Reportable

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION – MTHATHA)

APPEAL CASE NO: CA & R27/15

LOWER COURT CASE NO: 1530/12

Heard on : 11/09/15

Delivered on : 15/09/15

In the matter between:

VUYANI MEHLWEMPI **Appellant**

and

UNITY INSURANCE LIMITED **Respondent**

CORAM : Nhlangulela ADJP et MJALI J

APPEAL JUDGMENT

NHLANGULELA ADJP:

[1] The nature of this appeal makes it necessary to re-state the meaning of s 28 (1)(d) of the Magistrates' Court Act 32 of 1944, (the Act), which reads as follows:

> "(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, <u>if the cause of action arose wholly within the district or regional division</u>."
>
> (Underlining is mine for emphasisi).

[2] Following upon theft of the appellant's motor vehicle he instituted an action against the respondent in the magistrates' court of Mthatha for payment of damages arising from an alleged breach, or repudiation, of a written insurance contract intended by the parties to serve as cover in the event of appellant's motor vehicle being stolen. At the trial the respondent raised a special plea that the magistrate did not have jurisdiction to entertain such a dispute as the appellant, a permanent resident of Mthatha, had concluded the insurance

contract with the respondent, a permanent resident of Port Elizabeth, and the claim for compensation made by the appellant on that contract was repudiated by the respondent in Port Elizabeth. The parties informed the magistrate that the contract of insurance was made on 23 July 2009 partly in Mthatha and partly in Port Elizabeth. This concession had origin in paragraph 3 of the special plea; and it was accepted by the parties in as much as that the offer and acceptance of the terms of the contract did not take place in Mthatha. On these bases, it was contended on behalf of the respondent before the magistrate that the whole cause of action brought by the appellant did not arise within the jurisdiction of the magistrate of Mthatha as is envisaged in s 28 (1)(d) of the Act.

[3] It was contended on behalf of the appellant before the magistrate, and in this Court, that since the contract of insurance was made in Mthatha and the appellant was domiciled in Mthatha the magistrate had jurisdiction to entertain the action.

[4] Although the magistrate accepted that the insurance contract "came to existence" in his jurisdiction, and the appellant was ordinarily resident in Mthatha, he held that since the breach/repudiation of the appellant's claim for compensation took place in Port Elizabeth he did not have jurisdiction to

entertain the appellant's action. The special plea was upheld. It is against that decision that the appellant noted the appeal to this Court.

[5] The first ground of appeal refers to the decision the magistrate had made, on the same day of hearing of the special plea, granting the respondent's application for rescission of judgment on the same matter. For present purposes, if the magistrate did not have jurisdiction to entertain the matter, it will not be necessary to deal with that decision. The other grounds relate to the jurisdiction issue, prefaced in the preceding paragraphs, which I proceed to deal with below.

[6] In *Dusheiko v Milburn* 1964 (4) SA 648 (A) Ogilvie-Thompson JA said the following at 656 G:

> "As is well known, the phrase, "if the cause of action arose wholly within the district", occurring in sec. 28 (1) (b) (*sic)* of the Act, was authoritatively defined by the Court as far back as 1921 in *McKenzie v Farmers' Co-operative Meat Industries Ltd.,* 1922 A.D. 16 at p. 23, by adopting the definition given by LORD ESHER in R*ead v Brown*, 22 Q.B. 128 at p. 131, in these terms, viz.:
>
> > 'What is the real meaning of the phrase 'cause of action arising in city'?. It has been defined

> in *Cook v Gill,* L.R., 8 C.P. 107, to be this: 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the 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. It has been suggested to-day in argument that this definition is too broad, but I cannot assent to this, and I think the definition is right.'"

[7] The learned Judge of Appeal, analysing the statement of Maasdorp JA in *McKenzie's* case, *supra*, at page 20 that:

> "Now that fact is not a fact material to the cause of action. The question is not where the application was signed, but where the application was made to the plaintiff's company",

said at 658A:

> "I venture to think that most difficulties will in practice be resolved if, in applying the definition stated in *McKenzie v Farmers' Co-operative Meat Industries Ltd., supra,* to any given case, it is borne in mind that the definition relates only to "material facts", and if at the same time due regard be paid

> to the distinction between the *facta probanda* and the *facta probantia.*"

[8] The definition of the phrase, "if the cause of action arose wholly with the district" contained in s 28 (1)(d) of the Act has been applied by the courts consistently ever since it was formulated in 1922 in the case of *McKenzie, supra.* On contracts, the court in *Erasmus v Unieversekerings Adviseurs (Edms) Bpk* 1962 (4) SA 646 (T) said the following at 648A – 649A:

> "Different considerations arise when a contract is sued upon as distinct from a delictual one. In the former case the place of conclusion and terms of the contract are important. In addition the plaintiff must prove that the breach took place in the district in question and the first enquiry in the present matter is where were the offer and acceptance made? At the same time the distinction between the *facta probanda,* that is the facts which must be established in order to disclose the cause of action, and the *facta probantia* or facts which establish them."

[9] In this case the facts which must be established in order to disclose the cause of action are *inter alia,* the place where the offer and acceptance were made, the place where the claim would be lodged, the place where payment of

compensation would be made. These factors, the *facta probanta*, had to be established by the appellant in order to disclose the cause of action arising wholly within the district of Mthatha. The material facts required to be established to disclose the cause of action prove the contrary because the insurance cover was offered by the respondent in Port Elizabeth, and accepted by the appellant in Mthatha; the claim was made in Port Elizabeth where it was considered and repudiated there, with the appellant being informed of such repudiation in Mthatha; and the respondent had at all material times relevant to the making, performance and repudiation of the contract been permanently resident in Port Elizabeth. The contention advanced by *Mr Zilwa*, with reference to the case of *Wolmer v Rees And Others* 1935 TPD 319 at 324, that the insurance contract was made in Port Elizabeth and accepted in Mthatha is not a decisive factor for the purposes of s 28 (1)(d). In other words the cause of action did not arise arose wholly within the district of Mthatha. Therefore, the magistrate was correct in upholding the special plea.

[10] In the result the following order is made:

1. **The appeal be and is hereby dismissed.**

2. **The appellant to pay costs of the appeal, including the costs of litigation in the magistrates' court.**

Z. M. NHLANGULELA

ACTING DEPUTY JUDGE PRESIDENT

I agree:

G.N.Z. MJALI

JUDGE OF THE HIGH COURT

Attorney for the applicant	:	Mr H Zilwa c/o X M Petse Inc MTHATHA.
Counsel for the respondent	:	Adv. J. F. Heunis
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