

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

Reportable: YES/NO Of Interest to other Judges: YES/NO Circulate to Magistrates: YES/NO
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Case no. **1581/2021**

In the matter between:

ZELDA BISSCHOFF

Applicant

and

MAGISTRATE JANSEN VAN RENSBURG

First Respondent

ACTING MAGISTRATE SEBE

Second Respondent

McINTYRE & VAN DER POST INCORPORATED

Third Respondent

CORAM:

LOUBSER, J *et* DE KOCK, AJ

HEARD ON:

11 October 2021

JUDGMENT BY:

DE KOCK, AJ

DELIVERED:

28 October 2021

- [1] This is an application for the review and setting aside of orders made in the Bloemfontein Magistrate Court in interlocutory motion Court proceedings. The interlocutory proceedings followed upon an action instituted in the Magistrate Court by the Third Respondent (“the Respondent”) against the Applicant for payment of a sum of R5700. The sum claimed was for fees owed by the Applicant to the Respondent for legal services rendered.

- [2] Before summons was issued, a dispute ensued between the Applicant and the Respondent pertaining to the amount owing. The Applicant then reported the dispute to the Legal Practice Council (“the LPC”) for their investigation and findings. Before the LPC could adjudicate the matter, the Respondent proceeded to issue summons against the Applicant for the amount claimed, well knowing that the LPC was still considering the complaint of the Applicant.

- [3] The Applicant responded by filing a plea wherein she stated the fact that the LPC had not yet made findings concerning her complaint.

- [4] The next step that the Applicant took was to make application in the Magistrate Court for an order striking out the Respondent’s claim on certain grounds. This application was dismissed with costs.

- [5] In a next application the Respondent applied for an order declaring the filing of further pleadings and affidavits by the Applicant in the action as irregular. This application was granted with costs. What then followed was an application by the Applicant for rescission of the orders made in the applications referred to. The outcome of this rescission application is still pending.

- [6] Another Application then served before the Magistrate Court in which the Applicant moved for the stay of the proceedings in terms of Section 130 of the National Credit act 34 of 2005. This application was also dismissed.

- [7] In the present application the Applicant seeks not only to have the orders set aside but also various directives and findings relating to the merits of the main action.
- [8] The Applicant acted in person in the proceedings before Court and thus was not legally represented.
- [9] The First and Second Respondents filed a notice to abide. The Respondent filed an opposing affidavit. In the Respondent's opposing affidavit, the Respondent raised two points *in limine*.
- [10] The Respondent's first point *in limine* is that the relief sought in terms of prayers 3, 4.1, 5.2, 5.3 and 7 are not permitted under either Section 22 or Rule 53 of the Uniform Rules of Court.
- [11] This current application before court is an application for the review of the conduct of the respective Magistrates, as indicated; in the Applicant's Notice of Motion and founding papers. This Court is of the view that the various declaratory orders and additional findings sought by the Applicant in the stated prayers as well as in prayers 4.2-4 and 6.1-6 cannot be entertained by this Court.
- [12] This is so because section 22(1) of the Superior Courts Act, Act 10 of 2013 deals with the grounds upon which the proceedings of a Magistrate's Court may be reviewed whilst Uniform Rule 53 lays down the relevant procedure.
- . The grounds upon which proceedings of any Magistrate's Court may be brought under review before a High Court 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 officer;
 - (c) Gross irregularity in the proceedings and
 - (d) The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

- [13] The relief sought in prayers 3.1, 3.2, 4.1, 4.2, 4.3, 4.4, 5.2, 5.3, 6.1, 6.2, 6.3, 6.4, 6.5, 6.6 and 7 does not fall within the ambit of Section 22(1) and Uniform Rule 53. The relief sought in the aforementioned prayers therefor cannot succeed.
- [14] The Respondents' first point *in limine* is therefore upheld.
- [15] Due to the fact that the Respondent's first point *in limine* is upheld it is not necessary to adjudicate upon the second point *in limine* raised by the Respondent.
- [16] The Court now proceeds to adjudicate the remainder of the relief sought by the Applicant

Reviewing and setting aside of the proceedings on 4 and 11 September 2020 in the Magistrate's Court of Bloemfontein.

- [17] The proceedings which took place on the 4th and 11th September 2020 were motion court proceedings.
- [18] In the Rule 19(2) application legal arguments were provided by both parties on the 4th September 2020 and on 11 September 2020 the First Respondent delivered her Judgment thereto in which she upheld the first point *in limine* raised in opposition thereto and therefore dismissed the application.
- [19] Evenly on the 4th September 2020 the First Respondent proceeded to hear the Respondent's Rule 60A (2) application on an unopposed basis as the Applicant did not submit an opposing affidavit. The First Respondent offered the Applicant an opportunity to postpone the hearing for the Applicant to submit an opposing affidavit on condition that the Applicant pays the costs of the postponement. The latter is evident from the Applicant's founding affidavit. The Applicant refused the opportunity to oppose the stated application.

- [20] The First Respondent then in her discretion did not allow a further postponement and opportunity to oppose the application and granted the Rule 60A application on an unopposed basis. Then on 20 September 2020, the Second Respondent ruled that the National Credit Act 34 of 2005 was not applicable to the Respondent's claim in a "*point in limine*" application launched by the Applicant,
- [21] On the 21st September 2020 the Applicant lodged an application for rescission in respect of both the Magistrate's Court Rule 19(2) order and the Magistrate's Court Rule 60A (2) order granted by the First Respondent. As indicated earlier, judgement in that application is still pending. Moreover, the action proceedings instituted by the Respondent, has not commenced yet.
- [22] The Court deems it fit now to refer to the following applicable case law.

Generally, a High Court will be reluctant to reviews incomplete proceedings in a Magistrate's Court. See: **Motata v Nair N.O. and another 2009 (2) SA 575 (T) 578 H – I.**

In **Motata v Nair N.O. and another** *supra* the following was stated by Hancke and Pickering JJ relevant to reviews in *medias res*:

“(9) *It is trite that as a general rule a High Court will not by way of entertaining an application for review intervene with incomplete proceedings in a Lower Court. As was stated in **Wahlhouse and others v Additional Magistrate Johannesburg and another** 1959 (3) SA 113 (AD) at 119 G, the High Court will not ordinarily interfere whether by way of appeal or review before conviction has taken place in the Lower Court even if the point decided against the accused by a Magistrate is fundamental to the accused's guilt ...*”

- [23] In **Mispha CC and another v The Honourable Regional Magistrate and others** 2647/2011 (15 August 2013) ECD, Grahamstown, delivered on 18 September 2013 the Full Bench held as follows as to Review in *medias res*:

“(46) *Against this background our Courts are extremely reluctant to interfere with or allow the review of proceedings not yet completed in an inferior Court. It has been said that the Court will only do so in exceptional circumstances where serious injustice or otherwise result or where justice cannot be achieved in any other way. **Wahlhouse and others v Additional Magistrate Johannesburg** 1959 (3) SA 113 (A) at 119 H – 120 H, **Building Improvement Finance Co (Pty) Ltd** supra at 793 F – 794 A, **R v Marais** 1959 (1) SA 98 (2) at 101 H, **Van Tonder v Killian N.O.** 1992 (1) SA 67 (T) at 74 D – I, **Nourse v Van Heerden** 1990 (2) SACR 198 (W), **S v Attorney General of the Western Cape; S v Regional Magistrate, Wynberg** 1992 (2) SACR 13 (C).”*

[24] In **Adonis v Additional Magistrate Bellville and others** 2007 (2) SA 147 (C) at paras [21] the following was stated:

“[21] *It is generally accepted that this Court will not readily intervene in Lower Court proceedings which have not yet terminated unless grave injustice may otherwise result or where justice may not be obtained by other means. See: **Wahlhouse and others v Additional Magistrate Johannesburg** 1959 (3) SA 113 (A) at 119 H to 120 C, **Ishmael and others v Additional Magistrate Wynberg and another** 1963 (SA) 1 (A) at 5 G to 6 A, **Building Improvements Co (Pty) Ltd v Additional Magistrate Johannesburg and another** 1978 (4) SA 790 (T) at 793 F – G.*

[25] What has been overlooked by the Applicant is that the review of the orders granted in the Magistrate’s Court, Bloemfontein by the First and Second Respondents is in *medias res*. The question of review in *medias res* must be considered against such grave injustice as a result, if the Court were not to intervene at this stage, such as to materially prejudice the Applicant which cannot in due course be corrected on review or appeal.

[26] In this Court’s view no exceptional circumstances have been demonstrated to exist in this matter which would lead to serious injustice arising. Further

and in any event on what is before this Court the Court is not convinced that any of the grounds referred to in Section 22 of the Superior Courts Act is in any way satisfied. With due regard to what has been stated in this Judgment and raised in the papers in this review, the Court is of the view that not only is the review in regard to the orders granted on the 4th September 2020 and 11 September 2020 impermissible at this stage in *medias res*, but and also do not fall within the ambit of Section 22 of the Superior Courts Act at all. No gross irregularities were evident from the records at our disposal.

The review and setting aside of the proceedings on 20 November 2020.

- [27] These proceedings were concluded as a result of the Acting Magistrate Sebe concluding that the National Credit Act does not apply to the matter at hand.

- [28] The latter caused the Applicant to request the Court to cease the proceedings immediately and to provide the Applicant an opportunity to take this finding “*on appeal*”.

- [29] Acting Magistrate Sebe adhered to this request and the matter was removed from the roll for the Applicant to take the findings regarding the applicability of the National Credit Act on appeal.

- [30] The Court deems it fit to refer to the following authorities: If the complaint is against the result of the proceedings in a Magistrate’s Court appeal is the remedy, if against the method, review is the remedy. See: **Snyders v De Jager** 2016 (5) SA 218 (SCA) 222 F – J, as well as **South Durban Community Environmental Alliance v MSC for Economic Development Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government** 2020 (4) SA 453 (SCA).

- [31] It is emphasized that, if review proceedings are correctly brought as opposed to appeal proceedings the provisions of Section 22 of the Superior Courts Act finds application.

- [32] The issue raised by the Applicant does not go to the method of the proceedings but to the result thereof and it is a matter for appeal. On what has been raised on the papers before Court in this review, the Court is not persuaded that any of the grounds referred to in Section 22 of the Superior Courts Act are in any way satisfied to say the least.
- [33] This Court disagrees with the Applicant's view that the Respondent acted irregular and or unlawful. The court is in strong disagreement with the Applicant's contention that the Respondent acted dishonestly in that the Respondent did not declare in the court a quo that the matter is under dispute resolution before the LPC. A special plea in regard to a pending dispute resolution first needs to be adjudicated, the matter is not automatically under dispute resolution. In any event we have been informed at the hearing of the review that the LPC has adjudicated the complaint and the claim of the Respondent has now been reduced to some R5000-00. This outcome makes it practically an academic exercise for this Court to pronounce itself on the issues raised by the Applicant. In any event we are of the view that all the issues that were brought by the Applicant before the court by way of motion proceedings, should have been adjudicated in the main action itself. It was not necessary to burden the Court with separate applications which could have been considered in the main action.

COSTS:

- [34] The next question is the question of costs.
- [35] It is trite that costs is in the discretion of the Court. See in this regard: Swartbooi v Brink 2006 (1) SA 203 (CC) at para [7].
- [36] Having regard to all the circumstances of the matter, the Court is not persuaded that a punitive costs order would be appropriate. The Applicant is not legally represented and she obviously did all she could to advance her case.

[37] Accordingly the following order is granted:

ORDER:

1. The Applicant's application is dismissed with costs.

D. DE KOCK, AJ

I agree and it is so ordered.

P. J. LOUBSER, J

For the Applicant:

In Person

For the Third Respondent:
Instructed by:

Mr. L. D. Van Vuuren
McIntyre & van der Post Attorneys
Bloemfontein