

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NO. : CA&R96/2016

Date reserved : 5 May 2017

Date delivered : 17 May 2017

In the matter between:

MFANISENI NKUNGWINI

Appellant

And

OLD MUTUAL ASSURANCE CO. SA LTD

Respondent

JUDGMENT

MAJIKI J:

[1] This is an appeal against the judgment of the magistrate for the district of Mthatha. The magistrate upheld the special plea of jurisdiction raised against the appellant's claim. Consequently, the appellant's claim was dismissed with costs. The main ground of appeal is that the magistrate erred in finding that the cause of action did not arise within the jurisdiction of the court *a quo*.

[2] The appellant in his amended particulars sued the respondent for a sum of R51 523.16. This amount being a refund of premiums deducted from the appellant's personal banking account.

[3] The background to the payment by the appellant was an attempt, on 6 September 2006, to enter into a written agreement for an insurance policy, covering the life of his sister Nonesi Nkungwini. The appellant paid monthly premiums until the death of the insured.

[4] He duly lodged a death claim with the respondent following the passing of his sister Nonesi Nkungwini and no payment was forthcoming. When the respondent disclosed the “policy contract” which had always been in their possession he realised that there were serious discrepancies. The beneficiary of the policy was one Nomanesi Nkungwini who was not known to him; her late sister was the policy holder; the appellant was only a sponsor and the contract did not have his signature or that of a contracting party, amongst others. In his view, there was interference with the written contract he attempted to enter into, he averred that the documents were fraudulently altered by the employees of the respondent.

[5] He claimed that the contract was *void ab initio* and was therefore entitled to the full refund of the premiums with interest.

[6] In its plea the respondent raised a special plea of jurisdiction, having abandoned the other of the non-joinder of unknown Nomanesi.

[7] Both in its amplification of the special plea and the plea over the respondent persisted that its principal place of business is Pinelands, Cape Town. Therefore, the respondent pleaded that the contract was entered into in Pinelands, Cape Town. It persisted that the contracting party was not the appellant but his late sister. It annexed the document which was not signed by the contracting party, with the details that are averred by the appellant, above. Glaringly absent in that document is the place where it was entered into. The

respondent pleaded further that it was entitled to refuse to pay the appellant as he was not the nominated beneficiary.

[8] The magistrate disposed of the matter by upholding the special plea of jurisdiction. The issue for the appeal is whether the magistrate did not misdirect himself by finding that the court *a quo* had no jurisdiction in the matter. This he supported by stating in the main that the cause of action did not arise within the jurisdiction of the court *a quo*. This issue therefore requires an answer as to what the appellant's cause of action is and whether he made the necessary averments in that regard.

[9] Section 28 (1)(d) of the magistrate's court Act 32 of 1944 provide:

“Saving any other jurisdiction assigned to a court by this act or by any other law, the persons in respect of whom the court shall, subject to subsection (1A) have jurisdiction and no other -

Any person whether or not he resides, carries on business or is employed within the district, if the cause of action arose within the district.”

[10] The magistrate found that the appellant did not allege that the whole cause of action arose within the jurisdiction of this court. This is clearly not the case, in paragraph 15 of the particulars of claim the appellant state the basis of his averment that the court *a quo* had jurisdiction and in 15.3 he states :

“the cause of action (fraudulent misrepresentation) arose within its area of jurisdiction”.

[11] The magistrate correctly referred to the judgment in ***Ndlovu v Santam Ltd (550/2003) [2005] ZASCA 41*** and quoted Mtiyane JA as he then was,

“In my view the starting point of the enquiry, when dealing with a challenge to jurisdiction under s. 28 (1)(d) of the Act, is to determine the presence or absence of facts which have to be proved by the plaintiff to

succeed in his or her cause of action (facta probanda) as opposed to facts tending to prove such facta probanda (facta probantia). Thereafter one has to establish whether facta probanda arose wholly within the particular magisterial district.”

[12] The magistrate considered the submission on behalf of the appellant that the contract was *void ab initio*, and according to the appellant his claim was based on fraudulent misrepresentation. The magistrate found that the plaintiff failed to aver where the misrepresentation was initiated and concluded. He found that the averments of what was noted by the appellant from the discovered document did not show where that cause of action (misrepresentation or alteration) occurred. I do not regard it as necessary to address further findings of the magistrate with regard to the necessity of a prayer by the appellant to rescind the contract.

[13] Mr Foord, attorney for the respondent sought to persuade us during the hearing of the appeal that there was a contract. He however conceded that the document disclosed by the respondent did not meet the requirements of a valid contract. Noteworthy, it is not signed by the contracting parties. Furthermore, there is no indication that it was concluded in Pinelands, Cape Town, as the respondent would have wanted us to believe.

[14] Without a valid contract, we have to accept Mr Vutula's submission that the appellant's claim is that of repayment of monies the appellant paid. The appellant's entitlement to refund of monies is not based on contract but on payments made by him on a non-existent contract. He did not even require to allege misrepresentation, alteration or fraud. These are merely what he must have suspected happened, which he would not be able to prove in any case. In my view the necessary averments are contained in the particulars of claim:

On 6 September 2006, in Mthatha he (sought to insure the life of his sister) and entered into an insurance contract. The contract is *void ab initio*. He is

entitled to the refund of all monies deducted from his bank account in terms of that invalid contract. It is common cause that the deductions were made from his personal bank account, also held in Mthatha.

[15] The magistrate therefore misdirected himself by holding that the required *facta probanda* as was held in *Ndlovu*, supra, were absent. All the facts which the appellant would have to prove at trial, to succeed in his cause of action are present. Consequently, the court *a quo* has jurisdiction and the appeal has to succeed.

In the result,

1. The appeal is hereby upheld.
2. The order of the magistrate is hereby set aside and replaced with “the special plea as to jurisdiction fails and is hereby dismissed with costs.”
3. The respondent is ordered to pay the costs of the appeal.

B MAJIKI

JUDGE OF THE HIGH COURT

I agree

S M JOLWANA

ACTING JUDGE OF THE HIGH COURT

Attorney for the plaintiff : Mr S C Vutula

Instructed by : Messrs S C Vutula & Company
Nobakhe House
17 Madeira Street
MTHATHA

Counsel for the defendant: Mr Foord

Instructed by : Messrs S P F Attorneys
No. 8 Owen Street
MTHATHA