



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

Case no: 85/06  
REPORTABLE

In the matter between:

**YAGAMBARAM MOODLEY**

**APPELLANT**

**and**

**NEDCOR BANK LTD**

**RESPONDENT**

Before: Harms ADP, Heher, Cachalia JJA, Snyders, Theron AJJA

Heard: 16 March 2007

Delivered: 27 March 2007

Summary: Jurisdiction - In an action upon a debt secured by a mortgage over immovable property, the fact that the property is situated in the territory over which a high court exercises jurisdiction constitutes a jurisdictional connecting factor which confers jurisdiction on the court.

Neutral citation: This judgment may be referred to as *Moodley v Nedcor* [2007] SCA 27 (RSA)

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**JUDGMENT**

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**CACHALIA JA**

[1] In an action upon a debt secured by a mortgage over immovable property the plaintiff is entitled not only to judgment for the amount of the debt but also to an order declaring the mortgaged property executable where it is situated within the court's jurisdiction. If the immovable property sought to be declared executable is situated within the jurisdiction of a court other than where the cause of action for the money claim arose the question arises whether that court has concurrent jurisdiction over the matter. The question presents itself in this matter against the following background.

[2] On 30 July 1996 the appellant entered into a loan agreement in Johannesburg in terms of which the respondent, a commercial bank, agreed to lend and advance to the appellant the sum of R180 000 upon security of a mortgage bond registered against an immovable property situated in the Durban area ('the property') within the Province of Kwazulu-Natal.

[3] On 10 August 2000 the respondent (as plaintiff) instituted proceedings against the appellant (as defendant) in the Pretoria High Court for the recovery of the sum of R191 720,38 being the capital amount which it alleged was then due and payable in terms of the agreement. As is the practice in matters of this nature, the respondent also sought an order declaring the property executable. On 12 September 2000 the respondent obtained judgment against the appellant and a warrant of execution was thereafter issued against the property. The appellant then brought an application to stay the sale in execution. The dispute was settled on 8 November 2002 and the settlement agreement made an order of court. This agreement also became a subject of dispute and the litigation recommenced. This time the appellant applied successfully for the order of 12 September 2000 to be rescinded.

[4] Following the rescission of the order the appellant filed a plea and counterclaim on 2 February 2004. In his special plea, he alleged that the Pretoria High Court lacked jurisdiction over the matter because the property was situated within the Province of Kwazulu-Natal, and also because his chosen *domicilium citandi et executandi* was there. The special plea was clearly bad because the Pretoria High Court obviously had jurisdiction over the matter on the basis that the cause of action arose there.<sup>1</sup> Inexplicably however, on 31 May 2004, the respondent withdrew its action and paid the appellant's wasted costs.

[5] On 15 June 2004 the respondent instituted fresh proceedings against the appellant in the Durban High Court based on the same cause of action. This time the amount claimed was R365 291,06, more than double the amount of the original loan, the increase having resulted from further interest that had accumulated on the loan. Once again the respondent sought an order that the property be declared executable. The appellant instructed the same attorney who had represented him in the Pretoria High Court to defend this action. A plea was filed and the matter set down for hearing in the Durban High Court. However, three days before the trial was to commence, the appellant instructed another firm of attorneys to represent him. This necessitated a postponement of the hearing and on 2 September 2004 the newly instructed attorneys filed an amended plea and three special pleas on his behalf. The special pleas related to a plea that the court lacked jurisdiction to entertain the action; a plea that the same dispute was pending before the Pretoria High Court by virtue of the appellant not having withdrawn his counterclaim

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<sup>1</sup>See s 19(1)(a) of the Supreme Court Act 59 of 1959 referred to below at para 8. Section 6(2) of the Act confers concurrent jurisdiction on the Transvaal Provincial Division (TPD), also referred to as the Pretoria High Court, in the areas of jurisdiction of the Witwatersrand (WLD), also referred to as the Johannesburg High Court.

against the respondent in that court; and a plea (in the nature of an exception rather than a special plea) that the respondent's particulars of claim lacked averments to sustain its cause of action.

[6] The matter was argued before Jappie J on 8 November 2004 and on 2 February 2005 he dismissed each of the special pleas. On 29 August 2005 the judge heard the appellant's application for leave to appeal against his judgment and on 7 October 2005 he refused the application in respect of the three special pleas. This court however granted leave on the first special plea only ie, whether the Durban High Court had jurisdiction to entertain the action.

[7] There are two issues in this appeal. The first, as mentioned in the opening paragraph, is whether the Pretoria High Court has exclusive jurisdiction over the matter by virtue of the cause of action having arisen there, as the appellant contends it does, or whether, as the respondent asserts, the Durban High Court has concurrent jurisdiction on the basis that the property sought to be declared executable is situated within its area of jurisdiction. The second arises only if the first is decided in the appellant's favour. This relates to whether in raising a special plea of lack of jurisdiction initially in the Pretoria High Court and his failure thereafter to object to the Durban High Court's jurisdiction before the pleadings had closed amounted to a waiver of his right to do so.

[8] I turn to deal with the first question. The authority of a high court to decide any matter is derived from s 169 of the Constitution.<sup>2</sup> The Supreme Court Act 59 of

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<sup>2</sup> Section 169 provides: '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.'

1959 regulates its jurisdiction.<sup>3</sup> Section 19(1)(a) of the Act confers on a high court jurisdiction ‘over all persons residing or being in and in relation to all causes arising . . . within its area of jurisdiction’. The phrase ‘causes arising,’ with which we are concerned for present purposes, is sometimes mistakenly understood to mean ‘causes of action’. The phrase has been interpreted to refer to ‘legal proceedings duly arising’ that is to say, proceedings in which the court has jurisdiction under the common law.<sup>4</sup> And while it is well established that a court has jurisdiction over a matter where the cause of action arises within its territorially demarcated area, the jurisdiction of a court is determined with reference not only to the cause of action but also to all connecting factors (*rationes jurisdictionis*) which give rise to jurisdiction at common law.<sup>5</sup> What has to be determined in this matter is whether the location of the hypothecated property in Durban, within the territorial jurisdiction of the Durban High Court, constitutes a jurisdictional connecting factor giving rise to concurrent jurisdiction of the Durban High Court.

[9] It has long been considered a sufficient basis for a court to exercise jurisdiction over a matter if the nature of the relief claimed involves immovable property situated within its area of jurisdiction, even where the court has no power over the defendant or because the cause of action does not arise in the area. This is because, as Price AJA observed in *Sonia (Pty) Ltd v Wheeler*<sup>6</sup>:

‘The Court of the area in which the property is situate can certainly control the transfer of, or any interference with, the property through the Registrar of Deeds of that area, and by other means.’

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<sup>3</sup> Jurisdiction here means the power vested in a court by law to adjudicate upon, determine and dispose of a matter (*Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) at 256G).

<sup>4</sup> *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 486D; *Ewing McDonald* (above) at 257F-G.

<sup>5</sup> *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) at 211D-E.

<sup>6</sup> 1958 (1) SA 555 (A) at 562A-B.

This approach is based on the principle of effectiveness – the power of the court, not only to grant the relief claimed, but also to effectively enforce it directly within its area of jurisdiction.<sup>7</sup> It was on this basis that the court below assumed jurisdiction in the present matter.

[10] Many years ago, in *Palm v Simpson*<sup>8</sup> it was held that even though the defendant was not resident within the area over which the court exercised jurisdiction and no property of his had been attached to found jurisdiction for an action claiming from him the contract price of land he had purchased, the fact that the land was situated in that area constituted a sufficient basis for the court to assume jurisdiction over a claim for rescission of the contract of sale. That decision was approved by this court in *Sonia v Wheeler*, referred to above, on grounds of ‘principle, convenience and common sense’.<sup>9</sup> In so approving Price AJA observed that:

‘*Palm’s* case recognises what is a patent fact that the Court of the *situs* is the best-equipped Court to deal with matters relating to land situated within its territorial jurisdiction.’

[11] In *Sonia v Wheeler* the property in question was situated in East London, within the area of the Eastern Districts Local Division (EDLD); the contract for the sale of the property had been entered into in the Orange Free State and the purchase price was payable in the Transvaal where the defendant was resident. The plaintiff sought an order in the EDLD cancelling the contract on the ground of fraudulent misrepresentation and also for a refund of the purchase price. This was a money claim, as in the instant case. The defendant was not susceptible to the court’s jurisdiction on any of the usual grounds of jurisdiction for a claim of this

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<sup>7</sup>*Estate Agents Board v Lek* 1979 (3) SA 1048 (A) at 1063H.

<sup>8</sup> (1848) 3 M 565.

<sup>9</sup>1958 (1) SA 555 (A) at 562C-D.

nature. Despite this, this court upheld the finding of the lower court that the plaintiff was entitled to institute the action in the EDLD solely on the basis that the property was situated there. It was however contended by the defendant that even if the EDLD had jurisdiction to order the cancellation of the contract, its jurisdiction did not extend to the money claims for the refund of the purchase price. It was argued in other words that if the money claim stood alone and there was no claim for cancellation, the court would not have jurisdiction. In rejecting this contention Price AJA said the following:

‘Assuming this to be so, assuming that the Eastern Districts Court could not entertain a claim for a refund of the purchase price if that claim stood alone, it nevertheless seems to me that every consideration of convenience and common sense indicates that where such a money claim is as closely associated with a claim for cancellation of the contract, as in this case, and is a consequential claim, following on the cancellation, the same Court which has jurisdiction to decree cancellation should have jurisdiction to hear the money claim for a refund of the purchase price, and to order costs.’<sup>10</sup>

[12] In relation to cases involving the transfer of immovable property it is also a sufficient basis for jurisdiction if the property is situated within the area over which a high court exercises jurisdiction. It is therefore not necessary for a high court to have power over the defendant, or for the cause of action to have arisen there for a court to entertain a claim for the transfer of immovable property situated within the division.<sup>11</sup> Such jurisdiction is however not exclusive.<sup>12</sup>

[13] Thus, as the cases in the preceding paragraphs demonstrate, provincial divisions have exercised jurisdiction in matters involving the rescission or

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<sup>10</sup>1958 (1) SA 555 (A) at 562F-H.

<sup>11</sup>See David Pistorius *Pollak on Jurisdiction* 2 ed p 91.

<sup>12</sup>*Ward v Burgess & another* 1976 (3) SA 104 (TK) at 107B-C; *Hugo v Wessels* 1987 (3) SA 837 (A) at 857C-F.

cancellation of an agreement,<sup>13</sup> or the transfer of immovable property where the property is situated within their area of jurisdiction, even where none of the other traditional jurisdictional factors were present. Their rationale for so doing is that they exercise effective control over the property, that there is a close association between the property in question and the cause of action and also on grounds of ‘convenience and common sense’.<sup>14</sup> And as was said in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*,<sup>15</sup> the main objective for the assumption of jurisdiction in such cases is to avoid a proliferation of proceedings.

[14] Recently in *Geyser v Nedbank Ltd: In re Nedbank Ltd v Geyser*,<sup>16</sup> which appears to be the only reported case dealing with the issue we are concerned with (whether a high court is competent to exercise jurisdiction over a matter on the basis only that the hypothecated property in question is situated within its area of jurisdiction) Van Oosten J found that it was. He reasoned that:

‘. . . the property, quite apart from its executability, has another relevance for purposes of founding jurisdiction. It undoubtedly played an integral if not vital part in the loan transaction which . . . constituted the basis for the bank’s cause of action. It was obviously on the strength of the security of a first mortgage bond that the loan was granted to the applicant . . . It is accordingly my finding that the *situs* of the hypothecated property constitutes a jurisdictional connecting factor giving rise to the jurisdiction of this court.’<sup>17</sup>

I respectfully agree with and adopt his reasoning. It is apparent that there is a close association not only between the hypothecated property and the nature of the proceedings ie, for payment of money arising out of loan agreement, but also between the nature of the consequential relief, for the hypothecated property to be

<sup>13</sup>On the distinction between rescission and cancellation, see RH Christie *The Law of Contract In South Africa* 5 ed p 539.

<sup>14</sup>See *Sonia v Wheeler* 1958 (1) SA 555 (A) at 562F-H.

<sup>15</sup>2005 (6) SA 205 (SCA) at 211D-H.

<sup>16</sup>2006 (5) SA 355 (W).

<sup>17</sup>See *Geyser v Nedbank* 2006 (5) SA 355 (W) at para 11.



declared executable, and the cause of action.<sup>18</sup> The decision by the court below to assume jurisdiction over this matter is therefore consistent with the approach taken in the cases referred to above.

[15] There is another reason why I think it was competent for the court below to have exercised jurisdiction over this matter. The facts show that the matter commenced in the Pretoria High Court where the appellant objected to the jurisdiction of that court. Appellant concedes that the objection was ill-founded. It was however a consequence of this objection that the respondent thereafter instituted proceedings in the court below and only shortly before the trial was to commence, and pleadings had closed, that the respondent again objected to its jurisdiction. Apart from the fact that the appellant has an insurmountable hurdle to overcome before he can escape the inference that by his conduct he had acquiesced in the court's jurisdiction,<sup>19</sup> I think that every consideration of convenience and common sense required the court below to assume jurisdiction over the matter. This conclusion makes it unnecessary to deal with the issue of the waiver any further.

[16] It follows that the appeal must fail. The following order is made:

The appeal is dismissed with costs.

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**A CACHALIA**

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<sup>18</sup>See *Estate Agents Board v Lek* 1979 (3) SA 1048 (A) at 1063F-G.

<sup>19</sup>*Purser v Sales; Purser & Another v Sales and Another* 2001 (3) SA 445 (SCA) paras 15-18.

**JUDGE OF APPEAL**

**CONCUR:**

**HARMS ADP**

**HEHER JA**

**SNYDERS AJA**

**THERON AJA**