NOT REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

APPEAL NO. AR 128/2009

In the matter between:

DIAL DIRECT INSURANCE LTD **Appellant**

and

EDMOND PADARATH **Respondent**

JUDGMENT

GORVEN J

[1]This appeal lies against the judgment of the magistrate for the district of Lions River who dismissed two special pleas. I shall refer to the parties as they were referred to in the court a quo. The defendant has appealed against the dismissal of the special pleas.

[2]The plaintiff instituted action in the magistrate's court for the district of Lions River, claiming indemnification under an insurance contract for damage to his vehicle caused in a collision. The defendant raised two special pleas; the first as to jurisdiction and the second as to the plaintiff being time barred from claiming under the insurance policy. The appeal against the dismissal of the latter special plea has been abandoned. The only remaining issue is, therefore, whether the magistrate correctly dismissed the special plea relating to jurisdiction.

[3]It is necessary to set out the relevant averments in the summons and the plea on this issue. The first relevant averment of the plaintiff was at the foot of the face of the summons where the averment appeared that the whole cause of action arose within the jurisdiction of the court *a quo*. The second was that the plaintiff and the defendant entered into an agreement during 2006 in Howick. It is not in issue that Howick was within the area of jurisdiction of the court *a quo*. The third averred that the vehicle was damaged in a collision which took place in Howick. The special plea was to the effect that the principal place of business of the defendant was in Johannesburg and that the whole cause of action did not arise within the jurisdiction of the court *a quo*. In its plea over, the defendant denied that its principal place of business was in Durban and further denied that "the contract was entered into at Durban". It noted the averment relating to the place of the collision.

[4]The hearing was dealt with under rule 19(12) of the Magistrates' Court rules. This provides that:

> Any defence which can be adjudicated upon without the necessity of going into the main case may be set down by either party for a separate hearing upon 10 days' notice at any time after such defence has been raised.

In approaching this appeal it is of some importance that the Magistrates' Court Rules do not make special provision for a special plea.[1] This means that a plea over is required which in turn means, for the purposes of this appeal, that the averments in both the special plea and the plea over relating to the issue raised in the special plea form the basis for the separate hearing.

[1] *Du Plessis v Doubells Transport (Edms) Bpk* 1979 (1) SA 1046 (O) 1048H-1049A

[5]In the Magistrates' courts, jurisdiction is conferred by statute. The averments in the particulars of claim rely on S 28(1)(d) of the Magistrates' Courts Act[2] which provides that the court has jurisdiction over:

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

[6]In *McKenzie v Farmers' Co-operative Meat Industries Ltd*[3] the Appellate Division said in relation to a statutory provision defining the geographical limits of the jurisdiction of a magistrate's court, that 'cause of action' meant 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact, which is necessary to be proved.'

[7]In relation to an insurance contract, the facts necessary to prove jurisdiction were dealt with in *Ndlovu v Santam Ltd*[4]. In relation to the approach in the High Court from which the appeal lay that the enforcement of such contract arose from its repudiation by the insurance company and, since the repudiation took place beyond the jurisdiction of the Magistrates' court in Roodepoort that court had no jurisdiction under s 28(1)(d), Mthiyane JA said the following:

> 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 a 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 the *facta probanda* arose

[2] No. 32 of 1944
[3] 1922 AD 16 at 23
[4] 2006 (2) SA 239 (SCA) at 248

> wholly within the particular magisterial district. In the present matter the appellant did not accept the respondent's repudiation and sued the respondent for specific performance on the agreement. It follows therefore that the repudiation was not a material fact which the appellant had to prove to establish his cause of action. The fact that the repudiation might have taken place outside the district of Roodepoort is accordingly irrelevant.

[8]The court went on to hold that the place of conclusion of the contract of insurance, the place of payment of the premiums and the place of breach, being the place the claim should have been paid, formed the *facta probanda* and that any other facts amounted to *facta probantia*. If the latter took place outside the district, this did not relieve the court of jurisdiction under the section.

[9]In the present matter the claim was also for specific performance of the insurance agreement. No evidence was led by either party. What is of importance, however, is that the plaintiff on many occasions during argument indicated his intention to lead evidence. His entitlement to do so was objected to by the attorney for the defendant and, eventually, the magistrate stated that it was not necessary to hear evidence.

[10]The first question is whether, on the face of the summons and particulars of claim, sufficient averments were made relating to jurisdiction. If not, the matter could have been disposed of on exception. If there were sufficient averments, the next question which arises is whether jurisdiction was admitted. If not, the final question is who bore the *onus* of proof on the issue raised by the special plea. If this question arose, the failure to discharge the *onus* by leading evidence should have been decisive in the light of the failure to lead evidence.

[11]It was averred on the face of the summons that the whole cause of action arose within the jurisdiction of the court *a quo*. This has been held to be a necessary averment when relying on this section.[5] No further particulars were sought. The provisions of Rule 6(5)(f) state that no further particulars need be set out in the summons in support of such averment.[6] This means that the averment in question was sufficient and no exception could have been upheld on that basis.

[12]The magistrate based his finding in favour of the plaintiff on his view that the defendant had admitted jurisdiction in the plea. He did not, in his judgment, give any indication of how he arrived at this conclusion. The attorney appearing for the plaintiff submitted that paragraph 3 of the plea amounted to an admission of jurisdiction. This submission was not developed fully in the court *a quo*. It was taken up and developed before us by Mr Manikam, who appeared for the plaintiff. The plaintiff averred that the agreement was concluded at Howick. Paragraph 3 of the plea said, “Save to deny that the contract was entered into at Durban …the Defendant admits the contents of this paragraph”. Mr Manikam submitted that, since there was no express denial that the agreement was concluded at Howick, but only a denial that it was concluded at Durban, it was admitted that the agreement was concluded at Howick. This is because, in terms of Rule 19(10), matters not denied are taken to be admitted. Since the defendant did not amend this paragraph, the rule applied.

[13]On a strictly formalistic approach to pleadings, this may be so. But the meaning of the paragraph is unclear. It was pleading to the averment in the particulars of claim

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[5] *Dusheiko v Milburn* 1964 (4) SA 648 (A) 655 F-H

[6] In addition to *Dusheika’s* case, see *Noorbhai v Fairview Trading Company* 1948 (3) SA 906 (N) 907 which dealt expressly with the predecessor to Rule 6(5)(f), viz. Rule 10(8)(vi) which was to similar effect.

that the agreement was concluded at Howick. The paragraph denied something not asserted, namely it denied that the agreement was concluded at Durban.

[14]If it was proper to hold that the averment as to where the contract was concluded was admitted, it is only one of three *facta probanda* necessary for proving that a cause of action based on an agreement arose wholly within the district. Other required *facta probanda* are that the damage for which an indemnification is sought must have taken place in the district[7] as also the breach. Since, in the plea, the place of the collision was noted, this amounted to an admission.

[15]This then leaves the question of the place of breach. As was said in *Ndlovu v Santam Ltd*[8]:

> Where should the defendant, in terms of the contract, have performed? If, as would seem to be the case, Erasmus had to pay Unie in Pretoria, then that is where he had to perform and where his breach (failure to pay/perform) occurred.

The law is to the effect that, absent a term to the contrary in the insurance contract, the plaintiff would have to be paid cash.[9] Since the plaintiff pleaded his residential address and since this was admitted, the place of payment would therefore be within the district. However an agreement can vary the common law. The agreement was not annexed to the summons and admitted by the defendant and no evidence was led introducing it. The court *a quo* therefore had no basis for making a factual finding. The question is whether, on the pleadings, the plaintiff did not need to lead evidence on this point. Put another way, absent countervailing evidence, would the common law apply in which case the plaintiff would not need to lead evidence?

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[7] *African Guarantee & Indemnity Co Ltd v Coulidge* 1922 CPD 2 at 4
[8] At para 16, approving *Patel v Desai* 1928 TPD 443 at 449 - 50.
[9] Joubert: *LAWSA* Vol. 12, para 440 (First reissue)

[16]In *Malherbe v Britstown Municipality*[10] the court dealt with the issue of *onus*. Ogilvie-Thompson AJ (as he then was) said the following:[11]

> Under the procedure now prescribed by Act 32 of 1944 any question of *onus* which arises in connection with any challenge of the Court's jurisdiction must, in my judgment, be determined on a consideration of the particular form in which that challenge is raised on the pleadings in the particular case. It is the province of the plaintiff to establish the jurisdiction of the Court into which he, as *dominus litis*, has brought the defendant. In this sense the *onus* of establishing jurisdiction is, in my view, always on the plaintiff. But the form of defendant's plea may be such as to burden him with an *onus* to prove certain facts. As shown by VAN DEN HEEVER, J.P. (as he then was) in *Lubbe v Bosman* [1948 (3) SA 909 (O) at 914, 915], there is weighty Roman-Dutch authority for the proposition that once a defendant raises the *exceptio fori declinatoria* as a substantive plea 'the *onus* rests upon him of proving the facts upon which his plea to the jurisdiction is based'. In such a case the defendant in his plea avers the existence of certain facts which, if proved, will defeat the jurisdiction. The *onus* of proof of such facts rests upon the defendant. Where however the plaintiff in his summons (either as originally filed or as augmented by the particulars contemplated by Rule 10 (8) (vi)) avers facts which, if proved, establish jurisdiction on the ground of the whole cause of action having arisen within the district, and the defendant's plea merely puts those facts in issue, then the *onus* remains with the plaintiff to prove both the facts which he avers and the conclusion (viz., that the whole cause of action arose within the district) which he deduces therefrom. In such a case, in the words of VAN DEN HEEVER, J.P., in *Lubbe v Bosman* (supra, at p. 915), 'the *onus* will continue to burthen the plaintiff'.[12]

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[10] 1949 (1) SA 281 (C)
[11] At 287
[12] See also: *Munsamy v Govender* 1950 (2) SA 622 (N) 624

[17]On the assumption that the plea admitted the place of conclusion of the agreement, the special plea and plea do not allege specific facts in opposition to those on which the plaintiff sought to found jurisdiction. They deny that the cause of action arose wholly within the district. On this basis the case is on all fours with that of *Malherbe v Britstown Municipality* where Ogilvie Thompson AJ went on to say:

> There was, therefore, ….no substantive plea raising the *exceptio fori declinatoria* by an averment of new facts not contained in the summons: there was merely a denial of plaintiff's averment that the Britstown court had jurisdiction, and a denial of the allegations set out in the summons whereon that averment was based.[13]

It seems, therefore, that the plaintiff bore the *onus* to prove the relevant *facta probanda* which would substantiate his legal assertion. If there was a need to lead evidence by the plaintiff, either on the place of conclusion of the agreement or on the place of payment, the failure to do so would render the *onus* decisive.

[18]It is significant that the plaintiff's attorney on several occasions tried to lead the evidence of the plaintiff on the special pleas and the magistrate quite wrongly refused to allow evidence to be led. The record shows that the plaintiff's attorney asked to lead the plaintiff's evidence prompting the defendant's attorney to object. The magistrate declined to deal with the matter at that stage, saying that he would "cross that bridge" when he came to it. Thereafter the plaintiff's attorney alluded to the need for the plaintiff to lead evidence and repeatedly indicated what the plaintiff's evidence would be when he testified. The plaintiff's attorney then asked to lead the evidence of the plaintiff if the magistrate was "not satisfied". The defendant's attorney again objected to the plaintiff leading evidence saying that it would not be fair since the defendant's witnesses were not available. The plaintiff's attorney argued that evidence

[13] At 288

was “crucial” before a final decision could be made on the special pleas. The defendant’s attorney objected to a submission or an argument of the plaintiff’s attorney on the basis that no evidence had been provided. The plaintiff’s attorney again asked to lead evidence but the magistrate refused this on the basis that: “I think that your submissions are sufficient”.

[19]In those circumstances I am of the view that it would be unfair on the plaintiff for this matter to be decided on the basis of *onus*, namely that the plaintiff bore the onus of proving that the court had jurisdiction and since he failed to do so he must fail. This is all the more so since there is, at best for the defendant, ambiguity as to what is meant in paragraph 3 of the plea. This may well require the defendant to amend this paragraph, as submitted by Mr Manikam. If not, it either amounts to an admission or may be held to be excipiable as being vague and embarrassing if it conflicts with the general denial as to jurisdiction. Mr Oliff, from the bar, referred to the fact that, after judgment, a notice to amend this paragraph was served on the plaintiff in terms of the rules. He sought leave to conditionally amend in line with that notice if the appeal was held to turn on this point. Mr Manikam objected to the procedure adopted by the defendant. His objection has some substance to it since, if a formal application to amend had been brought, the plaintiff would have had the opportunity to set out facts on affidavit in answer to such an application. It is my view that it would not be proper for this court to adjudicate on the conditional application and Mr Oliff, correctly in my view, conceded the point.

[20]S 87(b) of the Magistrates’ Courts Act, No. 32 of 1944 and s 22 of the Supreme Court Act, No. 59 of 1959 give the power to remit the case to the court *a quo* for the

hearing of evidence on the special plea as to jurisdiction. The former section provides as follows:

> The court of appeal may -
> (b) if the record does not furnish sufficient evidence or information for the determination of the appeal, remit the matter to the court from which the appeal is brought, with instructions in regard to the taking of further evidence or the setting out of further information;
> (e) make such order as to costs as justice may require.

S 22 of the Supreme Court Act provides, in its relevant parts, as follows:

> The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power-
> (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and
> (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.

[21]*Jones & Buckle*[14] states that one reason to remit a matter under s 87(b) is if "the magistrate has wrongly disallowed admissible evidence". The authority that is cited is *Mokhachane v Hendricks* [15]. In this matter cross-examination was disallowed on whether the plaintiff was a married woman. The appeal court held that this was a relevant issue and remitted the matter for evidence on the point to be led. I am of the view that this is also such a case since the *onus* may be decisive and the plaintiff clearly desired to lead evidence but was not afforded this opportunity.

[22]It is also my view that the unclear formulation of paragraph 3 of the plea and the desire of the defendant to amend has caused the matter to be remitted along with the unfounded objections by the defendant to the plaintiff leading evidence. As a result, I am persuaded that the defendant should bear both the costs of the appeal and of the proceedings which took place before the magistrate on 21 October 2008.

[14] At p Act368B (service issue 22)
[15] 1935 EDL 28

[23]The following order is granted:

1. The appeal is upheld with regard to the special plea relating to jurisdiction and the magistrate's order dismissing that special plea is set aside;
2. The appeal is dismissed with regard to the special plea relating to the time barring of the action and the magistrate's order dismissing that special plea is confirmed;
3. The appeal against the judgment of the magistrate as to costs succeeds and the costs order of the magistrate is set aside and replaced by an order directing the defendant to pay the costs of the proceedings before the magistrate on 21 October 2008 including the costs of preparation, travel and waiting time;
4. The matter is remitted to the Magistrate's Court for the District of Lions River for the determination of the special plea relating to jurisdiction, including any interlocutory procedures such as amendments and the like, after having heard and considered such evidence as the parties may choose to lead;
5. The appellant is directed to pay the costs of the appeal;

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GORVEN J

I agree.

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STEWART AJ

Counsel for the Appellant:	MA Oliff
Instructed by:	Johnston & Partners Durban

Correspondents:	Schoerie & Sewgoolam Inc. Pietermaritzburg
Counsel for the Respondents:	M Manikam
Instructed by:	Govindsamy & Pillay Pietermaritzburg
Date of hearing:	30 November 2009
Date of judgment:	8 December 2009