

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal Number : A70/2013

In the appeal between:-

VAN RENSBURG PATHOLOGISTS INCORPORATED Appellant

and

D.E. RAMPANA Respondent

CORAM: EBRAHIM, J, et VAN ZYL, J

JUDGMENT BY: VAN ZYL, J

DELIVERED ON: 19 DECEMBER 2013

[1] The appellant approached the Magistrate's Court for the district of Bloemfontein on 12 November 2012 by means of an urgent application for an order in the following terms:

“1. The applicant's failure to adhere to this Court's rules relating to time periods and service be condoned, and that the application be heard as an urgent application.

2. Respondent be ordered - in specific performance of the employment contract concluded between the parties – to render her services as technologist to the applicant until 30 November 2012.
3. Alternatively to prayer 2 above, that the respondent be ordered to effect payment to the applicant in the amount of R15 569-90, as damages suffered by applicant due to the respondent's breach of contract.
4. In the further alternative to prayers 2 and 3 above that leave be given to the applicant to institute an action for the aforementioned damages within thirty days after the date of the granting of this order.
5. That the respondent be ordered to pay the costs of the application on the scale as between attorney and client.
6. Further and/or alternative relief.”

[2] For reasons which will become evident later in this judgment, I do not consider it necessary to deal in detail with the respective factual averments made by the parties in the three sets of affidavits. I deem it apposite to only give a

broad outline of the facts that underpin the appellant's claim.

- [3] The appellant renders pathologist services. The respondent was employed by the appellant as a technologist and the parties concluded a written employment agreement on 26 August 2011, attached to the founding affidavit as Annexure "JM1". In terms of clause 17.1 of the employment contract, the respondent was required to give two calendar months' notice of her termination of service to the appellant should she wish to resign. On 27 September 2012 the respondent gave written notice of her resignation by means of a letter attached to the founding affidavit as Annexure "JM2". In the said letter she intimated that she would not be able to serve out her two months' notice period for the reasons stated in the letter. She therefore only gave one calendar month's notice, starting from 1 October 2012 to 31 October 2012. Although the appellant accepted her resignation, it indicated in a letter dated 28 September 2012, attached to the founding affidavit as Annexure "JM3", that the respondent would be required to in fact work her two months' calendar notice period. On 26 October 2012 a further letter of

demand was addressed to the respondent, attached to the founding affidavit as Annexure “JM4”. The respondent however indicated in an e-mail dated 31 October 2012, attached to the founding affidavit as Annexure “JM5”, that the matter was no longer in her hands and that the appellant would be contacted by her attorney or union official. On 1 November 2012 the respondent did not report for duty and had not reported subsequently prior to the bringing of the application. The appellant therefore contended that the respondent breached the employment contract concluded between the parties and that the appellant is consequently entitled to an order for specific performance of the employment contract concluded between the parties. In the alternative and should the Court not be willing to order specific performance of the employment contract, the appellant requested that the respondent be ordered to pay the amount claimed to the applicant as damages *in lieu*.

- [4] The respondent in her answering affidavit raised two points *in limine* in addition to her response on the merits of the application. These points were the following:

4.1 Firstly, the respondent contended that the relationship between the parties is governed by the Labour Relations Act and other labour related legislation, as is evident from the contract of employment concluded between the parties, Annexure “JM1”. It was therefore contended by the respondent that “the Labour Relations Act 66 of 1995 as amended has exclusive jurisdiction to adjudicate Labour disputes and that the applicant ought to have referred matters to either the Commission for Conciliation, Mediation and Arbitration or the Labour Court and that the Honourable Magistrates Court lacks the necessary jurisdiction to deal with the matter”. (*sic*)

See Record, p. 44, para 4.1 – 4.3

4.2 Secondly, the respondent contended that the Magistrate`s Court furthermore lacked jurisdiction because the cause of action as framed by the appellant is for specific performance of an employment contract which falls outside the Magistrate`s Court`s statutory powers, which leaves only the damages claim which ought to have been

pursued by means of an action and not application proceedings.

See Record, p. 44 - 45, para 5.

[5] At the onset of the hearing it was agreed between the parties that only the two points *in limine* would be dealt with and that the success of the application would depend entirely upon the determination of these two points. In other words, if any of the two points *in limine* were to be upheld, the application was to be dismissed, but if the two points *in limine* were to be dismissed, the claim for specific performance was to be granted.

[6] On 19 November 2012 the Court *a quo* upheld the respondent's first and second points *in limine* and therefore dismissed the application with costs. In response to a request for reasons for the aforesaid order filed on 19 November 2012, the Court *a quo* provided such reasons, dated 4 December 2012.

[7] In his heads of argument and also at the onset of the

hearing of the appeal, Mr Grobler, on behalf of the appellant, spontaneously conceded that it is no longer competent for the appellant to seek an order for specific performance of the contract as the relevant notice period had already expired on 30 November 2012. In his heads of argument Mr Grobler indicated that he would therefore request that should the appeal be successful, the respondent be ordered to pay the damages that was initially claimed in prayer 3 of the notice of motion, together with costs, which costs are to include both the costs of the application and the costs of the appeal. However, during the hearing of the appeal Mr Grobler contended that because the Court *a quo* never ruled upon the damages as an alternative, he is compelled to request that an order in terms of prayer 4 of the notice of motion (hence leave to institute an action for damages) be granted should the appeal be successful, again together with costs.

THE FIRST POINT IN LIMINE:

- [8] In finding that the Magistrate's Court has no jurisdiction to deal with the appellant's application, the Court *a quo*, in the

reasons for her order, referred to the fact that the employment contract between the parties was subject to the Labour Relations Act and furthermore referred to an extract (paragraphs 20 and 21) from the judgment in WANNENBURG v MADAMU TECHNOLOGIES (PTY) LTD, Case number AR87/2012, delivered on 13 June 2012 in the High Court, Pietermaritzburg. She then concluded that the first point *in limine* should be upheld in favour of the respondent.

- [9] In his argument during the appeal Mr Grobler submitted that the aforesaid judgment does not impact on the issue of jurisdiction in the current matter. However, in my view the said judgment actually confirms the appellant's stance in the current matter regarding the jurisdiction of the Magistrate's Court. The reliance of the Court *a quo* on the contents of, *inter alia*, paragraph 21 of the said judgment, is in my view misplaced. It seems that the remarks made in paragraph 21 of the said judgment were not only made *obiter*, but furthermore relates to a general principle that the Labour Court should be preferred for labour disputes because it is a specialist court designed for disputes in employment and

furthermore because in the Labour Court there is no risk of jurisdictional challenges in employment disputes. But the essence of the judgment actually related to the jurisdiction of Magistrates' Courts to determine an employee's claim for remuneration. In this regard the Court made the following findings which, in my view, are in fact in favour of the appellant in the current appeal:

“[15] In short, for this employee neither the LRA nor the BCEA provided remedies that fell within the exclusive jurisdiction of the Labour Court.

[16] In applying the precedent set in Fedlife and Makhanya it was confirmed that the High Court and the Labour Court both have the power to enforce common law contractual and constitutional rights insofar as their infringement arises from employment.”

And then furthermore, very importantly, in paragraph 19 of the judgment:

“[19] What is in issue in this appeal is whether the

Magistrates' Court had jurisdiction to enforce a claim arising from contract. The fact that the employee did not specify whether he accepted the repudiation and claimed damages or whether he rejected the repudiation and sought to enforce his claim, is immaterial in the circumstances of this case. ...If it was material, the employer could have inferred that the employee sought specific performance....Any doubt the employer had about the employee's claim could have been clarified in either an exception to the particulars of claim or by a request for further particulars. **Deficiencies in the pleading therefore did not impact on the Magistrates' Courts having jurisdiction.**"

(Own emphasis)

[10] The aforesaid judgment therefore, in my view, does not substantiate the finding of the Court *a quo* - to the contrary.

[11] Mr Qwelane, on behalf of the respondent, submitted that it is evident from the contents of the employment contract concluded between the parties that it was their intention that their relationship and therefore any dispute between them

should be dealt with in terms of the relevant different labour legislation in that paragraph 1.2 of the said contract reads as follows:

“This Agreement shall be subject to the Labour Relations Act 66 of 1995, legislation regulating minimum conditions of employment as well as the General Conditions of Employment and Quality Control Measures of the Employer.”

He furthermore relied on the judgment in CHIRWA v TRANSNET LTD AND OTHERS (2008) 29 (ILJ) 73 (CC), and more specifically paragraph 41 thereof in which the following is stated:

“[41] It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action

can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims.”

[12] Mr Qwelane consequently submitted that the subject matter of the appellant’s application, regardless of how it is formulated, arises out of an employment relationship in which the appellant, hence the employer, alleges a breach of the employment contract by means of an unfair resignation or an unfair labour practice and the appellant should therefore have pursued its claim in terms of the mechanisms established by labour related legislation.

[13] I cannot agree with the aforesaid submissions of Mr Qwelane. His submissions are not supported by the relevant case law of the recent years, some of which I will refer to now.

[14] In FEDLIFE ASSURANCE LTD v WOLFAARDT 2002 (1)

SA 49 (SCA) the respondent had claimed damages in the High Court resulting from the premature termination of his fixed-term contract of service. The appellant claimed that the High Court lacked jurisdiction because the matter should have been referred as an unfair dismissal to the Labour Court. The following relevant findings are to be found in the majority judgment as from paragraph 22 and further:

“[22] In my view chapter 8 of the 1995 Act is not exhaustive of the rights and remedies that accrue to an employee upon the termination of a contract of employment. Whether approached from the perspective of the constitutional dispensation and the common law or merely from a construction of the 1995 Act itself I do not think the Respondent has been deprived of the common-law right that he now seeks to enforce. A contract of employment for a fixed term is enforceable in accordance with its terms and the employer is liable for damages if it is breached on ordinary principles of the common law.

[23] There remains the question whether the respondent's action for contractual damages is nevertheless a matter

that falls within the exclusive jurisdiction of the Labour Court in terms of s 157(1). The appellant's counsel submitted in the alternative that it does.

[24]

[25] Furthermore s 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employee. Some of the implications were recently discussed by Zondo JP in LANGEVELDT v VRYBURG TRANSITIONAL LOCAL COUNCIL AND OTHERS (2001) 5 ILJ 1116 (LAC). Its exclusive jurisdiction arises only in respect of 'matters that elsewhere in terms of this Act or in terms of any law are to be determined by the Labour Court'. Various provisions of the 1995 Act identified particular disputes or issues that may arise between employers and employees and provide for such disputes and issues to be referred to the Labour Court for resolution, usually after attempts at conciliation have failed.... In my view, those are the 'matters' that are contemplated by s 157(1) and to which the Labour Court's exclusive jurisdiction is confined....

[26]

[27] Whether a particular dispute falls within the terms of s 191 depends on what is in dispute, and the fact that an unlawful dismissal might also be unfair... is irrelevant to that enquiry.The dispute in the present case is not about the fairness of the termination of the respondent's contract but about its unlawfulness and for that reason alone it does not fall within the terms of the section.... In those circumstances the respondent's action is not a 'matter' that is required to be adjudicated by the Labour Court as contemplated by s 157(1) and a special plea was correctly set aside." (Own emphasis)

Also see BOXER SUPERSTORES MTHATHA AND ANOTHER v MBENYA 2007 (5) SA 450 (SCA)

[14] In the very same CHIRWA-decision to which Mr Qwelane referred, Skweyiya J in his judgment, paragraph 60, quoted FEDLIFE, *supra*, with apparent approval:

"It is apparent from the provisions of s 157(1) that it does not confer 'exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between

employer and employee' . It seems implicit from the provisions of this section that the jurisdiction of the High Court is not ousted simply because a dispute is one that falls within the overall sphere of employment relations. The jurisdiction of the High Court will only be ousted in respect of matters that, in the word of s157(1) 'are to be determined by the Labour Court....'

(Own emphasis)

- [15] In UNIVERSITY OF THE NORTH v FRANKS AND OTHERS (2002) 23 ILJ 1252 (LAC) the Labour Appeal Court dismissed a challenge to the jurisdiction of the Labour Court to adjudicate a dispute regarding the interpretation of an employment contract with the following finding:

"The dispute therefore concerns a contract of employment any breach of which would vest the civil courts with jurisdiction to adjudicate it and, as the statute provides, so does the Labour Court concurrently have jurisdiction."

- [16] It in fact appears from the judgment in NEWU v CCMA & OTHERS (2007) 28 ILJ 1223 (LAC) that had the appellant in this instance claimed damages from the respondent in

the CCMA or the Labour Court, it would have been non-suited because there is no provision in the LRA which permits employers to pursue claims against their employees or former employees.

[17] In the judgment of TSIKA v BUFFALO CITY MUNICIPALITY (2009) 30 ILJ 131 (E) Grogan, AJ as he then was, specifically dealt with the effect of the CHIRWA-decision. In the said judgement he did a detailed analysis of the relevant case law pertaining to the issue in the current appeal, specifically also with reference to the effect of the CHIRWA-decision. He then concluded that the state of the law after the CHIRWA-decision is, *inter alia*, the following (at 130 B of the judgment):

“This Court and other civil courts retain their common-law jurisdiction to entertain claims for damages arising from alleged breaches of contracts of employment and the acts or omissions of either party after the termination of the employment, and the Labour Court has concurrent jurisdiction to determine such matters.” (Own emphasis)

[18] Mr Grobler in his argument heavily relied on the judgment in

GCABA v MINISTER FOR SAFETY AND SECURITY AND OTHERS 2010 (1) SA 238 (CC). He submitted that no reliance was placed by the appellant on any rights given to the employer generally in labour legislation or anything alike. The appellant's claim, according to his contention, was simply one for contractual relief.

Van der Westhuizen J on behalf of the unanimous court held as follows in paragraph 73 and further of the judgment:

“[73] Furthermore, the LRA does not intend to destroy causes of action or remedies and s 157 should not be interpreted to do so. Where a remedy lies in the High Court, s 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in *Chirwa* speaks of a Court for labour employment disputes, it refers to labour- and employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts, like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped

out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with a common-law other statutory remedies.

[74]

[75] Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case. In the event of the Court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the Court's competence. ..." (Own emphasis)

[19] In the current instance it is in my view very evident from the contents of the founding affidavit that the appellant's claim is for specific performance of a contract, with the alternative of contractual damages for the breach of the said contract. The mere fact that this contract is in fact an employment contract concluded between the parties, does not detract from the fact that the appellant's claim is for contractual relief under the common law. No remedy has been

provided for an employer such as the appellant in this instance in the LRA and furthermore the relief sought was not in any manner entrenched in any relevant labour legislation to fall under the exclusive jurisdiction of the CCMA and/or the Labour Court.

[20] In the premises I find that the Court *a quo* as a civil court did have jurisdiction to entertain the application of the appellant (subject to the findings regarding the second point *in limine*).

[21] I consequently find that the Court *a quo* erred in upholding the first point *in limine*.

THE SECOND POINT IN LIMINE:

[22] Mr Grobler submitted that the Court *a quo* confused the general discretion conferred upon a civil court to order specific performance of a contract with the question of whether or not that court has jurisdiction to issue such an order. He therefore contended that the Court *a quo* failed to properly have regard to the nature of the second point *in*

limine and erred in dismissing the appellant's claim for specific performance in the exercise of her discretion.

[23] Upon a proper reading of the reasons for the order it is evident that the Court *a quo* did in fact not consider the real issue raised by means of the point *in limine*, but adjudicated it on the basis of a court's discretion to refuse an order for specific performance. See Record, p. 127 – 128.

[24] In his argument during the hearing of the appeal, Mr Qwelane also spontaneously conceded that the Court *a quo* misunderstood the true nature of the second point *in limine* and that she therefore misdirected herself in that regard. He however submitted that the outcome of having upheld the second point *in limine*, was still correct, although based of the wrong reasons.

[25] From the formulation of the second point *in limine* in the answering affidavit, considered in conjunction with the arguments presented by the two legal representatives in the Court *a quo* and again during the hearing of the appeal, it is evident that the Court *a quo* in fact misdirected herself

regarding the true nature of the second point *in limine*. The second point *in limine* partly overlaps with the first point *in limine*, in that, in my understanding, it actually consists of two elements. The first is whether the Magistrate's Court has jurisdiction to order specific performance where the Court is requested to direct an employee to return to work, in which regard Mr Qwelane contended that this type of specific performance which the appellant claimed in the Court *a quo* is not of the class that falls within the statutory powers contained in the Magistrates' Courts Act, 32 of 1944 (hereinafter referred to as "the Act"). The second and more prominent element is that the respondent contends that a claim for damages in the alternative to specific performance in any event ought to have been instituted by means of action proceedings and not by means of motion/application proceedings, which, according to his argument, is confirmed by the appellant's claim in prayer 4 of the notice of motion.

- [26] Considering the Court *a quo*'s misdirection regarding the real issue raised in the second point *in limine*, we are at liberty to decide the said point *in limine* afresh.

[27] With regard to the first element of this point, one must firstly consider section 46(2)(c) of the Act, the relevant part of which reads as follows:

“46 Matters beyond the jurisdiction

(1)

(2) A court shall have no jurisdiction in matters -

(a)

(b)

(c) in which is sought specific performance without an alternative of payment of damages except in”

It is essential to realise that section 46 is prohibitive in nature, prohibiting Magistrates’ Courts from hearing claims and granting orders in those matters set out in the said section. See BADENHORST v THEOPHANOUS 1988 (1) SA 793 (C) at 796 E. It is not an enabling or empowering section.

[28] Section 29 of the Act, on the other hand, is in fact the section bestowing jurisdiction upon Magistrates’ Courts in

respect of causes of action, subject to monetary limits. It lays down what matters can be entertained in Magistrates' Courts. Section 29(1)(g) of the Act reads as follows:

“29 Jurisdiction in respect of causes of action

- (1) Subject to the provisions of this Act and the National Credit Act, 2005 (Act 34 of 2005), a Court, in respect of causes of action, shall have jurisdiction in –
 - (a)
 - (b)
 - (c)
 - (d)
 - (e)
 - (f)
 - (fA)
 - (g) actions other than those already mentioned in this section where the claim or the value of the money in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette.” (Own emphasis)

[29] Magistrates' Courts' entitlement to entertain a claim for specific performance of a contractual obligation with an

alternative claim for damages, therefore emanates from section 29 (1)(g) of the Act and not from section 46 (2)(c).

[30] That the Magistrate's Court has the jurisdiction to entertain a claim for specific performance, albeit with the alternative for damages, is evident from the following passage in JONES & BUCKLE, THE CIVIL PRACTICE OF THE MAGISTRATES' COURTS IN SOUTH AFRICA, Van Loggerenberg, 10th Edition (loose leaf edition), Vol 1, at Act 306:

“A plaintiff has a common-law right to demand specific performance of a contract, but the court has a discretion to refuse it. Magistrates' Courts have the ordinary common-law jurisdiction to grant orders for specific performance, but this jurisdiction is fettered to the extent laid down in the Act, in that in certain cases the court cannot grant an order without an alternative order for damages. In addition, the court may, in a proper case, exercise its discretion by refusing to grant an order which the Act allows it to grant. This discretion is vested in the High Courts and there is nothing to suggest that it is not also exercisable by the Magistrates' Courts.”

[31] The mere fact that in the current instance it was the specific performance of an employment contract which the appellant claimed (with the alternative of damages), does not detract from the Magistrate's Court's jurisdiction to entertain such an application and to order specific performance. There is no restriction in the Act, other than the monetary limit, to the nature of specific performance orders which the Magistrate's Court may order. To the contrary, it is evident from the case law I have already dealt with under the first point *in limine* that the Magistrate's Court in fact has such jurisdiction.

[32] The only remaining issue is the question whether the appellant was entitled to have made use of application proceedings as opposed to action proceedings.

[33] Mr Grobler submitted that there is no restriction in the Act or any other reason why the appellant was compelled to have instituted action proceedings. He also referred to the operative word "matters" contained in section 46 and submitted that it includes both applications and actions.

[34] As already indicated, section 46 is not the empowering

section. Although I agree with the interpretation of the word “matters”, that only means that the **prohibitions** contained in section 46 pertains to both applications and actions. The operative word that was used by the Legislature in the **empowering** section 29 is “actions”, which has previously already been construed as to have the restrictive meaning of action proceedings as such, not including application proceedings. In IN RE: PENNINGTON HEALTH COMMITTEE 1980 (4) SA 243 (NPD) at 247 H and further, the following *dicta* appear:

“A perusal of all the sections shows that the Legislature drew a clear distinction between actions and applications. Procedure by way of application is recognised, but the intention appears to have been to confer jurisdiction generally in actions (in a narrow sense) while authorising application proceedings only in specific cases. My conclusion that the word ‘actions in s 29(1) means proceedings initiated by summons is supported by the case of WOLMAN v BLOCK (2) 1928 OPD 119.It follows that the decision in WOLMAN v BLOCK (*supra*) is still applicable notwithstanding that it dealt with legislation which has since been repealed.”

[35] That the use of application procedure to initiate proceedings in Magistrates' Courts finds very limited application and that it may not be used if not specifically sanctioned, is very clear from the following respective extracts:

“The Magistrates' Courts Act and Rules provide only for applications in certain limited circumstances. Other legislation may also expressly or implicitly empower applications in the Magistrates' Courts.Although, in the Magistrates' Courts, the only applications that are strictly speaking capable of being independent proceedings are interdicts and spoliation orders..... If application proceedings are not sanctioned by the Act or rules or other legislation it is not competent to launch proceedings by way of application. When proceedings are launched by application not sanctioned in the rules or Act, they are a nullity in terms of the Act and Rules. (Own emphasis)

See CIVIL PROCEDURE IN MAGISTRATES' COURTS, LTC Harms, at B 485 – B 486.

“Die aansoek of mosie kan slegs in gevalle waarvoor uitdruklik voorsiening gemaak is, gebruik word om gedinge in te stel. Word dit gebruik in gevalle waarvoor daar nie voorsiening gemaak is nie, kom geen geding binne die raamwerk van die

Wet op Landdroshowe 32 van 1944 tot stand nie. Dit word aan die hand gedoen dat die enigste gevalle waar van die aansoek as middel tot die instel van 'n selfstandige geding ingevolge die Wet op Landdroshowe 32 van 1944 gebruik gemaak kan word, is wanneer 'n finale interdik en die mandament van spolie aangevra word.”

See BURGERLIKE PROSESREG IN DIE LANDDROSHOWE, H M Pretorius, Vol 2, at p. 687. Also see WOLMAN v BLOCK (2) 1928 OPD 119.

In BURGERLIKE PROSESREG IN DIE LANDDROSHOWE, (loose leaf) H Daniels, at AFD L-3 tot AFD L-4, the following is stated:

“Nie alle gedinge in die Landdroshof hoef deur middel van 'n dagvaarding ingestel te word nie; 'n beperkte aantal kan deur middel van die aansoekprosedure aanhangig gemaak word. Die aansoek of mosie kan slegs in gevalle waarvoor uitdruklik voorsiening gemaak is, gebruik word om gedinge in te stel. As dit gebruik word in gevalle waarvoor nie voorsiening gemaak is nie, kom geen geding binne die raamwerk van die Wet tot stand nie. Dit word aan die hand gedoen dat die enigste gevalle waar van die aansoek as middel tot die instel van 'n

selfstandige geding ingevolge die Wet gebruik gemaak kan word , is wanneer 'n finale interdik, die mandament van spolie, arrestasies en sommige beslagleggings, aangevra word.”

In E. CASTIGNANI (PTY) LTD v CLAUDE NEON LIGHTS (SA) LIMITED 1969 (4) SA 462 (O) at 465 A – C it was stated as follows:

“Die tipe bevel of vonnis waarvoor aansoek gedoen kan word by wyse van kennisgewing van mosie word egter bepaal deur die Wet op Landdroshoe self. Kyk WOLMAN v BLOCK 1928 OPD 119 te 122-3. ‘n Volledige lys van hierdie vonnisse en bevel word uiteengesit op bladsy 618 en 619 van The Civil Practice of the Magistrates’ Courts in South Africa deur Jones & Buckle. Die tipe bevel wat die Landdros in die onderhawige geval gemaak het, is nie een van die bevel wat ‘n Landdros bevoeg is om by wyse van kennisgewing van mosie te verleen nie. Indien die respondent in die onderhawige geval by wyse van kennisgewing van mosie geprosedeer het, het dit geen siviele geding of verrigting binne die raamwerk van die Wet op Landdroshoe tot stand gebring nie.”

See further BURGERLIKE PROSESREG IN DIE LANDDROSHOE, H M Pretorius, *supra* Vol 1, at p. 30

[36] A list of examples of proceedings which may be brought by way of application in terms of the Magistrates' Courts Act and the Rules are set out in CIVIL PROCEDURE IN MAGISTRATES' COURTS, LTC Harms, at B 487 – 489 and in BURGERLIKE PROSESREG IN DIE LANDDROSHOWE, (loose leaf) H Daniels, at p. AFD L-5.

[37] In the premises it is very clear that the appellant was not entitled to have made use of application proceedings in claiming its relief in the Magistrate's Court. The application therefore has to be considered to be null and void as if no proceedings have been instituted at all. The appellant should have instituted action proceedings and if that would have meant that claiming an order for specific performance would not have been possible, so be it – then it should have claimed damages. Alternatively the appellant should have instituted urgent application proceedings in the High Court.

[38] Mr Grobler's request that we grant an order in terms of prayer 4 of the notice of motion can also not be successful; firstly, because the appellant's application should is to be

considered to be null and void and secondly, because the appellant at no stage needed any permission to institute action proceedings for the recovery of damages– it was and still is entitled to do so in terms of the Act.

[39] In my view the second point *in limine* was therefore correctly upheld by the Court *a quo*, although based on the wrong reasons.

COSTS:

[40] Although the appellant is successful with some of the issues it took on appeal, the substantive outcome and result of the appeal is no different than what the outcome of the hearing in the Court *a quo* was. Therefore I deem it appropriate that the appellant be ordered to pay the costs of the appeal.

[41] The appeal is dismissed with costs.

C. VAN ZYL, J

I concur:

S. EBRAHIM, J

On behalf of the Appellant:

Adv S. Grobler
On Instructions of:
Honey Attorneys
BLOEMFONTEIN

On behalf of the Respondent:

Mr D Qwelane
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