THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO. 422/2004

In the matter between

DAVID LEIBOWITZ t/a LEE FINANCE **Appellant**

and

A T MHLANA AND OTHERS **Respondents**

CORAM: MPATI DP, STREICHER, LEWIS, VAN HEERDEN and JAFTA JJA

HEARD: 16 NOVEMBER 2005

DELIVERED: 1 DECEMBER 2005

Summary: Jurisdiction – s 19(1)(a) & (b) of the Supreme Court Act 59 of 1959 – meaning of 'causes arising' – meaning of principal place of business – submission to jurisdiction.

JUDGMENT

JAFTA JA

[1] This appeal concerns the jurisdiction of a high court. The first to eighth respondents ('the respondents') instituted an application in the Transkei High Court for an interdict against three insurance companies and the appellant. The appellant raised an objection in *limine* to the court's jurisdiction. The court of first instance (Maya J) ruled that it had no jurisdiction and dismissed the application with costs. The respondents appealed to the full court which held that the court of first instance had jurisdiction, dismissed the appellant's point in *limine* with costs and referred the matter back to the court of first instance to deal with the merits of the application. The present appeal is against the latter order with the leave of this court.

[2] The background facts are briefly these. The appellant is a businessman residing in Durban. In 1997 he carried on a moneylending business in that city. The respondents are teachers in the Transkei where they also reside. In 1997 they applied, in Durban, for loans of small sums of money from the appellant. As was the practice in the appellant's business, he required that insurance policy contracts be attached to such

applications as security. The respondents complied with this requirement and later on they were granted loans.

[3] In January 2001 the respondents brought an urgent application against the appellant and the insurance companies for an order restraining them from facilitating or assisting in the cession, surrender or utilisation of the policies that have a connection with the appellant; declaring that purported cessions, surrenders, sureties and other contracts relating to these policies are null and void; and directing that the insurance companies release from cession and reinstate policies that had been surrendered or utilised by the appellant. The case of the respondents is that they never ceded their policies to the appellant and that they never gave him authority to cede, surrender or utilise the policies. They contend that his actions in this regard were fraudulent and it is on this basis that the order was sought.

[4] As previously stated, the appellant resides in Durban, carried on business and came into possession of the policies in Durban. The contracts relating to the policies were concluded in Durban. The insurance companies have their principal places of business in either Durban or Cape Town. Counsel for the respondents submitted that the court of first instance had jurisdiction because payment in terms of the agreements of loan had to be collected in the Transkei. However, in the light of the respondents' cause of action the place where payment in respect of the loans had to be

made is irrelevant. In any event the acknowledgments of debt in respect of the loans expressly provided that payment had to be made in Durban.

[5] All the actions concerned took place or may in future take place in either Cape Town or Durban in respect of policies which were handed to the appellant in Durban. In these circumstances the court of first instance, in so far as the appellant was concerned, could only have had jurisdiction if he had consented to the jurisdiction of the court or, in terms of s 19(1)(b) of the Supreme Court Act 59 of 1959 ('the Act') if the appellant had been joined to legal proceedings in respect of which the court of first instance had jurisdiction. The latter would be the case if the insurance companies had their principal places of business within the area of jurisdiction of the court or if the insurance companies submitted to the jurisdiction of the court.

[6] Subsections 19(1)(a) and (b) of the Act provide:

'19(1)(a) A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising . . . within its area of jurisdiction and all other matters of which it may according to law take cognizance . . .

(b) A provincial or local division shall also have 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 provincial or local division 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 provincial or local division.'

[7] In *Gulf Oil Corporation v Rembrandt Fabrikante en Handelaars (Edms) Bpk* 1963 (2) SA 10 (T) at 17D-H Trollip J stated that 'cause' means an action or legal proceeding (not a cause of action) and that 'a cause arising within its area of jurisdiction' means 'an action or legal proceeding which, according to the law, has duly originated within the Court's area of jurisdiction'. Further support for this interpretation is to be found in the Afrikaans text of s 19(1)(a) and (b) where the words 'gedinge wat . . . ontstaan' and 'geding met betrekking waartoe' are used as the Afrikaans equivalent for 'causes arising' and 'cause in relation to which'. Trollip J concluded:

'The result is that the Court's jurisdiction under sec. 19(1) is simply determined, as hitherto, by reference to the common law and/or any relevant statute.'

This statement is quoted with approval in *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 486H-J.

[8] The court a quo held that the insurance companies as well as the appellant submitted to the jurisdiction of the court of first instance by reason of the fact that they were parties to other proceedings in the High Court, Transkei. The court a quo erred in this regard. The fact that a court has jurisdiction in respect of certain legal proceedings does not confer jurisdiction on such a court in respect of other legal proceedings. The onus of proving submission was on the respondents. They failed to make out any case whatsoever that either the appellant or the insurance companies

submitted to the jurisdiction of the court of first instance. The mere failure to oppose an application, as in the case of the insurance companies, does not constitute submission to the court's jurisdiction (see *Du Preez v Philip-King* 1963 (1) SA 801 (W) at 803A-H) and *Girdwood v Theron* 1913 CPD 859 at 862).

[9] The court a quo also held that the court of first instance had jurisdiction over the insurance companies by reason of their principal places of business being within the Transkei. In *Bisonboard* at 499C-D this court held that a company resides at its registered office as well as its principal place of business. Relying on *Federated Insurance Co Ltd v Malawana* 1986 (1) 751 (A) the court a quo held that where a company has a branch office within the jurisdiction of the court that place should be regarded as its principal place of business for purposes of jurisdiction. However, in *Malawana* this court interpreted rule 4(1)(a)(v) in terms of which service of a summons on a company 'shall be effected . . .by delivering a copy . . . at its principal place of business within the Court's jurisdiction' (758I-J and 762A-E). It held that Federated Insurance's branch office in East London was its principal place of business within the jurisdiction of the court concerned (762F). However, there is a vast difference between 'a company's principal place of business' and 'a company's principal place of business within the court's jurisdiction'. The principal place of business of a company for jurisdictional purposes is the

place where the central control and management of a company is situated (*Bisonboard* at 496C). The court a quo, therefore, erred in holding that the court of first instance had jurisdiction over the insurance companies by reason of their principal places of business being situated within the Transkei.

[10] The appeal record was overburdened with material which was wholly unnecessary for the adjudication of the present appeal. This material consists of heads of argument filed in the court below, papers in the application for leave to appeal and other documents. Such documents constituted approximately half of the record placed before us. It was the duty of the appellant's attorneys to ensure that such documents were excluded from the record as required by Rule 8(9). That they failed to do and there is no explanation for the breach. In the light of repeated warnings issued by this court in the past (*Salviati & Santori (Pty) Ltd v Primesite Outdoor Advertising* 2001(3) SA 766 (SCA) and *Zulu and Others v Majola* 2002(5) SA 466 (SCA) at 470B-E), I consider it appropriate to limit the costs to which the appellant is entitled for the preparation of the record to 50 per cent.

[11] On 15 September 2005 the hearing of this appeal was postponed at the request of the respondents. They had failed to file heads of argument and their counsel was not ready to argue the matter. We were then informed by counsel that the respondents were not aware of the date of the

hearing because they had not received the notice of set down. As a result counsel was only instructed on the previous day to draw heads of argument and to appear for them.

[12] On granting the postponement this court ordered that the respondents' attorneys should furnish an explanation for their unreadiness and show why they should not be held liable for the costs of the postponement. In his affidavit Mr Edward Bikitsha (the respondents' attorney) states, contrary to what we were told on 15 September, that he received the notice of set down. The only explanation he now furnishes for the respondents' state of unpreparedness is that he had not received the appellant's heads of argument.

[13] Although the respondents' attorney was, on his own admission, aware of the date of hearing he took no steps in preparation for it. He had appointed correspondent attorneys in Bloemfontein for, inter alia, receiving documents served. He did not enquire whether the heads had been delivered there, even after the appellant's attorneys had, by a letter dated 9 September, asked for the respondents' heads. He only made such enquiry after he was advised by the appellant's attorneys that such heads had been delivered. The fact that the appellant's heads had not been delivered to him, in Mthatha, cannot be an excuse for taking no steps at all. In my view, his failure to act amounted to gross neglect of his professional responsibilities. The attorney's tardiness is aggravated by the conflicting reasons furnished.

It is clear that this court was misled during the hearing of the application for postponement which resulted in wasted costs. The blame for such costs lies entirely on the respondents' attorney. It would be unfair to expect the respondents to bear any part of those costs. I consider it proper to order that the respondents' attorney must pay such costs *de bonis propriis* and on the scale as between attorney and client.

[14] The following order is made:

1. The appeal is upheld with costs, save that the appellant is entitled to only 50 per cent of the costs of preparing the record.

2. Bikitsha and Associates are ordered to pay the costs of the postponement on 15 September 2005 *de bonis propriis* and on the scale as between attorney and client.

3. The order of the court *a quo* is set aside and replaced with the following order:

   'The appeal is dismissed with costs.'

C N JAFTA
JUDGE OF APPEAL

MPATI DP)
STREICHER JA) CONCUR
LEWIS JA)
VAN HEERDEN JA)