

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO: A370/10

In the matter between

BONGANI NTSHINGILA

First Appellant

CLIVE THOMAS

Second Appellant

KAIN JACOBUS STUURMAN

Third Appellant

DAWID PIETERSE

Fourth Appellant

DANIEL MGQIBISA

Fifth Appellant

AUBREY NOLAN OOSTHUIZEN

Sixth Appellant

CLAYTON PETERS

Seventh Appellant

COBURN DE BRUIN

Eighth Appellant

JOHN THEODARE WILSON

Ninth Appellant

CARLO WAYNE LUCAS

Tenth Appellant

XOLILE GLADILE

Eleventh Appellant

VANADENE VICTOR FISHER

Twelfth Appellant

and

THE MINISTER OF POLICE

Respondent

JUDGMENT DELIVERED ON 09 MARCH 2011

CORAM	:	D H ZONDI J & E T STEYN J
JUDGMENT BY	:	D H ZONDI J
FOR THE APPELLANTS	:	ATT. J RAMAGES
INSTRUCTED BY	:	J RAMAGES ATTORNEYS & CONVEYANCES
FOR THE RESPONDENT	:	ADV. R JAGA
INSTRUCTED BY	:	STATE ATTORNEY
DATE OF HEARING	:	18 FEBRUARY 2011
DATE OF JUDGMENT	:	09 MARCH 2011

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

REPORTABLE

CASE NO: A370/10

In the matter between

BONGANI NTSHINGILA

First Appellant

CLIVE THOMAS

Second Appellant

KAIN JACOBUS STUURMAN

Third Appellant

DAWID PIETERSE

Fourth Appellant

DANIEL MGQIBISA

Fifth Appellant

AUBREY NOLAN OOSTHUIZEN

Sixth Appellant

CLAYTON PETERS

Seventh Appellant

COBURN DE BRUIN

Eighth Appellant

JOHN THEODARE WILSON

Ninth Appellant

CARLO WAYNE LUCAS

Tenth Appellant

XOLILE GLADILE

Eleventh Appellant

VANADENE VICTOR FISHER

Twelfth Appellant

and

THE MINISTER OF POLICE

Respondent

JUDGMENT DELIVERED ON 09 MARCH 2011

ZONDI, J

Introduction

[1] The main issue presented in this appeal concerns the interpretation of section 3(4)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 ("the Act") and in particular whether the magistrates court has jurisdiction to condone non-compliance with the provision of section 3(2)(a) of the Act.

[2] It is the appellants' case that the magistrates court's jurisdiction to hear and grant applications condoning non-compliance with the provision of section 3(2)(a) has not been excluded either expressly or implicitly. On the other hand the respondent contends that the magistrates court does not have jurisdiction to entertain condonation applications brought under section 3(4)(a) of the Act unless there is a related pending action between the parties in the magistrates court.

Background

[3] On 15 March 2010 the appellants instituted various claims for damages against the respondent which they allegedly suffered when

they were wrongfully and unlawfully assaulted on 16 March 2007 by certain members of the South African Police Service acting within the course and scope of their employment with the respondent.

[4] On 12 February 2010 the appellants' attorney forwarded to the respondent a letter purporting to be a notice in terms of section 3(2) of the Act *inter alia* giving notice of the intention to bring legal proceedings against the respondent to claim damages they suffered as a result of the respondent's employees' unlawful conduct and simultaneously therewith requesting the respondent to condone the appellants' failure to give the respondent the requisite six months notice.

[5] It is common cause that the respondent refused to consent to the institution of the intended legal proceedings and its refusal prompted the appellant to bring an application for condonation in terms of section 3(4)(a) of the Act.

[6] On 15 March 2010 the appellants issued summons against the respondent for damages they allegedly suffered as a result of the unlawful conduct of the respondent's employees. It appears from the

sheriff's returns of service that the summons was served on 15 March 2010 at about 15h20 at the respondent's place of employment being Room 915, 120 Plein Street, Cape Town, and also at 15 Alfred Street, Green Point at about 15h38. Prior to the issue and service of the relevant summons on the respondent, the appellants brought on or about 25 February 2010 an application for condonation in terms of section 3(4) of the Act in the Worcester Magistrates Court and which was set down for hearing on 15 March 2010 at 09h00. The respondent opposed the application. It is common cause that the summons had not been issued and served at the time of the hearing of the condonation application.

[7] At the hearing of the condonation application the respondent raised a point *in limine* to the effect that the magistrates court did not have jurisdiction to hear such application and the decision of this Court in the **Minister of Safety and Security and Another v Bosman** 2010(2) SA 148 (C) at 152 C-D was cited as authority for that proposition. In that case the Court held that the provisions of the Act do not confer jurisdiction on the magistrates court to hear applications for condonation. Nor could such jurisdiction be implied.

[8] The magistrate, who heard the application, upheld a point *in limine* and dismissed the application with costs on the basis that the law as set out in **Bosman** case, *supra* was binding on him.

[9] The appeal before us is against the judgment and costs order made by the magistrate. One of the grounds of attack on the judgment is that the magistrate erred in law in holding that the decision of this Court in **Bosman** case was binding on him and in support of this contention section 37(2) of the Magistrates' Courts Act, 32 of 1944 was relied upon as providing a source of jurisdiction to the magistrate to hear a condonation application brought under section 3(4)(a).

The Law

[10] Section 3 of the Act makes provision for the giving of notice of intended legal proceedings to organs of state. It provides as follows:

"(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

- (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 from 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.*

(3) For purposes of subsection (2) (a) -

- (a) *a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the*

organ of state wilfully prevented him or her or it from acquiring such knowledge; and

- (b) a debt referred to in section 2 (2) (a) , must be regarded as having become due on the fixed date.*

- (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.*

- (b) The court may grant an application referred to in paragraph (a) if it is satisfied that-*

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure.

- (c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate."*

[11] As correctly pointed out by Lewis JA in **Minister of Safety and Security v De Witt** 2009(1) SA 457 (SCA) at paragraph 1, this Act was introduced to harmonise periods of prescription of debts owed by organs of state and to make provision for a uniform requirement for the giving of notice in connection with the institution of legal proceedings.

[12] The learned Judge went on to say at paragraph 2:

"[2] The Act is meant not only to bring consistency to procedural requirements for litigating against organs of State but also, it is clear, to render them compliant with the Constitution. The way in which it seeks to achieve a procedure that is not arbitrary and that operates efficiently and fairly both for a plaintiff and an organ of State is to give a court the power to condone a plaintiff's non-compliance with procedural requirements in certain circumstances. Thus access to courts is facilitated, while at the same time procedures against large governmental organisations that need to keep their affairs in order are regulated."

[13] Section 3(4)(a) makes it clear that non-compliance with the provisions of section 3(2) may be condoned by a court having jurisdiction.

[14] The question is what the legislature intended in using the phrase "*a court having jurisdiction*" in section 3(4)(a) of the Act. Did it intend to exclude the magistrates courts from courts to which an application for condonation could be made?

[15] The dispute turns on the interpretation of the phrase "*a court having jurisdiction*" as used in section 3(4)(a) of the Act. First and foremost the legislature's intention must be sought in the first place by interpreting the words used in section 3(4)(a) according to their ordinary meaning and in the light of their context. (**Jaga v Dönges, NO and Another; Bhana v Dönges, NO and Another** 1950(4) SA 653 (A) at 662g-664h).

[16] If the meaning of the words using the above approach is clear then such meaning represents the intention of the legislature and the court may only depart from such meaning if it would lead to absurdity so glaring that it could have never been contemplated by the

legislature, or where it would lead to a result contrary to the intention of the legislature as shown by the context or by such other consideration as the court is justified in taking into account.

[17] In my view the legislature in employing the phrase "*a court having jurisdiction*" in section 3(4)(a) did not intend to exclude the jurisdiction of the magistrates courts from considering applications for condonation brought under section 3(4)(a). If it had intended to do so it would do so expressly or show by necessary implication that it intended to do so. There is nothing in the language of the Act as a whole or section 3(4)(a) in particular which indicates that the legislature intended to exclude the magistrates courts from the courts that would have jurisdiction to condone non-compliance with the provisions of section 3.

[18] I say this for three reasons. First, section 165(1) of the Constitution vests judicial authority in the courts which in terms of section 166 includes the magistrates court. It follows therefore that in terms of section 3(4)(a) the magistrates court is competent to condone non-compliance with the provision of section 3 as long as it

has jurisdiction on the main claim under the Magistrates' Courts Act 32 of 1944 or rules.

[19] Secondly, it is presumed that the legislature does not intend to interfere with or oust the jurisdiction of a court of law. (**Minister of Law and Order and Others v Hurley and Another** 1986(3) SA 568(A)). There is nothing in the Act which suggests that the legislature in enacting the Act intended to exclude the magistrates courts from courts that would have jurisdiction to consider condonation applications brought under section 3(4)(a).

[20] In my view when the legislature enacted the Act it was aware that magistrates courts had always enjoyed jurisdiction to adjudicate on claims against organs of state for the recovery of debts. Thus in enacting section 3(4)(a) it must be taken to have intended to retain the magistrates courts jurisdiction the exercise of which would of course be subject to the provisions of the Magistrates' Courts Act 32 of 1944 or rules.

[21] Thirdly, my conclusion regarding the meaning of section 3(4)(a) finds support in the decision of Musi JP in **Tshisa v Premier of the Free State and Another** 2010(2) SA 153 (FB).

[22] In **Tshisa** supra the appellant had launched an application for condonation in terms of section 3(4)(a) of the Act in the magistrates court. At the same time the appellant had issued summons under the same case number for the loss of income claim. The respondents defended the action and opposed the application.

[23] In opposing the application the respondent took an *in limine* point to the effect that the magistrates court had no jurisdiction to hear the condonation application. The magistrate, who heard the application, upheld an *in limine* point and dismissed the application. But on appeal the magistrates court's judgment was set aside.

[24] On appeal the question before the court was whether the provisions of the Act empowered the magistrates court to hear an application for condonation in terms of section 3(4)(a). The question involved the construction of the phrase "*may apply to a court having jurisdiction*" appearing in section 3(4)(a).

[25] After analysing the Act as well as its background and purpose the court concluded at paragraph 15 that:

"...where section 3(4)(a) says that a creditor may apply to a court having jurisdiction, the legislature must have intended to mean any court having jurisdiction over the main claim. That would include the magistrates' court."

[26] I agree entirely with the conclusion reached by Musi JP regarding the meaning of section 3(4)(a).

[27] With this background I now turn to consider whether the magistrate was correct in upholding a point *in limine* and holding that the magistrates court did not have jurisdiction to hear the condonation application brought in terms of section 3(4)(a).

[28] In my view on the facts of the instant case the magistrate was correct in holding that the magistrates court did not have jurisdiction to hear a condonation application brought under section 3(4)(a) of the Act. In the present matter the application for condonation was served and filed before the issue and service of the summons on the

respondent. **Tshisa** case makes it clear that a magistrates court which will have jurisdiction to hear the condonation application under section 3(4)(a) is the one before which there is a related main claim. In fact this is one of the bases upon which the court in **Bosman** case supra found that the magistrates court did not have jurisdiction to hear the condonation application. At paragraph 13 it held:

"[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' court's 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."

[29] In the present case the magistrates court at the time of the hearing of the condonation application did not have before it the main claim (summons). In this regard *Mr Jaga*, who appeared for the respondent, correctly submitted that the time of service of the summons is the time at which jurisdiction over the person of the defendant is determined.

[30] The appellants' reliance on section 37(2) of the Magistrates' Courts Act is misplaced. In my view section 37(2) has no application in the present case.

[31] Section 37(2) provides as follows:

"(1) ...

(2) Where the amount claimed or other relief sought is within the jurisdiction, such jurisdiction shall not be ousted merely because it is necessary for the court, in order to arrive at a decision, to give a finding upon a matter beyond the jurisdiction."

[32] It seems to me that section 37(2) only applies "*where the amount claimed or other relief sought is within the jurisdiction*" of the magistrates court. The relief sought in the instant case is the condonation of the appellants' failure to comply with the provisions of section 3(2) of the Act. The condonation application does not arise out of the consideration of the main claim or matter (which in the instant case will be the claim for damages). The pre-requisite laid down by section 37(2) therefore does not exist.

[33] The meaning of section 37(2) of the Magistrates' Courts Act was considered by the Court in **Tshisa** case supra. It held at 156J – 157B as follows:

“A reading of this section makes it clear that a finding on the matter that is beyond the jurisdiction of the court must be necessary in order for the court to reach a decision on the main matter before it, which is within the jurisdiction. The cases cited in Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa vol 1 under a discussion of s 37(2) illustrate the point. It will not be necessary to make a finding on the condonation application in order for the magistrates' court to reach a decision on the appellant's loss of income claim. What s 37(2) envisages is an issue that is central to a determination of the merits of the case before the court, but which is beyond the jurisdiction.”

[34] The application for condonation was set down for hearing on 15 March 2010 at 09h00. The summons was issued on 15 March 2010 and served on the respondent after 15h00. Therefore at the time when the magistrates court heard the condonation application there could not have been a main claim before it and being so it cannot be said that the magistrates court was the court having jurisdiction as

envisaged in section 3(4)(a). The time at which the incidence of jurisdiction should be determined is the time of service of summons. (**Mills v Starwell Finance (Pty) Ltd** 1981(3) SA 84 (N) at 89B – 90H).

[35] In his supplementary heads of argument *Mr Ramages* submitted with reference to rule 55(4)(a) and (b) of the magistrates court rules that a magistrates court has jurisdiction to hear applications for condonation brought under section 3(4)(a) of the Act even if there is no related action instituted in the magistrates court. The rule to which *Mr Ramages* refers, forms part of the new rules which were published in Parts 1 to 3 of Government Gazette 33487 of 23 August 2010 and put into operation by Government Notice 888 of 8 October 2010.

[36] I disagree with *Mr Ramages'* contention. Generally procedure by way of application is limited in the magistrates court to those cases specifically laid down and the application to condone non-compliance with section 3(2) is not specifically laid down by the Magistrates' Courts Act or rules. An application for condonation under section 3(4)(a) may not be used on its own and in the absence of there being

a main action as a basis for establishing or conferring jurisdiction on the magistrates court.

[37] The provisions of rule 55(4)(a) upon which the appellants rely for the contention that the magistrates court has jurisdiction to hear the condonation application do not support the case they seek to advance. In the first place the new rule 55 came into operation on 8 October 2010 long after 15 March 2010. Rule 55(4)(a) clearly refers to interlocutory and other applications incidental to pending proceedings. It does not purport to enlarge the jurisdiction of the magistrates court so as to empower it to hear applications which it otherwise would not have been empowered to hear either in terms of the Magistrates' Courts Act or rules.

[38] To sum up, the phrase "*a court having jurisdiction*" appearing in section 3(4)(a) includes the magistrates court exercising its jurisdiction subject to the provisions of the Magistrates' Courts Act and the rules. Secondly, subject to the Magistrates' Courts Act and rules the exercise by the magistrates court of its jurisdiction under section 3(4)(a) depends on the existence of a related main matter over which it has jurisdiction. Thirdly, for the purposes of section

3(4)(a) the question of whether or not the magistrates court has jurisdiction over the main claim must be determined at the time of service of the summons.

The Order

[39] In the result I would dismiss the appeal with costs.

A handwritten signature in black ink, appearing to be 'J. Zondi', written over a horizontal line.

ZONDI, J

I agree.

A handwritten signature in black ink, appearing to be 'J. Steyn', written over a horizontal line.

STEYN, J