

SOUTH AFRICA / JUDGMENT

Schweizer Tyres v Engelbrecht (CIV APP FB 21/2020) [2023] ZANWHC 41 (14 April 2023) [2023] ZANWHC 41

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Djaje, Petersen

CASE / FILE NUMBER

CIV APP FB 21/2020

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE

NO: CIV APP FB 21/2020

Reportable:

YES
/ NO
Circulate
to Judges: YES
/ NO
Circulate
to Magistrates: YES
/ NO
Circulate
to Regional Magistrates: YES / NO
In

the matter between:

SCHWEIZER
TYRES Appellant
and
MARI
LEONIE ENGELBRECHT Respondent

CORAM:

HENDRICKS JP et DJAJE DJP & PETERSEN J
DATE

OF HEARING:

17 FEBRUARY 2023
DATE

OF JUDGMENT: 14 APRIL 2023
FOR

THE APPELLANT: ADV. AM HEYSTEK SC
FOR

THE RESPONDENT: ADV. JHF PISTOR SC

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 14 April 2023.

ORDER

Resultantly, the following order is made:

- (i) The appeal is upheld.
- (ii) The order of the court a quo is set aside and is replaced by the following order:
"The special plea of lack of jurisdiction raised by the defendant is upheld and the plaintiff's claim is dismissed with costs."
- (iii) The respondent is ordered to pay the costs of this appeal including the costs of the application for leave to appeal on a party-and-party basis, to be taxed.
- (iv) Such costs to include the costs consequent upon the employment of Senior Counsel (SC).

HENDRICKS JP

Introduction

- [1] This is an appeal against the judgment and order granted by Mahlangu AJ on 15 June 2022, in which the following order was made:

"(i) The special plea is separated from the merits of this matter.

- (ii) The special plea is dismissed with costs.
- (iii) Each party to pay its costs of 26 July 2020."

This appeal centres around a question of law, as contended by counsel. Central to the appeal the following questions arise:

- (i) whether there is an appeal before this Court, and if so, whether the appeal is properly before this Court;

(ii) whether on the merits, the court a quo was correct in finding that the common law principle with regard to jurisdiction needed to be adapted or developed to cater for the situation in which the respondent (as plaintiff) found herself, where her claim was instituted in this Court under the pretext that it has jurisdiction, when in fact the contrary was said to be the position.

[2] A brief synopsis of the salient facts is to the effect that the respondent (as plaintiff) was in the employ of the appellant (defendant), when she sustained an injury on the 29 June 2010. A period of two (2) years and eleven (11) months later, on 04 June 2013 just before her claim could prescribe, an action was instituted by the respondent claiming delictual damages. A special plea of lack of jurisdiction was raised. It was contended on behalf of the appellant (as defendant) that at the time of instituting the action (claim), the magisterial district of Schweizer – Reneke did not fall within the jurisdiction of this Court, but within the jurisdiction of the Gauteng Division of the High Court, more particularly North Gauteng, Pretoria. No application to transfer the matter to the Gauteng Division of the High Court, Pretoria was made.

[3] The Court a quo found that there was a need to adapt or develop the common law principle insofar as jurisdiction is concerned, otherwise (so it was reasoned) the respondent (as plaintiff) would be left without a court. Due to the intervention by the Legislature, so it was furthermore contended on behalf of the respondent, she was left without a court to approach for the relief she claimed.

The appeal has lapsed

[4] To deal with the first issue, the question arises as to whether there is an appeal before this Court. The contention on behalf of the respondent was initially that the appeal has lapsed and cannot be considered by this Court. Therefore, the appeal should be struck from the roll. This was due to the fact that security was not put up before an application was made to the Registrar of this Court for a date of hearing, hence the contention that the appeal is not properly before this Court. Reliance was placed on Rule 49 (13) (a) of the Rules of Court, which states:

"(13)(a) Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has released the appellant wholly or partially from that obligation, the appellant shall, before lodging copies of the record on appeal with the registrar, enter into good and sufficient security for the respondent's costs of appeal.

(b) In the event of failure by the parties to agree on the amount of security, the registrar shall fix the amount and the appellant shall enter into security in the amount so fixed or such percentage thereof as the court has determined, as the case may be. "

The contention is that in terms of Rule 49 (6) (a) and (b) that within the prescribed period, the appellant shall apply for a date of the appeal and if the appellant fails to do so, the appeal shall be deemed to have lapsed. The court hearing the appeal may upon good cause shown, reinstate the appeal deemed to have lapsed. It was further submitted that at the same time as the application

for a date of hearing of an appeal is made, the appellant shall file with the Registrar and with the respondent, the required number of copies of the record. The lodging of the record and the application to the Registrar for a date of hearing of the appeal, must therefore take place at the same time but before that, the appellant must provide security for the respondent's costs of appeal.

- [5] The contention furthermore on behalf of the respondent is that Rule 49 (13) (a) is peremptory. It reads that the appellant shall before lodging copies of the record, put up security for costs. The word before in the pretext used means that the putting up of security for costs is a pre-condition to a valid application for a date of hearing of the appeal from the Registrar. Reliance for this proposition was placed on the case of *Dr. Maureen Allem Inc v Baard* 2022 (3) SA 207 (GJ).
- [6] It is common cause that there was a dispute between the two different sets of attorneys of record representing the different parties as to the amount of security for costs that should be put up by the respondent for the appeal. There was correspondence (communique) exchanged between the two sets of attorneys representing the respective parties. Without going into much detail as to what the

communique entails, the net effect was that there was initially no consensus on the exact amount that needed to be put up as security for costs by the appellant. In fact, the fact that such security needed to be put up by the appellant was also contested.

- [7] This ended up in the respondent resorting to illicit the assistance of the Registrar of this Court. A letter to request intervention in the stalemate was addressed to the Registrar by the attorneys of record of the appellant. This was done in terms of Rule 49 (13) (b). This request was met with absolute silence from the side of the Registrar, who did not even have the courtesy of responding to the said letter. This omission on the part of the Office of the Registrar of this Court, is indeed regrettable.
- [8] To add to this, the respondent knew that security for costs of the appeal was not put up by the appellant. Thus notwithstanding, the respondent did not file a notice in terms of Rule 30, as she should have done, and neither was there an application made for a declaratory order that the appeal has lapsed. These remedies were available to the respondent.
- [9] However, it did not end there. When the appellant realised that its efforts to put up security for costs are being frustrated, the attorneys of record addressed a letter to the respondent's attorneys of record in order to inform them that it is prepared to put up security for costs in the amount of R150 000.00 as requested by the respondent. A receipt as proof of payment of the requisite amount of R150 000.00 as security for costs into the appellant's attorneys trust account, was provided. Thus notwithstanding, there was still the persistence that there was non-compliance with Rule 49 (13) (a).

[10] Adv. Pistor SC on behalf of the respondent contended that it is not sufficient to merely write a letter with this content. This does not mean that security for costs was indeed put up. No warranty or guarantee was presented. Neither was the amount of security for costs deposited into the trust account of the respondent's attorneys of record. Therefore, the contention that no security for costs was put up. Reliance for this proposition was placed in Rule 49

(6) of the Uniform Rules of Court.

[11] Sight should not be lost of the fact that there was an impasse with regard to the amount of security for costs requested, and that the Registrar did nothing to resolve the dispute. There was also no application made to court for an order that security be put up in the aforesaid requested amount by the respondent. But in order to avoid a situation where the appeal could not proceed because of security for costs not being put up, the appellant opted to tender the requisite amount of security for costs. I am of the view that the tender to put up the requisite security for costs, coupled with the receipt as proof of the amount of security for costs being paid, is sufficient substantial compliance with the Rules. Form should not trump substance and neither is the Court made for the Rules but vice versa.

[12] Emphasis was furthermore placed by Adv. Pistor SC on the fact that before the application for a trial date was made, security for costs had to be put up. The contention was that time is of the essence. I am respectfully in disagreement. The fact that the security was not put up before an application for a date of hearing of the appeal was made, is in my view not crucial, especially because of the dispute about the amount of security that existed.

[13] The Full Court of this Division has criticised the bringing of technical objections by way of oral address to the court at the date of the hearing of the appeal itself. In *Quantibuild (Proprietary) Limited v Ngaka Modiri Molema District Municipality* (Case No.: CIV APP FB12/2019, 8 December 2022), this Court per Hendricks JP (with Petersen J and Mongale AJ concurring) inter alia held:

"Of importance to note is that there is no application before this Court by the respondent seeking a declaratory order that the appeal has lapsed. This is despite the fact that the respondent knew as far back as 17 May 2022, when it was served with the notice of set down, that there was non-compliance with Rule 7(2), 49(13)(a) and 49(7)(d) of the Uniform Rules of Court."

"Resultantly, the appeal cannot be deemed to have lapsed unless the respondent applies for relief seeking an order to the effect that the appeal has lapsed, which the respondent has not done."

[emphasis added]

[14] Moreover this is a peculiar case, similar to the case of *Janse van Rensburg v Obiang and Another* [2019] ZAWCHC 53 (A338/2018, 10 May

2019) (and referred to in the case of *Dr Maureen Allem Inc v Baard* 2022 (3) SA 207 (GJ)). Because the Taxing Master (or Registrar) had not yet fixed the amount of security, despite a request, that court held:

“Rule 49 does not provide that should the appellant fail to furnish security within the time period stipulated by the rule the appeal

shall lapse. And any implication to such effect would in any event probably be unconstitutional...”

Furthermore

“... The appropriate course for the applicant to have taken in the described circumstances was to have approached the taxing master or the registrar and pressed for an early determination of the amount of security to be provided. In the unlikely event of the registrar,

notwithstanding such an approach, unreasonably failing to discharge her duty in terms of rule 49(13)(b), the applicant would have been entitled to approach the court for an order directing the registrar to discharge the function provided in terms of the subrule. Having not taken the indicated steps, it was not appropriate in the given circumstances for the applicant to apply instead for the appeal to be struck out.”

(emphasis added)

[15] Also, as was held in the *Dr Maureen Allem* case, Rule 49 (13)

(a) was not only considered to be inconsistent with section 17 (5) of the Superior Courts Act, but the imposition of a duty on an appellant to furnish security would also be ultra vires the powers of the Rules Board under section 6 (1) of the Rules Board Act. In these circumstances, it was held that:

“... rule 49(13) ought not to be read as imposing an obligation to furnish costs. It must be read restrictively as operating only where the respondent is able to assert a right to security derived from another source, such as a court order.”

[16] As alluded to earlier, reliance was placed by the appellant on the matter of *Quantibuild (Proprietary) Limited v Ngaka Modiri Molema District Municipality* CIV APP FB 12/2019, supra, that the appeal has not lapsed. Adv. Pistor SC conceded, quite correctly in my view, that he cannot argue that *Quantibuild* was incorrectly decided. If it cannot be said that the *Quantibuild* decision is patently wrong, it must be followed.

[17] Much was made of the passage in the *Quantibuild* judgment that states:

“It is an imperative that the Registrar should not set an appeal down on the roll without a power of attorney being filed and security for costs being put up.”

This is indeed correct. It is an imperative that the Registrar should not set an appeal down on the roll without a power of attorney being filed and security for costs being put up, but the particular and peculiar facts of each case must be taken into consideration. The peculiar facts of this case is

that there is no court order compelling the putting up of security for costs. There is also no application in terms of Rule 30 that the appellant took an irregular step in setting down the appeal without complying with the prescripts of Rule 49 (6). The contention by Adv. Pistor SC that the appeal has lapsed receded to the back burner, and was argued in the alternative to the argument that the matter should be removed from the roll, as security for costs were not put up by the appellant. Suffice to state that neither the argument that the appeal has lapsed nor that security for costs were not put up, can be sustained. I am therefore of the view that the appeal is properly before this Court and that this Court should entertain it.

The Merits

[18] Insofar as the merits of the appeal is concerned, the court a quo made the following findings:

“With effect from 18 April 2018, Schweizer Reneke was incorporated into the area of jurisdiction of this Court.

This Court is now the only court that has jurisdiction over this matter. It is impossible to transfer this matter to another court at this stage.”

Advocate Heystek SC submitted that, plaintiff did not remove the matter from this Court to institute it in another court because she was going to be faced with the objection of prescription as a special plea. In response the plaintiff submitted that the special plea of prescription could not be dealt with in this matter as it was not brought up as a special plea in the pleadings.

In *Ngqula v South African Airways (Pty) Ltd* 2013 (1) SA 155 (SCA) it was held that prescription must be tested if and when it is raised in the pleadings. Therefore, prescription as a special plea was not before this Court and could not be dealt with.

Section 173 of the Constitution provides that:-

“Inherent power-The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice.”

The legislature changed the jurisdiction of the courts but did not deal with what should happen in cases which have been instituted in wrong courts and have to be transferred to another court. There is therefore a lacuna that was left by the legislature when the new jurisdictions of the courts were created.

In the matter of *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018(1) SA 355 (CC) at para 28 it provides that:

"Development occurs not only when a common-law rule is changed altogether or a new rule is introduced, but also when a court needs to determine whether a new set of facts falls within or beyond the existing rule"

For these reasons, I am of a view that this court has jurisdiction to entertain this matter, otherwise plaintiff's right in terms of section 34 of the Constitution would have been denied. The plaintiff would be left with no court to go to and she would not have any recourse of the injuries she sustained at the defendants' premises.”

[19] The contention on behalf of the appellant was that the crucial time of determining jurisdiction is the date on which the action was instituted. The court having jurisdiction at that time will be the court clothed with jurisdiction. It is common cause that the Legislature enacted the Superior Court Act 59 of 1959. In terms of this act, as at the date of institution of the action (claim), the Gauteng Division of the High Court, Pretoria had jurisdiction over Schweizer-Reneke and not the North West Division. The respondent (as plaintiff) instituted her claim in the incorrect or wrong court or forum. There was no application to transfer the matter to the court having jurisdiction. The basis for this argument lies in the following.

[20] At the time of the institution of the action in the present matter section 19 of the Supreme Court Act 59 of 1959, regulated jurisdiction in the then Supreme Courts in South Africa. The latter act was repealed by section 55 of the Superior Courts Act, 10 of 2013, which came into operation on 29 August 2013. Section 21 of the latter act provides for the jurisdiction of the High Court of South Africa in terms which are (for present purposes) the same as those of the said section 19 of Act 59 of 1959. The relevant parts of Section 21 of Act 10 of 2013 read as follows:

“Persons over whom and matters in relation to which Divisions have jurisdiction.—

(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power -----”

[21] It is common cause between the parties that the whole cause of action in the present matter arose within the town of Schweizer-Reneke and therefore within that magisterial area. The parties to the litigation were also domiciled within that jurisdiction at the time when the present action was instituted.

[22] When the present action was instituted, the town and district of Schweizer-Reneke indeed fell within the geographical area of the North West province, but by then had not been included in the list of towns that previously had been incorporated into the area of jurisdiction of the North West High Court. Therefore and despite the fact that Schweizer-Reneke was governed by the Provincial Government of the North West Province, the North West High Court did not have jurisdiction in respect of Schweizer-Reneke. On the contrary and at that stage (i.e. when the action was instituted) that magisterial district fell within the area of jurisdiction of the Gauteng Division of the High Court, Pretoria. Consequently, so it was contended, this Court did not have jurisdiction in respect of the plaintiff's claim at the time when it was instituted.

[23] It was submitted on behalf of the respondent that the latter situation prevailed then because the legislator took time to consolidate the various jurisdictions of the High Courts, after the coming into existence of the democratic South Africa. Bearing in mind the said provisions of section 21 of the Superior Courts Act 10 of 2013 and of section 19 of Act 59 of 1959 of its predecessor, the action was thus instituted in the wrong court.

[24] The respondent's (plaintiff's) problem regarding the question of jurisdiction could have been solved by the "transfer"

of her action to the court with jurisdiction at the time. In this regard Section 3 of the Interim Rationalisation of Jurisdiction of High Courts Act, 41 of 2001 provided:

"3 Transfer of proceedings from one High Court to another (1) If any civil proceedings have been instituted in any High Court, and it appears to the Court concerned that such proceedings -

- (a) should have been instituted in another High Court; or
- (b) would be more conveniently or more appropriately heard or determined in another High Court, the Court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other High Court."

[25] The latter section therefore specifically provides for the situation where a party has mistakenly instituted an action in the wrong court. Regarding the latter section the Supreme Court of Appeal (SCA) decided in *Road Accident Fund v Rampukar; Road Accident Fund v Gumede* 2008 (2) SA 534 (SCA) that a court in which an action was instituted has jurisdiction to transfer an action in terms of the said section, even if that court does not have jurisdiction to hear the merits of a matter.

[26] The latter section was repealed by section 55(1)(a) of the Superior Court's Act 10 of 2013. However, section 27 of the latter act provides in terms similar to the said section 3 as follows:

"(1) If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings—

- (a) should have been instituted in another Division or at another seat of that Division; or
- (b) would be more conveniently or more appropriately heard or determined—
 - (i) at another seat of that Division; or
 - (ii) by another Division, that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.
- (2) An order for removal under subsection (1) must be transmitted to the registrar of the court to which the removal is ordered, and upon the receipt of such order that court may hear and determine the proceedings in question."

[27] As alluded to earlier, the Legislature amended the Act by introducing the Superior Courts Act 10 of 2013, which transferred jurisdiction of Schweizer – Reneke to the North West Division of the High Court. It is quite apparent that due to the passage of time, the claim of the respondent (as plaintiff) would have prescribed, although not specifically pleaded as such. This issue was canvassed and extensively argued in the court a quo, although to emphasize, no special plea of prescription was pleaded, only the lack of jurisdiction. That it may well be the case that the claim has prescribed goes without saying, but it is not part of this appeal to be decided by this Court of Appeal and until then it remains speculative.

[28] It was argued by Adv. Heystek SC on behalf of the appellant, that the court a quo erred in finding that the common law principle on jurisdiction needed to be adapted. This is based on what the Constitutional Court (CC) found in the case of MEC for Health & Social Development, Gauteng v DZ obo WZ 2018 (1) SA 335 (CC) in which it is stated:

“[34] When exercising their authority to develop the common law, courts should be mindful that, in accordance with the principle of the separation of powers, the major engine for law reform should be the legislature. Relevant factors here include whether the common law rule is a judge-made rule, the extent of the development required and the legislature’s ability to amend or abolish the common law.”

[29] It was submitted on behalf of the appellant that in purporting to develop the common law as requested by the respondent (plaintiff), and in finding that the Court does have jurisdiction, the Court a quo:

- has failed to state in which manner the common law rule had to be developed (adapted) and did not formulate any such ‘development’;
- effectively abandoned the common law rule.

[30] That the matter raises a legislative and/or constitutional issue is apparent from paragraphs 15 and 17 of the court a quo’s judgment, where it was indeed held, inter alia, that “[t]here is therefore a lacuna that was left by the legislature when the new jurisdictions of the courts were created” since the Legislature “did not deal with what should happen in cases which had been instituted in wrong courts and have to be transferred to another court.”

[31] Either way, the law has purportedly been developed by the Court a quo, in the absence of:

- any facts pleaded by the plaintiff; or
- evidence led by the plaintiff; or
- notice to any relevant State Department or Minister, so it was contended by the appellant.

[32] Further, in so developing the common law, or widening the ambit of the relevant legislation, and finding that the Court a quo does have jurisdiction, the learned acting judge a quo, with respect, failed to take cognisance of what was held by the Constitutional Court in the matter of MEC for Health & Social Development, supra, at paragraph [34], namely that:

“When exercising their authority to develop the common law, courts should be mindful that, in accordance with the principle of the separation of powers, the major engine for law reform should be the legislature [and not the Judiciary].”

See also: Carmichele v Minister of Safety & Security (Centre for Applied Legal Studies Intervening) [2001] ZACC 22; 2001 (4) SA 938 (CC).

- [33] The case for the respondent (plaintiff) has run full circle, it was further submitted. Originally this Court did not have jurisdiction and the respondent (plaintiff) took no steps for a period of almost five years — for which the relevant legislation then allowed — to transfer her case. Yet, some seven years after she instituted action, and without pleading any facts, she expected the Court a quo to accept jurisdiction in a case where the common law and applicable legislation simply did not allow for the vesting of such jurisdiction.
- [34] The material common cause facts, again, are the following: At the time when the respondent (plaintiff) instituted her action on 4 June 2013 in the North West Division of the High Court, the Court did not have jurisdiction over the matter. It is also common cause between the parties that at the time when the plea was filed in this matter namely on 24 July 2013, the respondent’s (plaintiff’s) claim, in principle, had become prescribed. The respondent (plaintiff), however, did nothing until, fortuitously it seems, the area of Schweizer-Reneke was incorporated into the area of jurisdiction of this Court on 18 April 2018, that is almost five (5) years after the special plea was raised. The requirements for the adaption or development of the common law principle have not been met, so it was submitted by Adv. Heystek SC on behalf of the respondent.
- [35] Adv. Pistor SC contended the contrary. He submitted that the net effect of the intervention by the Legislature in the jurisdiction of the High Courts, is that the respondent as claimant (plaintiff) is left without a court in which she could have instituted her claim (action). Therefore, so it was further submitted, the common law needed to be adapted to this particular and peculiar circumstances of the respondent in this matter. This is not a general adaption of the common law principle but a special adaption for this case and for the present claimant / plaintiff. I am unpersuaded.
- [36] The facts set out above are important in view of what has been explained by Heher JA (Ponnan JA and Wallis JA concurring) in Ngqula v South African Airways (Pty) Ltd 2013 (1) SA 155 (SCA) as follows:
- “[17] ... The purpose of s 3(1)(a) of the Act is to empower a court that does not have jurisdiction to remove proceedings to a court which does have jurisdiction. Before the Act came into being that was not possible if the SGHC did not have jurisdiction to entertain the main dispute when the summons was issued, cf Road Accident Fund v Rampukar; Road Accident Fund v Gurnede 2008 (2) SA 534 (SCA) para 10 at 5381— 539A.*

[18] As such a removal is now permitted, it may follow that a party which is deprived of its right to object to the court's jurisdiction in consequence of the case being transferred to a court having jurisdiction, cannot complain of either the loss of its plea to the jurisdiction or the loss of any advantage that would otherwise flow from that plea being upheld, such as the acquisition of a defence of prescription if the plaintiff instituted action afresh. So viewed, the legislation provides a means for overcoming challenges to the jurisdiction of the different high courts by treating such challenges as procedural in character. However, I do not rule out the possibility that, for the purposes of prescription, the institution of proceedings in a court not

possessing jurisdiction may be regarded as ineffective to interrupt prescription. In such a case the transfer may properly be treated as if it were the commencement of a fresh action constituting an effective interruption. It is unnecessary to decide which, if either, is the correct approach. I raise the alternatives to illustrate that a party must

take the law (and its consequences) as it finds it rather than rely on the consequences of the law that was." [own emphasis]

[37] Another important principle is that, once jurisdiction is established, "it continues to exist to the end of the

proceedings...". That principle has important consequences for the appellant (defendant) since service of the present summons in June 2013, in principle, interrupted the running of prescription in terms of section 15(1) of the Prescription Act 68 of 1969 and respondent (plaintiff) will, in principle, now be able to prosecute her claim to finality as contemplated by the aforesaid section of the Act, even though the court did not have jurisdiction in respect of her claim so instituted.

See: Van der Merwe v Protea Inc co Ltd 1982 (1) SA 770 (E).

[38] It is therefore not an answer to say that because a special plea of prescription was not pleaded, it could not be dealt with in this matter. Although it is correct that a special plea of prescription was not before the court a quo, the issue of prescription was relevant in the context of not only what was held in the Nqkula case, but also because respondent (plaintiff), in argument and without raising the issue in the pleadings and without adducing any evidence, sought to persuade the court a quo to change the common law position pertaining to the jurisdiction of the court.

[39] Therefore, even though the court a quo did not possess jurisdiction at the time when summons was issued, and even though service of the summons upon appellant (defendant) in June 2013 would thus have been ineffective to interrupt prescription, the dismissal of the defendant's special plea of jurisdiction resulted in the untenable situation where the defendant has been deprived of a valid plea of prescription - which it could and would have been able to raise, if the matter was re-instituted in, or transferred to, the correct court or forum.

- [40] As alluded to earlier, there is an unexplained passage of time of approximately five (5) years. This specific timeframe must be taken into consideration. The respondent had ample time to institute her action (claim) timeously, but failed to do so. Furthermore, after instituting her claim in the incorrect forum (this Court), she could have applied for the transfer of her case to the court having jurisdiction namely the Gauteng Division of the High Court, Pretoria which she failed to do. It is not the case that due to the intervention by the Legislature, the respondent as claimant (plaintiff) and all other residents of Schweizer – Reneke, were at a given time without any High Court in which they could institute their actions (claims). If that was indeed the position, it would have been understandable that the common law principle regarding jurisdiction should be adapted (or developed) to cater for the residents of Schweizer-Reneke. To reiterate, this is however not the position. There was at no given time a situation where the residents of Schweizer-Reneke had no High Court in which they could have instituted their claims (actions).
- [41] The Legislature always ensured that there was a High Court which exercised jurisdiction over the magisterial district of Schweizer-Reneke. There exists no plausible reason to adapt the common law principle with regard to jurisdiction merely to accommodate the respondent, as an exception and for this peculiar case. The unexplained delay in the timeous institution of the action (claim) on the part of the respondent negatively impacts on her case. This, the court a quo failed to take into account. The court a quo erred in its finding that a case has been made out for the common law principle with regard to jurisdiction to be adapted. The appeal must be upheld.

Costs

- [42] That this case is important for both parties behoves no argument. Furthermore, not only the importance of this case but also its complexity and the fact that novel issues and questions of law are being raised, warranted the employment of Senior Counsel (SC). Senior Counsel were employed by both parties. Costs should also follow the result and be awarded in favour of the successful litigant, the appellant, as there exists no plausible reason to direct otherwise. The scale to be on a party-and-party basis and to be taxed.

Order

- [43] Resultantly, the following order is made:

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree

J T DJAJE

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

A H PETERSEN

JUDGE OF THE HIGH COURT

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