

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 49008/2021

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

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In the matter between:

VUSANI VINCENT MNCUBE

PLAINTIFF

and

TOYOTA FINANCIAL SERVICES

SOUTH AFRICA LIMITED

DEFENDANT

JUDGMENT

MANAMELA AJ

Introduction

- [1.] This is an opposed interlocutory application in terms of Rule 23 of the Uniform Rules of Court.
- [2.] The defendant was served with summons on 4 October 2021 and entered appearance to defend on 20 October 2021. The plaintiff placed the defendant under bar on 22 November 2021, after the defendant's failure to file plea. In response to the notice of bar, the defendant served a notice of exception, in terms of which the plaintiff had 15 days to remove cause of complaint.
- [3.] The plaintiff elected not to remove the cause of complaint, and the defendant filed a notice of motion for the exception. The exception was based on that the plaintiff's particulars of claim does not provide any averments regarding the Court's jurisdiction.

Background

- [4.] The plaintiff and defendant entered into an instalment sale agreement in terms of which the plaintiff sold and delivered a 2016 Toyota Corolla Quest to the defendant.
- [5.] In terms of the instalment sale agreement, the total amount of sale was R362 708.64 payable in monthly instalment of R 5 106.02, over 70 months. The defendant fell into arrears, and the plaintiff issued summons for the cancellation of the agreement and return of the motor vehicle under the main action.

[6.] The agreement falls within the precinct of the National Credit Act.

[7.] The agreement was signed electronically, and part of the material terms of the agreement as stated in paragraph 5.6 of the particulars of claim is that the defendant chose his *domicilium citandi et executandi*, in paragraph 2 of the agreement, for purposes of the agreement.

Legal issues

[8.] The preliminary issues to be determined by this Court are –

- a) whether jurisdiction must be alleged/pleaded in every particulars of claim;
and
- b) whether failure to plead jurisdiction amounts to violation of rule 18 of the Uniform Rules of Court.

Legal framework

[9.] Section 34 of the Constitution of the Republic of South Africa, 1996, provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

[10.] Section 169 of the Constitution provides that a High Court may decide:

‘(a) any constitutional matter except a matter that —

- (i) only the Constitutional Court may decide; or

- (ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and
- (b) any other matter not assigned to another court by an Act of Parliament.'

[11.] Section 21 of the Superior Courts Act 10 of 2013 provides that:

'21. Persons over whom and matters in relation to which Divisions have jurisdiction.

(1) 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 and all other matters of which it may according to law take cognisance, and has the power -

(2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third-party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.'

[12.] Rule 23(1) provides that :

'(1) where any pleadings are vague and embarrassing or lack averments which are necessary to sustain an action or defense, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: provided that – (a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days; and

(b) the party excepting shall within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 days from which such reply is due, deliver the exception.'

[13.] Rule 18(4) states that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

[14.] Rule 18(12) further provides that if a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30.

[15.] Rule 30(3) of the Uniform Rules of Court states that if at the hearing of such application the court is of the opinion that the application or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.

[16.] Rule 30(4) further provide that until *a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an amount for an extension of time within which to comply with such order.* (Emphasis added.)

[17.] Section 90 of the National Credit Act 34 of 2005 (hereinafter the NCA) deals with unlawful provisions in credit agreements. One of these prohibited provisions is a provision in a credit agreement which 'expresses, on behalf of the consumer – (vi) a consent to the jurisdiction of – (aa) the High Court, if the magistrates' court has concurrent jurisdiction; or (bb) any court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept'.¹

Analysis

[18.] The principle underlying the rule '*actor sequitur forum rei*' was almost certainly effectiveness, but, today, the rule serves an important consumer protection purpose in that the consumer who is a defendant must be sued in the jurisdiction of the court where he or she resides unless there is a ground which gives the court of another area jurisdiction.² There is no contention as to whether or not the applicant's *domicilium* address is his place of residence and neither does the applicant argue that court has no jurisdiction.

[19.] Jurisdiction is the power or competence that a particular court has to adjudicate a dispute.³ A person who has decided to litigate must select the proper court in which to proceed. Several courts may have jurisdiction in one instance. The

¹ See s 90(2)(k)(vi).

² *Visser N.O and Others v Van Niekerk and Others* (5937/16) ZAFSHC 200 (9 November 2018).

³ *Gcaba v Minister for Safety and Security and Others* (CCT64/08) [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) para 74.

plaintiff is *dominis litis* in this regard. The onus is on the plaintiff to prove jurisdiction.⁴

[20.] The defendant argues that the plaintiff's failure to make averments as to why the plaintiff elected to bring its case to this court's jurisdiction makes it impossible for him to plead. The defendant states that he could not raise it as a special plea,. The defendant further contends that the plaintiff's particulars of claim does not comply with Rule18(4) read with Rule 18(12) and should be found to be irregular and set aside, as contemplated in Rule 30(1), (3) and (4).

[21.] The applicant did not follow the procedure under Rule 30(1), instead the applicant filed an exception in terms of Rule 23. By its nature, Rule 23, the onus of showing that a pleading is excipiable rests on the excipient, and pleadings are suspended until the court has ruled on the exception.

[22.] The question to be addressed is whether jurisdiction should have been explicitly pleaded. The issue of a summons that does not set forth any grounds on which the court could exercise jurisdiction was discussed in *Girdwood v Theron* 1913 CPD 859 – 862. It was highlighted that before a court can exercise any jurisdiction . . . it is necessary either that the defendant should be resident in the jurisdiction of the court, or that the contract on which the action is brought should have been entered into within the jurisdiction of the court, or that the contract should provide for performance, or part performance, within the jurisdiction of court. The court ruled that the grounds of jurisdiction should be

⁴ *Visser* case (n 2) para 9.

clearly set forth in the summons. It follows that a summons which does not set forth particulars showing that the court has jurisdiction is bad and liable to be dismissed. *Zhongji Development Construction Engineering Company Limited vs Kamoto Copper Company SARL 2015 (1) SA 345 para [50]*, it may be of interest to you. SCA reaffirmed that when a party raises a challenge to the jurisdiction of a court, the issue must necessarily be resolved before any other issues in the proceedings. The SCA explained that if the court lacks jurisdiction, it is precluded from dealing with the merits of the matter brought to it.

[23.] In terms of Rule 23(1)(a) an exception should be taken within 10 days from date of receipt of the pleadings, it is not clear why did the applicant wait until he is placed under bar to raise an exception.

[24.] The respondent on the other hand, argues that jurisdiction does not have to be pleaded in high court proceedings. Generally, the High Court is the primary forum for adjudicating commercial disputes of over R400 000.00 in value. Disputes with a lower commercial value are dealt with in the Magistrates Courts.

[25.] In the particulars of claim, the plaintiff made no express averment relating to jurisdiction. At the very least the provision on jurisdiction is found under annexure 'A' to the particulars of claim, the terms of sale agreement between the plaintiff and the defendant, paragraph 22.8, which provides that '*in terms of section 45 of the Magistrates' Court Act 32 of 1944 and at your option, any claim that may arise may be recovered in any Magistrates' Court having*

jurisdiction of the Magistrates' Court' and is so far as the applicant's *domicilium citandi et executandi* being his place of residence is cited.

[26.] The test on exception, as was formulated by the court in *Southernport Developments (Pty) Ltd (previously known as Tsogo Sun Ebhayi (Pty) Ltd) v Transnet Ltd* 2003 (5) SA 665 (W), para 6. The court held that:

'(i) in order for an exception to succeed, the excipient must establish that the pleading is excipiable on every interpretation that can reasonably be attached to it;

i. A charitable test is used on exception, especially in deciding whether a cause of action is established, and the pleader is entitled to a benevolent interpretation;

ii. The Court should not look at a pleading 'with a magnifying glass of too high power'. . . . "Minor blemishes in and unradical embarrassments caused by a pleading can and should be cured by further particulars."

[27.] The factors to be considered when considering exception were dealt with in the *Living Hands (Pty) Limited and Another v Ditz and Others* 2013 (2) SA 368 (GSJ) para 15, where Makgoba J stated as following:

'Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:

(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

(b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception⁵.

(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.⁶

⁵ *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* (2) 1976 (1) SA 100 (W).

⁶ *Van der Westhuizen v Le Roux* 1947 (3) SA 385 (C) at 390.

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.⁷

(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.⁸

(f) Pleadings must be read as a whole, and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.⁹

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.¹⁰

[28.] The applicant argues that the *Living Hands* case, is not relevant to this matter as it deals with exception on the grounds that the averments are vexatious and scandalous and that the claim has prescribed.

[29.] I tend to agree with the respondent that the applicant could have raised the issue of jurisdiction in a special plea, in that the allegations pleaded by the plaintiff clearly discloses a cause of action, I cannot find any form of embarrassment cause by the lack of averment on jurisdiction. The applicant's argument is purely being over-technical and not constructive. Considering that no question of prejudice to the defendant had arisen, Schreiner JA reasoned in *Trans-Africa Insurance Co. Ltd v Maluleka* 1956 (2) SA 273 (AD) that, '*technical objections to less than perfect procedural steps should not be permitted in the absence of prejudice, to interfere with the expeditious and if possible inexpensive decisions of cases on their real merits*'. (Emphasis added).

[30.] Rule 18(4) provides that: every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim,

⁷ *Fairoaks Investments Holdings (Pty) Ltd v Oliver* [2008] ZASCA 41; 2008 (4) SA 302 (SCA) para 12.

⁸ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) para 3.

⁹ *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 902 J.

¹⁰ *Jowell* above, at 900 J.

defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto. The plaintiff's particulars of claim substantially complies with the provisions of Rule 18(4) and there is no envisaged prejudice to the defendant. Court is entitled to overlook, in proper cases, any irregularity of procedure which does not work any substantial prejudice to the other party¹¹. In the circumstances, I find the applicant's reliance on the procedure under Rule 18 and Rule 30 to be misplaced.

[31.] In *Visser NO and Others V Van Niekerk and Others*, paragraph 14, Judge Opperman mentioned that:

'It is the duty of all courts in South Africa to prevent vexatious and disruptive litigation. Our courts must jealously protect the virtue of the justice system and litigation must be with the utmost honour and responsibility. It must not be for the mere sake of litigation. Superfluous litigation in one matter obstructs the genuine want for access to and justice in courts for another. The use of courts to settle disputes must be in good faith and is not absolute. Counsel are the guardians of the dignity and integrity of the nation. They need to make sure that they give effect to what the Constitution expects of them and their customers want to be served with integrity. Lawyers are not hired guns but the foot soldiers of the Constitution, whose ultimate role it is to administer justice and they need to do it with the highest standard of integrity'.

[31.] In *Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana N O and Another* (38/2019; 47/2019; 999/2019) [2021] ZASCA 92; [2021] 3 All SA 812 (SCA); 2021 (6) SA 403 (SCA) the SCA made a

¹¹ *Marais v Munro & Co Ltd* 1957 (4) SA 53 (E).

declaratory order that the High Court must entertain matters within its territorial jurisdiction that fall within the jurisdiction of a Magistrates' Courts, if brought before it, because it has concurrent jurisdiction with the Magistrates' Court. The SCA declared further that the High Court is obliged to entertain matters that fall within the jurisdiction of a Magistrates' Court because the High Court has concurrent jurisdiction. It was also declared that the main seat of a Division of a High Court is obliged to entertain matters that fall within the jurisdiction of a local seat of that Division because the main seat has concurrent jurisdiction. There is no obligation in law on financial institutions to consider the cost implications and access to justice of financially distressed people when a particular court of competent jurisdiction is chosen in which to institute proceedings.

Conclusion

In conclusion, I find that the exception raised in the case is purely technical, and I concur with the Respondent's counsel that this exception is solely aimed at delaying the plaintiff's case. The fact that the applicant is also an attorney clearly confirms that he is familiar with the grounds of jurisdiction, and that he knows that he could have pleaded timeously before the last day of being bared, including raised the issue of jurisdiction as a special plea. As a result, the relief claimed by the applicant is therefore incompetent.

Costs

[32.] It is inevitable that the applicant should bear the costs of this application.

The following order is made:

- (a) The applicant's exception is dismissed with costs.

P N MANAMELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 22 August 2022
Judgment delivered: 16 November 2022

APPEARANCES:

Counsel for the Plaintiff: Adv. I Oschman
Instructed by: Bezuidenhout van Zyl Inc & Associates Attorneys

The Defendant: In person