

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Regional Court case number: RCC/MOS: 84/23

Appeal case number: A207/2024

In the matter between

H[...] G[...] W[...]

Appellant

and

M[...] W[...] (née B[...])

Respondent

JUDGMENT DELIVERED ON 26 MARCH 2025

VAN ZYL AJ (LEKHULENI J concurring):

Introduction

1. Jurisdiction is fundamental. A court must have jurisdiction in a matter for its judgment or order in that matter to be valid. Without jurisdiction the judgment or order is a nullity. No pronouncement to that effect is required. It is simply treated as such.¹ Once a court has jurisdiction, it retains that jurisdiction until the suit is concluded.²
2. The appellant appeals against the judgment handed down by the Mossel Bay Regional Court on 4 July 2024, dismissing the appellant's special plea of lack

¹ *Trade Fairs and Promotions (Pty) Ltd v Thomson and another* 1984 (4) SA 177 (W) at 183D-E.

² *Mills v Starwell Finance (Pty) Ltd* 1981 (3) SA 84 (N) at 88A-B.

of jurisdiction in the divorce action pending between the parties. The appellant had pleaded that the court lacked jurisdiction over the persons of the parties as required in section 28(1A) of the Magistrates' Courts Act

3. The issue before this Court is whether the regional court was justified in its dismissal of the special plea, given the contents of the pleadings in the action in relation to jurisdiction, coupled with the fact that neither of the parties furnished oral evidence in this respect at the hearing.

The pleadings in the divorce action

4. Section 2(1) of the Divorce Act 70 of 1979 provides as follows:

“2. Jurisdiction. – (1) A court shall have jurisdiction in a divorce action if the parties are or either of the parties is---

(a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted;³ or

(b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.’

5. The respondent, as plaintiff, instituted a divorce action against the appellant, as defendant, on 20 April 2023 in the Mossel Bay Regional Court. In her particulars of claim, the respondent alleged in relation to jurisdiction that she and the appellant “*are currently residing within the area of jurisdiction of this Honourable Court*”. No further allegations are made as to the basis for that particular court’s jurisdiction.
6. *Ex facie* the particulars of claim, therefore, the respondent relied solely on the issue of ordinary residence to establish the Mossel Bay Regional Court’s jurisdiction. She did not rely on domicile as contemplated in section 2(1)(a) of the Divorce Act.

³ In terms of section 1(2) of the Divorce Act a divorce action “*shall be deemed to be instituted on the date on which the summons is issued*”.

7. It is apparent from the particulars of claim, too, that the respondent did not make any allegation as to the second part of section 2(1)(b) of the Divorce Act, namely ordinary residence in the Republic for at least a year prior to the institution of the action. It is, in fact, common cause that neither party had been so resident at the relevant time. The respondent's reliance on section 2(1)(b) of the Divorce Act was therefore misplaced from the outset. In this regard, it appears from the counterclaim and replication that the parties had resided in Australia for some time prior to the institution of the divorce action, and had relocated to South Africa with the intent either to settle in Namibia or in South Africa.
8. The appellant disputed the court's jurisdiction to entertain the action by way of a special plea, which was subsequently amended. The amended version of the special plea reads as follows:
 - “1. *As on the date on which the divorce action had been instituted neither of the parties were domiciled or ordinarily resident within the area of jurisdiction of the honourable court and ordinarily resident within the Republic of South Africa for at least one year prior to the date on which the action was instituted.*
 2. *The Defendant therefore denies that this honourable court is enjoined with jurisdiction to grant a decree of divorce and associated relief herein.”*
9. The question thus arose whether the Mossel Bay Regional Court had jurisdiction to entertain the divorce action, and specifically whether the respondent was domiciled in its area of jurisdiction on the date when summons was issued by the registrar of that court. As indicated, neither of the parties furnished any evidence at the hearing of the special plea.
10. The regional court, after considering the pleadings and hearing argument on the matter, dismissed the special plea, with costs. The magistrate found that it "*can be inferred*" from the pleadings that the respondent was domiciled

within the Court's area of jurisdiction, and that the regional court accordingly had jurisdiction to adjudicate the matter. It is this finding that gave rise to the appeal.

Did the respondent establish that she was domiciled within the area of jurisdiction of the Mossel Bay Regional Court?

11. It is trite that jurisdiction is determined with reference to the allegations in the pleadings, and not by the substantive merits of the case. In the event of the court's jurisdiction being challenged at the outset, the plaintiff's pleadings are the determining factor since they contain the legal basis of the claim under which the plaintiff has chosen to invoke the court's competence.⁴
12. A summons (whether simple or combined) must indicate that the court has jurisdiction.⁵ Generally in action proceedings, a plaintiff must allege and prove the facts necessary to establish that the court has jurisdiction in the matter and over the person of the defendant.⁶ It does not suffice merely to allege the legal conclusion of jurisdiction. The onus of establishing jurisdiction ordinarily rests on the plaintiff as *dominus litis*.⁷
13. It is not necessary in the ordinary course to make any specific allegation concerning jurisdiction, provided that the underlying facts establishing jurisdiction appear from the pleading. For instance, an allegation that the defendant resides within the area of jurisdiction of the court may be an adequate *prima facie* allegation of jurisdiction. Likewise, an allegation that the delict was committed within the court's area of jurisdiction is sufficient to establish jurisdiction.⁸ Where, as in the present matter, a statute prescribes the bases upon which a court exercises jurisdiction, it must appear from the pleading that the requirements posed by such statute – the Divorce Act, in the present matter – have been met. The plaintiff in a divorce action must thus

⁴ *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) at para [75].

⁵ See *Kikillus v Susan* 1955 (2) SA 137 (W).

⁶ *Communication Workers Union v Telkom SA Ltd* 1999 (2) SA 586 (T) at 594G-H.

⁷ *Malherbe v Britstown Municipality* 1949 (1) SA 281 (C) at 287.

⁸ See the discussion in *Erasmus Superior Court Practice* (online version, RS 23, 2024) at D1 Rule 22-26, and the authorities cited there.

allege and prove that the court has jurisdiction on the basis of either domicile or residence.⁹

The appellant's case

14. The appellant contends, correctly, that respondent does not make an averment in her particulars of claim that the Mossel Bay Regional Court has jurisdiction on the basis of domicile. As indicated, she also does not plead that either party has been ordinarily resident in the country for at least one year prior to institution of the proceedings.
15. The appellant therefore argues that the regional court erred in dismissing the special plea, on the following two grounds. First, the court erred in finding that it had jurisdiction based on the respondent's domicile, when no averments or factual foundation as to domicile was made by the respondent in her particulars of claim. Reference was merely made to where the parties resided. Second, the court erred by having regard to matter not on the pleadings, and not given in evidence, in reaching its decision as regards the respondent's domicile.
16. A consideration of the judgment indicates that the regional court found that it was "common cause" that the respondent had been resident in Mossel Bay for a period of 3 days at the time of institution of the divorce. This is not the case on the pleadings. The only references to "3 days" is in the replication, in which the respondent pleads that she had informed the appellant within 3 days of arriving in South Africa that she intended to stay in South Africa and not return to Namibia with him. A similar reference appears in the unamended special plea, and it is possible that the regional court had regard to the unamended pleadings.
17. Any averments in the original special plea however became irrelevant when the pleading was successfully amended without objection, and the regional

⁹ See *Rousalis v Rousalis* 1980 (3) SA 446 (C) at 449F-450B.

court should not have had regard to the unamended pleadings in reaching a decision:

*"It is a general rule that a pleading into which words have been incorporated by amendment must be read as if the incorporated words had been there in the first place, i.e. when the pleading was filed in the first instance."*¹⁰

18. The regional court found that the respondent had not given up her domicile of origin in South Africa in favour of another country, had not established a *domicilium* other than her *domicilium* of origin, and therefore retained her domicile as South Africa. As mentioned earlier, the pleadings merely indicate that the parties had relocated from Australia shortly before the institution of the divorce action, seemingly with the intent to settle in Namibia (on the appellant's version in the counterclaim) or South Africa (on the respondent's version in the replication). There are thus insufficient allegations on the pleadings to come to the conclusion that the magistrate had come to in relation to the respondent and, as indicated, no evidence was led in this respect. In fact, the respondent avers in her particulars of claim that the parties had emigrated to Australia in May 2018, which likely affected her domicile.
19. The regional court found, further, that the parties had not set up residence nor taken up employment in Namibia as of yet. Here, again, the court seemingly considered the appellant's original special plea of jurisdiction, which had referred to the parties' plans to move to Namibia. After the amendment of the special plea, the only averment on the pleadings as they stand, pertaining to Namibia, is the appellant's averment in his counterclaim that he does in fact reside in Namibia.
20. The regional court found that it was common cause between the parties that the respondent regarded South Africa as her permanent residence at the time of institution of the proceedings. There is no indication thereof from the

¹⁰ *Cordier v Cordier* 1984 (4) SA 524 (C) at 533B.

pleadings. The regional court also found (seemingly contradictorily) that the parties had been resident in Australia for over 5 years prior to institution of the proceedings. This is not on the pleadings as they stand.

21. The regional court found that "*from a proper reading of the file contents*" it seemed that the respondent had no intention of returning to Australia or taking up residence in Namibia, but had decided to remain in South Africa for an indefinite period. This is not evident from the pleadings in their amended form.
22. The magistrate found that "*it is apparent from the facts and the particulars of claim*" that:
 - 22.1. The appellant was resident within the Court's jurisdiction when proceedings were instituted. This is however the opposite of what the appellant alleges in his counterclaim.
 - 22.2. The respondent "*avers in her particulars of claim*" that the Court has jurisdiction. No such averment is made in the particulars of claim.
 - 22.3. Prior to institution of the proceedings, the respondent was resident in Australia, but never considered Australia to be her permanent place of residence and was never issued with Australian citizenship. This does not appear from the pleadings.
 - 22.4. The respondent had decided that Mossel Bay would be her domicile of choice because of the fact that she did not intend to relocate to Namibia and would remain in South Africa for an indefinite period of time. Apart from the fact that the respondent did not rely on domicile in her particulars of claim, and no evidence on these issues had been led, this is a finding that contradicts the court's earlier finding that the respondent had not given up her domicile of origin.
23. I agree with the submissions made by the appellant's counsel that the regional

court erred in coming to the conclusions that it did on the material available to it. The appellant had placed the question of jurisdiction in dispute by pleading that neither of the parties were domiciled or ordinarily resident in the area of the court's jurisdiction at the time of the institution of the action. In the absence of evidence having been led on the question of domicile,¹¹ the allegations in the pleadings (as amended) were insufficient to support the ultimate finding that the Mossel Bay Regional Court had jurisdiction to determine the divorce action.

The respondent's submissions

24. The respondent relies on a report delivered by the Family Advocate under another case number, which dealt with an investigation conducted into the best interests of the parties' minor child. According to the respondent's counsel, a copy of the report was on the divorce action file, and the regional court had regard to it in deciding the question of jurisdiction. The report apparently considered aspects of the minor child's residence.
25. The respondent argues that on the authority of *Thompson v South African Broadcasting Corporation*¹² the regional court was entitled to rely on the report in reaching a decision. Counsel relies on the following extract from *Thompson*, where the Supreme Court of Appeal stated:¹³

"The function of oral argument, especially in a Court of appeal, is supplementary to the written argument. If a party chooses not to raise an obvious issue in his head, he does so at his peril. The court is entitled to base its judgment and to make findings in relation to any matter flowing fairly from the record, the judgment, the heads of argument or the oral argument itself."

26. This is not, however, authority for the proposition that a court may accept as evidence (or as pleadings where reference is to be made to the pleadings)

¹¹ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 2871-288D.

¹² 2001 (3) SA 746 (SCA).

¹³ *Thompson supra* at para [7].

material that constitutes neither evidence nor pleadings. This includes facts and submissions made in heads of argument which do not arise from the pleadings or from the evidence before the court.

27. The question in *Thompson* was whether the Court could accept that factual matters not raised in the heads of argument were no longer in issue between the parties. This appears from paragraph [4] of the judgment, read with paragraph [7] in its entirety:¹⁴

“[4] Although the finding of the Court a quo was attacked by the applicant when applying for leave to appeal, it is noteworthy that in the heads of argument filed on his behalf it was not alluded to at all. Instead, the argument focused on legal issues. This Court was therefore justified in assuming that the applicant accepted these findings. Factual findings of trial courts are in any event presumed to be correct unless shown otherwise. At the hearing in this Court the argument was directed towards the legal issues.

[7] There is an underlying assumption in the applicant's submissions to the effect that unless something was raised or dealt with during oral argument, the matter can be reopened and that the Court can amend its judgment in relation thereto. This is a misconception. The function of oral argument ...”.

28. The family advocate's report is not part of the pleadings of the divorce action, and it is not before this Court as part of the appeal record. No evidence was led in relation thereto at the hearing of the special plea. It was, therefore, not open to the regional court to have regard thereto in deciding the fate of the special plea.
29. The respondent argues further that every South African who was born in South Africa has South Africa as their domicile by operation of law, in this instance referred to as their domicile of origin. Persons – such as the respondent - who have South Africa as their domicile of origin and have not given up South Africa as their domicile in favour of another country, retains

¹⁴ *Thompson supra* at paras [4] and [7]. Emphasis added.

their domicile as South Africa. The regional court was therefore entitled to accept that the respondent had been domiciled in South Africa at all relevant times, including on the date of the institution of the divorce action.

30. Section 1 of the Domicile Act 3 of 1992 provides as follows:

“Domicile of choice. ---(1) Every person who is of or over the age of 18 years, and every person under the age of 18 years who by law has the status of a major, excluding any person who does not have the mental capacity to make a rational choice, shall be competent to acquire a domicile of choice, regardless of such a person’s sex or marital status.

(2) A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period.”

31. The respondent’s counsel argues that the respondent never lost her original domicile, as one cannot be without a domicile at any given time.¹⁵ Her original domicile was South Africa. This was also her domicile of choice.
32. The respondent is correct on the law relating to domicile, but where a person’s domicile is is a factual question. Whether a party is domiciled in South Africa depends on the facts of each unique case. The point remains that the regional magistrate had no evidence before him to support a finding that the respondent was in fact domiciled in South Africa, and within the area of jurisdiction of the Mossel Bay Regional Court,¹⁶ on the date of the institution of the divorce action.

33. The respondent argues that this Court should follow a “flexible approach” as set out in *OB v LBDS*¹⁷ in which a Full Bench of this Division stated as follows:

“[37] In LAWSA: Conflict of Laws (2ed 2(2)) at para 301 the author, relying on

¹⁵ *Smith v Smith* 1970 (1) SA 146 (R) at 147G.

¹⁶ As required by section 2(1)(a) of the Divorce Act.

¹⁷ 2021 (6) SA 215 (WCC) at paras [37]-[38]. Emphasis added.

the opinion expressed in para 3.44 of the South African Law Commission Working Paper 20 on the issue of domicile of choice, states:

‘Whilst the strength of an intention to settle in a country may be easy enough to gauge... and thus satisfy the test of intention, the just resolution of hard cases will require a more flexible approach for determining the acquisition of a domicile of choice than can be provided by the test of intention which serves legal certainty alone.’

[38] Having regard to the evidence before the court a quo I am persuaded that, although the facts in this matter may constitute a “hard case” on domicile, a flexible approach is called for, and that to lean on legal certainty alone would militate against the interests of justice. It would follow, on this reasoning, that the appellant established on a balance of probabilities that at the time of institution of the divorce proceedings she was domiciled within this court’s area of jurisdiction, and the court a quo thus had the requisite jurisdiction to grant the decree of divorce.”

34. The problem for the respondent in the present matter is that the situation in *OB v LBDS* is distinguishable from the situation that pertained in the present case. In *OB* the Court had scope to follow a flexible approach, because the parties had furnished evidence on the issue of domicile at the hearing of the action. The Court therefore had facts at its disposal upon which it could decide whether a case had properly been made out to the effect that the court had jurisdiction to entertain those parties’ divorce action.
35. The authorities are clear that to establish a domicile of choice the person concerned, besides expressing a mere intention to reside permanently at a proposed domicile, must also establish such choice of domicile from all the surrounding circumstances, and that she has in fact done so:

“Factors to be considered in determining whether a new domicile has been acquired are the (probably questionable) assumption that a spouse who leaves the other spouse behind at a place does not change his or her domicile there; the period of residence at the alleged domicile; the motive for residing there; the ownership of property there (or sale of property in the previous

domicile); the application for permanent residence or citizenship there; any circumstantial evidence indicating the presence or absence of an animus manendi; direct evidence about the subjective intention to be domiciled in a certain area; and evidence of past expressions of intention.”¹⁸

36. The regional court in the present matter did not have the benefit of any evidence upon which to find that the respondent had established that she was domiciled within the court’s area of jurisdiction at the time of the institution of the divorce action.
37. In these circumstances, I respectfully borrow the following *dictum* from the minority judgment in *OB*,¹⁹ which *dictum* seems to me to be apposite in the present matter given the absence of evidence on the question of domicile:

“In this regard I am mindful of the reference by the majority to LAWSA: Conflict of Laws (Vol 7(1) 3rd Ed para 326), where reliance is placed on the opinion expressed by the South African Law Commission Working Paper 20 on the issue of domicile of choice. While this may indeed be a ‘hard case’ on domicile, I am not persuaded that a flexible approach, in respect of the facts of this matter, can be adopted in the interests of justice. In my view, the interests of justice are more properly served when a domicile of choice is properly established on the facts and on the evidence presented, rather than on an overly generous interpretation of the evidence, or by a lack thereof.”

38. At the hearing of the appeal the Court raised with counsel the possibility, should the appeal be upheld, of remitting the issue to the regional court to hear evidence on the question of domicile, and to decide the issue afresh. Section 19(c) of the Superior Courts Act 10 of 2013 provides as follows:

“The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for any other law – ... (c) remit the case to the court of first instance, or to the court whose

¹⁸ Joubert et al LAWSA Vol. 7(1) (3ed) at para 328.

¹⁹ *OB v LBDS supra* at para [16] (minority judgment). Emphasis added.

decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; ...”

39. Similar provision for the remittal of matters is made in section 87(b) of the Magistrates’ Courts Act 32 of 1944:

“The court of appeal may ... (b) if the record does not furnish sufficient evidence or information for the determination of the appeal, remit the matter to the court from which the appeal is brought, with instructions in regard to the taking of further evidence or the setting out of further information...”

40. The appellant contends that this route is not open to the Court because the respondent did not plead, in her particulars of claim, that she was *domiciled* within the jurisdiction of the Mossel Bay Regional Court. Domicile is therefore not an issue on the pleadings. Counsel relies on *Minister of Safety and Security v Slabbert*²⁰ in which the Supreme Court of Appeal held as follows:

“[11] A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.”

41. The appellant argues that it will therefore be impermissible for the respondent to adduce evidence regarding her *domicilium* to establish jurisdiction. She will be seeking to establish a different case to the one pleaded in her particulars of claim. Should this Court remit the matter to the Regional Court, it would effectively be directing the magistrate to allow the hearing of inadmissible evidence.

42. I am, however, of the view that although the issue of *domicilium* had not been

²⁰ [2010] 2 All SA 474 (SCA) at para [11].

pleaded in the particulars of claim, it became an issue between the parties when the appellant, in his special plea (as amended), alleged that *“as on the date on which the divorce action had been instituted, neither of the parties were domiciled ... within the area of jurisdiction of the honourable court ...”*

43. To this, the respondent replicated as follows:

“1.1 Plaintiff denies that she was not domiciled within the jurisdiction of the honourable court when the action was instituted.

1.2 In amplification of the aforesaid denial plaintiff, who is South African by birth, avers that within 3 days upon the parties’ arrival in South Africa from Australia and prior to the institution of the divorce action, she conveyed to defendant that she and the parties’ minor child will not accompany defendant to Namibia and that she will permanently remain in Mossel Bay, South African (sic) with the parties’ minor child”.

44. In *Minister of Safety and Security v Slabbert*²¹ the Supreme Court of Appeal qualified the statement in paragraph [11] of its judgment (quoted above) by pointing out that:

“[12] There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial. In South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd,³ this court said:

‘However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue’.”

45. The issue of domicile was squarely raised by the appellant in his special plea, replicated to by the plaintiff, and the regional court was asked to make a ruling

²¹ *Supra* at para [12].

in relation to jurisdiction after consideration of the issues of both ordinary residence and *domicilium*. Full argument in relation to these aspects were addressed to the regional court, and it was expected to pronounce upon the issue.

46. The fact that the regional court pronounced on the issue of domicile is therefore not the problem *per se*. The difficulty lies in the absence of evidence supporting the regional court's finding in relation to the respondent's domicile. It seems to me, in any event, that a remittal is not necessary. The regional court was incorrect in its finding on the special plea, and that is the end of the matter. In summary, the regional court lacked the necessary jurisdiction to hear the matter based on the filed pleadings.

Conclusion

47. In the premises, the respondent has failed to establish that the Mossel Bay Regional Court has the necessary jurisdiction to determine the divorce action, and the regional court erred in finding, on the material at its disposal, that it had jurisdiction over the divorce action on the basis of the respondent's domicile at the time of the institution of the action.
48. As an aside, I must question the parties' decision to pursue this appeal to finality, rather than to effect an appropriate amendment to the particulars of claim at the time when the special plea was delivered. The parties were, and are, both assisted by experienced attorneys and counsel, and there is no reason why the action should have been delayed because of the issue at the core of this appeal.
49. Although a decision to amend was the respondent's prerogative, I blame both parties for this sad state of affairs. The divorce action was instituted almost two years ago, and the regional court delivered its judgment nearly 8 months ago. The parties have incurred significant legal costs, and wasted time, without resolving the real disputes between them. This is not a well-considered manner in which to conduct litigation in which the emotional costs

are already high.

Costs

50. There is no reason why costs should not follow the event. Counsel for both parties submitted that counsel's fees should be taxed on Scale C.
51. In the exercise of my discretion on the available facts as a whole, I regard an award of counsel's fees on Scale B as warranted in the present matter. The issue of jurisdiction is fundamental to the eventual validity of an order granted in the divorce action, but I do not think that the issues were so complex as to warrant a higher scale.²²

Order

52. In the circumstances, I would grant the following order:
- 52.1. The appeal is upheld, and the order dated 4 July 2024 of the Mossel Bay Regional Court, dismissing with costs the appellant's special plea, is set aside and replaced with the following order:
- "The defendant's special plea is upheld, with costs."*
- 52.2. The respondent shall pay the costs of the appeal, including counsel's fees taxed on Scale B.

P. S. VAN ZYL
Acting judge of the High Court

I agree, and it is so ordered.

²² See Uniform Rule 67A(3).

J. LEKHULENI
Judge of the High Court

Appearances:

For the appellant:

Mr M. van der Merwe, instructed by VST
Attorneys

For the respondent:

Ms T. le Roux, instructed by Natascha
Pretorius & Associates