IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No A320/12

In the matter between:

REGINALD WILLIAM LYNTON RABIE Appellant

and

SCHNETLER DE WIT Respondent

Court: GRIESEL J & NYMAN AJ

Heard: 22 February 2013

Delivered: 26 February 2013

JUDGMENT

GRIESEL J & NYMAN AJ:

[1] This is an appeal against an order granted in the Bellville magistrate's court whereby the magistrate dismissed with costs an application brought by the appellant in terms of rule 60A of the Magistrates' Court Rules.

[2] It arose from an action instituted in the court *a quo* by the present respondent (as plaintiff) against the appellant (as defendant) for repayment of a monetary claim based on an acknowledgment of debt concluded between the parties. (For convenience the parties are referred to as they were in the court *a quo*.)

Procedural history

[3] On 23 August 2011 the plaintiff issued a combined summons, accompanied by a document headed 'Annexure "A" – Particulars of Claim'. Six further schedules were attached to the particulars of claim, including the written acknowledgment of debt ('Skuldbewys') on which the claim is based, as well as voluminous schedules showing how the three individual amounts comprising the claim have been calculated. These latter schedules occupy more than 90 pages of the record, which is an aspect to which I shall return later in this judgment.

[4] After service of the summons on him, the defendant gave notice of his intention to defend the action. He subsequently delivered a notice in terms of rule 60A(2)(b) (followed by an amended notice spelling out the grounds of complaint in more detail) in which he complained that the summons and particulars of claim did not comply with the provisions of various rules in the following respects:

(a) The summons does not comply 'in all respects' with Form 2B, contrary to the provisions of rule 1(4)(a).[1] The complaint in this regard appears to be that although a combined summons was issued, the form of summons corresponds with Form 2, and not Form 2B, as required.

(b) The particulars of claim are defective because they do not contain a heading and case number, contrary to the provisions of rule 6(2).

(c) The particulars of claim are further defective because they do not contain 'a clear and concise statement of the material facts upon which the pleader relies for his or her claim', contrary to the provisions of rule 6(4). The defendant's complaint in this regard was aimed at the voluminous schedules referred to above, the defect being that 'weens geen en of swak nommering [of the annexures to the particulars of claim] is verweerder nie in staat om op genoemde aanhangsels te antwoord of te onderskei nie, meer spesifiek die bewering aangaande die uiteensetting van die onderskeie eise'.

(d) A further complaint based on alleged non-compliance with rule 5(7), read with the High Court Practice Notes relating to claims under the National Credit Act, was abandoned by the defendant's

---

[1] Rule 1(4)(a) provides:

'With the exception of Forms 2, 2A, 2B, 3, 5A and 5B which shall in all respects conform to the specimens, the forms contained in Annexure 1 may be used with such variation as circumstances require.'

attorney in the course of the argument before the magistrate and does not require further attention.

[5] The plaintiff was afforded a period of ten days to remedy the alleged 'irregular steps'. When he failed to do so, the defendant delivered a substantive application seeking dismissal of the plaintiff's action with costs; alternatively, that the combined summons be set aside as an irregular step, accompanied by an order for costs.

[6] In an opposing affidavit delivered on behalf of the plaintiff, his attorney took issue with the defendant's complaints, describing them as 'pedanties' and accusing the defendant and his legal representatives of delaying tactics and 'kwelsugtige litigasie', well-knowing that the plaintiff at that stage (January 2012) was in the terminal stages of a form of lymphoma, as borne out by a letter from an oncologist, attached to the affidavit.

[7] The answer to these allegations, as contained in the defendant's replying affidavit, can only be described as cynical and callous in the extreme: apart from denying the allegation of pedantry, the defendant challenged the plaintiff and his legal representative 'om die sogenaamde terminale fase van die respondent [plaintiff] te bewys en die relevansie wat so 'n terminale fase op regspleging het'. (It is common cause that the plaintiff has in the interim succumbed to his illness and has not yet been replaced in this litigation by his executor.)

[8] After hearing argument, the magistrate took the view that the alleged irregularities complained of by the defendant could either be overlooked or clarified in the course of litigation, because they did not

result in any substantial prejudice to the defendant. He accordingly dismissed the defendant's application with costs, hence this appeal.

On appeal

[9] On appeal before us, Mr *Zazeraj*, who appeared on behalf of the defendant, relied on only two of the alleged 'irregularities' listed in the defendant's notice in terms of rule 60A, namely the first and third defects referred to above. (He wisely did not persist with the second complaint, namely that the particulars of claim do not comply with the provisions of rule 6(2) because they do not contain a heading and case number.)

[10] Both remaining complaints amount, in our view, to formalism for the sake of formalism. The fact of the matter is that the plaintiff's claim is for a 'debt or liquidated amount'. He was therefore entitled, had he so wished, to have issued a simple summons, as authorised by rule 5(2)(b), read with Form 2 of Annexure 1, setting out 'in concise terms' his cause of action in a sentence or two. Instead, he chose to utilise 'a combined summons similar to Form 2B of Annexure 1', as contemplated by rule 5(2)(a). He duly annexed to the summons 'a statement of the material facts relied upon by the plaintiff in support of plaintiff's claim'.

[11] Be that as it may, it appears that the defendant's complaint is based on a narrow, literal interpretation of the provisions of rule 1(4)(a) which require that 'Forms 2, 2A, 2B, 3, 5A and 5B . . . shall *in all respects* conform to the specimens . . . contained in Annexure 1'. In our view, this was an unfortunate choice of words on the part of the rule-maker, which lends itself to unnecessary pedantry, as the present matter

matter illustrates. It is instructive in this context to have regard to what was said by Schreiner JA in *Trans-African Insurance Co Ltd v Maluleka*[2] with reference to the requirement in the erstwhile Transvaal rule 19, which required that a summons 'shall be as nearly as possible in the form set forth in Schedule D':

'The words "as nearly as possible" can hardly be taken at their full face value for, if they were, any departure from the language of the form would involve a breach of the Rule if it would have been possible to avoid such departure. Formalism of that kind was clearly not intended.'

[12] In our view, a similar flexible interpretation must be applied to the requirement in rule 1(4)(a) that the Forms in question should 'in all respects conform to the specimens'. In this regard, the further remarks by Schreiner JA in *Trans-Africa Insurance, supra,* likewise bear repetition:

'No doubt parties and their legal advisers should not be encouraged to become slack in the 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.'[3]

[13] In our view, the complaint based on the incorrect form of summons used can be described, at best for the defendant, as a technical objection to a less than perfect procedural step, which should not even have detained the magistrate, not to mention this court on appeal.

---

[2] 1956 (2) SA 273 (A) at 277A-B.
[3] At 278F-G.

[14] The complaint relating to the schedules that had not been numbered or collated correctly likewise does not warrant serious consideration. First, as conceded by counsel, there is no provision in the rules requiring that the pages of annexures to the summons should be numbered. Obviously it would make everyone's task easier if they were properly numbered and identified. But that is not to say that failure to do so constitutes an 'irregular step', as contemplated by rule 60A. Secondly, as rightly pointed out by the magistrate, any uncertainty or embarrassment on the part of the defendant could have been cured simply by means of a telephone call or other means of communication; alternatively, it can still be cured by means of a request for further particulars for purposes of trial in terms of rule 16(2)(a), or at a pre-trial conference in terms of rule 25, read with s 54(1) of the Act. The defendant's failure to employ any of these alternative solutions inevitably raises questions as to his *bona fides* in this litigation.

[15] Mr *Zazeraj* assailed the judgment of the magistrate essentially on two grounds:

(a) The magistrate 'acted outside his discretion in effectively condoning the plaintiff's non-compliance with the rules' in the absence of a formal application for condonation in terms of rule 60(5)(b).

(b) The magistrate erred in his finding that the plaintiff's alleged non-compliance with the rules did not cause the defendant any prejudice, as prejudice (or the absence thereof) was irrelevant and

should not be taken into account as a factor to condone non-compliance.

[16] Neither of these arguments has any merit. Regarding the first argument, no authority has been quoted to us in support of the proposition, nor have we been able to find any. From a plain reading of sub-rule 60A(3) it is patently clear that a magistrate has a wide discretion to condone or set aside an irregular step:

'If at the hearing of an application in terms of subrule (1) the court is of opinion that the proceeding or step is irregular or improper, it *may* set it aside in whole or in part, . . . and grant leave to amend *or make any such order as it deems fit*.'[4]
[emphasis added]

The same position pertains in the High Court, where Uniform rule 30(3) has almost identical provisions and where, in our experience, it has never been suggested that a formal application is a *sine qua non* for the exercise of the court's wide discretion in terms of the rule.[5]

[17] As for the contention that the magistrate erred in his finding that the plaintiff's alleged non-compliance did not cause the defendant any prejudice, counsel submitted that prejudice (or the absence thereof) was irrelevant and should not be taken into account as a factor to condone non-compliance. Again, no authority was quoted to us to substantiate this argument. This is perhaps not surprising, in the light of the plethora of authority to the contrary.[6] Thus, in *Trans-African Insurance Co Ltd,*

---

[4] See the commentary to this subrule in Jones and Buckle, *The Civil Practice of the Magistrates' Courts in South Africa,* at 60A-4 (Service 2, 2012) and 60A-5 (original service, 2011).
[5] See also Cilliers & others *Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa* (5 ed., 2009) Vol 1 p 741.
[6] See eg Jones & Buckle, *op cit,* at 60A-5 n 3 & 4.

supra,[7] the requirement of prejudice was reaffirmed by Schreiner JA, who quoted with approval what was held by a Full Bench in *Foster v Carlis and Houthakker*[8] in a similar context:

> 'It seems to me impossible to construe the rule otherwise than as conferring upon the Court the power to condone any such irregularity or impropriety, because the contrary view would convert the latter part of the rule into an instruction to the Court to set aside the irregular or improper proceeding . . . It seems to me, therefore, that the Court is entitled to overlook in proper cases any irregularity in procedure which does not work any *substantial prejudice* to the other party.' [emphasis added]

[18] In this context, counsel made the further rather sweeping submission:

'In fact, if anything, the rules of Court were prejudiced by virtue of the Respondent's non-compliance.'

This submission, that the rules must somehow be regarded as being an end in themselves, flies in the face of the *dictum* by Van Winsen AJA in *Federated Trust Ltd v Botha*:[9]

'The court does not encourage formalism in the application of the Rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts.'

---

[7] At 276G-H.
[8] 1924 TPD 247 at 251-252.
[9] 1978 (3) SA 645 (A) at 654D- E and the cases cited therein.

[19] We are satisfied that the magistrate exercised his discretion properly when he came to the conclusion that, even though the summons and particulars of claim do not strictly conform to the requirements contained in Form 2B, the defendant did not suffer any prejudice as a result thereof and for this reason, such irregularity should be condoned. We are of the view that all the various complaints raised on behalf of the defendant are unfounded and border on the vexatious. We can accordingly find no grounds for interference with the magistrate's discretion.

Record

[20] A final aspect requires comment. It relates to the record placed before us on appeal, which comprises 252 pages in total. The bulk of it consists of documents that are totally unnecessary and irrelevant to the issues to be determined on appeal. Thus it includes, *inter alia*, a full transcript of the legal representatives' oral and written arguments before the magistrate (some 60 pages). This is contrary to well-established practice that unless special circumstances are present or the court directs otherwise, it is unnecessary for counsel's argument to be transcribed.[10] It also contains various annexures, occupying more than 90 pages, containing nothing but columns of figures showing how interest on the plaintiff's claim has been calculated. Reams of formal notices, filing sheets and other irrelevant documents also form part of the record. On a rough calculation, approximately 70% of the record was unnecessary for purposes of the present appeal.

---

[10] See *Omega Africa Plastics v Swisstool Manufacturing Co* 1978 (4) SA 675 (A) at 682E–683A; *Leibowitz t/a Lee Finance v Mhlana & ors* 2006 (6) SA 180 (SCA) para 10; *Nkengana v Schnetler* 2011 (1) All SA 272 (SCA) para 17.

[21] Uniform rule 50(8) provides:

'(8)(a) Save in so far as these affect the merits of an appeal, subpoenas, notices of trial, consents to postponements, schedules of documents, notices to produce or inspect, and other documents of a formal nature shall be omitted from the copies of the record prepared in terms of the aforegoing subrule. A list thereof shall be included in the record.

(b)(i) With the written consent of the parties any exhibit or other portion of the record which has no bearing on the point in issue on appeal may be omitted from the record.'

[22] Practitioners have repeatedly been admonished over the years for their failure to comply with the letter and spirit of these provisions, at the same time being warned of the possibility of punitive costs against them for non-compliance.[11] As long ago as 1983 Corbett JA warned that '[t]he time may come when this Court may consider it appropriate in such cases to order that such unnecessary costs be paid by the attorney concerned *de bonis propriis*.'[12] Since then, punitive costs orders have on innumerable occasions been issued against practitioners;[13] yet still the problem persists, as the present appeal illustrates. It is accordingly necessary once again to remind practitioners of their duties in this regard and to warn them of the consequences of non-compliance.

---

[11] See Erasmus *Superior Court Practice* at A1-65 (Service 40, 2012) and the cases cited in footnotes 3 and 4; and at C1-9 (Service 37, 2011) and the cases cited in footnote 3.
[12] *Government of RSA v Maskam Boukontrakteurs* 1984 (1) SA 680 (A) at 692H–693A (other case references omitted).
[13] Erasmus *loc cit.*

[23] The appeal is accordingly DISMISSED with costs.

B M GRIESEL
Judge of the High Court

R M NYMAN
Acting Judge of the High Court