IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

Case No. 1585/2022

In the matter between:-

MINISTER OF POLICE Applicant

and

MAGISTRATE MR NOBUMBA N.O. First Respondent

NTSIKELELO SIKO Second Respondent

JUDGMENT

BANDS AJ:

[1] Many a claim has floundered at the first hurdle. This matter is no different.

[2] The applicant applied to review and set aside the decision of the first respondent, condoning the second respondent's non-compliance with section 3(2)(a), read with section 4(1)(a), of the Institution of Legal Proceedings Against Certain Organs of State, Act 20 of 2002 ("*the Institution of Legal Proceedings Act*"); and granting the second respondent leave to pursue the civil action against the applicant for unlawful arrest and detention. In pursuance of such relief, the applicant placed reliance on the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("*PAJA*"). Only the second respondent opposes the relief sought, with the first respondent having filed a notice to abide the decision of this court.

[3] The history of this matter can be summarised as follows. The second respondent was arrested, without a warrant, by members of the South African Police Services ("*SAPS*") on 15 January 2020 and detained until the next day. Aggrieved

by the aforesaid, the second respondent instituted action in the New Brighton District Court, claiming damages against the applicant for his alleged unlawful arrest and detention. Two special pleas were raised on the pleadings. Following the withdrawal of the applicant's second special plea, argument proceeded on 25 October 2021 in respect of the first special plea, which was founded on the second respondent's failure to serve a notice of intended legal proceedings on the National Commissioner of SAPS within six months of the date on which the debt became due.

[4] Following argument, the first respondent granted an order upholding the first special plea.

[5] On 11 November 2021, the second respondent brought an application for condonation for his aforesaid failure. The applicant, having elected not to file an answering affidavit, filed a notice in terms of Rule 55(1)(g)(iii) of the Magistrates' Rules of Court, in which the following was raised:

> *"1. Two Special Pleas were raised as per the Defendant's Amended Plea, in respect of non-compliance with the provisions of Act 40 of 2002 and Act 8 of 2017.*
>
> *2. Arguments only proceeded on Special Plea (sic) in respect of Act 40 of 2002, separately from the merits before court on 25th October 2021, and consequently the Special Plea was upheld with costs as per Court Order dated 25 October 2021 resulting int the action being dismissed with costs.*
>
> *3. The only legal remedy available to the Applicant is an appeal, at a higher court within the prescribed period by the Court Rules, as the matter is dismissed. This was confirmed in Lindile Soga vs Minister of Police & Another, where it was stipulated that* ***Special Pleas of time-bearing (sic) render the claim permanently unenforceable and the plaintiff has no duty to give notice of any intended legal proceedings as there is no claim. Moreover, Application for Condonation cannot revive the claim unless the judgment is reversed on appeal. See a copy whereof duly (sic) annexed hereto marked "A" and "B".****"*

[Underlining and bold typeset as contained in the notice].

[6] Following argument of the application for condonation, the first respondent granted the order forming the subject matter of this review. I pause to mention that the condonation proceedings were not recorded and accordingly, there exists no transcript. I now turn to the application at hand.

[7] The applicant's shortcomings in the present proceedings are patent.

[8] Judicial review under PAJA is only tenable if the impugned decision constitutes 'administrative action'. In terms of section 1 of PAJA:

> *"**administrative action**" means any decision taken, or any failure to take a decision, by-*
>
> *(a) an organ of state, when-*
>
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
>
> *(ii) exercising a public power or performing a public function in terms of any legislation; or*
>
> *(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-*
>
> *(aa) …*
>
> *(bb) …*
>
> *(cc) …*

(dd) …

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating 7 Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) …"

[9] Accordingly, decisions of judicial officers are specifically excluded from the ambit of PAJA and do not constitute administrative action. Instead, section 22 of the Superior Courts Act 10 of 2013 ("*the Superior Courts Act*") is of application.

[10] In terms of section 22 of the Superior Courts Act:

"*(1) 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; and

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

(2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts."

[11] This was correctly raised in the heads of argument filed on behalf of the second respondent. In response thereto, the applicant filed supplementary heads of argument in which the court was implored to adopt an approach that substance prevail over form. It is so that the labels used by the parties is not decisive.[1] However, where a litigant relies upon a statutory provision, and whilst it is not necessary to specify it, it must be clear from the facts alleged by the litigant that the section is relevant and operative.[2] For the purposes of this judgment and on the assumption that the applicant's incorrect characterisation of the proceedings is not fatal to his cause of action, it is necessary to consider whether the papers set out fully the facts upon which the applicant's cause of action is based, and the legal basis therefor.

[12] In this regard, it was argued on behalf of the applicant, that the first respondent, in entertaining the application for condonation, committed a gross irregularity as envisaged in section 22(1)(c) of the Superior Courts Act.

[13] Van Loggerenburg, *Erasmus, Superior Court Practice* Vol 2 (Juta)[3] interprets gross irregularity to refer to "*an irregular act or omission by the presiding judicial officer . . . in respect of the proceedings of 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.*"

[14] The high-water mark of the applicant's case is contained in paragraphs 26 to 28 of his founding papers, which reads as follows:

> "*26. On 30th March 2022, Ms Ngeyakhe argued the matter on behalf of the Applicant and it was before the First Respondent once again, the First Respondent with great respect committed an error in law by entertaining the application more especially having regard to the fact that he upheld the special plea, which effectually disposed of the matter permanently.*

[1] *Notyawa v Makana Municipality and Others* 2020 (2) BCLR 136 (CC).
[2] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 27.
[3] [Service 7, 2018] A2-134.

27. I submit with respect that a condonation application cannot be instituted and considered in respect of a claim, which was dismissed. By upholding the special plea, First Respondent has finally decided the issue raised by the Special plea; such decision resulted in the dismissal of the claim and as such is final and permanent.

GROUNDS FOR REVIEW

28. The decision taken by the First Respondent falls to be set aside by this Honourable Court in terms of Section 6(2)(d) read with section 8 of the Promotion of Administrative Justice Act No 3 of 2002 ("PAJA") for the following reasons:

a) The First Respondent has granted an order upholding the special plea and thereby disposing of the matter permanently, it is wrong in law to then entertain a condonation application on a matter which had already been finally dealt with; - Res Judicata;

b) The First Respondent committed an error in law by handing down an order that the Second Respondent is granted leave to pursue a permanently disposed of civil action;

c) The First Respondent's decisions in this matter were materially influenced by error of law; The First Respondent failed to take the relevant legislative and judicial interpretation of the law into account;

d) The decisions were unreasonable, irrational and no reasonable decision maker would come to the same decision."

[15] On a proper construction of the aforesaid, the basis for the review is that the applicant contends that the second respondent's claim was finally adjudicated upon and has accordingly been rendered *res judicata.* Accordingly it was wrong in law to entertain the application. This is not a ground of review which falls within the

purview of section 22(1)(c) of the Superior Courts Act and accordingly, the application stands to be dismissed on this ground alone.

[16] In any event, if I am incorrect in this regard, the grounds of review relied upon by the applicant in the context of the present matter, properly considered, take issue with the result of the proceedings and not the method thereof and accordingly constitute grounds of appeal and not grounds of review.

[17] In the context of review proceedings, the court, in the oft-quoted passage in *Ellis v Morgan*, stated as follows:[4]

> *"But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined."*

[18] The aforesaid principle was thereafter qualified in *Goldfields Investments Ltd and Another v City Council of Johannesburg and Another*[5] wherein the court expressed that:

> "*The law, as stated in Ellis v Morgan (supra) has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in*

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[4] *Ellis v Morgan; Ellis v Dessai* 1909 TS 576.
See also: *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at paragraph [72].
[5] 1938 TPD 551.

relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the Court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial."

[19] The Supreme Court of Appeal, in *Telcordia Technologies Inc. (supra)*, drew a distinction between the reasoning of the decision-maker and the conduct of the proceedings, and warned that the two concepts ought not to be confused with one another.

[20] The Constitutional Court *in Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, with reference to the aforesaid distinction, said as follows:[6]

"Both Ellis and Goldfields make it plain that the crucial enquiry is whether the conduct of the decision-maker complained of prevented a fair trial of issues. The complaint must be directed at the method or conduct and not the result of the proceedings. And the reasoning of the decision-maker must not be confused with the conduct of the proceedings. There is a fine line between reasoning and the conduct of the proceedings, and at times it may be difficult to draw the line; there is nevertheless an important difference."

[21] The applicant, seemingly, conflates these two issues.

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[6] 2008 (2) SA 24 at paragraph [265].

[22] Accordingly, the applicant's application for review stands to be dismissed on either of the aforesaid grounds. I see no reason why the costs should not follow the result.

[23] In the result, I make the following order:

1. The review is dismissed with costs.

I BANDS
ACTING JUDGE OF THE HIGH COURT
I agree.
L RUSI
JUDGE OF THE HIGH COURT

Appearances:

For the applicant:	Ms Cubungu
Instructed by:	The State Attorney 29 Western Road, Central, Gqeberha
For second respondent:	Ms Ntsepe
Instructed by:	Magqabi Seth Zitha Attorneys No 14 Market Street, Harmony Building, North End, Gqeberha

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Coram:	Rusi J *et* Bands AJ
Date heard:	1 December 2022
Delivered:	2 March 2023