THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1394/2018

In the matter between:

JONE JOHN MOTLOUNG	**FIRST APPELLANT**
MOSELE MERRIAM MOLOI	**SECOND APPELLANT**
and	
THE SHERIFF, PRETORIA EAST	**RESPONDENT**
STEINMANN ATTORNEYS	**FIRST THIRD PARTY**
CJ VAN RENSBURG ATTORNEYS	**SECOND THIRD PARTY**

Neutral citation: *Motloung and Another v The Sheriff, Pretoria East and Others* (Case no 1394/18) [2020] ZASCA 25 (26 March 2020)

Coram: SALDULKER, SWAIN and MOLEMELA JJA, and GORVEN and EKSTEEN AJJA

Heard: 9 March 2020

Delivered: 26 March 2020

Summary: Summons – not signed by registrar – condonable or nullity – interpretation of rule 17(3)(c) of the Uniform Rules of Court – absence of signature not on the same footing as a summons which had not been issued – susceptible to condonation under Uniform Rule 27(3).

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Baqwa J, sitting as court of first instance): *judgment reported sub nom Motloung & Another v The Sheriff, Pretoria East & Others* [2018] ZAGPPHC 664; 2019 (3) SA 228 (GP).

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the high court is set aside and replaced by the following order:

(a) The special plea is dismissed with costs.

(b) The defendant is directed to pay the costs arising from the exception.

(c) The costs in paragraphs (a) and (b) hereof shall include the costs of two counsel where so employed.

JUDGMENT

Gorven AJA (Saldulker, Swain and Molemela JJA and Eksteen AJA concurring)

[1] The crisp issue in this appeal is whether a summons which has not been signed by the registrar of the court is a nullity or a defective pleading which is condonable under Uniform Rule 27(3). There are conflicting decisions of two divisions of the High Court on the issue. In *Noord-Kaap Lewendehawe*

Koöp Beperk v Lombaard,[1] Erasmus J held that such a summons is a nullity and not susceptible of condonation. In *Chasen v Ritter*,[2] Burger AJ held that the absence of the signature of a registrar could be condoned.

[2] The appellants were involved in a motor vehicle collision on 15 January 2007. They instructed their attorney to institute action against the Road Accident Fund (the RAF) for damages arising from the collision. A summons was prepared and taken to the Registrar of the Gauteng Division of the High Court, Pretoria. The Registrar allocated a case number and stamped the summons. The stamp contained the date on which he processed the summons, his designation as Registrar and his name, BI Ankowitz. The summons was returned to the attorney for service. It later emerged, however, that the Registrar had not signed the summons.

[3] The appellants' attorney sent the summons to the respondent for service. The respondent refused to serve it. He took the view that 'only once a summons is signed by the Registrar [is it] constituted as a court process'. He contended that the summons was a nullity and did not amount to court process and that he was accordingly not obliged nor permitted to serve it.

[4] Because the summons was not served, the claim against the RAF prescribed. The appellants sued the respondent for damages arising from his failure to serve the combined summons. They averred that, because of this, they were precluded from claiming from the RAF. As such, they had suffered damages in the sum which would have been awarded against the RAF.

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[1] *Noord-Kaap Lewendehawe Koöp Beperk v Lombaard* 1988 (4) SA 810 (NC).
[2] *Chasen v Ritter* 1992 (4) SA 323 (SE) 325-327; [1992] 4 All SA 137 (SE).

[5] The respondent initially excepted to the particulars of claim. The exception came before Fourie J in the Gauteng Division of the High Court, Pretoria. He did not give a judgment but instead ordered the respondent to deliver a plea. The respondent entered a special plea and pleaded over the merits. The special plea raised the defence of nullity mentioned above. The respondent also joined the two third parties in the action. They took no part in the aspect of the matter which gave rise to this appeal, nor in the appeal itself.

[6] The special plea was adjudicated separately, in terms of rule 33(4) of the Uniform Rules of Court, before Baqwa J in the Gauteng Division of the High Court, Pretoria (the court of first instance). It was dealt with on the basis that the only defect in the summons was the lack of signature of the registrar. The sole issue was whether this meant that it was a nullity and thus did not amount to court process. The court of first instance upheld the special plea and dismissed the appellants' claim,[3] but granted leave to appeal to this court.

[7] This finding was squarely based on the decision in *Lombaard* and on the following obiter dictum of Rumpff JA in *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk*:[4]

'A summons that is not issued by the registrar would be a nullity and service of such a summons would not result in action being instituted.'[5]

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[3] The judgment is reported as *Motloung and Another v The Sheriff Pretoria East and Others* [2018] ZAGPPHC 664; 2019 (3) SA 228 (GP).

[4] *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 780G. The dictum is obiter because that matter concerned a notice of motion rather than a summons. Rumpff JA contrasted the position of a notice of motion which had not been issued with that of a summons that had not been issued.

[5] My translation from the original Afrikaans which reads: ''n Dagvaarding wat nie deur die griffier uitgereik is nie, sou 'n nulliteit wees en deur betekening van so 'n dagvaarding sou geen geding ingestel word nie.'

Lombaard held that, because rule 17(3)*(c)* requires a registrar to issue and sign a summons, where the original summons has not been signed by the registrar, the sheriff had no lawful direction to serve it.[6] The court of first instance concluded:

'What can be gleaned from both the *Republikeinse Publikasies* and *Noord-Kaap Lewendehawe Koöp* decisions is that the signature and its issuing being joined by the conjuctive "and" are critical components of the Registrar's instruction. It goes without saying that absent one or two of those requirements, the document is visited with nullity.'[7]

[8] Rule 17 deals with the provisions relating to summonses. The requirement that the registrar must sign a summons is found in rule 17(3)*(c)*. The proper approach to this matter lies in the interpretation of the provisions of rule 17(3)*(c)* in the context of the rules as a whole.[8]

[9] The established approach to interpretation was set out by this court in *Endumeni Municipality*:[9]

'Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.'

To this must be added what was said in *Cool Ideas 1186 CC v Hubbard and Another*:[10]

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[6] *Lombaard* at 816I-J.
[7] Paragraph 19.
[8] *Minister of Prisons and Another v Jongilanga* 1985 (3) SA 117 (A) at 123B-D.
[9] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18. (References omitted.) This approach was confirmed by the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) para 29.
[10] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC) para 28. (References omitted.)

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'

[10] The starting point is the wording of a provision. The relevant parts of rule 17 provide:

'(1) Every person making a claim against any other person may, through the office of the registrar, sue out a summons or a combined summons addressed to the sheriff directing him to inform the defendant *inter alia* that, if he disputes the claim, and wishes to defend he shall —

… .

(3) *(a)* Every summons shall be signed by the attorney acting for the plaintiff and shall bear an attorney's physical address, within 15 kilometres of the office of the registrar, the attorney's postal address and, where available, the attorney's facsimile address and electronic mail address.

. . .

(c) After paragraph *(a)* or *(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.'[11]

What, then, of the language used in rule 17(3)*(c)*?

[11] Paragraph *(b)* is not relevant to this matter.

[11] The rule says that the 'summons *shall* be signed and issued by the registrar'.[12] The word 'shall' does not necessarily denote a peremptory provision. In *Sutter v Scheepers*,[13] Wessels JA suggested how to arrive at the 'real intention' of such a provision. His approach was helpfully summarised, in *Pio v Franklin NO*, as follows:[14]

'(1) The word "shall" when used in a statute is rather to be considered as peremptory, unless there are other circumstances which negative this construction.

(2) If a provision is couched in a negative form, it is to be regarded as a peremptory rather than a directory mandate.

(3) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.

(4) If when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.

(5) The history of the legislation also will afford a clue in some cases.'

In the present matter, the provision is couched in positive terms. Its breach carries no sanction at all, let alone one of nullity. Applied to the present matter, these guidelines favour an interpretation that the provision is directory only. However, the first principle requires consideration of 'other circumstances which negative this construction.'

[12] One such circumstance is the dictum of Rumpff JA in *Republikeinse Publikasies* concerning a summons which is not issued.[15] Another is provided

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[12] My emphasis.
[13] *Sutter v Scheepers* 1932 AD 165 at 173 – 174.
[14] *Pio v Franklin NO and Another* 1949 (3) SA 442 (C) at 451.
[15] See fn 4 above.

in the matter of *Jongilanga*.[16] There the address of the respondent's attorneys given in the summons was more than eight kilometres from the office of the registrar. Rule 17(3)*(a)* uses similar terms to those of rule 17(3)*(c)*, providing:

'Every summons *shall* be signed by the attorney acting for the plaintiff and *shall* bear an attorney's physical address, within 8 kilometres of the office of the registrar'.[17]

Eloff AJA distinguished the breach in *Jongilanga* from that referred to by Rumpff JA, explaining:

'It stands to reason that when the basic component of an action, viz the issue of a summons by a Registrar, is absent, the Court will not condone the omission.'[18]

He held that the requirement to provide an address no further than eight kilometres from the office of the registrar did not stand on the same footing as the requirement that a summons be issued. The latter was, as he put it, 'the basic component of an action' while the former was not. Eloff AJA held that although 'the Rule is couched in peremptory terms, the Court has a discretion to condone a breach of its requirements'. This court has thus held that the use of 'shall' in rule 17(3)*(a)* makes the provision peremptory. I see no reason why that word should be construed differently in a different sub-paragraph of rule 17(3). In my view, therefore, the provision for signature is peremptory.

[13] The context of rule 17(3)*(a)* has shed light on one aspect of the rule. Rule 27(3) provides a broader context and reads:

'The court may, on good cause shown, condone any non-compliance with these Rules.'

The effect of this was explained in *Northern Assurance Co Ltd v Somdaka*:[19]

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[16] See fn 8 above.
[17] My emphasis. This was how the rule read at the time. It has since been amended to 15 kilometres.
[18] *Jongilanga* at 123G-I.
[19] *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A) at 595A-C.

'Once it is seen that the Court has a discretion, it seems to follow inescapably that it was not intended that a breach of the Rules relating to actions should necessarily be visited with nullity.'

The key word here is 'necessarily'. Even the breach of a peremptory provision does not invariably result in nullity. On the other hand, the dictum in no way excludes that outcome. The effect of the breach of the specific provision must be assessed.

[14] *Somdaka* approved the following dictum in *Foster v Carlis and Houthakker*:[20]

'But notwithstanding this emphatic language, the Courts have generally adopted the principles laid down by Lord Campbell in *The Liverpool Bank v Turner* (1861, 30 LJ Ch 379) where he said "No universal rule can be laid down as to whether a mandatory enactment shall be considered as directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."'

This seems to suggest that there are three categories of irregularity; directory rules whose breach can be condoned, peremptory rules whose breach can be condoned and peremptory rules whose breach is visited with nullity.

[15] As mentioned, rule 17(3)*(c)* is couched in peremptory terms. The failure to sign thus breached a peremptory provision. This does not necessarily mean that it results in nullity. It has been seen that, in the context of rule 17(3), such a breach was condoned in *Jongilanga*. What, then, is the position in the present matter? Was the breach condonable or was it visited with nullity?

[20] *Foster v Carlis and Houthakker* 1924 TPD 247 at 252.

[16] Reverting to the wording, rule 17(3)*(c)* requires two distinctive actions of registrars. They are required to sign and issue a summons. The use of the word 'and' does not convert these into a single action as appears to have been the reasoning in the court of first instance.[21] All that it does is make the word 'shall' applicable to both actions. Both are peremptory in the context of rule 17(3). Because the rule distinguishes between two specific and separate acts required of the registrar, they cannot amount to the same thing. This must mean that, factually, one can be done and not the other. A summons can be signed without it being issued. A summons can also be issued without it being signed.

[17] The significance of the two different actions for the present matter is that the only irregularity relied upon is the lack of signature. This means that we are here dealing with a summons which has been issued but not signed. The dictum in *Republikeinse Publikasies* concerns a summons which has not been issued. This, said Rumpff JA, would be a nullity. No mention is made in the dictum of the failure to sign. The dictum is accordingly not of direct application to the present matter. It does, however, provide the most immediate context in which to interpret the provision, standing as it does in the same sub-paragraph of the rule.

[18] There was some debate in the papers and the heads of argument as to what actions constitute 'issuing' a summons. The appellants submit that a summons which has taken a route through the office of the registrar has been issued. This may be somewhat too broad. It does, however, bear echoes of the

[21] See para 19 of the judgment of the court of first instance, as quoted in para 7 above.

dictum of Innes CJ concerning the meaning of 'process of court' in *Dorfman v Deputy Sheriff for the Witwatersrand District*[22] where he held that:

'A "process of the court" must be something which "proceeds" from the court; some step in legal proceedings which can only be taken with the aid of the court or of one of its officers.'

If the registrar has allocated a case number, that number and the requisite particulars have been entered into whatever records are used by the registrar to regulate the further administrative procedures relating to the action, and the registrar has dated and stamped the summons and then released it for service, this may amount to issuing a summons. It would certainly constitute a process of court as described by Innes CJ. However, it is not necessary in this matter to determine what is meant by the word 'issued' in the context of the rule. This is because, as pointed out above, we are dealing with a summons which was issued but not signed.

[19] It is convenient at this point to consider the reasoning in *Lombaard*. It is this on which the respondent relies and was the basis on which the court of first instance found that 'absent one or two of those requirements, the document is visited with nullity'. In *Lombaard*, a provisional sentence summons had not been signed by the registrar. Condonation was sought in terms of rule 27(3) for this oversight. Erasmus J quoted the dicta in *Republikeinse Publikasies* and *Jongilanga* mentioned above. He then concluded that the failure to sign was the most basic component of the summons and is required to lend legality to it.[23] Based on this, he said:

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[22] *Dorfman v Deputy-Sheriff for the Witwatersrand District* 1908 TS 701 at 703.
[23] *Lombaard* at 816I-817B.

'In my view, the failure of the Registrar to sign the original summons breached the fundamental requirement of the summons coming into operation: it was a nullity'.[24]

But this conclusion does not follow from the dicta he relied upon. He did not recognise that both dicta dealt with the issue of a summons. Neither of them dealt with its signature. He appears to have conflated the two. He certainly did not treat them as two distinctive acts required under the rule.

[20] The contrary authority, rejected by the court of first instance, is *Chasen v Ritter*.[25] Here, the summons was regular in all respects except for the failure of the registrar to sign it. A clerk who lacked the requisite authority had signed some copies of the summons but not that which was served. Burger AJ noted that the two dicta relied upon in *Lombaard* did not support the conclusion arrived at in that matter.[26] He held that the use of the word 'any' in rule 27(3) 'emphasises the absence of any restriction on the Court to condone or to waive the requirements of its own Rules.'[27] And that '[t]he rule, if it does exist, that an irregularity (but not a nullity) can be condoned is artificial and does not serve a real purpose'.[28] In other words he did not recognise that a nullity could not be condoned. He condoned the lack of signature.

[21] This approach does not take into account that two dicta of this court have held that the failure to issue a summons is visited with nullity. Although those matters did not interpret rule 17(3)*(c)*, they related to one of the two actions referred to in that rule. They say, in effect, that the breach of one of

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[24] *Lombaard* at 817C-D. My translation. The original reads: 'Myns insiens by gebrek aan ondertekening van die oorspronklike dagvaarding deur die Griffier ontbreek die kardinale vereiste vir die inwerkstelling van die dagvaarding'.
[25] See fn 2 above.
[26] At 326E-F.
[27] At 328G-H.
[28] At 329C-D.

the two requirements of that rule cannot be condoned. Burger AJ did not consider the effect which that might have on the approach to be taken to the other requirement of signing a summons. In other words, he did not consider the most immediate context of the provision for signature in arriving at a conclusion on the effect of its breach.

[22] During argument, mention was made of *Frost, Mulligan & Routledge v Rising NO*.[29] In that matter the defendant took an exception on the ground that the copy served was undated and did not bear the name of the clerk of the court. There was no issue that the original was dated and contained his name. A magistrate upheld the exception and set it aside. Innes CJ held that, because a true copy had not been served, the defendant had not been properly cited. The appeal was dismissed. However, the matter is of little assistance to the respondent in the present proceedings. The reasoning is terse in the extreme and, in any event, the issue was limited to a failure to serve a true copy of the summons.[30]

[23] Reverting to the present matter, it has been seen that an unissued summons is a nullity. Given that this is the immediate context for the provision for signature, it is necessary to determine whether any distinction is to be drawn between the result of a failure to sign and that of a failure to issue. Eloff AJA distinguished the situation in *Jongilanga* from the failure to issue a summons on the basis that the issuing of a summons was 'the basic

[29] *Frost, Mulligan & Routledge v Rising NO* 1905 TS 445.
[30] This matter was mentioned in *Minister of Justice & Another v Human* 1970 (2) SA 765 (E). In that matter, the registrar did not sign copies of the summons. An exception was taken to this effect. It was conceded in argument that the only requirement was that the name of the registrar appear on the copies. No signature was required. The exception was dismissed.

component of an action'.[31] The failure to issue was seen as an example of the breach of a peremptory provision which leads to nullity. Can it be said that the signing of a summons is 'the basic component of an action'?

[24] In the first place, *Jongilanga* says issuing a summons is '*the* basic component' rather than '*a* basic component'.[32] If this is so, no other component is basic. Why might this word have been chosen? The issue of a summons has been held to initiate an action.[33] Once it has been issued, litigation has been commenced. An action has come into existence in which a claim is made against named defendants. Once service has been effected, they are called on to defend on pain of judgment. The underlying rationale for this is that the registrar has processed the summons. It can be traced in the court records as having been initiated and has been authorised by the registrar to be sent out. After service, failure to defend may result in a judgment being entered against them, followed by a writ for execution. All of these documents will bear the allocated case number. The authorised court official has placed their imprimatur on the summons. This is probably why *Jongilanga* describes it as '*the* basic component of an action'[34] and why Rumpff JA said that, if not issued, a summons is a nullity.

[25] The failure to sign stands on an entirely different footing. No external consequences arise if a summons is issued but not signed. An action has been initiated. If no summons has been issued, litigation has not been initiated. No action has come into existence against the named defendants. They may be

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[31] *Jongilanga* at 123G-H.
[32] My emphases.
[33] *Marine & Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407 (A) at 413D.
[34] My emphasis.

supine in the face of such a document without consequence. Once the summons has been served, the cited defendants ignore it at their peril. Failure to sign does not change the status of an issued summons. Unlike the failure to issue, it cannot be said to be 'the basic component of an action'. It is much the same as any other peremptory provision of rule 17(3). I do not see how the present breach differs from the failure to comply with either of the provisions of rule 17(3)*(a)*.

[26] As part of the interpretive exercise, the 'apparent purpose to which it is directed' must be considered and a 'purposive approach' adopted.[35] What, then, might be the purpose of the requirement of signature? It seems to raise the issue of whether it is the registrar, rather than someone else, who has issued the summons. This is, of course, a factual enquiry which can be established in due course during the litigation. If the person who issued was not the registrar and not authorised, it can be set aside as a nullity. But if it was issued and not signed, that does not, in my view, lead to the same result. Of course, in the present matter, the registrar's stamp, bearing his name, was affixed to the summons. The identity of the person who issued the summons was thus clear. It can scarcely be imagined that the registrar would allow anyone else to use his personalised stamp. There was no submission from the respondent that this might have been the case. In any event, once more, that is a factual enquiry to be undertaken and reverts to the question of whether the summons was in fact issued. I can discern no purpose in nullifying such a summons.

[35] See para 9 hereof.

[27] This approach is buttressed by the principle, articulated almost a century ago, that:

'The rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice.'[36]

In his judgment, sometime after the dictum under discussion, Rumpff JA cited the above authority and went on to say:

'[I]t is desirable to repeat what is of general application, namely, that the Court does not exist for the Rules but the Rules for the Court'.[37]

And, in *Trans-African Insurance Co Ltd v Maluleka*,[38] Schreiner JA, in upholding the dismissal of an application to cancel an admittedly defective summons said:

'But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.'[39]

[28] All of these dicta emerged from general principles of our common law applied prior to the coming into effect of the Constitution.[40] But it accords with the principles of the Constitution and thus complies with the approach to interpretation referred to in *Cool Ideas*.[41] It supports the constitutional right to have disputes adjudicated in a fair public hearing.[42] Overly technical approaches to hinder the courts deciding of genuine disputes between parties are to be strongly discouraged. The need for condonation to show good cause

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[36] *Ncoweni v Bezuidenhout* 1927 CPD 130 at 130.
[37] My translation. The original reads:
'. . . is dit wenslik om te herhaal wat in die algemeen van toepassing is, nl dat die Hof nie vir die Reëls bestaan nie maar die Reëls vir die Hof'.
[38] *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A).
[39] At 278F-H.
[40] Constitution of the Republic of South Africa, 1996.
[41] See fn 9 above.
[42] Section 34 of the Constitution.

allows for a consideration of prejudice. If courts are to err at all they should do so in finding that irregularities are susceptible of condonation rather than being necessarily visited with nullity.

[29] In my view, the present matter clearly falls within the ambit of a peremptory requirement whose breach can be condoned under rule 27(3). Despite not complying with a peremptory provision of rule 17(3)*(c)*, it is not visited with nullity. It can be condoned. The court of first instance was thus wrong to treat a failure to sign on the same basis as a failure to issue. This also means that the conclusion arrived at in *Lombaard* is incorrect and that in *Chasen* correct. Accordingly, in my respectful view, the court of first instance ought to have dismissed the special plea.

[30] In conclusion, it is necessary to say something about the conduct of the respondent in refusing to serve the summons. It is not for sheriffs to judge whether a summons is a nullity or susceptible of condonation. That is a matter for courts to decide within the context of a proper ventilation of the issues. As can be seen from this matter, some complexity may attend on that determination. The approach which was taken by the respondent was regrettable and is to be strongly discouraged.

[31] The appeal must be upheld. The parties were represented by two counsel at the appeal. The matter involved two divisions of the High Court coming to different conclusions. The parties submitted that the costs of two counsel were warranted, both on appeal and in the court of first instance, where two counsel were employed. I agree. The exception was taken, set down and a direction given as a result. The issues raised were those dealt with

in the special plea. It could therefore not succeed. No costs order was made for that aspect. The costs arising from the exception must therefore follow suit.

[32] In the result, the following order issues:

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the high court is set aside and replaced by the following order:

(a) The special plea is dismissed with costs.

(b) The defendant is directed to pay the costs arising from the exception.

(c) The costs in paragraphs (a) and (b) hereof shall include the costs of two counsel where so employed.

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GORVEN AJA

ACTING JUDGE OF APPEAL

Appearances

For appellant: G Lubbe

Instructed by: Nell Kotze & Van Dyk Attorneys, Pretoria

Symington De Kok Attorneys, Bloemfontein

For respondent: BP Geach SC, with him CM Dredge
Instructed by: Van Zyl Le Roux Incorporated, Pretoria
Honey Attorneys, Bloemfontein.