IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION : MTHATHA

REPORTABLE

CASE NO. 2795/11

In the matter between:

MATSAPA TRADING 562 CC	**Applicant**
and	
GEBUZA BAITSHEOHI CONSTANCE	**1st Respondent**
GEBUZA BAITSHEOHI CONSTANCE N.O.	**2nd Respondent**
MATELA SIBANYONI & ASSOCIATES	**3rd Respondent**
JOLWANA MGIDLANA INC.	**4th Respondent**

JUDGMENT

GRIFFITHS, J.:

[1] On 29 November 2012, Cossie AJ delivered a judgment in motion proceedings in favour of the first respondent who was the applicant in those proceedings. I shall refer to those proceedings as "the main

application". Paragraph 4 of the order which she made consequent upon her judgment, being the ultimate paragraph thereof, reads as follows:

> "4. If the applicant (the present first respondent) does not institute action in respect of the dispute regarding the ownership of the property in question within 30 days of this judgment. (sic) The orders under paragraphs 1 and 2 above will fall away, and the applicant will pay costs of this application."

[2] The orders under paragraphs 1 and 2 which were referred to in paragraph 4 of her judgment in turn read as follows:

> "1. The application to strike out is dismissed with costs.
>
> 2. An order is granted restraining the first (the present applicant), second, third and fourth respondents pending an action to be instituted by the applicant from:
>
> 2.1 dealing, transferring, and/or encumbering the property in any way or form excluding payment of municipal services and taxes;
>
> 2.2 further destroying and demolishing the remaining building situated within the property;
>
> 2.3 ejecting, evicting and expelling from the property any of the tenants who were in

occupation prior to the alleged transfer of the property to the first respondent;

2.4 collecting or accepting monthly rental payments from tenants, should first and fourth respondents receive rental payments from tenants or any other party, such rentals and any other rental not paid to the first and fourth respondents, including rental paid to the applicant must be paid into the trust account of Messrs Jolwana Mgidlana Incorporated Attorneys, details of which must be made available to all parties within 5 days of the issue of this order, pending finalisation of the action to be instituted by the applicant."

[3] In passing, it appears that whilst she referred in paragraph 4 to paragraphs 1 and 2 of the order, she clearly intended to refer to paragraphs 2 and 3 as paragraph 1 of the order referred to the dismissal of an interlocutory application to strike out. Paragraph 3, in turn, reads as follows;

"3. The costs of this application are ordered to be costs in the action to be instituted by the applicant, subject to 4 below."

[4] It is common cause that in attempted compliance with paragraph 4 of the order, the first and second respondents issued summons out of this court on 11 January 2013 within the time period stipulated, the date by which they had to institute action being 16 January 2013. However,

service of the summons was not effected on the defendants until 18 January 2013, that is, some two days after the expiry of the 30 day period stipulated in paragraph 4 of the order.

[5] Because of this, the applicant in this matter (who was the first respondent in the main application) launched this application under the same case number in terms of which it seeks a declarator as follows

> "1. An order declaring that the First and/or Second Respondent have failed to institute action in respect of the dispute regarding the ownership of the property known as and described as Erf 86, Main Street, Herschel situated in the Senqu Municipality within 30 days of the judgment granted and handed down under case number 2795/11 in this Honourable Court on or about the 29th of November 2012."

[6] The effect of this order, if granted, would be to completely negate the orders granted by Cossie AJ and result, *inter alia*, in the applicant becoming entitled to payment of all monies collected as rental, which the applicant seeks as ancillary relief consequent upon the declarator mentioned earlier.

[7] The first respondent in her personal capacity and the second respondent, being the first respondent in her capacity as executor in her husband's deceased estate, have opposed the application and have contented themselves with the filing of a notice pursuant to the provisions of Rule 6(5)(d)(i) and (iii). In that notice they indicated that a legal point would be argued to the effect that the first and second respondents did

indeed comply with the above-mentioned order by instituting the relevant action timeously and that, accordingly, the applicant has not disclosed a cause of action.

[8] It is accordingly common cause between the parties that the only issue in this matter is whether or not the action was indeed instituted timeously. Narrowed further, the issue between the parties is as to whether or not the injunction to "institute action" in paragraph 4 of the order was complied with once the respondents had issued the summons out of the registrar's office or whether, in addition, service had to be effected on the defendants.

[9] The answer to this question lies, in my view, in the correct interpretation of the orders given by Cossie AJ. In this regard:

> "The court's intention has to be ascertained primarily from the language of the judgment or order as construed according to the usual well known rules.… The judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it. But if any uncertainty in meaning emerges, the extrinsic circumstances surrounding or leading up to the court's grant of the judgment or order may be investigated and taken into account in order to clarify it."[1]

[10] In this regard, Mr. Snyman, who has appeared for the applicant in this regard, has placed much reliance on the case of **Himmelsein v Super**

[1] Herbstein & van Winsen (fifth edition) at page 936

Rich CC and Another[2]. He has submitted that in that case it was found, and I quote from his heads of argument:

> "… That for an action to be instituted against parties, the summons commencing such action should at least be served in terms of the Rules of the honourable Court, upon such parties."

[11] Having read the judgment of Cameron J (as he then was) I am of the view that this submission made by Mr. Snyman is not entirely accurate. In my view, this statement was, at best for the applicant, *obiter dictum*. The learned judge in dealing with a similar argument to that punted by the applicant in the present matter stated as follows:

> "I shall assume that Himmelsein's contention that the order automatically lapsed on 20 January in the absence of service is correct; and that the respondents' contention that "institute" the action should be amended to read "commence by issue of summons" is wrong."

[12] The learned judge thereafter proceeded to find in favour of the respondents on the basis that the court had the power to, on good cause shown, extend the relevant time period which it proceeded to do. It was thus unnecessary for the court to make any finding with regard to the same matter in issue in this case as, even if the court had found in favour of the applicant in that matter on this issue, it was prepared to grant an extension of the relevant time period. For some unknown reason, the first and second respondents in this matter have seen fit not to follow the same route by applying for an extension of time in the event that I might find

[2] 1998 (1) SA 929 (W)

against them on the question in issue. However, be that as it may, it is my view that Himmelsein's case provides no support for the contention of the applicant that the words "institute action" as expressed in Cossie AJ's judgment require that the first and second respondents both issue and serve the summons on the defendants.

[13] On the contrary, there is substantial support for the contention that these words require no more than that the summons should be issued out of the office of the registrar within the time period stipulated. In this regard Mr. Bodlani, who has appeared on behalf of the respondents, has referred me to a number of relevant cases such as **Labuschagne v Minister Van Justisie**[3] which dealt with the now notorious section 32 of the Police Act[4], a section which limited actions against the police in that it required that any civil action against the State pursuant to the Act was to be commenced within six months after the cause of action had arisen. It furthermore required that at least one month's written notice of the action be given before the action was commenced. The Appellate Division (as it then was) found that on a correct interpretation of the section the action was commenced by the issue of summons, and not by service thereon on the defendant.

[14] Mr. Snyman has argued that these decisions are of little use in determining the intention Cossie AJ in framing the order as she did for the reason that those judgments dealt with legislative intent in framing a legislative measure for the protection of the State by drastically limiting the prescriptive, or expiry, period for actions against it and in other

[3] 1967 (2) SA 575 (A). The Appellate Division in this matter approved the earlier decision of Nxumalo v Minister of Justice and Others 1961 (3) SA 663 (WLD) which also dealt with the provisions of section 32 of the Police Act, 7 of 1958.
[4] No. 7 of 1958

regards. There is some force in this argument in that Cossie AJ's purpose in granting the order was very different. This is a matter to which I shall return later but these cases do provide some guidance as to how the courts have dealt with the words "shall be commenced".

[15] Mr. Snyman has sought to distinguish between the words "commencement of the action" and the words "institute action". In my view there is no difference in this regard in interpreting the words "institute action" as they appear in the judgment. Much the same argument was advanced in the case of **Mati v Minister of Justice, Police and Prisons, Ciskei** [5] in dealing with a similar provision to section 32 mentioned earlier which appeared in the Police Act No. 32 of 1980 (CK). This section provided that no civil proceedings could be "brought" against the Minister if a period of six calendar months had elapsed from the date on which the cause of action arose. The argument was advanced on behalf of the defendant in that matter that the word "brought" was only satisfied when the summons had been issued and served on the defendant. In other words, the mere issue of the summons would not suffice to satisfy the section. Classen J dismissed this argument after a thorough examination of the wording of the section and a number of relevant cases. He then concluded at page 754B – E:

> "The Shorter Oxford English Dictionary gives as a meaning of the verb 'bring' 'to set on foot (an action at law)'. The same dictionary states 'to set on foot' to mean 'to originate or start, to set going'. One of the meanings of the verb 'institute' is given as 'to set on foot, initiate, start'. The verb 'commence' has the same meaning. In the literary sense then use of any one of these words can convey the identical meaning. In the

[5] 1988 (3) SA 750 (CkGD)

> context of s 48, and in the legal sense, I can see no reason to differentiate between the meaning of the words 'commence', 'institute' or 'bring'. If the commencement or institution of an action is the issue of summons, so must the bringing of an action be the issue of summons. The section provides that civil proceedings shall be brought against the State or against a member of the Force within a stated period. On an ordinary understanding of the words used they mean nothing more than that the first procedural step to redress, by way of civil proceedings, a wrong as envisaged in the section, must be taken within the stated period and the first procedural step is undoubtedly the issue of summons. It cannot, in my view, be read from or into the section that proceedings already commenced or instituted must be brought to the attention of a cited defendant (that is by way of service of the summons upon him) in the stated period."

[16] Whilst Mati's case dealt with the Legislature's intent in creating a prohibition of actions after a limited period, which, as I have indicated, is different to the present matter, it does in my view provide fairly persuasive guidance as to how the relevant words are to be construed in their ordinary sense.

[17] Mr. Snyman has referred me to the case of **Msomi V Eagle Insurance Co. Ltd.**[6] which involved interpretation of the words "if the claim in question has not been instituted by the claimant" as contained in section 23(d) of the Compulsory Motor Vehicle Insurance Act[7]. The issue involved was whether or not the plaintiff had indeed instituted a claim in accordance with the relevant subsection in that an agent, and not the plaintiff personally, had prepared the necessary claim form and delivered

[6] 1983 (4) 592 (D&CLD)
[7] No. 56 of 972

it to the defendant. In dealing with the question of what was meant by this section Leon J stated the following:

> "The phrase "institute a claim" is not a happy one: it would be more correct to say that one makes a claim or institutes an action. In this context the reference to "claim" must refer to the liability of the authorized insurer under section 21 to compensate the person referred to in the section. And a "claim" is a "claim for compensation"…"

[18] Read in this context, it apparently became common cause between counsel in that matter that the claim could not be instituted unless the relevant claim form was in fact lodged with the insurance company. Mr. Snyman has pointed to this as support for his submission that service of the summons is required. In my view, this does not assist in the present matter. Leon J referred to a distinction between "making a claim" and "instituting an action" and concluded that the making of a claim must, of necessity, require that the claim form come to the attention of the entity from whom the claim is made (in that instance the insurance company) as, as stated by Leon J:

> "In general the "claim" is the assertion of the right to something. One cannot assert a right to claim something in the air."

[19] Mati's case is strong authority for the conclusion that the words "institute action", in their ordinary sense, mean that the first and second respondents were to issue summons in the contemplated action within the 30 day period. It is necessary however to measure this as against the

reasoning of Cossie AJ in her judgment to determine whether or not she might have intended otherwise.

[20] Mr. Snyman has urged me to find that, on a reading of her judgment, Cossie AJ did indeed intend by these words that service on the defendant, or defendants, was required. In support of this submission he has argued that if service were not a requirement, this could have had the result that the plaintiff might merely have issued summons out of the registrar's office, placed it in a drawer and forgotten about the matter in order to keep the interdict alive in perpetuity. This, so he has contended, could never have been the intention of the learned acting judge.

[21] Mr. Bodlani has countered this submission by arguing that the fact that the summons was served two days after the expiry of the 30 day period is a clear indication that the first and second respondents did not intend to issue summons with the sole purpose of perpetuating the interdict. However, as I pointed out to Mr. Bodlani, the judgment must be interpreted as it stands and I am not entitled to take into account *ex post facto* events such as this.

[22] There are, however, a number of factors which militate against this argument of Mr. Snyman. Firstly, if Cossie AJ indeed intended service to be an element of the act of instituting the action, one would have expected her to have expressed this in her order. Secondly, if this had been her intention, a similar argument could be used against the applicant in that the applicant, as a defendant in the action, might well have evaded service until such time as the 30 day period had expired, thereby causing the interdict to lapse which is clearly favourable to the applicant. Thirdly, Cossie AJ did not deal with this particular question in her judgment and

there is nothing therein to indicate that she intended service on the defendant to be a component of the words "institute action". Finally, the main dispute involves the alleged unlawful transfer of certain fixed property out of the first respondent's deceased husband’s estate which she seeks to have returned to the estate. Despite the arguments to the contrary by Mr. Snyman, I am of the view that her clear intent throughout was to ensure that this property reverts to the estate. This she seeks to do by way of the action. There is, accordingly, no reason whatsoever as to why she would wish to delay service of the summons and thereby delay action for such relief.

[23] I am accordingly of the view that not only is the ordinary meaning of the words in question to the effect that issue of summons out of the registrar's office without service is sufficient, but that that there is nothing in the judgment of Cossie AJ which might militate against this. Indeed, in my view, her judgment is supportive of this conclusion in that her obvious intent was that the interdict was not to remain extant in perpetuity but that it should only remain extant until such time as the first and second respondents had exhausted their avenues of relief by way of action. She thus required some act of faith on the part of these respondents which she determined to be the institution of an action by way of issue of summons.

[24] In the circumstances, I find that the intention of Cossie AJ's order was that the respondents were to institute action by way of the issue of summons within 30 days of her judgment and that, as it is common cause that this was done, the applicant is not entitled to the declarator it seeks.

Accordingly, the application is dismissed with costs.

JUDGE OF THE HIGH COURT

HEARD ON : 30 AUGUST 2013
DELIVERED ON : 26 SEPTEMBER 2013

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