IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**~~YES~~/NO**
Of Interest to other Judges:	**YES/~~NO~~**
Circulate to Magistrates:	**YES/~~NO~~**

Case No: 1521/2017

In the matter between:

OOS VRYSTAAT KAAP BEDRYF BEPERK **Plaintiff**

and

FRIEDEL CILLIERS **Defendant**

JUDGMENT

CORAM: NAIDOO J

HEARD ON: 17 OCTOBER 2018

DELIVERED ON: 23 OCTOBER 2018

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[1] The plaintiff issued summons against the defendant for payment of an amount of R108 761.42, together with interest thereon and costs. The debt arose out of a finance agreement entered into between the parties, which the defendant allegedly breached, giving rise to the institution of the action. The matter was set down for trial on 16, 17 and 19 October 2018. On the day before the trial was scheduled to commence, the parties agreed to separate two issues which were to be determined by the court, and which could be dispositive of the action. To this end Heads of Argument were prepared and filed on 17 October 2018, and the matter was heard on the same day. The two issues, arising from the pleadings, relate to the lack of jurisdiction by this court to hear this matter and the applicability and impact of the Consumer Protection Act 68 of 2008 (the CPA). Adv S Tsangarakis appeared for the plaintiff and Adv P Greyling for the defendant.

[2] The plaintiff based its cause of action upon the provisions of the written finance agreement between the parties, mentioned above, and proceeded in terms thereof following an alleged breach of the agreement by the defendant. One of the clauses relied upon by the plaintiff is clause 2.18, which reads as follows:

> "Tensy die kredietopnemer binne drie maande na die uitreik van 'n staat, skriftelik per aangetekende pos teen enige debiet of krediet of enige inskrywing wat daarin verskyn beswaar maak, word dit vir alle doeleindes geag dat die inhoud van die staat korrek is en sal die staat in enige regsgeding afdoende bewys dat die goedere en dienste daarin vermeld deur die maatskappy aan die kredietopnemer verskaf is en dat die debiet en krediete of enige inskrywing wat daarin verskyn, korrek is"

Loosely translated, the essence of clause 2.18 is that unless the credit receiver objects, in writing per registered post to a statement or any entry therein, within three months of the issue of such statement, the contents of the statement will be regarded as correct, and shall in any legal action be conclusive proof that the goods and services mentioned therein were supplied by the company (plaintiff) to the credit receiver (defendant), and that the debit and credit or entry that appears therein, is correct.

[3] I shall deal, firstly, with issue, of the applicability and impact of the CPA. The defendant admits the contents of clause 2.18 in his plea but pleads that such clause is without legal force or effect, as it is in conflict with the provisions of the CPA and has the effect that the defendant waives his rights. Therefore it is a term that is unfair, unreasonable and/or unlawful and which, in terms of the CPA, is null and void, and without effect. The plaintiff's response to this is that the provisions of the CPA, as amended, do not afford the defendant a defence in view of his failure to exhaust all t he remedies available to him in terms of the CPA. Therefore this court does not have the jurisdiction to determine the matter in respect of this defence, alternatively this defence put forward by the defendant is incomplete.

[4] The applicable provision of the CPA is section 69, which provides as follows:

"**69 Enforcement of rights by consumer**

A person contemplated in section 4 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by-

(a) referring the matter directly to the Tribunal, if such a direct referral is

permitted by this Act in the case of the particular dispute;

(b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;

(c) if the matter does not concern a supplier contemplated in paragraph *(b)*-

(i) referring the matter to the applicable industry ombud, accredited in terms of section 82 (6), if the supplier is subject to any such ombud; or

(ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court;

(iii) referring the matter to another alternative dispute resolution agent contemplated in section 70; or

(iv) filing a complaint with the Commission in accordance with section 71; or

(d) approaching a court with jurisdiction over the matter, <u>if all other remedies available to that person in terms of national legislation have been exhausted.”</u> (my emphasis)

[5] The defendant invoked the provisions of the CPA in his plea and, in its replication, the plaintiff correctly pointed out the requirements to be met in such an instance. Mr Greyling submitted in his Heads of Argument that clause 7 of the agreement between the parties entitles but does not oblige them to engage in alternate dispute resolution, from which I gather that the defendant denies that he is obliged to proceed as stipulated in section 69 of the CPA. From a careful reading of clause 7, it is clear that reference is made to sections 134, 136 and 137(3) of the National Credit Act 34 of 2005, and not the CPA. That argument is misplaced and cannot, therefore, avail the defendant.

[6] There is no indication in the papers that the defendant proceeded to enforce his rights in terms of the CPA, the provisions of which are clear and unambiguous. He was obliged to exhaust all the remedies provided for in section 69(a) – (c) before approaching a court with jurisdiction to determine the matter. He has also made no averments to this effect in his papers. In the matter of **Joroy 4440 CC v Potgieter and Another 2016(3) SA 465 (FB),** the court as per Reinders J, held at para [8] that the legislature was very specific in prescribing the redress that a customer has in terms of this section. The court then referred to the Constitutional Court case of **Chirwa v Transnet Ltd and Others [2007] ZACC 23; 2008(4) SA 367 (CC)**, in which the principle was laid down that where a specialised framework has been created for the resolution of disputes, parties must pursue their claims primarily through such mechanisms. I align myself with the views in Joroy and Chirwa. The defendant's reliance on the provisions of the CPA cannot avail him and has no prospect of success, in the face of his failure to pursue his claim within the framework stipulated therein.

[7] I deal now with the issue of the jurisdiction of this court to hear this matter. The defendant raised as a special plea to the plaintiff's summons, that this court does not have jurisdiction to hear this matter. The special plea is based on the provisions of clause 2.13 of the finance agreement, which provides as follows:

"Vir enige geregtelike prosesse wat die maatskappy mag instel teen die kliënt op wie die Wet van toepassing is, om geldsomme wat hom toekom kragtens voorskotte en krediet aan die krediet-opnemer verleen en voorgeskiet te verhaal, stem hy toe tot die jurisdiksie van enige bevoegde hof wat die maatskappy op besluit met dien verstande dat indien in 'n bepaalde geval die landdroshof gelyklopende jurisdiksie het, die maatskappy verplig sal wees om die voormelde geregtelike prosesse in te stel in die landdroshof waarin die kredietopnemer woon of werk of waar goedere betrokke by die dispuut, gewoonweg gehou word. Die maatskappy en die kliënt bly egter te alle tye geregtig, om sy/die kliënt se uitsluitlike diskresie, enige geskil tussen die kliënt en die maatskappy by wyse van arbitrasie te laat besleg. In laasgenoemde geval geld die bepalingsbvan klousule 2.14 hieronder"

The essence of clause 2.13 is that in the event that the plaintiff institutes any legal proceedings against the defendant for recovery of monies owed to the plaintiff, he consents to the jurisdiction of any competent court, on the understanding that in any given case where the magistrates' court has concurrent jurisdiction, the plaintiff will be obliged to institute such legal proceedings in the magistrates' court where the defendant lives or works, or where the goods, relevant to the dispute between the parties, are ordinarily held.

[8] The defendant, in his special plea avers that, by virtue of the agreement between the parties, this court does not have jurisdiction to hear this matter because the plaintiff, in terms of clause 2.13, was obliged to institute legal proceedings in the Smithfield magistrates' court, where the defendant lives and works. In the alternative, the defendant pleads that section 90(2)(k)(vi) (aa) of the National Credit Act 34 of 2005 (the NCA) stipulates that where a summons is issued in a High Court in circumstances where the Magistrates' Court has concurrent jurisdiction, it is an unlawful practice. The defendant pleads further that, in terms of the common law, this court, consequently, does not have jurisdiction to hear this matter. In his address to court, Mr Greyling conceded that the plea in its current form avers that this court's jurisdiction has been ousted by clause 2.13. His

stance during oral argument changed somewhat and he conceded that this court has jurisdiction to hear the matter. He argued that while this court has jurisdiction, it should not entertain this matter, as plaintiff bound itself, in terms of clause 2.13 to institute proceedings in the Magistrates' Court. Institution of the action in the High Court is an abuse of the process of court and deprives the defendant access to justice in that the cost of litigation is higher in the High Court.

[9] I mention that after the defendant entered an appearance to defend, the plaintiff brought an application for Summary Judgment. This application was adjourned on three occasions before it was finally dealt with. Mr Tsanagrakis submitted, without any dispute from the defendant, that each adjournment was at the request of the defendant. For the sake of completeness, I tabulate the dates of the various adjournments: the first adjournment was granted by Mbhele AJ (as she then was) on 28 May 2015, when the matter was adjourned to 11 June 2015. Van Zyl J adjourned the matter on 11 June 2015 to 25 June 2016. On the latter date Williams AJ adjourned the matter to 6 August 2015. Jordaan J dealt with the summary judgment application and an application for condonation for the late filing of the defendant's affidavit opposing summary judgment, on 6 August 2015. An order was made in respect of the condonation application, the summary judgment application was dismissed and the defendant was given leave to defend the action. The defendant was legally represented throughout the summary judgment proceedings.

[10] The High Court derives its jurisdiction from section 21 of the Superior Courts Act 10 of 2013, and clearly does have jurisdiction

over the parties, particularly the defendant, in this matter. It has been held in a number of matters that where the Magistrates' Court has concurrent jurisdiction with the High Court, instituting action in the High Court impacts negatively on the defendant's access to justice, as the costs of litigating in the High Court can be prohibitively high. Section 90(2)(k)(vi)(aa) of the NCA makes it unlawful to have a provision in a credit agreement consenting to the jurisdiction of the High Court while the Magistrate's Court has concurrent jurisdiction. This is a salutary provision as it aims to ensure access to justice for ordinary members of society, in keeping with its objectives of promoting a fair and non-discriminatory marketplace for access to consumer credit and to prohibit certain unfair credit and credit marketing pr actices. It seems that the defendant misunderstood the provisions of this section and averred in paragraph 1.5 of his special plea that the section makes it unlawful to issue summons in the High Court where the Magistrates' Court has concurrent jurisdiction. This situation in this matter is not that there is a provision in the agreement consenting to the jurisdiction of the High Court while the Magistrates' Court has concurrent jurisdiction, but that there was agreement to proceed in the Magistrates' Court, which by implication acknowledges that this court has jurisdiction to hear the matter. The reliance on section 90(2)(k)(vi)(aa) is therefore misplaced.

[11] Clause 2.13 appears to me to have been inserted in the agreement for the benefit of the defendant. Although the provision stipulates that the plaintiff is obliged (verplig) to institute proceedings in the Magistrates' Court, this does not oust the jurisdiction of the High Court. (See **Firstrand Bank Ltd v Horing**

and Another (2134/2017) [2017] ZAFSHC 142 (31 August 2017, a decision of this court). The contention of the defendant in this regard, as it appear in the papers, is that the obligation of the plaintiff to institute proceedings in the Magistrates' Court excludes the jurisdiction of this court. Parties are not permitted to insert provisions in a contract between them, which renders a statutory provision inapplicable or unenforceable. **[Foize Africa (Pty) Ltd v Foize Beheer BV and Others 2013 (3) SA 91 (SCA)].** Therefore, this plea raised by the defendant will not avail him. In any event Mr Greyling correctly conceded that the jurisdiction of this court was not ousted by the provisions of clause 2.13.

[12] It is trite that the parties are bound by the pleadings in a matter, and such determination as a court is required to make, for example in a special plea, must be based on the pleadings as they are presented to the court. The plaintiff's response to the special plea regarding jurisdiction and the averment that clause 2.18 is unlawful because it is in conflict with the CPA, arise out of the pleadings. There were some submissions which Mr Greyling made from the Bar, which do not appear from the pleadings, namely that the institution of proceedings in the High Court is an abuse of process, that the matter should be transferred to the Magistrates' Court (although the court may do so *meru motu*) and that the submissions regarding the defendant's financial standing. The plaintiff had no opportunity to properly respond to these submissions and the court is constrained to pay any heed to them. It seems that Mr Greyling relies on the judgment in **Nedbank Limited v Thobejane, case no. 84041/15 and 12 other matters,** emanating from the High Court, Pretoria, an (as yet) unreported

judgment, handed down in September 2018, where the court dealt extensively with the conduct of banks in bringing mortgage bond foreclosure matters to the High Court where in many instances the Magistrates' Court has concurrent jurisdiction. The court dealt extensively with the aspect of access to justice for people who live in poverty and socio-economic inequality, and was of the view that if a party attempts to bypass the Magistrates' Court, such a litigant is actually defying the attempt by the legislature to bring justice to the people. **(Para 74).** In **paragraph 76**, the court held that it is an abuse of process to allow a matter which can be decided in the Magistrates' court to be heard in the High Court, simply because it has concurrent jurisdiction.

[13] In my view, the type of cases dealt with in the Nedbank matter can be distinguished from the present matter. The defendant, in this case, was legally represented from the outset, when litigation commenced in the High Court. The summons was issued on 26 March 2015 and the defendant entered an appearance to defend on 15 April 2015. His legal representatives clearly had access to and perused the plaintiff's summons and the finance agreement (which was attached to the summons) containing all the provisions upon which the plaintiff's cause of action was based, including clause 2.13. The plaintiff, in its replication, specifically pleaded that the defendant, either expressly or tacitly, by his actions and/or his conduct during the litigation, submitted himself to the jurisdiction of this court. As indicated earlier, the defendant on three occasions requested the court to adjourn the summary judgment application, and such request was made an order of court on each occasion. The defendant then filed an application seeking condonation for the late filing of his affidavit opposing

summary judgment. On the fourth appearance in respect of the summary judgment application, such condonation was granted, the summary judgment application was dismissed and the defendant was given leave to defend the action.

[14] The defendant did not, even once, in his affidavit opposing summary judgment or during any of the four appearances in court raise any objection to the jurisdiction of this court. Mr Tsangarakis pointed out that parties held a conference in terms of Uniform Rule 37 on 19 September 2017. The minute of such conference records under the heading "Oorplasing Na 'n Ander Hof" (Transfer to Another Court) the notation "Nie van toepassing nie" (not applicable). It is clear that as late as September 2017, it was not within the contemplation of the defendant to object to the jurisdiction of this court, and that he in fact submitted himself to the jurisdiction of this court. There is a long line of cases in our law where it has been held that where a person submits himself by a positive act or negatively by not objecting to the jurisdiction of the court, he may confer jurisdiction on that court **[Mediterranean Shipping Co v Speedwhale Shipping Co Ltd and Another 1986(4) SA 329 (D); Bonugli and Another v Standard Bank of South Africa (Ltd) 2012(5) SA 202 (SCA)]**

[15] The Bonugli matter dealt with the issue of submission to the court's jurisdiction in an application for summary judgment. The court at para 23, citing the Mediterranean Shipping case with approval, held that the second appellant in that case "invoked the jurisdiction of the trial court for relief which was, as prayed for by him, to dismiss the Respondent's application for summary judgment with attorney and client costs and to grant him leave to defend the respondent's action on its merits. On the facts of this case we therefore conclude that by not

contesting the competence of the court below to grant summary judgment, the Second Appellant…., by his conduct, unequivocally submitted to its jurisdiction…"

This is the exact situation that prevails in the present case. The defendant, by seeking and obtaining an order to dismiss the plaintiff's application for summary judgment and grant him leave to defend the matter on its merits, without contesting the jurisdiction of the court to do so, "unequivocally submitted to its jurisdiction". As I indicated earlier, clause 2.13 was inserted for the benefit of the defendant, but he waived that benefit when he submitted himself to the jurisdiction of this court. It does not, in my view, now avail the defendant to contest the jurisdiction of this court. However, in view of the defendant's concession in respect of this court's jurisdiction to hear this matter, it is not necessary to deal further with this aspect. Mr Greyling submitted that the court should transfer this matter to the Magistrates' court for hearing, in the interests of granting the defendant access to justice.

[16] This matter had reached the advanced stage of being set down for trial before this court, when the parties decided to separate the two issues mentioned above. While this court has the power to order the transfer of the matter to the Magistrates' Court, this, to my mind, would serve little purpose at this stage. The issue of costs seems to be the main motivating factor for the defendant's request to transfer the matter to the Magistrates' Court. In a case such as this, where the plaintiff agreed to institute proceedings in the Magistrates' Court but proceeds in the High Court, the court should show its displeasure by making the appropriate costs order. The plaintiff, can hardly complain, therefore, if costs are awarded on the Magistrates' Court scale. The award of costs is in the discretion of the court hearing a matter, and while the practise

is that costs follow the result, it is open to the court to deviate from the usual practice by making a costs order that it deems equitable or one that will demonstrate its displeasure at the conduct of a party to the proceedings. I note that in this matter the defendant agreed to pay costs on the attorney and client scale

[17] In summary, therefore, I find that the two points raised by the defendant and separated for determination by this court, were not well taken. For the reasons set out above, the pleas that this court lacks jurisdiction to hear this matter, and that clause 2.18 is unenforceable due to being in conflict with the CPA must fail.

[18] In the circumstances, the following order is made:

18.1 The two special points raised by the defendant are dismissed.

18.2 The defendant is ordered to pay the plaintiff's attorney and client costs on the Magistrates' Court scale.

S. NAIDOO, J

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