


IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A3019/2019

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED:
<u>31/10/2019</u>	
DATE	SIGNATURE

In the matter between

FAIRVEST PROPERTY HOLDINGS

Appellant

and

VALDIMAX CC t/a FISH AND CHIPS CO

First Respondent

MARITZA ERASMUS

Second Respondent

JOSHUA HERMANUS JOUBERT

Third Respondent

Summary:

Lack of jurisdiction in the Magistrate's Court, should generally be raised before the close of pleadings (*litis contestatio*). If the defendant fails to raise the special plea *initio litis* the defendant will be assumed to have waived his right to raise the special plea and therefore deemed to have consented to the jurisdiction of the Magistrate's Court. The *ratio* in *Zwelibanzi Utilities v TP Electrical Contractors 160/10* [2011] ZASCA 33 (25 March 2011), applied. This principle only applies in respect of jurisdiction over a person as envisaged in terms of section 28 of the Magistrates' Court Act 32 of 1944. Section 29 read with sections 45 and 46 of the Magistrate's Court Act, requires that a defendant must give written consent to the jurisdiction of the court where the amount claimed exceeds the monetary jurisdiction of such court. Where there is no written consent, the defendant retains the right to raise the lack of jurisdiction even after *litis contestatio*.

J U D G M E N T

NOKO AJ:**Introduction**

[1] This appeal lies against the order of the magistrate's court for the district of Johannesburg West, Roodepoort, granted against appellant at the instance of the three respondents. The magistrate upheld the special plea raised by the three respondents that the court has no jurisdiction as the amount claimed by the appellant exceeded the monetary jurisdiction of the district court.

Background facts

[2] The Appellant sued out summons against the respondents for the amount of R242 014.06 for arrear rental and other charges in respect of a lease agreement concluded with the first respondent. The appellant claimed interest at the rate of 2% above the prime

rate of interest on the aforesaid sum alternatively 15.5% *a tempore morae* to date of final payment. The causes of action against the second and third respondents were suretyship agreements in respect of the lease agreement concluded with the first respondent. The lease agreement and suretyship agreements were signed on 25 May 2011 with Absa Bank Limited, a predecessor-in-title to the appellant, and was in respect of the premises being shop GF04, the Ridge Shopping centre, corner Mozart Avenue and Paul Kruger streets, Wilgeheuwel.

Court a quo

[3] In their special pleas, the first and second respondents raised the following issues, *firstly*, the lack of the court's jurisdiction in terms of section 29 read with sections 45 and 46 of the Magistrates' Court Act 32 of 1944 ('the Magistrates' Court Act'), *secondly*, appellant's lack of *locus standi*. The third respondent raised a special plea of jurisdiction only. Jurisdiction was dealt with separately by consent between the parties and without any evidence having been led.

[4] The appellant argued before the Magistrate's Court that the respondents had consented to the jurisdiction of the court in accordance with clause 20 of the lease agreement which reads as follows:

"JURISDICTION OF MAGISTRATE COURT

At the option of the Landlord and in its sole discretion any action or application arising out of the lease or any suretyship furnished for the obligations of the Tenant, may be brought in the Magistrate's court having jurisdiction in respect of the Tenant or the surety/ies."

[5] The magistrate returned an order upholding the special plea of jurisdiction on the basis that the amount claimed is in excess of the monetary jurisdiction of the district court and thereby dismissed the appellant's claim.

On appeal

[6] Appellant persisted on appeal with the argument that clause 20 of the lease agreement constitutes consent to the monetary jurisdiction above the limit prescribed in terms of section 29 of the Magistrates' Court Act and further that the amount of R246 014.06 should be interpreted to mean that it is an aggregate of monthly arrears which in themselves constitute individual causes of action, each month being a separate cause of action. Further, that such individual monthly amounts do not exceed the monetary jurisdictional limits as envisaged in terms of section 29 of the Magistrates' Courts Act.

[7] The appellant added a further argument on appeal which was not raised in the court *a quo* being that the third respondent's special plea was served after *litis contestatio* and reliance on the lack of jurisdiction is not permissible at such stage.

Monetary jurisdiction

[8] The appellant argued that clause 20 of the lease agreement confirms that the first respondent had consented to the jurisdiction of the magistrate's court. This assertion is indeed correct in so far as it relates to the jurisdiction as envisaged in terms of section 28 of the Magistrates' Court Act. This understanding is buttressed by the appellant having clearly stated in paragraph 5.11 of the particulars of claim, though disavowed during

argument before me, that “[T]he first Defendant agreed to the jurisdiction of the magistrate court in respect of any proceedings in terms of section 28 of the Act, (Clause 20)”.

[9] It remains unclear as to why the appellant persisted with the argument that clause 20 would still apply to jurisdiction in relation to a cause of action as envisaged in terms of section 29 of the Magistrates’ Court Act.

[10] Section 29(1)(g) of the Magistrates’ Court Act provides that:

“Subject to the provisions of this Act and the National Credit Act, 2005 (Act 34 of 2005) a court, in respect of causes of action, shall have jurisdiction in actions already mentioned in this section where the claim or the value of the matter in dispute does not exceed the amount determined by the Minister from time to time by Notice in the Government Gazette”

[11] The amount determined by the Minister for the purpose of this action was R100 000 for the district court. It therefore follows that on a reading of section 29(1)(g) it is clear that the amount of R246 014.06 is in excess of the jurisdiction of the district court and the court did not have jurisdiction to adjudicate over the appellant’s claim unless there was consent in terms of section 45(1) or if the appellant had abandoned a portion of its claim, ie that portion, in excess of the amount prescribed. Section 45 provides as follows:

“JURISDICTION BY CONSENT OF PARTIES

(1) Subject to the provisions of section 46, the court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction, if the parties consent in writing thereto: provided that no court other than a court having jurisdiction under section 28 shall, except where such consent is given specifically with reference to

particular proceedings already instituted or about to be instituted in such court, have a jurisdiction in any such matter". (underlining added).

[12] As set out above the second and third respondents were alleged to have signed a suretyship agreement. The said agreement was disputed by the third respondent in his plea but was admitted by the second respondent. Clause 5 of the suretyship agreement provides that:

"the Landlord shall be entitled at its option to institute any legal proceedings which may arise out of or in connection with this suretyship in any Magistrate's court having jurisdiction in respect of the Surety's person, notwithstanding the fact that the claim or value of the matter in dispute might exceed the jurisdiction of such Magistrate's Court in respect of the cause of action".

[13] It should be remembered that the issue was argued without any evidence having been led. The court thus had before it the pleadings only. On the pleadings, the second respondent had admitted the conclusion of the suretyship agreement but the third respondent had not. Thus, the second respondent had admitted clause 5 of the suretyship agreement but the third respondent had not.

[14] Counsel for the appellant argued that the court should interpret the amount in the particulars of claim, though globular, as the aggregate of claims for breaches of the lease agreement by the first respondent in failing to pay for specific months. The argument relating to the proper interpretation of the claims by the appellant was advanced on the basis of two judgments, namely *Cohen v Sherman and Co* 1941 TPD 134 and *Locherenberg v Sisulu* 1960 (2) SA 502 (E). The Respondents' counsels argued that both

judgments are distinguishable as in the two authorities relied upon, the aggregate or globular amounts claimed, were supported by clear allegations in the particulars of claim relying on separate causes of action for each claim. The appellant's papers do not specifically identify monthly causes of action which would help the court to determine *ex facie* the papers that there are separate causes of action which underpin the amount of R246 014.06. Reference to annexure D (being a summary of monthly statements by the appellant) to the particulars of claim, referred to by the appellant's counsel also failed to properly identify each alleged cause of action. In any event, the appellant did not prove the lease agreement which, as set out above, was disputed by both the first and second respondents.

Litis contestatio

[15] The appellant argued that ordinarily a special plea regarding lack of jurisdiction should be raised by the respondent before the close of pleadings also known as *litis contestatio*. *Litis contestatio* as noted by Gajjar AJ in *Naidoo NO v Minister of safety and Security and Ano.* [1411/2011] ECHC (12 March 2019) denotes that the pleadings are said to be closed and that would be on the happening of one of the following instances, viz, *firstly*, either party has joined issue without alleging any other new matter, and without adding any further pleading; *secondly*, the last day for filing of the replication or subsequent pleading has elapsed and it has not been filed; *thirdly*, the parties agree in writing that the pleadings are closed and such agreement is filed with the Registrar; or *fourthly*, the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed. This is also provided for in rule 21A of the Magistrates' Court Act.

[16] In advancing his argument counsel for appellant referred the court to the judgment of *Zwelibanzi Utilities v TP Electrical Contractors 160/10 [2011] ZASCA 33 (25 March 2011)*, (Zwelibanzi Utilities/SCA judgment) in terms of which the court ruled that a special plea of jurisdiction after *litis contestatio* is legally not permissible (in general terms).

[17] The facts in *Zwelibanzi Utilities* judgment are briefly that the respondent issued summons in the magistrates' court in Durban against the appellant for payment of the balance of an agreed price for the installation of certain electrical services. The appellant served a plea and filed a counter-claim and subsequently amended his plea to raise a special plea that the court lacked jurisdiction. The respondent argued that there was a tacit prorogation of jurisdiction of the court and therefore the appellant was estopped from raising the special plea. The court was requested to rule *in limine* on the special plea. The court decided that the appellant had acquiesced in the jurisdiction of the magistrate's court and dismissed the special plea. This decision was upheld on appeal by a full bench of the High Court at Pietermaritzburg and was referred to the Supreme Court of Appeal. The Supreme Court of Appeal considered several previous judgments, *Lubee v Bosman* 1948 (3) SA 909 (O), *Van Heerden v Muir* 1955 (2) SA 376 (A), *Churchill v Standard General Insurance Co Ltd* 1977(1) SA 506 (A), *Purser v Sales; Purser and Another v Sales and Another* 2001 (3) SA 445 (SCA), and upheld the decision of the magistrate dismissing the special plea raised by the appellant. Those judgments in principle related to jurisdiction in respect of the person and not cause of action.

[18] The appellant's argument in this matter was that since the third respondent had pleaded and since *litis contestatio* had been reached, the third respondent was presumed to have waived his right to raise a special plea disputing jurisdiction. This argument needs to be supported by the clear indication that the pleadings were closed at the time when the special plea of jurisdiction was raised. The appellant conceded that it cannot be gleaned from the record before the court as to when the pleadings were closed in respect of the first and second respondents and under those circumstances the argument could not be advanced in respect of them. As a result the appellant decided to jettison the *litis contestatio* argument against the first and second respondents.

[19] The position is however different with regard to the third respondent who argued that this case was distinguishable.

[20] The crisp issue which needs to be considered is whether the decision of the SCA is applicable to the case before me. At the outset it should be mentioned that the matter which served before the SCA related to the jurisdiction of the magistrate court in relation to a person, which is regulated by section 28 of the Magistrates' Court Act. In contrast the *lis* serving before me relates to the monetary jurisdiction of the Magistrate's court and is regulated by section 29 of the Magistrates' Court Act.

[21] There appears to be a dearth of decisions in this division on this point. Some four decades ago, Schock AJ in *Hydromar Pty Ltd v Pearl Oyster Shell Industries Pty Ltd* 1976

(2) SA 384 C (*Hydromar*), stated that the argument that special pleas on jurisdiction should be raised prior to *litis contestatio*, applies only to jurisdiction in respect of persons and not also to monetary jurisdiction. The learned judge opined at page 388, par G that “the mere failure to take an objection in initio litis is not sufficient to preclude a defendant from thereafter objecting to the jurisdiction (as would be the case, I may add, with jurisdiction in respect of persons in terms of section 28 of the Act)”. What plaintiff must establish is a waiver by defendant of his right to object”. (underlining added).

[22] Binns-Ward J (with whom Traverso DJP concurred) in *The Minister of Police v The Regional Civil Magistrate, Oudtshoorn and Others* (WCC) [unreported case no 15587/2013, (6.11.2014)] (*Regional Civil Magistrate, Oudtshoorn*) made reference in passing to the *Zwelibanzi Utilities* judgment that *litis contestatio* may be a bar to raise a special plea in terms of section 29 of the Magistrate Court Act. As will be shown below this was not the *ratio decidendi* of the court. In that case, Binns-Ward J was seized with a review application relating to a decision of a regional court magistrate. The magistrate was challenged for dismissing a special plea raising its lack of monetary jurisdiction which was based on the argument that the Minister’s determination stated that the regional court had jurisdiction to adjudicate over claims above R100 000 and not exceeding R300 000 and therefore that the monetary jurisdiction of the regional magistrate court was excluded. The magistrate held that the Minister’s determination that the regional court should adjudicate matters which are above R100 000 was *ultra vires* as the enabling legislation enjoined the Minister to determine the maximum amount for the monetary jurisdiction and not the minimum. As such the minimum as set out was ignored.

[23] Binns-Ward J reasoned that the reviewing of the judgment by the applicant was an incorrect procedure and instead the applicant should have appealed the decision of the magistrate's court. The applicant argued that the decision by the magistrate is also reviewable on the basis that the magistrate committed a gross irregularity in declaring that the minister's determination was *ultra vires* the enabling legislation and was therefore of no force and effect. The applicant argued that it was outside the powers of the lower court. Binns-Ward J held further that the magistrate's decision in dismissing the special plea was correct though the judgment was ineptly expressed as the Minister's determination was in fact not *ultra vires*. In any event, there was no contention that the magistrate did not have the power to dismiss the special plea. On a purposive and contextual interpretation, as stated by Binns-Ward J, the Minister's notice was only to fix the maximum amount for the monetary jurisdiction, the plaintiff's claim was below R300 000 and the court was therefore clothed with jurisdiction. The review application was dismissed.

[24] Binns-Ward J then stated in passing at par [12] that there was another reason why the special plea and the challenge to its dismissal would have no merit being that "*.....a litigant may not, in general, raise a point of jurisdiction after litis contestatio. By failing to take the point before pleadings had closed, the applicant was taken to have submitted to the court's jurisdiction.*" The court relied on the *Zwelibanzi Utilities* judgment. This finding was, however, not the *ratio decidendi* of the judgment. No reasons were advanced why the judgment of *Hydromar* was incorrect. Indeed, it was not even referred to.

[25] The provisions of section 28(1)(f) do not require a litigant to assent to the court's jurisdiction in writing. Section 29, in contrast, when read with section 45, requires expressly that the consent to jurisdiction should be in writing. The SCA judgment should therefore be distinguished from the matter under consideration as the subject matter in that case related to jurisdiction in respect of persons (section 28(1)(f)) whereas *in casu* the issue is the magistrate's court jurisdiction in terms of section 29 read with section 45 of the Magistrate's Court Act.

Conclusion

[26] Applying all the foregoing principles to the facts of this case:

26.1. A single globular amount was claimed which amount exceeded the jurisdiction of the Magistrate's Court at the time being R100 000.

26.2. The consent to jurisdiction clause could only have application to the second respondent as she had admitted the conclusion of the suretyship agreement. The first and third respondents had disputed the enforcement of the lease agreement and suretyship agreement on the pleadings and no reliance could therefore, and in the absence of evidence, be placed on the written terms of the respective agreements. The finding of the court *a quo* in respect of the first respondent should accordingly be confirmed. The second respondent admitted the conclusion of the suretyship agreement which contained the consent to jurisdiction clause. The finding of the court *a quo* accordingly falls to be set aside as against the second respondent.

26.3. The *litis contestatio* point was only persisted with as against the third respondent. The third respondent could raise the lack of monetary jurisdiction as a matter of principle after *litis contestatio*. The third respondent did not consent to the Magistrate's Court's jurisdiction as the suretyship agreement on the pleadings is in dispute and the provisions dealing with jurisdiction accordingly do not avail the appellant. The finding of the court *a quo* in respect of the absence of jurisdiction in relation to the third respondent must therefore be upheld.

Costs

[27] There appears to us to be no reason why the costs should not follow the result.

Order

[28] I accordingly grant the following order:

- (a) The appeal against the first and third respondents, is dismissed with costs.
- (b) The appeal against the second respondent is upheld with costs. The order of the court *a quo* as against the second respondent is set aside and replaced with the following:

'The special plea of jurisdiction raised by the second respondent, is dismissed with costs'



MV NOKO
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree



I OPPERMAN
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

**For the Appellant
 Instructed by**

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 : Witz, Calicchio, Isakow & Shapiro
 Attorneys

**For the 1st and 2nd Respondents
 Instructed by**

: Mr Matthew-Kerr Phillips
 : Matthew Kerr-Phillips Attorneys

**For the 3rd Respondent
 Instructed by**

: Adv Gary Ferrar
 : Van Quickelberger Attorney

**Date of hearing
 Date of judgment**

: 12 August 2019
 : 1 November 2019