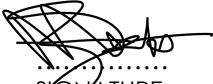


IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 29972/2019

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES /NO
4 AUGUST 2022	
.....	
DATE	SIGNATURE

In the matter between:

THAMSANQA RONNY MIYA

Plaintiff

and

THE MINISTER OF POLICE

1st Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Defendant

JUDGMENT

Mazibuko AJ

1. The first defendant is raising a special plea in that the plaintiff issued summons against the first defendant. The plaintiff did not serve that summons on it but served same at the State Attorney's office.

BACKGROUND

2. In the main action, the plaintiff sued the defendants for unlawful arrest and detention and malicious prosecution. The cause of action arose on 19

December 2017. Summons was issued against the first and second defendants. On 7 May 2019, the summons was served on the office of the State Attorney, Pretoria. The last day to file a notice of intention to defend was 4 June 2019. None was filed, and the plaintiff took no action in that regard.

3. On 9 July 2019, the summons was served on the National Director of Public Prosecutions (NDPP), the second defendant. On 11 July 2019, the state attorney placed itself as attorneys of record for the first and second defendants and, on behalf of both defendants, filed a notice of intention to defend the plaintiff's claim.
4. On 9 February 2022, the defendants filed their notice of intention to amend their plea, raising a special plea in that the plaintiff failed to serve the summons on both defendants but only served same at the office of the State Attorney. On 22 February 2022, the Defendants filed their amended plea.
5. On 3 August 2022, before the trial could commence, the first defendant gave notice of its intention to amend its plea. Mr Kwindu, on behalf of the defendants, submitted that in February 2022, both defendants raised a special plea and filed their amended plea.
6. However, on perusal of their file, he realized that the service of summons was proper on the second defendant. Therefore, the second defendant was not pursuing the special plea, and only the first defendant was raising the special plea.

7. On behalf of the first defendant, Mr Kwindi indicated the grounds upon which the first defendant relied and its cause of complaint. The following submissions were made on behalf of the first defendant and are contained in the special plea:
 - 7.1. The Plaintiff never served the summons on the first defendant, the Minister of Police, as per the provisions of section 2(1) of the State Liability Act No 20 of 1957 (the SLA);
 - 7.2. Paragraph 7 of the special plea: Section 5(1)(a) of the Institution of Legal Proceedings Against Certain Organs Of State Act, 40 of 2002 (the Legal Proceedings Act) provides that any process by which legal proceedings contemplated in section 3(1) of the Legal Proceedings Act are instituted must be served in accordance with provisions of section 2 of the SLA;
 - 7.3. Paragraph 10 of the special plea: on proper construction and interpretation of section 2 of the SLA, it was obligatory for the plaintiff to serve the combined summons on both the NDPP and Minister of Police's Head offices, Pretoria, as well as on the State Attorney's office, Pretoria, within a period of five days after the service of the combined summons on the first defendant; and
 - 7.4. Paragraph 11 of the special plea: the provision above is peremptory in its terms and that the combined summons was not served on the first defendant but only on the office of the State Attorney.

PARTIES' SUBMISSIONS

8. Both parties referred the court to the case of *Molokwane*¹ and section 39² of the Constitution of the Republic of South Africa, 1996 (the Constitution). The first defendant also relied on section 9³ of the Constitution and submitted that the first defendant has the right to raise the special plea.
9. Mr Kwindi, on behalf of the first defendant, submitted that as the peremptory provisions of the SLA were not complied with, there was no proper service of the combined summons on the first defendant as required. Accordingly, all proceedings after the service of the combined summons on the state attorney are deemed to be legally void. The plaintiff's action be dismissed with costs. Alternatively, an order be granted that his claim against the first defendant has prescribed on or about 20 December 2020.
10. It was submitted on behalf of the first defendant that *Molokwane* was distinguishable from this case since, in *Molokwane*, the summons was served on the Minister of Police, the debtor and not on the State Attorney, whereas, in *casu*, the debtor was not served, which means the peremptory requirement was not met as per the provisions of the Prescription Act read with the SLA.

¹ Minister of Police and others v Samuel Molokwane (730/2021) (2022) ZASCA 111

² (2) When interpreting any legislation and when developing the common law, or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

³ Everyone is equal before the law and has the right to equal protection and benefit of the law.

11. The plaintiff contended the special plea. Mr Maphutha, on behalf of the plaintiff, submitted that the special plea was mechanical and illogical as there was no doubt that the first defendant was aware of the combined summons. It had participated from the onset when it filed its intention to defend and in all the stages, including the pre-trial conferences. There was no prejudice suffered or to be suffered by the first defendant as the first defendant is represented by the state attorney and ready to proceed with the trial. It was also contended that the plaintiff's claim against the first defendant had not prescribed.
12. It was argued that *Molokwane* requires the courts to read and interpret statutes to promote the spirit, purport, and objects of the Bill of Rights. The laws are not to obstruct access to justice. It was also submitted that the court needed to adopt a purposive approach to reading and interpreting the acts of parliament. In that, the purpose of service of summons is to inform the defendant about the claim against them.

ISSUE

13. Whether the service of summons issued against the first defendant, the Minister of Police, upon the State Attorney only, was proper and effective service of summons on the first defendant. Whether the omission to serve on the first defendant rendered the plaintiff's summons void.

LEGAL PRINCIPLES

14. Rule 4(9)⁴ provides, "*In proceedings in which the State or an organ of state, a Minister, a Deputy Minister, a Premier or a Member of an Executive Council in*

⁴ Uniform Rules of Court

such person's official capacity is the defendant or respondent, the summons or notice instituting such proceedings shall be served in accordance with the provisions of any law regulating proceedings against and service of documents upon the State or organ of state, a Minister, a Deputy Minister, a Premier or a Member of an Executive Council".

15. Section 5(1)(a) of the Legal Proceedings Act, as amended, provides that *"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"*.

16. Section 2 of the SLA reads, *"proceedings to be taken against executive authority of department concerned:*

(1) in any action or other proceedings instituted against a department, the executive authority of the department concerned must be cited as a nominal defendant or respondent".

(2) the plaintiff or applicant, as the case may be, or his or her legal representative must

(a) After any court process 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 process on the head of the department concerned at the head office of the department; and

(b) Within five days after the service of the process contemplated in paragraph (a), serve a copy of that process on the office of the State Attorney operating within the area of jurisdiction of the court from which the process was issued".

17. Section 15(1) of the Prescription Act, 68 of 1969 (the Prescription Act) provides that *“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 debtor”*.

ANALYSIS

18. The special plea, as raised in *casu*, necessitates the balancing of rights. On the one hand, the plaintiff's rights in holding the state liable for the alleged infringement of rights. On the other hand, the first defendant's right to be served with court process in terms of the legislation.
19. In reading and interpreting the relevant prescripts and applying the same to the facts in this matter, I will look at the strict approach, which I will refer to as the “general” approach and the purposive approach.

The general approach

20. The mandatory thrust of section 2 of the SLA was aimed at the citation of the nominal defendant and service thereon. It did not affect the status of the first defendant, as a debtor as required by section 15(1) of the Prescription Act.
21. According to the Prescription act, the summons must be served on the debtor. In terms of the SLA, that is peremptory. In this case, the first defendant, the debtor was not served with the summons.
22. On the face of the combined summons in issue; the Plaintiff stated as follows;

“To the Sheriff or His Deputy

Inform: Minister of Police, the honourable General Bheki Cele, in his official capacity as the executive head of the South African police service, whose address for the purpose of service of the process in these proceedings is that of the office of the State Attorney, SALU building, 316 Thabo Sehume street, Pretoria Gauteng province, (hereinafter called the first defendant)’. (my emphasis).

Inform: the National Director of Public Prosecutions, Adv. Shamila Batohi, in her official capacity, is an adult female person and currently employed as the national director of the public prosecution with business address, VGM Building, 123 Westlake Avenue, Weavind Park, Silverton, Gauteng Province. (hereinafter referred to as the second defendant)”.

23. Paragraph 2.1 of the particulars of claim reads as follows ‘*the first defendant is the Minister of Police, General Bheki Cele, in his official capacity as the executive head of the South African police service (SAPS), with business address at 7th floor, Wachthuis Building, 231 Pretorius street, Pretoria, Gauteng Province, (my underlining) whose address for purpose of service of the process in these proceedings, are that of the Office of the State Attorney, SALU building, 316 Thabo Sehume street, Pretoria Gauteng province*”.
24. Paragraph 2.2 of the particulars of claim reads as follows “*the second defendant is Adv. Shamila Batohi, in her official capacity, an adult female person and currently employed as the national director of the public prosecution with business address, VGM Building, 123 Westlake Avenue, Weavind Park, Silverton, Gauteng Province, whose address for purpose of service of the process in these proceedings, are that of the Office of the State Attorney, SALU building, 316 Thabo Sehume street, Pretoria Gauteng province*”.

25. The summons was served on the second defendant at her business address at VGM Building. It is unclear why the same was not done for the first defendant, significantly absent a prior arrangement with the first defendant. In reading the three statutes; the Legal Proceedings Act, the SLA Act and the Prescription Act, the summons was supposed to be served upon the first defendant at the business address (*7th floor, Wachthuis Building, 231 Pretorius Street, Pretoria, Gauteng Province*), as it appears in paragraph 2.1 of the particulars of claim and within five days of such service at the office of the State Attorney.
26. The Prescription Act is clear in that the service of summons must be on the debtor, in this case, the first defendant. It is not either the debtor (the first defendant) or the State Attorney. In fact, the State Attorney is served within five days of service on the debtor. In ***Rauwane***⁵, Mahalelo J held that the purpose of section 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.
27. Generally, the plaintiff cannot rely on the service effected on the State Attorney as proper and effective service for the purpose of the SLA and the LPA. To this end, the plaintiff was non-compliant with the provisions of section 2 of the SLA read with the Prescription Act. However, the inquiry does not end here.

Purposive approach

28. In the case of the **African Christian Democratic Party**⁶, *“the Constitutional Court held that the adoption of the purposive approach in our law has rendered obsolete all the previous attempts to determine whether a statutory provision is directory or peremptory on the basis of the wording and subject of the text of*

⁵ *Rauwane v MEC for Health Gauteng Provincial Government* (19009/14) (2018) ZAGPJHC 518, para 10

⁶ *African Christian Democratic Party (ACDP) v Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006

(5) BCLR 579 (CC) para 25

the provision. The question was thus ‘whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose’. A narrowly textual and legalistic approach is to be avoided”.

29. In *Molokwane*, the court held that “*There is also the injunction in s 39(2) of the Constitution, which enjoins courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. Thus, where a provision is reasonably capable of two interpretations, the one that better promotes the spirit, purport and objects of the Bill of Rights should be adopted.*¹ *The right implicated in this case is that of access to courts, enshrined in s 34 of the Constitution.*² *Consistent with this injunction, the interpretation of s 2(2) of the State Liability Act must be one which promotes this right, by considering the underlying purpose of the section, rather than merely its text. This purposive approach is far more consistent with our constitutional values, than reading the section narrowly and strictly, as preferred by the appellants”.*
30. When the State Attorney received the summons on 7 May 2019, it took no action. The plaintiff also did nothing. On 9 July 2019, the summons was served on the NDPP at its business offices. On 11 July 2019, the State Attorney filed a notice of intention to defend the action not only for the NDPP but also for the first defendant, the Minister of Police.
31. In adopting the purposive approach and reading the Legal Proceedings Act, the SLA and the Prescription Act whilst embracing the Constitutional values, in my view, the question is, did the debtor (the first defendant) know or become aware of the summons? Was there any prejudice suffered by the first defendant, and at what stage was it material? It can be accepted that when the first defendant filed its notice of intention to defend the matter, it was aware of the plaintiff’s claim and instructed the State Attorney to protect its interest and defend the plaintiff’s claim.

32. In my view, when the first defendant filed court processes in response to the summons served only at the office of the State Attorney, that step taken by the first defendant changes the complexion of the argument about non-compliance as the purpose of making known the plaintiff's claim to the first defendant was then achieved.
33. To the question of whether there was any prejudice? The first defendant did not only know about the summons but reacted to it by filing relevant court processes and participating in pre-trial conferences. When it was argued on behalf of the first defendant, it was not said that the first defendant suffered any prejudice due to the non-compliance by the plaintiff. Instead, it was submitted that the first defendant readied itself as it had three witnesses from the SAPS, three from the Independent Police Investigative Directorate (IPID) and two from the NDPP. They are ready to testify in the first and second defendants' defence.
34. It is not my finding that the State Attorney accepted the summons on behalf of the first defendant nor that the State Attorney replaced the first defendant as a debtor. The first defendant remained a debtor that was not served with the court process but who ultimately became aware of the summons (plaintiff's claim) as it responded to it.
35. Further, I do not read the Molokwane Judgment to be saying the litigant can either serve the "debtor" or the State Attorney. However, I, among others, read it in relation to the SLA and the Prescription Act concerning the service of process to interrupt prescription.

CONCLUSION

36. I, therefore, hold the view that though the summons was not served on the first defendant, the first defendant became aware of the summons and responded to it by filing relevant court processes in its defence. The first defendant also suffered no prejudice due to the plaintiff's non-compliance of not serving the summons on it. Also, the omission to serve on the first defendant did not render the plaintiff's summons void, as the first defendant became aware of the summons and responded to it. Consequently, the special plea stands to be dismissed.

The order;

37. The special plea is dismissed.

38. No order as to costs.



N. Mazibuko

Acting Judge of the High Court, Gauteng, Pretoria

Counsel for the Plaintiff: Mr RM Maphutha

Instructed by: Makhafola & Verster Incorporated, Pretoria

Counsel for Respondents: Mr TC Kwindu

Instructed by: The State Attorney, Pretoria

Date of hearing: 3 August 2022

Judgment delivered on: 4 August 2022