IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A383/2018

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

30.05.2019 _____
DATE SIGNATURE

In the matter between:

DORINGKLOOF PRIMARY SCHOOL **APPELLANT**

And

AQWITAMISI JOSEPH TSHIGUVHO **FIRST RESPONDENT**
TSHILIVHALI OLGA NDSKIOZWI **SECOND RESPONDENT**

JUDGMENT

STRIJDOM AJ

[1] In this matter the appellant sought default judgment against the respondents on 11 July 2018 in the Magistrates Court for payment of an amount of R11,100.00.

[2] The Appellants request for default judgment was refused for two reasons, firstly on the basis that the provisions of Rule 5(6) were not complied with and secondly on the basis that the court *a quo* is not vested with jurisdiction to adjudicate the action.

[3] The grounds for appeal is set out in the Notice of Appeal and may be summarised as follows:

3.1 The Learned Magistrate erred in finding that the Appellant had to adduce evidence pertaining to jurisdiction in the absence of a dispute between the parties.

3.2 The Learned Magistrate erred in finding that the Court a quo did not have jurisdiction and;

3.3 The Learned Magistrate erred in finding that failure to comply with the provisions of Rule 5(6) of the Magistrate Court Rules are grounds for the refusal of the application.

[4] Section 28(1)(d) of the Magistrates' Court Act, Act 32 of 1944 as amended reads as follows:

"4.1 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 shall be the following and no other:-

(d) any person, whether or not he or she resides, carries on business or is employed within the district or regional division, if the cause of action arose wholly within the district or regional division".

[5] Rule 6(4) of the Magistrates Court Rules provides that: "*Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to, any pleading, as the case may be, with sufficient particularly to enable the opposite party to reply thereto.*"

[6] All that was required of the appellant, in its particulars of claim, was to make the necessary factual allegations which would support its claim that the court a quo had jurisdiction, based thereon that the cause of action wholly arose within the Court a quos' area of jurisdiction.

[7] The Appellants' claim was premised on the respondents' breach of an agreement to pay school fees alternatively the respondents' obligation to make payment of school fees in terms of Sections 39 and 40(1) of the South African School Act, Act 84 of 1996 (as Amended).

[8] In order to be successful in its claim based on the contract, the appellant thereof had to allege and prove the following;

8.1 The agreement and its terms;

8.2 That it complied with its obligations in terms of the agreement;

8.3 Breach of the agreement by the respondents and;

8.4 Its claim for specific performance.

[9] In order to be successful in its alternative claim based on the provisions of the South African Schools Act ("the Act"), the appellant has to allege and prove the following:

9.1 The jurisdictional requirements of Section 40(1) of the Act i.e. A parent is liable to pay the school fees determined in terms of section 39 unless or to the extent that he or she has been exempted from payment in terms of this Act,

9.2 That school fees was determined in terms of section 39;

9.3 Failure to make payment of the said school fees.

[10] In paragraph 3 of the particulars of claim, the appellant alleges that the parties entered into an agreement at Centurion, in terms of which the appellant would render certain services pertaining to the education of the respondents and the respondents would make payment to the appellant in exchange for the services rendered.

[11] In paragraph 6 of the particulars of claim, the appellant alleges that it had rendered the required services and seeks payment of specifically tuition fees.

[12] In paragraph 7 of the particulars of claim, the appellant alleges that it made demand to the respondents and the respondents acknowledged receipt of the demand at Doringkloof, at the school, and the respondents were warned that their failure to make payment of school fees constitute failure to comply with a statutory obligation.

[13] In paragraph 2 and 3 of the affidavit in support of the application for default judgment, the chairperson of the appellants Governing Body, confirmed that the school fees were determined as provided for in, section 39 of the Act, at the appellants' premises. In paragraph 4 of the affidavit, the Chairperson of the appellants Governing Body further confirms that payment of the amount claimed was not made and that the respondents were indebted to the appellant as claimed.

[14] It appears that the Court *a quo* took issue with the fact there is no agreement as to the place where payment was to be made. The Court a quo, relying on the matter of Buys v Roodt (now Atto) 2000(1) SA 535, (OPA) found that in the circumstances it is not vested with jurisdiction.

[15] In my view the facts in Buys v Roodt are distinguishable from the facts *in casu*. In that matter two payments were made by cheque, one payment of which was made in Hermanus (as opposed to Kroonstad where the matter was heard.)

[16] There were no facts before the Court to suggest that any payment was made or received from outside the area of jurisdiction of the court, and there was thus no basis to justify the departure from the norm- that where place of payment is not agreed, payment is to be made at the place where the agreement was entered into.

[17] The Court *a quo* found that because the parties did not agree where performance had to take place, it could not be said that breach occurred within a specific district.

[18] The court a quo did not deal with the appellants' alternative claim based on the provisions of the South African Schools' Act, Act 84 of 1996. (As amended).

[19] If regard is had to the provisions of Section 39 to 41 of the Act it is patent that the statutory obligations arise within the area of the jurisdiction of the court a quo. As the statutory obligations arose within the area of jurisdiction of the Court a quo, it follows that failure to comply with the statutory obligations similarly arose with the area of jurisdiction of the court a quo.

[20] In the matter of Dusheika vs Millburn 1964 (4) SA 648 (AD), the Appellate Division (as it then was) considered what was meant with "cause of action arose wholly' and found that "Cause of action has been held to mean every fact which is material to be proved to entitle the plaintiff to succeed- every fact which the defendant would have the right to traverse."

[21] In Venter v Venter 1949(1) SA 768 (A) it was held that payment must be made in place in which the obligation is contracted unless another place has been expressly or tacitly fixed for the fulfilment of the contract. The court continues to consider whether it is necessary for a creditor to seek out his debtor or whether a debtor is obliged to seek out his creditor in order to perform. The court distinguishes between situations where a debtor has to be placed in mora and where a debtor is in mora by virtue of the terms of the agreement. In the present matter, the respondents were in mora the moment their obligation fell due and same was not paid-it was thus not necessary for the appellant to seek out the respondents- the respondents were obliged to seek out the appellant and tender performance.

[22] The court in the Venter matter concludes that a debtor is entitled to perform at any place where it may legally perform its obligations. The question which must thus be answered is this: Where were the respondents entitled to perform? The answer must be, in the modern age, be that the respondents were entitled to perform from anywhere in the world, provided that the appellant received their performance, as it is trite that payment is made when same is received by the creditor.

[23] In the matter of Goldfields Confectionary and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd[1] it was held that payment is made only once payment is in fact received, unless there is an agreement to the contrary. It therefore follows that in the present matter, the place of performance by the respondents would be the place where the appellant would receive payment.

[24] The Court *a quo* found that as the parties had not agreed on a place for performance, performance could arguably not have taken place within the area of jurisdiction of the court *a quo*. The court *a quo* disregards the question as to where performance was to be received. There were no facts before the court *a quo* which would suggest that the place of the performance was anywhere but where the appellant was situated.

[25] The final issue that must be considered is whether or not it was necessary for the appellant to plead that, through operation of law, performance was to take place where the appellant is situated.

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[1] 1950(2)SA 763 (T) at 771 See also Stabilphave(Pty) Ltd vs South African Revenue Services 2014 (1)SA 350 (SCA).

[26] If the particulars of claim are read as a whole, the allegation in paragraph 8 must be read against the backdrop of the preceding paragraphs. The particulars of claim, properly interpreted thus states, that all of the *facta probanda* (which includes place of performance) took place within the area of jurisdiction of the court a quo.

Rule 5(6) of the Magistrate Court Rules.

[27] Rule 5(6) of the Magistrates Court Rules provide that where a party relies on section 28(1) (d) of the Magistrates Court Act, a party must in the summons set out particulars of support of such an allegation. The facts upon which the appellant relied was set out in the particulars of claim which was served with the summons- there could thus be no prejudice to the respondents.

[28] Rule 60(1) of the Magistrates Court Rules reads as follows: Except where otherwise provided in these rules, failure to comply with these rules, or with any requests made in pursuance thereof shall not be ground for the giving of judgment against the party in default.

[29] It therefore follows that any finding in relation to want of compliance with the provisions of rule 5(6) was not on its own sufficient for the application for default judgment to be refused.

[30] In my view the court a quo erred in finding that it did not have jurisdiction. The court *a quo* further erred in dismissing the application for default judgment.

[31] In the result the following order is made;

31.1 That the appeal is upheld;

31.2 That the order of the Magistrates Court dismissing the application for default judgment is set aside and replaced with the following order:

"2.1 Default judgment is granted against First and Second Defendant, jointly and severally, the one paying the other to be absolved;

2.2 Payment of the sum of R11,100.00;

2.3 Interest at a rate of 10.5% per annum *a temporae morae* to date of final payment;

2.4 Costs of suit on a scale as between attorney and client.

JJ STRIJDOM

ACTING JUDGE OF THE HIGH COURT

I agree, and is so ordered.

TUCHTEN J

JUDGE OF THE HIGH COURT

MATTER HEARD: **28 May 2019**

Judgment delivered: **30 MAY 2019**

COUNSEL FOR APPELLANT:	**ADV M Riley**
Instructed by:	**GROENKLOOFCHAMBERS PTA**
	MP KOEKEMOER ATTORNEYS
COUNSEL FOR RESPONDENT:	**NO APPEARANCE**
Instructed by:	**NO APPEARANCE**