IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED: NO

_____ **10 March 2022**

APPEAL CASE NO: 2021/A3058

In the appeal between:

HONEY SILK TRADING & INVESTMENT 1027 CC Appellant (defendant *a quo*)

and

360 ABL (PTY) LTD Respondent (plaintiff *a quo*)

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date for hand-down is deemed to be 10 March 2022.

Ossin AJ

INTRODUCTION

[1] In October 2016 the respondent (as plaintiff) instituted action against the appellant (as defendant) in the Magistrates' Court, Randburg ['the action']. In the action respondent claims repayment from the appellant of a loaned amount of R1 108 979.00 plus interest from 4 March 2015. The basis for the claim is a written agreement concluded between the parties in September 2014 ['the written agreement'].

[2] The appellant's plea includes four special pleas. The parties agreed to separate the second special plea for adjudication prior to the hearing of all other issues, and it then served before the learned Magistrate. The *in limine* defence raised in the second special plea is that the Magistrates' Court does not have jurisdiction to entertain the action. The learned Magistrate dismissed the second special plea with costs. Appellant has appealed against that judgment. This is the judgment on appeal.

[3] The second special plea is formulated as follows:

> SECOND SPECIAL PLEA
>
> 1. Defendant repeats what is afore set out.
>
> 2. Defendant specifically avers that this Honourable Court does not have jurisdiction to hear this matter.
>
> WHEREFORE Defendant prays that the claim be dismissed with costs on a scale as between attorney and own client.

[4] Paragraph 1 of the second special plea refers to "*what is afore set out*." It is, however, only the appellant's first special plea which is "*afore set out*". The defence raised in the first special plea is one of *res judicata.* In this special plea, appellant pleads that the respondent had, in the High Court, applied for appellant's winding up on the same basis as the action i.e., a debt of R1 108 979.00 arising from the loan agreement, and that the High Court

dismissed that application. According to the appellant, because the High Court dismissed the winding up application which is based on the same debt claimed by respondent in the action, the action is *res judicata.*

[5] I have difficulty in understanding how the pleading in the first special plea is appropriately incorporated in the second special plea. There is furthermore no indication in the second special plea as to which portions of "*what is afore set out*" the pleader incorporates in the second special plea. A further difficulty with the second special plea (at least from a pleading perspective), is an absence of particularity as to the basis upon which appellant contends "*this Honourable Court does not have jurisdiction to hear this matter.*" This difficulty becomes more acute when regard is had to the common cause fact that appellant's registered address is situated within the geographic area of jurisdiction of the Randburg Magistrates' Court, and that accordingly that court has jurisdiction over the appellant as required by section 28 of the Magistrates' Courts Act ['the Act'].[1] The pleaded basis upon which the appellant contends the Randburg Magistrates' Court does not have jurisdiction is, accordingly, left hanging. In my view, the pleader was required to plead the basis for appellant's contention that "*this Honourable Court does not have jurisdiction to hear this matter.*" For failing to plead such a material allegation, there might very well have been justification to dismiss the second special plea on that ground alone.

[6] The learned Magistrate's judgment reflects confusion on the part of the appellant as to the basis for its contention of absence of jurisdiction. It would have been preferrable for the appellant to have crystallised its position prior to argument. Ultimately, however, and fortunately for the appellant, the learned Magistrate and the respondent accepted that the jurisdiction dispute revolved around appellant's contention that jurisdiction was absent because the respondent's claim exceeded the monetary jurisdiction of the Magistrates' Court, notwithstanding the presence of a written consent to jurisdiction contained in the written agreement. The consent to jurisdiction which is attacked by the appellant reads as follows:

[1] 32 of 1944

> The Borrower[2] hereby consents to the jurisdiction of the Magistrates Court having jurisdiction. The Lender[3] may however agree to commence legal proceedings in any other competent court.

THE GROUNDS OF APPEAL

[7] Appellant contends that the learned Magistrate incorrectly dismissed the second special plea. The grounds relied upon by the appellant are summarised below. [4]

[8] The first ground may be stated as follows. The consent contained in the written agreement was not a valid consent as required by section 45(1). A valid consent is one given with reference to "*particular proceedings already instituted or about to be instituted in such court*" as provided for in the exception contained in section 45(1). Because the consent was a general or pre-emptive consent, the consent is not valid. The learned Magistrate erred in not correctly applying section 45 and section 46.

[9] The second ground also arises from the consent itself. Appellant contends that, on a proper interpretation of the consent, the consent was not the type of consent envisaged by section 45(1). Accordingly, there was no consent to jurisdiction.

[10] The third ground is as follows. Respondent's claim of R1 108 979.00 is in fact two separate claims. The first claim is for R800 000.00 based on the written agreement. The second claim is for R308 979.00 which is based on an oral agreement. The consent, if it is valid, only applies to the first claim. The learned Magistrate erred in not distinguishing between these two claims. If she had done so she would, at the very least, have upheld the second special plea in respect of R308 979.00.

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[2] i.e., the appellant
[3] i.e., the respondent
[4] As distilled from the notice of appeal, heads of argument and oral submissions made in this appeal

MAGISTRATES' COURTS ACT: RELEVANT JURISDICTION PROVISIONS

[11] As might be gathered from the above summary, this appeal revolves around the following sections of the Act: section 28 ("*Jurisdiction in respect of persons*"), section 29 ("*Jurisdiction in respect of causes of action*"), in particular section 29(1)(g), section 45 ("*Jurisdiction by consent of parties*") and section 46 ("*Matters beyond the jurisdiction*").

[12] Jurisdiction as it pertains to the Magistrates' Court encapsulates two concepts: jurisdiction of the Magistrates' Court as a forum to resolve disputes ['forum jurisdiction'] and jurisdiction of a particular Magistrates' Court to resolve the dispute instituted in that court ['area jurisdiction']. Forum jurisdiction is obviously a pre-requisite for area jurisdiction.

[13] Section 28 addresses area jurisdiction. Section 29 and section 46 address forum jurisdiction. Section 45 straddles area and forum jurisdiction.

[14] Section 28 limits area jurisdiction to those circumstances listed in the section. For example, there will be area jurisdiction over a person (natural or otherwise) who resides, is employed or carries on business within the geographical area of that particular court's jurisdiction as envisaged by section 26 ("*Area of jurisdiction*"), or if the cause of action arose within the court's area of jurisdiction. It is possible for there to be more than one court with area jurisdiction. In the present matter, the Randburg Magistrates Court has area jurisdiction over the appellant.

[15] Section 29 gives forum jurisdiction in respect of those causes of action listed in section 29(1)(a) to 29(1)(f). Even if the cause of action is not one envisaged by sub-paragraphs (a) to (f), a catch all 'cause of action' in terms of section 29(1)(g) extends forum jurisdiction to cases where the money value involved falls below a Ministerial regulated threshold. Section 29(1)(g) reads as follows:

> *(1)* 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…(g) actions other than those 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 *Gazette*

[16] Section 46, on the other hand, lists those causes of actions which may not be dealt with by the forum at all (forum jurisdiction from the negative point of view).

[17] Section 45 was amended in 2017.[5] Since the action was instituted in 2016 (prior to the amendment), the relevant version of section 45 is that which was in effect prior to its amendment. This judgment concerns section 45 prior to its amendment in 2017. Section 45 read as follows:

> (1) Subject to the provisions of section *forty-six*, 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 *twenty-eight* shall, except where such consent is given specifically with reference to particular proceedings already instituted or about to be instituted in such court, have jurisdiction in any such matter.
>
> (2) Any provision in a contract existing at the commencement of the Act or thereafter entered into, whereby a person undertakes that, when proceedings have been or are about to be instituted, he will give such consent to jurisdiction as is contemplated in the proviso to subsection (1), shall be null and void.

[18] Section 45(1), through a written consent of the litigating parties, gives forum jurisdiction to the Magistrates Court to entertain a claim which would otherwise be beyond such jurisdiction. However, even under these circumstances, the

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[5] Pursuant to its 2017 amendment, section 45 now reads as follows:

45 Jurisdiction by consent of parties

(1) Subject to the provisions of section 46, the parties may consent in writing to the jurisdiction of either the court for the district or the court for the regional division to determine any action or proceedings otherwise beyond its jurisdiction in terms of section 29(1).

(2) Any provision in a contract existing at the commencement of the Act or thereafter entered into, whereby a person undertakes that, when proceedings have been or are about to be instituted, he will give such consent to jurisdiction as is contemplated in the proviso to subsection (1), shall be null and void.

(3) Any consent given in proceedings instituted in terms of section 57, 58, 65 or 65J by a defendant or a judgment debtor to the jurisdiction of a court which does not have jurisdiction over that defendant or judgment debtor in terms of section 28, is of no force and effect.

particular Magistrates' Court seized with the claim must, subject to one exception which is front and centre of the appellant's submissions, still have area jurisdiction. Section 45(1) also makes it clear that the parties can never consent to forum jurisdiction of a matter which falls within the restrictive list contained in section 46.

RESPONDENT'S CLAIM

[19] In its particulars of claim, respondent pleads that in terms of a written agreement an amount of R800 000.00 would be made available to the appellant by way of a loan facility, and that this facility would bear intertest at the rate of 7.5% per month. The written agreement is attached to the particulars of claim. It comprises three documents namely a document headed "*LOAN AGREEMENT*" ['loan agreement'], a document headed "*ACKNOWLEDGEMENT OF DEBT*" and marked as Schedule 1 ['AOD'] and a document headed "*Annexure A*".

[20] The particulars of claim allege that in terms of the written agreement the R800 000.00 and all interest accruing thereon, "…*shall be paid by the defendant to the plaintiff in terms of the payment schedule attached to the agreement.*" The payment schedule is Annexure A. An acceleration term is pleaded for the whole of the indebtedness in the event of appellant's default. Further pleaded is a term of the written agreement to the effect that "*The defendant consents to the jurisdiction of the Magistrates Court having jurisdiction*."

[21] After pleading the material terms of the written agreement, the respondent pleads that it "*duly performed in terms of the agreement and during the period September 2014 to March 2015 advanced various amounts to the defendant, totalling an amount of R1 099 175-00 (not including interest).*"

[22] In respect of appellant's failure to repay the respondent, respondent pleads that the appellant made repayments totalling R270 673.43, and that no payments have been received from the appellant since 4 March 2015. The following is then pleaded:

As a consequence of defendant's failure to repay the facility in accordance with the agreed repayment schedule, a trigger event, as provided for in terms of clause 7 of the agreement, has occurred and the defendant's total liability in terms of the agreement became due and payable, in the total amount of R1 108 979.00.

The loan agreement

[23] The loan agreement reflects the appellant signing it on 22 September 2014 in Umhlanga Rocks on 22 September 2014, and the respondent having done so on 23 September 2014 in Sandton.

[24] Clause 19.2 (the consent to jurisdiction) is contained in the loan agreement. The loan agreement contains the following further material terms:

> 3. The Lender hereby agrees to make the Facility available to the Borrower for the duration of the Facility Term as is stipulated in this Agreement.
>
> 4.1 The Lender will, on the Advance Date, make the Capital Sum available to the Borrower by way of the Facility, which Facility shall be made available to the Borrower for the duration of the Facility Term.
>
> 4.2 For the avoidance of doubt, it is recorded that once the full Capital Sum has been drawn down by the Borrower, no further amount shall be made available to the Borrower in terms of this Agreement, irrespective of whether or not any repayments are made by the Borrower to the Lender during the Facility Term, unless otherwise agreed to in writing between the parties thereto.
>
> 5.1 The Facility outstanding from time to time, shall bear interest at the Interest Rate, and all interest shall accrue on a monthly basis on the amount outstanding from time to time until the full amount of the Facility and all accrued interest has been repaid by the Borrower to the Lender.
>
> 6.1 The Capital Sum and interest accrued thereon owing from time to time shall be paid by the Borrower to the Lender's bank account as follows:

AS PER ATTACHED ANNEX (A) [*manuscript insertion*]

[25] Clause 6.1 of the loan agreement requires comment. In its original typed out form, clause 6.1 also comprised sub-clauses 6.1.1 and 6.1.2. However, the parties' initials next to these sub-clauses appear to confirm their deletion and replacement with the manuscript insertion "*AS PER ATTACHED ANNEX (A)*".

[26] Relevant definitions are set out clause 1.1 of the loan agreement:

"*Acknowledgment of Debt*"	the acknowledgment of debt to be executed by the Borrower in favour of the Lender on or before the Advance Date, attached hereto as Schedule 1
"*the Advance Date"*	the later of the Signature Date or the date of fulfilment of the last condition precedent, as confirmed by the Lender at any time during the Facility Term;
"*the/this Agreement"*	the loan agreement set out in this document together with all attachments hereto;
"*the Capital Sum"*	the amount of R800 000.00…which amount is to be made available by the Lender to the Borrower by way of the Facility, pursuant to the provisions of this Agreement;
"*Facility"*	the capital sum made available by the Lender to the Borrower pursuant to the provisions of this Agreement;
"*Facility Term"*	…5 months from the Advance Date;
"*Final Repayment Date"*	the date which falls…5 months after

	the Advance Date as notified in writing by the Lender;
"*Signature Date"*	the date of signature of this Agreement by the last Party to sign;

[27] It is apparent from the above that the definition of "*the/this Agreement*" includes not only the loan agreement itself, but also its attachments i.e., the AOD and Annexure A.

The acknowledgment of debt

[28] As with the loan agreement, the AOD was signed by the appellant in Umhlanga Rocks on 22 September 2014. The respondent's signature also appears on the AOD, but the place and date of this signature is not reflected. It appears that the same persons who signed the loan agreement on behalf of the parties, also signed the AOD.

[29] In terms of the AOD the appellant acknowledged itself to be indebted to the respondent (defined as "*the Creditor*" in the AOD)

> in the sum of R800 000.00...("Capital Sum") when advanced plus legal costs and interest at the rate of 7.5% per month from date of advance to date of payment, both days inclusive, arising from and being due in respect of monies lent and advanced to us in terms of the Loan Agreement to which this document is annexed as Schedule 1.

[30] Further relevant terms of the AOD are as follows:

> 1. We undertake to pay the Capital Sum advanced to the Creditor in accordance with the provisions of the Loan Agreement.
>
> 2. In the event of a default by us of the Loan Agreement, the Creditor shall be entitled to claim payment of all amounts lent and advanced to us in terms of the Loan Agreement, plus any interest accrued thereon, from us,

> notwithstanding that repayment thereof might not otherwise have been due.

[31] Clause 11 of the AOD contains a consent to the jurisdiction of the Magistrates' Court. Its formulation is somewhat different to the formulation contained in clause 19.2 of the loan agreement. It reads follows:

> In the event of the Creditor instituting legal action against us for any reason whatsoever, we agree to be liable for all costs on the attorney and own client scale, tracing agent charges and collection commission. We consent to the jurisdiction of the Magistrate's [*sic*] Court notwithstanding that the amount may exceed the jurisdiction of the Magistrate's [*sic*] Court. Notwithstanding what is set out herein, the Creditor shall be entitled at its sole discretion to institute legal out [*sic*] proceedings out of the High Court of South Africa having jurisdiction.

Annexure A

[32] Annexure A is dated 10 September 2015. It is addressed to the appellant by the respondent using the words "*Bill to: …*" and identifies the appellant as the "*Customer*". The body of Annexure A is a 6-column spreadsheet, with headings "*Date*", "*Description*", "*Capital*", "*Interest*", "*Interest Paid*" and "*Balance*".

[33] Annexure A reflects transactions for dates between 19 September 2014 and 28 August 2015 (both dates inclusive), which are described under the column "*Description*". In the main, these transactions are described as "*Advance*", "*Interest Due*" and "*Interest Paid*".[6]

[34] The "*Advance*" transactions are for loans advanced. There are 12 such transactions. The transactions commence on 19 September 2014 and end on 19 March 2015.[7] The money value of these transactions is reflected in the column "*Capital*", and total R1 108 970.00, the same amount claimed by the respondent in the action.

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[6] There is one transaction described as "*Legal Fees*".
[7] The "*Legal Fees*" transaction is dated 1 October 2014.

[35] "*Interest Due*" is interest due in respect of such loans. There are 23 transactions. The transactions commence on 23 September 2014 and end on 28 August 2015. The money value of "*Interest Due*" is reflected in the column "*Interest*". The total amount reflected under "*Interest*" is R773 139.51.

[36] "*Interest Paid*" reflects 6 payments of amounts apparently allocated to interest. These payments commence on 29 October 2014 and end on 4 March 2015. The total of the payments, R270 673.43, is reflected in the column "*Payments*".

[37] The last column, "*Balance*", reflects a total of R1 528 271.65. This amount is arrived at by adding the capital of R1 108 979.00 to the interest of R773 139.51, and then deducting the payments of R270 673.43, save for the last "*Interest Due*" transaction of R83 173.43. If this last "*Interest Due*" transaction was to be included, the "*Balance*" would reflect as R1 611 445.08.

[38] It will be recalled that in the particulars of claim respondent pleaded that appellant had made payments totalling R270 763.43. Annexure A also reflects payments totalling this amount and identifies these as interest payments. Accordingly, the payments pleaded by the respondent are payments towards interest and not capital.

APPELLANT'S FIRST GROUND OF APPEAL: INVALIDITY OF THE CONSENT

[39] The appellant's submission that the consent is invalid is expressed as follows in its heads of argument:

> 13. …Section 45(1) provides that notwithstanding the provisions of section 29 and subject to the provisions of section 46, the parties may consent in writing to the jurisdiction of the Magistrate court to hear matters which would otherwise be beyond its jurisdiction
>
> (a) The proviso at section 45(1) is to the effect that the consent to extend the Magistrates' court's jurisdiction will only be valid if it is given with specific reference to proceedings already instituted or about to be instituted. Pre-emptive consent to jurisdiction is

therefore prohibited. In essence, consent to jurisdiction can only be given once proceedings are imminent.

17. The proviso at section 45(1) of the Magistrates Court Act makes it clear that the consent to jurisdiction as contained in the Agreement is invalid as it was concluded long before the present proceedings were instituted or even envisaged. The consent to jurisdiction clauses can therefore not be relied upon by the plaintiff in present instances in founding jurisdiction for this Honourable Court.

18. The position therefore remains that consent to jurisdiction must be given at the time that proceedings are instituted as opposed to being a blanket approval at the signing of an agreement, which was not applied in the present instance.

[40] Appellant submits that section 45(1)'s proviso requires that any consent to jurisdiction under the first portion of section 45(1), to be valid, must be given with reference to a specifically earmarked proceeding (either already instituted or about to be instituted). In support of this submission appellant relies on paragraphs 112 and 114 of the Constitutional Court's judgment in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others.*[8]

[41] Regrettably the parties did not refer us to other judgments which, through my own research, appear directly relevant to the present debate. In chronological order these are the full bench decision in *Truck & Car Company (Pty) Ltd v Ewart,* [9] the appellate division decision in *Van Heerden v Muir,*[10] and the full bench decision in *McLaren v Badenhorst and Others.*[11] I return to these judgments later in this judgment.

[42] At the outset it appears to me that if the appellant is correct, all contractual clauses which contained a consent to jurisdiction of the Magistrates' Court notwithstanding that the monetary claim might exceed that court's monetary jurisdictional threshold, would, at least when dealing with section 45(1) in its

[8] 2016 (6) SA 596 (CC)
[9] 1949 (4) SA 295 (T)
[10] 1955 (2) SA 376 (A)
[11] 2011 (1) SA 214 (ECG)

pre-2017 iteration, be rendered invalid. Since the vast majority of contracts are concluded at a time when legal proceedings are neither contemplated nor imminent, this would effectively have meant that such a clause could never be relied upon by a creditor when instituting legal proceedings to claim back what it alleges is owed to it under the terms of the contract in question.

[43] Having stated my peace regarding the consequence of appellant's submission, the legal correctness of the appellant's submission still requires assessment.

[44] Section 45(1) is repeated below but with my reference points:

> **[1]** Subject to the provisions of section *forty-six*, **[2]** the court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction, if the parties consent in writing thereto: **[3]** Provided that no court other than a court having jurisdiction under section *twenty-eight* shall, **[3A]** except where such consent is given specifically with reference to particular proceedings already instituted or about to be instituted in such court, **[3]** have jurisdiction in any such matter.

[45] Section 45(1) may be divided into several portions: **[2]** - Subject matter of section 45(1); **[1]** - Principal limitation; **[3]** - Secondary limitation; **[3A]** - Exception to secondary limitation

[46] The subject matter of section 45(1) is the parties' written consent to the jurisdiction of the Magistrates' Court, which would, otherwise, not have had jurisdiction to entertain the case (**[2]**).

[47] When read as a whole, section 45(1) proscribes the validity and effectiveness of the written consent with reference to the principal limitation **[1]**, which is informed by section 46, and the secondary limitation **[3]**, which is informed by section 28. The principal limitation relates to the forum, whilst the secondary limitation relates to the particular Magistrates' Court which is seized with the case.

[48] The principal limitation, **[1]**, is that under no circumstances will a consent be valid and effective if it purports to extend the forum's cause of action jurisdiction to include those matters listed in section 46.

[49] The secondary limitation, **[2]**, relates to the geographical area of jurisdiction of a particular Magistrates' Court. Although the written consent affords jurisdiction where jurisdiction would otherwise not be present, the Magistrates' Court which is ultimately seized with the case, must still have jurisdiction as required by section 28. In other words, whilst the written consent might itself be valid and effective, the party who institutes proceedings must still ensure that the particular court has jurisdiction on one or more of the grounds set out in section 28 (for example, the court in whose geographic area of jurisdiction the defendant resides or is employed).

[50] There is, however, an exception to the secondary limitation. The exception is **[3A]**. The exception provides that the particular court seized with the case need not have jurisdiction under section 28 "*if the consent had been given specifically with reference to particular proceedings already instituted or about to be instituted in such court*." The full bench in *McLaren v Badenhorst and Others* expressed the point as follows:

> Counsel were in agreement that s 45 requires that the consent to the jurisdiction of a magistrates' court, which would not normally have jurisdiction in terms of s 28(1), must refer specifically to particular proceedings already instituted or about to be instituted in the court contemplated. [12]

[51] Conceptually, therefore, section 45(1) distinguishes between two types of written consent: a written consent given for specifically earmarked and imminent proceedings or proceedings already instituted, and a written consent given for future proceedings which may or may not be instituted. The latter consent has been labelled as a pre-emptive or general consent,[13] whilst the former is said to be a non-pre-emptive consent. The pre-emptive or general consent is the type of consent with which most legal practitioners are familiar,

[12] 2011 (1) SA 214 (ECG) at [11]
[13] See for example *University of Stellenbosch Legal Aid Clinic* at [112]

and which is, often, standardly incorporated in most contracts, or at least contracts involving money payments and repayments.

[52] In *Truck & Car Company (Pty) Ltd v Ewart,*[14] the full bench stated as follows:

> It has been pointed out by Mr. Vieyra, who appears for the appellant, that the first part of sub-sec. (1) of sec. 45, which is the sub-section shorn of its present proviso, has reference only to jurisdiction in respect of subject-matter. That has been laid down with reference to sec. 43 of the old Magistrates' Courts Act, corresponding to the present sec. 45 (1) in two cases to which we have been referred. the case of *Smith v Petersen, Limited* (1925 CPD 323) and the case of *Connock's Motors v Pretorius* (not reported, decided in this Court on the 22nd June, 1939). There can be no doubt that that is the correct interpretation of sec. 45 as it stood before the proviso was added by Act 32 of 1944. The proviso refers clearly only to a magistrate's court which has not got jurisdiction in respect of the person of the defendant under sec. 28. Where the magistrate's court has got such jurisdiction it seems to me that the restrictive proviso has no application nor has sub-sec. (2). In this case, as I have pointed out, the defendant is resident within the jurisdiction and so far as the defendant's person is concerned the magistrate of Johannesburg is vested with jurisdiction...

[53] The ultimate purpose of section 45(1) was (and this is still the case) to give the Magistrates' Courts forum jurisdiction over a claim which exceeds the monetary threshold. This is because, other than jurisdiction over the person for which provision is made in section 28, the only other limit to jurisdiction is the monetary jurisdictional threshold. In their commentary to the pre-2017 version of section 45(1), the learned authors of Jones & Buckle stated as follows:

> Section 45(1) refers only to matters beyond the jurisdiction of either the court for the district or the court for the regional division, which has jurisdiction over the defendant's person under s 28, in respect of amount.[15]
>
> The jurisdiction of a magistrate's court as to amount may be increased by consent of the parties, but subject to the limitations of s 46 as to subject-

[14] 1949 (4) SA 295 (T)

[15] Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* (Volume I and II)/ The Act / Appendices/ Appendix G Prior versions /45 Jurisdiction by consent of parties (2018, Juta & Company) [Downloaded : Mon Dec 06 2021 15:15:59 GMT+0200 (South Africa Standard Time)]

> matter…a provision in a written contract whereby the parties thereto agrees that the magistrates' courts shall have jurisdiction to determine any action arising out of the contract, whatever the amount claimed, is fully effective to confer jurisdiction upon any magistrate's court that has jurisdiction over the defendant's person.
>
> The parties are not entitled to confer jurisdiction by consent upon a magistrate's court which would not normally have jurisdiction over the defendant's person in terms of s 28.
>
> The consent must be in writing, but may be given in advance and may be a general consent to cover proceedings not contemplated at the time of giving the consent, provided always that the magistrate's court mentioned has jurisdiction over the defendant's person under s 28.

[54] *Van Heerden v Muir* [16] was a decision of the appellate division on appeal ultimately from the Magistrates' Court. The issue before the magistrate was the defendant's special plea objecting to the jurisdiction of the Bloemfontein Magistrates' Court. In his particulars of claim, the plaintiff had pleaded that the court had jurisdiction by virtue of the parties' consent which was contained in a promissory note, and upon which the plaintiff's cause of action was based.

[55] In *Van Heerden,* the consent relied upon by the plaintiff was a pre-emptive or general consent to jurisdiction. The consent itself was, however, not to the Magistrates' Courts in general but to a specific court, namely the Bloemfontein Magistrates' Court. It was common cause that the Bloemfontein Magistrates' Court did not have jurisdiction over the defendant as required by section 28 of the Act. In the special plea, the defendant admitted the consent but pleaded that, because the consent was to a specific court, the consent was invalid and ineffective as it had not been given in respect of imminent and specified proceedings (section 45(1)'s **[3A]**).

[56] The magistrate dismissed the special plea, but the full bench upheld it. In turn the appellate division agreed with the full bench's judgment. After referring to section 45(1), the appellate division stated as follows:

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[16] 1955 (2) SA 376 (A)

> The proviso to the above sub-section is clearly of no assistance to the appellant [plaintiff], because the consent relied on by him was not given when the present proceedings had already been instituted in the Bloemfontein magistrate's court or were about to be instituted in that court but were given at the time the defendant signed the promissory note.[17]

[57] Both from the clear meaning of section 45(1) and the above referenced judgments, section 45(1) allowed for pre-emptive consents extending forum jurisdiction to include monetary claims that were otherwise beyond such jurisdiction, but provided that the court in which the claim was pursued had jurisdiction over the defendant under section 28. However, even under this regime, it was possible for a court to entertain and have jurisdiction over a claim which it would otherwise not have had under section 28 provided the consent was given in respect of a specifically earmarked and imminent proceeding. In other words, only a consent which is given in respect of imminent proceedings could extend forum jurisdiction to a court which did not have area jurisdiction in terms of section 28.

[58] Where does this leave the appellant's submission? The appellant's submission is that a pre-emptive/general consent to jurisdiction can never be valid, and that all consents, to be valid, would have to be obtained with reference to proceedings which have commenced, or which are due to commence. This approach is not only contrary to authority, but also ignores the wording of section 45(1), in particular the proviso or secondary limitation **[3]** when read with the exception to the secondary limitation **[3A]**. In this regard I refer to the appellant's heads of argument on this aspect, where from the second paragraph thereof, it is apparent that the appellant only refers to the exception **[3A]** and ignores the proviso **[3]**.

[59] The question now is whether *University of Stellenbosch* is nevertheless authority for the position taken up by the appellant, bearing in mind the legal position set out above.

[60] There were two issues in *University of Stellenbosch.* The first issue concerned certain sub-sections of section 65J of the Act, more particularly whether the

[17] At 379G-H

High Court's order declaring these sub-sections unconstitutional, ought to be confirmed. This issue is not relevant to the present appeal. The second issue concerned the inter-play between sections 90 and 91 of the National Credit Act[18] ['NCA'] and section 45 of the Act. Only that portion of the judgment which addresses section 45 is relevant for present purposes and has been made relevant because of appellant's reliance on certain dicta appearing in *University of Stellenbosch* in relation to section 45.

[61] In respect of the section 45 issue, the High Court had made a declaratory order in the following terms:

> 3. It is declared that in proceedings brought by a creditor for the enforcement of any credit agreement to which the National Credit Act 34 of 2005 (NCA) applies, s45 of the Magistrates' Courts Act does not permit a debtor to consent in writing to the jurisdiction of a magistrates' court other than that in which that debtor resides or is employed.[19]

[62] The declaration as it pertains to section 45, crucially for our purposes, revolves around a debtor's consent to a geographic area of jurisdiction of the Magistrates' Court. The declaration has two components. The first component introduces and is informed by the provisions of the NCA. This component limits the declaration to proceedings brought in terms of the NCA for enforcement of a credit agreement. The second component relates to section 45. In respect of enforcement proceedings under the NCA, a debtor is only entitled to consent to the jurisdiction of the court in which the debtor resides or is employed. In other words, where a court is dealing with enforcement proceedings under the NCA, if the debtor has consented to the jurisdiction of a court where the debtor does not reside or is employed, such consent will be invalid.

[63] After referring to section 45 of the Act, in paragraph 112 of *University of Stellenbosch* the following is stated:

> Reading the two subsections of s45 together, it is clear that the section prohibits what will be defined as 'pre-emptive' consent to jurisdiction —

[18] 34 of 2005

[19] *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC) at [94]

> consent to jurisdiction that is given at a time prior to any proceedings having been initiated or which are about to be initiated. In other words, the consent can be given only once proceedings are imminent.

[64] The appellant submits that the above extract from *University of Stellenbosch* supports his position. In doing so the appellant interprets this extract in a vacuum, ignoring the issue that served before the Constitutional Court. The section 45 issue in *University of Stellenbosch* was whether a debtor could consent to the jurisdiction of a Magistrates' Court in whose geographic area the debtor did not reside or work. It is in that context that paragraph 112 is to be understood. The pre-emptive consent referenced in paragraph 112 was to area jurisdiction. It was not a pre-emptive/ general consent to forum jurisdiction. This is a different issue from that which pertains to our matter. In our matter, the consent in clause 19.2 is not related to area jurisdiction (of a particular Magistrates' Court) but rather to forum jurisdiction (the Magistrates' Courts in general). It therefore follows that the exception portion of the proviso in section 45(1), **[3A]**, is not relevant to the present matter.

[65] It is also necessary to point out that paragraphs 112 and 114 of *University of Stellenbosch* form part of the minority judgment, with no other judges concurring.

[66] In my view, the submission that the consent contained in clause 19.2 is invalid because it was given as a pre-emptive/general consent is contrary to authority and the clear meaning of section 45. Section 45(1) clearly envisages the validity of a consent which gives forum jurisdiction to the Magistrates' Court. This is exactly what clause 19.2 does. It is furthermore common cause that the Randburg Magistrates' Court has area jurisdiction over the appellant as required by section 28.

[67] I accordingly reject the appellant's submission, and I find that the consent contained in clause 19.2 of the loan agreement is valid.

APPELLANT'S SECOND GROUND OF APPEAL: MEANING AND INTERPRETATION OF THE CONSENT

[68] The appellant's second ground of appeal does not appear from its notice of appeal. Rather it is expressed in its heads of argument as follows:

> 6. The Appellant consented to the jurisdiction of any Magistrates' Court having jurisdiction. The wording of this consent is critical for present instances and [is reproduced] for ease of reference.
>
> > *The [defendant] hereby consents to the jurisdiction of any Magistrates (sic) Court having jurisdiction. The [plaintiff] may however agree to commence legal proceedings in any other competent court.*
>
> 7. No Magistrates Court has jurisdiction to hear the matter.

[69] In putting forward its position, the appellant correctly accepted that the consent envisaged in section 45(1) has always been understood as one which extends the forum jurisdiction to include claims which would otherwise be beyond its monetary threshold. Appellant also contended that clause 19.2 can only be of application in respect of the monetary threshold aspect of forum jurisdiction.

[70] The appellant's submission in respect of this ground is not clear to me, and I have had some difficulty in understanding it. Respondent, appears to understand the submission to be as follows (as set out in respondent's heads of argument):

> 12. The Appellant states that the wording of clause 19.2 with reference to:
>
> " ...having jurisdiction";
>
> qualifies the monetary jurisdiction of the Magistrate's Court, i.e., that the parties agreed that an action could be issued out of the Magistrate's Court, if the value of the claim was less than R200 000.00.

17. The Appellant wants the Court to interpret the wording of the clause to say that the words, '*having jurisdiction*', refers to the Magistrate's Court monetary jurisdiction.

[71] Before us appellant submitted that the phrase "*having jurisdiction*" as contained in clause 19.2 was the salient and crucial part of its appeal. According to the appellant, the consent to jurisdiction pre-supposes that the Magistrates' Court already had jurisdiction. Since no Magistrates' Court had jurisdiction, the consent collapses in on itself. Appellant therefore appears to contend that because section 45(1) and the consent in clause 19.2 can refer only to monetary jurisdiction, the words "*having jurisdiction*" in clause 19.2 can itself only refer to a court which already has such monetary jurisdiction. Since a Magistrates' Court only has jurisdiction to entertain claims of less than R200 000.00 (we are talking here about the threshold applicable to district courts), the consent can only be effective if the Magistrates' Court already had such jurisdiction. Because the claim exceeds the Magistrates' Court monetary threshold, there is no Magistrates' Court which has jurisdiction.

[72] In its heads of argument and argument before us, respondent referred to several recent judgments handed down by the Supreme Court of Appeal in relation to the approach to interpretation of contracts. These judgments include *Natal Joint Municipal Pension Fund v Endumeni Municipality*[20] and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk.*[21] In argument before us the respondent relied on the often quoted dictums appearing at paragraph [18] in *Endumeni* and paragraph [12] in *Bothma-Batho.*[22]

[73] The general principle, which is relevant to the present matter, appears to me to be quite simply this: The starting point for interpreting words in a contract is the words themselves. Then one must also have regard to the nature and purpose of the contract as whole and the clause in question (expressed in *V v V* as the "*purpose or (where relevant) the mischief it was intended to address*").[23] The interpretation process must also have regard to the contract when read as a

[20] 2012 (4) SA 593 (SCA)
[21] 2014 (2) SA 494 (SCA)
[22] We were also referred to *Shakawa Hunting and Game Lodge (Pty) Ltd v Askari Adventures CC* [2015] JOL 33131 (SCA); [2015] ZASCA 62 [17 April 2015] at [15], *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202, and *Novartis v Maphill* 2016 (1) SA 518 (SCA) at [28]
[23] [2016] ZAGPHC 311 [24 November 2016] at [8]

whole, the circumstances which were present at the time of its conclusion, and the material which was known to the persons who signed the contract. A sensible meaning to a particular term is preferred to an insensible or unbusinesslike meaning. The interpretation process is "*essentially one unitary exercise*."[24]

[74] The respondent disagrees with the interpretation which the appellant seeks to place on clause 19.2. It submits that the interpretation (1) is not commercially sensible, (2) is not supported by the circumstances surrounding the conclusion of the written agreement and indeed ignores such circumstances, (3) and is contrary to the principles set out in *Endumeni* and *Bothma-Batho*.

[75] In my view the interpretation which the appellant seeks to place on clause 19.2 is not a reasonable interpretation. I agree with most of the respondent's criticisms as to why the appellant's interpretation should not be sustained. Expanding the respondent's criticisms, reasons why I hold this view include the following:

a. It has always been understood, and both parties agree, that section 45(1) was introduced to provide a procedure by means of which the Magistrates' Courts would have forum jurisdiction in respect of a claim which exceeded the statutory monetary threshold.

b. Having regard to the circumstances giving rise to the written agreement, as well as the subject matter of the written agreement, which was the granting of a loan facility, the consent in clause 19.2 would ordinarily be understood as a consent to jurisdiction where the claim exceeded the monetary threshold. The consent would otherwise serve no purpose and have little if any meaning.

c. A further relevant circumstance is the AOD, which forms part of the written agreement. The consent in the AOD makes it clear that what is being consented to is directly related to the monetary threshold. Clause 19.2 when read with the consent in the AOD confirms the intent behind clause 19.2.

[24] *Bothma-Batho* supra at [12]

Regarding this aspect, the appellant submitted that the AOD is irrelevant to the interpretation of clause 19.2 and that it was in any event never pleaded as the basis for the consent. The AOD is relevant to the interpretation of clause 19.2. In my view the fact that the AOD and its consent was not expressly pleaded is neither here nor there. The AOD forms part of the written agreement and was attached as part of the written agreement in the particulars of claim. Moreover, I do not find that it was necessary for the respondent to expressly plead the AOD and its consent, since the issue is one of interpretation, and a court is entitled, and in fact obliged, to have regard to all relevant circumstances.

d. I do not agree with the appellant that the words "*having jurisdiction"* in clause 19.2 refers to a court that in fact has jurisdiction for a claim that falls within the monetary threshold (see paragraph [71] above). The consequence of the appellant's interpretation is that clause 19.2 does not even get off the ground. I do not believe this to be the intended meaning of clause 19.2. The sensible interpretation to be placed on clause 19.2 is that the parties consented to forum jurisdiction if the claim brought by the respondent exceeded the monetary threshold, with the words "*having jurisdiction*" being understood as referring to area jurisdiction. Thus, in terms of clause 19.2 the Magistrates' Court has forum jurisdiction, whilst only the particular Magistrates' Court which has area jurisdiction ("*having jurisdiction*") in terms of section 28 is the court which has jurisdiction to entertain the claim.

[76] I therefore find that the second ground of appeal is without merit.

APPELLANT'S THIRD GROUND OF APPEAL: CLAIM EXCEEDS MAGISTRATES' COURT MONETARY JURISDICTION

[77] The plaintiff's total claim exceeds the Magistrates' Court monetary threshold. The appellant's position is that, accordingly, the Magistrates' Court does not have jurisdiction over the claimed amount. I have already found that there was a valid consent to jurisdiction in terms of section 45(1). The appellant, however, contends that even if there was a valid consent to jurisdiction, this consent would only apply to R800 000.00 out of the total amount of R1 108 979.00 being claimed. This is because, according to the appellant, the balance of the

claim is for monies loaned pursuant to an oral agreement, and the consent in clause 19.2 forms part of the written agreement relating only to the R800 000.00.

[78] In my view, and for the reasons that follow, the appellant's position is incorrect.

[79] It is apparent from the particulars of claim read together with the written agreement, that the respondent did not grant and give the appellant a loan for the amount being claimed, but rather made provision for a loan facility and then made a series of advances or loans to the appellant over a period of time. This is further confirmed by the contents of Annexure A, which reflects such a series of advances.

[80] In its heads of argument the appellant broke down the respondent's claim of R1 108 979.00 into a claim for R800 000.00 which appellant ascribed to the written agreement and a claim for R308 979.00 which the appellant ascribed to a verbal agreement. The appellant's heads of argument then identified 6 separate payments or loans comprising the R800 000.00, and 7 separate payments or loans comprising the R308 979.00. For the most part the appellant's list is identical to the advance payments reflected in Annexure A.

[81] All of the advance amounts reflected in Annexure A and the appellant's list are individually within the monetary threshold of the Magistrates' Court, save for one amount of R355 000.00.

[82] Each of the 13 loans give rise to 13 individual claims and causes of action.[25] For the loan which exceeds the monetary threshold, that loan is covered by the consent in clause 19.2. As for the rest, the presence or absence of a consent to jurisdiction is irrelevant since each of them individually in fact fall within the Magistrates' Court monetary threshold.

[83] It is also apparent from clause 6.1 of the loan agreement, that the loan facility included amounts in excess of R800 000.00, and that such amounts were

[25] See for example *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) at 546E-F

reflected in Annexure A. Consequently, the consent in clause 19.2 would then cover not only the R800 000.00 but also the alleged additional amount of R308 979.00.

[84] I therefore find that the third ground of appeal is without merit.

CONCLUSION

[85] I therefore find that the learned Magistrate was correct when she dismissed the second special plea, and that in any event the second special plea fell to be dismissed.

[86] In the circumstances, I would dismiss the appeal with costs.

_____
T Ossin AJ
Acting Judge of the Gauteng Division

I agree and it is so ordered

_____
MMP Mdalana-Mayisela J
Judge of the Gauteng Division

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Instructed by:	Zwiegers Attorney
Date of Hearing:	12 October 2021
Date of Judgment:	10 March 2022