Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: A725/2007
4261/2007
- REPORTABLE -

Coram: CLEAVER et LE GRANGE JJ

In the matter between:

THE MINISTER OF SAFETY AND SECURITY 1st Appellant
MORNE VAN SCHOOR 2nd Appellant

and

OLIVIA ELBENITA BOSMAN Respondent

JUDGMENT DELIVERED ON: 4 JUNE 2008

Le Grange J :

[1] This is an appeal against an order granted by the magistrate, Paarl in favour of the Respondent.

[2] The Respondent (Applicant in the court *a quo*) launched an urgent application on notice of motion in the Magistrates' court, seeking relief, *inter alia* for

condonation of the late service of the notice in terms of Section 3(4)(a) of the Institution of Legal Proceedings against Certain Organs of State Act, No 40 of 2002 (*"the Act"*).

[3] The Appellants (Respondents in the court *a quo*), opposed the application and *in limine*, raised the issue that in terms of the Magistrates' Court Act, no 32 of 1944, as amended, the magistrate lacked jurisdiction to hear such an application.

[4] Briefly stated, the facts relating to the relief sought by the Respondent are as follows: During August 2004, the Respondent was allegedly assaulted by the Second Appellant, a policeman, whilst in the employ of First Appellant. A criminal charge was preferred and the Second Appellant was prosecuted. The Respondent did not immediately instruct her present attorneys to institute a civil claim against the Appellants. According to her, she was under the mistaken impression that the criminal matter had first to be finalized. In June 2005, she gave the necessary instructions to proceed with the claim. In July 2005, her attorneys sent a written notice of the claim per registered mail to the offices of the Provincial Commissioner of Police, Cape Town. This caused the Provincial Commissioner of Police Western Cape, to respond immediately in writing, in which he pointed out that the Respondent had failed to comply with the provisions of section 4 of the Act. The Respondent's Attorneys, were also notified of the address of the National Commissioner of Police who, in terms of section 4, is the authorized person to receive such correspondence. During August 2005, the Respondent's claim was forwarded to the office of the National Commissioner of Police. The Respondent's Attorneys were then informed in

December 2005, by the National Commissioner that the claim had been rejected on the basis that the written notice of the Respondent did not comply with the provisions of section 3(2)(a) of the Act. According to the Respondent she had sight of said letter in January, 2006. Despite the correspondence from the National Commissioner, the Respondent failed to instruct her attorneys to proceed with her claim. She says this was due to a lack of funds. The criminal trial against Second Appellant has also not been finalized. It was only when the Respondent's attorneys informed her, shortly before the application was launched, that the claim was due to prescribe on 26 August 2007 that the proceedings were launched in the Court *a quo* on 20 August 2007.

[5] In terms of the provisions of Section 3(1) of the Act, no legal proceedings for the recovery of a debt may be instituted against an organ of state unless:-

(1)(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) the organ of state in question has consented in writing to the institution of *that legal proceedings-*

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(2) A notice must –

(a) within six months form the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and

(b) briefly set out –

(i) the facts giving rise to the debt; and
(ii) such particulars of such debt as are within the knowledge of the creditor.

[6] The magistrate's findings are recorded as follows:-

"Na oorweging van die stukke en die argumente word die volgende gelas:

- *die hof het jurisdiksie om aansoek aan te hoor as Reël 29(1) (g) gelees word saam met Art 46, Wet op Landdroshowe;*
- *die skuldoorsaak oor die stukke het* geheel binne hierdie hof se jurisdiksie gebied plaasgevind;*
- *m.b.t. beskrywing van applikant is dit so dat meer volledige besonderhede uit die dagvaarding sal voortspruit. Sy het nie 'n volledige beskrywing gegee van haarself, maar dit maak nie die aansoek ongeldig nie;*
- *M.b.t. dringendheid: die hof het bevind dat daar voldoende grond naamlik haar finansiële onvermoë (te kort aan geld) uit stukke voor hof geplaas is. Die tyd het verloop mag wees a.g.v. * se getalm, maar applikant kan nie daarvoor blameer word nie en ek * is bewering dit is as gevolg van haar eie finansiële onvermoe.*
- *Die hof* dat hof reels nagekom word:*
- *Die hof kan bevind dat die Reëls nie nagekom is nie, maar die applikant is steeds binne tyd (verjaring) en het alle reg om die aansoek to bring. Tegniese argumente soos die nie-nakoming van die hofreëls behoort nie die applikant te ontneem van haar reg om haar saak in die hof te stel nie.*
- *Die staat het alle middele tot hul beskikking en word nie onredelik benadeel nie."*
- *Die skuld is nog nie uitgewis nie, derhalwe word die aansoek toegestaan vir bedes 1-4*
- *Dit is 'n eenvoudige aansoek en nie ingewikkeld om Adv aan te stel nie. Koste sal wees koste in geding."*

[7] The principal argument by Mr J van der Scyff, who appeared on behalf of the Appellants, is that the Magistrate erred in finding that the Magistrates' Court has the necessary jurisdiction to hear an application condoning a litigant's failure to serve a notice in terms of Section 3(2) of Act 40 of 2002 timeously. He contended that neither the Magistrates' Court Act, nor the Magistrates' Court Rules, provided the court *a quo* with the jurisdiction to hear an application of this nature.

[8] Mr A Caiger, who appeared on behalf of the Respondent, contended that the Act, does not prohibit a Magistrate's Court from entertaining such an application, but even if it does, this Court can rely on its inherent jurisdiction to substitute the Court *a quo's*, order with the same order to avoid the Respondent from suffering any further prejudice.

[9] The magistrate in *casu,* relied on rule 29(1)(g) read with section 46 of the Magistrate's Court Act, to hear the application. Rule 29 of the Magistrates' Court rules is only applicable to trials. The reliance by the magistrate on rule 29(1) is therefore misplaced. Even if the magistrate inadvertently referred to rule 29(1) instead of section 29(1)(g) read with section 46 of the Magistrates' Court Act, to confer jurisdiction, then she also misdirected herself. Section 29 clearly refers to jurisdiction in respect of causes of action. Section 29(1)(g) provides as follows:-

> "29 Jurisdiction in respect of causes of action – *(1) Subject to the provisions of this Act and the National Credit Act, 2005, the court, in respect of causes*

of action, shall have jurisdiction in-

(a)…;

(b)…;

(c)…;
(d)…;
(e)…;
(f)…;
(fA)..;

(g) actions in terms of section 16(1) of the Matrimonial Property Act, 1984, where the claim or the value of the property in dispute does not exceed the amount determined by the minister from time to time by notice in the Gazette;.."

[10] Our law is replete with case law and legal authority that the jurisdiction of Magistrates' Courts is established in the statute under which the Courts are constituted. This applies not only to the empowering sections of the Magistrates' Court Act but also to the Rules. A magistrate cannot exercise powers which are not expressly stated in the Act or the Rules. There may be instances where authority may be implied since it has been held that the purpose of an Act is not to be defeated because the ancillary powers which are necessary to enforce a judgment have not been especially mentioned. See, Sibiya v Minister of Police 1979 (1) 333 TPD at 337 C – D; Abarder v Astral Operations Ltd t/a County Fair 2007 (2) SA 184 CPD at D – E; Jones & Buckle, *The Civil Practice of the Magistrates' Courts of South Africa 9 ed Vol 2 at 55-2;* Eckard's *Principles of Civil Procedure in the Magistrates' Courts 5 ed at 42-45; Civil Procedure in the Magistrates' Courts, Com 6-3 and further [Issue 19], by* LTC Harms.

[11] In my view, the correct position in our law is that, generally speaking, application procedures in the lower courts are permissible only in those instances

sanctioned by the Act or the Rules, or where an act makes such a procedure permissible. Jones & Buckle, *supra* at *55-2*, and Eckard, *supra* at *44,* clearly and correctly set out the sections and rules which permit the procedure by way of application. The preamble to an act may be taken into account in order to determine whether the provisions of the act may be enforced by means of an application in the Magistrates' Court. In Nduna v Absa Bank Ltd and others 2004(4) SA 453 at 456 [8]. The Court held it was clear from the preamble of the Prevention of of illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), read with section 9 of the act, that the Legislature intended to confer jurisdiction on the Magistrates' Court to entertain applications for eviction proceedings under the act.

[12] Section 3(4)(a) provides as follows:- *"(4)(a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure."*
In my view, it is clear that the provisions of the Institution of Legal Proceedings against Certain Organs of State Act, do not confer jurisdiction on the Magistrates Courts to hear applications of this nature nor can this be implied having regard to the preamble of the statute.

[13] It is common cause that no action was pending between the parties in the court *a quo.* The finding by the magistrate that the whole cause of action arose within the Magistrates' Courts jurisdiction is according to me, irrelevant. The matter in *casu* differs significantly from the instance where authority may be implied when a statute gives jurisdiction to the court on the subject in dispute and an action is pending between the parties. See Sibiya, *supra* at 337 E-G.

[14] The proposition by Mr Caiger, that this Court should rely on its inherent

jurisdiction to substitute the magistrate's order with the same order to prevent the Respondent from suffering any further prejudice, is misconceived. In my view it will be bad in law for this Court to do so.

[15] It follows that magistrate, due to lack of jurisdiction, erred in entertaining the application and the appeal should therefore succeed.

[16] In the result, I propose the following order.

The appeal succeeds with costs. The order of the magistrate dated 23 August 2007, is set aside and substituted with the following.

"The Application is dismissed with costs."

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A LE GRANGE, J

I agree. It is so ordered.

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CLEAVER, J