

SOUTH AFRICA / JUDGMENT

**Parameter Properties (Pty) Ltd t/a
Aida Pretoria v Reed (A93/2020) [2020]
ZAGPPHC 751 (11 December 2020)
[2020] ZAGPPHC 751**

COURT

North Gauteng High Court, Pretoria

BEFORE

MMD LENYAI, MJ TEFFO

CASE / FILE NUMBER

A93/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)

REPORTABLE:

NO
(2)
OF
INTEREST TO OTHER JUDGES: YES
(3)
REVISED
11
December 2020
CASE NO: A93/2020
In

the matter of:

PARAMETER
PROPERTIES (PTY) LTD t/a AIDA PRETORIA
Appellant
and
JOUBERT
REED
Respondent

JUDGMENT

This appeal has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgement and order are accordingly published and distributed electronically. The date and time of hand-down is deemed to be 10h00 on 11 December 2020.

LENYAL, AJ

- [1] This appeal lies against the judgement and order of the Magistrate 's Court for the District of Tshwane North . Pretoria North on the 8th November 2019 granted against the appellant, in terms whereof the Magistrate dismissed the appellant's claim due to lack of jurisdiction with costs , including costs of counsel.

B. BACKGROUND OF FACTS

- [2] The Appellant sued the Respondent for agent's commission in the amount of R126 000.00 pursuant to a written professional fee agreement entered into between them.
- [3] The appellant is an estate agent company in the business of selling houses on the instructions of the registered owners of the relevant properties. The appellant at all material times was represented by one of its agents, Mr Quentin Meyer. On the 28th July 2015 at Pretoria North, the respondent verbally gave the appellant a mandate to find a purchaser for his property being Erf

1710 Theresa Park, Pretoria North situated at 1710 Turnberry Street. Theresa Park, Pretoria North.

- [4] On 4th August 2015, the appellant introduced Mashudu Ngubana and Lugisani Phuthu Tshedzo, the purchasers, to the respondent and the property.

On 5th August 2015, the respondent and the purchasers entered into a written purchase agreement. The purchase price was R 1 476 000.00.including

VAT and the total amount was to be secured by a bank loan or other approved guarantee/s, payable in cash on date of registration•

which guarantees were to be delivered to the conveyancer within 45 days from acceptance of the offer.

- [5] The offer was subject to a suspensive condition, in favour of the purchasers, to secure a loan secured by a mortgage bond of a total amount of not less than R 1476000.00 in favour of the purchasers. The purchasers irrevocably authorised the appellant and the respondent to perform all such acts as may be necessary to arrange the loan.

- [6] Upon fulfilment of the suspensive conditions in the purchase agreement, the respondent shall be liable to the appellant for payment of the professional fee as agreed upon in terms of a separate agreement.
- [7] On the same day that the purchase agreement was signed, the appellant and respondent signed a written professional fee agreement, in which the respondent agreed to pay the appellant a professional fee of R126 000.00, VAT inclusive.
- [8] The purchasers failed to cooperate with the appellant by refusing to supply their personal information or as contemplated in the purchase agreement apply for or accept a loan and the suspensive condition was deemed to have been fulfilled.
- [9] Notwithstanding the purchasers' failure to cooperate and as a direct result of the appellant's introduction of the property to the purchasers, the purchasers purchased the property at a purchase price of R 1 476 000.00 and the property was registered in their names at the Pretoria Deeds Office.
- [10] The appellant was the effective cause of the sale and in the premise had duly performed the obligations in terms of the mandate given to it by the respondent. It was an express term of the mandate that should the appellant perform thereunder, it would be paid a commission of R126 000.00 inclusive of VAT. Despite due and proper demand, the respondent has refused to pay the appellant the professional fee as agreed.
- [11] At the trial on the 16 September 2019 the Respondent conceded the Appellant's claim except the issue of the jurisdiction of the Pretoria North Magistrate Court.

C. GROUNDS OF APPEAL

- [12] The appellant contends that Learned Magistrate misdirected himself and erred in dismissing its action and finding that the whole cause of action did not arise in the area of jurisdiction of the Pretoria North Magistrate Court.

D. DISCUSSION

- [13] In its particulars of claim the Appellant relied upon jurisdiction in terms of Section 28(1)(d) of the Magistrates' Court Act 32 Of 1944 ('the Act'). The section provides that a Magistrates' Court will have jurisdiction to hear a matter "if the cause of action arose wholly within the district or regional division". It is apparent from this matter that this section can prove to be particularly problematic in the case of claims based on a contract.
- [14] Jurisdiction cannot be conferred under this provision unless every element of the contract, namely, the offer, acceptance, performance and/or breach has occurred within the same magisterial district. The plaintiff must firstly distinguish between the material facts (*facta probanda*) upon which the cause of action is based and, all other facts (*facta probantia*) which, although not material, provide evidence in support of the material facts. The material facts must all be tied to the particular magisterial district.

- [15] The term "cause of action" was defined in *McKenzie v Farmers' Co-operation Meat Industries Ltd* 1922 AD 16 wherein Maasdorp JA approved the definition given in the English matter *Cook v Gill* LR 8 C.P 107 which defined the term as : "... every fact which it would be necessary for the plaintiff to prove , if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which it is necessary to be proved".
- [16] In *Dusheko v Milburn* 1964 (4) SA 648(A), the Appellate Division as it then was, also considered what was meant by the words "cause of action arose wholly within the district" and found that the definition relates only to material facts to be proved to enable the plaintiff to succeed (*facta probanda*).
- [17] In *Ndlovu v Santam Ltd* 2006 (2) SA 239 (SCA) , it was pointed out that when dealing with a challenge of jurisdiction under Section 28 (1)(d) of the Act, the starting point of the enquiry should be 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 magisterial district. In this matter, the appellant did not accept the respondent's repudiation and sued the respondent for specific performance on the agreement. It was held that where a plaintiff suing on a contract does not accept defendant's repudiation of the contract, the repudiation was not a material fact which the plaintiff had to prove in order to establish his cause of action. It was held further that the repudiation by the insurer was not material; it did not form an integral part of the insured's cause of action; it was not one of the *facta probanda* on which the insured had to rely. It was held accordingly that the fact that the repudiation might have taken place outside the magisterial district did not prevent the cause of action arising wholly in the district where the contract was concluded.
- [18] *Facta probanda* and *facta probantia* were also distinguished in *Kings Transport v Viljoen* 1954 (1) SA 133 (C). The matter related to a delictual claim in the Magistrates' Court, arising out of a motor- vehicle collision which took place in

Somerset West. The Kings Transport vehicle was being driven by an employee of the company, one Du Plessis , who was acting in the

course and scope of his employment at the time. The other vehicle was owned by Viljoen, who sued Kings Transport in the Somerset West Magistrates' Court, for damages to his vehicle. The jurisdictional basis of Viljoen's claim was that the cause of action had arisen wholly within the magisterial area of Somerset West, where the collision had occurred. Kings Transport countered that the cause of action had not arisen wholly in Somerset West , for the simple reason that Viljoen's claim was based on vicarious liability. They argued that, in order to prove vicarious liability, Viljoen had to prove that Kings Transport driver, Du Plessis, was acting within the course and scope of his employment at the time of the collision. Kings Transport maintained that, because the contract of employment between itself and its driver, Du Plessis, had been entered

into in Salt River, Viljoen's cause of action had therefore not arisen "wholly" in Somerset West. The court, however, rejected Kings Transport's submission and held that as far as the issue of jurisdiction was concerned, the signing of the contract of employment between Kings Transport and its driver, Du Plessis, was part of the *facta probantia* and not part of the *facta probanda*. The signing of the contract of employment was only part of the *facta probantia*, that was, a piece of evidence to be adduced to prove that the driver was acting within the course and scope of his employment at the time and place of the collision.

[19] The challenge with the matter before us is that the parties did not expressly agree on a place of payment of the professional fee. The Respondent in their heads of argument make a submission that "...it is common cause that the agreement was concluded in the district of the Pretoria North Magistrate's Court and that the appellant had to perform within that court's district by selling respondent's house situated within the same district and had in fact carried out its obligations in this regard. The problem for the appellant was that the respondent had to perform (make payment) outside the district and that its failure to pay and therefore its breach, occurred outside the court's area of jurisdiction, which resulted in the whole cause

of action not arising within the district of the Pretoria North Magistrate's Court."

[20] The appellant on the other hand submitted that "Ex facie the sale agreement and the written professional fee agreement, the parties did not agree on a place of payment. It was not agreed that payment in terms of the sale agreement or the written professional fee agreement, will be made by the respondent to the appellant in Hatfield, Pretoria."

[21] The Respondent submitted that the appellant conceded that the said payment had to be made into its account held with ABSA BANK at its Hillcrest branch, which is in Hatfield, Pretoria, outside the district of the Pretoria North Magistrate's Court. The appellant's witnesses, testified and conceded that Elke de Klerk Attorneys, respondent's attorneys, was to have paid the commission on behalf of the respondent from their account held at Standard Bank, Centurion, to the appellant's bank account held by ABSA Bank. Hillcrest in Pretoria and not in Pretoria North.

[22] The respondent further submitted in their heads of argument that the performance, namely the payment of the commission. was to be made outside the district of the Pretoria North magistrate's Court. Therefore the respondent's breach, namely the failure to pay the commission, also arose outside the area of jurisdiction of the Pretoria North Magistrate's Court.

[23] In my view, the evidence that the payment of the commission would have to be paid by Elke de Klerk Attorneys on behalf of the respondent, from their account held at Standard Bank, Centurion, Pretoria, into the account of the account of the appellant held at ABSA Bank, Hatfield, Pretoria is not a material fact but it is part of the *facta probantia* explaining the process that would have been followed had payment of the commission been effected.

[24] It is trite that in the absence of an express or tacit agreement on where payment must be made, the place of payment must be determined in accordance with the common law. In *Covaco (PTY) LTD v Mohawk Industries (PTY) LTD 1969 (1) SA409 (D)* at 410, the court, in dealing with a lease, held that the effect of a lease agreement not specifying a place for payment of the rent brought into operation the common law rules as to the place of payment. In terms of the common law, where parties to a contract do not agree as to the place where payment is to be made, payment is to be at the place where the contract was entered into.

[25] In the matter of *Buys v Roodt (now Otto) 2000 (1) SA 535 O*, the plaintiff instituted action in the Kroonstad Magistrate's Court against the defendant for payment of the balance of the purchase

price for a motor vehicle which she had sold to the defendant, in terms of an oral agreement that had been concluded in Kroonstad. In his plea the defendant denied that the Kroonstad Magistrate's Court had jurisdiction in terms of Section 28(1)(d) of the Magistrate's

Court Act 32 of 1949 to hear the matter. The magistrate granted judgement in favour of the plaintiff. At the time of the conclusion

of the agreement and at the time of the issue and service of the summons, the defendant was resident in the Western Cape Province. The defendant had made two payments by cheque to the plaintiff respectively at Maitland and Bellville in the Western Cape, paid into the plaintiff's bank account and drawn on the defendant's bank account at Hermanus. The dispute in the matter was whether the parties had specifically agreed upon the place at which and the manner in which payment had to be made. In an appeal it was held that the appellant bore the onus of proving that the cause of action had arisen wholly in the area of jurisdiction of the Kroonstad Magistrate's Court. It was held further, that it appeared from the evidence that there had been no specific agreement with regard to the place at which and the manner in which payment had to be made. The plaintiff had however, on two occasions accepted payment by cheque and it could accordingly be said that it had been at least tacitly agreed that payment be made by cheque. Payment therefore did not necessarily have to take place where the contract had been concluded. The court held further, that payment had taken place at the bank where the cheque had been drawn. In the circumstances partial payment had therefore taken place at Hermanus, outside the Kroonstad Magistrate's Court's area of jurisdiction. It was held accordingly, that the cause of action had not arisen wholly within the area of jurisdiction of Kroonstad Magistrate's Court and that the court had therefore no jurisdiction to hear the matter and the court a quo should have dismissed the action as a result.

[26] In the matter before us, it is evident that the parties did not agree on the place of payment. The respondent relies heavily on the Buys case in their attempt to prove that payment would have been made in Hatfield, where the appellant's bank account is held. The facts of the two cases are different in that in the Buys matter there were two prior payments by cheque by the defendant which were accepted by the plaintiff and in so doing the plaintiff tacitly

agreed that payment can be made by cheque thereby altering the place of performance by the defendant. The same cannot be said about the case before us. no payment had been made, neither had the parties agreed on the manner or place of payment.

[27] In *Hazis v Transvaal and Delagoa Bay Investment Co Ltd* 1939 AD 3772, the Appellate Division held, with regard to the enquiry as to the place of performance, that in the absence of an express or implied

intention of the parties to a contract to the contrary, performance of a contract must be the place where the contract was made. This was later echoed by the same division in *Venter v Venter* 1949 (1) SA 768 (A), where the court reasoned that payment must be made in a place in which the obligation was contracted unless another place had been expressly or tacitly fixed for the fulfilment of a contract.

[28] I am of the view that the respondent's argument that his failure to perform falls outside the jurisdiction of the Pretoria North Magistrate's Court jurisdiction is incorrect. It is evident from the written professional fee agreement that the parties never agreed on a place and method for the respondent's performance of his obligation. Furthermore, seeing that there is no evidence of an express or tacit arrangement for the fulfilment of the obligations of the respondent, I am of the view that the payment had

to be made at Pretoria North, being the place where the professional fee agreement was concluded.

[29] Accordingly, I am of the view that the Magistrate erred in finding that the whole cause of action did not arise in the area of jurisdiction of the Pretoria North Magistrate's Court " since the payment was to be made from another district and that the Appellant's account is held in another district".

E.ORDER

[30] I therefore propose the following order:

1. The appeal is accordingly upheld with costs. The order and judgement of the Court a quo is set aside and replaced with the following:

"The plaintiffs claim in the amount of R126 000. 00 together with interest is granted."

MMD LENYAI

Acting Judge of the High

Court of South Africa

Gauteng Division, PRETORIA

I agree, and it is so ordered

MJ TEFFO J

Judge of the High

Court of South Africa, Gauteng Division,

Pretoria

Date of hearing: 29 October 2020

Date of judgment: 11 December 2020

For the Appellant: ADV J EASTER

CIRCLE CHAMBERS, BROOKLYN, PRETORIA

Instructed by: COUZVN, HERTZOG & HORAK INC

321 MIDDEL STREET, BROOKLYN, PRETORIA

For the Respondent: ADV W GIBBS

CLUB ADVOCATES CHAMBERS

HAZELWOOD, PRETORIA

Instructed by: ELKE DE KLERK ATTORNEYS

1018 SAXBY ROAD, ELDORAIN

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2020/751.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/parameter-properties-pty-ltd-ta-aida-pretoria-v-reed-unknown-topic-agpphc-2020>

Prepared on 9 October 2026 · Esheria