

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NO 2008/2018

Reportable	Yes / No
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In the matter between:

**TRANSNET SOC LIMITED
ACTING THROUGH ITS TRANSNET
FREIGHT RAIL DIVISION**

Applicant

and

**THE LEARNED MAGISTRATE M DOUWS
FIKILE MBALEKI
TYSON MQOBOLI
AKHONA MNQAMBI**

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

JUDGMENT

NQUMSE AJ:

INTRODUCTION

[1] The applicant herein is second respondent in the court *a quo* (hereinafter referred to as the second respondent), has approached this court following an order made by the first respondent in case number 485/2017, for an order in the following terms:

- 1.1 to review and set aside the judgment delivered by the first respondent (The presiding Magistrate in the court *a quo*) hereinafter referred to as the Magistrate in the Butterworth Magistrate's Court on 22 March 2018;
- 1.2 directing the first respondent to show cause why the judgment should not be reviewed and set aside;
- 1.3 that the first respondent dispatch to the Registrar of this Honourable Court the record of proceedings, together with reasons, and to notify the applicant that she has done so;
- 1.4 that the matter be referred back to the Butterworth Magistrate's Court for hearing by a different Magistrate, and in accordance with fair procedure;
- 1.5 granting costs of suit against any party who opposes this application.

[2] The first respondent herein is the presiding magistrate (hereinafter referred to as the magistrate), against whose judgment this application is launched. Notwithstanding having been duly served with the notice of motion, she elected not to react to the application neither did she file a notice to abide the decision of this court. Similarly, no opposition was filed in respect of third and fourth respondents.

COMMON CAUSE FACTS

[3] The applicant in the court *a quo* is the second respondent herein (hereinafter referred to as the applicant), together with the first respondent in the court *a quo* and who is the third respondent herein (hereinafter referred to as third respondent) are tenants in the property owned by the second respondent. They both entered into lease agreements with the second respondent to occupy business spaces it owns at the Butterworth Railway Station. Each tenant would identify a space within the perimeters of the premises of the second respondent and would be allowed to put up a structure that will be suitable for his/her business needs.

[4] This unsupervised self-allocation of space led to a conflict between the tenants which culminated in the launching of an *ex parte* application by the applicant against the first respondent to remove his container which he had put up in the space allegedly occupied by the applicant.

[5] On 11 July 2017 the *ex parte* application was granted in favour of the applicant with an order that the first respondent must show cause why the order should not be made final.

[6] On 17 August 2017 the applicant moved an application to join Transnet as the second respondent. The application for joinder was granted as per the Order of

Court of 8 September 2017. Pursuant to its notice to oppose the application, the second respondent filed its answering affidavit in which it raised points in *limine*.

[7] At the hearing of the matter in the court *a quo*, the parties were represented as follows: Mr Mapenzela for the applicant (hereinafter), Mr Duze for the first respondent (hereinafter) and Mr Anderson for the second respondent (hereinafter).

[8] In light of the points in *limine* that were raised by the second respondent, the presiding magistrate ruled that the second respondent should address its points in *limine*. At this juncture I find it necessary to refer to the actual words used by the magistrate which reads as follows:

“... then in that case I think it would then be proper that the second respondent addresses the court on their points in *limine* and because the court would want to take into consideration the fact that you are coming from Johannesburg and for you to only argue the point in *limine* and then come back again to argue on everything else would be a costly exercise” (*sic*).

The magistrate continued and said:

“The court will then allow you to argue on everything. You raise your points in *limine*, the court does not make a ruling immediately on that rather the court would look at the matter in total, okay” (*sic*).

The magistrate concludes by saying:

“Then you can make your submissions in response to the point in *limine* and as well as in the whole application and then maybe you could also file your heads of arguments and

the court will make its decision based on all submissions that have been made. I think that would save a lot of costs" (*sic*).

[9] It is significant to note that both representatives of the first respondent and the second respondent agreed with the process suggested by the magistrate. However, after Mr Anderson raised his concern on the opportunity to reply to the responses that would have been made by the applicant and third respondent, the magistrate suggested as follows:

"... if its going to suit all of you having filed your heads of argument or submissions as they are (*sic*). After they have then filed theirs okay, they communicate that with you, but then I put a date within which you would have exchanged ... you exchange and you finalise all that (*sic*). By the time all submissions with your supplementary submission, of cause, because you will have to supplement in response to what would have been said in their papers and then you can then file supplementary submissions. (*sic*)

"... and then I will have written arguments before me and I would consider the whole matter based on that. Unless you want to come back to the Eastern Cape again, you are welcome to do so".

It is worthy to note Mr Anderson's response which is as follows:

"No, I am indebted to you your worship. I am very happy with that process."

The net result of the arrangement was for the parties to file their submissions and heads of argument by 8th of December 2017, with the understanding that the ruling of the magistrate can only be expected around January 2018.

[10] As soon as the parties had agreed on the process outlined above, in a strange twist of events, Mr Anderson proposed that he be allowed there and then to argue his points in *limine* in order to test whether they have merit or not. When the representatives of the applicant and first respondent agreed to Mr Anderson's proposal, the magistrate ruled that he should proceed and argue his points in *limine*.

[11] The points in *limine* were ostensibly that there was a clear dispute of fact on the papers which could not be resolved without the matter being referred for oral evidence, alternatively to convert the motion proceedings to action proceedings. Mr Anderson further submitted that the applicant was aware or ought to have been aware of the fact that the first respondent was laying a similar claim on the same allocated space, especially that the applicant had allegedly placed two containers in the second respondent's premises. After a lengthy argument around this point, Mr Anderson implored the court to convert the application to action proceedings. Mr Duze aligned himself with Mr Anderson, maintaining that there are certain issues which will require to be ventilated in oral evidence.

[12] In his reply, Mr Mapenzela argued in the main that the dispute of fact is not *bona fide*. He based his argument on the exchange of correspondence between the second respondent and the applicant, which was to the effect that applicant is the

one who has the right to the use of the piece of land on which the first respondent had placed its containers.

[13] Subsequently the magistrate went on in great detail to debate with the legal representatives, whether the second respondent would allocate a space or spot to a tenant or the tenant would choose a spot and advise the second respondent of the spot he or she has chosen. Unfortunately that engagement became so protracted that it caused the representatives not to only argue but also proffer evidence from the bar. Needless to say that the debate that ensued was no longer confined to the points in *limine* but it went into the merits of the application as well.

[14] After a lengthy discussion the magistrate indicated that the point to be determined was those raised in *limine*. This is borne out in the following remarks:

“look what I would suggest is that I think we all need to carefully look at the point in *limine* that you raised. You look at your submissions as far as that point in *limine* is concerned. We then come to a conclusion in your submissions because otherwise we are going to . . . Because unfortunate, I’m not . . . I don’t think it will be fair for us to go as we are because in one way or another it would be as if we coming to a decision of the matter in the exchange that you are doing in trying to . . . we’re trying to . . . we’re trying to eliminate issues but at the same time, we may also unintentionally get into the finality of the matter with no intention. So I would rather have us look at what has been pointed out by . . . then and then the respondent, first respondent also have an opportunity of making his submissions on everything that has been said now.”

[15] When Mr Anderson wanted to confirm whether the presiding magistrate referred them to focus on the disputes of fact that he had complained about. He responded as follows:

“not necessarily the dispute of fact but as I have said at the end of the day the crux of the matter is that there is a portion that was allocated to a person and that portion was not identified by Transnet. This is what I was saying when we adjourned okay”.

[16] Immediately after the explanation above, the presiding magistrate continued in another lengthy discussion of the matter with Mr Anderson, contrary to her earlier ruling that they should deal with the points in *limine* first. This caused the magistrate to further remark as follows:

“so we would be wasting a lot of time if we were going to go to whether . . . what the facts and everything . . . instead of going exactly to what the problem is here. The problem is that a person has been given a spot to be a tenant on and as to whether the second person who has been given that same spot has informed Transnet if that spot is occupied already or not” (*sic*)

[17] After those remarks Mr Duze sought an opportunity to make few submissions. After seeking the approval of Mr Anderson the presiding magistrate allowed Mr Duze the opportunity to make his submissions.

[18] Mr Duze's submissions were focused mainly on whether it was a vacant space or not in which the first respondent had placed his structure of bricks. His submissions went so far as to suggest an alternative to the impasse, that they should be moved to an alternative space on condition that Transnet will bear the costs thereof. The magistrate spontaneously agreed with Mr Duze on the basis that it was Transnet's duty to know how many tenants they have as well as the available spaces.

[19] Mr Mapenzela cautioned the court to the fact that the submissions of Mr Duze are not covered in their answering affidavit. Despite the caution, the magistrate allowed both Mr Anderson and Mr Mapenzela to reply to the submissions of Mr Duze. Once again the appetite of the magistrate was stirred up to enquire from second respondent on the number of spaces that were available at the time and their sizes.

[20] When the magistrate finally realised that the debate was becoming unstructured and uncontrollable, she remarked that she was not going to allow anybody to make further verbal submissions; she wants them to make written submissions. It is then not surprising that Mr Anderson sought clarification on whether their submissions should be on the whole application or should only deal with the points in *limine* that he had raised. The magistrate replied as follows:

“Look, I don’t want to restrict but if it was me, I would deal with the point in *limine* because you have raised that it has to be addressed, okay? And then the directions of the court because they deal directly with the issue in question”. (*sic*) The magistrate continued and said: “but in dealing with these submissions obviously it would go through the whole case because the letters is contained in the whole case, the letters that will be referred to. The applications that will be referred to which will deal with how that piece or that space was acquired has to do with the whole case. This is what is contained so I don’t know. It’s up to you, how really want to deal with it. You want to first deal with my directives and the point in *limine* and after I have responded to that, you then deal with the whole case or do you want to deal with everything. But I am saying if you deal with, especially my directives or my concerns that I have raised, they have the potential of killing the case right there. Do you understand what I’m saying? They have the potential of killing the case right there as to whether in terms of the dispute of fact raised of whether the application will be converted into an action or *viva voce* evidence being called would be neither here nor there if you deal with what I have concerns about which I wanted clarity on or which I wanted you deal with. Because that has the potential of killing it right there. I have heard your submissions that this is what Transnet has said and you may want to hold Transnet responsible for your loss, we can look at that, even from that perspective but you can deal with everything”. (*sic*) (own underlining for emphasis)

[21] Finally, the matter was postponed for the ruling of the magistrate. In her ruling the magistrate summarised the issues to be determined as the following:

- (i) *The court has to determine as to who is the rightful tenant of the said property in question and has make an order either in favour of the prayers in the Notice of Motion.* (*sic*)
- (ii) *Has the applicant made out a good case and if so, what is the first respondent’s fact and against whom does he have records if the court confirming the Rule Nisi* (*sic*)

[22] What is clearly left out in the issues for determination is the application of the second respondent to refer the matter for oral evidence owing to the dispute of fact that is alleged.

[23] In deciding the matter the presiding magistrate made the following order:

- (i) *Second respondent (Transnet) to provide an alternative space / property for the first respondent.*
- (ii) *Second respondent to pay for the removal of the first respondent's container to the alternative space.*
- (iii) *Whatever other recourse the first respondent seeks it be against the second respondent.*
- (iv) *The legal costs incurred to oppose the application, be borne by the second respondent.*

[24] The essence of the review before us is premised on the averments made in the founding affidavit, which is briefly that the applicant instituted legal proceedings on an urgent basis and he subsequently joined the second respondent who in its answering affidavit raised two points in *limine*.

[25] It is further stated that during the course of the hearing of the points in *limine*, the presiding magistrate committed an act of gross irregularity in one or more of the following respects:

- 25.1 she failed to give the second respondent legal representative an opportunity to present their case without interruption;

- 25.2 she failed to set a procedure allowing each of the parties to present their case unhindered and without undue interruption, resulting in the proceedings descending into chaos;
- 25.3 **she failed to take cognisance of the submissions made by the second respondent's legal representative particularly with regard to the two points in *limine*, which were fatal to the second respondent's case; and**
- 25.4 the magistrate made an order **which was not rationally connected to the prayers in the Notice of Motion** and her order is **so open-ended rendering its implementation subject to numerous interpretations and giving rise to great uncertainty and major prejudice** to the second respondent. (own emphasis)

[26] The second respondent avers that the magistrate committed a **gross irregularity which resulted in the prejudice to the second respondent and a miscarriage of justice.** (own emphasis)

[27] The second respondent further filed a supplementary affidavit in which she further submitted that the magistrate interjected continuously during legal submission by the legal representative of the second respondent. The interjection is borne out in asking questions unrelated to the points in *limine* that were raised

but instead the magistrate asked points that dealt with the merits of the case. She goes further to state the lack of the magistrate to appreciate the procedure to be followed constituted an affront to both the magistrate's court as well as the High Court procedures, thereby denied the second respondent's legal representative a fair opportunity to address the court.

[28] The second respondent further contends that, the confusion created by the presiding magistrate had conflated the submissions on the points in *limine* and the full hearing of the case. In so doing the magistrate compromised the submissions made by the legal representatives of the second respondent.

[29] It also alleged that the magistrate's lack of understanding of the pleadings had the net result of throwing the second respondent's legal representatives of course. The remarks of the matter being '**killed**' if certain submissions were made demonstrates that the magistrate had already made up her mind even before the parties concluded their submissions. It is contended that the conduct of the presiding magistrate did not instil confidence that she was impartial. According to the second respondent, this is evident in the tone and demeanour directed towards the second respondent's representative which was intimidating, condescending, discourteous and rude. (own emphasis)

[30] Before this court, the applicant submitted that the judgment of the presiding magistrate is not reviewable on the grounds relied upon by the second respondent. He contends that the two points in *limine* which are contended by the second respondent were sufficiently dealt with and consequently, the magistrate made rulings albeit unsatisfactory to the second respondent. Applicant further submitted that the presiding magistrate was applying her discretion when she engaged the parties. He contends that the judgment and the order of the presiding magistrate is well-reasoned, clear and requires no other interpretation.

[31] In its heads of argument, the second respondent repeated in great detail what is stated in its founding and supplementary affidavits. The second respondent's argument is that its legal representative was not afforded a fair opportunity to present its case. The failure by the presiding magistrate to take into cognisance the second respondent's point in *limine* and failure to refer the dispute of fact to oral evidence, all constitute an irregularity. It further argued that the decision of the presiding magistrate is not rationally connected to the evidence that was before her and that amounted to flouting of the court's processes.

[32] In the supplementary heads of argument, the second respondent submitted that the promotion of the Administrative Justice Act¹ (PAJA) is not applicable in

¹ Act 3 of 2000.

this application, since the decision of a magistrate is specifically excluded by PAJA.

[33] The reliance on PAJA by the applicant is borne clearly out in its heads of argument where the following is stated:

“It is accepted that the first respondent’s decision constitutes an administrative action within the meaning ascribed thereto by section 1 of the Promotion of Administrative Justice Act and that the provisions of PAJA apply to this application”.

[34] From here onwards the submissions in the heads of argument of the applicant were along the lines, whether the magistrate’s conduct complied or not with the provisions of PAJA. However, before us, Mr James for the applicant abandoned this line of argument conceding that to have premised its argument on PAJA was misplaced.

THE LAW

[35] I find it necessary, to reiterate that PAJA is not applicable to decisions made by judicial officers, as their decisions are not an administrative action but constitute judicial functions as referred to in section 166 of the Constitution² which

² Act 108 of 1996.

includes the Magistrates' Courts.³ That being the position of the law, I shall now deal with the grounds of review of proceedings from the Magistrate's Court.

[36] The grounds for review of proceedings of the Magistrates' Court are set out in the Superior Court's Act.⁴ Section 22 reads:

"The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a Court of a Division are –

- (a) Absence of jurisdiction on the part of the Court;
- (b) Interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- (c) Gross irregularity in the proceedings;
- (d) The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence –"

[37] If any of the grounds above have been established, an aggrieved party is entitled to bring an application for review.

[38] Since the second respondent's complaint is not premised on the lack of jurisdiction by the court and also conceded that there is no evidence to suggest that the presiding magistrate was biased, or malicious, it can be accepted that the thrust of the complaint turns predominantly on the grounds envisaged in section 22(1)(c).

³ See definition of administrative action in s1 of the Promotion of Administrative Justice Act.

⁴ Act 10 of 2013.

[39] A gross irregularity in civil proceedings in a magistrate's court means an irregular act or omission by the presiding judicial officer in respect of the proceedings, if so gross a nature that it was calculated to prejudice the aggrieved litigant, on proof of which the court would set aside such proceedings, unless it was satisfied that the litigant had in fact not suffered any prejudice.⁵

[40] A scrutiny of the proceedings as well as the judgment of the presiding magistrate, does not bear out evidence that her conduct in the proceedings was calculated to prejudice the aggrieved party. Neither does the evidence show that the presiding magistrate acted in a high handed manner preventing the second respondent to present its case. In fact the opposite is true, in that the reading of the record shows that the presiding magistrate afforded each party a fair opportunity to present its case and address the magistrate on any points that required further clarification.

[41] Whilst it is patently clear that the magistrate was extremely interruptive in her discussions with the legal representatives, and at times appearing to have been argumentative, that does not translate denying the parties, particularly the legal representative of the second respondent the opportunity to present its case. In fact, the reading of the record shows that the magistrate had allowed the legal

⁵ Van Loggerenberg Wet al, Erasmus: Superior Court Practice (2015) A2-134.

representatives multiple times to address the court and reply even to the extent of disregarding the rules of practice.⁶

[42] The judgment of the presiding magistrate does not in itself show overtly that she dealt with the points in *limine*. Even if it were to be accepted that she may have implicitly decided against referring the matter to oral evidence, unfortunately this is something that required to be explicitly expressed and decided upon. It is not something that the parties should infer from the judgment whether she elected to deal with the merits as they appear on the papers or she indeed made a decision on the points in *limine*. The point raised by the second respondent, that the presiding magistrate failed to take cognisance of the submissions made in respect of the points in *limine* is justified, due to this failure to explicitly state that she was dismissing the points in *limine* and advance reasons for such determination.

[43] Undoubtedly, the failure by the presiding magistrate constitutes an irregularity which had the effect of compromising the case for the second respondent.

[44] Similarly, the order of the presiding magistrate is disjunctive of the prayers that were sought in the Notice of Motion in the court *a quo*. The order that was sought was in essence to order the first respondent to remove his container and to allow the applicant to regain his full occupation of his rented space. The applicant

⁶ See Civil Practice of the Magistrate's Courts in South Africa, Ninth edition vol 2 Rule 29(14).

had further prayed that the first respondent should bear the costs of the removal of his containers as well as costs that may have been occasioned by the storage of the respondent's container by the sheriffs.

[45] For sake of completeness, I shall restate the order of the presiding magistrate which reads as follows:

- 45.1 Second respondent to provide an alternative space / property for the first respondent.
- 45.2 Second respondent to pay for the removal of the first respondent's container to the alternative space.
- 45.3 Whatever other recourse the first respondent seeks it to be against the second respondent.

[46] It shall be noted that none in the relief ordered by the presiding magistrate was sought in the Notice of Motion. She also appears to have either misconstrued or failed to appreciate why the second respondent was joined in the proceedings before her. The purpose of joining the second respondent was spelt out clearly in the affidavit of applicant in support of his application for joinder. In paragraph 8.2 it was stated that the second respondent is joined to answer and to clarify as to who is the rightful owner of the property and what should happen to the applicant since he wants immediate possession of his property.

[47] Instead the order of the magistrate is not directed at the first respondent but to the second respondent and despite that there were no grounds for the presiding magistrate to do so.

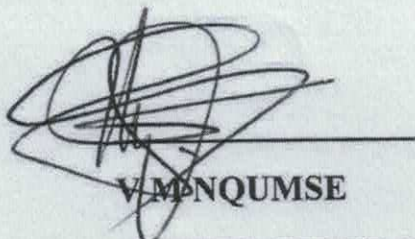
[48] I therefore agree with the second respondent that the order of the presiding magistrate is not rationally connected to the prayers set out in the Notice of Motion and is so open-ended that its implementation is subject to numerous interpretations and gives rise to great uncertainty, causing major prejudice to the second respondent.

[49] Accordingly the second respondent has demonstrated adequately that there has been a gross irregularity on the part of the presiding magistrate entitling it to have the judgment reviewed and set aside.

[50] The applicant opposed this application, despite no substantive relief being sought against him herein and proceeded to raise irrelevant issues in his heads of argument. He could just as well have stated his grounds of disagreement in an affidavit and filed a notice to abide. He however, chose to actively oppose this application and has not advanced any reason why he should not be ordered to pay costs in circumstances where he was aware that costs were being sought against parties opposing the application.

[52] ORDER

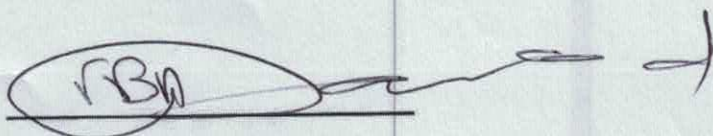
- a) The judgment of the presiding magistrate (first respondent herein) delivered on 22 March 2018 under case number: 458/2017 is reviewed and set aside.
- b) The matter under case number: 458/2017 is referred back to the Butterworth Magistrate's Court to commence *de novo* before another magistrate.
- c) The applicant in the court a quo, being the second respondent in these proceedings is directed to pay the costs of this application.



V. M. NQUMSE

ACTING JUDGE OF THE HIGH COURT

I agree



F DAWOOD

JUDGE OF THE HIGH COURT

Counsel for the Appellant:

Instructed by:

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MTHATHA

REF: 18/00772/06/0N

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Instructed by:

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BUTTERWORTH

REF: MN/X01/BT

Date Heard:

09 May 2019

Judgment Delivered:

10 September 2019