

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 55408/2021

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

In the matter between:

ISIBONELO PROPERTY SERVICES (PTY) LTD

Plaintiff

and

**UCHEMEK WORLD CARGO LINK FREIGHT CC
t/a THE FISH AND CHIPS COMPANY
(Registration no: 2010/167505/23)**

First Defendant

EMEKA, PB

Second Defendant

JUDGMENT

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 16h00 on 17 February 2023.

OLIVIER, AJ:

[1] The defendants (excipients) except to the plaintiff's (respondent's) particulars of claim. They allege that this Court lacks jurisdiction. The defendants seek that the exception be upheld and that the plaintiff's claim against the defendants be dismissed; alternatively, that the plaintiff be granted 14 (fourteen) days within which to amend its particulars of claim, failing which the plaintiff's action be dismissed with costs.

[2] Although lack of jurisdiction is generally raised as a special plea, the exception route may be followed where it is apparent *ex facie* the particulars of claim that the court lacks jurisdiction.¹

[3] The plaintiff and the first defendant entered into a lease agreement in Pretoria, which become operational on 20 August 2019. The agreement was signed by a representative of the first defendant on 10 July 2019 and by a representative of the plaintiff on 8 August 2019. The second defendant is not a signatory to the main lease agreement, but signed a separate agreement binding herself as surety and co-principal debtor on 10 July 2019.

[4] Following an alleged breach of the main agreement by the first defendant – non-payment of rental and other costs – the plaintiff issued summons in the Gauteng Division of the High Court, Johannesburg ('the Johannesburg seat'), claiming a total amount of R 1,378,595.17.

¹ *Curoscore (Pty) Ltd v Nxumalo* (1619/2020) [2021] ZAECBHC 6 (23 March 2021) at para 8. See Cilliers et al *Herbstein & Van Winsen - The Civil Practice of the High Courts of South Africa* (2017) 5ed at 633—634.

[5] The exception is based on two grounds: first, that the Johannesburg seat lacks jurisdiction; second, that the Magistrates' Court is the appropriate forum as the parties had agreed to its jurisdiction in the lease agreement.

First ground

[6] The defendants submit that summons should have been issued in Pretoria where all the jurisdictional facts are present. It is common cause that the business and residential addresses, the *domicilium citandi* of the defendants, as well as the leased premises, are in Pretoria. It is also where the cause of action arose.

[7] Section 21(1) of the Superior Courts Act 10 of 2013 ('the Act') provides that a division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction.

[8] There are two seats of the High Court in the Gauteng Province: the main seat in Pretoria, and the local seat in Johannesburg. The plaintiff's argument is that the Johannesburg seat has concurrent jurisdiction with the Pretoria seat.

[9] The Johannesburg seat is no longer known as a local division. In *Murray NO v African Global Holdings (Pty) Ltd* the Supreme Court of Appeal explained, in respect of 'local divisions', that they are 'not separate courts and it is no longer appropriate to refer to them as such or to describe them as local divisions.'²

[10] Section 6(3) of the Act provides that the 'Minister [of Justice] must, after consultation with the Judicial Service Commission, by notice in the Gazette, determine the area under the jurisdiction of a Division, and may in the same manner amend or withdraw such a notice.'

[11] The Minister made regulations in January 2016 in terms of which Johannesburg, as a local seat, 'has concurrent jurisdiction with the main seat [Pretoria] until such time that the area of jurisdiction of the local seat is determined in terms of section 6(3)(c) of the Act.'³ Regulations promulgated only a month earlier, in December 2015, made concurrent jurisdiction even clearer, describing the areas of jurisdiction

² See *Murray NO and Others v African Global Holdings (Pty) Ltd and Others* 2020 (2) SA 93 (SCA).

³ GN 30 in GG 39601 (15 January 2016).

of the local seat [Johannesburg] as the 'same as [the] main seat [in Pretoria] until such time that it is re-determined.'⁴

[12] The defendants maintain, however, that only the main seat of the Division has concurrent jurisdiction – in other words, the main seat may hear cases falling within the area of the local seat, but not *vice versa*. So, if all the jurisdictional facts are present in Pretoria, only the main seat has jurisdiction, not the Johannesburg seat. This is incorrect.

[13] The wording of the regulations is clear and should be given its ordinary meaning: the local seat and the main seat share geographical jurisdiction over the entire Gauteng Province. The jurisdiction of the Johannesburg seat is no longer limited to only some parts of Gauteng.

[14] This interpretation is in line with that of Senyatsi J in *AV v YV*, where the learned judge dismissed a defence of lack of jurisdiction.⁵ Similarly, in *Petersen v Bochum Foods (Pty) Limited t/a Roman's Pizza Bochum*,⁶ the Court dismissed an objection to the jurisdiction of the Johannesburg seat. In that case plaintiffs' counsel argued that local and main seats hold concurrent jurisdiction in respect of Centurion. The Court accepted that such concurrent jurisdiction existed.

[15] Neither counsel has brought to my attention any subsequent re-determination of the geographical jurisdiction of the local seat by the Minister.

[16] The defendants submit that the Minister exceeded his powers and that the regulations are against the wording and purpose of the Act, causing them to be of no force or effect. Therefore, the Minister of Justice had acted *ultra vires*.

[17] The defendants' reliance on this argument is misconceived. The Minister has not been joined in these proceedings, and the setting aside of the regulations is not part of the relief sought. In any event, an exception is not the appropriate vehicle to challenge the lawfulness of regulations or the exercise of a minister's power in making those regulations.

⁴ GN 1266 in GG 39540 (21 December 2015).

⁵ *AV v YV* (39813/2019) [2021] ZAGPJHC 865 (1 July 2021).

⁶ *Petersen and Others v Bochum Foods (Pty) Limited t/a Roman's Pizza Bochum and Another* (2020/18058) [2021] ZAGPJHC 644 (18 August 2021) at para 19.

[18] The present concurrent jurisdiction arrangement could potentially be abused by a plaintiff or applicant, ultimately disadvantaging a defendant or respondent. In *Nedbank v Thobejane* a full bench of the Pretoria seat ('*Thobejane a quo*') expressed concern about cases being enrolled in Pretoria, even though they involved parties who fell within the jurisdiction of the Johannesburg seat.⁷ The court went so far as to state quite sweepingly that it was an abuse of process to allow a matter which could be decided in a 'Local Division' to be heard in the 'Provincial Division' simply because it had concurrent jurisdiction.⁸ This view of the court *a quo* was rejected soundly on appeal. The Supreme Court of Appeal affirmed the legal position that abuse of process is a matter which needs to be determined by the circumstances of each case.⁹

[19] Should the defendants consider themselves to be prejudiced or inconvenienced by the choice of forum, they may avail themselves of s 27(1)(b) of the Act, which provides for a change of venue:

If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings (a) should have been instituted in another Division or at another seat of that Division; or (b) would be more conveniently or more appropriately heard or determined – (i) at another seat of ... that Division; or (ii) by another Division, that court may, upon application by any party thereto and after hearing all parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.

[20] The first ground of exception is accordingly dismissed.

Second ground

[21] The defendants submit that s 45 of the Magistrates' Court Act 32 of 1944 applies, as the parties had consented in writing to the jurisdiction of the Magistrates' Court in the event of a dispute.

⁷ *Nedbank Limited v Thobejane* 2019 (1) SA 594 (GP) at para 1.

⁸ At para 76.

⁹ *Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana NO and Another* 2021 (6) SA 403 (SCA) at para 47.

[22] Clause 25.9 of the lease agreement reads as follows:

The TENANT and LANDLORD hereby consents to the jurisdiction of the Magistrate's Court (including District and Regional Court) having jurisdiction over the TENANT for any proceedings arising out of or in connection with this Lease, even if for a cause of action otherwise beyond the jurisdiction of that court.

[23] A term in a commercial agreement in terms of which the parties consent to the jurisdiction of the Magistrates' Court is not unusual. It is often a practical arrangement to limit litigation costs and time as it is generally not advisable from a cost point of view to pursue a defendant in the High Court for insignificant sums of money. In *casu*, the claims exceed the monetary jurisdiction of the Magistrates' Court by some margin: R 816,120.71 (claim 1) and R 562,474.46 (claim 2).

[24] Plaintiff's counsel argued that the provision does not mean that the plaintiff is compelled to launch proceedings in the Magistrates' Court. All the provision does is to vest the Magistrates' Court with jurisdiction, but this does not limit or exclude the jurisdiction of the High Court or the plaintiff's choice of forum.

[25] It is well established in terms of the common law that where different courts have concurrent jurisdiction, the party who launches proceedings, *as dominus litis*, may choose the forum. The court *a quo* in *Thobejane* called this principle 'at best outdated' and observed that it loses sight of the deep seated inequalities in our society and the constitutional imperative of access to justice.¹⁰ However, the principle was explicitly confirmed by the Supreme Court of Appeal (per Sutherland AJA):

Self-evidently, litigation begins by a plaintiff initiating a claim. Axiomatically, it must be the plaintiff who chooses a court of competent jurisdiction in just the same way that a game of cricket must begin by a ball being bowled. The batsman cannot begin. This elementary fact is recognised as a rule of the common law, founded, as it is, on common sense.¹¹

[26] Some older authorities suggest that the jurisdiction of the High Court may be excluded in certain circumstances – where there is a clear intention to make the

¹⁰ *Nedbank v Thobejane supra* at para 79.

¹¹ *Standard Bank v Thobejane supra* at para 25. See too *Moosa NO v Moosa* 2014 JDR 2194 GP at para 19.

Magistrates' Court the exclusive forum,¹² or if there is clear agreement debarring a plaintiff from doing so.¹³ In practice, though, where the agreement is intended for the benefit of the plaintiff, as is almost certainly the case here, a defendant essentially consents to be bound by the plaintiff's selection to sue in the Magistrates' Court, but the jurisdiction of the High Court is not excluded should the plaintiff decide to follow that route.¹⁴

[27] The legal position now appears settled following Sutherland AJA's judgment in *Thobejane*:

It is also law of long standing that when a High Court has a matter before it that could have been brought in a Magistrates' Court, it has no power to refuse to hear the matter.¹⁵

[28] Sutherland AJA also affirmed the finding of the Supreme Court of Appeal in *Agri Wire (Pty) Ltd v Commissioner, Competition Commissioner*¹⁶ that the doctrine of *forum non conveniens* ('inconvenient forum') does not apply in South Africa: 'courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction.'¹⁷

[29] In *Allied Value Investors (Pty) Ltd v Lebitse*¹⁸ the Court was faced with a broadly similar scenario where the parties had agreed that the Magistrates' Court would have jurisdiction over disputes. With reference to *Thobejane*, the Court found that the High Court enjoyed concurrent jurisdiction with the Magistrates' Court, despite the jurisdiction clause.

[30] In the result, both grounds of exception must fail.

¹² D E Van Loggerenberg *Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa* 10ed [Service 16, 2018] Vol 'The Act' at 296.

¹³ *Id.* See eg *Union Cities Agency & Trust Co (Pty) Ltd v Makubo; Union City Agency & Trust Co (Pty) Ltd v Faskude* 1942 WLD 261.

¹⁴ *Jones & Buckle* at 296. See the cases mentioned there: *Union Cities supra*; *Standard Bank of SA Ltd v Pretorius* 1977 (4) SA 395 (T).

¹⁵ *Standard Bank v Thobejane supra* at para 27.

¹⁶ *Agri Wire (Pty) Ltd v Commissioner, Competition Commission and Others* 2013 (5) SA 484 (SCA) at para 19.

¹⁷ *Standard Bank v Thobejane supra* at para 31.

¹⁸ *Allied Value Investors (Pty) Ltd v Lebitse and Others* (28859/2020) [2022] ZAGPJHC 828 (20 October 2022).

[31] The plaintiff argues that this application is an abuse of process which justifies a punitive costs order. I disagree. The plaintiff is entitled to costs, but not on a punitive scale.

I MAKE THE FOLLOWING ORDER:

The exception is dismissed with costs.



M Olivier

Acting Judge of the High Court
Gauteng Division, Johannesburg

Date of hearing: 24 October 2022

Date of judgment: 17 February 2023

On behalf of Defendants/Excipients: A. Granova (Ms)

Instructed by: Nwobi Attorneys

On behalf of Plaintiff/Respondent: J.G. Dobie

Instructed by: Reaan Swanepoel Attorneys