IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISON, PORT ELIZABETH

CASE NO: 1107/2015
Date heard: 5 May 2015
Date delivered: 7 May 2015

REPORTABLE

In the matter between

JOHANNES LODEWIKUS BLIGNAUT **Applicant**

And

DIRECTOR-GENERAL FOR THE
DEPARTMENT OF LABOUR **Respondent**

Uniform Rules – rule 4(9) – service on the office of the State Attorney – whether rule sanctions service in matters where functionary or administrator exercising administrative functions is cited as party – *Held* that reference to "the State" in the rule does not include functionaries or public officials exercising public powers by virtue of their office – service upon the State attorney *in casu* not in accordance with rules – application struck off roll.

JUDGMENT

GOOSEN, J.

[1] This is an unopposed application in which the applicant seeks an order directing the respondent to consider and to decide upon an application for compensation lodged in terms of the Compensation for Occupational Injuries and Diseases Act, Act 130 of 1993 (hereinafter "the Act"). The respondent is cited in his / her

capacity as the official who, in terms of section 4 of the Act is obliged to adjudicate claims for compensation brought in terms of the Act. The respondent is a functionary, falling within the meaning of “organ of state” as defined in section 1 of the Promotion of Administrative Justice Act, 3 of 2000 and section 239 of the Constitution. Service of the application was effected by service upon the State Attorney at Port Elizabeth.

[2] At the hearing of the application Mr. *Horn*, who appeared for the applicant, made detailed submissions in which he sought to persuade me that the service was effective and in accordance with the Rules of this Court. I stood the application down to the commencement of the opposed motion court roll to consider the arguments raised and the authorities to which counsel referred.

[3] Rule 4(9) of the Uniform Rules provides as follows:

> 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 proceeding may be served at the Office of the State Attorney situated in the area of jurisdiction of the court from which such summons or notice has been issued: Provided that such summons or notice issued in the, Transvaal Provincial Division shall be served at the Office of the State Attorney, Pretoria, and such summons or notice issued in the Northern Cape Division shall be served at the Bloemfontein Branch Office of the State Attorney.

[4] The only category which may notionally include the respondent in this application is that covered by the term “the State”. The reference to “Administrator” does not contemplate an “administrator” within the meaning of the Promotion of Administrative Justice Act. The reference to “Administrator” in the rule refers, in the context of the constitutional transition which has been affected, to the Premier of a Province and head of the provincial administration.

[5] It was argued that there is no settled meaning to the phrase “the State” as a concept and that its meaning must be determined by reference to the legislation or rule in which it appears (see Holeni v Land and Agricultural Bank of Africa

2009 (4) SA 437 (SCA)). In developing this contextual argument it was submitted that the term "the State" should be interpreted not as referring to a single juristic entity, but rather as an amalgam of all of its officers and servants. On this basis the ambit of rule 4(9) was such as to permit service of process against a functionary of the state on the office of the State Attorney in the area of jurisdiction of the court.

[6] In support of the argument reference was made to rule 6(13) and the rule 19(2). The former provides that:

> In any application against any Minister, Deputy Minister, Administrator, officer or servant of the state, in his capacity as such, the State or the administration of any province, the respective periods referred to in paragraph (b) of sub rule (5), or for the return of a rule nisi, shall be not less than 15 days after the service of the notice of motion, or the rule nisi, as the case may be, unless the court has specifically authorised a shorter period.
> (My emphasis)

[7] The latter rule provides:

> In an action against any Minister, Deputy Minister, Administrator, officer or servant of the State, in his official capacity, the State or the administration of a province, the time allowed for delivery of notice of intention to defend shall be not less than 20 days after service of summons, unless the court has specifically authorised a shorter period.
> (My emphasis)

[8] These rules, it was submitted, indicate that the framers of the rules intended that rule 4(9), should also apply to officers or servants of the State in their capacity as such. I disagree. In my view the contrary interpretation is indicated. In both rule 6(13) and rule 19(2) an additional category of persons is referred to, namely an "officer or servant of the State", as being persons to whom those particular rules apply. Rather than indicate that rule 4(9) also applies to such persons, the reference to the additional category in rule 6(13) and rule 19(2) highlights the fact that the specified category of persons or institutions referred to in rule 4 (9) does not include "officers or servants of the State" in their official capacity.

[9] Words used in a statute (or in this case the set of rules) are generally taken to have the same meaning. If, as the argument would have it the phrase “the State” is to be consistently read as including reference to “officers or servants of the State” for purposes of interpreting rule 4(9), then the use of that phrase in rules 6(13) and 19(2) would be superfluous.

[10] The contextual interpretation of rule 4(9) was not, however, the only string to Mr. *Horn*’s bow. In his very thorough and able argument he referred to a number of decided cases as reflecting a broader and permissive interpretation of rule 4(9), such as would bring the respondent in this matter within the ambit of that rule.

[11] Reliance was placed on a passage in the judgment of Van Straaten v President of the Republic of South Africa and Others 2009 (3) SA 457 (CC), at paragraph 7, where the court said the following:

> There is one matter which calls for comment. The papers in this application were served on the State Attorney, Johannesburg on 11 December 2008. In terms of Rule 1(8) of the Rules of this Court, read with Rule 4(9) of the Uniform Rules of Court, notice of application may be served on the State Attorney. Service of the papers on the State Attorney, Johannesburg by the applicant therefore constituted proper service on the President and the Minister for Justice and Constitutional Development.

[12] As I understood the submission, it was that since rule 4(9) does not specify that service may be effected at the office of the State Attorney on the President, the above passage indicates that the term “the State” must be regarded as referring to an amalgam of all of its officers and servants.

[13] In my view the passage quoted above does not reflect a “permissive” interpretation of rule 4(9). The President is, in terms of section 83 of the Constitution, the Head of State. Ordinarily when the State is a party, it is the President who is cited in his capacity as Head of State or as the Head of the Executive. The passage in the judgment amounts to no more than the statement of what is, in my view, self-evident, namely that where the President is cited, the

State is a party and therefore that service may be effected on the office of the State Attorney.

[14] Mr *Horn* also referred to three unreported judgments in this division. The first of these was Hlulani v Minister of Health and others [2006] JOL 16831 (Tk). In that matter the question of compliance with rule 4(9) was raised. The case concerned an urgent application in which the applicant sought an order directing the Minister of Health (as first respondent), the Member of the Executive Council for Health (as second respondent) and the Permanent Secretary of Health in the Province (as the third respondent) to pay his emoluments pending an appeal against a decision to discharge him from the public service. Service of the application was effected on the third respondent by service at the office of the State Attorney. It was argued by counsel who appeared for the respondents that such service was not in accordance with rule 4(9). Pakade AJ (as he then was) said the following (at p 2 - 3):

> The application is against the administration of the Eastern Cape Province, a provincial government of the Republic of Africa. These in essence are proceedings against the State. In my view, therefore, the third respondent is an agent of the Provincial Administration or the State. Service effected on him in terms of rule 4(9) is a proper one. Furthermore, the third respondent is before court. He is aware of these proceedings and has briefed counsel to represent him. He would hardly therefore be heard to say that he is not aware of the case he is to answer.

[15] This latter finding, namely that the third respondent had effective notice of the proceedings, is in my view, the true *ratio decidendi* on this point. The statement that the Permanent Secretary of Health is an “agent” of the State and that service is therefore permitted in terms of rule 4(9) is *obiter dictum*. I am unable to agree with the statement that by reason of this “agency”, service may be effected in terms of rule 4(9). In my view, if the rule had been intended to cover agents or servants of the State it would have stated so expressly. The particular portion of the passage upon which the applicant relies is, as I have indicated, *obiter* and is not binding upon me. In any event, for reasons which appear more fully hereunder, I do not consider that it is correct.

[16] The second matter referred to was that of Rumdell Construction (Pty) Ltd v MEC, Health, Eastern Cape Province [2005] JOL 16290 (Ck). There the court was concerned with whether effective service of had occurred. Kemp AJ says the following at paragraphs [8] and [9]:

> The applicant argued in its founding affidavit that it is permissible to effect service of the application on the respondent in terms of rule 4(9) of the Rules of Court. Rule 4(9) provides that when the Minister is the defendant or respondent in his official capacity, then the summons or application may be served on the State Attorney. The crisp question to be answered is thus whether these proceedings have been brought against the respondent in her official or personal capacity. I do not believe that it could be argued that if the MEC is before court in a nominal capacity that relief could be sought against the MEC in his or her personal capacity.
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> The relief sought is to the effect that the respondent would be ordered to appear in court personally, and could also be ordered to pay the costs of the application *de bonis propiis*. Whilst it is true that there is much authority to the effect that an order of costs *de bonis propiis* may be made under certain circumstances against an official acting in such official capacity, this does not mean that the official concerned should not be given notice of and an opportunity to oppose such an application. The relief sought here is to the effect that a *rule nisi* be issued, and that it be served upon the respondent personally, calling upon her to appear personally and to show cause why she should not be ordered to pay the costs *de bonis propiis.* It could hardly be argued that the relief sought is not relief against her in her personal capacity and if that is so, then the provisions of rule 4(9) do not assist the applicant.

[17] It was submitted that these passages indicate that the court accepted that service upon an MEC, a person not specified in rule 4(9), was sanctioned by that rule and that this serves as authority for a broader interpretation of the rule.

[18] It may well be that the Rumdell judgment is to that effect. That however does not mean that the court found that rule 4(9) envisages service upon a servant or functionary of the State by effecting such service on the office of the State Attorney. The same applies to the third judgment referred to, MEC for Health, Eastern Cape v George [2009] JOL 23330 (ECM). In that matter the question was whether service upon a unit designated Shared Legal Services established

within the provincial administration, was in accordance with the rules. The judgment records the following at paragraph [10]:

> Service on a Member of the Executive of a Province can, in my view, only be effected in High Court proceedings in terms of rule 4(1)(i) and (ii) and rule 4(9) of the Rules of Court. The fact that there has been a practice of service serving process on the Member of the Executive Council for the Department of Health on persons working for Shared Legal Services and that such practice has not been queried does not alter the situation. The practice has been queried in this matter and has been found to be irregular as it is apparent from Ms Qanqule's affidavit that persons working for Shared Legal Services are not employees of the Applicant. Service of process directed at the applicant upon Shared Legal Services may possibly be regularised through compliance with rule 4(1)(vi). In this matter there was no such compliance.

[19] None of these judgments specifically find that rule 4(9) sanctions service on the office of the State Attorney in matters where a public officer or administrator is cited in proceedings relating to the exercise of that official's public law or administrative law functions.

[20] I was also referred to a full bench decision of the North Gauteng High Court, namely Ex Parte Thukwane (15301/05) [2005] ZAGPHC 7 (1 January 2005).

[21] That matter concerned an urgent application brought by a prisoner at the Pretoria Central Prison in which a *rule nisi* was sought, calling upon interested parties to show cause why a letter issued by the Registrar of the Court to the Head of the Prison should not be set aside as being invalid. The letter written by the registrar indicated that applications by prisoners are to be served by the Sheriff; to be typed or printed and must be stamped with R80.00's worth of revenue stamps and must be brought in terms of the long form notice of motion. The circumstances giving rise to this are set out in the judgment and need not be repeated here.

[22] A reading of the judgment indicates that the court was not called upon to interpret rule 4(9). The court was dealing with a wholly different question which had arisen

in the context of a spate of applications from prisoners in which the applications would be prepared and delivered to the office of the State Attorney by relatives of the prisoner and then subsequently enrolled for hearing. This would result in prisoners being requisitioned or attendance at court even though the matters were not properly initiated or were not ripe for hearing. As will be apparent from the passages quoted below, the reference to rule 4(9) occurs in the context of the court setting out the peremptory requirement that proceedings are initiated on notice to a party and that this is achieved by way of service of process.

> [4] The biggest problem is that prisoners seem to think that by coming to court, even where the matter is not ripe for hearing, they will speed up the process. They do not seem to understand that courts have to listen to both sides of the story. They do not understand the rules or, if they do, it appears that often they deliberately try to circumvent them.
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> [5] Uniform rule 4(1) of the rules of court is peremptory. It provides that "subject to the provisions of paragraph (aA)" service of "any document <u>initiating application proceedings</u> shall be effected by the sheriff…" [Original emphasis] The ways in which the sheriff is to do that in the case of different classes of respondents are set out in sub rules (i) – (ix). Not one of those sub rules has to do with service upon the State or organs of State. That aspect is specifically dealt with in rule 4(9). It provides:
> *"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 <u>served</u> at the Office of the State Attorney……"* [Original emphasis]
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> [6] The position is clearly that in order to initiate proceedings against an organ of state it will not be necessary to <u>serve</u> upon a specific person or department but that <u>service</u> can be effected at the office of the State Attorney. The service, however, has to be in terms of rule 4(1) i.e.by the sheriff, and more in particular, in terms of rule 4(1)(v), by delivering it to a responsible person. After all, the purpose of having process served through the sheriff is to ensure that the defendant or respondent receives the document initiating the proceedings and that the court has proper proof thereof. [Original emphasis]

[23] The reference to "organ of state" in paragraph 6 of the judgment is perhaps unfortunate. I do not however, consider that the court thereby intended to find, unequivocally, that rule 4(9) applies in all proceedings when an "organ of state" is a party to the process. The court was not called upon to make such a finding. In

any event, if the court did make such a finding, then, in my view it is plainly wrong. I say so because rule 4(9) does not refer to "organs of state" and because the definition of an organ of state, as provided for in section 239 of the Constitution encompasses a wide variety of public bodies. The term is defined to mean:

> (a) any department of state or administration in the national, provincial or local sphere of government; or
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> (b) any other functionary or institution.
>
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
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> (ii) exercising a public power or performing a public function in terms of any legislation,
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> but does not include a court or a judicial officer;

[24] There are numerous judgments in which a great many institutions have been found to be organs of state. These include for example, local authorities, development and planning tribunals, public education and training colleges, universities, and parastatal corporations. It is inconceivable in my view that the court in the Thukwane matter intended, without being called upon to do so, to sanction the service on such a broad range of institutions and public bodies as meet the definition of an organ of state, by service upon the State Attorney. Quite apart from extending the ambit of rule 4(9) beyond the language employed in the rule, the effect upon the State Attorney would almost certainly be overwhelming. Nor would such an extension of the ambit of rule 4(9) serve the purpose for which the rule was enacted, namely that the duly cited defendant or respondent has proper and effective notice of proceedings initiated against it.

[25] In my view, rule 4(9) is clear in its terms. Its purpose is to facilitate service of process initiating proceedings against the specified persons or institutions. There is no warrant or need to extend the ambit of the rule beyond those specified persons and institutions. Nor is there any warrant for interpreting the phrase "the State" to mean any functionary of the state performing official functions and duties. In all proceedings against persons or institutions, including public bodies

and all organs of state not specified in rule 4(9) the other sub rules dealing with service apply.

[26] In this matter, the respondent is cited as an administrator responsible for administrative action required in terms of the Act. To properly initiate proceedings against the respondent service ought to have been effected in terms of rule 4(1). That has not occurred. In the circumstances, it cannot be said that, absent proof of proper and effective service of the papers in this application, that the proceedings have been properly initiated against the respondent. In the circumstances it follows that no relief can be granted and that the proper order is that the application be struck off the roll.

[27] In the result I make the following order:

The application is struck off the roll.

G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances: For the Applicant
Adv. M. F. Horn
Instructed by O'Brien Inc Attorneys