141/1959

141/59.

G.P.-S.134917–1955-6–1,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate Provincial Division.)
(~~Provinsiale~~ Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

NORTHERN ASSCE COMPANY LTD. *Appellant,*

versus

MARY JANE SOMDAKA *Respondent.*

Appellant's Attorney Hetherington & Son *Respondent's Attorney*
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate A.B. Harcourt Q.C. *Respondent's Advocate* J. Gurwitz
Advokaat vir Appellant J.A. Howard *Advokaat vir Respondent*

Set down for hearing on
Op die rol geplaas vir verhoor op Thursday, 19th November, 1959.

(DCL)

(A)

14 & 19 11. 9.45 a.m. — 3.30 p.m.

C.A.V.

Reg.

Coram: Steyn. C.J. Beyers, Ogilvie Thompson, Botha et Holmes.

27.11.59.

The appeal is dismissed with costs.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

THE NORTHERN ASSURANCE COMPANY LIMITED Appellant

and

MARY JANE SOMDAKA Respondent

Coram: Steyn, C.J.,Beyers,Ogilvie Thompson JJ.A.,Botha et Holmes A.JJ.A.

Heard: 19th November, 1959. Delivered: 27-11-1959

JUDGMENT

HOLMES A. J. A. :- This is an appeal from a decision of KENNEDY J. in the Durban and Coast Local Division, dismissing an application for the setting aside of a summons under Order XI Rule 54 of the Natal Rules of Court. The rule is in the following terms :-

"Where any proceeding in an action on the part of one of the parties is irregular or improper,it shall be competent to the opposite party,before taking further steps,to apply to the Court on Motion to set aside such proceeding,and to call upon the opposite party by notice to show cause why the same should not be set aside. The Court, upon the proof of the service of such notice, shall make such order thereon as shall seem meet. "

The irregular or improper proceeding relied upon was that the attorney for the plaintiff had

failed/.....

failed (in circumstances which will be dealt with later) to file a power of attorney with the registrar before suing out the summons, in breach of Order Vl Rule 1 which reads as follows :-

"In every action which shall be commenced in the Court, the Attorney of the plaintiff shall, before any process is sued out to compel the appearance of any person to answer any claim or demand, file with the Registrar his warrant to sue or power of attorney, signed by the plaintiff. "

In this connection I also refer to Order Xl Rules 1 and 2. Rule 1 provides that all civil process may be sued out by any person..... Rule 2 follows :-

"That said process shall be issued by the Registrar for which the warrant to sue shall be his authority....."

The court a quo condoned the irregularity but ordered the respondent (the plaintiff) to pay the costs of the application.

The first submission of Mr. Harcourt, for the appellant, was that Order Vl Rule 1 is imperative and that non-compliance was fatal and could not be condoned. An imperative provision (as distinct from one which is directory) expressly or impliedly visits non-compliance with nullity. Mr. Harcout relied strongly on Frost, Mulligan and Routledge v. Rising N. O. (1905 T. S. 445). That was an appeal from the decision of a magistrate upholding an exception that the copy of the summons served on the defendant was undated

and/.....

and did not bear the name of the clerk of the court. The Magistrate's Court Rules under Proclamation 21 of 1902 (T) were deemed, in terms of section 51 of the Proclamation, to be of the same force and effect as if the same or the substance thereof had been embodied in the Proclamation. Rule 8, in so far as here relevant, reads as follows :-

"A copy of the said summons together with copies of any documents or accounts upon which the said complaint or demand is founded shall be delivered to the Messenger with the said summons and shall be served.....But no case shall be dismissed for or on account of the omission to deliver the copy of any such document or account as aforesaid in case it shall appear to the court that such omission had not in fact and in truth prejudiced the defendant in respect of his defence. "

INNES C.J., who gave the judgment of the court dismissing the appeal, referred to the importance of due citation and to the fact that the law distinctly laid down the mode in which citation should take place, and held that it was very important that the direction so laid down should be strictly observed. He held further that the copy of the summons was wanting in vital respects "It bore no date and no "signature of the officer of the court, without whose signature "the process of the court is not in proper form. The defendant "who got that summons was therefore never cited in the way the "law says he should be cited, and the proceedings against him

"were/.....

"were ineffectual. "

Mr. Harcourt submitted that that reasoning showed clearly that Order Vl Rule 1 of the Natal Rules (read with Order Xl Rule 2) was fundamental to the due citation of a defendant, and was imperative, and that it was intended that a breach should be visited with nullity. In my view the decision in Frost's case (supra) is distinguishable, for there was no provision in Rule 8 (or in the Rules generally) corresponding with the last sentence of Order Vl Rule 54 of the Natal Rules. (This distinction is heightened by the last sentence of Rule 8, which only protected the summons in cases of failure to serve a copy of the document or account it was founded on).

In my view it is clear beyond doubt that the last sentence of Order Vl Rule 54 confers a discretion on the court in the matter of an irregular or improper proceeding in an action. In this respect I agree with the decisions of Distins Seed Cleaning and Packing Co. v. Stuart Wholesalers (1954 (1) S.A. 283 (N) at pages 285 and 286), and Foster v. Carlis and Another (1924 T.P.D. 247 at page 252) dealing with the corresponding Transvaal Rule 37.

Once it is seen that the court has a discretion, it seems to me to follow inescapably that

it/.....

it was not intended that a breach of the Rules relating to actions should necessarily be visited with nullity. Upon this simple ground, the judicial reasoning to the contrary in Allen Pohl, Otto and Theron (Pty)Ltd. v. Schoeman and Another (1954(3) S.A.589 (T)), and Employer's Liability Assurance Corporation Ltd. v. Potgieter (1959 (1) S.A.850 (T)) and Poligan v. Rickagio (1928 N.P.D. 463 at page 464), cannot be supported.

To sum up so far, I hold that Order Vl Rule 1 (read with Order Xl Rule 2) is not imperative (It is not necessary to decide what the position is in regard to Natal Rules not dealing with actions. Rule 54 only refers to actions).

I proceed now to consider, on the facts, the propriety of the condonation of the breach of the Rules in this case. The plaintiff (the respondent in this Court and in the court below) lives in Butterworth, Cape Province. Some months prior to 4th May 1959 she instructed an attorney in Durban to institute proceedings against the appellant in the Durban and Coast Local Division for damages in the sum of £6250. This sum was alleged to represent damages suffered by the plaintiff and caused by the collision with her of a certain motor vehicle in Durban on 4th May 1957, in circumstances rendering the defendant insurance company liable under Act 29 of 1942. After receiving instructions the attorney wrote to

the plaintiff asking her to come to Durban. She intended doing so but was prevented by the illness and death of her mother. The difficulty of taking instructions by post caused further delay. On 13 April 1959 the attorney sent a power of attorney to the plaintiff and asked her to/ complete and return it. The power was received back on 24 April 1959, witnessed and with the 1/- revenue stamp cancelled, but the plaintiff had omitted to sign it. The attorney posted it to the plaintiff again with a covering letter,on 24 April by registered airmail express post. Despite these precautions, it only reached her on 5 May 1959, although she called at the post office daily. She signed the power and posted it on 6 May, and the attorney received it on 11 May. The attorney also sent her a telegram on 1 May, but she only received that on 4 May. In the meantime the prescriptive period of 2 years under section 11(2) of Act 29 of 1942 was running against the plaintiff. Her attorney interviewed the registrar on 4 May 1954 and explained the position. He assured that officer that he expected the power of attorney at any moment. In these circumstances the registrar issued the summons on 4 May 1959.It was served the same day. The power of attorney was filed on 11 May 1959.

The foregoing were the facts

which/.....

which the court a quo had to bear in mind when asked to set the summons aside. It had to "make such order thereon as shall seem meet." In other words it had a discretion, to be exercised judicially upon consideration of the circumstances, to do what was fair to both sides. Dreyer v. Naidoo (1958(2) S.A. 628 (N) at page 629).

In attacking the exercise of a discretion in favour of the plaintiff, Mr. Harcourt made two main submissions. First, he contended that by not setting the summons aside the court a quo frustrated the defence of prescription under section 11(2) of Act 29 of 1942. This argument is unfounded. In accordance with the majority judgment in Kleynhans v. Yorkshire Insurance Co. Ltd. (1957(3)S.A.544 (A.D.)), the last day for the service of the summons in order to obviate prescription was 3 May 1959. Hence it will still be open to the defendant company to raise the defence of prescription in its plea, if it should so wish. Second, Mr. Harcourt stressed the need for proper citation, as emphasised in Frost's case (supra). In that connection it is important to bear in mind the following aspects. The plaintiff had in fact duly authorised the attorney to sue out the summons. It was not a case of the attorney acting without instructions, as appears to have been the position in Allen Pohl's case (supra). The registrar was in fact re-

quested/.....

-quested by the attorney to issue the summons. It was not a case of the registrar acting mero motu. And the copy of the summons which was served on the defendant was, on the face of it, complete and regular. In that respect it was not wanting in some vital information, as was the position in Frosts's case (supra). In these circumstances it seems to me that what was missing was merely the formal proof or evidence of the authority of the attorney to sue out the summons and of the registrar to issue it. I see no reason why that irregularity should not be condoned in a proper case.

As to whether this was a proper case, it must also be borne in mind that the ultimate fault lay not with the plaintiff or her attorney but with the dilatoriness of the postal service. Furthermore, it would certainly be a hardship on the plaintiff to shut her out from ventilating her claim in Court, subject of course to any defence open to the defendant. In all the circumstances I can see no reason for interfering with the discretion exercised in favour of the plaintiff by KENNEDY J.

In the result the appeal is dismissed with costs.

Steyn, C.J.
Beyers, J.A.
Ogilvie Thompson J.A.
Botha A.J.A.
} Concur.