



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case No: 730/2021

In the matter between:

MINISTER OF POLICE

FIRST APPELLANT

GEZANI MICHAEL CHABALALA

SECOND APPELLANT

SELLO CHAUKE

THIRD APPELLANT

SIMPHIWE LAURENS DANTI

FOURTH APPELLANT

and

SAMUEL MOLOKWANE

RESPONDENT

Neutral citation: *Minister of Police and Others v Samuel Molokwane* (730/2021)

[2022] ZASCA 111 (15 July 2022)

Coram: VAN DER MERWE, SCHIPPERS and MAKGOKA JJA and MUSI and
MAKAULA AJJA

Heard: 13 May 2022

Delivered: 15 July 2022

Summary: Civil Procedure – s 2(2) of State Liability Act 20 of 1957 — whether failure to serve summons against Minister of Police on State Attorney nullified summons.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van der Schyff J, sitting as a court of first instance):

The appeal is dismissed with costs, including costs of two counsel where so employed.

JUDGMENT

Makgoka JA (Van der Merwe and Schippers JJA and Musi and Makaula AJJA concurring):

[1] The appeal turns on whether the respondent's omission to serve a copy of a summons issued against the first appellant, the Minister of Police (the Minister), on the State Attorney, rendered the summons a nullity, despite a copy having been served on the Minister. The Gauteng Division of the High Court, Pretoria (the high court) concluded that it did not, and dismissed two special pleas raised by the appellants based on such non-service. The high court subsequently granted the appellants leave to appeal to this Court.

[2] The factual background is briefly this. On 2 December 2015, Mr Molokwane (the respondent) instituted action in the high court against the first appellant, the Minister, the second, third and fourth appellants, in which the respondent claimed damages arising from alleged wrongful arrest and assault by the second to fourth appellants on 8 February 2014. It is common cause that the second to fourth respondents were acting within the course and scope of their employment with the Minister, and they were, respectively, served with copies of the summons on 8 December 2015. There is no controversy about service on these appellants. It is the service on the Minister which is at the heart of the appeal.

[3] Service of the process commencing litigation against members of the national executive, such as the Minister, is governed mainly by s 2(2) of the State Liability Act 20 of 1957 (the State Liability Act). Before its amendment, and at the relevant period to this matter, that section read as follows:

‘(1) In any action or other proceedings instituted by virtue of the provisions of section 1, the executive authority of the department concerned must be cited as nominal defendant or respondent.

(2) The plaintiff or applicant, as the case may be, or his or her legal representative must, within seven days after a summons or notice instituting proceedings and in which the executive authority of a department is cited as nominal defendant ... has been issued, serve a copy of that summons... on the State Attorney.’

[4] The above provisions were not complied with, as the respondent caused a copy of the summons to be served on the Minister at his official place of business, Wachthuis, 231 Pretorius Street, Pretoria, on 4 December 2015. It was never served on the State Attorney as prescribed in s 2(2) of the State Liability Act. There was no appearance to defend by any of the appellants. Consequently, the respondent obtained default judgment on 4 March 2016 against the appellants, in terms of which liability and quantum of the claim were separated in terms of rule 33(4) of the Uniform Rules of Court (the Uniform Rules) and liability was determined in favour of the respondent against the first, third and fourth appellants on the basis that the respondent was entitled to recover his full proven or agreed damages against the appellants. The determination of the respondent’s quantum was postponed *sine die*.

[5] The order granting default judgment was served on the Minister on 22 March 2016. On 26 March 2018, the respondent lodged an application against the Minister for the determination of quantum. That application was served on the State Attorney on 24 August 2018, and on the Minister at his official place of business. The respondent also served a notice of intention to amend his particulars of claim; the amended pages to the particulars of claim; and the order granting default judgment on 4 March 2016, as mentioned already. The application for the determination of quantum was set down for 10 September 2018.

[6] On 29 August 2018, the State Attorney, on behalf of all the appellants, delivered a notice of intention to oppose that application. On 6 September 2018 the State Attorney launched an application on behalf of the appellants to stay the application for the determination of quantum, pending the rescission of the default judgment granted on 4 March 2016. On 25 November 2019 the respondent abandoned the default judgment in terms of rule 41(2) of the Uniform Rules. On 13 December 2019 the State Attorney delivered a notice of intention to defend the action on behalf of the appellants and subsequently delivered their plea to the respondent's particulars of claim.

[7] On 3 September 2020 the appellants delivered an amended plea, in which they raised two special pleas, in the alternative. The main plea was based on non-compliance with s 2(2) of the State Liability Act, as mentioned already. It was contended that because there was no service of a copy of the summons on the State Attorney, the respondent's summons was a nullity. Alternatively, the appellants pleaded that in the event it was found that service was effected on the State Attorney on 24 August 2018 (when the application for determination of quantum against the Minister was served on the State Attorney) the respondent's claim had prescribed, as that occurred more than three years after the respondent's cause of action arose on 8 February 2014.

[8] The special pleas were placed before the high court by way of a Special Case and Statement of Facts in terms of rule 33(1) and (2) of the Uniform Rules, which set out the issues for determination. It was agreed, among other things, that 'if the defendants' special pleas [were] dismissed the trial is to immediately proceed in respect of the issue of the defendants' liability.'

[9] The high court considered the purpose of s 2(2) of the State Liability Act, and reasoned that the non-service on the State Attorney did not render the summons a nullity. At most, the high court held, the non-service constituted an irregular step, which could be rectified. It further held that, in any event, the 'irregular step' of non-service became moot when the State Attorney formally placed itself on record on behalf of the appellants, exchanged pleadings with the respondent's attorneys, and participated in a pre-trial conference. The high court concluded that the appellants had failed to

demonstrate that they were prejudiced by non-service on the State Attorney. It accordingly dismissed the appellants' special pleas.

[10] In this Court, the submissions on behalf of the appellants were as follows. Service upon the State Attorney was 'mandatory' in terms of s 2(2) of the State Liability Act, as that provision was 'couched in peremptory terms by the use of the words "must within 7 days serve".' As the State Liability Act does not make provision for condonation for non-compliance with the service on the State Attorney, a court had no power to condone such non-compliance. In the result, the special plea of non-service should have been upheld. Alternatively, the high court should have found that the respondent's action had been extinguished by prescription by the time summons was served on the State Attorney on 24 August 2015.

[11] The approach to s 2(2) propounded on behalf of the appellants is incompatible with the approach to the interpretation of similar provisions by our courts. As explained in *All Pay Consolidated Investment Holdings (Pty) Ltd and Others v The Chief Executive Officer, South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) para 30, the strict mechanical approach of drawing 'formal distinctions between "mandatory or peremptory" provisions on the one hand and "directory" ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance, has been discarded'.

[12] The jettisoning of the 'mechanical approach' has its origin in *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A). After having concluded that the legislative provision it was concerned with was peremptory, the court went on to enquire whether it was fatal that it had not been strictly complied with. This Court laid down the following test at 646C-E:

'...The enquiry, ... is not so much whether there has been 'exact', 'adequate' or 'substantial' compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is, is not identical with what it ought to be, the injunction has nevertheless been complied with. In

deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved, are of importance.’

[13] In *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H-434A the following was said about the categorisation of statutory requirements as ‘peremptory’ or ‘directory’:

‘... They are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become somewhat blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular...’.

[14] In *Ex Parte Mothuloe (Law Society, Transvaal, Intervening)* 1996 (4) SA 1131 (T) at 1132F, it was observed, with reference to *Maharaj* and other authorities, that there was a ‘...trend in interpretation away from the strict legalistic to the substantive. . .’. It was emphasised that even though the provisions of an Act are peremptory, the question needs to be asked whether or not exact compliance therewith is required. Consequently, the answer will ‘. . . be sought in the purpose of the statutory requirement which is to be ascertained from its language read in the context of the statute as a whole’.

[15] The ‘trend’ referred to above was applied in *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) where it was emphasised that in matters such as the present, the question is whether there has been compliance with the statutory provisions viewed in the light of their purpose. This Court trenchantly observed at para 13:

‘... Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether ‘shall’ should be read as ‘may’; whether strict as opposed to substantial compliance is required; ... etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us

what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have a posteriori, not a priori significance. . . .'

[16] This approach received the imprimatur of the Constitutional Court in *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) para 25. There, it was held that the adoption of the purposive approach in our law has rendered obsolete all the previous attempts to determine whether a statutory provision is directory or peremptory on the basis of the wording and subject of the text of the provision. The question was thus 'whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose'. A narrowly textual and legalistic approach is to be avoided.

[17] There is also the injunction in s 39(2) of the Constitution, which enjoins courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. Thus, where a provision is reasonably capable of two interpretations, the one that better promotes the spirit, purport and objects of the Bill of Rights should be adopted.¹ The right implicated in this case is that of access to courts, enshrined in s 34 of the Constitution.² Consistent with this injunction, the interpretation of s 2(2) of the State Liability Act must be one which promotes this right, by considering the underlying purpose of the section, rather than merely its text. This purposive approach is far more consistent with our constitutional values, than reading the section narrowly and strictly, as preferred by the appellants.

[18] With these interpretive iterations in mind, I turn to s 2(2) of the State Liability Act. Its purpose, especially the requirement that a summons must be served on the State Attorney within seven days after it was issued, is clearly to ensure that the relevant 'executive authority' (the Minister in this case) is afforded effective legal representation in the matter by the State Attorney. If the State Attorney provides such legal representation, in any manner whatsoever, despite it not having been served by

¹ *Wary Holdings (Pty) Ltd v Stalwo (Pty) and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) paras 46, 84, 107.

² Section 34 of the Constitution of Republic of South Africa, 1996 provides:

'Access to courts

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

the sheriff within seven days of the process commencing such proceedings, this purpose would have been served. That would also be the position where, as in the present case, there was no service on the State Attorney at all. In other words, it is not so much about how the State Attorney obtained the knowledge of the process commencing proceedings, as the representation of the party in the legal proceedings itself.

[19] In the present case, a copy of the summons was served on the Minister. In the midst of legal and technical arguments advanced on behalf the Minister, there is deafening silence on the Minister's part as to what he did with the summons after receiving it. The critical point, however is that the State Attorney effectively represented the Minister in this action, by entering appearance to defend the action if *de novo*, by filing a plea and by being able to be ready for trial. Thus, the purpose of the section has been achieved. The Minister's contention that, despite a copy of the summons having been served on him, the summons should nevertheless be declared a nullity solely because it has not been served on the State Attorney, is simply untenable.

[20] One of the overarching considerations in matters of this nature is prejudice. In the present case, I am unable to discern any prejudice suffered by the Minister as a result of non-service of a copy of the summons on the State Attorney. The Minister has not pointed to any. As I have said he was able to serve a plea in which he responded to the respondent's allegations in the combined summons. The absence of prejudice is also evident from the fact that in the statement containing the agreed facts, the Minister asserts none. Instead, the parties agreed that in the event the special pleas were dismissed, the trial would proceed immediately on the issue of liability. To my mind, this is the clearest indication that the Minister suffered no prejudice.

[21] Furthermore, the respondent's condonation application for the late service of his statutory notice in terms of s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (Legal Proceedings Act), was granted. In terms of s 3(4)(b)(iii) of the Legal Proceedings Act, the court granting such application must be satisfied, among others, that the organ of state was not unreasonably prejudiced

by the failure which necessitated the condonation application. The application for condonation was served on the State Attorney, who at that stage, was already on record on behalf of all the appellants. If ever there was prejudice, one would have expected the Minister to place the necessary facts before the court to establish it. Instead, the Minister decided not to oppose the application. It must therefore be accepted that no prejudice occurred to the Minister.

[22] It remains to consider briefly, the appellants' alternative special plea of prescription. As mentioned already, the appellants contended that service on the State Attorney had occurred more than three years (on 24 August 2018) after the respondent's cause of action arose on 8 February 2014. In terms of s 11(d) of the Prescription Act 68 of 1969 (the Prescription Act), the respondent's claim would have prescribed after three years, ie on 7 February 2017. Section 15 of the Prescription Act provides that the running of prescription shall be interrupted by the service on the 'debtor' of any process whereby the creditor claims payment of the debt. There is no dispute that the Minister is the 'debtor' as envisaged in s 15(1) of the Prescription Act.

[23] The respondent's condonation application for the late service of his statutory notice in terms of s 3 of the Legal Proceedings Act, was granted. Similar to the issue of prejudice as discussed above, in terms of s 3(4)(b)(i) of the Legal Proceedings Act, the court granting an application for condonation must be satisfied, among others, that the debt had not been extinguished by prescription. To the extent the high court has granted the condonation, it, of necessity, found that the respondent's claim had not been extinguished by prescription. The issue is thus *res judicata*, and no longer open to the appellants to assert it.

[24] The plea of prescription in any event had no merit. It is correct that when this section is read with s 2 of the Legal Proceedings Act, service on the State Attorney, instead of the Minister, would have been effective service to interrupt prescription. However, this does not mean that the State Attorney replaced the Minister as the 'debtor'. Viewed in this light, service on the Minister, as it happened in the present case, was effective for the purpose of interrupting prescription. The fact that the summons has not been served within the prescripts of s 2(2) of the State Liability Act,

does not affect this. For purposes of interrupting prescription, there was service of 'a process' on the Minister. I am fortified in this view by the fact that, where summons is served without giving the statutory notice in terms of s 3 of the Legal Proceedings Act within the prescribed period, or at all, such service is nevertheless effective for the interruption of prescription if condonation is subsequently granted.³

[25] In all the circumstances the high court was correct to dismiss the special pleas. The appeal must, accordingly, fail.

[26] In the result the following order is made:

The appeal is dismissed with costs, including costs of two counsel where so employed.

T MAKGOKA
JUDGE OF APPEAL

³ See *Minister of Safety and Security v De Witt* [2008] ZASCA 103; 2009 (1) SA 457 (SCA) para 18.

APPEARANCES:

For appellants: H C Janse van Rensburg (with him J J van Rensburg)

Instructed by: State Attorney, Pretoria
State Attorney, Bloemfontein.

For respondent: T Odendaal (heads of argument having been
prepared by J P Van den Berg SC and T Cooper)

Instructed by: Adams & Adams, Pretoria
Honey Attorneys, Bloemfontein.