

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

APPELLATE

Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appel in Siviele Saak.

WILLEM JACOBUS VAN HEERDEN Appellant,

versus

CORNELIA MUIR Respondent.

Appellant's Attorney
Prokureur vir Appellant

Melby

Respondent's Attorney
Prokureur vir Respondent

Knecht

Appellant's Advocate
Advokaat vir Appellant

J. J. Potgieter, Q.C.

Respondent's Advocate
Advokaat vir Respondent

Set down for hearing on

Op die rol geplaas vir verhoor op

FRIDAY, 11th MARCH 1955

12.3.55.

(9.45-10.35) — C.A.V.

Poster: 18/3/55: Appeal dismissed with costs.

Prins
- Register

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :-

WILLEM JOCOBUS VAN HEERDEN.

Appellant

&

CORNELIA MUIR

Respondent

CORAM :- Centlivres C.J., Greenberg, Schreiner, v.d. Heever
et Fagan JJ.A.

Heard :- 11th March 1955. Delivered :- 18 - 3 - 55.

J U D G M E N T

CENTLIVRES C.J. :- The appellant, to whom I shall refer as the plaintiff, carries on business in Bloemfontein as a bill broker. He sued the respondent (defendant) in the magistrate's court at Bloemfontein for the sum of £18. 10. Od. on a promissory note. The defendant did not reside within the area of jurisdiction of that court but the summons alleged that she "had consented in writing to the jurisdiction of the above "honourable court, which consent has been accepted by the "plaintiff." At the foot of the promissory note the defendant signed the following consent which is the consent relied on by the plaintiff :-

" Ek stem hiermee toe tot die regsbevoegdheid van die Bloemfonteinse Magistraatshof ingevolge Articiel 45(1) van Wet 32 van 1944, vir die beslissing van enige regsgeding

" deur my ingestel teen die wettige houer van hierdie bewys of deur sodanige wettige houer teen my ingestel in verband met enige eis spruitende uit hierdie bewys. "

The defendant filed a special plea which was as follows :-

" VERWEERDER PLEIT SPESIAAL IN BOGEMELDE SAAK AS VOLG :-
Verweerder erken dat sy toegestem het tot die regsbevoegdheid van bogemelde agbare Hof vir die beslissing van enige regsgeding teen haar ingestel in verband met enige eis wat uit die bewys spruit soos beweer in die verdere besonderhede tot Eiser se eis, maar sê dat die beweerde toestemming geen regsgeldigheid het nie

(1) Aangesien bogemelde agbare Hof geen jurisdiksie het oor die persoon van die Verweerder deurdat die bepalings van Artikel 28 van Wet 32 van 1944 nie op Verweerder van toepassing is nie.

(2) Die betrokke toestemming nie spesifiek met betrekking tot hierdie saak gegee is nie.

W E S H A L W E sê Verweerder dat bogemelde agbare Hof geen jurisdiksie het nie, en smeek dat Eiser se eis met koste van die hand gewys word. "

The magistrate dismissed the special plea with costs but on appeal to the Orange Free State Provincial Division the magistrate's order ^{was} ~~was~~ set aside ~~and~~ and an order substituted upholding the special plea with costs. The Provincial Division granted leave to appeal to this Court on condition that the plaintiff undertook to pay the costs of the application for leave to appeal as well as the costs of appeal of both parties

irrespective of the result of the appeal.

The determination of the issue raised in this appeal depends on the proper construction to be placed on Sec. 28(1) of Act 32 of 1944 as amended by Sec. 12 of Act 40 of 1952. That section is as follows :-

" 28 (1) Saving any other jurisdiction assigned to a court by this Act or by any other law, the persons in respect of whom the court shall have jurisdiction shall be the following and no other -

- (a) any person who resides, carries on business or is employed within the district ;
- (b) any partnership which has business premises situated or any member whereof resides within the district ;
- (c) any person whatever, in respect of any proceedings incidental to any action or proceeding instituted in the court by such person himself ;
- (d) any person, whether or not he resides, carries on business or is employed within the district, if the cause of action arose wholly within the district ;
- (e) any party to interpleader proceedings, if -
 - (i) the execution creditor and every claimant to the subject matter of the proceedings reside, carry on business, or are employed within the district ; or
 - (ii) the subject matter of the proceedings has been attached by process of the court ; or
 - (iii) such proceedings are taken under sub-section (2) of section sixty-nine and the person therein referred to as the 'third party' resides, carries on business, or is employed within the district ;
or

" (iv) all the parties consent to the jurisdiction of the court.

- (f) any defendant (whether in convention or reconvention) who appears and takes no objection to the jurisdiction of the court ;
- (g) any person who owns immovable property within the district in actions in respect of such property or in respect of mortgage bonds thereon. "

The words italicized were introduced into the 1944 Act by the 1952 Act.

In my opinion the words "the following and no other" make it clear beyond any doubt that ~~the~~ only persons over whom a magistrate's court has jurisdiction ~~are~~ are the persons enumerated in paragraphs (a) to (g) and that unless the defendant is one of those persons the magistrate's court at Bloemfontein has no jurisdiction to hear an action against ~~her~~ ^{her.} It was not contended before us by the appellant's counsel that the defendant fell within any of the categories mentioned in Sec. 28(1) and it is clear that she did not but it was contended that under the common law a defendant could waive the privilege of having to be sued in a particular court and could thus give his consent to the jurisdiction over his person in a court, other than the one in which he resided or carried on business, and that Sec. 28 should be read as being subject to the common law. A principle of construction is that a statute is to be construed in conformity

with the common law rather than against it except where and in so far as the statute is plainly intended to alter the common law (Dhanabakium v Subramanian - 1943 A.D. 160). In the present case the Legislature plainly intended to alter the common law excepting in the case of a defendant who appears and takes no objection to the jurisdiction (par.(f) of Sec. 28). To that extent, and to that extent alone, has the Legislature preserved the common law in Sec. 28. There is nothing in the section which in any way suggests that a defendant is precluded from taking an objection to the jurisdiction on the ground that he has consented to the jurisdiction. To hold that in such circumstances he is so precluded would result in ignoring the words "the following and no other."

The consent in the present case purports to have been given in terms of Sec. 45(1) of the Act. Section 45⁽¹⁾ is as follows :-

" 45. (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."

