



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
.....	
DATE <u>17/08/2022</u> SIGNATURE: 	

CASE NO: HCA07/2022

In the matter between:

JOHANNES ZACHARIAS HUMAN MULLER N.O.

FIRST APPELLANT

LARISSA ARENDS N.O.

SECOND APPELLANT

and

JAN DIRK JOHANNES TALJAARD

RESPONDENT

JUDGMENT

NAUDÉ-ODENDAAL J:

[1] This is an appeal to the Full Bench of this Division against the order of the court *a quo* wherein a special plea of jurisdiction was upheld. The grounds of appeal are as per the notice of appeal.

[2] From the onset it needs to be mentioned that shortly prior to the hearing of the matter, counsel for the Respondent in the appeal became medically unfit to proceed with the argument in opposition of the appeal. The Appellants and the Respondent agreed that the appeal may proceed and be adjudicated on the papers filed without hearing any oral argument. It is on this basis that this court therefore proceeds to deal with the appeal.

Application for Condonation:

[3] The Appellants filed an application for condonation for the late filing of the Appellants' notice of appeal. The application does not contain any prayer seeking the reinstatement of the lapsed appeal. The fact that the Appellants attempt to have the appeal reinstated by their application for condonation is however inferred from the application filed. The application for condonation is opposed.

[4] The approach adopted in determining whether or not to grant condonation is well-known. In **Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others (619/12) [2013] ZASCA 5; [2013] 2 All**

SA 251 (SCA) at para 11, Ponnann JA held that factors relevant to the discretion to grant or refuse condonation include *'the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.'*

- [5] **Fleshing out the aforementioned general considerations, Plewman JA in the Darries v Sheriff Magistrate's Court, Wynberg and Another [1998] ZASCA 18; 1998(3) SA 34 (SCA) at 40H-41E,** stated the following:

'Condonation of the non-observance of the rules of this court is not a mere formality. In all cases, some acceptable explanation, not only of, for example, the delay in noting the appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realizes that he has not complied with a rule of court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellants' attorney that condonation will be granted. In applications of this sort the applicants' prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. But appellant's prospect of success is but one of the factors relevant to the exercise of the court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an

application for condonation should not be granted, whatever the prospects of success might be.'

- [6] In the present matter, the Appellants have given an acceptable explanation of the delay in noting the appeal. The Appellants did not unordinary delay in seeking condonation either. Having considered the explanation given by the Appellants, the degree of non-compliance, the explanation therefor, the importance of the case, the Respondent's interest in the finality of the judgment of the court *a quo*, the convenience of this court and the avoidance of unnecessary delay in the administration of justice, this court is of the view that condonation should be granted, and the lapsed notice of appeal be reinstated.

The Merits of the Appeal:

Background Facts:-

- [7] The Appellants instituted action against the Respondent in the court *a quo* for payment of monies pursuant to certain provisions of the Insolvency Act, 24 of 1936. The Appellants act in their capacities as the joint liquidators of the insolvent estate of Love and Let's Live (Pty) Ltd (in liquidation).
- [8] In the Appellants' combined summons the Appellants' sought to establish jurisdiction in the court *a quo* by pleading as follows:-
- "This Court has jurisdiction to adjudicate this matter as the Defendant resides, alternatively is employed, within the Court's jurisdiction."*

- [9] The Respondent raised a special plea alleging that the court *a quo* did not have the requisite jurisdiction to adjudicate the claim. The Respondent pleaded as follows:-

"Special Plea

The defendant denies that the above Honourable Court has jurisdiction to entertain this matter as the defendant is not resident within the area of jurisdiction of the above Honourable Court.

In the event that the above Honourable Court finds that it has jurisdiction the defendant pleads to the particulars of claim as follows:..."

- [10] The special plea was heard on 19 October 2021. At the hearing of the special plea, the legal representative for the Respondent applied in terms of **Section 111 of the Magistrate's Court Act, 32 of 1944 (as amended)**, that the special plea be amended to read as follows:-

"The Defendant denies that the above Honourable Court has jurisdiction to entertain this matter, as the Defendant is neither employed nor resides within the area of jurisdiction of the above Honourable Court."

- [11] The legal representative for the Respondent also applied in terms of **Section 111 of the Magistrate's Court Act, 32 of 1944 (as amended)** that paragraph 2 of the Respondent's plea be amended to read as follows:-

"The contents of this paragraph are denied as if specifically traversed as the Defendant is neither employed nor resides within the jurisdiction of the above Honourable Court."

- [12] The Appellants' legal representative did not object to the above amendments being made and in the result the court *a quo* effected the amendments as aforestated in terms of **Section 111 of the Magistrate's Court Act, 32 of 1944 (as amended)**.

The Evidence

- [13] The Appellants called one witness to prove jurisdiction. Mr. Claassen confirmed that the Respondent does not work, nor reside within the area of jurisdiction of the court *a quo* as he is stationed on a farm, Rietgat situated in the area of Dikgale (Morobeng) as farm manager. Mr. Claassen further confirmed that the Respondent is employed by Bertie Van Zyl (Pty) Ltd, t/a ZZ2. The head office of ZZ2 Farm is situated on the farm Boekenhout Bult, Modjadjiskloof, Tzaneen.
- [14] Mr. Taljaard (the Respondent) testified in support of his special plea of jurisdiction raised. Mr. Taljaard confirmed that he is employed by Bertie Van Zyl (Pty) Ltd t/a ZZ2 as a farm manager of the farm Rietgat in the area of Dikgale. Mr. Taljaard further testified that the head office of ZZ2 is in Moketsi.

The Law:

- [15] **Section 28(1)(a) – (d) of the Magistrate's Court Act, 32 of 1944** stipulates 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, subject to subsection (1A), have jurisdiction shall be the following and no other:*

(a) *Any person who resides, carries on business or is employed within the district or regional division;*

(b) *any partnership which has business premises situated or any member whereof resides within the district or regional division;*

(c) *any person whatever, in respect of any proceedings incidental to any action or proceeding instituted in the court by such person himself or herself;*

(d) *any person, whether or not he or she resides, carries on business or is employed within the district or regional division, if the cause of action arose wholly within the district or regional division;...*"

- [16] Jurisdiction should be determined by common law and/or the relevant statute. (See **Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd 1991 (1) SA 482 (A) at 486H—J**). Consideration of the question of jurisdiction involves a two-stage enquiry. Firstly, it should be determined if the Court is, as matter of principle, competent to take cognisance of the particular case (whether a recognised jurisdictional ground exists – *ratio jurisdictionis*). Secondly, whether the defendant is subject to the Court's authority (whether an effective judgment can be given). In **Estate Agents Board v Lek 1979 (3) SA 1048 (A) at 1063 F–H Trollip JA** set out the general principles of our law in determining jurisdiction as follows:

"That depends on (a) the nature of the proceedings, (b) the nature of the relief claimed therein, or (c) in some cases, both (a) and (b). . . . Approach (a) was

adopted by **Innes J in Steytler's case 1911 AD at 315-16**. The inquiry was, he said, whether, by its nature, the action was personal, real, or mixed. De Villiers JP adopted approach (b) at 346-7; and (c) was applied in the **Gulf Oil case [Gulf Oil Corporation v Rembrandt Fabrikante en Handelaars(Edms) Bpk 1963 (2) SA 10 (T)]**. Approach (b) is based on the principle of effectiveness - the power of the Court, not only to grant the relief claimed, but also to effectively enforce it directly within its area of jurisdiction, ie without any resort to the procedural provisions in the Supreme Court Act 59 of 1959 canvassed above."

- [17] In **Jones & Buckle: Civil Practice of the Magistrate's Courts in South Africa** in the commentary to **Section 28 of the Magistrate's Court Act, 32 of 1944 (as amended)** the following is stated:-

"Or is employed" These words cover the case of an employee who falls outside the phrase 'carries on business'. It is probable, however, that some degree of permanence in the employment will be required, and that a defendant habitually employed in a workshop in district A will not become subject to the jurisdiction of the court of district B merely because he is sent to do a two-day job in the latter district. The date of service of the summons (and not the date of issue) is the date when the incidence of jurisdiction is determined in respect of whether a defendant was employed within the jurisdiction. Consequently, even though he may have been employed within the jurisdiction when summons was issued, the court has no jurisdiction over him in terms of this subsection if he was not still employed there when summons was served." (footnotes omitted)

Application of the Law to the Facts:

- [18] A special plea of jurisdiction, or the lack thereof, is a declinatory plea that quashes the action as far as the court is concerned, but the merits of the case may still be tried by another court with jurisdiction.
- [19] In applying the law to the facts, it is clear that in the present matter, the court *a quo* correctly upheld the special plea and correctly found that the court *a quo* did not have the necessary jurisdiction. The Respondent is not resident, nor employed within the district or area of jurisdiction of the court *a quo*. The fact that the Respondent is employed as a farm manager at Dikgale, at the farm Rietgat is indicative thereof that his employment, at the place of his employment being the farm Rietgat at Dikgale, has some permanence despite the fact that he, from time to time, has to travel to the Head Office of Bertie van Zyl (Pty) Ltd t/a ZZ2 Farm to attend meetings or to attend to administrative related tasks.
- [20] In respect of the Appellants' argument that the court *a quo* failed to hear any closing arguments before judgment was handed down and by doing so infringed on the Appellants' fundamental rights is without any merit in the present matter. The parties by agreement introduced to the court *a quo* that argument shall be made by filing heads of argument. The heads of argument was to be filed on or before 9 November 2021 and the matter was postponed for judgment to 14 December 2021.
- [21] The Appellants' legal representative confirmed this agreement and the dates agreed upon for the filing of Heads of Argument and Judgment to be handed down. The

fact that the Appellants' failed to file any heads of argument was at their own peril. They were the authors of their own misfortune. In any event, even if the Appellants' filed heads of argument, it would not have changed the outcome of the matter as the court a quo still would have lacked the necessary jurisdiction. The appeal should therefore fail.

Order:

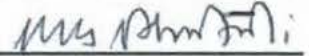
[22] In the result the following order is made:-

1. Condonation for the late filing of the Appellants' notice of appeal is granted with no order as to costs.
2. The appeal is reinstated.
3. The appeal is dismissed with costs.



M. NAUDÉ-ODENDAAL
JUDGE OF THE
HIGH COURT, LIMPOPO DIVISION
POLOKWANE

I AGREE:



M.G. PHATUDI

**ACTING DEPUTY JUDGE PRESIDENT
OF THE HIGH COURT, LIMPOPO DIVISION**

POLOKWANE

APPEARANCES:

HEARD ON: 5 AUGUST 2022

JUDGMENT DELIVERED ON: 17 AUGUST 2022

For the Appellants: None

Instructed by: Mathys Krog Attorneys.
C/O AH Burger Attorneys
Polokwane

For the Respondent: None

Instructed by: Joubert & May Attorneys
C/O De Bruin Oberholzer Attorneys
Polokwane