

# Meaning of a summons

## The first step in a legal action follows a specific procedure

WHEN a party intends to start legal action, he or she issues a summons on which the claim is stated.

It is a document a landlord or landlady or tenant or their representative issues, but the court rules empowers a sheriff to serve it. Examples of a landlord/lady causing summons to be served may relate to the tenant's failure to vacate after an eviction notice was issued, or for failure to pay rental due.

It is first presented to the Clerk of the Court, who stamps it and files a copy in the (landlord's) file in court.

There are two types of summons the landlord / lady could serve on the tenant: -

1. Ordinary
2. Rent Interdict.

### What should the tenant do on receiving a summons?

- Enter "an appearance to defend".  
If the tenant does not know how to do this, immediately consult an attorney, nearest community organisation or approach the Legal Aid Board.
- If the tenant does not respond to a summons immediately (at least within 10 days of having been served by the sheriff), default judgment can be taken against him or her, followed by an ejection order.
- A tenant must ensure that he or she has a proper defence, i.e. a reason why the court should not give judgment in favour of the landlord / lady.

If the tenant does not have a good defence, he or she may lose the case and will have to pay the landlord's legal costs as well.

Examples of a good defence, which must be pleaded in papers:-

- a. Where the tenant has in fact paid the rent, but the landlord/ lady is suing for arrears.
- b. Where the tenant has a claim against the landlord for some other reason and the money the landlord owes him or her, cancels out the money owed to the landlord /lady.
- c. Where the landlord /lady has failed to effect a repair to the dwelling which he or she is obliged to undertake, and the tenant carries out the relevant repair and recovers the cost from the landlord by withholding the rent, provided the tenant followed the procedure of "Repair and Deduct".
- d. Complaint lodged with the Rental Housing Tribunal: if the tenant's complaint relates to the landlord's failure to carry out repairs and the tenant is not in rental arrears or not breached the lease, he or she can inform the magistrate's court that the complaint in respect of an unfair practice is unresolved.  
In the opposing affidavit, the tenant under oath will provide the date the complaint was lodged with the RHT and concise information about the nature of the complaint. Tenant must request the court to refer the matter to the RHT, or delay the proceedings until the RHT has finalised the dispute.  
It is advisable to consult an attorney.
- e. The landlord /lady must satisfy the court that there is a valid and lawful termination and proof that there is no unfair practice.

“...The onus lies on the applicant to allege and prove a valid and lawful termination, which in turn includes the averment and proof that the grounds therefore do not constitute an unfair practice,” Knoll J<sup>1</sup>.

### **Request further particulars**

A tenant (defendant) who is challenging the legal action, after entering an appearance to defend, may request further particulars from the landlord / lady (applicant). The court has a guideline or format that must be followed when such a request is made from the defendant and it is advisable to have a lawyer. In fact, the lawyer would decide whether it is necessary to file a “Request further Particulars”.

### **Summary judgement**

After the tenant enters an appearance to defend, the landlord / lady may inform the court that the tenant has no grounds to defend the summons and is merely playing "for time". The court is asked to grant judgment immediately. However, the tenant may oppose the “Summary Judgment” within a specified period [e.g., 14 days] by filing an opposing affidavit with the landlord / landlady's attorney and the court.

There are various other legal procedures that follow after summons is served, after the tenant enters an appearance to defend. It is therefore necessary to seek legal advice immediately.

### **Ejectment order**

This is granted by the court authorising the physical removal of the tenant or occupant, and his or her belongings. An ejectment order can be stayed, i.e. delayed, provided an application is made to Court.

A tenant must have good reasons for the court to stay or temporarily stop the ejectment. Such an application can be expensive.

### **Withdrawing or rescinding a court judgment**

What is default judgment?

- Court grants an order asked (prayed) for by default in the absence of the defendant having informed the court of his / her intention to defend the action.

Can a default judgment be withdrawn?

- Yes, but you must have good reasons and follow certain procedures!

The landlord or landlady may not be aware that the defendant is not the tenant and may for good reason or acting in bad faith, claim arrear rentals. However, by instructing the clerk of the court to grant judgment in his or her favour in the absence of the summons being defended, the defendant is considered to be in default and judgment as requested by the plaintiff is granted.

If a default judgment is granted, the person may be able to have it withdrawn or rescinded.

This must be done within 20 days of default award. When a magistrates' court judgment is given by default, it means that the court has decided in favour of the plaintiff (e.g., landlord / lady). Let us take the case of a landlord who issued summons for unpaid rentals and cancellation of the lease contract. The tenant, when served with summons, has five days to enter his or her intention to defend the landlord's court action. If the tenant agrees with the landlord's claim then he or she does not defend the action but consents to judgment.

It is very important to seek legal advice so that an action is defended within the time limit allowed by law.

***Dr Sayed Iqbal Mohamed is the chairperson, Organisation of Civic Rights; For tenants' rights advice, contact Pretty Gumede or Loshni Naidoo at 031 304 6451***

---

<sup>1</sup> *Kendall Property Investments v Rutgers* 2005 (4) 81 (C) at 70.