

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No.2022/4340

**DELETE WHICHEVER IS NOT
APPLICABLE**

- (1) REPORTABLE: No
- (2) OF INTEREST TO OTHER JUDGES: No
- (3) REVISED. No

.....
R. SHEPSTONE

13 June 2023

In the matter between:

GREEN OUTDOOR GYM(PTY)LTD

FIRST APPLICANT

TIMOTHY PAUL HOGINS

SECOND APPLICANT

and

NORMAN OGANA

FIRST

RESPONDENT

MAGISTRATE BEHARIE

SECOND RESPONDENT

JUDGMENT

Introduction

- [1] Judicial review is the process during which the High Court examines the decisions of lower courts under the magnifying glass of higher scrutiny. It is a reminder that the scales of justice demand not just the weight of the law, but also the careful application of the judicial mind.
- [2] This is an application to review the decision and judgment of the Honourable Magistrate Behari handed down on the 19th of October 2021 in the Magistrate's Court for the district of Johannesburg Central ("**the Judgment**").
- [3] The applicant seeks an order setting aside the Judgment inter alia in terms of section 22(1)(a) of the Superior Courts Act 10 of 2013 ("**the Superior Court's Act**").
- [4] The applicants assert that the Magistrate's Court for the district of Johannesburg Central lacked the requisite jurisdiction to transfer the action to another court. The applicants sought to review the judgment of the Magistrate's Court on two further grounds which, for the reasons set out herein, become irrelevant.

Background

- [5] In September 2020 the first respondent, Mr. Norman Ogana, instituted an action against the applicants out of the Magistrate's Court for the district of Tshwane Central, held at Pretoria.
- [6] The first respondent's attorneys subsequently withdrew the action pursuant to a special plea of lack of jurisdiction brought by the applicants.
- [7] The first respondent, following the withdrawal of the action in the Pretoria Magistrate's Court, instituted action against the applicants in the Johannesburg Magistrate's Court. The applicants once again filed a plea containing a special plea of lack of jurisdiction.
- [8] The special plea spurred the first respondent to file a notice of intention to amend his particulars of claim, by deleting paragraph 4 thereof in which it was alleged that the Johannesburg Magistrate's Court has jurisdiction to determine the matter as the business address of the first applicant, and the residential address of the second applicant, fell within the territorial jurisdiction of the Johannesburg Magistrate's Court.
- [9] The first respondent sought to amend paragraph 4 his particulars of claim to read: -

"The cause of action arose within the above Honourable Court's jurisdiction."

The application to transfer

- [10] The applicants delivered a notice of objection to the proposed amendment. The first respondent elected not to pursue an application to amend his particulars of claim but rather elected to bring an application to transfer the action to the Randburg Magistrate's Court in terms of section 35 of the Magistrates' Courts Act 32 of 1944 ("**the Magistrates' Courts Act**").
- [11] The application to transfer the action was opposed by the applicants.
- [12] The application to transfer the action was heard by magistrate Behari, who on 19 October 2021, granted an order transferring the action to the Randburg Magistrate's Court.
- [13] In the introductory paragraph of the judgment the court unequivocally states that it is common cause that "*...indeed this court lets lacks jurisdiction to hear the matter*".
- [14] The judgment further records that it is clear from the papers that the Randburg Magistrate's Court will have jurisdiction to determine the action.
- [15] The magistrate's court reasoned further, relying on its interpretation of section 35 of the Magistrates' Court act, that only a court which has jurisdiction in the matter can grant an order for its removal to another court.
- [16] The magistrate, despite ruling that the court does not have jurisdiction to entertain the transfer of the action to another, rules that the court has a discretion to order the transfer if undue expense or inconvenience may befall a party if the proceedings are not transferred to another court.

[17] The court then exercises its discretion in favour of the first respondent and orders that the action be transferred to the Randburg Magistrate's Court with costs to be cost in the cause of the main action. Although not relevant to this application, the court did not record the factual basis upon which it exercised a discretion in favour of the first respondent.

The law

[18] Section 35 of the Magistrates' Court Act reads as follows: -

"An action or proceeding may, with the consent of all the parties thereto, or upon the application of any party thereto, and upon it being made to appear that the trial of such action or proceeding in the court wherein summons has been issued may result in undue expense or inconvenience to such party, be transferred by the court to any other court."

[19] In ***Welgemoed and Another v The Master and another***¹ wherein it stated that:

"Counsel for the applicants on the other hand argued that I have no jurisdiction to grant the orders that he seeks by the same token I have no jurisdiction to transfer the case. It seems to me that the latter is the more logical approach. A number of cases were cited in which it was held that before a case can be transferred to another court on the grounds of convenience the court transferring it may have jurisdiction to entertain the case in the first place."

Application of the law

- [20] Mr. Jacobs who appeared on behalf of the applicants argued that it is a trite principle that Magistrate's Courts are, to use a well-trodden phrase, creatures of statute and that the jurisdiction of the court must be deduced from the four corners of the Magistrates' Court Act. He also argued that it is a well-established principle of our law that only a court which has jurisdiction in the main matter can grant an order for the removal of transfer.
- [21] Mr. Mfazi who appeared for the first respondent did not argue to the contrary and accepted that this is the prevailing law.
- [22] In the circumstances, so Mr. Jacobs argued, it is evident that the Johannesburg Magistrate's Court did not have the requisite jurisdiction to make the order for the transfer of the action and, premised on section 22 of the Superior Courts Act, are entitled to the order as set out in the notice of motion.
- [23] Mr Mfazi argued that this review was *in medias res*, which means the proceedings have not yet been completed in the magistrates court. Accordingly, this court should only interfere if exceptional circumstances prevail or where serious injustice would otherwise result cannot be achieved in any other way.

- [24] It is a matter of record that the Johannesburg Magistrates Court does not have jurisdiction in this matter and that the court held that this matter ought to have been instituted in the Randburg Magistrates Court.
- [25] The decision of the Johannesburg Magistrates Court had the effect of terminating the course of proceedings in that court. This is therefore not the exercise of the High Court's review power in proceedings *in media res*.
- [26] In any event, and even if I am wrong, this is an instance where the High Court ought to exercise its power to review the proceedings of the Magistrates Court because justice cannot be achieved in any other way.

Section 172 of the Constitution

- [27] Prior to the hearing of the matter, I invited Council to address me on whether section 172 of the Constitution of the Republic of South Africa was applicable to this matter and, should I declare that the conduct of the proceedings in the Magistrates Court is inconsistent with the Constitution and therefore invalid, whether this court has the power to make any order that is just and equitable in the circumstances.
- [28] Mr Mfazi asserted that this was a constitutional matter as the proceedings relate to access to courts and justice. He argued that section 34 of the Constitution would be infringed should this court uphold the review and set aside the proceedings in the Magistrate's Court.

- [29] Mr Jacobs submitted that section 172 of the Constitution was not applicable to this matter, and hence this court does not have to competence to make a just and equitable order following upon a declaration of invalidity of the proceedings.
- [30] A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.ⁱⁱ This definition is rather wide and it is difficult to comprehend of any matter which would not fall into its net. In *S v Boesak*ⁱⁱⁱ the Constitutional Court said that the Constitution ‘...offers no definition of a constitutional matter, or an issue connected with decision on a constitutional matter.’
- [31] The Superior Courts Act as a subsidiary constitutional statute was specifically enacted to provide for a “...uniform framework for judicial management, by the judiciary, of the judicial functions of all courts”. This statute specifically provides for the review by the High Court of the proceedings of Magistrates’ Courts and in particular on the ground of lack of jurisdiction. It is therefore not necessary to invoke section 172 of the Constitution.
- [32] The first respondent was, furthermore, not denied the right to have his dispute decided in a fair public hearing before a court. The first respondent in fact exercised his right but instituted his action in a court without jurisdiction. He cannot now complain that the court he chose did not have the jurisdiction to transfer the matter.

[33] The first respondent's right to have his dispute determined by a competent court in a fair public hearing was not infringed, and therefore this matter does not raise a constitutional issue that would trigger section 172 of the Constitution.

Conclusion

[34] The learned magistrate made an order transferring the action to another court in circumstances where the transferring court did not have, on the record, the jurisdiction to entertain the action or to transfer the action to a different court. This constituted a procedural irregularity.

[35] The magistrate, to add insult to injury, made a finding that the court did not have jurisdiction to transfer the matter, and yet granted the order.

[36] In the circumstances the review succeeds, with costs.

Order

In the consequence, the Court makes the following order: -

1. The judgement handed down by learned Magistrate Beharie on 19 October 2021 in the Magistrate's Court for the Magisterial District of Johannesburg Central held at Johannesburg under case number:19758/2020 is reviewed, set aside and declared invalid.

2. The First Respondent is to pay the costs of the application.

- i 1976 (1) SA 513 (T) at 523 C-D.
- ii Section 167(7) of the Constitution.
- iii 2001 (1) SA 912 (CC).

R. SHEPSTONE
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 05 June 2023
Judgment: 13 June 2023

Appearances

For Applicant: Adv M Jacobs
Instructed by: Phillip Venter Attorneys

For Respondent: Adv L Mfazi
Instructed by: Z & Z Ngododo Attorneys Inc