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IN THE SUPREME COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

CASE NO: 595/90

In the matter between

DELIVERED: 30 11 90

THEMBESILE MANTAWULE — Applicant

and

MR. VAN ZYL, MAGISTRATE STUTTERHEIM — First Respondent

CHRISTOPHER RANCE — Second Respondent

JOHN RANCE — Third Respondent

JUDGMENT

MULLINS J

This matter comes before us by way of review proceedings. The applicant was the plaintiff in an action in the magistrate's court in which he claimed damages from second and third respondents in the amount of R4 000.00 arising out of the alleged unlawful detention of applicant by the said respondents.

In his summons, the applicant alleged that he was resident in Ciskei. Respondents accordingly called upon applicant to give security for their costs in the action in the amount of R3 000. The notice was given in terms of Rule of Court 62(1)(a) of the Magistrates Courts Rules, which provides that "(W)here a plaintiff .... is not resident within the Republic .... the defendant may .... require him to give security for the costs of the action."

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As the aforesaid notice was not complied with, second and third respondents made application in terms of Rule of Court 62(2) for an order staying the proceedings until the request for security had been complied with, or alternatively dismissing the action. An answering affidavit was filed in which the present applicant contended that he was relieved from the obligation to find security by reason of his impecuniosity. He alleged he was unable to furnish such security and an order on him to do so would effectively extinguish his claim.

The matter was argued before first respondent, and in a very short judgment, first respondent held that he had a wider discretion than the mere dismissal of the action or the stay of proceedings, as prescribed by Rule 62(2). He came to this conclusion on the basis of the decision in Magida vs Minister of Police 1987(1) SA 1 (AD). He ruled, however, apparently as a result of suggestions made during the course of argument, that the present applicant's opposing affidavit required certain amplification, and that the application be postponed sine die, costs to be costs in the main action.

Thereafter the present applicant filed a supplementary affidavit, and again set the matter down for hearing. On this occasion however the first respondent was persuaded that Magida's case was distinguishable, and he accordingly stayed the proceedings until security was furnished as requested by second and third respondents.

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The applicant initially noted an appeal against this decision, but this appeal was withdrawn when it was realised that an interlocutory order such as this is not appealable. He now comes before this court by way of review proceedings in which he contends that first respondent's decision was based on a mistake of law and amounted to a gross irregularity. The review application is opposed on behalf of second and third respondents, there being no appearance for first respondent.

In his founding affidavit in the present proceedings, the applicant seeks condonation of he delay in bringing these review proceedings, such delay being as a result of the abortive appeal that was lodged. There is no prescribed time for bringing review proceedings, which must however be brought within a reasonable time. The magistrate gave his decision on 30 November 1989. The present application was launched on 19 April 1990. The second and third respondents "do not consent to the condonation", but it was not strenuously argued on their behalf that this court should not hear the matter.

The issue in the present proceedings is whether the principles laid down in Magida's case (supra) are applicable. In Magida's case the plaintiff, also resident in the Ciskei, issued summons in the Supreme Court, and the defendant sought security in terms of Rule of Court 47 of the Supreme Court Rules of Court. The whole of the said Rule 47, as well as Rule 47A, read as follows:

"47/....

"47(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.

(2) If the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final.

(3) If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.

(4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.

(5) Any security for costs shall, unless the court othewise directs, or the parties otherwise agree, be given in the form, amount and manner directed by the registrar.

(6) The registrar may, upon the application of the party in whose favour security is to be provided

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and on notice to interested parties, increase the amount thereof if he is satisfied that the amount originally furnished is no longer sufficient; and his decision shall be final.

47A. Notwithstanding anything contained in these rules a person to whom legal aid is rendered by a statutorily established legal aid board is not compelled to give security for the costs of the opposing party, unless the court directs otherwise."

By contrast Magistrates Court Rules 62(1) and (2) (the remaining sub-rules are irrelevant), read as follows:

"62(1) Where a plaintiff -

(a) is not resident within the Republic;

(b) is an unrehabiliated insolvent;

(c) is a registered or incorporated company;

(d) has no substantial interest in the cause of action;

(e) is a person in respect of whom the court has made an order, which is still in force in terms of section 74 of the Act whereby provision is made for the administration of his estate; or

(f) is a person to whom assistance is rendered in terms of the Agricultural Credit Act, 1966(Act 28 of 1966),

the defendant may (unless legal aid is rendered to

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> the plaintiff by a legal aid board established by statute and the court does not direct otherwise, or unless the plaintiff has obtained leave to sue as a pauper) after service of the summons and before the close of the pleadings require him to give security for the costs of the action (excluding the principal of costs of any claim in reconvention made by the defendant): Provided that if the fact relied upon first came to the knowlegde of the defendant after the close of pleadings, the defendant may within seven days after such fact has come to his knowledge require that such security be given.
>
> (2) If such request is not complied with within 7 days, the court may on application either stay the proceedings until such request is complied with or dismiss the action."

The main thrust of the argument on behalf of second and third respondents is that the Supreme Court Rules provide that the Court may stay proceedings until security is given (Rule 47(3)), and if such security is not given, may dismiss the action, "or make such other order as to it may seem meet." (Rule 47(4)). On the other hand the Magistrates Court Rules empower a magistrate only to stay proceedings, or to dismiss the action, without any broader discretionary power. A magistrate has therefore, so it was argued, no power to order that security be dispensed with where a plaintiff in a magistrates court falls into one of the categories stated in Rule 62(1).

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The same argument was considered by this court in Dyosi vs Schroeder CA 521/87 (1 August 1988) (unreported), where the relevant portions of the judgment of Kannemeyer J.P. (as he then was), with Erasmus J. concurring, read as follows:

> "Under the previous line of cases dealing with security to be provided by peregrini, it had repeatedly been stated that lack of funds did not preclude a court from ordering a peregrinus to find security, but in fact was a cogent reason why security should be found. MAGIDA's case reversed this approach and in effect laid down that the fact that the applicant is impecunious is a strong reason why he should be relieved of the obligation to find security for costs.
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> Now before the magistrate the present appellant argued that MAGIDA's case should be applied. He still lived in Mdantsane, he was now working as a labourer in East London and had not the financial resources to provide security. The magistrate, however, considered that MAGIDA's case was not applicable to the present matter. He pointed out that a Magistrate's Court is a creature of statute and has no inherent jurisdiction but only has those powers which are conferred upon it by the legislature either in the Act or in the Rules formulated under the Act, and accordingly he said that in his view MAGIDA's case did not apply to an application of this sort when it is heard before

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a magistrate. Because, so his reasoning went, the Supreme Court from which the MAGIDA decision emanates, has inherent jurisdiction in matters of this sort, it is at large to act in certain ways and those ways are now formulated in the MAGIDA judgment. But, the magistrate held, as his power to grant security was a statutory one and not one that flowed from any inherent jurisdiction, MAGIDA's case did not apply.

At this stage it is not for us to determine whether or not the magistrate was correct in this view. It seems, prima facie, to be arguable that he was in fact incorrect in reaching this decision. He is not bound by the provisions of the law governing Magistrate's Court which suggests that if security is not found, he must either stay the action or make no order. It is clear from the case of S A SCOTTISH FINANCE CORPORATION LTD v SMIT 1966 (3) SA p. 629(T) that he also has the implied power to refuse an order to provide security and, as I see it, it seems probable that a Magistrate's Court is thus governed by the principles laid down in MAGIDA's case, and that the magistrate erred in coming to the decision that that case was not applicable to applications of this sort in Magistrate's court."

Despite its prima facie view that the principles laid down

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in Magida's case were also applicable to actions in magistrates' courts, the court in Dyosi's case found it unnecessary to reach a decision thereon, as that matter came before it by way of appeal, and the court held that the magistrate's order was interlocutory, and not appealable.

We are in the present case called upon however to decide the issue.

In his very learned review of the Roman and Roman Dutch authorities relating to the furnishing of security by peregrini, Joubert J.A. in Magida's case considered the various forms of security. One of these was the cautio juratoria which was a form of security whereby a plaintiff could declare on oath that he could not furnish security by way of sureties (cautio fideiussores), but that he would prosecute the case to its end. See p 10 H. Furthermore, "It was left entirely to the discretion of the

> Judge who heard an application for the furnishing of security by a non-domiciled foreigner to refuse or grant the latter permission to furnish security on oath by means of a cautio juratoria. Such decision depended upon the particular circumstances of the case with due regard to what was just and equitable as well as conducive to justice being done."

Ibid p 11H. At pages 12 - 13 of the judgment, the learned Judge of Appeal set out various considerations which should

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properly influence a judge in deciding whether to accept a cautio juratoria or not.

Dealing with modern South African law, the judgment, at p 14 D - G, reads as follows:

> "Notwithstanding the obsolescence of the cautio juratoria as security on oath we must bear in mind that our common law principles which underlie its granting are still applicable in our modern practice when a peregrinus in his answering affidavit deposes to his inability to furnish security for costs owing to his impecuniosity, since it must be left to the judicial discretion of the Court by having due regard to the particular circumstances of the case as well as considerations of equity and fairness to both the incola and the peregrinus to decide whether the latter should be compelled to furnish, or be absolved from furnishing, security for costs."

The court in that case found support for plaintiff's allegation of impecuniosity in the fact that he had obtained assistance from the Legal Aid board. In the present case the plaintiff is assisted by the Legal Resources Centre, which, while not a "statutorily appointed legal aid board" in terms of Rule 47A, nevertheless is known to assist persons in financial need of legal representation.

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There seems to me to be no reason in principle why there should be any distinction between superior and inferior courts in the applicability of the aforementioned principles. In the S A Scottish Finance case (referred to in the passage from the Dyosi judgment quoted above), Trollip J (as he then was) dealing with the then magistrates court Rule 58(2) (the forerunner to the present Rule 62(2)), said, at p 633H:

> "Rule 58(2) says that the court may either stay the proceedings or dismiss the action, but I think that it must necessarily be implied that it can also dismiss or make no order on or postpone the application in an appropriate case."

See also British Oak Insurance Co vs Abramowitz 1932 CPD 360; Graansak Bpk vs Additional Magistrate, Johannesburg 1969(1) SA 305 (T) at p 309 B.

The general principles that a magistrate's court is a creature of statute and has no inherent jurisdiction does not mean that such a court has no powers other than those expressly stated in the Magistrates Courts Act No 32 of 1944 or in the Rules framed in terms thereof. See Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa Vol II (7th Edit) p 5. Section 25 (3)(a)(iii) of the Act empowers the Rules Board to make rules regulating, interalia "the giving of security", and such rules are to be found in Rule of Court 62. But section 25(3)(a) of the Act does not give the Rules Board the power

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to make an incursion into the common law. Trust Bank van Afrika Bpk vs Geregsbode Middelburg 1966(3) SA 391(T) at p 395 D.

It is true that Rule 62(2) specifies two courses that the court has open to it if a plaintiff fails to comply with a request for security, namely to stay the proceedings, or to dismiss the action. If however this is to be interpreted as restricting a magistrates powers only to one or other of those courses, then the rules would supersede the common law, as stated in Magida's case. Such common law is clear that in certain circumstances a peregrinus plaintiff may be relieved of the obligation to provide security. Furthermore Rule 62(2) enacts that the court "may" adopt one of these courses, not that it "shall".

The statement in Jones and Buckle (supra) at p 446 that rule 62 "supersedes the common law rules upon the subject of security by plaintiffs" is misleading. What appears to be meant by this statement is that the Rule defines the categories of plaintiffs in magistrates courts who may be required to furnish security.

It is clear from the papers and from the facts found proved that the plaintiff is unable to find security, that his place of residence is situated where a judgment for costs against him could be enforced, that he is not a vagabundus, and that he will pursue the action to its completion. He has also established that he can not find sureties for defendants' costs.

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In fact before the magistrate it was conceded on behalf of the respondents that "the papers filed are now adequate.

Mr Lang for the second and third respondents referred us to the unreported judgment of Cooper J in Price vs Price (ECD Case No 1544/84) delivered on 7 December 1989. The issue in that case concerned the acceptance of a written offer of settlement in terms of Supreme Court Rule 34(6). After an offer of settlement in terms of that rule had been made by the defendant, there were negotiations which the defendant contended amounted to a rejection of his offer. Nevertheless the plaintiff thereafter purported to accept the offer within the period of 15 days provided for in Rule 34(6).

Cooper J held that Rule 34 creates a procedural device for the benefit of a defendant which falls outside the common law field of contract (of offer and acceptance). He went on to say

> "Rule 34(6) confers upon a plaintiff an unqualified right to accept an offer within a period of 15 days of receipt of the notice of the defendant's offer and since this provision supersedes the common law, a plaintiff is not precluded from negotiating with or making an offer to the defendant during the 15 day period at the risk of forfeiting his rights."

Cooper J's judgment was upheld by the Appellate Division in a judgment dated 11 September 1989, in the course of which the court quoted the aforementioned passage from the judgment of the Court a quo. The Court of Appeal made it quite clear that the "cause of action is not founded on contract," but was "based squarely on the provisions of the Rule."

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It is in this sense only that it could be said that Rule 34 "supersedes the common law", in that the rule created a procedure for which the common law did not provide, namely the making and accepting of written offers of settlement during the course of civil litigation. I do not find Price's case as authority in support of respondent's contentions in the present case.

There is no doubt in my view that a magistrate is not compelled to make an order either staying the proceedings or dismissing the action. These are two orders he "may" make. But I have no doubt that he also has the power to dismiss the application, which is the order which was sought by the present appellant.

It is clear from the magistrate's reasons that he did not regard himself as having the power. For these reasons I am satisfied that the magistrate erred in law in staying the proceedings, and that the review should succeed. In so far as the costs of the proceedings before the magistrate are concerned, applicant sought an order that the costs of those proceedings be costs in the cause. Before us Mr Lang did not suggest any other order.

The order of the magistrate staying the proceedings until plaintiff furnishes security for defendant's costs of the action is set aside. There is substituted therefore an order that the application for an order that plaintiff furnish security is dismissed, the costs of such application to be costs in the cause.

Second and Third respondents are ordered to pay the costs

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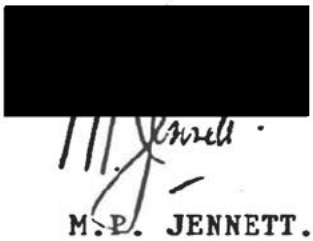
of these review proceedings jointly and severally, the one paying, the other to be absolved.

T.M. MULLINS.
JUDGE OF THE SUPREME COURT.

JENNETT. J

I AGREE.



M.P. JENNETT.
JUDGE OF THE SUPREME COURT.