THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 160/10

In the matter between:

ZWELIBANZI UTILITIES (PTY) LTD

t/a ADAMS MISSION SERVICE CENTRE **Appellant**

and

TP ELECTRICAL CONTRACTORS CC **Respondent**

Neutral citation: *Zwelibanzi Utilities v TP Electrical Contractors* (160/10) [2011] ZASCA 33 (25 March 2011)

Coram: CLOETE, HEHER, SNYDERS, MAJIEDT JJA and PLASKET AJA

Heard: 8 March 2011

Delivered: 25 March 2011

Updated:

Summary: Magistrates' courts – practice – jurisdiction – objection to – cannot be raised after *litis contestatio.*

_

ORDER

On appeal from: KwaZulu-Natal High Court (Pietermaritzburg) (Gorven and Mnguni JJ sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

HEHER JA (CLOETE, SNYDERS, MAJIEDT JJA AND PLASKET AJA concurring):

[1] Heads of argument signed by counsel on behalf of the respondent were received in this appeal. But when the appeal was called in court senior counsel representing the appellant informed the court that the respondent's attorney had not received a notice of set-down (apparently due to a fault in the registrar's office) and that the attorney requested a postponement of the appeal as he wished his client to be legally represented.

[2] The court nevertheless heard the appeal, on the understanding that should it appear at any time before judgment that the respondent might be prejudiced, the matter would be postponed sine die and argued by both sides. Counsel for the appellant agreed to this procedure. The attorney was notified by the registrar that the appeal had proceeded on this basis and that judgment had been reserved. As will appear the respondent has not been prejudiced and this judgment is accordingly delivered.

[3] This appeal concerns the effect of a special plea to the jurisdiction of a magistrate's court first raised after *litis contestatio*.

[4] In August 2004 the respondent issued summons against the appellant in the magistrates' court at Durban for payment of the balance of an agreed price for the installation of certain electrical services. In June 2005 the appellant pleaded to the merits of the claim and filed a claim in reconvention seeking damages for breach of contract. Issue was joined after the respondent pleaded to the claim in reconvention in June 2005. During November 2006 the court declined an application by the appellant to deal

separately with its so-called 'special plea' based on an 'estoppel' and ordered that it be left for decision during the trial of the matter. In April 2007 the appellant gave notice of its intention to amend its plea by the addition of a special plea that the court lacked jurisdiction to try the action because the appellant neither resided nor carried on business within its area of jurisdiction. No written objection was delivered and the appellant formally amended its plea. The respondent replicated that the appellant had, both in convention and reconvention, appeared and taken no objection to its jurisdiction. The magistrate, asked to rule *in limine* on the special plea, dismissed it. He ruled that the defendant had acquiesced in the jurisdiction of the Durban court. On appeal the full bench of the High Court at Pietermaritzburg dismissed the appeal with costs and confirmed the magistrate's ruling. With its leave this appeal is before us.

[5] Section 28 of the Magistrates' Courts Act 32 of 1944 provides:

'(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-

. . .

(f) any defendant (whether in convention or reconvention) who appears and takes no objection to the jurisdiction of the court; . . .'

[6] The meaning of this provision was discussed in *William Spilhaus & Co (M.B.) (Pty) Ltd v Marx* 1963 (4) SA 994 (C) in the context of the common law and its legislative history. Van Winsen J was prepared to allow the possibility of a defendant being permitted to raise an objection to the jurisdiction even as late as the trial of the action (at 999A-D) but added (at 999D-E):

'In my view, however, if the defendant was aware of the facts, or must in all the circumstances be taken to have been aware of the facts, upon which a plea to the jurisdiction could have been founded, and he was so aware at the time that he filed his plea to the merits and he fails to plead to the jurisdiction of the court, he should not be accorded leave at a later stage to amend his plea so as to raise a defence to the jurisdiction. By failing with such knowledge, to file a plea to the jurisdiction of the court he must be taken to have assented to that court's jurisdiction, and he cannot thereafter be permitted to withdraw such assent. A sound basis for such rule is to be found in the common law authority, namely, that *litis contestatio* having been effected without the plea to the jurisdiction having been raised by the defendant, the latter must be taken to have assented to the court's jurisdiction. Moreover it accords with the balance of convenience between the parties

and similarly serves the convenience of the court.'

[7] Theron J was less inclined to indulge a late amendment which introduced a plea to the jurisdiction. He said (at 1001G-1002G):

'Leaving aside, for the moment, all questions as to whether the position has possibly been affected by any Rules promulgated to govern the practice and procedure in relation to a particular court, I can see no reason for thinking that our Courts in general would fail to give effect to the rule of the common law, as it is to be gathered from *Voet*, 2.1.20, as read with 2.1.18, 26 and 27, that a defendant who has pleaded to the plaintiff's main claim without objecting to the jurisdiction must, at any rate after the stage of *litis contestatio* has been reached, be considered to have bound himself irrevocably to accept the jurisdiction of the court – and this even in a case where his failure to raise the question of the jurisdiction might have been due to some mistake on his part. According to my understanding, an objection or plea to the jurisdiction has always been considered to be in a rather special position even amongst those pleas which are normally required to be taken *in initio litis*. Not only do our Roman-Dutch writers appear to allocate a special position to it, but so do modern authors. Thus in Beck *Theory and Principles of Pleading*, 2nd ed. at p. 132, one finds that the plea to the jurisdiction is the only plea described as a plea in bar; and in Pollak on *The South African Law of Jurisdiction* at p. 88, it is stated to be a defence which must be raised before any other plea. Bearing in mind the manifest inconvenience and wastage of costs which must almost inevitably result if a defendant were to be allowed to advance a defence so fundamental in nature as a plea declinatory of the jurisdiction for the first time after *litis contestatio* (and *a fortiori* after commencement of the very trial itself, as in the present case), it would therefore be surprising if the Courts were to fail to give full effect ─ wherever possible ─ to the rule propounded by *Voet*. In these days of rapid communication and ready facilities for journeying from one place to another there appears to be even better reason than in *Voet's* time for expecting a defendant to abide by a jurisdiction which he was initially prepared to accept when he pleaded to the plaintiff's claim on the merits. From a practical point of view and also as a question of legal principle there do not appear to be any considerations of any importance requiring the rule in question to be confined in its operation to the Superior Courts and not applied in statutory courts such as our magistrates' courts: it was certainly not so confined in *Voet's* day. It is interesting to note that there are decided cases in England (including cases dealing with the procedure in inferior, statutory courts) in which it has been held that a defendant residing outside the jurisdiction of a court which has material or "contingent" jurisdiction is not entitled to object to the jurisdiction of such court after entering upon the merits of an action instituted against him in it. It seems to me that these decisions are probably based ultimately on the same considerations of inconvenience and wastage of costs as I have

mentioned above and which, I think, underlie our common law rule.'

[8] In relation to whether the operation of the principles governing the prorogation of jurisdiction in the common law had been affected by the Magistrates' Courts Act or the Rules made under that Act, the learned judge examined the question in depth. He said *inter alia*,

'In my view the probability is that when the Legislature brought about this change – dropping the special rules and time limits which applied to special defences – from the position obtaining under Act 32 of 1917, it intended to leave the common law rules applicable to the prorogation of jurisdiction to hold full sway once more in the magistrate's court, in the same way as in the Supreme Courts.' (At 1003C.)

[9] In *Lubbe v Bosman* 1948 (3) SA 909 (O) Van den Heever JP enunciated the general principle of the common law that 'where a defendant without having excepted to the jurisdiction, joins issue with a plaintiff in a Court which has material jurisdiction, but has no jurisdiction over defendant because he resides outside the jurisdiction of that Court, the defendant is deemed to have waived his objection and so as it were conferred jurisdiction upon the Court'. The learned Judge referred to a number of common law authorities and then added (at 914, obiter, but it seems to me, correctly) that:

'This rule in regard to tacit prorogation of jurisdiction has not been altered in the rules and is incompatible with the notion that after joinder of issue without objection the plaintiff is still charged with the *onus* of proving that the court has jurisdiction'.

[10] In *Purser v Sales; Purser and Another v Sales and Another* 2001 (3) SA 453 (SCA) this Court was concerned with an appellant, who, while neither domiciled or resident in the United Kingdom at the time of commencement of proceedings in England, had, in an action instituted against him by service in South Africa, filed a plea on the merits and participated fully in the proceedings and then resisted enforcement of the judgment obtained against him in those proceedings on the ground that the English court was not a court of competent jurisdiction because he had not submitted to its jurisdiction. Mpati AJA referred to *Lubbe v Bosman*, *William Spilhaus & Co (MB) (Pty) Ltd v Marx* and *Voet* 2.1.18 and 19. He agreed with the conclusion of Theron J (at 1001H-1002A) in *William Spilhaus* that a defendant who pleads to the main claim without objecting to the jurisdiction must,

after *litis contestatio*, 'be considered to have bound himself irrevocably to accept the jurisdiction of the court' even when failure to raise the question of jurisdiction derives from a mistake on his part.

[11] The learned judge considered the interrelationship of submission and the principles of waiver, acquiescence and election and said (at 453H):

'A defendant who raises no objection to a court's jurisdiction and asks it to dismiss on its merits a claim brought against him is invoking the jurisdiction of the court just as surely as the plaintiff invoked it when he instituted the claim. Such a defendant does so in order to defeat the plaintiff's claim in a way which will be decisive and will render him immune from any subsequent attempt to assert the claim. Should he succeed in his defence, the doctrine of *res judicata* will afford him that protection. Should his defence fail, he cannot repudiate the jurisdiction of the very court, which he asked to uphold it. In my view the facts point overwhelmingly to the appellant having submitted to the jurisdiction of the English Court.'

[12] Of course, *Purser v Sales* had nothing directly to do with s 28(1)(f) of the Magistrates' Courts Act and the approval by the learned judge of the general principle of the common law in relation to the case before him does not of itself bind us in relation to the interpretation of the section or the preference accorded to the view of Theron J. Nevertheless I am persuaded by the reasoning of Theron J that his was the interpretation which accorded with the legislative intention and should be applied by us. There is the additional factor of the presumption that the legislature in enacting legislation intends to depart as little as possible from the common law; s 28(1)(f) contains no indication to the contrary. Indeed, in *Van Heerden v Muir* 1955 (2) SA 376 (A) at 379D-F Centlivres CJ, in relation to s 28(1), invoked the principle of construction which requires a statute 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 and continued:

'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 (para (f) of sec 28).'

[13] Furthermore the approach of Mpati AJA in *Purser's* case to the question of implied waiver finds direct resonance in the facts of this case. The appellant pleaded to the claim in the Durban court though it carried on business in Amanzimtoti. It pleaded to the merits

and asked the court to dismiss the case against it after adjudicating the merits. It chose not to plead to the allegation in the particulars of claim that it carried on business in Amanzimtoti but in a counterclaim filed on its behalf it repeated that allegation and asked the court to adjudicate its claim for damages and grant judgment in its favour. These were still the limits of the action when the pleadings closed. On the authorities to which I have referred and of which I have approved that was the end of any possible reliance on an absence of jurisdiction. And, I should have thought, the end of this appeal. That the appellant, after close of pleadings, sought a hearing on the validity of its estoppel defence simply compounded its difficulties.

[14] Appellant's counsel sought, however, to save his client's bacon by resort to the following argument. When the application for amendment was applied for (to introduce the special plea to the jurisdiction) the respondent did not oppose and the amendment was accordingly granted by consent. The consequence, so counsel submitted, was that the respondent was bound to submit to the trial of the merits of the jurisdictional plea. Counsel also contended that the effect of the amendment to the plea was retrospective in operation to the stage of the original plea, preceding the filing of the counterclaim and, therefore, negating the effects of the apparent reliance upon the jurisdiction of the court to decide the merits of the claim and counterclaim. These arguments are, however, specious.

[15] The appellant relied, in the first mentioned regard, on *Presto Parcels v Lalla* 1990 (3) SA 287 (E). It was there held, in relation to a special plea to the jurisdiction of the magistrate's court that:

'Once the pleadings have been amended, by what is in effect consent, and once the amendment has been incorporated therein, then the magistrate was obliged to hear the special plea on its merits and to adjudicate thereon. It is not open to a litigant who has consented to an amendment and allowed it to be incorporated in the pleadings thereafter to argue that the court should disregard it without going into the merits.' ('Merits', in the context, means 'the merits of the special plea'.) I respectfully disagree. The effect would be that a party who elects not to oppose an amendment of pleadings thereby waives his right to raise and rely on an argument that would otherwise have been open to him, in this case, in relation to the substance of the amendment, invocation of the terms of any subsection of s 28 which would meet the reliance on the special plea. There is in my view no logical or practical

reason why such an objection must be taken before the plea is amended or why it cannot with equal force be raised *in limine* after amendment and before its merits are traversed. With that alternative open to the litigant, the language of waiver, which is only appropriate to unequivocal conduct, is misplaced.

[16] That an amendment operates retrospectively is a procedural consequence. It does not affect accrued rights. So, for example, a right already extinguished by prescription cannot be revived by subsequent introduction of a claim by amendment. See *Cordier v Cordier* 1984 (4) SA 524C at 533B-C, 533F-G and *Churchill v Standard General Insurance Co Ltd* 1977 (1) SA 506(A) at 516G-517A. Nor can jurisdiction already vested by the appellant's failure to object to its absence before *litis contestatio* be rendered non-existent by subsequent amendment, as in this case. Since the establishing of jurisdiction in this manner gives rise to an objective fact without the intervention of the plaintiff in the action, the latter's inaction in opposing the amendment is of no consequence. Absence of jurisdiction on the ground that the defendant was a peregrinus in the magisterial area of Durban was no longer a potential issue in the case once it had been so established.

[17] The submissions I have addressed were reflected in the appellant's heads of argument, drafted by junior counsel. At the hearing Mr Kemp SC, leading for the appellants, without pressing or abandoning the arguments, added a further contention. This was, in short, that when the Magistrates' Courts Act 32 of 1944 was passed and the fixed time periods for raising an objection to the jurisdiction of the court under the 1917 Act were jettisoned, the legislature intended not to reinstate the common law but rather to regulate the pleading of objections to the jurisdiction according to the terms of s 111(1) of the new Act, which read then, and still reads, as follows:

'(1) In any civil proceedings, the court may, at any time before judgment, amend any summons or other document forming part of the record: Provided that no amendment shall be made by which any party other than the party applying for such amendment may (notwithstanding adjournment) be prejudiced in the conduct of his action or defence.'

Thus, so ran the argument, the objection to the jurisdiction could be raised by a defendant by way of an application for amendment at any time until judgment with the prospect that the court would grant the application. That, said counsel, was how the magistrate should have approached the application of the appellant.

[18] Section 111 is a procedural provision. It affirms the power of the court to entertain applications for amendments of, inter alia, pleadings at any time until judgment. It does not confer substantive rights on the parties. The fact that a court may grant an amendment does not mean that it must do so but merely that it has a discretion in the matter, to be exercised according to established principles. One such principle is that the discretion will not be exercised in the applicant's favour if the resulting amendment will be excipiable (for example, because it will be bad in law). Thus, if an objection to the jurisdiction is raised by the amendment but it is clear that jurisdiction does vest in the court the amendment will properly be refused: *Muller v Möller and Another* 1965 (1) SA 872 (C) at 877H-878A. Under the Magistrates' Courts Act 32 of 1917 s 105 provided in substantially similar terms ('the court may, at any time before judgment amend any summons or other document forming part of the record. . .') for the same procedural relief as s 111 has covered since the Magistrates' Court Act 32 of 1944 came into operation.

[19] Under the earlier statute, and despite the broad power conferred by s 105, the procedural right to amend at any time was curtailed by Order XIII r1 which laid down time limits within which objections had to made, in relation inter alia to an objection that the court sued in had no jurisdiction in respect of the defendant, although the court was vested with a residual discretion under r 1(2) 'on application after notice to the plaintiff' to allow such an objection to be raised. Order XIII was also concerned with procedure and a court approached to exercise the residual discretion would have been obliged to have regard to the substantive rights of the parties at the time the application was made.

[20] Section 28(1)(f) – in the same terms in the 1917 and 1944 Acts – as I have pointed out earlier, reflects the common law: *Van Heerden v Muir* at 379E-F; *Muller v Möller at 879B*.

[21] The effect of the common law relating to objections to the jurisdiction is stated by *Voet* 2.1.18 in these terms (Gane's translation):

'*Tacit consent may be in error. In this case* litis contestatio *required to complete jurisdiction.*—But if this has been clearly done in mistake, extension cannot be deemed to have taken place. In the case of a person under mistake all consent is entirely lacking. All the same the final supervening of

litis contestatio produces in the case of persons under mistake the same effect as the mere approach produces in the case of persons who know that yon magistrate has no jurisdiction and yet purposely approach him with a view to their suit. We must only add, as we said above, that approach has been made to a person to whom the parties are not forbidden to extend jurisdiction in yon matter by expressed intention also. I mean that law then supplies the want of that consent which is required for extension, in that it fictionally conceives that the legal proceeding creates a quasi-contract, and thus that consent has intervened by the very fact of *litis contestatio*, just as in other quasi-contracts also law presumes that a consent which is physically lacking has been present.'

And in 2.1.20, *A defendant summoned before an incompetent court against his will does not consent to the jurisdiction unless he joins issue*—

'So far we have dealt with the law of extension when together and voluntarily, whether with knowledge or in error, both plaintiff and defendant have approached an incompetent judge. But if the plaintiff has with a view to testing his right solemnly summoned an unwilling defendant before one who was not competent in that business, but was yet a fit subject for extension — then I consider that we must lay down one rule for the plaintiff and another for the defendant. As regards the defendant, he is only to be deemed to have extended the jurisdiction if he has joined issue by pleading to the plaintiff's main claim, and so has as it were made a quasi-contract with his opponent in a judicial proceeding, on the lines of what was said above.'

[22] It is clear from these passages that jurisdiction is established as an objective fact by the joinder of issue and is thereupon irreversible. A substantive right is thereby conferred on the plaintiff to pursue his action in the previously incompetent court without the threat that jurisdiction may be declined at the instance of the other party. This was a right which any court approached for an amendment under Order XIII r 1(2) would have been bound to recognise and give effect to. When Act 32 of 1944 was passed without the equivalent of r 1, any court to which application was made under s 111 would have been bound to do likewise. The common law as stated by *Voet* was not abrogated by either r 1 or s 105 although the opportunity to resort to it would seldom have occurred. Since Act 32 of 1944 has been in operation its relevance has continued to be the negation of pleas to the jurisdiction brought after *litis contestatio*.

[23] Resort to the terms of s 111 was accordingly of no help to the appellant's case. The magistrate was therefore correct to refuse the amendment sought by the appellant.

[24] It follows that the court a quo was correct in dismissing the appeal to it. This appeal is likewise dismissed with costs.

_____

J A Heher
Judge of Appeal

APPEARANCES

APPELLANT:	K J Kemp SC (with him E S Crots)
	Ngwenya & Zwane, Durban
	McIntyre & van der Post, Bloemfontein
RESPONDENT:	No appearance. (Heads of argument drafted by O A Moosa SC)
	Haralambous Attorneys, Durban North
	Claude Reid Inc, Bloemfontein