SUMMARY

CASE NO.: A 230/2007

CHINA STATE CONSTRUCTION ENGINEERING CORPORATION (SOUTHERN AFRICA) (PTY) LTD

and

PRO JOINERY CLOSE CORPORATION

SILUNGWE, AJ

06/12/2007

PRACTICE - Summons – Irregularity in – Failure to cite correct party – Proceeding before Registrar who has no jurisdiction in terms of Rule 31(5)(a) – Registrar granting irregular Default Judgment – Rule 31(5)(d) application to Court to reconsider Default Judgment and to set it aside – Rule 30(1) provides for (prejudiced) party to apply to Court for an order to set aside irregular step or proceeding – What constitutes further step or proceeding – Filing notice of intention to defend does not amount to further step – Whether procedural irregularity can result in nullity – Distinction between irregular proceeding capable of being condoned and irregular proceeding amounting to a nullity which is not capable of being condoned.

- Indulgence – Interchangeable with condonation – Application to set aside irregular proceeding – Applicant does not approach Court to crave Court's indulgence but does so as of right.

COSTS - Gross laxity and negligence – Respondent's legal practitioner ordered to pay costs of application *de bonis propriis* on attorney-and-client scale.

CASE NO.: A 230/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CHINA STATE CONSTRUCTION ENGINEERING CORPORATION (SOUTHERN AFRICA) (PTY) LTD **Applicant**

and

PRO JOINERY CLOSE CORPORATION **Respondent**

CORAM: **SILUNGWE, AJ**

Heard on: 2007.09.11

Delivered on: 2007.12.06

JUDGMENT:

SILUNGWE, AJ: [1] This is a Rule 31(5)(d) application in which the sole issue for determination is whether the respondent should be ordered to pay costs and, if so, whether such costs should be costs on an attorney-and-client scale, in terms of prayer 2 of the applicant's notice of motion.

[2] The history of the case is that on April 11, 2007, the respondent (then plaintiff) filed a lawsuit against China State Construction Engineering Corporation for damages to the tune of N$450 000-00, in respect of an alleged breach of contract entered into between the parties on January 11, 2006.

[3] On April 23, 2007, a Deputy Sheriff served a combined summons, addressed to China State Construction Engineering Corporation, on a Mr Zhang Yigang (Zhang), the Managing Director of the applicant (China State Construction Engineering Corporation (Southern Africa (Pty) Ltd)). When Zhang informed the Deputy Sheriff that service had been effected on the wrong party and that it was a matter of mistaken identity, the Deputy Sheriff departed. Zhang then assumed (wrongly, as it later transpired) that that was the end of the matter. On the "Return of Service" itself, the Deputy Sheriff endorsed the words: "I was informed by MR YIGANG ZHANG that the defendant was not the sub-contractor for the project …" Zhang's mobile and facsimile contact numbers were inscribed thereon.

[4] On May 14, the respondent (through its legal representative) filed an application for default judgment against China State Construction Engineering Corporation which was subsequently granted by the Registrar on May 22. This was followed by the respondent's writ of execution obtained on June 28. Although the Deputy Sheriff was evidently reluctant to execute the writ, against the backdrop of the information previously received during the process of serving the summons, the respondent's legal practitioner pressed for execution.

[5] On August 17, the applicant filed a notice in terms of Rule 31(5)(d) of the Rules of Court wherein the following relief was sought:

> 1. That the default judgment granted by the Registrar on 22 May 2007 in case number I 1175/2005 be reconsidered and set aside.
>
> 2. That the respondent be ordered to pay applicant's costs herein on a scale of attorney and client.
>
> …

[6] Although the respondent had initially opposed the application, it subsequently capitulated with the result that when the application was heard on August 31 (before Damaseb, JP), the first relief prayed for by the applicant was agreed to and the Court accordingly granted it, but the relief sought in the second prayer (i.e costs) was postponed for argument and determination.

[7] It is incontrovertible that the respondent brought the wrong "party" to Court. The agreement upon which the respondent's litigation was premised was between the respondent and a close corporation, namely, China State Construction Engineering CC. The applicant, to wit, China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd – a company with limited liability – was never a party to the said agreement.

[8] Moreover, it has since (following the launching, by the applicant, of the proceedings *in casu*) become common cause that the default judgment was irregularly granted because the Registrar had no power to grant it. The Registrar derives his powers from Rule 31(5) of the Rules of Court, as amended by Government Notice No. 81, published in Government Gazette No. 1293 of April 16, 1996, the relevant provisions of which read as follows:

> 31(5)(a) Whenever a defendant is in default of delivery of notice of intention to defend an action where each of the claims is for a **debt or liquidated demand**, the plaintiff, if he or she wishes to obtain judgment by default, may file with the Registrar a written application for judgment against such defendant, instead of following the procedure prescribed by sub-rule (2),
>
> (b) The Registrar may -
>
> (i) grant judgment as requested;
>
> …
>
> (d) Any party dissatisfied with a judgment granted or direction given by the Registrar may, within 20 days after he or she has acquired knowledge of

> such judgment or direction, set the matter down for reconsideration by the Court.

(Emphasis is provided)

[9] It is further common cause that the respondent's claim was not for a "debt or liquidated demand" but for damages in respect of the alleged breach of contract; as such, the claim fell outside the ambit of Rule 31(5)(a) and thereby rendered the Registrar devoid of jurisdiction in the matter. It was for this reason that the respondent (properly) agreed that the default judgment granted by the Registrar be reconsidered and set aside, in terms of prayer 1 of the applicant's notice of motion.

[10] I now turn to the pivotal issue of costs. The basic rule is that, statutory limitations apart, all awards of costs are in the discretion of the Court – a discretion that must be exercised judicially, with due regard to all relevant considerations. See: *Intercontinental Exports (Pty) Ltd v Fowles* 1999(2) SA 1045 (SCA) at 1055F-G. The Court's discretion is a wide, an unfettered and an equitable one. There is also, of course, the general rule, namely, that costs follow the event, that is, the successful party should be awarded his or her costs. This general rule applies unless there are special circumstances present. See: *Joubert t/a Wilcon Beachman* 1996 (1) SA 500 (C) at 502D-E.

[11] The general rule that costs follow the event is not applicable to successful applications for the grant of an indulgence by the Court. In such cases, the general rule is that the applicant should pay the costs of the application.

[12] Mr Coleman, learned counsel for the applicant, submits that an excipiable summons against the wrong "party" was pursued and that this led to an *ultra vires* judgment being obtained. The applicant, he continues, did not come to Court for an indulgence – this is manifestly not an indulgence – it (the

applicant) is entitled, as a matter of right, to approach the Court for the purpose of having an irregular judgment reconsidered and set aside (the applicant was legally represented, apparently from the outset). That judgment should never have been applied for or granted, stresses Mr Coleman. He adds that the applicant was entitled to ignore the summons. Hence, he urges the Court to award costs to the applicant on the scale of attorney and client.

[13] The submission that the applicant was entitled to ignore the "excipiable" summons will at once be disposed of. Rule 30 of the Rules of Court addresses the issue of irregular proceedings in these terms *(inter alia)*:

> *"30 (1) A party to a cause in which an irregular step or proceeding has been taken by any other party may, within 15 days after becoming aware of the irregularity, apply to Court to set aside the step or proceeding: Provided that no party who has taken any further step in the cause with knowledge of the irregularity shall be entitled to make such application.*
>
> *(2) Application, in terms of sub-rule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged.*
>
> *..."*

[14] The provisions of Rule 30(1)(a) are loud and clear. On the basis of these provisions, a proper course for a party who is prejudiced by an irregular step or proceeding (proceeding), is not simply to ignore or to treat it as if no such proceeding has been taken; he should apply to Court under Rule 30 for an order to set aside the irregular step or proceeding. See: *KDL Motorcycles (Pty) Ltd v Pretorius Motors* 1972 (1) SA 505 (O) at 507D-F.

[15] It is, of course, important to be mindful of the fact that the Court has a discretion whether or not to grant the application, even if the irregularity is established. See: *National Union of Southern African Students v Meyer* 1973 (1) SA 363 (T) at 367E-F; *Uitenhage Municipality v Uys* 1973 (3) SA 800 (E) at 803A-B. The general approach is that, in a proper case, the Court is entitled to

overlook any irregularity in procedure which does not occasion any substantial prejudice. Such an approach was affirmed by Hoff, J in *Gariseb v Bayer* 2003 NR 118 where he said at 121I – 122A-B:

> This Court has a discretion to overlook any irregularity in procedure which does not work any substantial prejudice. See: *SA Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd* 1977 (3) SA (D), *O'Donoghue v Human* 1969 (4) SA 35 (E) at 40A-E, *Minister of Prisons and Another v Jongilanga* 1983 (3) SA 47 (E) at 57A-D, *Uitenhage Municipality v Uys* 1974 (3) SA 800 (E) at 805D-E.
>
> In *Trans-African Insurance Co. Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F-G Schreiner JA said the following:
>
> > *"... [T]echnical 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 the real merits."*

[16] In point of fact, it has judicially been decided that "prejudice" is a prerequisite to success in an application in terms of Rule 30: *Gardiner v Survey Engineering (Pty) Ltd* 1993 (3) SA 549 (SE) at 551B-C; *Consani Maschinefabrik GmbH* 1991 (1) SA 823 (T) at 824G-I.

[17] Consequently, where the irregular step or proceeding causes no prejudice, the best thing to do would be to ignore it or, alternatively, to have it corrected by some non-litigious means. The rationale for this approach is that an application for an order to set aside an irregular proceeding which causes no prejudice is likely to be dismissed. See: *De Klerk v De Klerk* 1986 (4) SA 424 (W) at 426I – 427B.

[18] Although the Court may, in a proper case, condone an irregularity or allow the party in default an opportunity to cure the defect, such condonation should not, as previously shown, unfairly prejudice the party that applied for the irregular proceeding to be set aside. Of course, the wide powers that the Court enjoys to condone non-compliance with its own Rules, where justice so

demands, is subject to the requirement, and safeguard, that good cause must be shown. See: *Chasen v Ritter* 1992 (4) SA 323 (SECLD) at 329C.

[19] The vexed question is whether a distinction exists between an irregular proceeding which can be condoned and one that is a nullity or void which cannot be condoned. This question has given rise to conflicting decisions in South African Superior Courts.

[20] In the first place, there is a line of cases which incline towards the view that the distinction referred to in para 19, *supra*, does exist. Such cases illustrate that, where an irregular proceeding or step amounts to a nullity, it cannot be condoned. However, where an irregular proceeding is capable of being condoned, it may be so condoned regardless of whether the rule which has not been complied with is directory or mandatory and whether there has been substantial compliance or not. For instance, in *Krugel v Minister of Police* 1981 (1) SA 765 (IDP), which was about an irregular summons, Nestadt, J said (at 767F-768E):

> In relation to a Natal Rule of Court 54, worded similarly to Rule 30 (3), it was stated in *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A) at 595 that, seeing that the Court has a discretion, it was not intended that a breach of the Rules should necessarily be visited with nullity. *Distins Seed Cleaning and Packing Co (Pty) v Stuart Wholesalers* 1954 (1) SA 283 (N) was approved of. In that case SHAW J, in dealing with the same Natal Rule, said the following (at 285):
>
> > *"It seems to me, therefore, that where the Court has a general discretion, such as is conferred by Rule 54 of Order XI, an irregular proceeding is not to be regarded as a nullity. The proper course for the aggrieved party to adopt is to make application for an order setting the proceeding aside, whereupon the Court will make such order as shall seem meet. This is the position whether the irregularity is a failure to comply with provisions which are peremptory or merely directory, though it may well be that the Court will more readily condone the later than the former."*

I do not think that this approach is inconsistent with the views of COETZEE J in *Simross Vintners (Pty) Ltd v Vermeulen* 1978 (1) SA 779 (T). In that case it was held that a notice of motion prescribed in form 2 (appropriate to *ex parte* applications) which had been addressed to and served upon the respondent was a nullity. Dealing with whether it could be condoned under Rule 27 (3) the learned Judge stated (at 783):

> *"…(T)he more fundamental difficulty arises that the document which purports to be a notice of motion is, as I have indicated above, a nullity and I have grave doubt whether the Court has power under this Rule to repair a nullity, a concept in law which carries within itself all the elements of irreparability."*

This must surely be correct in relation to Rule 30 as well. There is no need to have a nullity set aside. Whatever has been done is regarded as non-existent or void. An example of this would be a summons which is not issued by the Registrar (*Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies* 1972 (1) SA 773 (A) at 780G).

The result as I see it is the following. Where what has been done amounts to a nullity it cannot be condoned under Rule 27 (3); nor is it necessary to set it aside under Rule 30. Where, however, there is a proceeding or step, albeit an irregular or improper one, it is capable of being condoned. This is so whether the particular Rule which has not been complied with is directory or mandatory and whether there has been substantial compliance or not.

The distinction between an irregular proceeding and one that is a nullity or void is one that has been recognized (see, eg, *Dalhouzie vs Bruwer* 1970 (4) SA 566 (T) at 569 and the cases there cited). I do not propose to attempt to define the standard by which a step or proceeding is to be judged as so irregular or defective that it constitutes a nullity. Perhaps it is a question of degree. (*Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278G-H; *Rooskrans v Minister van Polisie* 1973 (1) SA 273 (T) at 274.)

See also: *Nampark Products Ltd t/a Nampark Flexible Parking v Sweetoor (Pty) Ltd* 1981 (4) at 922F-G.

[21] In *Minister of Prisons and Another v Jongilanga* 1983 (3) SA 47, Van Rensburg, J said (at 53G-H, 54A and 54D-E):

> Once it is seen that the Court has a discretion, it seems to me to follow inescapably that it was not intended that a breach of the Rules relating to actions should necessarily be visited with nullity …
>
> In the case of *Wiehahn Konstruksie Toerustingmaatskappy (Edms) Bpk v Potgieter* 1974 (3) SA 191 (T) at 199E-H Botha, J (as he then was) expressed the view with which I respectfully agree, that the principles laid down in *Somdaka's* case also apply to cases where a summons is on the face of it incomplete.
>
> There is accordingly, no merit in the submission that because the wording of Rule 17 (3) appears to be imperative, the Court has no power to condone non-compliance therewith.
>
> It would, however, seem that, the defect in the summons is so serious as to visit it with nullity, the Court has no power to condone for nullity is "a concept in law which carries within itself all the elements of irreparability …"
>
> In *O'Donoghue's* case [1969 (4) SA 35 (E)] Kannemeyer, J concluded that the copy of the summons served was wanting in some vital information. In this regard Kannemeyer, J says the following at 41A:
>
> > *"Service was, on the authorities quoted above, irregular and proceedings against the applicant were thereby rendered ineffectual. There was thus no service as envisaged by the Rules. Such service as there was was a nullity and I cannot, by way of condonation, rectify a nullity."*

In *Wiehahn's case* Botha, J expressed the view that in the light of the decision of the Appellate Division in *Somdaka's* case, *O'Donoghue's* case was wrongly decided …

[22] When the case of *Minister of Prisons and Another v Jongilanga* 1985 (3) 117 was taken to the Appellate Division, the Court said at 123A-H (per Eloff AJ, with Jansen ACJ, Corbett JA (as he then was), Kotze JA and Vivier AJA, concurring):

> The main contention advanced in this Court on behalf of the defendants, is that the shortcoming in question, having occurred in breach of a peremptory provision, was so

serious as to render the issue of the summons a nullity, and that the Court for that reason lacked the power to grant condonation.

The question whether a procedural irregularity results in a nullity or not necessitates a consideration of the Rule concerned in the context of the set of Rules as a whole. *In casu* the positive language of Rule 17(3) has to be noted against the remedial provisions of Rules 27(3) and 30(3):

> *"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 of 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."*

(*Foster v Carlis and Houthakker* 1924 TPD 247 at 252, approved in *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A) at 595.)

The reasoning of this Court in *Somdaka's* case *supra* at 595A-C is, I think, to the effect that the existence in Rules of Court of remedial provisions, such as those now under consideration, significantly affects the criteria for deciding whether breaches of the Rules necessarily lead to nullities:

> *"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."*

It is for present purposes unnecessary to decide when a breach of the Rules will, notwithstanding the powers of the Court under Rules 27(3) and 30(3), lead to an irreparable nullity. One instance to which reference might be made is that mentioned in *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A), of a summons not issued by a Registrar …

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.

The present is however a far cry from such a situation.

[23] Secondly, and in contrast to the preceding paras 20, 21 and 22, the validity of the distinction between an irregular proceeding (which is capable of being condoned) and one that is a nullity or void (which cannot be condoned) has been doubted in such cases as: *Mynhardt v Mynhard* 1986 (1) SA 456 (T) at 457A (and 462G, 463E-G); *Chasen v Ritter*, *supra,* at 329D-I; *General Accident Insurance Co. v South Africa Ltd v Zampelli* 1988 (4) SA 407 (C) at 410B.

[24] It suffices to cite the case of *Chasen v Ritter*, *supra*, where Burger, AJ said (at 328E-J):

> I have difficulty in describing a wrong proceeding as a nullity. Any material departure from the Rules renders a summons or any other pleading defective and invalid. But, as was said by Clayden J in *Gibson & Jones (Pty) ltd v Smith* 1952 (4) SA 87 (T) at 89F:
>
> > *'It is a wrong entry of appearance, but there it is …'*
>
> One must recognize it for what it is: a defective or irregular proceeding. But it is not nothing and cannot be ignored.
>
> The power conferred on the Court by Rule 27(3) is wide:
>
> > *'The Court may, on good cause shown, condone any non-compliance with these Rules.'*
>
> The use of 'any' emphasizes the absence of any restriction on the Court to condone or to waive the requirements of its own Rules. This is also the view of Van Zyl J in *Myhardt v Mynhardt* 1986 (1) SA 456 (T) at 463G where he points to 'any non-compliance with the Rules', and says that there is no justification to limit the wide words of Rule 27(3). Ultimately one is left with the position that the Rule authorizes the condonation of any non-compliance with the requirements of these Rules. The requirement that the Registrar sign the summons is a requirement of 'these Rules'.
>
> The only limitation would be that which is inherent in the requirement to administer justice, and in particular to ensure a fair trial. This is the paramount consideration transcending all rules. As was said in *Ncoweni v Bezuidenhout* 1927 CPD 130:

> *'The Rules of Procedure of this Court are devised for the purpose of administering justice and not for 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.'*

The Court continued as follows at 329C-H:

> The rule, if it does exist, that an irregularity (but not a nullity) can be condoned is artificial and does not serve a real purpose. Van Zyl J in *Mynhardt v Mynhardt* (*supra* at 462) appears to share this doubt …
>
> If there is no act or objective manifestation of an intention, there is nothing to be condoned. In the context, a nullity is an objective manifestation of an intention or ac which is devoid of legal effect because it does not comply with the Rules of Court. But it does imply that something was done with the *bona fide* purpose of having the effect which it would have had if it had complied with the Rules. Under these circumstances the distinction between an irregularity and a nullity is of little practical value. Both of thee Rule demonstrate the overriding object of the Legislature that the Rules had as their object the creation of the framework for doing justice. If the requirements of the Rules prevent that, it is proper to grant condonation.
>
> It is noteworthy that the English Rules of Court in their present form have been drafted to cover, in one Rule, not only an irregularity but also a nullity. In South Africa we have two Rules: Rule 30 to cover irregularities and Rule 27, maybe, to cover nullities.

[25] A closer examination of the relevant cases for and against the validity of the distinction between an irregular proceeding (which can be condoned) and one that is a nullity or void (which cannot be condoned) unveils a golden thread that runs through such cases. That golden thread is the wide discretionary power which Rule 27(3) confers upon the Court, to wit: "The Court may, on good cause shown, condone any non-compliance with the Rules."

[26] In this regard, the following comments of Burger, AJ in *Chasen v Ritter*, *supra*, (at 328G-H) are opposite:

> The use of 'any' emphasizes the absence of any restriction on the Court to condone or to waive the requirements of its own Rules. This is also the view of Van Zyl, J in *Mynhardt v Mynhardt* 1986(1) SA 456(J) at 463G …

[27] Although the foregoing reasoning cannot be faulted, it materially affects the criteria for deciding whether all breaches of the Rules of Court are capable of being condoned or otherwise. See also: *Minister of Prisons and Another v Jongilanga* 1983, *supra*, (at 53G-H). The fact that the Court enjoys unfettered discretion to condone a procedural irregularity does not, in my view, perforce mean that *all* procedural irregularities (without any exception whatsoever) are, *per se*, capable of being condoned. In other words, not every single procedural irregularity is capable of being condoned. Whereas it is probable that a large number of procedural irregularities may be capable of being condoned, it is, nevertheless, conceivable that there may well be occasional procedural irregularities of such gravity as to constitute a nullity. A nullity has no legal effect and, as such, it cannot be condoned.

[28] Even the remarks reiterated by Van Rensburg, J in the case of *Minister of Prisons and Another v Jongilanga* 1983, *supra*, are not at variance with the contents of para [27] above. The remarks referred to, and which appear at 53G, read thus:

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

(Emphasis is provided)

[29] A paraphrase of the remarks would read:

> Given that the Court has a discretion, it … follows inescapably that it was not intended that a breach of the Rules … should necessarily be visited with nullity.

The dictionary meaning of the work "necessarily" is as follows:

> *"unavoidably, indispensably, as a necessary result or consequence, of necessity, inevitably."*
>
> (See The Shorter Oxford English Dictionary on Historical Principles Vol. II (1987 ed.) at 1390).

[30] To put the remarks differently but without altering the meaning, they would read:

> Given that the Court has a discretion it … follows inescapably that it was intended that a breach of the Rules … should not necessarily be visited with nullity.
>
> The expression "not necessarily" is defined in the Oxford Advanced Learner's Dictionary, 7th ed., at 978, *inter alia*, as meaning that something is possibly true but not definitely or always true.

[31] In *Minister of Prisons and Another v Jongilanga* 1985, *supra*, a Bench of five judges of the Appellant Division saw it fit to make the following observation (at 123F-G):

> *"It is for the present purposes unnecessary to decide when a breach of the Rules will, not withstanding the powers of the Court under Rules 27(3) and 30(3), lead to an irreparable nullity."*

[32] In that case *(Minister of Prisons and Another v Jongilanga* 1985) the Court used the expression:

> "**When** a breach … of the Rules … will lead to irreparable nullity", as opposed to "**whether**" or "**if**" a breach…
>
> (Emphasis is provided)

It is, therefore, a mater of "when" not "if" or "whether" a breach of the Rules will lead to irreparable nullity. In other words, the Appellate Court acknowledged that a breach of the Rules may, in a proper case, lead to an "irreparable nullity."

[33] Moreover, the phraseology used in the case of *Minister of Prisons and Another v Jongilanga* 1985 (at 123H), namely,

> *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*

serves to confirm that a grave procedural irregularity can, in a suitable case, constitute a nullity.

[34] Equally of note is the fact that, whereas the case of *Minister of Prisons and Another v Jongilanga* 1985 was decided by the Appellate Division, *Chasen v Ritter*, *supra*, was decided by a single judge. Hence, the former case is more authoritative than the latter one.

[35] In the circumstances, it is noticeable that a procedural irregularity, which does not amount to a nullity, can be condoned, but that when it is a nullity, it cannot be condoned. It follows that the distinction between a procedural irregularity and a nullity can hardly be said to be "*of little practical value*" or that it is "*artificial.*" Cf. *Chasen v Ritter*, *supra*, at 329F and C.

[36] In any event, Burger, AJ in *Chasen v Ritter* appreciated that the inherent requirement to administer justice and, in particular, to ensure a fair trial, imposes a limitation on the Court's wide discretion. He continued at 328I-J:

> This is the paramount consideration transcending all rules. As was said in *Ncoweni v Bezuidenhout* 1927 CPD 130:

> *"The Rules of Procedure of this Court are devised for the purpose of administering justice and not for 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."*

[37] The current case is a clear illustration that a (grave) procedural irregularity can, in a proper case, constitute a nullity. It is unassailable that an altogether wrong "party" was cited in the respondent's summons (and in the particulars of claim) which was subsequently served on a blameless "party" (as the agreement annexed to the applicant's founding papers amply demonstrate). As if this were not bad enough, the respondent, who had the benefit of legal representation, chose the wrong forum (which was not clothed with jurisdiction) for relief.

[38] This brings me to Mr Coleman's contention that the applicant did not come to Court to seek an indulgence but that, on the contrary, it was the applicant's right to approach the Court in order to have an irregular judgment set aside. He further contends that the judgment is, in reality, not a default judgment.

[39] In opposition, Ms Bassingthwaighte, learned counsel for the respondent, firstly argues that the judgment was indeed a default judgment in that the applicant, who had been duly served with the summons in the matter, elected not to file a notice of intention to defend. In fact, she adds, the applicant who had taken the risk of not defending the matter, should have itself to blame. Moreover, Ms Bassingthwaighte submits that the default judgment would not have been granted had the applicant elected to defend the matter and to place its defence properly before the Court. The fact that the applicant gave an explanation to the Deputy Sheriff was not sufficient and did not amount to a proper process, so claims the respondent's counsel. In addition, she contends that, in so far as the default judgment was granted because of the applicant's

failure to defend the matter, the application to set it aside is a request for an indulgence.

[40] In response to the concerns raised by both learned counsel in the preceding two paras, my starting point is whether the judgment granted by the Registrar was, in reality, a default judgment. The brief answer, which is predicated upon Rule 31(5)(a), is in the affirmative. The sub-rule stipulates that –

> …the plaintiff, if he or she wishes to obtain **judgment by default**, may file with the Registrar a written application for judgment against such defendant …

(Emphasis is provided)

The categorical reference in the sub-rule to "judgment by default" obviously needs no further elaboration. Hence, Ms Bassingthwaite's argument, that this was a default judgment, is merited.

[41] Secondly, Ms Bassingthwaighte takes the point that, had the applicant elected to file a notice of intention to defend and properly placed its defence before the Court, the default judgment would not have been granted. This raises the question whether entry of appearance to defend, with the defendant's knowledge of the irregularity, amounts to a "further step" and so stands in the defendant's way by barring him or her from applying to Court for an order to set aside the offending proceeding.

[42] The proviso to sub-rule 30(1) reads "that no party who has taken any further step in the cause with knowledge of the irregularity shall be entitled to make such application". It follows that an aggrieved party forfeits his or her right to have the offending proceeding set aside if he or she has taken any further step in the cause, with knowledge of the irregularity. What constitutes

a further step has been judicially considered in a number of cases. For instance, in *Pettersen v Burnside* 1940 NPD 403, Broome, J said (at 406):

> In my opinion **a further step in the proceedings is some act which advances the proceedings one stage nearer completion.** Thus the entry of appearance would not be a step in that sense, but would merely be an act done with the object of qualifying the defendant to put forward his defence. Similarly an objection taken with the object of ensuring that the security required by law will be available to the objector is merely an act which places the objector in a position to resist the petition. In my opinion it is not in itself a step in the proceedings.

(Emphasis is provided)

[43] A party takes a further step in the cause by, for instance, requesting for, or furnishing of, further particulars (*Vonck v Fraserburg Munispaliteit* 1974(1) SA 777 (C) at 778H and 780B-F); *Killarney of Durban (Pty) Ltd v Lomax* 1961 (4) SA 93 (D & E.L.C.D) at 96 G); filing of a declaration or a notice of bar (*Chase & Sons (Pty) Ltd v Tecklenburg* 1957 (3) SA 51 (T) at 55A); filing a notice of exeption (*Killarney of Durban's* Case, *supra*, at 96E); filing of a replication (*Odendaal v De Jager* 1961 (4) SA 307 (O) at 310D); choosing a forum that lacks jurisdiction (*Kikillus v Susan* 1955 (2) SA 137 (W) at 138F).

[44] However, filing a notice of intention to defend does not amount to a further step (as the case of *Pettersen v Burnside*, *supra*, illustrates) by reason of the fact that it is merely an act done with the object of qualifying the defendant to put forward his or her defence. See: *African Guarantee & Indemnity Co Ltd v Mills NO* 1955 (2) SA 522 (T); *Singh v Vorkel* 1947 (3) SA 400 (C)). In addition, a notice requiring the furnishing of security for costs has also been held not to constitute a further step in the proceedings (*Market Dynamics (Pty) Ltd t/a Brian Ferris v Grögor* 1984 (1) SA 152 (W) at 156D).

[45] In my judgment, the contents of paras 42 to 44 apply only to an irregular proceeding that is capable of being condoned, but not to one which amounts to

a nullity. This means that, where an irregular proceeding is a clear nullity, as in the present case, it is unnecessary for the defendant to enter a notice to defend, on the basis that there is nothing to defend. In all other cases, or when in doubt, it is incumbent upon the defendant, as a matter of *ex abundanti cautela*, to enter a notice of appearance to defend. In my opinion, a party enters an appearance to defend a claim made against him or her, but not merely to point out that an irregular proceeding has occurred. In the instant case, the claim is breach of contract with a party completely different from the applicant and, therefore, the applicant would have nothing to defend.

[46] I will now consider the contention whether the applicant's application to set aside the default judgment was a request for an indulgence. Craving an indulgence of the Court is certainly interchangeable with applying for the Court's condonation. The word "condone" as ordinarily used, means, *inter alia*, to overlook or to excuse wrongdoing. *The Collins Wordfinder, The Ultimate Thesaurus from A to Z* (reprinted in 1998) defines the term to include: disregard, excuse, forgive, overlook and pardon. In legal parlance, the term "condonation" is used in applications for non-compliance with the provisions of statutes or the Rules of Court. It is used to seek the Court's excuse or forgiveness for such non-compliance, coupled with a prayer for consequential relief. In *Tshivhase Royal Council & Another v Tshivhase & Another; Tshivhase & Another v Tshivhase & Another* 1992(4) SA 852 (A) at 859E-F, the Appellate Division indicated that condonation is an *indulgence* which may be refused in cases of flagrant breaches of the rules (Emphasis is provided). In the more recent appeal case of *Newman Karupua v The State*, Case No.: CA 110/2005 (unreported), delivered by this Court on October 29, 2007, Parker, J held as follows, in para 4 of the judgment (with my concurrence):

> …[I]n my judgment there is no reasonable and acceptable explanation for failure to note an appeal within the time limit. It follows inexorably that *I cannot accept the application for condonation* because there is simply no proper application before this Court. *There is, therefore, no jurisdiction for the grant of the indulgence sought by the appellant.*

(Emphasis provided)

[47] Evidently, Rule 30(1) gives a clear right to a defendant who is prejudiced by an irregular proceeding to approach the Court for an order to set aside such irregular proceeding when the irregularity does not constitute a nullity. Van Winsen, Cilliers & Loots write in *Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa*, 4th ed., at 562, that "an aggrieved party forfeits his right to have the offending step or proceeding set aside if he has taken any further step in the cause …" For such a party to forfeit his right presupposes that he has the right, for one cannot forfeit what one does not actually, *prima facie,* or potentially, have. The object of the sub-rule is to give an aggrieved-cum-prejudiced party an opportunity of compelling his or her opponent to abide by the Rules of Court on pain of having any proceeding irregularly taken by him or her set aside.

[48] In *casu*, however, the irregular proceeding was a nullity and, as such, the applicant was in any event, entitled to approach the Court as of right. Hence, the applicant did not come to Court, cap in hand, to seek the Court's indulgence. It would obviously be unnecessary for an innocent person to approach the Court for the purpose of seeking forgiveness, fully conscious that he or she is not guilty of any wrongdoing or remissness. In the result, the general rule that costs follow the event applies to this case.

[49] With regard to the respondent, it is not in dispute that it had instituted proceedings against the wrong "party". Zhang, the applicant's Managing Director, brought this glaring fact to the attention of the Deputy Sheriff who reproduced Zhang's response on the Return of Service (Annexure 4 to the respondent's founding papers). The respondent's legal practitioner, Ms Elmarie Thompson, who had been put on notice that the wrong "party" was being sued, disregarded the notice, approached the wrong forum and irregularly obtained "judgment by default". Thereafter, she obtained a writ of execution and dispatched it to the Deputy Sheriff on June 28, 2007, for action. On August 8,

she addressed a letter to the Deputy Sheriff (for the attention of Ms Esterhuizen) expressing her displeasure at the manner in which Mr Van Lill (another Deputy Sheriff), was handling the writ of execution. The letter continues, *inter alia*:

> I informed him that Defendant should have filed a Notice of Intention to defend …
>
> I am of the opinion that Mr Van Lill is hesitant to execute the Warrant for that reason.
>
> I therefore demand that someone else be assigned to execute the Warrant, since nothing prevents Defendant from approaching the Court and applying (sic) for a Rescission of Judgment or an appropriate relief.

[50] In the circumstances of this case, the conduct of the respondent's attorney, by choosing to overlook what could be described as *the writing on the wall*, was demonstrative of gross laxity and negligence, with the result that the irregular proceeding – a nullity – was needlessly launched and, in addition, the enforcement of the resultant (irregular) writ of execution was resolutely pursued. In matters such as this, legal practitioners ought to exercise diligence by ensuring that their clients, particularly lay clients (as in this case), refrain from embarking upon unnecessary (costly) litigation.

[51] In considering an application for condonation for failure to comply with the Rules of this Court and for leave to appeal against the Court's decision. Levy, J (with Frank, J as he then was, concurring) pertinently said in *Swanepoel v Marais and Others* 1992 NR 1 (HC) at 3C and E-H:

> Should an attorney fail to acquaint himself with the Rules of Court and launch costly litigation, he does so at his own risk. Should he not comply with the Rules of Court his client would certainly be entitled to apply for condonation for non-compliance with the Rules, but such condonation is not a formality.

[52] In the present case, what the respondent's legal practitioner, Ms Elmarie Thompson, did was done at her own risk. I consider this to be a proper case for an award of costs on the attorney-client scale *de bonis propriis*.

[53] In conclusion, and for the reasons already given on the question of costs, I exercise my discretion in favour of the applicant. In all the circumstances of the case, the following order is made: The respondent's legal practitioner, Ms Elmarie Thompson, is directed to pay the costs of this application *de bonis propriis* on the attorney-and-client scale.

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SILUNGWE, AJ

COUNSEL ON BEHALF OF THE APPLICANT:

Adv. Coleman

Instructed by: Kruger, Van Vuuren & Co.

COUNSEL ON BEHALF OF THE RESPONDENT:

Ms Bassingthwaighte

Instructed by: Elmarie Thompson Inc.