

Reportable:	<u>YES</u> / NO
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>



IN THE NORTH WEST HIGH COURT, MAHIKENG

CASE NO: CIV APP FB 8/2016

In the matter between:

AECI LIMITED

Appellant

and

MARTHINUS JOHANNES LAUFS

Respondent

CIVIL APPEAL

HENDRICKS J, GUTTA J & DJAJE AJ

DATE OF HEARING : 28 OCTOBER 2016

DATE OF JUDGMENT : 01 DECEMBER 2016

COUNSEL FOR APPELLANT : ADV. A.J.P ELS

COUNSEL FOR THE RESPONDENT : ADV. D.B DU PREEZ SC

JUDGMENT

HENDRICKS J

[1] The matter started as a semi-urgent application. The Appellant, as the applicant in the court *a quo*, issued a notice of motion (and accompanying founding affidavit with annexures) praying for the sequestration of the Respondent in the hands of the Master of the High Court together with ancillary relief.

[2] In his answering affidavit, the Respondent stated that:

“the application is void and of no legal force and effect, because the notice of motion was not signed by an attorney practicing within the area of jurisdiction of the North West Division, Mahikeng of the High Court of South Africa” (“this Court”).

[3] In reply thereto the Appellant in its replying affidavit stated:

“...deny the correctness of this allegation. It is not disputed that the office of the applicant’s attorney of record is situated in Pretoria. It is also not disputed that the applicant’s attorney signed the notice of motion. The applicant’s attorney was admitted as an attorney, not in a particular division, but as an attorney of the High Court of South Africa.”

[4] Gura J, in the court *a quo*, stated the following in his judgment:-

“[5] It is my view therefore that the applicant’s attorney was not properly qualified to sign the notice of motion. The result is that the notice of motion has not been validly issued and is void and of no legal force or effect. On this ground alone the whole application can be disposed off.

[6] Consequently, the application for sequestration is dismissed with costs.”

[5] The Appellant now appeals, with leave being granted by the Court *a quo*, the judgment and order of that court.

The appeal is premised on the following grounds of appeal:-

- “1. The Honourable Court erred in finding, by necessary implication, that it is a peremptory requirement that an attorney, admitted, enrolled and entitled to practice as such in the division of this honourable Court (hereinafter referred to as “a local attorney”), should sign the notice of motion;*
- 2. The honourable Court erred in finding that the notice of motion constitutes a nullity due to the fact that a local attorney did not sign the notice of motion;*
- 3. The honourbale Court erred in finding that it was not required of the respondent to utilize the provisions of Rule 30;*
- 4. The honourable Court erred in not condoning the irregularity, insofar as it may be found to constitute an irregularity;*

5. *The honourable Court erred in finding, by necessary implication, that it is a requirement of the Uniform Rules of Court that a notice of motion should be signed by a local attorney. This is only a requirement in the rules in respect of a simple summons (Rule 17) and a combined summons (Rule 18);*

6. *The honourable Court erred in not finding that there was no conceivable prejudice suffered by the applicant and failing to condone the irregularity particularly as a result of the following:*
 - 6.1 *The application was originally launched as an urgent application and the appellant sought condonation in the notice of motion;*

 - 6.2 *The merits of the matter were fully ventilated in an answering affidavit and a replying affidavit;*

 - 6.3 *The matter was duly set down after both parties had filed heads of argument;*

 - 6.4 *Both parties fully addressed the Court on the merits of the application;*

7. *The honourable Court failed to draw a distinction between a condonable irregularity and something which is ab initio void. At best, even if it is found to be a peremptory requirement that a notice of motion should be signed by a local attorney, it did not cause the notice of motion to be void, but merely irregular;*

8. *The honourable Court erred in not granting a provisional order for sequestration against the respondent.*

9. *The appellant seeks an order in the following terms*
- 9.1 *That the appeal be upheld with costs;*
- 9.2 *That the order of the Court a quo be set aside and replaced with an order in the following terms:*
- 9.2.1 *A provisional order for sequestration is granted against the respondent with such a return date as the honourable Court might deem appropriate in the circumstances.*

[6] Central to this appeal is the issue whether an attorney, who is not admitted in this Court (Division), can sign a notice of motion and what is the effect thereof if such an attorney signs a notice of motion. The attorney (or the applicant if the applicant appears in person) issuing the notice of motion, has to sign the notice of motion and that attorney must be duly admitted in the Division in which the notice of motion is issued. Rule 1 of the Uniform Rules of Court define “attorney” as “*an attorney admitted, enrolled and entitled to practice as such in the division concerned*”.

[7] It is common cause that Appellant’s attorney was not admitted, enrolled and entitled to practice as an attorney in the North West Division, Mahikeng of the High Court of South Africa. The attorney was therefore not entitled to sign the notice of motion *qua* attorney as he is not an attorney of this Division. The notice of motion is voidable because it was not issued and signed by “an attorney

admitted, enrolled and entitled to practice as such in the division concerned”.

[8] In **Magnetic Advertising Co (Pty) Ltd vs Manie van Rooyen (Edms) Bpk** 1957 (2) SA 174 (O) the following appears in the judgment by De Villiers J:

“This is an application for a provisional order off sequestration. The notice of set down is signed by one S. as the attorney for applicant. The Registrar of the Court has drawn my attention to the fact that S. is not an attorney of this Court though he is apparently a duly admitted attorney of a neighboring province. The question arises whether the Court can make any order on the application.

In this Court a notice of application or motion must be signed by the attorney issuing same or by the applicant if he appears in person. It cannot be signed by a person holding the applicant’s power of attorney unless such person is a duly qualified attorney. (Cf. Rule of Court (O) 9 (b); Donovan v. Bevan, 1909 T.S 723; Estate Amod Jeewa v. Kharwa, 1911 N.P.D. 371 at p. 382.) Moreover the attorney who purports to sign on behalf of applicant must be duly admitted to practice in this Division; otherwise the provisions sec 25 of Act 23 of 1934 would Be rendered nugatory. (Cf. Schneider v. Roberts, 1917 E.D.L. 416.) The notice of set down in the present case is clearly irregular since it is not signed bt applicant or by a duly admitted attorney of this Court. Mr. Berman, who appeared for applicant, asked the Court to condone the irregularity. Assuming without deciding that I have the power to condone an irregularity of this nature in terms of Rule of Court 37 (see D’Anos v. Heylon Court (Pty) Ltd., 1950 (2) S.A 40 (C) Goosen v. van Dyk, 19399 W.L.D 32), I am not prepared to do so in the present case: no circumstances have been brought to my notice why I should do so. In the result no order is made on the application.”

Therefore, the signing of the notice of motion by an attorney who is admitted and practice as such in another division amounts to an irregularity which is voidable.

[9] It was contended on behalf of the Respondent that the notice of motion is void and of no legal force and effect, if an attorney duly admitted as defined (or the applicant appearing in person), did not sign it. On the other hand, the Appellant's contention is that its attorney "was admitted as an attorney, not in a particular division, but as an attorney of the High Court of South Africa". This in my view is contrary to the definition of "attorney", namely "an attorney admitted, enrolled and entitled to practice as such in the division concerned".

[10] A High Court Registrar's certificate issued under section 4 (2) of the Right of Appearance in Courts Act 62 of 1995, has the effect that an attorney has the right of appearance in the high court and:

- confers on that attorney the right to appear before, and carry out the functions of an advocate in all divisions of the high court;
- entitles the attorney to sign pleadings, *qua advocate*, in all divisions of the high court.

However, an attorney's right to sign pleadings *qua attorney* is limited to the division in which the attorney was admitted or enrolled.

See: **Liberty Group Ltd v Singh and Another** 2012 (5) SA 526
(KZD)

[11] Practice Direction No. 9 of the Practice Directions of the North West High Court, Mafikeng reads as follows:-

“ATTORNEYS’ NAMES ON DOCUMENTS

1. *The name and telephone numbers (including cellular phone numbers) of the attorney filing documents in the Registrar's office **must** appear in the left-hand bottom corner of the first page of such document.*
2. *The Registrar's office shall refuse to accept any document which does not comply with this requirement.*
3. *Where an attorney signs documents as both the attorney of record for any party and as the attorney who will present the case in Court on behalf of his/her client, he/she must sign twice at the bottom end of the document. In the case where one attorney is an attorney of record for a party but has instructed another attorney to represent his client in this Court, each attorney must sign once.*
4. *The attorney, presenting a case in this Court, must indicate clearly whether he/she has the right to appear in the High Court.”*

[12] In **Rösemann v General Council of the Bar of South Africa** 2004 (1) SA 568 (SCA), the Supreme Court of Appeal pertinently held in paragraph [35] that:

“The signing of the summonses and notice of motion and the furnishing of the name, address and telephone number of the legal practitioner on such documents belong among the bread and butter activities of an attorney”

(emphasis added)

This confirms that an attorney has to sign a notice of motion.

[13] In the matter of **Liberty Group Ltd v Singh and Another**, *supra*, the following is stated in paragraph [40]:

“[40] The signature of the combined summons by an attorney as required by Rule 18, as distinct from the signature of the combined summons by an advocate, has never been the function of an advocate. A signature of the combined summons, qua attorney, cannot accordingly be justified in terms of Section 3 (4) of the Right of Appearance Act, where the summons is issued in a division, other than where the attorney was admitted or enrolled. The authority of an attorney to sign a combined summons must accordingly be found within the provisions of the Attorneys Act. An attorney would be entitled to sign a combined summons, qua attorney, issued in the division in which he/she was admitted and enrolled, or in a division in which he/she has been enrolled by the Registrar of that division in terms of Section 20 (3) of the Attorneys Act, as an attorney thereby entitled in terms of

Section 20 (4) of that Act, to practise within that division. On the facts of the present case, the plaintiff's attorney was admitted and enrolled in the Gauteng High Court, and was accordingly not entitled to sign the combined summons, qua attorney, which was issued in this division, despite the fact that the attorney possessed the right to appear in this division.

(emphasis added)

[14] Every application other than one brought *ex parte* must be brought on notice of motion as near as may be in accordance with Form 2 (a) of the First Schedule of the Uniform Rules of Court. Irrespective whether the application is brought *ex parte* or otherwise, the notice must be signed by the attorney issuing it (or by the applicant appearing in person) and the date and place of signature must also be inserted. It follows that Appellant's submission that an attorney does not have to sign a notice of motion, is unmeritorious.

[15] The gist of the court *a quo*'s judgment and order is that the notice of motion is a nullity, because an attorney admitted and enrolled in the North West Division, Mahikeng, did not sign it. The court *a quo* did not consider the appellant's application for condonation which was made from the bar nor did it pronounce on the other aspects raised in the application and the merits of the application. These issues should be dealt with by the court *a quo*.

[16] A court of appeal exercising jurisdiction has, in addition to any power as may specifically be provided for in any other law, the power, among others, to:

- receive further evidence;
- remit the case to the court *a quo* for further hearing, with such instructions as regards the date and further evidence or otherwise as the court of appeal deems necessary;
- confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.

I am of the view, that seeing that the court *a quo* did not pronounce on the merits of the application and also because an irregularity was committed that does not have the effect of a nullity but is merely voidable, the matter should be remitted to be dealt with by the court *a quo*.

[17] Perhaps it would have been prudent if the attorney of record, after being made aware of the fact that (s)he was not entitled to sign the notice of motion in the answering affidavit, corrected the situation. By so doing, (s)he would have saved the costs incurred.

I am of therefore of the view that the appeal should be upheld. The matter should be remitted to the court *a quo* to be dealt with further. The costs should also follow the result.

ORDER

[18] Consequently, the following order is made:-

- (i) The appeal is upheld.
- (ii) The matter is remitted to the court *a quo* to deal further with the matter.
- (iii) The Appellant is ordered to pay the costs of the appeal.

R D HENDRICKS
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

I agree

N GUTTA
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

I agree

**T DJAJE
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG**