

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A6/2009

In the matter between:-

M A TSHISA

Appellant

and

PREMIER OF THE FREE STATE

1st Respondent

N FENI

2nd Respondent

CORAM:

H.M. MUSI, JP *et* J.Y. CLAASEN, AJ

HEARD ON:

14 SEPTEMBER 2009

DELIVERED ON:

19 NOVEMBER 2009

JUDGMENT

H.M. MUSI, JP

- [1] This is an appeal from a judgment of the magistrates' court for the district of Bothaville, in terms of which the magistrate dismissed with costs an application for condonation brought by the appellant in terms of section 3(4) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 (the Act).

- [2] The history of the matter is somewhat chequered. The appellant had sued the Premier of the Free State (the first respondent) for damages he sustained as a result of damage to his minibus taxi in a motor collision involving his motor vehicle and a motor vehicle belonging to the first respondent which was at the time driven by Ms N. Feni (the second respondent). The latter had been in the employ of the first respondent at the time and was acting within the course of her employment as such. After service of summons, the first respondent entered an appearance to defend and thereafter the parties reached a settlement in terms of which the first respondent would settle the appellant's full claim together with costs. Whereas the settlement was reached in March 2007, the actual payment was received only a year later in May 2008, after an extensive exchange of correspondence between the attorneys of the respective parties. The delay was clearly occasioned by the failure of the first respondent's representatives and employees to get proper authorisation for the payment.
- [3] The appellant then adopted the attitude that due to the long delay in payment of the agreed amount, he had suffered loss

of income in that he had been unable to repair his minibus taxi timeously and could not run his business for the period of the delay. His attorneys then directed a notice in terms of section 3(2) of the Act to the first respondent (in fact it was addressed to the Minister of Health) communicating his intention to institute a fresh action for loss of income based on the same cause of action as the settled and finalised claim for damages. Since the six months' period within which such notice should have been issued had elapsed, the letter also requested the first respondent to consent to the late institution of the action. I should say that this should really have been a request for consent in terms of section 3(1)(b) but the letter concerned speaks of condonation in terms of section 3(4)(a).

- [4] The request for consent was rejected and the appellant then launched an application for condonation in terms of section 3(4) of the Act in the same magistrates' court under case number 783/2008. At the same time the appellant issued summons under the same case number for the loss of income claim. In due course the application and the summons were served on the respondents. The

respondents gave notice of their intention to oppose the application as well as an appearance to defend the action.

- [5] In opposing the application the respondents raised a point *in limine*, the essence of which was that the magistrates' court had no jurisdiction to hear such application. In support of this the respondents' legal representative referred to the judgment of the full bench of the Western Cape High Court in the matter of **THE MINISTER OF SAFETY AND SECURITY AND ANOTHER v BOSMAN**, case number A725/2007 delivered on 4 June 2008. Therein it was held that the magistrates' court, being a creature of statute, can only entertain such applications as are authorised by the Magistrates' Court Act, 32 of 1944, as amended or the Rules promulgated thereunder or some other Statute. It was held that the application under section 3(4) is the type of application not authorised by the Magistrates' Court Act or the Rules. Nor could the magistrates' power to entertain such application be implied in the Act.
- [6] The magistrate hearing the matter ruled that he was bound by the decision aforesaid and accordingly that he had no

jurisdiction to hear the application. He dismissed the application with costs. It is against this decision that the appeal is directed.

- [7] Before us Mr. Gilliland, for the appellant, contended that the **BOSMAN** judgment is distinguishable on the facts on the basis that there the appellant had not issued summons when she approached the magistrates' court for condonation. He contended that in this case the application was incidental to the matter before the magistrates' court and that that court could adjudicate it. Mr. Gilliland also submitted that **BOSMAN** was wrongly decided and urged us not to follow it. His argument in this regard rested on the following premises:

- 7.1 Where action has already been instituted in a magistrates' court and such court has jurisdiction in the cause of action, it will be convenient and in the interest of justice that the same court be clothed with authority to hear the condonation application.
- 7.2 A proper interpretation of the words "to a court having jurisdiction" appearing in section 3(4)(a) of the Act, is that the condonation application should be heard by the court having jurisdiction in the principal case.

7.3 Section 37(2) of the Magistrates' Court Act gives the magistrates' court the necessary jurisdiction to hear a condonation application as such application is merely ancillary to the main action before it. Mr. Gilliland handed up a copy of an order made by the North Gauteng High Court under case number 23045/2006 in terms of which the court transferred a similar application to a magistrates' court. He contended that this shows that the North Gauteng High Court accepted that the magistrates' court does have jurisdiction to hear such application.

[8] Mr. Mene, for the respondents, referred to the doctrine of *stare decisis* in terms of which the lower courts are bound by decisions of the superior courts. He submitted that the court *a quo* was correct in following the **BOSMAN** judgment. He argued that the **BOSMAN** judgment was based on settled legal principles and that it was correctly decided. He urged us to follow it.

[9] It is appropriate to dispose of the contentions, firstly, around the order of the North Gauteng High Court referred to above

and, secondly, section 37(2) of the Magistrates' Court Act. The order of the North Gauteng High Court reads in part as follows:

“Dat die saak oorgeplaas word na die betrokke landdroshof wat jurisdiksie het in terme van reël 39(22).”

The court here was acting in terms of rule 39(22) of the Uniform Rules. This was clearly an order pursuant to a written request of the parties prior to the commencement of trial. The parties themselves consented to the jurisdiction of the magistrates' court. The point in issue herein does not seem to have been canvassed at all.

[10] Section 37(2) of the Magistrates' Court Act reads as follows:

“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.”

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' Court in South Africa**, Vol 1 under a discussion of section 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 section 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.

[11] It is apposite to refer to the following passages in the **BOSMAN** judgment which appear to me to correctly reflect the legal position regarding the jurisdiction of the magistrates' court generally and in particular its power in relation to application proceedings:

“[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.
(my emphasis)

- [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.”

I have highlighted the third sentence in paragraph [10] of the quotation because I think it is significant for purposes of this judgment.

- [12] It seems to me that the answer to the question whether the provisions of the Act impliedly empowers the magistrates' court to hear an application for condonation in terms of section 3(4) is to be found in the interpretation of sub-section 4(a) thereof in the context of the purpose of the Act as appears from the preamble and taking into account the background against which the Act was introduced. The sub-section reads 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.” (my emphasis)

The highlighted words are critical. The question is which court did the Legislature have in mind? It will be noted that the word “court” is not defined in the Act in the sense that no indication is given whether it is reference to a magistrate's

court or high court and this may be significant. The question is whether the word “court” in the sub-section includes a magistrates’ court.

- [13] It is important to briefly sketch the background against which the Act was introduced. Its enactment can rightly be regarded as the Legislature’s response to the criticism that the courts had levelled against previous, similar statutory provisions that prescribed notice periods and time frames for institution of legal proceedings against certain organs of state for the recovery of debt. Some of these provisions have been repealed or amended by the Act, as can be seen from its preamble. One such statutory enactment is the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970, which applied to bodies like the first respondent herein. Section 2(1)(a) thereof prescribed a limited period of 90 days within which a creditor had to notify the relevant organ of State of the intended proceedings, failing which the proceedings could not be instituted. The section was declared unconstitutional in **MOISE v GREATER GERMISTON TRANSITIONAL LOCAL**

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(4) SA 491 (CC). It was pointed out that although it was open to a litigant to approach the court for condonation, nonetheless the provision remained a real obstacle to a litigant seeking the assistance of the court. In a nutshell, the section was found to be in conflict with section 34 of the Constitution in that it unjustifiably limited the right of access to the courts. A similar provision in the Defence Act, 44 of 1957 was found, on similar grounds, to be unconstitutional in **MOHLOMI v MINISTER OF DEFENCE** 1997 (1) SA 124 (CC).

- [14] Quite clearly the Act was meant to avoid the pitfalls of the previous legislation by making it less onerous for prospective litigants to have their disputes resolved by the courts. In my view, it is only proper and logical that a court interpreting section 3(4)(a) should be mindful of the above background and interpret it in the light of section 34 of the Constitution.

[15] The purpose of the Act is to “regulate the prescription and to harmonise the periods of prescription of debts for which certain organs of state are liable; to make provision for the notice requirements in connection with the institution of legal proceedings against certain organs of state in respect of the recovery of debt.....”. Now it is a fact that magistrates’ courts have jurisdiction to adjudicate on claims against organs of state for the recovery of debt and have always adjudicated such claims. Surely Parliament was fully aware of this and must have intended that the provisions of the Act would apply to all the courts that have jurisdiction over such claims. Therefore, 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.

[16] The above conclusion is fortified by the decision in **MINISTER OF SAFETY AND SECURITY v DE WITT** 2009 (1) SA 457 (SCA) to the effect that the application for condonation in terms of section 3(4) is no prerequisite for the institution of action; which means that a creditor may issue

and serve summons against an organ of state even when he/she has not issued a notice in terms of section 3(1) read with sub-section 2(a). The matter was put as follows at p. 461 F:

“[10] In my view, the argument loses sight of the purpose of condonation: it is to allow the action to proceed despite the fact that the peremptory provisions of section 3(1) have not been complied with. Section 3 must be read as a whole.”

This statement highlights the fact that a condonation application is something extraneous to the subject matter of dispute before the court. Reference to “the action” that condonation would allow to proceed can only be reference to the matter before the court over which it has jurisdiction. The “court having jurisdiction” in section 3(4)(a) clearly refers to the court having jurisdiction over the cause of action. If that court is a magistrates’ court then surely it should and must have jurisdiction to hear the condonation application.

[17] A contrary construction would, as Mr. Gilliland submitted, correctly, in my view, have absurd results. Imagine a person

seeking R5 000,00 compensation from a municipality for injuries sustained as a result of having fallen into a manhole. Having issued summons in the magistrates' court, the municipality raises the objection that he/she has not issued a notice in terms of section 3(2)(a). Could the litigant be expected to suspend the action and go to the High Court in order to seek condonation? He/she may simply not have the funds for such a venture and, moreover, the costs of High Court litigation may far exceed the amount of the claim. And what about the waste of time and inconvenience of shuttling between the two courts? It could quite easily amount to a negation of the right of access to the courts.

[18] In the instant case the appellant issued and served summons at the same time that he issued and served the condonation application. When the application was heard the principal claim was pending before the same court. The latter court was therefore the court having jurisdiction in the cause of action and was competent to hear the application in terms of section 3(4). I refrain from commenting on the prospects on success of such application, for that is a matter

that was not canvassed in this appeal and over which the magistrate's court would have to decide.

[19] The following order is granted:

- (a) The appeal is upheld with costs;
- (b) The judgment of the court *a quo* is set aside and replaced with the following:
 - 1. The point *in limine* is dismissed with costs.

H.M. MUSI, JP

I concur.

J.Y. CLAASEN, AJ

On behalf of appellant:	Adv. J.G. Gilliland Instructed by: Quinton Grimbeek Attorneys BLOEMFONTEIN
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On behalf of respondents:	Adv. B.S. Mene Instructed by: State Attorney BLOEMFONTEIN
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