THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

# JUDGMENT

Case no: 146/09

**ABSA BANK LIMITED** Appellant

and

**PIETER DE VILLIERS** First Respondent

**THE MAGISTRATE FOR THE DISTRICT OF SIMON'S TOWN** Second Respondent

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**Neutral citation:** *Absa v De Villiers* (146/09) [2009] ZASCA 140 (17 November 2009)

**CORAM:** Navsa, Ponnan, Maya, Mhlantla JJA and Tshiqi AJA

**HEARD:** **5 November 2009**

**DELIVERED:** **17 November 2009**

**CORRECTED:**

**SUMMARY:** **Review of decision by Magistrate on the basis of gross irregularity in the proceedings – contention that Magistrate's mistaken view of the law constituted such irregularity – held that decision not susceptible to review.**

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ORDER

**On appeal from:** High Court, Cape Town reviewing a decision of a Magistrate. (Full court).

The appeal is dismissed.

JUDGMENT

NAVSA JA (PONNAN, MAYA, MHLANTLA JJA and TSHIQI AJA concurring):

[1] During September 2007, the appellant, Absa Bank Limited (Absa), a commercial bank, applied *ex parte* in the Magistrates' Court for the district of Simon's Town for an order, the relevant parts of which are set out hereafter:

'A AN interim interdict be authorized which would prohibit the respondent to use the vehicle [mentioned below];

B THE Sheriff of this Honourable Court be authorized to attach, remove and to hand over to the applicant for safe-keeping, the following goods, wherever it might be found: -

VEHICLE MAKE: OPEL CORSA LITE 140i

…

REGISTRATION NUMBER: CY126181

C A Rule Nisi be issued in terms whereof the Respondent be called upon to provide reasons, if any, before this Honourable Court on THURSDAY, 25th OCTOBER 2007 at 09h00: -

(a) Why the attachment should not be made final;

(b) Why the costs of this application shall not be paid as between attorney and client;

(c) Why such alternative relief as may be just, not be granted.'

[2] Absa is the owner of the motor vehicle in question, which it had sold to the first respondent, Mr Pieter de Villliers, in terms of an instalment sale agreement as defined in the National Credit Act 34 of 2000 (the NCA).

[3] The instalment sale agreement had been concluded on 25 August 2006.

The material terms of the agreement are:

'The Purchaser will:

2.1 Keep the Goods in the Purchaser's possession, maintain them in good working condition at the Purchaser's own cost, not make the Goods available for use by another person or body.

…

2.5 Allow the Seller or the Seller's agent reasonable opportunity to inspect the Goods.

…

4. Notwithstanding delivery, ownership of the Goods shall not pass to the Purchaser until all amounts owing under this agreement have been paid in full.

…

BREACH

10.1 The Purchaser will be in breach of this agreement if the Purchaser –

10.1.1 fails to make payment in terms of this agreement.

10.1.2 fails to comply with any other provision of this agreement.

…

10.3 In the event of any breach of this agreement, including 10.1.1 ... the Seller may, in addition to any other remedies that it may have in terms of this agreement or at law:

10.3.1 terminate this agreement and/or

10.3.2 claim, at the Purchaser's cost return and possession of the Goods, …

10.3.3 claim damages (which may include immediate payment of all arrear payments plus finance charges thereon).'

[5] The first respondent defaulted in paying instalments. The amount in arrears was alleged to be R6 980.59 and the total outstanding balance was said to be R65 049.08.

[6] On 24 August 2007, Absa, purportedly acting in terms of s 129(1) (a) of the NCA, gave written notice to Mr de Villiers of his default and informed him of the arrears and outstanding balance as set out in the preceding paragraph. The material part of the letter by Absa reads:

'We have been instructed to demand from you, as we hereby do, payment of the aforesaid amount within 10 days of delivery hereof.

Should you not be able to pay the arrears, you are requested to return the item in question to our clients, but you will remain liable for the payment of all amounts owed to our clients after realisation of the item.

Your attention is further drawn to the provisions of Section 129 of the National Credit Act, 34 of 2005, and this letter must be regarded as a notice in terms of the said section. You may refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent to resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement, up to date.

We suggest that you give this matter your urgent attention.'

[7] The first respondent did not respond to the notice.

[8] In its affidavit in support of the *ex parte* application Absa stated that, Mr de Villiers had given a number of undertakings to settle the arrears but failed to adhere to them 'while the [vehicle] is deteriorating and depreciating in value on a daily basis as the respondent is using it and will continue to do so unless interdicted and restrained from doing so'. Absa did not allege that the respondent was in fact abusing the motor vehicle or was failing to maintain it in working condition.

[9] In support of the application Absa relied on the affidavit of a manager in its motor vehicle and asset finance department, who stated that during his lengthy career he 'frequently experienced' that a purchaser would damage and/or neglect goods intentionally pending the hearing of an application of which notice had been given or would conceal the whereabouts of the vehicle.

[10] Although Absa alleged that the first respondent was in arrears and therefore in breach of the instalment agreement, it did not state that it had cancelled the agreement. Absa submitted that it was entitled to be placed in possession of the motor vehicle in terms of the provisions of the NCA.

[11] The matter was heard by the second respondent, the Magistrate for the district of Simon's Town. He considered the affidavit on behalf of Absa to contain only generalities but no pertinent factual information in relation to harm caused or the potential of harm being caused to the vehicle. In the Magistrate's view the provisions of the NCA did not, in the circumstances of the present case, assist Absa as a credit provider to regain possession, absent a cancellation of the instalment agreement. He consequently dismissed the application.

[12] Absa was aggrieved. However, instead of appealing the decision as it was entitled to, it chose, to apply to the Cape High Court for an order 'reviewing, setting aside and correcting [the Magistrate's] decision to dismiss the applicant's application for an interdict.'

[13] In substantiation of its application Absa stated that the Magistrate's decision was reviewable on the grounds of a gross irregularity in the proceedings, and further, on the basis that he had rejected admissible, competent and available evidence. The evidence aspect does not appear to have been persisted with in argument before the Cape High Court. Nor, rightly, was it persisted in before us.

[14] As correctly observed by the Magistrate and the court below the application was not for relief *pendente lite* but, was in fact, for a final order authorising the attachment of the vehicle in question. Absa had not instituted an action for cancellation of the agreement, nor was it alleged that it intended instituting an action of any kind in relation to the vehicle.

[15] Properly analysed, Absa's contention that proceedings in the Magistrates' Court were reviewable on the grounds of a gross irregularity is based on the view the Magistrate took of the provisions of the NCA in relation to its claim to be

placed in possession of the motor vehicle. The following two paragraphs of the affidavit in support of Absa's application demonstrate this:

'20. The procedure introduced by the National Credit Act is vastly different. Section 127(2) to Section 127(9) which deal with the voluntary surrender of goods by a consumer is in terms of Section 130(1) of the Act applicable to the procedure that applies subsequent to an attachment order being made by a Court. As is evident from Section 127 as a whole and in particular the provisions of Section 127(6)(b) and Section 127(8)(b) an instalment agreement is now terminated in accordance with the provisions of the Act and the return of the asset is no longer dependant on a prior cancellation of the instalment agreement.

…

22. I therefore submit that the Second Respondent's dismissal of the application on the aforesaid basis constituted a gross irregularity that can be reviewed by this Honourable Court.'

[16] After making the unambiguous claim that the Magistrate's decision to dismiss its application was reviewable on the basis of a gross irregularity, thereby bringing its review application squarely within the ambit of s 24(1)(c) of the Supreme Court Act, Absa set out what it considered to be the Magistrate's most important reason for dismissing the application, thereby suggesting that it was the most compelling basis for a review:

'[18] The most important reason being that the Applicant has failed to substantiate the bringing of the application for the return of the vehicle whilst the application lacked an averment that the agreement was cancelled and furthermore that the application was not accompanied by a simultaneously issued summons in which a claim was made for the cancellation of the agreement, the return of the motor vehicle and damages to be determined subsequent to the attachment of the vehicle.'

[17] Probably because Absa considered the review application as a test case for credit providers, a full court was constituted to hear the matter. The Cape High Court (Fourie, Saldanha JJ and Madima AJ concurring) recorded in the first line of the judgment that it was considering a 'review application'. In the second sentence of the judgment the following is stated:

'In particular, it involves the interpretation of certain provisions of the NCA dealing with the repossession of property that is the subject of an instalment agreement.'

[18] The court below did not pause to consider whether there was a proper basis for review. Put differently, it did not consider whether the Magistrate's decision was indeed susceptible to review. The full court immediately went on to consider the provisions of the NCA and the merits of Absa's contentions in relation thereto. The court below said the following in the penultimate paragraph of its judgment:

'[43] I accordingly agree with the finding of second respondent that, absent a claim for the cancellation of the instalment agreement, applicant was not entitled to a final order for the attachment of the vehicle in terms of section 131 of the NCA. It accordingly follows that the application for review cannot succeed. In view of my conclusion, it is not necessary to deal with second respondent's finding that the allegations in applicant's founding affidavit fell short of what is required for the granting of applications of this nature.'

[19] Because Absa proceeded by way of an *ex parte* application, the first respondent was not party to the proceedings in the Magistrates' Court and despite having the review application served on him he did not take part in the review proceedings nor was he represented before us.

*Conclusions*

[20] As far back as 1903 Innes CJ spelt out, with customary clarity, the distinction between the review of proceedings of inferior courts, both civil and criminal, and a review of the decisions of public bodies acting in furtherance of statutory duties imposed on them.[1]

[21] At that time the grounds for the review of inferior courts were set out in the Administration of Justice Proclamation. The mechanism to be employed in such a review was indicated by the prevailing Rules of Court. The proceedings of an inferior court could be reviewed on the basis of 'grave irregularities or illegalities' occurring during such proceedings.

[1] *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111.

[22] Insofar as the second species of review was concerned, a public body which disregarded provisions of a statute or was guilty of gross irregularity or clear illegality in the performance of its duty was liable to have its decision reviewed and set aside or corrected. A review of this kind was different from a review of the decisions of inferior courts. The body being reviewed was not a judicial one and the grounds upon which a review might be claimed were 'somewhat wider than those which alone would justify a review of judicial proceedings'.[2]

[23] Although a high court has overriding jurisdiction to prevent abuse of process, it has inherent power to make orders furthering the administration of justice only when a statute or rule of court is silent.[3]

[24] The constitutionalisation of administrative law has fundamentally altered the basis of judicial review of administrative action. The enactment of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) had the effect of adding new kinds of administrative-law review to those available in the past. The common-law grounds have become subsumed under the Constitution.[4]

[25] Importantly, PAJA which gives effect to administrative action that is lawful, reasonable and procedurally fair as contemplated in the Constitution provides bases on which 'administrative action' can be reviewed. Administrative action *does not* include the judicial functions of a judicial officer of a court referred to in s 166 of the Constitution, which includes the Magistrates' Courts.[5]

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[2] *Johannesburg Consolidated Investment Co op cit* at pp 115-116.
[3] *Op cit* at 116 and *Western Bank Limited v Packery* 1977 (3) SA 137 (T) at 142C-E; *Sabena Belgian World Airlines v Ver Elst and Another* 1980 (2) SA 238 (W) at 242E-G and see A C Cilliers, C Loots, HC Nel SC *Herbstein & Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) Vol 2 at p1270.
[4] Cora Hoexter *Administrative Law in South Africa* (2007); Cilliers *et al op cit* 1302; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) 266 at para 60.
[5] See definition of administrative action in s 1 of PAJA.

[26] Presently, the review of proceedings of inferior courts is provided for by s 24 of the Supreme Court Act 59 of 1959, which sets out the grounds on which it could be brought. Section 24(1)(c) lists 'gross irregularity in the proceedings' as one such ground. A gross irregularity in civil proceedings in an inferior court means 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.[6] An example of conduct justifying a review based on a gross irregularity in the proceedings is where a judicial officer acts in a high-handed manner and prevents a party from having its case heard.[7]

[27] As a rule, where the complaint is against the result of proceedings rather than the method, the proper remedy is by way of appeal rather than review. Put differently, if the motivation for having a judgment of an inferior court set aside is that it came to the wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal.[8]

[28] Generally speaking, a bona fide mistake of law is not a ground for review.[9] Sometimes, a mistake of law might qualify as a gross irregularity. In *Goldfields Investment Ltd and another v City Council of Johannesburg and another* 1938 TPD 551 Schreiner J said the following (at 560-561):

'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

[6] D E van Loggerenberg, P B J Farlam *Erasmus Superior Court Practice* (2009) A1-71.
[7] For further examples see Cilliers *et al op cit* 1270 and Van Loggerenberg *et al op cit* A1-72.
[8] Van Loggerenberg *et al op cit* A1-70A.
[9] Loots *et al* at 1273 and the authorities there cited.

wrong decision owing to his having made a mistake on a point of law in 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.'

[29] Counsel for Absa attempted to persuade us that the present case fell within the latter class of case referred to at the end of the dictum set out in the preceding paragraph. Before us counsel for Absa rightly conceded that the conclusion reached by the Magistrate was tenable, but submitted that Absa's view was preferable and more compelling. For present purposes I discount confirmation by the court below of the merits of the conclusion reached by the magistrate. The court below was faced with a basis of review which it ought to have scrutinised at the outset. It ought to have considered not just whether Absa had provided a sustainable basis for review but also whether review was indeed the appropriate remedy.

[30] That the Magistrate was correct in his view of the relevant provisions of the NCA is, at the very least, arguable. For completeness, I record that both the Magistrate and the court below considered the NCA not to be a model of elegance and clarity ─ a view that appears at face value to be justifiable. The Magistrate was concerned that Absa's submissions in relation to the provisions of the NCA militated against fundamental contractual principles.[10] He considered the relevant provisions of the NCA closely and came to the conclusion, that in the circumstances referred to above, it did not provide a basis for Absa to reclaim possession. Even if one were to assume, in Absa's favour, that the Magistrate's

[10] See in this regard *Mulder v Combined Motor Finance (Pty) Ltd* 1981 (1) SA 428 (W).

view of the law is incorrect, this is certainly not a case where a judicial officer's view of the law is such as to amount to a gross irregularity.

[31] Perhaps even more fundamentally, the Magistrate was entitled to refuse to entertain the application on the basis that, in effect, final relief was being sought without the knowledge of the respondent, who was excluded on the flimsiest basis. He was being denied an opportunity of presenting his case in relation to the interpretation contended for by Absa. In *Jordan and Another v Penmill Investments CC and Another* 1991 (2) SA 430 (E) the high court set aside a decision of a magistrate on the basis of a gross irregularity which consisted of a magistrate deciding to eject an occupant of a flat on application by the owner, pending finalisation of the main action in which the legality of the ejectment was to be considered. The magistrate had not provided reasons for doing so. There was no averment by the owner that continued occupancy of the flat would have caused damage to it or would in any way have frustrated his claim. The high court observed that the very object of an interlocutory order is to freeze the position until the court decides where the right in issue lies, whereas the order under review had the effect not of preserving the position at the time of the initiation of the action, but of changing the *status quo* in favour of the owner without there being any justification for it. The Magistrate in the present case was being asked to do exactly what the court in that case considered objectionable.

[32] To sum up: No sustainable basis was provided for a review on the basis of a gross irregularity in the proceedings. The court below rightly refused the application for review, but for the wrong reasons. The more appropriate order in the court below should have been to strike the matter off the roll. However, there is in effect, no difference. It is therefore not necessary to have the order of the court below substituted. Considering that the matter was not opposed there is no necessity for a costs order.

[33] The following order is made:

The appeal is dismissed.

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M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

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|---|---|
| For Appellant: | P Coetsee SC |
| | Instructed by<br>Sandenbergh Nel Haggard Bellville<br>Schoeman Maree Inc Bloemfontein |
| For Respondent: | No opposition |