
SOUTH AFRICA / JUDGMENT

Visser NO and Others v Van Niekerk and Others (5937/16) [2018] ZAFSHC 200 (9 November 2018) [2018] ZAFSHC 200

COURT

Free State High Court, Bloemfontein

BEFORE

M Opperman

CASE / FILE NUMBER

5937/16

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 5937/16

In the matter between:

M VISSER N.O. 1st Plaintiff

CF VAN DER LINDE N.O. 2nd Plaintiff

R KOLVER N.O. 3rd Plaintiff

R OOSTHUIZEN N.O. 4th Plaintiff

(In their capacities as trustees: Trust IT 938/09[1])

and

JA VAN NIEKERK 1st Defendant

HC PRETORIUS 2nd Defendant

A A ROBERTS N.O. 3rd Defendant

THE MASTER: HIGH COURT, BLOEMFONTEIN 4th Defendant

HEARD ON: 23-24 OCTOBER 2018

CORAM: M OPPERMAN, J

DELIVERED ON: 9 NOVEMBER 2018

INTRODUCTION

- [1] The matter serves before this court as a special plea. The issue is jurisdiction.
- [2] The first and second defendants pleaded that they are not resident in the jurisdiction of the court and that the cause of action did not arise here.[2] The third defendant did not take issue with the authority of this court to hear the matter but challenged the vagueness of paragraph 90 of the plaintiff's plea in that it does not state the foundation for the jurisdiction of this court; it is incomplete.[3]

THE PLEA-ISSUE[4]

- [3] Paragraph 90 of the Particulars of Claim[5] reads:

The Court has jurisdiction to adjudicate this matter.

- [4] First and second defendants made an issue of the fact that the Particulars of Claim did not set out the grounds upon which jurisdiction was founded. I refer to their Heads of Arguments. Ironically, did they not plead this in the first instance. It was the third defendant that took the point.
- [5] If a pleading does not comply with the required specified particulars to be set out, then prejudice to the opposite party must be prima facie established. The pleader will bear the onus of showing that the opponent is not in fact prejudiced.[6]
- [6] A summons which does not set forth particulars showing that the court has jurisdiction is bad and liable to be dismissed. (*Girdwood v Theron* 1913 CPD 859)
- [7] *Marais v Munro & Co Ltd* 1957
- (4) SA 53 (E) confirmed dictum that the Court is entitled to overlook, in proper cases, any irregularity of procedure which does not work any substantial prejudice to the other party. Further; was it stated in *Trans-African Insurance Co. Ltd v Maluleka* 1956
- (2) SA 273 (AD) that; "technical objections to less than perfect procedural steps should not be permitted in the absence of prejudice, to

interfere with the expeditious and if possible inexpensive decision of cases on their real merits."

- [8] There has not been any prejudice alleged, proved or disproved in relation to the defendants in casu. I will allow the plea to stand in the interest of justice.

JURISDICTION

- [9] Jurisdiction is the power or competence that a particular court has to adjudicate a dispute. A person who has decided to litigate must select the proper court in which to proceed. Several courts may have jurisdiction in one instance. The plaintiff is dominis litis in this regard. The onus is on the plaintiff to proof jurisdiction.

- [10] It is trite that section 34 of the Constitution of the Republic of South Africa, 1996 rules that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.
- [11] A fair public hearing pertaining to jurisdiction in this matter, would suggest due process, effective judgement, convenience and expense. The mosaic of evidence and rights and law must be weighed and the ultimate aim is the fair administration of justice.
- [12] The doctrine of effectiveness[7] is one factor to consider. The court must be empowered to give the most effective and proper judgement. Prevention of the destruction of the consistency of the cause, avoidance of duplication of proceedings, conflicting decisions in the same matter and the expeditious finalization of cases are vital factors.[8]
- [13] Another factor is the actor sequitur forum rei. In *Sciacero & Co v Central SA Railways* 1910 TS 119 at 121 and *Cabinet of the Transitional Government of SWA v Dagnin* 1990 NR 14 (HC) at 17E–G the general rule was stated to be that the plaintiff ascertains where the defendant resides, goes to his forum, and serves him with the summons there. Jurisdiction to hear an action does not rest exclusively upon the fact that the defendant is resident within the area over which it has jurisdiction. Its right and power to adjudicate proceedings may rest upon other grounds that will be discussed hereunder.

The principle underlying the rule 'actor sequitur forum rei' was almost certainly effectiveness, but, today, the rule serves an important consumer protection purpose in that the consumer who is a defendant must be sued in the jurisdiction of the court where he or she resides unless there is a

ground which gives the court of another area jurisdiction.[9] (Accentuation added)

- [14] It is the duty of all courts in South Africa to prevent vexatious and disruptive litigation. I have often stated this in past judgments; our courts must jealously protect the virtue of the justice system and litigation must be with the utmost honor and responsibility. It must not be for the mere sake of litigation. Superfluous litigation in one matter obstructs the genuine want for access to and justice in courts for another. The use of courts to settle disputes must be in good faith and is not absolute. Counsel are the guardians of the dignity and integrity of the nation. They need to make sure that they give effect to what the Constitution expects of them and their customers want to be served with integrity. Lawyers are not hired guns but the foot soldiers of the Constitution, whose ultimate role it is to administer justice and they need to do it with the highest standard of integrity.
- [15] Section 169 of the Constitution provides that a High Court may decide:
- (a) any constitutional matter except a matter that —
 - (i) only the Constitutional Court may decide; or

(ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and

(b) any other matter not assigned to another court by an Act of Parliament. (Accentuation added)

[16] The Act of Parliament that takes the pivotal position in this case is the Superior Courts Act 10 of 2013

21. 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—

(2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third-party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.

[17] It is common cause that the first defendant resides in Dana Bay, Western Cape Province, the second defendant resides in Kleinbrakrivier, Mossel Bay, Western Cape Province and with his place of business in Dana Bay, Western Cape Province. All indications are that the third defendant resides in Bloemfontein. Service on her was effected at Webbers Attorneys, Bloemfontein.[10] The fourth defendant, that was joined on demand of the second defendant,[11] is the Master of the High Court, Bloemfontein. The Master of the High Court, Bloemfontein has jurisdiction over the first and second defendants as trustees ex officio its custody over the trust. The applicants chose their domicilium to be in Bloemfontein for purpose of the application. Only two out of the eight parties to the disputes is domiciled in the Western Cape.

[18] Second defendant argued that the nature of the cause of action is a delict. First defendant claimed it to be sui generis. One must be careful not to conflate the “nature of the cause of action” and “causes of action arising.”[12]

[19] The first defendant also brought joinder into play in his Heads of Arguments.[13] Misjoinder is not the special plea here. In tolerant accommodation of the argument and for completeness sake is it adjudicated, as far as it is relevant to the cause of action, that the questions of law and fact are in the main and in their principal essentials, essentially the same in this case.

[20] The matter is based on the trustee's breach of trust and resorts under the action legis Aquiliae. The plaintiff must first show that the trustees performed a wrongful act, secondly, that the trustees breach of trust is ascribable to fault, be it in the form of intentional wrongdoing or negligence; thirdly, that the conduct must have caused damage which is both factually and legally not too remote; and; finally, that he suffered patrimonial loss.

Where a claim is in delict, the court of the area where the wrongful act was committed will generally have jurisdiction. In *Thomas v BMW South Africa (Pty) Ltd Van Reenen J* held that the locus of a delict for jurisdictional purposes should be determined with reference to the materiality of and the number of the ingredients thereof which have occurred in a court's area of jurisdiction and rejected the notion that all elements of a delict must have occurred in a court's area for it to be able to assume jurisdiction.

Where the court has jurisdiction in respect of some claims, but not others, it may apply the *causae continentia* doctrine, which is designed to avoid a multiplicity of processes and the possibility of conflicting judgments on the same cause of action, and to provide for the convenient disposition of suits. In terms of this doctrine if a court has jurisdiction in respect of one claim it can assume jurisdiction in respect of other claims in the same action which are based on different causes of action.[14]

[21] The action emanates from the administration in the estate of the late Alette Danore Blignaut. The will of the said deceased is registered and was accepted by the fourth defendant. The deceased estate was under the supervision of the fourth defendant that is situated in Bloemfontein. The trust was registered at the office of the fourth defendant and still is under its supervision that, as stated, is situated in Bloemfontein. Mentioned Alette Danore Blignaut resided in Parys in the Free State Province.

[22] Jurisdiction on the elements of the delict must be ruled to lie in both the Free State Province and the Western Cape Province. On the facts it will be nearly impossible to ascertain where the wrongful act, fault, causal connection and patrimonial loss is exactly situated. There exists no exclusivity for one or the other division.

[23] The Supreme Court of Appeal has held that the words "causes arising" do not refer to causes of action but to all factors giving rise to jurisdiction under common law (which may include a cause of action) and has found that a court will have jurisdiction if the facts show a sufficient connection to the court's area of jurisdiction.[15]

[24] The arguments on the monetary value of the claims and the liability or absence of liability of some defendants in paragraph 19 of the first defendants Heads of Arguments does not convince. It is rejected.

FINDING

[25] It follows from the above that this court has jurisdiction over the parties and the matters arising from the cause of action in terms of section 21 of the Superior Courts Act 10 of 2013

[26] As to costs; the fourth defendant did not join the dispute. The third defendant came to be joined because her husband Daniel Gerhardus Roberts passed away and she was appointed as executrix after the alleged delicts were transgressed. The plaintiff is indeed correct in his submission that; for the purpose of establishment of jurisdiction, the first and second defendants are the cause for litigation. I am therefor enjoined to make the costs order against them.

[27] ORDER

1. The special plea is dismissed.
2. First and second defendants to carry the costs of this application.

M. OPPERMAN, J

On behalf of the plaintiffs: Adv. P. J. Heymans

Instructed by:

EG Cooper Majiedt Inc

BLOEMFONTEIN

On behalf of the 1st defendant: Adv. I. J. Joubert

Honey Attorneys

On behalf of the 2nd defendant: Adv. J van der Merwe

Phatshoane Henney Attorneys

On behalf of the 3rd defendant: Me Koller

Webbers Attorneys

[1] Alette Blignaut Trust.

[2] Bundle: Return of Services and Pleadings, pages 134-135, par. 1-3 and pages 167-168, par. 1-3.

[3] Bundle: Return of Services and Pleadings, page 207, par. 2.

[4] Subrules 18(4) and (5) provide as follows: 18(4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto. 18(5) When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively, but shall answer the point of substance.

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[5] Bundle: Return of Services and Pleadings, page 58.

[6] Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen 1992 (4) SA 466 (W) at 470H–471B; Sterling Consumer Products v Cohen and other related cases [2002] 4 All SA 221 (W) at 238.

[7] Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa (5th Edition) Internet: ISSN 2224-7319 Jutastat e-publications 5th Ed, 2009 ch2-p64.

[8] Harms, Civil procedure in the Supreme Court, A-29 to A4.19.

[9] Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa (5th Edition) Internet: ISSN 2224-7319 Jutastat e-publications 5th Ed, 2009 ch2-p67.

[10] Index: Bundle: Return of Services and Pleadings, page 6.

[11] Bundle: Return of Services and Pleadings, page 169.

[12] Dreyer v Tuckers Land and Development Corporation (Pty) Ltd 1981 (1) SA 1219 (T) at 1224F–1225B; Dendy v University of the Witwatersrand

[2005] ZAGPHC 39; 2005 (5) SA 357 (W) at 386D–E.

[13] Pages 5-9.

[14] Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa (5th Edition) Internet: ISSN 2224-7319 Jutastat e-publications 5th Ed, 2009 ch2-p76.

[15] Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa (5th Edition) Internet: ISSN 2224-7319 Jutastat e-publications 5th Ed, 2009 ch2-p78 Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 (6) SA 205 (SCA) para 11; Geyser v Nedbank Ltd: In re Nedbank Ltd v Geyser

[2006] ZAGPHC 24; 2006 (4) SA 548 (W) at 547B.

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