REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 96760/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES 9 June 2021

Date: 8 June 2021 E van der Schyff

In the matter between:

MOLOKWANE, SAMUEL	PLAINTIFF
AND	
MINISTER OF POLICE	FIRST DEFENDANT
CHABALALA, GEZANI M	SECOND DEFENDANT
CHAUKE, SELLO	THIRD DEFENDANT
DANTI, SIMPHIWE L	FOURTH DEFENDANT

REASONS

Van der Schyff J

[1] On 7 June 2021, after having heard argument and after considering written submissions filed by both parties, I granted an order dismissing the special pleas raised by the defendants, with costs. I undertook to provide written reasons substantiating the order.

[2] The plaintiff issued summons against the four defendants. The first defendant raised two special pleas. The parties agreed that the special pleas be determined by way of a stated case without the hearing of oral evidence. In the event that the special pleas were to be dismissed, the trial was set down to continue immediately. The Acting Deputy Judge President approved the arrangement.

[3] The defendants pleaded that the plaintiff has failed to make out a cause of action as:

i. The plaintiff failed to serve the summons on the State Attorney within 5 days of service thereof on the first defendant as provided for in section 2(2)(a) of the State Liability Act, 20 of 1957 ('SLA');[1]
ii. The plaintiff failed to serve the summons on the National Commissioner as provided for in terms of s 5(1)(b)(ii) of the Institution of Legal Proceedings Against Certain Organs of the State Act, 40 of 2002 ('Act 40 of 2002');
iii. In the alternative (and in the second special plea), the defendants plead that the plaintiff's claim has prescribed as the summons was not served on the State Attorney within three years from 8 February 2014.

[4] The plaintiff disputes that -

i. It is a peremptory requirement to serve on the National Commissioner under the circumstances;

[1] It must be pointed out that, as indicated below, at the time when the summons was served s 2(2) of the SLA did not contain a sub-section (a) and reference was made to a period of seven days.

ii. A failure to serve on the Office of the State Attorney in terms of s 2(2) of the SLA would vitiate the proceedings or nullify the summons. The plaintiff disputes that his claim has prescribed.

[5] The timeline agreed upon by the parties that is relevant for the determination of the stated case is the following:

i. The cause of action arose on 8 February 2014;
ii. A notice in terms of s 3 of Act 40 of 2002 was delivered, outside the period prescribed in s 3 of Act 40 of 2002, on 10 April 2015;
iii. The plaintiff issued a combined summons under case number 96760/25 on 2 December 2015;
iv. The summons was served on the first defendant on 4 December 2015 at '7th Floor Wachthuis 231, Pretorius Street, Pretoria, 001 being the principal place of business of MINISTER OF POLICE, a copy of the Combined Summons was served upon MRS PS MLAMBOPHETHE (LEGAL CLERK) of MINISTER OF POLICE';
v. On 4 March 2016, in the absence of a notice of intention to defend, the merits and quantum of the plaintiff's claim were separated, and default judgment was granted in respect of the merits of the action on the basis that the plaintiff was entitled to recover 100% of his proven or agreed damages. The quantum determination was postponed *sine die* (the Basson J order;);
vi. The order was served on the first defendant on 22 March 2016;
vii. On 26 March 2018, the plaintiff issued an application for default judgment in respect of the quantum;
viii. The application for default judgment in respect of the quantum was served on the Office of the State Attorney on 23 August 2018 together with a notice of set down for 10 September 2018, a notice of intention to amend the particulars of claim, the amended particulars of claim, and the Basson J order;
ix. The application for default judgment in respect of the quantum was served on the first defendant at SAPS, 7th Floor Wachthuis, 231 Pretorius Street, Pretoria on 24 August 2018;

x. On 29 August 2018, the Office of the State Attorney delivered a notice of intention to oppose the default judgment application in respect of the quantum;

xi. On 6 September 2018, the State Attorney delivered an application seeking an order to stay the application for default judgment pending the rescission of Basson J's order;

xii. On 14 January 2019, the plaintiff issued an application for condonation for the late delivery of the s 3 notice, in terms of s 3(4) of Act 40 of 2002;

xiii. On 15 January 2019, the s 3(4) application was served on the defendants care of the Office of the State Attorney;

xiv. On 26 June 2019, condonation was granted [by Mtati AJ] as sought in the s 3(4) application;

xv. On 25 November 2019, the Basson J order was abandoned by the plaintiff as contemplated in terms of Uniform Rule 41(2);

xvi. On 13 December 2019, the Office of the State Attorney delivered a notice of intention to defend the action on behalf of all the defendants;

xvii. On 3 September 2020, the defendants delivered an amended plea to the plaintiff's particulars of claim and raised the two special pleas.

The parties' submissions

[6] Both counsel filed written heads of argument. In substantiating the two special pleas of (i) non-service in accordance with s 2 of the SLA and non-compliance with s 5(1)(b)(ii) of Act 40 of 2002, (ii) and prescription, the defendants' counsel submitted that the relevant statutory provisions must be interpreted in accordance with the prevailing principles of statutory interpretation. The defendants submitted that s 2(2) of the SLA did not require service on the Minister. The address and entity where service was to be effected in terms of the SLA when proceedings were instituted against a state department's executive authority, was the State Attorney. The defendants' counsel submitted that the methods of service are in general prescribed in the Uniform Rules of Court and *in casu* prescribed by statute. When the peremptory method of service is not complied with, it will have specific

consequences, rendering the service ineffective and a nullity. To date, the summons had not been served on the State Attorney. A defendant is not engaged in litigation until service has been effected. It was not sufficient that the State Attorney received notification of the proceedings but was not served with the summons. Because the court does not have the power to condone non-compliance with a statutory prescript, the non-service resulted in the plaintiff's claim having prescribed. Defendants' counsel submitted that *Rauwane v The MEC for Health of the Gauteng Provincial Department,*[2] a judgment relied upon by the plaintiff, was wrongly decided and is distinguishable from the present matter. It is distinguishable because, in *Rauwane,* the summons was served on the State Attorney, albeit 15 days after the time prescribed in the SLA. *In casu,* the matter only came to the attention of the State Attorney 4 years and 6 months after the incident, 3 years and 8 months after summons was issued, and 3 years and 5 months after default judgment was granted on the merits. It is not the summons but the subsequent proceedings that are null and void. The mere fact that neither the SLA nor Act 40 of 2002 provide an express consequence for failing to comply with the provisions relating to service does not mean that the provisions can be ignored and that non-compliance will have no effect. Defendants' counsel submitted that Mtati AJ's order did not finally dispose of the question of proper and effective service on the defendant.

[7] The plaintiff contended that the purpose of s 5(1)(b)(ii) of Act 40 of 2002 and s 2(2) of the SLA is to ensure that the State Attorney receives notice of all the legal proceedings instituted against an organ of state. Act 40 of 2002 does not provide for consequences in respect of a failure to comply with s 2(2) thereof, neither does the SLA provide any consequence for a failure to comply with s 2(2) thereof. Counsel submitted with reference to *Rauwane v The MEC for Health of the Gauteng Provincial Department*[3] that the purpose of Act 40 of 2002 and the SLA has been met in that the legal proceedings have been duly brought to the attention of the State Attorney, who had been instructed to defend the action on behalf of the defendants.

[2] Unreported decision of the High Court of South Africa, Gauteng Local Division, Johannesburg under case number 14/19009 dated 27 August 2018.

[3] Unreported decision of the High Court of South Africa, Gauteng Local Division, Johannesburg under case number 14/19009 dated 27 August 2018.

The first defendant did not allege any prejudice. Non-compliance with s 2(2) of the SLA did not result in the summons or the subsequent proceedings being nullified.[4] The plaintiff pleads that the defendants have received proper notice of the institution of the action and was effectively served with the summons. Counsel submitted with reference to *Moela v Shoniwe*[5] that the court can condone non-compliance with peremptory statutory prescripts. In the result, the argument goes, the defendant's special plea regarding service is without merit, alternatively, it is of a dilatory and procedural nature and does not constitute a defence to the plaintiff's claim. Plaintiff's counsel submitted that the issue of prescription was finally pronounced on when the court considered and granted the s 3(4) condonation application, and in the result, the special plea is *res judicata.*

Discussion

[8] This case requires, by means of statutory interpretation, the balancing of rights. On the one hand, the plaintiff's right to hold the state to account for an alleged infringement of the guaranteed right to physical freedom [and bodily integrity] and on the other hand, the first defendant's right to be served with court process in accordance with legislative prescripts.

Legal Framework

[9] Three statutory provisions, and Rule 4 of the Uniform Rules of Court, must be considered when the two special pleas are considered. Although the defendants distinguished between two special pleas, both boil down to the effect of the plaintiff not having served the summons on the Office of the State Attorney when the action was instituted or at least before the prescription period expired. I will only focus on the provisions of the relevant statutes as they stood at the time when the service of the summons was effected. It is trite that amendments to statutes and the uniform

[4] *Rauwane* at par [10].

[5] 2005 (4) SA 357 (SCA)

rules will not be regarded to have retroactive effect unless expressly determined by the legislature.[6]

[10] The starting point of the discussion is s 15(1) of the Prescription Act, 68 of 1969 ('the Prescription Act'):

> 'The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt'.

[11] This matter concerns the phrase 'service on the debtor.' It is common cause that the Minister of Police, the first defendant, is the debtor concerned. The claim is for delictual damages. This inevitably means that both the SLA and Act 40 of 2002 apply.

[12] Section 1 of the SLA provides:

> 'Any claim against the State, which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.'

[13] Section 2 of the SLA, after being amended by Act 14 of 2011, but prior to being amended by Act 8 of 2017, determined:

> '(1) In any action or other proceedings instituted by virtue of the provisions of section 1, the executive authority of the department concerned must be cited as nominal defendant or respondent.

[6] *S v Mhlungu ad Others* 1995 (3) SA 867 (CC) para [65]; *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another* 2020 (1) SA 623 (GJ).

(2) The plaintiff or applicant, as the case may be, or his or her legal representative must, within seven days after a summons or notice instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that summons or notice on the State Attorney.'

[14] The Long Title of Act 40 of 2002 reads:

'To regulate the prescription and to harmonise the periods of prescription of debts for which certain organs of state are liable; to make provision for notice requirements in connection with the institution of legal proceedings against certain organs of state in respect of the recovery of debt; to repeal or amend certain laws; and to provide for matters connected therewith.'

Section 5(1) of Act 40 of 2002, after its amendment by Act 11 of 2013 but prior to amendment by Act 8 of 2017, provided:

'(1)(a) Any process by which any legal proceedings contemplated in section 3(1) are instituted, must be served in the manner prescribed by the rules of the court in question for the service of process.

(b) Despite paragraph (a), any process by which any legal proceedings contemplated in section 3(1) are instituted and in which the-

(i) …

(ii) Minister for Safety and Security is the defendant or respondent, may be served on-

(aa) the National Commissioner of the South African Police Service as defined in section 1 of the South African Police Service Act, 1995 (Act No. 68 of 1995); or

(bb) the Provincial Commissioner of the South African Police Service as defined in section 1 of the South African Police Service Act, 1995, of the Province in which the cause of action arose; or

(iii) …

[15] Before its amendment in 2017, Rule 4(9) of the Uniform Rules of Court determined that:

> 'In every proceeding in which the State, the administration of a province or a Minister, Deputy Minister or Administrator in his official capacity is the defendant or respondent, the summons or notice instituting such proceedings may be served at the Office of the State Attorney situated in the area of jurisdiction of the court from which summons or notice has been issued: ….'

[16] If s 15 of the Prescription Act is viewed in isolation, service on the Minister of Police would have sufficed to interrupt prescription. The defendants, however, attack the 'effectiveness' of the service solely because service was not effected on the State Attorney, and adds the startling proposition that the service on the Minister of Police is of no concern due to the cumulative effect of the provisions of s 2(2) of the SLA and s 5(1)(b)(ii) of Act 40 of 2002.

[17] I do not read either s 2(2) of the SLA or s 5(1) of Act 40 of 2002 to limit effective service of process by which legal proceedings against the State are initiated, excluively to service on the State Attorney. At first glance, the two provisions seem to be contradictory. Section 2(2) of the SLA required service on the State Attorney, while s 5(1) of Act 40 of 2002 required service in the manner prescribed by the rules of a court. However, although s 2(2) prescribed that such process had to be served on the State Attorney within seven days of the process being issued, it did not restrict or prohibit other ways of effective service on the Minister. Moreover, the rules of court did not, at the time, prescribe any manner of service when legal proceedings were instituted against the State. The rules provided that process could ('may') be served on the State Attorney, it was not mandatory. When read in this context, the tension that seems to exist between the two statutes is difused.

[18] Section (2)(2) of the SLA can also not be read to mean that a plaintiff's claim would prescribe if the summons was not served on the State Attorney within 7 days of being issued. Such a reading would be inconsistent with the constitutionally protectect right of access to courts. Section 2(2) of the SLA and Rule 4(9) resonated with Rule 4(1)(aA) that provides –

> 'Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings.'

[19] I don't focus on s 5(1)(b)(ii) of Act 40 of 2002, because as it read at the time, it did not burden a plaintiff with any additional procedural requirements. It merely provided an additional recipient on whom, or address where, process could be served if the defendant was the Minister of Safety and Security.

[20] Meyer J held in *Akshardham (Pty) Ltd v JSR 108 Investments CC and Others*[7] that a distinction must be drawn between the situation where proceedings commenced without notice or where the initiating document such as the summons was served incorrectly. The process will be void and may be disregarded or set aside where proceedings have begun without any notice because the subsequent proceedings are null and void. However, subsequent proceedings where the summons was served incorrectly are not void but may be voided. The summons may be set aside as an irregular step. *In casu,* it cannot be said that the service on the first defendant was incorrect. It can, at most, be said that where a plaintiff did not utilise the concession provided for in Rule 4(9) to serve summons on the State Attorney instead of on the Minister, the legislature required a further step, namely that the process through which the legal proceedings were initiated also had to be brought to the attention of the Ministers' assigned legal representative, the State Attorney, by service thereof on it. Section 2(2) did not have the effect of substituting the Minister as a defendant with the State Attorney or joining the State Attorney as a party to the

[7] (3128/17) [2019] ZAGPJHC 323 (16 September 2019) para [12].

proceedings. The Minister remained the debtor. Non-service on the State Attorney, as it was required in terms of s 2(2) of the SLA, at most constituted an irregular step and not a nullity. It is trite that there is a clear distinction in our law between juristic acts that constitute a nullity and those constituting an irregularity. Where the irregular step is not rectified, the consequence of non-service on the State Attorney would be that default judgment cannot be granted in favour of the plaintiff, and where it was granted, it would constitute a ground for rescission. *In* casu, the 'irregular step' of non-service within seven days of the summons being issued on the State Attorney became moot when the State Attorney formally joined the proceedings as the defendants' legal representative and exchanged pleadings with the plaintiff's attorney, and participated in pre-trial conferences. The defendants did not make out a case on the papers that they were prejudiced by the non-service on the State Attorney. Prejudice is to be determined on a case-by-case basis and on the facts set out in the parties' affidavits.

[21] I agree with Mahalelo J in *Rauvane* that the purpose of s 2(2) of the SLA is to ensure that the State Attorney obtains notice, or is informed, of all the legal proceedings instituted against an organ of state, by being served with the summons. Where the summons was timeously served on the Minister, which is not disputed, prescription was interrupted.

[22] As for the fact that the State Attorney was not served with the documents by the sheriff, cognisance should be taken that Rule 4(1)(a) restricts the necessity of service by the sheriff to service of process initiation proceedings with Rule 4A providing for service of any subsequent documentation. Where the Minister was already served with the summons, effective service on the State Attorney need not be effected through the sheriff. As stated, the State Attorney duly represented the defendants as the matter proceeded after the notice of default judgment regarding quantum was served on it. In the result, I am of the view that the two special pleas stand to be dismissed. I therefore need not deal comprehensively with the plaintiff's claim that the issue of prescription is *res judicata*, although a valid point is raised that the court already found that the claim had not prescribed when the condonation application in terms of s 3(4) of Act 40 of 2002 was granted.

[23] In considering the stated case, I noted that although the plaintiff abandoned the default judgment on the merits, the application for rescission was never brought to fruition. I raised this point with the parties after the defendants' counsel argued in reply that the defence of *res judicata* cannot stand. Counsel submitted that the issue of prescription was not argued before a court because the rescission application was not moved. It became apparent that although the application for rescission was served on the plaintiff, and the plaintiff filed an answering affidavit and counter application seeking condonation in terms of s 3(4) of Act 40 of 2002, the defendants never enrolled the rescission application for hearing. The defendants' legal representative did, however, after the plaintiff abandoned the default judgment, took part in the exchange of pleadings and pre-trial meetings. I provided counsel with the opportunity to provide written submissions on this point.

[24] Plaintiff's counsel submitted with reference to the unreported judgment of Boruchowitz J in *Body Corporate of 22 West Road South v Ergold Property Number 8 CC*[8] that a judgment has legal consequences until it is set aside and requested the court to set the judgment aside. Counsel urged the court to take note of the content of the notice in terms whereof the plaintiff abandoned the default judgment.

[25] Defendants' counsel submitted with reference to applicable case law[9] that a judgment, whether granted by default or otherwise, has important legal consequences and stands until it is set aside by the court. He stressed the unilateral nature of abandonment. He submitted that once the judgment had been abandoned, the rescission application fell away, and the plaintiff cannot revive the rescission application. The plaintiff can also not apply for the default judgment to be rescinded in the present proceedings, as there is no rescission application before the court.

[26] Plaintiff's 'Notice in terms of Rule 41(2)' is instructive. The plaintiff unequivocally stated that the defendant is desirous of defending the action, that the plaintiff agreed to rescission of the default judgment, but that the action is still pending and has not

[8] 2014 JDR 2258 (GJ).

[9] *Inter alia, Jacobson v Havenga t/a Havenga* 2001 (2) SA 177 (T), *Clipsal Australia (Pty) Ltd v GAP Distributors* 2010 (2) SA 289 SCA and *West Road South, supra.*

finally been adjudicated. The defendants are opportunistic if they want to rely on their non-action in finalising the rescission application to render the matter *res judicata.* Due to the abandonment, specifically, the terms in which the plaintiff's abandonment was coached, I am of the view that *inter partes* the default judgment has no effect. The constitutional court explained in *S v Molaudzi*:[10]

> '[32] Since res judicata is a common-law principle, it follows that this court may develop or relax the doctrine if the interests of justice so demand. Whether it is in the interests of justice to develop the common law or the procedural rules of a court must be determined on a case-by-case basis. Section 173 [of the Constitution] does not limit this power. It does, however, stipulate that the power must be exercised with due regard to the interests of justice. Courts should not impose inflexible requirements for the application of this section. Rigidity has no place in the operation of court procedures.
>
> [33] This inherent power to regulate process does not apply to substantive rights but rather to adjectival or procedural rights. A court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties. This court held in South African Broadcasting Corp Ltd: 'The power in s 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a court to act effectively within its jurisdiction.'
>
> [34] The power in s 173 must be used sparingly otherwise there would be legal uncertainty and potential chaos. In addition, a court

[10] 2015 (2) SACR 341 (CC)

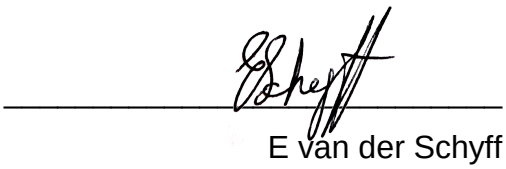
> cannot use this power to assume jurisdiction that it does not otherwise have.' (footnotes omitted) (Emphasis supplied)

[27] Sutherland J writing for in a Full Court in *Firstrand Bank Ltd t/a First National Bank v Fondse and Another*,[11] explained:

> '[30] The heart of the *Molaudzi* judgment is that when confronted with a substantial injustice that would result from the application of *Res Judicata* and the absence of an 'effective alternative remedy' [at [39]) *res judicata* should be relaxed to prevent injustice.
> …
> [31] The prominent issue is whether an abandonment of a judgment per se, or if not per se under what peculiar circumstances, would be proper grounds upon which to relax the application of *res Judicata*, if at all.'

[28] On the facts of this case, *res judicata* should be relaxed to prevent injustice. The plaintiff's notice of abandonment clearly indicated that the default judgment was abandoned because the defendant wanted to defend the action, but that the action remained pending. The facts are indeed novel and unique. The defendants' subsequent participation in the legal proceedings is indicative that both parties accepted that a trial court would in future adjudicate the dispute. *Inter partes* there exists no order that is of any consequence.

[29] As for costs, I find no reason to deviate from the general principle that costs follow cause.



E van der Schyff

Judge of the High Court, Gauteng, Pretoria

[11] (A5027/2016) [2017] ZAGPJHC 184 (23 June 2017).

Delivered: These reasons are handed down electronically by uploading it to the electronic file of this matter on CaseLines.

Counsel for the Plaintiff:	Adv. JP van den Berg SC
With:	Adv. T Cooper
Instructed by:	Adams & Adams
Counsel for the respondent:	Adv. HC Janse van Rensburg
Instructed by:	State Attorney
Date of the hearing:	7 June 2021
Reasons provided on:	8 June 2021
Revised:	9 June 2021

[Revisions in paras. 2 and 23]