

indicated that it was in fact a Summons which Mr. Ora said he was serving on her, she said that she was confused because she was thinking of what normally happens when they receive Summons and Notices. Mr. Mullins clearly established that Ms. Booyesen appeared to be confused on other issues also.

I do not propose to comment on the credibility of either of the witnesses since the same is not necessary in view of the conclusion to which I come.

If the mere issue of summons on the 18 October is in itself a further step in the proceedings as constrained for by the Plaintiff then *cadit quaestio* the Plaintiffs must succeed. There are no judicial pronouncements as to what constitutes a "further step in the proceedings" as envisaged by section 3(10)(a)(ii) of the Act.

The rationale behind section 3(10)(a)(ii) of the Act was to penalise dilatoriness and avoid inaction. A party cannot, accordingly, obtain security for its claim and thereafter adopt a *non possumus* position to the detriment of the party which has to continue to bear the costs of maintaining the security. Within the ambit of the Act, the mere furnishing of the Letter of Undertaking commences the proceedings in terms of section 1(2)(a)(iv) but it does not enable the Defendant to enter a Notice of Intention to Defend or to progress with the matter in any other way. Rule 8(4) of the Admiralty Proceedings rules, however, allows the Defendant to deliver a Notice of Intention to Defend once Summons is issued. Rule 8(4) reads :

"Notice of Intention to Defend may be given when a Summons has been issued, notwithstanding that the Summons has not been served upon the person giving Notice of Intention to Defend or any other person."

Rule 8(4) of the Rules has to be read in the context of the Act and the drafters of the rule must have had the provisions of section 3(10)(a)(ii) of the Act in mind when the Rule was drafted. Alternatively, the Rule can provide a subsidiary aid to interpret the legislative intent as envisaged by section, 3(10)(a)(ii). Although there are no judicial pronouncements as to what would constitute a "further step in the proceedings" in terms of section 3(10)(a)(ii) of the Act, there are numerous decisions with regard to the meaning to be attributed to the term "a further step" as envisaged in Uniform Rule 30(2) of the Uniform Rules of the High Court and in Rule 10 of the Magistrate's Court Rules.

Mr. Mullins, correctly submitted that there is a fundamental distinction between the provisions of Uniform Rule 30(2) and the Magistrate's Court Rule 10 since, in the former, the enquiry is directed at the question as to whether or not the party seeking to set aside an irregular step has effectively acquiesced in the irregularity. However in the case of Rule 10 of the Magistrate's Court Rules, as in the case of section 3(10)(a)(ii) of the Act, the question is really whether a formal step has been taken by the Plaintiff which would show that he intends proceeding with a further step.

In *Eke v Sugden* 2001(2) SA 216 (E), the Court had to interpret what constituted further steps as envisaged by Rule 10 of the Magistrate's Court Rules. The Court relying on the case of *Manyasha v Minister of Law and Order*, 1999(2) SA 179 (SCA) came to the conclusion that a restrictive interpretation should be adopted to include as many procedural steps as possible within the definition of a further step, rather than to exclude them, provided these steps clearly showed that the Plaintiff, within the period, advanced the proceedings one step nearer completion, thus evincing an intention of pursuing the matter further. I am in agreement with Mr. Mullns that the issue of the Summons *in casu* is manifestly a further step in the proceedings and one which advances the proceeding one stage nearer completion, thereby evincing the Plaintiff's intention of pursuing the matter further. Service of the Summons is not a prerequisite otherwise it would make nonsense of Rule 8(4) which allows a party to file a Notice of Intention to Defend after issue of Summons notwithstanding that Summons may not have been served upon the person giving Notice of Intention to Defend. Clearly there is a lacuna in section 3(10)(a)(ii) of the Act but it is for the Legislature to cure the lacuna. The fear that Plaintiffs, armed with security and having issued a Summons within the one year period, would thereafter do nothing and the purpose and effect of section 3(10)(a)(ii) will thereby be avoided is more imagined than real. A Defendant will always be vigilant to see whether the action has prescribed in terms of section 3(10)(a)(ii). All that a Defendant is required to do is look at the Admiralty Register to determine whether a Summons has been issued to avoid any

prejudice to it and thereafter and in terms of Rule 8(4) to file a Notice of Intention to Defend.

In view of the conclusion to which I come, it is not necessary for me to consider the Plaintiff's counter-application for condonation.

The application is dismissed with costs.



C.N. PATEL

Judge of the High Court

Durban and Coast Local Division

Date of hearing	:	28 September 2001
Date of Judgment	:	3 June 2002-05-28
Counsel for Applicant	:	Mr. A. Stewart Instructed by Deneys Reitz
Counsel for Respondent	:	Mr. S. Mullins Instructed by Adams & Adams