In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: 938/21

In the matter between:

PROPELL SPECIALISED FINANCE (PTY) LTD **Plaintiff**

and

BODY CORPORATE OF INDIANAPOLIS

SECTIONAL TITLE SCHEME (SS 824/2004) **Defendant**

Date of Hearing: *30 November 2021*

Electronically delivered: *08 February 2022*

JUDGMENT ON PLAINTIFF'S TWO EXCEPTIONS

08 FEBRUARY 2022

LEKHULENI J

INTRODUCTION

[1] For the sake of convenience the parties are cited as in the claim in convention. The plaintiff and the defendant entered into an arrear levy finance agreement on 22 February 2013 in terms of which the plaintiff allegedly advanced payment to the defendant and for the defendant's benefits. The plaintiff contends in its summons that the defendant breached the terms of the agreement by inter alia failing to account and

make payment to the plaintiff the sum of R119 377, 50 advanced to the defendant by the plaintiff.

[2] The defendant raised a special plea of jurisdiction and a point in limine that the plaintiff's claim offends against the in duplum rule. In the special plea on jurisdiction, the defendant pleads that this court does not have the requisite jurisdiction to adjudicate over the matter as paragraph 26.2 of the finance agreement to which both parties consented, to the non-exclusive jurisdiction of this court for any matter arising from the agreement is ultra vires and unenforceable as the parties did not have the requisite authority to specifically decide or elect the jurisdiction of this court whether it being exclusive or not. The defendant also denied that the cause of action arose within the jurisdiction of this court as the agreement was concluded outside the area of jurisdiction of this court.

[3] The defendant further raised a second special plea to the plaintiff's particulars of claim arguing that the arrear interest forming part of the plaintiff's claim prior to the institution of the litigation far exceeded the amount advanced by the plaintiff which is prohibited by the in duplum rule. To this end, the defendant prayed that the plaintiff's case be dismissed with costs.

[4] The plaintiff excepted to the two special pleas raised by the defendant. In respect of the special plea on jurisdiction, the plaintiff contends that the terms of the contract, in particular, the consent to jurisdiction in terms of clause 26.2 which is now impugned by the defendant has been admitted by the defendant in its plea and as such the first special plea does not raise a sustainable defence.

[5] The plaintiff further excepted to the second special plea based on the in duplum rule in which the defendant prays for the dismissal of the plaintiff's entire claim due to the interest allegedly exceeding the capital. The plaintiff pleads that this relief sought by the defendant for the dismissal of the plaintiff's entire claim is not competent in law on the limited averments made by the defendant concerning the application of the in duplum rule.

[6] It is these two exceptions that this court is enjoined to consider in this matter. I turn to consider these exceptions ad seriatim.

The first exception relating to Jurisdiction

[7] The grounds upon which the plaintiff alleges jurisdiction in the particulars of claim is that the defendant expressly agreed to the jurisdiction of this court in terms of clause 26.2 of the agreement. In addition, the plaintiff contends that in terms of section 21 of the Superior Courts Act 10 of 2013 the agreement was concluded within the area of jurisdiction of this court and that performance and the acceptance of the agreement therefore occurred within the jurisdictional area of this court.

[8] The defendant on the one hand contends that a consent of a local peregrines is not sufficient to give the court jurisdiction in the absence of one or more of the traditional grounds of jurisdiction. The defendant relies on *Veneta Mineraria SPA v Callirina Colleries (Pty) (in liquidation)* 1987 (4) SA 88 (A) where the court held that a peregrine defendant cannot effectively submit or consent to a court's jurisdiction

without other jurisdictional grounds being present. One or more of the traditional grounds of jurisdiction must be present for the court to enjoy jurisdiction.

[9] The defendant's submission is, with respect, incorrect and does not reflect the current legal position on jurisdiction in similar matters in our law. The current legal position in our law was succinctly set out by the full court in *American Flag PLC v Great African T-Shirt Corporation CC* 2000 (1) SA 356 at 363D-E where it was pointed out that our courts had for almost a century, if not longer, expressed *dicta* to the effect that actions by an incola plaintiff against a peregrines defendant could be entertained solely on the ground of the defendant's submission to the jurisdiction of the Supreme Court or the Magistrates Court. The court found that the submission to jurisdiction by a defendant precedes an attachment to found or confirm jurisdiction. The full court also found that in *Veneta Mineraria SPA v Callirina Colleries (Pty) (in liquidation)* (supra) the Appellate Division had no intention of overturning this long course of practice which was distinguishable in that case in that both parties had been peregrines of the trial court. Accordingly, the court found in *American Flag PLC* that the Appellate Division's dictum in *Veneta Mineraria SPA v Callirina Colleries (Pty)* that submission by a perigrine defendant was not enough and that one or more of the traditional grounds of jurisdiction had to be present, had not been meant to extend to the case where the plaintiff was an incola of the court's area.

[10] To this end, I am in agreement with the views expressed by the plaintiff's counsel that the position in the *Veneta Mineraria SPA v Callirina Colleries (Pty) (in liquidation)* to the effect that a preregrini defendant cannot effectively submit or

consent to a court's jurisdiction without other jurisdictional grounds being present, only applies where the plaintiff is also a peregrine of the court. In other words, where both the plaintiff and the defendant are preregrines, the plaintiff cannot solely rely on the submission of the defendant for the court to have jurisdiction. In such an instance, the traditional grounds of jurisdiction had to be present and pleaded. The position in *Veneta Mineraria SPA v Callirina Colleries (Pty) (in liquidation)* does not find application where the plaintiff is an incola of the court as is the case in this matter.

[11] The legal position expressed in *American Flag PLC v Great African T-Shirt Corporation CC* was quoted with approval by the Supreme of Appeal in *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 (2) SA 522 (SCA) at para 26 where the appeal court found that the decision in *American Flag PLC v Great African T-Shirt Corporation CC* correctly reflects the law in actions for money between a plaintiff incola of a court and a peregrine when the defendant has submitted to the jurisdiction.

[12] In this matter, it is common cause from the pleadings that the defendant voluntarily submitted to the jurisdiction of this court in terms of clause 26.2 of the agreement. It is also common cause that the plaintiff has its registered address and principal place of business in Tygervalley which is situated in the Western Cape. The plaintiff is therefore an incola of this court. Evidently, the position in *Veneta Mineraria SPA v Callirina Colleries (Pty) (in liquidation)* does not find application in this matter. The defendant has submitted to the jurisdiction of this court and as such no further jurisdictional grounds need to be present to establish jurisdiction.

[13] Notwithstanding the finding above, I am of the view that the agreement between the parties was concluded in Tygervalley within the area of jurisdiction of this court. In my opinion, the cause of action between the parties arose within the area of jurisdiction of this court. This court therefore does have jurisdiction to hear the matter. In my judgment, the plaintiff's exception in this regard must succeed.

The Second Exception – In duplum rule

[14] As discussed above, the plaintiff excepted to the defendant's second point in limine in which the defendant pleads that the arrear interest forming part of the claim amount prior to litigation far exceeded the amount advanced by the plaintiff to the defendant which is specifically prohibited by the in duplum rule. As a result, the defendant prayed for the dismissal of the plaintiff's claim in its entirety. The plaintiff excepted to this preliminary point on the grounds that the dismissal of the plaintiff's entire claim is not competent on the averments set out in this preliminary point.

[15] It is trite law that in terms of the in duplum rule the interest that the plaintiff can claim against the defendant is limited to the capital amount which was advanced to the defendant. The in duplum rule provides that interest on a debt stops running when unpaid interest equals the outstanding capital.

[16] The defendant contends that the particulars of claim does not allege a calculation of the amount advanced but rather only refers to statements. The defendant further contends that the particulars of claim is vague regarding the calculation of the balance amount and therefore lacks sufficient particularity regarding

what amounts were advanced, when and where payment was made. To this end, the defendant prays for the dismissal of the plaintiff's claim in its entirety.

[17] The prayer sought by the defendant in my view is legally incompetent. It must be stressed that the common law rule of appropriation of payment means that payments are allocated to interest first, then to capital. In other words, all payments made in respect of the loan amount must be appropriated to pay the interest before they are applied to the capital. See *Standard Bank of South Africa v Ltd v Oneanate Investments (in liquidation)* 1998 (1) SA 871 (SCA) at 828D-E. The capital is not reduced where the payments are not enough to service the outstanding monthly interest on a debt.

[18] In my view, the proposition expressed by the plaintiff's counsel that the defendant in this case should have sought an order reducing the plaintiff's claim for interest to equal the capital amount advanced to the defendant in line with the in duplum rule rather than seeking an order dismissing the plaintiff's claim in its entirety is correct and cannot be faulted. Counsel's submission in my view ties in well with the thrust of the in duplum rule that where the amount of interest paid ultimately exceeds the capital debt, the in duplum rule operates to limit the amount of interest payable in total to the original capital debt. See *Nedbank v National Credit Regulator* 2011 (3) SA 581 (SCA) at para 49.

[19] However, notably, the defendant contends that the plaintiff's particulars of claim are vague regarding the calculation of the balance and lacks sufficient particularity regarding the amount advanced to the defendant. It seems to me the defendant's complaint against the plaintiff's particulars of claim is that there are some defects or

incompleteness in the cause of action set out by the plaintiff in its particulars of claim. The defendant's complaint in my view strikes at the formulation of the plaintiff's cause of action and not its legal validity. See *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269I. In my judgment, in a case such as this, defendant could have raised an exception to the plaintiff's particulars of claim and averred that they are vague and embarrassing and called upon the plaintiff to remove the cause of complaint as opposed to seeking an order dismissing the plaintiff's case in its entirety. It follows therefore in my view that the plaintiff's second exception must succeed.

ORDER

[20] **In the result, the following order is made:**

20.1 The plaintiff's exceptions to the defendant's special pleas are hereby upheld.

20.2 The defendant's special plea of jurisdiction in respect of clause 26.2 of the finance agreement is hereby dismissed.

20.3 The defendant is hereby given leave to amend its second point in limine plea by written notice in terms of rule 28 of the uniform rules to be filed within 15 days from date of this order.

20.4 The defendant is ordered to pay the costs of the exceptions on a party and party scale.

LEKHULENI J

JUDGE OF THE HIGH COURT

WESTERN CAPE HIGH COURT

Appearances:

For the Applicant	Advocate J. Van der Merwe, SC
Instructed by	Mostert and Bosman Attorneys (Ref: Ms L Du Toit)
For the Respondent	Advocate S Du Plessis
Instructed by	Schuler Heerschop Pienaar Attorneys