THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO: 550/2003

In the matter between

LUCKY ARTHUR NDLOVU **APPELLANT**

and

SANTAM LIMITED **RESPONDENT**

CORAM: **ZULMAN, CAMERON, MTHIYANE, LEWIS JJA and COMRIE AJA**

HEARD: **18 MARCH 2005**
DELIVERED: **13 MAY 2005**

Summary: **Jurisdiction of a magistrate's court in terms of s 28(1)(d) of Act 32 of 1944 - dismissal of special plea to jurisdiction under the section is appealable – unaccepted repudiation of contract is not a material fact to be proved by a party suing on contract.**

JUDGMENT

MTHIYANE JA:

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[1] The appellant's private residence in Witpoortjie, Roodepoort was broken into on 17 October 1997 and his household contents and personal effects (household goods) to the value of R101 986 were stolen. At the time of the incident the appellant had a policy of insurance with the respondent, an insurer, to cover his household goods against the risks mentioned in the policy, one of which was theft. The appellant claimed indemnity under the policy but the respondent did not pay, for reasons that are not relevant for present purposes. Consequently the appellant instituted action in the magistrate's court for the district of Roodepoort for payment of R100 000. The respondent filed a special plea objecting to the court's jurisdiction. It contended that it did not have a registered office or principal place of business within the district of Roodepoort and that the appellant's cause of action had not arisen within that district as contemplated in s 28(1)(d) of the Magistrate's Court Act 32 of 1944 (the Act).[1]

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[1] Magistrates' Courts Act 32 of 1944 s 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 –

…

(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;

…'

[2] At the request of the parties the jurisdiction point raised in the first special plea was adjudicated upon separately in terms of rule 19(12)[2] of the Magistrates Courts' Rules ('the Rules'). A special plea of prescription taken by the respondent stood over for determination at a later stage. The appellant was called to give evidence to prove that his cause of action had arisen within the magisterial district of Roodepoort. He testified that at the relevant time there was a policy of insurance with the respondent; that the policy had been taken out in Roodepoort; and that the break-in and theft and the subsequent loss of his household goods had occurred at his residence in Witpoortjie, Roodepoort. The respondent did not dispute the appellant's evidence and did not lead any evidence. After hearing evidence and argument the magistrate reserved judgment. On 23 March 2002 the special plea was dismissed and reasons therefor were handed down on 28 March 2002.

[3] The respondent successfully appealed to the Johannesburg High Court (Schwartzman and Masipa JJ). The court upheld the special plea, set aside the magistrate's order and replaced it with an order dismissing the appellant's action with costs. The question of the appealability of the magistrate's order was not raised initially in the court *a quo* and Masipa J,

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[2] The rule provides:
'. . . Any defence which can be adjudicated upon without the necessity of going into the main case may be set down by either party for a separate hearing upon 10 days' notice at any time after such defence has been raised'.

who wrote for the court, dealt only with the appeal as to jurisdiction. Appealability was raised for the first time during the hearing of the application for leave to appeal. Schwartzman J held that the magistrate's order that he had jurisdiction was clearly appealable. The point was disposed of, so everybody thought, at that stage when the application for leave to appeal was refused. However at the commencement of argument in the appeal before us (leave for which this court granted), the point was revived when counsel for the appellant indicated that appealability had been incorrectly conceded before Schwartzman J. Counsel submitted that since making the concession he had become aware of a judgment of the Cape High Court in *Robbetze en 'n ander v Garden Route Resort Services BK*.[3] In *Robbetze* Thring J (Meer J concurring) held that the dismissal of the special plea by a magistrate was not appealable as it was not a rule or order having the effect of a final judgment as contemplated in s 83(b) of the Act.

[4] The concession made was one of law, which counsel was entitled to withdraw as it was made on a mistaken view of the law. We accordingly heard argument on the point.[4] There was no objection by the

[3] 2004 (4) SA 406 (C).
[4] See *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) para 44.

respondent and we allowed both counsel to present written argument on appealability.

[5] In this court there are now two issues to be considered: the question of the appealability of the order dismissing the special plea and whether the appellant's cause of action arose within the magisterial district of Roodepoort. I deal with the two points in turn.

[6] First, appealability: relying on the decision of this court in *Steenkamp v SABC*[5] counsel for the appellant submitted that the order made by the magistrate was not appealable as it was not a rule or order having the effect of a final judgment as contemplated in s 83(b) of the Act. This argument was rejected by Schwartzman J who found that the decision in *Steenkamp* did not assist. After considering *Steenkamp* and *Durban's Water Wonderland (Pty) Ltd v Botha and Another*[6] (to which reference is made in *Steenkamp*), the learned judge concluded that the defence raised in the special plea existed independently of the appellant's case. The judge reasoned that if the defence stood alone, and if it had been dismissed, the magistrate would have granted judgment for the

[5] 2002 (1) SA 625 (SCA).
[6] 1999 (1) SA 982 (A).

appellant. Consequently, he held that the special plea had every hallmark of a final judgment and was therefore appealable.

[7] In this court counsel for the respondent also relied on the decision in *Robbetze*. In that case the defendants raised a special plea in a civil trial before a magistrate's court that the particular court did not have jurisdiction to adjudicate the matter. After hearing evidence and argument the magistrate dismissed the special plea. After discussing *Steenkamp* amongst others, Thring J held that the decision of a magistrate dismissing a special plea was not appealable as it was not a rule or order having the effect of a final judgment within the meaning of s 83[7] of the Act. The learned judge held that the magistrate's order was nothing more than a ruling of a mere procedural nature and the real issues between the parties relating to the merits of the plaintiff's case were not influenced by it. Thring J held further that the position was analogous to the situation in a delictual claim for damages where the defendant's liability towards the plaintiff was dealt with separately and prior to the issue of *quantum* in

[7] Section 83 reads:
'Appeal from magistrate's court
Subject to the provisions of section 82, a party to any civil suit or proceeding in a court may appeal to the provincial or local division of the Supreme Court [now High Court] having jurisdiction to hear the appeal, against –
(a) . . .
(b) any rule or order made in such suit or proceeding and having the effect of a final judgment…'

terms of Rule 29(4).[8] In such a case, this court held in *Steenkamp*, the magistrate's ruling on liability is not appealable.

[8] In my view Thring J went further than *Steenkamp* and the correctness of the decision in *Robbetze* cannot be accepted. In *Steenkamp* the court dealt with an appeal from a decision of a magistrate in a delictual claim for damages where the issues of liability and quantum had been separated in terms of rule 29(4). Steenkamp did not deal with a defence raised entirely outside the claim. The defence raised in the present matter is independent of the appellant's claim. It concerns not the elements of the claim, but the competence of the court to determine it – jurisdiction. If the plea as to jurisdiction had been upheld it would have disposed of the matter finally as contemplated in s 83(b) of the Act. The decision in *Robbetze* may be taken to suggest that *Steenkamp* is to be understood as having laid down that in every case where the issues have been separated in a magistrate's court pursuant to either rules 29(4) or 19(12), an order made subsequently would not be appealable simply because of the separation. I do not think that this is correct. In my view the question as to whether an order issued by a magistrate is appealable to

[8] This rule provides:
'If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall at the request of any party make such order unless it appears that the questions cannot conveniently be decided separately.'

be is answered by reference to the order itself. Upon examination of the order one determines whether it has the effect of a final judgment as provided in s 83(b). In the present case, the issues were not separated as such: what the court did was to determine first the validity of a challenge to its competence to hear the claim at all.

[9] Finality of orders is a question that has been discussed by this court with respect to a 'judgment or order' made under s 20(1) of the Supreme Court Act 59 of 1959. In *Zweni v Minister of Law and Order*[9] it was said that an order that is final in effect has three attributes: first, the decision must be final in effect and not susceptible to alteration by the court that made it; second, it must be definitive of the rights of the parties; and third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.[10] In deciding whether an order made by a magistrate is final in effect there is in my view no sound reason in principle not to follow and apply the approach referred to in *Zweni*. In *Durban's Water Wonderland (Pty) Ltd v Botha and Another*[11] Scott JA appears to have done so when considering whether the orders made by the magistrates in *Santam Bpk v Van Niekerk*[12] and *Raubex*

[9] 1993 (1) SA 523 (`A) at 532J–533A.
[10] See also *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 532J–533A.
[11] 1999 (1) SA 982 (SCA) at 992G-H.
[12] 1998 (2) SA 342 (C).

Construction (Pty) Ltd h/a Raumix v Armist Wholesalers (Pty) Ltd en 'n Ander[13] were final in effect. That is to be deduced from the following:

'In terms of s 83(b) of the Magistrates' Courts Act 32 of 1944 any "rule or order", to be appealable, has to have "the effect of a final judgment". The difficulty that arises in relation to the kind of order considered in the *Santam and Raubex Construction* cases is that it does not finally dispose of any portion of the relief claimed.'

The 'relief claimed' referred to in the passage quoted is not to be understood to be confined to the relief claimed by the plaintiff/applicant. It also includes the relief claimed by the defendant/respondent, more particularly where the defence (such as prescription or lack of jurisdiction) arises entirely outside the cause of action. Thus in *Durban's Water Wonderland* a contractual disclaimer of liability, pleaded in response to a delictual claim for damages, was held to fall within this category.[14] Indeed in *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk*[15] Hefer JA pointed out that it is not just the relief claimed by the plaintiff/applicant that matters, but also the relief claimed by the defendant/respondent. There the respondents *a quo* (appellants on appeal) relied on certificates issued under the Agricultural Credit Act as a bar to liquidation proceedings. This defence in my view in effect went to jurisdiction. The court *a quo* ruled finally on this issue, dismissing the defence. This court held that the judgment of the court *a*

[13] 1998 (3) SA 116 (O).
[14] See *Constantia Insurance Co Ltd v Nohamba* 1986 (3) SA 27 (A) at 36B-H.
[15] 1994 (3) SA 407 (A) at 415B-416A; *cf Steytler NO v Fitzgerald* 1911 AD 295 at 304, 313.

quo was final and appealable. (The appeal failed on the merits.) It follows therefore that if the magistrate's order has the effect of finally disposing of some of the relief claimed by one of the parties[16] the third attribute referred to in *Zweni* is met and the order is appealable.

[10] It is apparent from what I have said that the present matter is quite different from *Steenkamp*, and the reasoning in *Robbetze* cannot in my view be supported. The respondent's defence raising lack of jurisdiction in the present matter was a defence that existed independently of the appellant's case. As to this type of defence the following was said in *Labuschagne v Labuschagne*[17] cited with approval by Scott JA in *Durban's Water Wonderland (Pty) Limited v Botha and Another*[18]:

'. . . this Court held that an order dismissing a special plea embodying a substantive defence which existed *dehors* the plaintiff's claim was a "judgment or order" and not an "interlocutory order" within the meaning of s 20 of the Supreme Court Act 59 of 1959 (as it then read) as the order was, . . .'"'n finale en onherstelbare afhandeling van 'n selfstandige en afdoende verweer wat eerste verweerder geopper het as grondslag vir die regshulp wat hy in die spesiale pleit aangevra het."'

As I have said in *Durban's Water Wonderland* the defendant had raised a disclaimer based on contract in a delictual action. The magistrate dismissed the defendant's defence in relation to the disclaimer. Scott JA

[16] *Constantia Insurance Co Ltd* at 36E.
[17] 1967 (2) SA 575 (A).
[18] 1999 (1) SA 982 (SCA) at 992(j)–993(d).

said that to the extent that the order of the magistrate dismissing the appellant's defence in relation to the disclaimer had the effect of finally and irreversibly disposing of a self contained defence which existed independently of the respondent's case the order was appealable. I agree with Schwartzman J that the decision in *Steenkamp*, which as I have said is different, does not assist the appellant. I also agree with the learned judge that the respondent's special plea had every hallmark of a final judgment and was therefore appealable.[19] *Robbetze* is accordingly overruled.

[11] I turn to the merits of the special plea. The respondent's main contention is that it repudiated liability in Krugersdorp. It says so because its letter repudiating liability was posted in Krugersdorp and was delivered to the appellant's broker in Krugersdorp. The respondent argues that the appellant's claim is based on repudiation and since this took place in Krugersdorp, the magistrate for the district of Roodepoort had no jurisdiction to adjudicate.

[12] In her reasons for judgment the magistrate, Ms Pienaar, found that all the elements necessary to prove that the 'whole cause of action' arose within the district of Roodepoort as contemplated in s 28(1)(d) of the Act

[19] See also *Malherbe v Britstown Municipality* 1948 (1) SA 676 (C).

had been established. The appellant was resident in Witpoortjie, Roodepoort; the contract of insurance was concluded in Roodepoort; and the event giving rise to the claim - the break-in and the theft – took place at his residence in Roodepoort. The magistrate concluded that it was these *facta probanda* that were essential to establish the appellant's cause of action and not the repudiation of liability relied on by the respondent. The magistrate followed and applied *African Guarantee & Indemnity Co Ltd v Couldridge*[20] in which it was said:

'It seems to me that there were two facts necessary to be proved to support the plaintiff's action, (a) a contract of insurance and (b) the occurrence of a risk insured against, involving damage to the insured motorcar. As to (b) the fire which destroyed the motor car occurred within the district of Uitenhage, but this, by itself, would not be sufficient to give the magistrate jurisdiction. It is only one of the elements going to make up the cause of action, and unless the other element also arose within the district, it would not be said that the cause of action arose wholly within the district.'

[13] Masipa J declined to follow and apply *African Guarantee* which she distinguished on the facts. The learned judge found that the appellant had 'instituted action [against the respondent] . . . because of the repudiation'. She said that the appellant had alleged *a refusal to indemnify* and thus a repudiation by the respondent. To succeed, said the judge, the appellant 'had to prove that the repudiation (breach) took place

[20] 1922 CPD 2 at 4.

within the jurisdiction of the court. Since the repudiation took place in Krugersdorp the learned magistrate should have found that the court [in Roodepoort] had no jurisdiction to hear the matter.'

[14] In my view the starting point of the enquiry, when dealing with a challenge to jurisdiction under s 28(1)(d) of the Act, is to determine the presence or absence of facts which have to be proved by a plaintiff to succeed in his or her cause of action (*facta probanda*) as opposed to facts tending to prove such *facta probanda* (*facta probantia*). Thereafter one has to establish whether the *facta probanda* arose wholly within the particular magesterial district. In the present matter the appellant did not accept the respondent's repudiation and sued the respondent for specific performance on the agreement. It follows therefore that the repudiation was not a material fact which the appellant had to prove to establish his cause of action. The fact that the repudiation might may have taken place outside the district of Roodepoort is accordingly irrelevant. The repudiation was therefore merely 'a thing writ in water'.[21]

[15] Masipa J considered herself bound to follow and apply *Erasmus v Unieversekerings-Adviseurs (Edms) Bpk*,[22] a judgment of Bresler J

[21] See *Culverwell & Anoher v Brown* 1990 (1) SA 7 at 28B-F; see also the remarks of Asquith LJ in *Howard v Pickford Co Ltd* [1951] 1 KB 417 [CA] at 421.
[22] 1962 (4) SA (T) 646 at 648H-649A.

concurred in by Snyman J. There, the cause of action appears to have been a claim for payment (by Erasmus) of a premium disbursed by Unie on his behalf to the insurance company. The contractual basis seems to have been the promise by Erasmus to refund such disbursements. What the plaintiff (Unie) had to prove, therefore, for jurisdictional purposes, were the following *facta probanda*:

(i) that the promise was given within the jurisdiction;

(ii) that the disbursement was made within the jurisdiction; and

(iii) that the refund was payable within the jurisdiction.

Requisites (ii) and (iii) appear to have been met. Requisite (i) was open to debate. However, Bresler J brought in the idea of a breach (at 649D-E) relying on Phipson, who apparently was dealing with breach and damages. However, what *Unie* seems to have claimed was specific performance.

[16] A failure specifically to perform, properly and on time, constitutes breach of contract. This, I believe, may be the source of confusion. So characterised, the enquiry for purposes of jurisdiction remains: Where should the defendant, in terms of the contract, have performed? If, as would seem to be the case, Erasmus had to pay Unie in Pretoria, then that

is where he had to perform and where his breach (failure to pay/perform) occurred.[23]

[17] Where Bresler J erred, with respect, was to couple breach with repudiation, and then to hold that the repudiation took place in Waterberg. Erasmus's refusal to pay and his denial of the whole contract were in my view part of the *facta probantia*. Once Unie had established the underlying contract, a disbursement in accordance with the terms thereof, and Erasmus' *failure* to pay (which was surely admitted on the pleadings), Unie's cause of action was complete. That the evidence revealed that the failure was coupled, on the facts, with a refusal to pay pursuant to a complete repudiation, does not change the analysis. These facts were simply evidence: *facta probantia*. In *McKenzie v Farmers' Co-operative Meat Industries Limited*[24] this court said in relation to a statutory provision defining the geographical limits of the jurisdiction of a magistrate's court, 'cause of action' meant 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact, which is necessary to be proved.' To the extent that Bresler J held otherwise, I

[23] *Cf Patel v Desai* 1928 TPD 443 at 449-450.
[24] 1922 AD 16 at 23; see also *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) at 328G-H; *Dusheiko* at 656G-H; *Herholdt v Rand Debt Collecting Co* 1965 (3) SA 752 (T) at 754 A-D.

think that he erred and his decision in *Erasmus* is incorrect. I can well understand the importance for jurisdictional purposes of the place of the breach,[25] but in my view the repudiation relied on by the respondent was not material; it did not form an integral part of the appellant's cause of action; it was not one of the *facta probanda* on which the appellant relied and it did not prevent the cause of action from arising wholly in the district of Roodepoort. To the extent indicated above *Erasmus* is overruled.

[18] The appeal is accordingly upheld with costs. The order of the High Court is set aside. In its place there is substituted:

'The appeal is dismissed with costs.'

KK MTHIYANE
JUDGE OF APPEAL

CONCUR:

ZULMAN JA
CAMERON JA
LEWIS JA
COMRIE AJA

[25] *Cf Dusheiko v Milburn* 1964 (4) SA 648 (A).