



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.

DATE

SIGNATURE

Case Number: 19130/2021

In the matter between:

STATE INFORMATION TECHNOLOGY AGENCY SOC LTD

(REGISTRATION NUMBER: 1999/001899/07)

Applicant

and

FORENSIC DATA ANALYSTS (PTY) LTD

(REGISTRATION NUMBER: 1999/023867/07)

Respondent

In Re:

FORENSIC DATA ANALYSTS (PTY) LTD

(REGISTRATION NUMBER: 1999/023867/07)

Plaintiff

and

STATE INFORMATION TECHNOLOGY AGENCY SOC LTD

(REGISTRATION NUMBER: 1999/001899/07)

First Defendant

MINISTER OF POLICE

Second Defendant

MINISTER OF TELECOMMUNICATION AND POSTAL

SERVICES

Third Defendant

JUDGMENT

POTTERILL J

[1] This matter was set down as a special motion for two-days of hearing. The papers comprise more than 736 pages. The heads of argument of SITA is a hefty 84 pages and that of FDA 53 pages. This matter is a prime example of *“where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for purposes extraneous to that object.”*¹

¹ *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734F-G

[2] The State Information Technology Agency SOC Ltd [SITA] is the defendant in an action for a claim for damages instituted by Forensic Data Analysts (Pty) Ltd [FDA]. In the matter before me SITA launched two Rule 30 applications in terms of the Uniform Rules. In the first Rule 30 application SITA seeks that FDA's summons and particulars of claim be set aside as nullity. The reasons for this application is fourfold: the summons was not correctly issued; the Rule 41A was not served simultaneously with the summons; no notice was given to the State Departments before the summons was issued, and the particulars of claim [POC] did not comply with Rule 18(10). This Rule 30 application is out of time and SITA seeks condonation for the late filing of the application. FDA opposed the granting of condonation submitting that SITA had not shown good cause.

[3] Pursuant to this application FDA filed a counter-application for condonation for the signing of the summons absent a statement regarding the attorney's right of appearance and a copy of his relevant certificate. Condonation for the late filing of the Rule 41A notice is also sought. Simultaneously FDA applied to be afforded a 10-day period to deliver a notice of intention to amend paragraph 19 of the particulars of claim conditional upon the court finding that FDA's calculation of its lost profits was not set out in accordance with Rule 18(10). Condonation was also sought for the late delivery of FDA's replying affidavit in the counter-application.

[4] In the second Rule 30 application SITA seeks to set aside the notice of bar that FDA served on SITA. In response to this application FDA has in terms of Rule 6(15) filed an application that certain paragraphs of SITA's founding affidavit and relevant annexures be struck out.

The Rule 30 application to set aside the summons and particulars of claim

Were the POC attached to the summons when it was issued by the registrar?

[5] Condonation for the one-day late filing of this Rule 30 application is granted. Counsel for FDA did not belabour the point in oral argument and this application is

standing in the way of the claim being finalised, one way or another. Condonation for the late filing of FDA's replying affidavit in the counter-application is granted on the same basis. Both parties in reply put new evidence before the Court. I have entertained both parties new evidence resulting in no prejudice to either party.

[6] The complaint lies therein that FDA's attorney signed the summons on 15 April 2021 without the POC being signed by counsel. The registrar of the court issued the summons on 16 April 2021. FDA's counsel signed the particulars of claim only on 19 April 2021. On behalf of SITA it was submitted that when the summons was issued it did not, and could not, have had the POC attached because counsel had only signed the POC on 19 April. A candidate attorney, Ms Tyzack of SITA's attorneys, went to examine the registrar's file on 7 September 2021. The file contained only the summons and not the 17 pages of POC and the annexures. The photographs of what she found in the file was attached to her affidavit. An affidavit of Mr Makalima was also filed. He too is an article clerk of the attorneys of SITA and he attended to the registrar's office on 14 September 2021 where a registrar confirmed to him that on the court file, one copy of the summons and POC is retained.

[7] The argument went that the summons was thus not compliant with Rule 17(2) (a) which reads as follows:

“17(2)(a) In every case ... the summons shall be in accordance with Form 10 of the First Schedule, to which summons shall be annexed particulars of the material facts relied upon by the plaintiff in support of the claim, which particulars shall *inter alia* comply with rule 18.”

[8] In answer to these allegations FDA filed the affidavit of Mr Loch, their attorney.

He set out that the POC were drafted on 2 April 2021 and were approved on 12 April 2021. He signed the summons on 15 April 2021. He further stated that he intended for counsel to sign the POC. Ms Duncan, the former article clerk of FDA's attorneys

confirmed that the summons was issued with the unsigned POC as counsel was unavailable to sign the particulars of claim early morning 16 April 2021. As it was during the COVID period there were long queues for issuing and it had to be dispersed to the Sheriff that was on standby for service on that day.

[9] Ms Manana, the Registrar who issued the summons confirms that she issued the summons and would never issue a combined summons if the POC were not attached. Mr Kganedi, the Head Registrar, confirms that in terms of the directives no combined summons will be issued without the POC attached. He also sets out that with the utilisation of the Caselines system when a document is uploaded onto Caselines then the initialising party had fully complied with the directive. He stated that all court papers must be uploaded onto Caselines. He also under oath stated registrars in the records section are instructed to retain only a copy of the summons in the court file, the POC is not retained in the court file in an attempt to save space in the basement section. He also explained that many court documents go missing from files and one would often encounter an empty file.

[10] In reaction to these affidavits being filed, counsel on behalf of SITA requested this Court to refer the issue whether the POC were attached to the summons when it was issued by the registrar to oral evidence in terms of Uniform Rule 6(5)(g):

“Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact ...”

[11] Counsel for FDA argued that in terms of the *Plascon-Evans*² principle. It must be accepted that the POC were attached to the summons when it was issued.

² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

[12] I already in court indicated that to refer the issue of whether the POC were attached to the summons when it was issued to oral evidence, trivial, putting form over substance and a technical objection to hinder the court in deciding the genuine disputes between the parties. It was never submitted that SITA suffered any prejudice. I interpose to exclaim that it was troublesome to hear arguments from senior counsel that the Registrars should be taken to task, and if this Rule 30 is not granted the Court will be complicit in perpetuating an irregularity.

[13] The Rule 30 application based on the fact that the POC were not attached is to be dismissed. In applying the *Plascon-Evans* rule the Court must accept the version of FDA unless the allegations do not raise a real, genuine dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting the allegations merely on the papers.³ In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at par [26] the rule is worded as follows: *“It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts alleged by the applicant’s (Mr Zuma’s) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.”*

[14] There is nothing untenable, far-fetched or uncreditworthy in the allegations of FDA. There is no basis of this Court to reject the version of Ms Duncan that the POC were attached to the summons when the registrar issued the summons. The fact that 6 months later Ms Tyzack did not find the POC on the court file is explained by the registrars of the Court; the Caselines system was implemented and the POC’s are not kept on file. Furthermore, documents get lost from a court file, a fact that I can take judicial note of having experienced same for 15 years working at this Court. There was no argument forwarded that SITA was prejudiced by being served with an unsigned copy of the POC. This basis for setting the summons aside is dismissed.

³ *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) par [12]

Is the summons irregular because the summons was not signed by both counsel and the attorney?

[15] SITA argued in the alternative, that even if the summons was accompanied by the POC, and signed by Loch on 15 April 2021 the summons and POC remain irregular because the summons was non-compliant with Rule 18 in that it must be signed both by an advocate and an attorney, or if the attorney has the right of appearance under the LPC Act, [Legal Practice Act 28 of 2014] then by the attorney only:

- “18(1) A combined summons, and every other pleading except a summons, shall be signed by both an advocate and an attorney or, in the case of an attorney who, under section 4(2) of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995), has the right of appearance in the High Court, only by such attorney or, if a party sues or defends personally, by that party.
- 18(12) If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30.”

And reliance was also placed on Rule 17 of the Uniform Rules of Court:

- “17(3)(a) Every summons shall be signed by the attorney acting for the plaintiff ...”
- “17(3)(c) After paragraph (a) and (b) has been complied with, the summons shall be signed and issued by the registrar and made returnable by the Sheriff to the court through the registrar.”

[16] SITA cannot dispute that the summons was signed by Mr Loch on behalf of

Charle Rossouw Attorneys on 15 April 2021. The complaint on behalf of SITA then morphed to there being no description of FDA's attorneys signing in the capacity as an attorney with rights of appearance. The reason submitted is that he was not signing by virtue of his right of appearance under the LPC Act and in place of counsel, but as the instructing attorney who signed together with counsel. As counsel did not sign there is non-compliance with the rules and the summons is a nullity that has to be set aside. Fortification for this stance was placed on *Fortune v Fortune* 1996 (2) SA 550 (C) It was also submitted that a nullity cannot be condoned and this Court has to set aside the summons and POC.

[17] On behalf of FDA it was argued that SITA cannot rely on this new ground of irregularity that was not raised in the notice in terms of Rule 30(2)(b). But, even if it could rely thereon, there is no practice directive in this division which requires an attorney who signs a pleading with a right of appearance to state that he or she holds such right. Furthermore, neither Rule 17 nor Rule 18 requires that the summons must expressly state that the attorney has the right of appearance. The argument went further that counsel did sign the POC before the summons was served and there is no prejudice to SITA. The non-compliance of the attorney not signing the POC was cured with counsel's signature appended on 19 April 2021. It was common cause that the attorney does have a right to appearance in this Court.

[18] I am satisfied that the attorney for FDA signed the summons. There is no requirement in the Uniform Rules that a right to appearance must *ex facie* the summons contain a statement that the attorney has a right of appearance. There is not such a directive in this Court and the directive issued in the *Fortune* matter is not applicable to this Court. If the attorney signed the summons, then there was compliance with Rule 18. Condonation is not required, but as an aside, a court has a discretion to condone the non-compliance with Rule 18 as found in *Plascon-Evans supra* and *Minister van Wet en Orde v Molaolwa* 1986 (3) SA 900 (NC).

FDA's non-compliance with Rule 41A

[19] This ground for the Rule 30 was abandoned by counsel and requires no address.

Did FDA fail to comply with the provisions of s3(1) of the Institution of Proceedings Against Certain organs of State Act 40 Of 2002 [the Act]?

[20] This Act requires notice to be given to an “organ of state”. On behalf of SITA it was submitted that SITA is a state-owned company established and incorporated in terms of section 2 and 3 of the State Information Technology Act 88 of 1998 [the SITA Act]. In terms of section 17 of the SITA Act, the State is the sole shareholder of SITA where the Minister, on behalf of the State, exercises such rights attached to the State as a shareholder. SITA is a state-owned company established and incorporated in terms of section 2 and 3 of the State Information Technology Act 88 of 1998 [the SITA Act]. Furthermore, in terms of section 17 of the SITA Act, the State is the sole shareholder of SITA where the Minister, on behalf of the State, exercises such rights attached to the State as a shareholder. In acting as an agent of the South African Government SITA clearly exercises power or performs functions in terms of the Constitution.

[21] Section 4(2) of the Act required FDA to take all reasonable steps to ensure the notice was received and that a certified copy of the notice was delivered together with an affidavit from the person who transmitted the notice by electronic mail. It was argued that FDA had not done this. The Sheriff’s return of service, so it was argued, does no more than state that the sheriff served the notice on the company secretary and the company secretary informed the Sheriff that “she is going to e-mail this letter to their Legal Department in Centurion”. This it was submitted did not serve as notice in accordance with the Act.

[22] The Ministers of Police and Telecommunications and Postal Services were also cited as defendants but no relief were sought against them as nominal defendants. No notices in terms of the Act were sent to these defendants. SITA contended that the institution of the main action without giving the Ministers notice in terms of section 3 of the Act, constitutes a nullity and an irregular step because a peremptory jurisdictional pre-condition was flouted.

[23] SITA defended its bringing of this complaint under Rule 30 instead of by means of special plea. It argued that although it has been stated that Rule 30 applies only to irregularities of form and not to matters of substance, this was an oversimplification and it could be applied to this irregularity.

[24] On behalf of the FDA it was submitted that this irregularity complained of cannot be brought by means of Rule 30, but must be brought by means of special plea. But, in any event, FDA did not have to comply with the Act because SITA is not an organ of state. It was argued that this is so because SITA's powers and or functions only flow from the SITA Act. The SITA Act was not enacted in the execution of any provision of the Constitution. The Act does not apply to all organs of state, only those exercising a power or performing a function directly from the Constitution. The fact that FDA did send a letter of demand to SITA is a neutral factor.

[25] The argument that Rule 30 is not the appropriate step for this complaint is upheld. This complaint of non-compliance with the Act cannot be brought by means of Rule 30. Non-compliance with the Act is to be raised by a special plea exactly because it is matter of substance; a jurisdictional pre-requisite before summons can be issued. Counsel for SITA will be well aware that special pleas of exactly this nature are dealt with regularly by means of special plea in this Court.⁴

[26] Having said that, for this complaint not to rear its head again, I find that no compliance with the Act was required. SITA is not an organ of state as it does not exercise a power or perform a function directly from the Constitution; the purpose of the SITA Act clearly dispels any conclusion that it was enacted pursuant to or in the execution of any provision of the Constitution. As for the nominal defendants' no "debt" is claimed from them, no remedy is sought against them and the Act need not to have been complied with.

Does the summons and POC comply with Rule 18(10)?

[27] Rule 18(10) provides as follows:

⁴ *Cochrane v City of Johannesburg* 2011 (1) SA 553 (GSJ) par [19]

“A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof ...”

[28] In its POC FDA alleged that as a consequence of SITA’s breach, it suffered damages in the form of loss profits in the amount of R95 million, calculated based on estimated gross revenue for the period May 2018 to 30 November 2019, less estimated costs of performance. On behalf of SITA it was submitted that this paragraph provides no particularity or a manner that puts SITA in a position to reasonably assess the quantum of the damages. FDA did not utilize the 10 days afforded it to cure this lacuna and cannot now ask the court for a further 10 days to do so.

[29] On behalf of FDA it was submitted that the fact that there was reference to claims for only “successfully completed services” would indicate a calculation of the remuneration that FDA would have earned over that period thus providing some clarity. But, even if the quantum of damages did not comply with Rule 18(10), the POC is not a nullity, only excipiable.

[30] I agree with the submissions on behalf of SITA. The POC does not set out the quantum of damages in a manner that SITA can reasonably assess the quantum thereof and does not comply with Rule 18(10). In terms of Rule 30(3) a Court has a discretion to set aside or grant leave to amend or make such order as it deems fit. I grant FDA 10 days from the date of judgment to amend the POC in order to comply with Rule 18(10).

The Rule 30 application to set aside the notice of bar.

[31] In view of the finding that FDA must amend its POC the notice of bar must be set aside. I therefore find it unnecessary to deal with any of the arguments presented, except in relation to the costs of this application.

Costs

[32] SITA’s application for condonation for the late delivery of the First Rule 30 is

granted. It sought the indulgence and it is to carry the costs for the condonation application.

[33] FDA's condonation for the late delivery of the replying affidavit in the counter-application is granted. It seeks an indulgence and it must carry the costs for the condonation application.

[34] No cost order is made pertaining to the striking out application.

[35] The first Rule 30 application is granted only pertaining to the irregularity of non-compliance with Rule 18(10). FDA is granted 10 days from the date of judgment to amend the POC. Although SITA is not substantially successful, only one of the complained irregularities had any merits, the irregularity complained of and found to exist [Rule 18(10)] did cause prejudice to SITA as to how to plead and therefore I will award costs of this Rule 30 to SITA.

[36] The same fate befalls FDA as to the second Rule 30. In view of it having to amend its POC the notice of bar must be set aside and there is no reason not to award costs to the successful party.

[37] The nature of this matter only required one counsel. Costs will be granted for one counsel only. No order as to costs for the counter-application of FDA is made.

[38] I accordingly make the following order:

38.1 The Rule 30 application is granted with costs on the basis that the particulars of claim do not comply with Rule 18(10). Costs of one counsel.

38.2 The Rule 30 application is granted with costs and the notice of bar is set aside as an irregular step. Costs of one counsel.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 19130/2021

HEARD ON: 17 July 2023

FOR THE APPLICANT: ADV. A.R. BHANA SC

ADV. A.W.T. ROWAN

INSTRUCTED BY: Fasken (Incorporated in South Africa as Bell Dewar Inc)

c/o Savage Jooste & Adams

FOR THE RESPONDENT: ADV. R. MICHAU SC

ADV. C.A.C. KORF

INSTRUCTED BY: Charle Rossouw Attorneys

DATE OF JUDGMENT: 8 September 2023