114/98

REPUBLIC OF SOUTH AFRICA

REPORTABLE
Case No: 113/97

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

T G MANYASHA — APPELLANT

and

THE MINISTER OF LAW AND ORDER — RESPONDENT

CORAM: SMALBERGER, SCOTT, ZULMAN JJA, MELUNSKY and FARLAM AJJA

HEARD: 17 NOVEMBER 1998

DELIVERED: 27 NOVEMBER 1998

JUDGMENT

SMALBERGER JA . . .

SMALBERGER JA:

This appeal concerns the proper interpretation of Rules 10 and 60(5) of the Magistrates' Court Rules. The issues are whether Rule 10 applies to both defended and undefended actions, or only the latter; and whether Rule 60(5) can be invoked to revive a summons that has lapsed.

The background facts are these. On 8 November 1993 the appellant (as plaintiff) in his capacity as father and natural guardian of his minor son, Sonwabo, issued a summons against the respondent (as defendant) in the Magistrate's Court, Grahamstown, for damages arising out of an alleged assault. The summons was served on the respondent on 11 November 1993. Appearance to defend was entered on 2 December 1993 and a request for further particulars was filed on 8

December 1993. Despite repeated requests by the respondent and threats to bring an application to compel their delivery (which never eventuated) the particulars were only furnished on 13 February 1995. It is not necessary to deal with the reasons for the delay.

On 6 April 1995 the respondent filed a special plea that the summons had lapsed in terms of Rule 10. On 6 November 1995 the appellant sought to invoke the provisions of Rule 60(5) in an application to extend the period provided in Rule 10 within which, after service of the summons, further steps in the prosecution of the action had to be taken. In due course the matters were heard. The appellant's application was dismissed and the special plea upheld with costs. The appellant unsuccessfully appealed to the Eastern Cape Division of the High Court, but was granted leave to appeal to this Court. The judgment of the Court

a quo is reported - see *Manyasha v Minister of Law and Order* [1997] 1 ALL SA 729 (E).

Rule 10 provides:

"10. If summons in an action be not served within 12 months of the date of its issue or, having been served, the plaintiff has not within that time after service taken further steps in the prosecution of the action, the summons shall lapse. Provided that where the plaintiff or his attorney files an affidavit with the clerk of the court before the expiration of such period setting out-

(a) that at the request of the defendant an extension of time in which to pay the debt claimed or any portion thereof has been granted to him;

(b) that in terms of the agreement judgment cannot, save in case of default, be sought within a period of 12 months from the issue of the summons; and

(c) the period of the said extension,

the summons shall not lapse until 12 months after the expiration of the period of extension."

At the hearing of the matter in the Magistrate's Court it was

common cause that the appellant had not, after the service of summons, "taken further steps in the prosecution of the action" until the further particulars were delivered more than 12 months later. As a result, if the Rule is applicable to defended actions the appellant's summons will have lapsed.

The issue whether Rule 10 applies to defended as well as undefended actions appears to have first arisen for decision in *Sibiya v Minister of Police* 1979(1) SA 333 (T). It was there held that the Rule applied to both. Since then there have been conflicting judgments in the Transvaal Provincial and Eastern Cape Divisions. The most recent decision on the point is that of the Full Court of the Transvaal Provincial Division in the case of *Langenhoven v Comyn t/a Rags to Riches* 1998(1) SA 710 (T), where the Court subscribed to the view expressed

in *Sibiya's* case. The judgments in which different views were expressed are referred to in the *Langenhoven* judgment at 713 D - J. They have both been reported - see *Kinsman v Two Core Walling and Driveways* 1994(2) PH F 40; *Die Trustees Indertyd van M & L Trust v Jason Lucas h/a Lucas Quality Thatchers* [1996] 4 ALL SA 237 (E). The *Langenhoven* judgment also sets out (at 711 H) the Rule in its original form, and traces, albeit not entirely accurately, its historical evolution until 1968 when the present set of Rules was introduced (at 711 G to 712 D). It is unnecessary to repeat that history save to point out that Order XXXIV (10) was first introduced by Government Notice 2323 of 22 December 1920 published *inter alia* in Government Gazette 1111 of 24 December 1920. It read at the time:

> "Where no steps have been taken by the plaintiff to proceed with the action within six months after the issue of

summons, the summons shall automatically lapse."

This Rule was amended (with effect from 1 November 1923) by Government Notice 1442 of 25 August 1923, published *inter alia* in Government Gazette 1340 of 31 August 1923.

The parties are *ad idem* that the Magistrates' Court Rules have statutory authority and should be construed in the same way as any other legislative enactment (*Chasfre Investments (Pty) Ltd v Majavie and Others* 1971(1) SA 219 (C) at 223 G - H). It is trite that the primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature; in the present matter it is, more pertinently, the intention of the rule-maker that needs to be determined. One seeks to achieve this, in the first instance, by giving the words of the provision under consideration the ordinary grammatical meaning which their context

dictates, unless to do so would lead to an absurdity so glaring that the rule-maker could not have contemplated it (*Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990(1) SA 925 (A) at 942 I - J).

As a starting point in interpreting Rule 10 one should have regard to the words "summons in an action". Without qualification they are wide enough, on a literal interpretation, to encompass all actions, undefended or defended. *Prima facie* the Rules must be taken to apply to all actions unless there is an express provision or a clear implication to the contrary. Neither indication is present in the Rule, as will appear more fully below.

The contextual setting of Rule 10 - its arrangement within the overall scheme of the Rules - lends support to an argument that it was

intended to apply to undefended actions only. This is because it is positioned after the Rules relating to matters such as summons commencing action and service of process but before those dealing with judgment by consent, judgment by default and appearance to defend. The sequence of the Rules would therefore tend to suggest that Rule 10 should be confined to undefended actions. This argument is negated, however, if one has regard to the origin of the Rule in its present form. It was introduced with practically identical wording to its present form in 1936 as Order XXXIV (10). (Such differences in wording as exist are minor, purely grammatical, do not affect the meaning of the Rule and can be disregarded; for practical purposes the original and present form are identical and I shall regard them as such.) The Rule occupied the same position as its predecessor - towards the end of the Rules and after

those relating to appearance to defend and other matters particularly pertinent to defended actions. Its positioning at the time would not have justified an inference that it was intended to apply to undefended actions only. Its subsequent rearrangement in 1968 to occupy a more logical position in the scheme of things is not of itself a strong enough indication of an altered intention.

This conclusion is fortified when regard is had to the historical evolution of the Rule and, in particular, what must be regarded as a significant change in its wording. The Rule after its amendment in 1923 read:

> "In all undefended cases where no steps have been taken by the plaintiff to proceed with the action within twelve months after the issue of the summons, the summons shall automatically lapse." (My emphasis)

Not only was the operation of the Rule specifically limited to

"undefended cases", but the fact that reference was only made to "issue of the summons", and not service as well, showed clearly that the Rule was never intended to apply to a matter that had proceeded beyond the issue of summons, in other words, an undefended matter.

When the wording of the Rule was altered to its present form the word "undefended" was omitted and a reference to the service of summons was incorporated. A change of wording in a statutory provision *prima facie*, although not inevitably, signifies a change of intention (*Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co Ltd* 1947(2) SA 1269 (A) at 1279; *R v Shole* 1960(4) SA 781 (A) at 787 B). Much will depend upon the nature, extent and significance of the change. The change in 1936 was a radical one from the specific ("undefended cases") to the non-specific ("summons in an

action"), and in my view provides a strong indication that the rule-maker no longer intended the application of the Rule to be limited to undefended actions. Had it intended the limitation still to apply the obvious course would have been to retain the word "undefended". Its omission was clearly calculated, not inadvertent. Furthermore, the incorporation of a reference to the service of a summons must be seen as moving the operation of the Rule from a situation which could pertain only to an undefended action closer to a defended one. In this regard one must accept that there was continuity of intention on the part of the rule-maker when the Rule, as introduced in 1936, was incorporated in (virtually) unaltered form in the new set of Rules in 1968, in other words, the change of intention manifest in 1936 must be taken to have still held sway in 1968.

It was argued that when the Rule in its current form was introduced in 1936 the word "undefended" was rendered redundant or superfluous by the introduction of the proviso which indicates that the Rule is only applicable to undefended actions. I do not agree. I see no reason why, sensibly interpreted, the proviso cannot also apply to actions where there has been an appearance to defend followed by an arrangement or settlement, whether overall, partial or conditional. But even if the operation of the proviso was confined to undefended actions, it would not necessarily follow that the rest of the Rule should also be so confined.

I agree with the view expressed in *Sibiya*'s case (*supra* at 336 C - D) that the primary purpose of the Rule is to penalise a supine plaintiff. (A subsidiary or complementary purpose may be to bring about finality,

both administratively and otherwise, to matters where actions have been instituted but nothing done to actively pursue them.) This purpose would apply to both undefended and defended cases. There is no difference in principle between a plaintiff who issues a summons and then sits back and does nothing and one who after service of summons and entry of appearance to defend (or, as in the present instance, after receipt of a request for particulars) acts likewise. In either instance he is being supine, and in both instances his inactivity is worthy of censure. The purpose of the Rule is best served if it applies to both situations. It is true that where there has been an appearance to defend followed by a request for further particulars and nothing further, the actual period of inactivity before the twelve month period from the date of service expires is correspondingly shortened. But the vigilant plaintiff can

guard against, and avoid, any pitfalls created by the Rule. The fact that a defendant who has entered an appearance to defend and requested further particulars, or filed a plea, can utilise the Rules to compel a plaintiff to respond and take further steps in the prosecution of the action does not alter the plaintiff's position. It may suit a defendant, for tactical or other reasons, simply to sit back and do nothing. But the Rule is not designed to penalise a defendant for inaction or a failure to take steps to bring a matter to finality. The most that can be said is that the Rule probably has greater application in undefended matters than in defended matters. It does not follow that it should not apply to both. And it is a far cry from concluding that it can only apply to undefended actions.

It was also argued that if the Rule were to be interpreted to apply to defended actions it would give rise to a number of anomalies. Some

of these so-called anomalies are alluded to in the judgments referred to in the *Langenhoven* case. Others were raised in argument. Anomalies have their place in the process of interpretation (*Manjra v Desai and Another* 1968(2) SA 249 (N) at 254 B;). Anomalies one way or another are an inevitable consequence of most statutory provisions. The fertile mind will always be quick to find them. In dealing with anomalies one must draw a distinction between far-fetched anomalies and those that are ordinary and predictable (*Aetna Insurance Co v Minister of Justice* 1960(3) SA 273 (A) at 278 B - D). I do not propose to deal with the various anomalies that have been suggested. Suffice it to say that they strike me as being more apparent than real, do not lead to an absurdity (it not having been suggested that they did) and, more importantly, arise from situations which can be guarded against, forestalled or avoided by

a vigilant plaintiff who, after all, is in a position largely to control the litigation process and determine his own destiny.

In the result there is no reason, or no sufficient reason, to depart from the literal interpretation of Rule 10. I am accordingly of the view that it applies to both defended and undefended actions as found by the Court *a quo* as well as the courts in the *Sibiya* and *Langenhoven* cases.

As it was common cause that the appellant had taken no further steps in the prosecution of the action after service of summons it is not necessary to consider the meaning of that phrase in Rule 10. What it clearly does not require of a plaintiff is that he should bring his action to finality within twelve months of the service of summons. It would seem that all that is required of a plaintiff is that he should within that period advance the proceedings one stage nearer completion, thereby

evincing his intention of pursuing the matter further. In view of the consequences that flow from non-compliance with Rule 10 it may require a restrictive interpretation in this respect. A step, rather than steps, in advancing the proceedings is probably all that is required to preclude the potentially harmful operation of Rule 10 (*cf Kagan and Co v Gunter's Store* 1955(2) SA 618 (O) at 621 C - D). I express no firm view on the matter.

This brings me to the next issue which is whether the provisions of Rule 60(5) can be invoked in order to revive the appellant's lapsed summons. This also involves a determination of the rule-maker's intent. Rule 60(5) provides:

> "(5) Subject to the provisions of rule 17(1)(b), any time limit prescribed by these rules, except the period prescribed in rule 51(3) and (6), may at any time, whether before or after the expiry of the period limited, be extended-

(a) by the written consent of the opposite party; and

(b) if such consent is refused, then by the court on application and on such terms as to costs and otherwise as may be just."

Rule 17(1)(b) prohibits a defendant from raising an exception without leave of the Court consequent upon a failure to deliver particulars of any exception to a summons; Rule 51(3) and (6) relate to an appeal and a cross-appeal. They are not germane to the present enquiry.

The issue referred to resolves itself into a question of what the meaning is of the word "lapse" and whether the twelve month period referred to in Rule 10 is a "time limit prescribed by these rules" capable of extension.

The meaning of "lapse" within the context of Rule 10 was considered in *Minister of Law and Order and Others v Zondi* 1992(1) SA 468 (N). In delivering the judgment of the Court Thirion J (at 470

I) referred to the observations of Selke J in *Dawood v Abdoola and Another* 1955(2) SA 365 (N) at 368 that the more usual meaning of the verb "to lapse", in the parlance of the law, is "to fall or pass away finally". He also referred (at 471 B) to *Pietermaritzburg Corporation v Union Government* 1935 NPD 36 at 51 where Matthews AJP said:

> "'Lapse' is a term which can only mean to come to an end altogether. The meaning given by *Webster's Dictionary* to 'lapse' when used in this sense is 'to become ineffectual or void'."

To these references may be added the *Shorter Oxford English Dictionary's* definition of "lapse" in a legal sense (Vol I, 1176) *viz* "[t]he termination of a right or privilege through neglect to exercise it within the limited time . . .".

Thirion J went on to conclude (at 471 B - F):

"The meaning of an expression must depend to a large

> extent on the context in which it is used, but on the view which I take of Rule 10, its effect is to render a summons void at the expiration of the period of 12 months unless a further step has been taken in the prosecution of the action within that period and provided that the proviso to the Rule does not find application.
>
> . . . .
>
> It would seem to me that the object of Rule 10 is to penalise a plaintiff who has been unduly dilatory in taking a further step in the prosecution of his action after issue or service of the summons. This object is achieved by depriving the summons after the passage of the prescribed period of time of all legal efficacy."

I agree. This corresponds with the use of the word "verval" in the Afrikaans text of Rule 10, a word which, if anything, is even clearer and stronger in its meaning than "lapse". Die *Verklarende Afrikaanse Woordeboek* (8th Ed. p 1020) defines "verval" as, *inter alia*, "ongeldig word". *HAT* p 1273) gives as one of its meanings "sy geldigheid of waarde verloor".

The matter does not end there. Thirion J went on to add (at 471 F - G):

> "The fact that a summons has lapsed in this sense would, not by itself, debar the Legislature from providing for its revival or for it to be reinvested with legal efficacy but, having regard to the important legal consequences which would flow from such revival and the prejudice which it might cause a defendant, it is hardly likely that the Legislature would have left the matter of its revival to be dealt with under a general provision such as Rule 60(5) . ."

In coming to this conclusion the learned judge appears to have been influenced by three factors:

(a) the fact that the rule-maker did not circumscribe in detail *the requirements which had to be complied with for a* revival of the lapsed summons to take place (at 471 G);

(b) the fact that the proviso to the Rule "sets out the requirements which have to be complied with in order to

prevent a summons from lapsing", this being "an important indication that the [rule-maker] contemplated that only in the case provided for in the proviso, and in no other, can there be an extension of the period of 12 months" (at 471 H - I); and

(c) the fact that in other Rules which provide for lapsing a magistrate is not competent under Rule 60(5) to grant an extension of time (at 471 J - 472 C).

Re (a): I do not find this a compelling consideration. There is no reason why the requirements for revival need to be spelt out if the rule-maker intended that the extension of the 12 month period by (a) written consent of the opposite party, or (b) order of court could effectively revive or reinstate the summons. Such intention would not be in conflict with the

purpose of Rule 10. The sanction for inaction remains. The plaintiff is penalised for not taking further steps within the prescribed period - his summons lapses. But the situation is not irretrievable. If written consent to the extension of the period, or failing that, a court order, can be *obtained, there is no fundamental principle which precludes the revival* of a summons through extension of the period. In the former instance there can be no prejudice to a defendant who has consented to an *extension of time; in the latter instance the question of possible* prejudice is a factor to be considered in the exercise of the magistrate's discretion. Nor is there anything absurd or incongruous in such a situation. Furthermore, there can be many reasons for a plaintiff's inactivity after the service of summons, just as there can be many reasons for a plaintiff's failure to comply with other time limits

prescribed in the Rules. In my view it would be perfectly understandable if the rule-maker decided to give a magistrate, in the absence of written consent, an extensive discretion to decide whether or not extensions of time should be granted when time limits prescribed by the Rules had been exceeded, without circumscribing the requirements in detail.

Re (b): Reliance on this factor is in my view misplaced. What it overlooks is that the proviso to Rule 10 caters for a special and fairly exceptional case where an otherwise apparently inactive plaintiff is able to obtain an extension *as of right* without the need for written consent of the opposite party or having to satisfy a magistrate to exercise a discretion in his favour. From this it does not necessarily follow that a plaintiff is precluded, in different circumstances, from obtaining an

extension of time in terms of Rule 60(5) with such written consent or leave of the court.

Re (c): The other cases provided for in the Rules where extensions could be granted otherwise than under Rule 60(5) do not, in my judgment, indicate that Rule 60(5) is not applicable in a case such as this. Where appeal or cross-appeals have lapsed there is a power, not in the magistrate, it is true, but in the High Court, as the court of appeal, to grant an extension. Where a warrant referred to in sec 65 F(1) or sec 65 G of the Magistrates' Courts Act 32 of 1944 has lapsed it may be extended under the proviso to Rule 45(4) by a period not exceeding 12 months: in other words the power to extend, in that case, unlike the general power under Rule 60(5), is limited in a particular way. In neither of the instances mentioned by Thirion J is there a "lapse" which

inevitably results in a permanent non-remittable termination of the right to proceed.

Rule 60(5) provides for the extension of "any time limit prescribed by these rules". The word "any" is one of very wide import (*Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983(1) SA 254 (A) at 261 B - D). Rule 10 effectively imposes on a plaintiff, on threat of a sanction, a time restriction within which further steps (in the prosecution of an action) have to be taken after issue or service of summons. Although coupled with a sanction, the restriction none the less remains a time limit. As such it *prima facie* falls within the ambit of Rule 60(5). I can think of no compelling reason why the operation of the Rule should be precluded. It is axiomatic that the rule-maker could have put its intention beyond doubt, if it was so minded, by

expressly excluding Rule 10 from the operation of Rule 60(5). It chose not to do so.

In interpreting Rule 60(5), and how it impacts on Rule 10, two further considerations are worthy of mention. The first is that in a matter pending in a High Court a plaintiff must, even if the action is undefended, proceed therewith within a reasonable time: the court has, however, a discretion to allow proceedings on a stale summons to continue: see Herbstein and Van Winsen: *The Civil Practice of the Supreme Court of South Africa*, 4th Ed 425-6, where the main decisions on the point are discussed. Neither principle nor policy dictates that there should be a fundamental difference between the position in the High and Magistrates' Courts (subject to the express terms of the respective legislative provisions that bear on the matter). In a case of

doubt as to the rule-makers' intention it seems appropriate to strive for equality of treatment in the respective courts, lest a plaintiff be better off in one rather than the other for no reason apart from the size of his claim. The second is that Rule 10 could have serious consequences for a plaintiff; consequences, moreover, out of all proportion to the latter's "fault". This calls for a restrictive interpretation of its effect to make it as least burdensome as possible; differently put, it calls for a wider interpretation of any Rule that may impact upon it in order to curtail Rule 10's radical effect.

In all the circumstances it seems to me that on a proper interpretation of Rule 60(5) it permits of an extension of the period of 12 months in Rule 10, either with the written consent of the opposite party or in the exercise of the court's discretion, and the corresponding revival

of the summons that has lapsed. (Written consent in the majority of cases is an unlikely prospect, but there may be instances where it would suit a defendant to give consent in order to dispose of a matter.) In my view the magistrate was empowered in terms of Rule 60(5) to grant the appellant's application for an extension of time to take a further step in the prosecution of the action and on the facts of this matter the application should have succeeded. Mr Ford, who appeared for the respondent, very fairly and in my view correctly, conceded during argument that if the magistrate was empowered to grant an extension under Rule 60(5), a sufficient case for the granting of such an order had been made out on the papers.

The following order is made:

1) The appeal is allowed, with costs.

2) The order of the court *a quo* is set aside.

3) The order of the magistrate is altered to read:

"a) The plaintiff's application in terms of Rule 60(5) of the Magistrates' Court Rules is granted.

b) The period of 12 months in Rule 10 within which to take a further step in the prosecution of the action is extended to 14 February 1995.

c) The special plea is dismissed, with costs."

4) The respondent is to pay the appellant's costs of appeal in the court *a quo*.

J W SMALBERGER
JUDGE OF APPEAL

SCOTT JA)Concur
ZULMAN JA)
MELUNSKY AJA)
FARLAM AJA)