at 422E-423A.

[8] It has been held that a judgment obtained without service is erroneously granted and may also be set aside in terms of rule 42(1)(a) notwithstanding the absence of good cause: see *Fraind v Nothmann* 1991 (3) SA 837 (W) at 839H; *Topol And Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 648D-649F.

[9] In *Fishing Touch 163 v BHP Billiton Energy Coal SA Ltd* 2013 (2) SA 204 (SCA) it was stated that the giving of notice to the respondent was an essential first step in an application on notice of motion, and that the application could not be considered to have been made if it had merely been issued but not served.

[10] In Fishing Touch the decision in *Republikeinste Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 780E-F was translated as follows: "*The object of a summons or notice of motion is of course to make the defendant or a respondent a party to the proceedings, and as far as he is concerned he only becomes a party when service of summons or notice of motion takes place".*

[11] The applicant argued that the order should be enforceable only against the first respondent notwithstanding the fact that some of the respondents had not been served. The applicant further argued that the order was properly granted against the first

respondent after he was duly served with the application and that he also filed an answering affidavit.

[12] In my view, the fact that the order was incorrectly typed cannot be attributed to the court or the applicant. The purported order complained of is in any event a nullity and of no force or effect. This is so despite the non-service of the application on some of the respondents because in reality there is no such an order as it was never so granted by the court.

[13] I have already found that the provisional order is a nullity against the second to the eleventh respondents. The question that remains to be answered is whether it was necessary to serve the application on all the respondents notwithstanding that at the end relief was sought and granted only against the first respondent. If it is found that notwithstanding relief being sought only against the first respondent, it was necessary to effect service on all the respondents, then the provisional order will fall foul of the rule that a necessary party should be joined, and be liable to be discharged.

[14] Uniform rule 6 (2) provides that when relief is sought against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion shall be addressed to both the registrar and such person, otherwise it shall be addressed to the registrar only. Rule 6 (14) provides that rule 10 which applies to joinder of parties and causes of action shall apply to applications.

[15] Our courts have held that the question whether all necessary parties have been joined depends upon the manner in which, and the extent to which, the court's order may affect the interests of third parties. See *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657; *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A) at 521; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) at 226F-227C.

[16] The rule is that any person is a necessary party and should be joined if such a person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he or she has waived his or her right to be joined: See *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659;

[17] There are also decisions to the effect that the rule is not a mechanical or technical one which "must be ritualistically applied", regardless of the circumstances of the case. It may not be necessary to join a party who has waived his right to be joined or where such joinder will not advance the interests of justice: See *Wholesale Provision Supplies CC v Exim International CC* 1995 (1) SA 150 (T) at 158D-I; *Leibowitz v Schwarts* 1974 (2) SA 661 (T).

[18] The first respondent delivered an answering affidavit in his personal capacity and on behalf of the South African Rugby League Association Est. 1988. (the SARL Est 1988). The applicant denies the existence of the SARL (Est 1988) *inter alia* because its

attorneys failed to prove their authority to act and the SARL (Est 1988) failed to respond to a request to provide a copy of its current constitution and a list of the names and addresses of its office bearers and their respective offices as also to set security for costs of the application.

[19] The applicant further argues that the SARL (Est 1988) does not exist because the club chairmen and provincial chairmen of the SARL clubs and provinces attended the annual general meeting and voted for a new constitution and a new board on 6 Nov 2011, and the applicant is the same South African Rugby League Association that was headed prior to Nov 2011 by the first respondent when it adopted a new constitution and elected a new board and president.

[20] The applicant further states that its attorney contacted the second to eleventh respondents telephonically and all except the eleventh respondent indicated that they did not intend to oppose the application. They also informed its attorney that they did not support the first respondent in his opposition of the application. The fifth and ninth respondents could not be reached and their position could not be established. Because of the difficulty in obtaining service addresses of some of the respondents and because of the respondents dissociating themselves from the present litigation it was decided by the applicant not to serve the application on any of the other respondents.

[21] The applicant further alleges that none of the alleged board members or members of the alleged association SARL (Est 1988) has ever verbally or in writing

voiced any support for the first respondent or denied the applicant's allegations that the alleged association SARL (Est 1988) does not exist and that they are not board members thereof. The applicant alleges that no purpose will be served by involving any of the other respondents in the matter.

[22] In its heads of argument the applicant argues that it has established all the requirements for a final interdict. This may be so simply because not all the respondents were served, in particular those who have stated under oath that they dispute the applicant's entitlement to the relief sought and would like to oppose the application. Despite some of the respondents vehemently denying that they have waived their right to be served with the application and also indicating their unwavering support for the first respondent, the applicant has deemed it appropriate to proceed with the application in their absence.

[23] The applicant relentlessly proceeded with the application without serving it on all the respondents after being informed of the respondents wish to oppose the application as early as on the 25th of April 2014 when the third, sixth, seventh and eleventh respondents filed their affidavits demanding to be served and disputing material allegations made in the applicant's founding affidavit. The first respondent had also specifically raised the issue of non-service on some of the respondents in his answering affidavit served on the applicant on 2 August 2012.

[24] It is clear from the contents of the affidavits filed the third, sixth, seventh and eleventh respondents as well as the first respondent's answering affidavit that the issue of non-service on some of the respondents was likely to become a contentious issue if the application proceeded without service. In my view the applicant should have taken all necessary steps to ensure service on all the respondents. Of course, it would always have been open to the respondents not to oppose the application. In that event the applicant would have been entitled to proceed with the application to its conclusion.

[25] The applicant seeks a final interdict against the first respondent. I am of the view that even if the final order was granted only against the first respondent it would still have an adverse effect on the respondents that were not served as some of them have steadfastly asserted their support of the first respondent as well as their official involvement in the SARL (Est 1988). It appears that they have a direct and substantial interest in any order the court might make, or that such an order cannot be sustained or carried into effect without prejudicing these respondents. This is so because if such an order was granted it would effectively paralyze the SALR (Est 1988), an organization these respondents claim to have a right to administer. It may well be so that this organization does not exist as alleged by the applicant. But that is only the applicant's version. These respondents insist on their right to be heard and the court cannot simply shut its doors to the respondents. At this stage these respondents are not before court simply because the applicant has undermined their fundamental right to be given due and proper notice of the proceedings instituted against them and in which they have a direct and substantial interest.

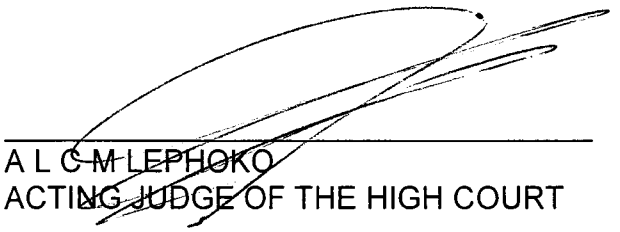
[26] If the order sought by the applicant was granted it would effectively deny the affected respondents access to courts, a fundamental right protected by section 34 of our constitution and may lead to a failure of justice.

[27] Mr. Bosman SC who appeared on behalf of the first respondent submitted that he was briefed a day before the hearing to argue the point *in limine* and would have no further involvement in the matter. He asked for the costs of two counsel due to the importance of the matter. He had earlier in argument submitted that the point was a simple and straight forward one. In deciding whether two grant such costs the court must consider the issue purely on whether it was proper and reasonable to brief two counsel in the circumstances relating to the action and not in light of what the court thinks of the ability and experience of the individual counsel: See *Steenkamp v Steenkamp* 1996 (3) SA 294 (T) at 297H; Rand Townships And Smallholdings (Pty) Ltd v Griebenow 1956 (2) SA 42 (W) at 45; In re Alluvial Creek 1929 CPD 532 at 535. I am of the view that the employment of two counsel was justified and was also necessitated by the applicant's refusal to serve the affected respondent not withstanding their requests for served.

In the premises I would make the following order:

1. The point *in limine* is upheld.
2. The *rule nisi* granted against the first respondent on 27 February 2014 is discharged.

3. The applicant is ordered to pay the costs of the application including the costs of two counsel.



A L C M LEPHOKO
ACTING JUDGE OF THE HIGH COURT

Heard on: 31 July 2014.

Judgment delivered on: 30 September 2014.

For the Applicant: J E Ferreira.

Instructed by: Dr. TC Botha Attorneys.

For the First Respondent: Adv A J H Bosman SC, Adv W CScheepers.

Instructed by: Ehlers Fakude Inc.