



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 16402/2014

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

22 May 2015

EJ FRANCIS

In the matter between:

OCTAGON CHARTERED ACCOUNTANTS

Applicant

And

ADDITIONAL MAGISTRATE, JOHANNESBURG

First Respondent

REGISTRAR OF THE HIGH COURT, JOHANNESBURG

Second Respondent

GOODWIN SOUTH AFRICA (PTY) LIMITED

Third Respondent

MIKO NO 143 (PTY) LIMITED

Fourth Respondent

MIKO NO 148 (PTY) LIMITED

Fifth Respondent

MIKO NO 151 (PTY) LIMITED

Sixth Respondent

WINGPROP (PTY) LIMITED

Seventh Respondent

JUDGMENT

FRANCIS J

1. This is an application to review and set aside the order of the first respondent (the additional magistrate) dated 5 April 2013 in the Magistrate's Court for the district of Johannesburg under case numbers 56584/12, 56586/12, 56589/12,

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56592/12 and 56594/12 that in each of the aforementioned case numbers the action (claim in convention) and counterclaim (claim in reconvention) and all proceedings forthwith be removed from the Magistrate's Court into the South Gauteng High Court or such competent Court having jurisdiction; and the decision and action of the second respondent to allocate High Court case numbers to the aforesaid actions.

2. On or about 31 May 2012, the applicant as plaintiff instituted action against each of the third, fourth, fifth, sixth and seventh respondents as defendants, in the Johannesburg magistrate's court for the recovery of fees in sums falling within the jurisdiction of the magistrate's court.
3. On or about 15 January 2013, each of the affected respondents delivered a plea and a claim in reconvention in a sum far in excess of the amount of jurisdiction of the magistrate's court.
4. On 22 January 2013, each of the affected respondents launched an application in the magistrates' court (the staying application) for the following relief:
 - “1. *Pronouncing that the Defendant/Applicant's claim in reconvention exceeds the jurisdiction of this Honourable Court in terms of Rule 20(5) of the Rules Regulating the Conduct of Proceedings of Magistrates' Courts of South Africa;*
 2. *Both the claim in convention and the claim in reconvention be removed to the South Gauteng High Court, as contemplated in section 50 of the Magistrate's Court Act 32 of 1944;*
 3. *That the current action be stayed in terms of section 47 of the Magistrate's Court's Act, 32 of 1944, pending the finalisation of the action to be instituted by the Defendant/Applicant in the South*

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Gauteng High Court, Johannesburg within 30 days from this order;

4. *That the Plaintiff/Respondent be ordered to pay the costs of this Application only in the event of opposing same;*

5. *Further and/or alternative relief.”*

5. The applicant did not oppose the staying-applications. The applicant's attorney of record dictated the following letter dated 28 March 2013, advising that the applicant would not oppose the application:

“1. *We refer to the matters above as well as the applications set down on the Roll for hearing in the Magistrates Court, Johannesburg on Thursday, 4 April 2013.*

2. *Kindly be advised that our client does not intend opposing the above applications that these matters be removed from the Magistrate's Court Roll, Johannesburg to the South Gauteng High Court, Johannesburg.*

3. *To the extent that you have any further queries in this regard, please feel free to contact the writer.”*

6. On or about 5 April 2013 the applications proceeded on an unopposed basis in the absence of the applicant. The orders made were on identical terms in each instance and were as follows:

6.1 The claim in reconvention exceeds the jurisdiction of the magistrate's court.

6.2 In terms of section 50 of Act 32 of 1944 all proceedings in the action are stayed. The action (claim in convention) and counterclaim (claim in reconvention) and all proceedings are to be forthwith removed from this court into the South Gauteng High Court or such competent court having jurisdiction.

6.3 The affected respondent was to furnish security as contemplated in

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section 50(1)(c) of Act 52 of 1944 for payment of the amount claimed.

Such security to include security for costs in an amount of R3 000.00.

6.4 Each party to pay its own costs.

7. On 7 February 2014, the Clerk of the Civil Court for the magistrate's court addressed a letter to the second respondent - the Registrar, in respect of each the actions, that an order for the removal of each of the action from the Magistrate's court into the South Gauteng High Court had been made. The Registrar thereafter allocated a case number in this High Court Action to each of the actions.
8. On or about 7 March 2014, each of the affected respondents served a notice of application for a trial date under the above numbers. These notices were later withdrawn by the affected respondents and on 3 April 2014, the affected respondents served notices of bar under each of the High Court case numbers.
9. The affected respondents seek to proceed with the matters as if all the pleadings in the magistrates' court stand as pleadings in the High Court and that there had been a removal from the magistrates' court to the High Court. In response thereto on 9 April 2014, the applicant's attorney challenged the validity of the removal.
10. On 14 April 2014, the affected respondents, as plaintiff, served five summonses in this Court on the applicant, claiming identical relief as that set

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out in the claims in reconvention.

11. After this review application was launched, the first respondent provided the following reasons for the order made:

- “3. *The respondents had brought their application in the Magistrate’s court in terms of Section 50 and also in terms of Section 47 of the Magistrate’s court Act 32 of 1944. It is not competent to grant orders in terms of Section 47 and Section 50 at the same time. When one perused the papers it became clear that the applicant was seeking an order in terms of Section 50. The section 50 order that was sought catered for the remedy sought in terms of Section 47. It was therefore not proper to grant orders in terms of Section 47 and Section 50 simultaneously.*
4. *The court considered granting an order in terms of Section 47 only. This would mean that the applicants claim would have been stayed for a period and allowing the respondents to pursue their counterclaims in the High Court or other appropriate forum with jurisdiction. It was not necessary to follow this route as the papers showed that the applicant was no longer opposing the application for the removal. Section 50 deals with the removal while Section 47 deals with staying proceeding and allowing the defendant time to pursue a counterclaim in the appropriate forum. The prayer in the application was clear that the removal of the claim in convention and claim in reconvention (my emphasis) was sought. The founding affidavits also make out a case for a Section 50 removal.*
5. *The applicant elected to merely dispatch a letter dated 28 March 2013 (indicating that the removal would not be opposed) and thereafter did nothing. The applicant did not attend court on the day of the hearing of the application. The applicant did not follow up as to what order was ultimately granted by the court. These are the circumstances under which the removal of the main action and counterclaims were made. The order was granted in terms of Section 50 of the Magistrate’s court act. No order was made in terms of Section 47 of the Magistrate’s court act.*
6. *Pursuant to the order for removal the second respondent (Registrar) was obliged to receive the Magistrate’s Court files and open High Court files with new case numbers. No fault can be attributed to the registrar. ‘He’ acted within the course and scope of ‘his’ duties.”*

12. The applicant seeks to review the decisions of the first respondent to remove

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the proceedings to the High Court as set out in paragraph 2 of the orders dated 5 April 2013 on the grounds that such are *ultra vires*. Further that the granting of the High Court case numbers was not competent.

13. The application was opposed by the third to seventh respondents on the grounds that the first respondent in ordering the removal of the claim, acted correctly since an election by the applicant to require the removal could be properly be inferred from the decision, communicated in the applicant's letter not to oppose the application in which such removal was sought. Further that if the inference was held to be wrong, it was at least one that could competently have been made, and so the decision of the first respondent cannot be challenged.
14. It was further contended by the third to seventh respondents that the learned magistrate, in ordering the removal of the counterclaim, made his decision without stipulating the provision under which its grant was authorised. Since he was under no duty to make such a stipulation, however his failure to say where his powers were derived from is of no moment. All that it signifies is that, in law, he enjoyed the applicable power. This requirement is met in the present case since section 50 of the Magistrates Court Act 32 of 1944 (the Act), alternatively section 47, embodies such a power.
15. It was further contended that should it be found that the first respondent committed an error exhibiting excess of jurisdiction, his discretion is

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nevertheless not reviewable since the applicant suffered no material prejudice in consequence of its grant, and has, in any event, pleaded no such prejudice in its founding papers. By expressly stating that it had no reason to oppose the removal of the matter to the High Court, the applicant showed that it could suffer no prejudice by reason of such a removal.

16. It is common cause that on or 31 May 2012, the applicant as plaintiff instituted action against each of the third, fourth, fifth, sixth and seventh respondents as defendants, in the Johannesburg Magistrate's court for the recovery of fees in sums falling within the jurisdiction of the magistrates' court. The defendants filed counterclaims against the plaintiff which is in excess of the magistrate's court jurisdiction. The respondents were desirous to remove the counterclaim from the magistrate's court to the High Court. They brought an application and sought an order in terms of rule 20(5) of the Magistrates Court Rules (the rules) regulating for a declarator stating the claim in reconvention is in excess of the jurisdiction of the magistrate's court and to stay the action under section 47 of the Act.
17. Rule 20 deals with claims in reconvention. Rule 20(5) provides that a defendant delivering a claim in reconvention may by notice delivered therewith or within 5 days thereafter apply to court to pronounce that the claim in reconvention exceeds the jurisdiction and to stay the action under section 47 of the Act. Prayer 1 of the third to seventh respondents application sought such an order.

18. Section 47 of the Act deals with a counterclaim exceeding jurisdiction. Section 47(1) provides that when in answer to a claim within the jurisdiction the defendant sets up a counterclaim exceeding the jurisdiction, the claim shall not on that action be dismissed; but the court may, if satisfied that the defendant has a *prima facie* reasonable prospect on his counterclaim of obtaining a judgment in excess of its jurisdiction, stay the action for a reasonable period in order to enable him to institute an action in a competent court. The plaintiff in the magistrate's court may (notwithstanding his action therein) counterclaim, in such competent court and in that event all questions as to the costs incurred in the magistrate's court shall be decided by that competent court. Section 47(2) of the Act provides that if the period for which such action has been stayed has expired and the defendant has failed to issue and serve a summons in a competent court in relation to the matters and the subject of the counterclaim the magistrate's shall on application either – (a) stay the action for a further reasonable period; or (b) dismiss the counterclaim (whether the defendant does or does not reduce such counterclaim to an amount within the jurisdiction of the court). Section 47(3) of the Act provides that if the defendant has failed to institute action within the further period or if the action instituted by the defendant be stayed, dismissed, withdrawn, or abandoned, or if the competent court has granted absolution from the instance thereon, the magistrate's court shall, upon application, dismiss the counterclaim and shall proceed to determine the claim.
19. It is clear from the provisions of rule 20(5) read with section 47 of the Act that

the applicant's claim that falls within the jurisdiction of the magistrate's court will be stayed if the respondents whose counterclaim exceeds the jurisdiction of the magistrate's court brought an application for its removal to the High Court.

20. It is clear from the third to seventh respondents' application to stay that they had sought prayers 1 and 3 which are competent orders in terms of rule 20(5) read with section 47 of the Act. Such a finding cannot be interfered with on review.
21. However the third to seventh respondents also sought an order in paragraph 2 of their stay application that both claim in convention and the claim in reconvention be removed to this Court in terms of section 50 of the Act. They were also granted such relief. The question that arises in this application is whether the first respondent was competent to grant the relief that it granted in relation to removing the applicant's claim that falls within the jurisdiction of the magistrate's court to the High Court.
22. This review takes issue with the order that in terms of section 50 of the Act all proceedings in the action are stayed. The action (claim in convention) and counterclaim (claim in reconvention) and all proceedings are to be forthwith removed from the magistrate's court act to this Court or such court having jurisdiction.

23. Section 50(1) of the Act deals with removal of actions from court to a provincial or local division. It provides that any action in which the amount of the claim exceeds the amount determined by the Minister from time to time by notice in the Gazette, exclusive of interest and costs, may, upon application to the court by the defendant, or if there is more than one defendant, by any defendant, be removed to the provincial or local division having jurisdiction where the court is held, subject to the following provisions: (a) notice of intention to make such application shall be given to the plaintiff, and the other defendants (if any) before the date on which the action is set down for a hearing; (b) the notice shall state the applicant objects to the action being tried by the court or any magistrate; (c) the applicant shall give security as the court may determine and approve, for payment of the amount claimed and such further amount to be determined from time to time by notice in the Gazette, for costs already incurred in the action and which may be incurred in the said provincial or local division. Upon compliance by the applicant with those provisions, all proceedings in the action in the court shall be stayed, and the action and all proceedings therein shall, if the plaintiff so requires, be as to the defendant or defendants, forthwith removed from the court into the provincial or local division aforesaid having jurisdiction. Upon the removal, the summons in the court shall, as to the defendant or defendants, stand as the summons in the division to which the action is removed, the return date thereof being the date of the order or removal in an action other than one founded on a liquid document, and, in an action founded on a liquid document, being such convenient day on which the said division sits for the

hearing of provincial sentence cases, as the court may order: Provided that the plaintiff in the action may, instead of requiring the action to be so removed, issue a fresh summons against the defendant or defendants in any competent court and the costs already incurred by the parties to the action shall be costs in the cause. Section 50(2) of the Act provides that if the plaintiff is successful in an action so removed to a provincial or local division he may be awarded costs as between attorney and client.

24. It is clear that section 50 of the Act does two things: first, it gives the defendant the ability to obtain a stay of action in the magistrate's court provided the three requirements referred to above are satisfied; secondly, it gives the plaintiff who is confronted by such a stay, the option of seeking a removal of action to the High Court or instituting proceedings *de novo* in the self-same court. The action may only be removed where the plaintiff requires that such an order be made.
25. Since the magistrate is a creature of statute, he derives his powers from the four corners of the statute. It is apparent from the provisions of section 50 of the Act that it is only applicable to an action that exceeds the jurisdiction of the magistrate's court. Once the action exceeds the jurisdiction of the magistrate's court a defendant may bring an application for the removal of such an action. This does not apply to an action that falls within the jurisdiction of the magistrate's court. If such a claim falls outside the jurisdiction of the magistrate's court three other requirements must be

complied with. These are that notice must be given by the defendant before the date on which the action is set out at the hearing; the notice must state that the defendant objects to the action being tried in the court or any magistrate's court and defendant must give security as the court may determine. There is nothing on record that indicates that the second requirement was given by the defendant.

26. The first respondent did not have the power to order that the action be removed to the High Court. The first difficulty is that the action did not exceed the jurisdiction of the magistrate's court. Even if the letter that the applicant's attorney had sent to the third to seventh respondents' attorney could be construed as consent, this was subject to the three requirements of section 50 of the Act be met and namely that the defendant objected to the claim filed by the plaintiff. There is simply no proof of such objection. The section only applies to actions exceeding the jurisdiction of the magistrate's court.
27. As stated earlier the applicant does not take issue with paragraphs 1 and 3 of the relief sought in the applicant's application and with paragraphs 1 and 3 of the order granted by the first respondent. It takes issue with paragraph 2 which was the removal of the action which the first respondent did not have the power to do so. It follows that the first respondent committed a reviewable irregularity in that he did what he simply did not have the power to do in terms of section 50 of the Act.

28. The application succeeds in part. Since both parties have been partly successful in the application and opposition thereof, I do not believe that costs should follow the result. An appropriate order is that each party is to pay its own costs.

29. In the circumstances I make the following order:

29.1 The order made by the first respondent on 5 April 2013 is hereby reviewed and set aside and is replaced with the following order:

29.1.1 The claim in reconvention exceeds the jurisdiction of the magistrate's court.

29.1.2 The action is stayed and the counterclaim is forthwith removed to the South Gauteng High Court.

29.1.3 Each party is to pay its own costs.

29.2 Each party is to pay its own costs.

FRANCIS J

JUDGE OF THE HIGH COURT

FOR PLAINTIFF : J PETER SC WITH E R VENTER
INSTRUCTED BY FLUXMANS INC

FOR DEFENDANT : M BRASSEY SC INSTRUCTED BY
SCHINDLERS ATTORNEYS

DATE OF HEARING : 11 MAY 2015

DATE OF JUDGMENT : 22 MAY 2015