

SOUTH AFRICA / JUDGMENT

McLaren v Badenhorst and Others (CA 10/2010) [2010] ZAECGHC 42; 2011 (1) SA 214 (ECG) (2 June 2010) [2010] ZAECGHC 42

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Chetty, Makaula

CASE / FILE NUMBER

CA 10/2010

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

In the matter between: Case No: CA 10/2010

RAYNARD EDWARD McLAREN Appellant

And

PAUL CHRISTIAAN BADENHORST First Respondent

BAYPORT FINANCIAL SERVICES Second Respondent

CAPITEC BANK Third Respondent

WESBANK Fourth Respondent

CREDIT WORX Fifth Respondent

ELANDRE POTGIETER & ASSOCIATES Sixth Respondent

EAST CAPE DEBT ADMIN Seventh Respondent

LIFE LINE FINANCE Eight Respondent

MFC Ninth Respondent

Coram: Chetty J and Makaula AJ

Date Heard: 21 May 2010

Date Delivered: 2 June 2010

Summary: National Credit Act 32 of 2005 – Application by debt counsellor for rearrangement of consumer's obligations in terms of s 86 (7)

- (c) – Consumer neither resident in court's area of jurisdiction nor did cause of action arise within area of jurisdiction – Consumer signing consent to jurisdiction – Whether such conferring jurisdiction in terms of s 28 (1) (f) or s 45 of Magistrates' Courts Act 32 of 1944 – No jurisdiction conferred – Application properly dismissed for want of jurisdiction – Appeal dismissed

JUDGMENT

Chetty, J

- [1] The appellant is a debt counsellor whose services were procured by the first respondent for reorganisation of his financial commitments by reason of his over indebtedness. The debt review process was set in motion by the first respondent utilising the machinery created by s 86 (1) of the National Credit Act 1 (the NCA) Having satisfied himself that the first respondent was indeed in parlous financial circumstances and could not make due payments on his credit agreements, the applicant reasonably concluded that he was over indebted in terms of s 79 of the NCA and made a proposal to the second to ninth respondents vis-à-vis a restructuring of the first respondent's obligations. It is common cause that the credit providers' (the second to ninth respondents') rejection of the debt restructuring arrangements proposed by the appellant precipitated the referral to the court below.
- [2] Although it does not appear from the wording of s 86 (7) (c) that notice of the referral be served on credit providers, it follows implicitly from the wording of s 86 (8)
- (b) that the referral must be in the form of an application envisaged by Rule 55 2 of the Magistrates' Court Act (the Act)³. Consequently, save for those limited instances where an ex parte application is permissible, every application which affects any other person must be made on notice⁴. Although the applicant states that the first respondent's application to him was communicated to the second to the ninth

respondents in terms of s 86 (4) it does not appear ex facie the applicant's papers that the requirements relating to service of the application to the court below in terms of the Act have been complied with. The notice of application cites the second to the ninth respondents as respondent/credit providers but ex facie the notice of application, only the fifth to the ninth respondents/credit providers were given notice of the application by e-mail, the second, third and fourth respondents seemingly oblivious of the application. There can be no question that the second, third and fourth respondents are affected parties as envisaged by Rule 55 and the failure to effect service of the application on them is fatal to the success of the application. On that ground alone the appellant could have been non-suited. However, even assuming in favour of the

appellant that service of the application was effected on the second, third and fourth respondents, the magistrates' court in any event lacked jurisdiction to hear the application,

Jurisdiction

- [3] Magistrates courts' powers are limited to those specifically granted to them by an Act of parliament and particularly by the statute in terms of which they have been established, in casu, the Act. It is common cause that the presiding magistrate raised the lack of jurisdiction *mero motu*. Her entitlement to do so has been attacked on the basis that whilst it is a court's duty to *mero motu* have regard to illegality, even in the absence of it being pleaded, it is only permissible to do so where the illegality appears *ex facie* that which is presented to the court. The reasons underlying the dismissal of the appeal, adumbrated hereinafter, vindicate the magistrate's decision to have *mero motu* raised the jurisdiction issue, and her decision to do so cannot be faulted.
- [4] The legal principles pertaining to jurisdiction in civil matters in the magistrate's court are trite, the general rule regarding jurisdiction being *actor sequitur forum rei*. Generally speaking, an applicant must bring his/her application in the magistrates' court that has jurisdiction in respect of the person of the defendant. The appellant's contention that the court below had jurisdiction is predicated on two sections of the Act viz. s 28 (1) (f) and s 45(1). There is a clear overlap between the two sections. S 28 (1) (f) of the Act, under the rubric, "Jurisdiction in respect of persons" provides as follows:

"28 Jurisdiction in respect of persons"

- (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) ...
 - (b) ...
 - (c) ...
 - (d) ...
 - (e) ...
 - (f) any defendant (whether in convention or reconvention) who appears and takes no objection to the jurisdiction of the court;
 - (g)
- ..."

S 45(1) in turn provides as follows –

"[doja32y1944s45] 45 Jurisdiction by consent of parties"

- (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.”

Mr. Beyleveld who, together with Ms. Beneke, appeared on behalf of the appellant sought to persuade us that in terms of the aforequoted sections of the Act the court below was vested with the requisite jurisdiction.

- [5] The submission to, or consent envisaged in the aforesaid sections in the Act has evoked much confusion. Lamenting hereupon the learner author, A.C Beck, in an informative article⁵ titled, Magistrates’ Courts: Consent to jurisdiction, correctly attributes the confusion to the wording of the two sections. He states as follows:-

“With regard to the topic of consent, it must be stressed at the outset that its two fundamentally different aspects: subject matter and person should be kept clearly separate. Unfortunately s 45 of the Magistrates’ Courts Act (the Act) which deals with the question of consent, does not keep the two aspects separate and this has led to some confusion.

As a general rule, jurisdiction over persons is limited absolutely to s 28 of the Act and the court will have jurisdiction over persons not under its jurisdiction who consent to those specific proceedings in writing. Jurisdiction as a subject matter is regulated by s 29 but subject to the provisions of s 46, it is always possible to give a general consent in writing to the jurisdiction of the magistrates’ court.”

and further

“The consent referred to in s 45 (1) is a consent to subject matter, but in the proviso it is extended to a consent to personal jurisdiction. It seems a pity that this proviso was not inserted as an additional subsection to s 28 (1) and it may even be construed as being in conflict with s 28. Nevertheless, as it stands, it seems that such a consent will found jurisdiction over the defendant’s person.

In view of the fact that s 45 (1) deals with actions or proceedings beyond the jurisdiction of the magistrates’ court only, it is clear that the proviso is also concerned only with such actions or proceedings. If, therefore, a consent as outlined above is given and the subject matter of the action falls within the ambit of the magistrates’ court’s jurisdiction, it will be of no force and effect. Jurisdiction over persons is strictly limited by s 28 (1) of the Act and this makes no provision for consent to jurisdiction. It seems, therefore, that where a magistrates’ court has jurisdiction over the subject matter of the action, it is not possible at any time to found personal jurisdiction by consent unless, of course, the defendant appears and takes no objection. Such consent is, therefore, null and void.”

- [6] Although the article focuses on the consent to jurisdiction in standard form contracts I have reproduced the aforementioned passages from the article by Beck for its clarity of reasoning and consider it to constitute a correct statement of the law on the issue of consent in terms of s 28 (1) (f) and s 45 (1) of the Act and I turn thus to consider the competing submissions advanced.
- [7] Mr. Beyleveld submitted firstly, that upon a proper interpretation of the word “appear” in s 28 (1) (f), the first respondent appeared in as much as he signed a consent to jurisdiction. It is indeed so that in support of the relief sought the appellant annexed a document styled “Consent in terms of Section 45” signed by the first respondent. The body of the document reads as follows:-

“I the undersigned,

Paul Christiaan Badenhorst

Do hereby consent to the contemplated Application by the Applicant in terms of Section 86 and 87 of the National Credit Act 34 of 2005 being issued out of the Magistrate’s Court for the district of Port Elizabeth.”

- [8] The difficulty I have with this submission is two-fold. Reliance on s 28 (1) (f) is clearly misplaced. Firstly, there is nothing in the wording of the section to suggest that the word defendant in s 28 (1) (f) bears anything but its ordinary grammatical meaning. In any law suit the parties are identified as either plaintiff or defendant, applicant or respondent and the submission that a consumer, on whose behalf an application is brought pursuant to the

provisions of s 86 (7) (c) of the NCA, is synonymous with a defendant, as envisaged in s 28 (1) (f) of the Act, is not only charitable in the extreme but -----such

an interpretation moreover ascribes to it a meaning the legislature clearly never intended.

- [9] Secondly, the submission that by appending his signature to the consent document the first respondent appeared within the meaning of the word appear in s 28 (1) (f) of the Act is equally misplaced. *Beverley Building Society v De Courcy and Another* 6 affords no authority for the submission advanced. *Beverley* was concerned with a clause in a contract where the question arose whether the choice of a domicillium citandi et executandi within the area of a court’s jurisdiction amounted to a submission to the jurisdiction of the court, a situation entirely

different to that in *casu*.

- [10] It can hardly be contended that by signing the consent to jurisdiction a consumer appears as contemplated by s 28 (1) (f). The interpretation contended for is strained and contrary to authority. Mr. Ford, who together with Ms. Beard appeared as *amicus curiae* at the request of the court, correctly pointed out that “appear” means to enter an appearance and nothing more – *William Spilhaus and Co (M.B) (Pty) Ltd v Marx* 7

[11] Counsel were in agreement that s 45 requires that the consent to the jurisdiction of a magistrates' court, which would not normally have jurisdiction in terms of s 28 (1), must refer specifically to particular proceedings already instituted or about to be instituted in the court contemplated. Mr. Ford submitted that the consent purportedly furnished in compliance with the requirements of s 45 is woefully inadequate. I agree with the submission that ex facie the document one cannot determine that the consent was given specifically with reference to the proceedings "about to be

instituted" in as much as such consent may conceivably have been given at the time the first respondent initially sought the applicant's assistance for debt review in terms of s 86 (1) of the NCA in which event the consent is null and void.

[12] Furthermore the word "consent" in the proviso to s 45 (1) cannot be interpreted to mean the consent of only one of the parties. Subsection (1) of s 45 specifically provides that the court shall have jurisdiction to determine any action or proceedings beyond its jurisdiction if the parties consent thereto in writing. In my judgment the words "such consent" in the proviso to s 45 (1) must be interpreted to mean the consent, not of one of the parties, but all the parties to the action or proceedings. It follows logically that where only one of the parties consents to the jurisdiction of the court such consent is null and void.

[13] It follows from the foregoing that the court below's conclusion that it lacked the requisite jurisdiction to determine the application was undoubtedly correct. Its reasoning was however convoluted and recourse to the provisions of s 90 and 91 of the NCA as a basis for finding that the court lacked jurisdiction clearly wrong. Those sections, counsel rightly contended, were entirely

irrelevant to the real issue which fell for determination. In my judgment therefore, the magistrate had no jurisdiction to hear the application and the appeal must consequently fail. The question of costs does not arise and in the result the following order will issue:-

The appeal is dismissed.

D. CHETTY

JUDGE OF THE HIGH COURT

Makaula, AJ

I agree.

M. MAKAULA

ACTING JUDGE OF THE HIGH COURT

Obo the Appellant: Adv A. Beyleveld SC / Adv Beneke

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Amicus Curiae: Adv E.A.S Ford SC / Adv Beard

1 Act No. 34 of 2005

2 Du Plessis, J, in National Credit Regulator v Nedbank Ltd 2009 (6) SA 295 (GNP) properly characterized the referral as an application in terms of Rule 55.

3 Act No 32 of 1944

4 In re Pennington Health Committee 1980 (4) SA 243 (N) at 248H-249A

5 1980 De Rebus at 409-412

6 1964 (4) SA 264 (SR)

7 1963 (4) SA 994 (C) at 997D-E

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Prepared on 13 October 2026 · Esheria