REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A296/2023

DELETE WHICHEVER IS NOT APPLICABLE

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

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In the matter between:

HWJ COAL (PTY) LTD **FIRST APPELLANT**

(Registration No: 2013/192858/07)

HWJ WOODCHIPS (LTD) **SECOND APPELLANT**

(Registration No:2005/001142/07)

and

NI-DA TRANSPORT (PTY) LTD **RESPONDENT**

(Registration No: 1985/10871/07)

***In re*:**

NI-DA TRANSPORT (PTY) LTD **PLAINTIFF**

((Registration No: 1985/10871/07)

and

HWJ COAL (PTY) LTD **FIRST DEFENDANT**

(Registration No: 2013/192858/07)

HWJ WOODCHIPS (LTD) **SECOND DEFENDANT**

(Registration NO: 2005/001142/07)

JABULEX (PTY)LTD **THIRD DEFENDANT**

(Registration No: 2015/295008/07)

THE TRANSFORMATION EXPERT (PTY) LTD **FOURTH DEFENDANT**

(Registration No: 2013/225329/07)

JUDGMENT

MOTHA, J:

Introduction

[1] Before this full bench is an appeal launched by the first and second appellants against a decision of the Magistrate in the District of Pretoria Central. Following the issuance of summons in the District Court of Tshwane against the appellants/defendant claiming the sum of R533 493.74 (Five Hundred and Thirty-Three Thousand Four Hundred and Ninety-Three Rand and Seventy-Four Cent), the respondent/plaintiff alleged in its particulars of claim that the parties to the action had consented to the jurisdiction of the District Court, which is ordinarily up to R200 000.00.

[2] The consent was allegedly found in clause 10.2 of a written agreement attached to the particulars of claim marked Annexure “A”. The first appellant/defendant denied ever agreeing to the terms in Annexure “A”, and filed a special plea to the particulars of claim that the District Magistrates’ court lacked the necessary jurisdiction to hear the claim.

The facts in brief

[3] The matter involves an action for a mobile screen, which was rented to the appellant by the respondent. In August 2016 the agreement was cancelled, and the screen returned to the respondent. Upon the examination of the screen, the respondent realized that it was no longer in a proper working condition and sued the appellant for damages in the sum of R533 493.74. However, this is not the issue confronting this court, rather the special plea is the reason we are here. The crux of the matter is in paragraph 8.2 of the particulars of claim and reads:

> “The parties have consented to the Jurisdiction of the Magistrates Court in terms of paragraph 10.2 of the agreement annexed hereto as annexure “A”.”

[4] Testifying for the appellant, Mr. Henry Joubert stated that the relationship between the parties was founded upon terms which were negotiated since 28th April 2016 and agreed upon on 25 May 2016. In the particulars of claim, the respondent confirms that, represented by Mr. Hennie Lubbe, they entered a partly written and partly verbal agreement on 25 May 2016.

[5] The parties differ on the Annexure “A” which the respondent signed and views as their agreement whilst the appellant rejects same. According to Mr. Joubert, the terms of their agreement were summarized in an e-mail message sent to the appellant on 26th May 2016, and Annexure “A” was sent to him about a month after their meeting of 25 May 2016, already signed only by a Mr. Maritz. He did not sign it because the terms in Annexure “A” were a draft and not finalized. They neither discussed the issue of jurisdiction nor agreed thereon.

[6] On 25 May 2016, the first defendant signed the plaintiff's Credit Application, which also contained a clause on jurisdiction of the Magistrates court at 12.6. which referred to the appellant, HWJ Coal Pty Ltd, and reads:

> "Consent to the jurisdiction of the magistrate Court to determine any action which the Creditor may which to institute against the Agreement arising out of this application for Credit."

The law

[7] The section that is implicated in these proceedings is s 45 (1) of the Magistrates' Court Act 32 of 1944, as amended ("the Act"), jurisdiction by consent of parties. It reads as follows:

> "(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)."

[8] Unpacking the word consent in the matter of *McLaren v Badenhorst,*[1] the court held that:

> "Furthermore, the word 'consent' in the proviso to s 45(1) cannot be interpreted to mean the consent of only one of the parties. Subsection (1) of s 45 specifically provides that the court shall have jurisdiction to determine any action or proceedings beyond its jurisdiction *if the parties* consent thereto in writing. In my judgment the words 'such consent' in the proviso to s 45 (1) must be interpreted to mean the consent, not of one of the parties, but all the parties to the action or proceedings. It follows logically that where only one of the parties concerns to the jurisdiction of the court, such consent is null and void."[2]

[1] 2011 (1) SA 214
[2] Supra para 12

[9] The Magistrates' court is a creature of statute because its powers are limited to those specially granted to them by the Act of Parliament. "The legal principles pertaining to jurisdiction in civil matters in the Magistrates Court is trite, the general rule regarding jurisdiction being *actor sequitur forum rei.* Generally speaking, an applicant must bring his/ her application in the magistrates' court that has jurisdiction in respect of the person of the defendant."[3]

Discussion

[10] Upon a closer examination of Annexure "A", s 10.2 refers to the hirer. It reads:

> "The hirer hereby consents to the jurisdiction of the Magistrate Court to determine any action which the Creditor may wish to institute against me/us or any of us arising out of this Agreement."

[11] From this paragraph, the court note that it is the hirer alone who consents to the jurisdiction of the magistrate court. The law is clear in this regard, both parties must in writing agree to the jurisdiction. In *Neale v. Edenvale Plastic Products (Pty) Ltd*[4], the court held:

> "On this passage, which has been quoted with apparent approval in certain other cases put before us, it has been contended that to confer jurisdiction in terms of sec. 45 of the present Act it is necessary for there to be put before the court a formal agreement executed by both parties. But that is not what sec. 45 requires. It merely states that the parties must consent in writing; each party may separately consent and they need be nothing in the form of an agreement between them; it is not even the requirement that such court said: consent need be signed by either party. There must be a writing or writings which constitute proof that each of the parties has consented to the jurisdiction. The consent cannot be a matter of mere legal inference from acts of conduct."[5]

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[3]Supra page 216 para 4 E
[4] *1971(3) [T.P.D.]*
[5] Supra page 865 paragraph D

[12] In *casu*, the respondent did not provide the court *a quo* with proof of its written consent to the jurisdiction of the Magistrates' court. It relied on inferences, which is not permissible, that it signed Annexure "A" and the Application for Credit Facilities' writing was on its letter head. Its high watermark is that it issued summons in the District Court. This is simply not enough, with respect, as it is neither in compliance with the dictates of s 45(1), nor is it in keeping with the case law on this issue. To drive this point home, it bears referring to the matter of *Hydromar Ltd v Pearl Oyster Shell Industries Ltd*[6], in which the court said:

> "A consent in writing by each of the parties although not necessarily in the form of an express agreement and not necessarily in the same document is, in terms of this construction, nevertheless essential.... In the present case, however, the aforesaid letter written by plaintiff's attorneys on behalf of plaintiff cannot possibly be construed as constituting a consent in writing by defendant, nor was Mr. Van Schalkwyk able to point to anything else which could be construed as a consent in writing by defendant to the jurisdiction of the magistrate's court. The conclusion I accordingly reach on this aspect is that plaintiff has not established that there was a "consent in writing" by the parties in terms of sec. 45 of the Act."[7]

[13] Curiously, the party that wanted the matter heard at the District Court failed to comply with s 45(1) of the Act, and the party that complied does not want it heard there. The court *a quo* misdirected itself by failing to establish the written consent of the respondent/plaintiff. The court a quo said, "I emphasize that before me I have two mutually destructive versions."[8] This was incorrect, the court *a quo* failed to examine the pertinent issues and busied itself with an analysis on what a court does, when confronted with two diametrically opposed versions. With respect, this was not the issue the court was supposed to spend its energies on. Before the court *a quo,* there was simply no written consent from the respondent/plaintiff.

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[6] 1976(2) [C.P.D.]
[7] Supra at page 387 H,
[8] Para 26 of the judgment

[14] Furthermore, it was a misdirection to place reliance on the Application for Credit which was not pleaded. Explaining the importance of the Application for Credit, the court *a quo*, at para 31 of the judgment, stated:

> "I am furthermore of the view that the fact that the Defendant did not sign Annexure "A" does not, when viewed against the backdrop of the Application for Credit Facilities, necessarily detract from the fact the Defendant consented to the jurisdiction of the Magistrates' Court for all debts for the supply of goods or service to the Defendant by the Plaintiff from time to time."

[15] The SCA has cautioned against this in the matter of *Minister of Safety and Security v Slabbert*[9], when it held:

> "The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case."[10]

[16] However, the exception to this impermissibility is when:

> "There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial. In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*,[3] this court said:
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> 'However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue'."[11]

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[9] 2009 SCA 163
[10] Supra at para 11
[11] Supra

[17] In *casu*, it was not submitted that the issue was fully canvassed in evidence. Counsel for the appellant submitted that it was part of the surrounding circumstances. Nonetheless, even if we are wrong on that score, it does not take the matter any further, because again in this document it is the appellant/defendant who consented to the jurisdiction alone.

[18] Giving an analysis of the issue of jurisdiction, the learned magistrate correctly captured the law with regard to ss 29, 28, and 45, and stated the following:

> "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…The ultimate purpose of section 45 (1) is to give the magistrates forum jurisdiction over claims which exceed 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 jurisdiction threshold."[12]

[19] The magistrate simply did not have the monetary jurisdiction to hear this matter. Consequently, the appeal should succeed.

Costs

[20] It is trite that, usually, costs follow the result, I see no reason to alter this well-trodden path.

ORDER

The appeal succeeds with costs on a party and party scale A

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[12] Para 18 of the judgment.

M. P. MOTHA

JUDGE OF THE HIGH COURT, PRETORIA

I Concur

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L. FLATELA

JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 07 March 2024

Date of judgement: 29 April 2024

APPEARANCES:

ADVOCATE FOR APPELLANTS: T. L. JACOBS

INSTRUCTED BY: FUCHS ROUX INC.

ADVOCATE FOR RESPONDENTS: J. PRINSLOO

INSTRUCTED BY: KRUGER ATTORNEYS AND CONVEYANCERS