

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: A2025-033374

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|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES |

DATE

SIGNATURE

In the appeal between:

ASHERSONS ATTORNEYS

First Appellant

CASH CRUSADERS (PTY) LTD

Second Appellant

MAUREEN N CIBE t/a SHERIFF SOWETO WEST

Third Appellant

and

B O KHUMALO t/a SHERIFF LENASIA / LENASIA NORTH

Respondent

JUDGMENT

Introduction

[1] This appeal arises from a judgment and order of the learned Acting Magistrate RM Masina, delivered in the Regional Court held at Kliptown on 12 February 2025 (“the Judgment”), in which the court *a quo* dismissed the special pleas of jurisdiction raised by both the first and second appellants (in respect of claim 1) and the third appellant (in respect of claim 2), with costs. The appellants now seek to have that decision set aside and replaced with orders upholding their respective special pleas, with costs.

Background

[2] The first appellant, Ashersons Attorneys, is a firm of attorneys based in Cape Town. The second appellant, Cash Crusaders (Pty) Ltd, is also situated in Cape Town and was at all material times a client of the first appellant and the execution creditor relevant to these proceedings. The third appellant, Maureen N Cibe, is a sheriff trading as Sheriff Soweto West and operates from Protea North, Soweto. The Respondent is the appointed sheriff for the areas of Lenasia and Lenasia North in Gauteng.

[3] In the court *a quo*, the respondent, as plaintiff, sued all three defendants for services rendered and disbursements incurred. In respect of the first and second defendants (now appellants), the claim pertained to the respondent’s fees and disbursements arising from the execution of a writ of execution issued by the Western Cape High Court in favour of the second appellant. In respect of the third defendant (now appellant), the claim was also contractual in nature, relating to the storage costs for the goods attached during execution.

[4] The first and second appellants (as a unit) and the third appellant, each raised separate special pleas that the whole cause of action had not arisen within the jurisdiction of the Kliptown Regional Court. The third appellant’s special plea raised additional grounds based upon the fact that a revised Government Gazette prescribed the geographical jurisdiction of Kliptown Magistrates Court.

[5] The appellants appeal against the dismissal of their special pleas by the learned magistrate.

[6] The respondent's counsel raised further arguments during the course of the appeal pertaining to the special pleas raised to claim 1 concerning the first and second appellants.

a. The one was that the respondent's claim was essentially statutory in nature, being for fees and disbursements to which he was entitled by statute, rather than for payment for services rendered under a contract.

b. The other was that even on the basis that a contractual claim had been pleaded, the evidence adduced at the trial was that he had made a counter-offer in insisting on the payment of a deposit before executing the writ that had been accepted by the first appellant in Cape Town but only communicated to him at his place of business within the jurisdiction of the Regional Court.

[7] The third appellant also added a further ground of appeal, namely that the amount of R65 000 claimed against the third appellant was below the minimum monetary threshold for claims in the Regional Court (whose band of jurisdiction is limited to claims between R200 000 and R400 000) and ought properly to have been brought in the Magistrate's Court.

[8] In response to this new "*special plea*" raised only on appeal, the respondent's counsel made reference to the decision of Binns-Ward J in the Western Cape High Court in the matter of *Minister of Police v Regional Magistrate, Outshoorn and Others*¹ that held that it is the upper limit set that is determinative of jurisdiction.

[9] The respondent's counsel also argued that a special plea of jurisdiction may not be raised after *litis contestatio*.

The issues to be decided

[10] The discrete issues that fall to be decided in this appeal are as follows:

The first and second appellants' special plea to claim 1

a. Whether, as against the first and second appellants, the whole cause of action arose within the territorial jurisdiction of the Kliptown Regional Court, as required

¹ (15587/2013) [2014] ZAWCHC 165 (6 November 2014)

by section 28(1)(d) of the Magistrates' Courts Act 32 of 1944 (“the Magistrate’s Court Act”).

- b. Whether, without an amendment to the particulars of claim, the respondent is entitled to rely upon the statutory duty of a sheriff to execute a warrant of execution that arises *ex lege* despite the fact that it was not pleaded but was raised and canvassed by the court *a quo*. (This inquiry applies equally to third appellant’s special plea to claim 2.)
- c. Whether the respondent was entitled by way of supplementary heads of argument to raise the argument that the respondent’s stipulation that a deposit be paid amounted to a counter-offer, that was accepted by the first appellant in Cape Town but conveyed to the respondent in Kliptown, within the jurisdiction of the Regional Court.

The third appellant’s special plea to claim 2

- a. Whether, as against the third appellant, the whole cause of action arose within the jurisdiction of the Kliptown Regional Court, having regard to the applicable Government Gazette delimiting the court’s geographical area, the place of conclusion and performance of the alleged oral agreement, and the place of any alleged breach.
- b. Whether, in any event, the Kliptown Regional Court had the monetary jurisdiction to adjudicate the claim against the third appellant in the amount of R65,000.00 below the monetary threshold of R200 000.
- c. Whether this latter ground can be raised by the third appellant after *lis contestatio*.

[11] Certain other points were raised by the respondent that I do not regard as real points in issue to be dealt with in this judgment; nevertheless I pay cursory regard to them in the course of this judgment.

The legislative framework and the relevant case law

a. *Section 28(1)(d) of the Magistrates’ Courts Act*

[12] The jurisdiction of the magistrates’ courts in respect of persons is comprehensively regulated by section 28 of the Act. Section 28(1)(d) confers jurisdiction over “*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.”

- [13] This provision creates a form of special jurisdiction and constitutes a departure from the common law rule of *actor sequitur forum rei*, which requires a defendant to be sued in the district where he or she resides or carries on business. Because the right to invoke this special jurisdiction is a departure from the common law, it is restricted: a plaintiff may sue a defendant under this provision only if the cause of action arose *wholly* - not merely partially - within the district or regional division.²
- [14] A Magistrates Court, including a Regional Court, unlike the High Court, has no inherent jurisdiction. It may entertain only those matters which the Magistrates' Courts Act and the applicable regulations confer upon it. Where jurisdiction is founded on s 28(1)(d) of the Act, the jurisdictional fact is that the cause of action must have arisen wholly within the district or regional division. That requirement is not satisfied because some facts occurred within the courts' area, nor because the respondent's office or storage facility is situated there. The whole cause of action must arise there.
- [15] In order for a cause of action to arise wholly within the area of jurisdiction of a Magistrates' Court, all the *facta probanda* - the material facts necessary to disclose a cause of action - must have occurred within the area of jurisdiction. In *McKenzie v Farmers' Co-operative Meat Industries Ltd*,³ the court defined cause of action as “*every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court.*”
- [16] In actions founded on contract, the cause of action includes: (a) the conclusion of the contract; (b) the terms of the contract (including the agreed place of performance); and (c) the breach of the contract. In an action for remuneration for services rendered, the cause of action does not arise wholly within the district if the contract was concluded elsewhere, the performance was to occur elsewhere, or the payment was to be made in another district.⁴
- [17] This is different from the jurisdiction conferred upon the High Court. In terms of Section 21(1) of the Superior Courts Act 10 of 2013, a High Court has jurisdiction over all causes

² See *Volume 5(1) Third Edition Replacement LAWSA at para 61.*

³ 1922 AD 16

⁴ *Eisenberg v OFS Textile Distributors (Pty) Ltd* 1949 (3) SA 1047 (O); *Herholdt v Rand Debt Collecting Co* 1965 (3) SA 752 (T) at 756G-757A; *Jones & Buckle, The Civil Practice of the Magistrates' Court in South Africa* (Lexisnexis) at Act 106.

arising and persons residing within its designated geographic area. In contractual disputes, for instance, a High Court has jurisdiction if:

- a. The contract was concluded within its jurisdiction.
- b. Performance in terms of the contract was meant to happen within its jurisdiction.
- c. The breach of contract occurred within its jurisdiction.

[18] This means if any one of these elements takes place in the province where the High Court sits, a High Court can hear the matter, whereas a Magistrate's Courts' jurisdiction is limited to matters where the whole cause of action occurs within its geographical limits.

[19] In actions founded on contract, the cause of action includes: (a) the conclusion of the contract; (b) the terms of the contract (including the agreed place of performance); and (c) the breach of the contract. In an action for fees for services rendered, the cause of action does not arise wholly within the district if the contract was concluded elsewhere, the performance was to occur elsewhere, or the payment was to be made in outside of the jurisdiction of the court.⁵

b. *Conclusion of a contract by telephone*

[20] The general rule in our law is that a contract is concluded at the time and place where agreement is reached - that is, when and where the offeror receives communication of the offeree's acceptance. This is known as the information theory.⁶

[21] In the case of contracts concluded by telephone - which are analogous to contracts made *inter praesentes* - the information theory applies.⁷ Where offer and acceptance are made by telephone, the contract is concluded at the place where the offeror is, i.e. where the offeror learns that the offer has been accepted.

[22] In *Tel Peda Investigation Bureau (Pty) Ltd v Van Zyl*,⁸ the defendant filed a special plea claiming lack of jurisdiction. The defendant argued that the contract came to existence in Johannesburg as opposed to East London (in which event the Johannesburg court would have jurisdiction). The special plea did not succeed in the Magistrates Court, as

⁵ *Eisenberg v OFS Textile Distributors (Pty) Ltd* 1949 (3) SA 1047 (O); *Herholdt v Rand Debt Collecting Co* 1965 (3) SA 752 (T) at 756G-757A; *Jones & Buckle The Civil Practice of the Magistrates' Court in South Africa* (Lexisnexis) at Act 106.

⁶ *Estate Breet v Peri-Urban Areas Health Board* 1955 (3) SA 523 (A) at 532; *Volume 9 Third Edition LAWSA at paras 306 & 307.*

⁷ *Jamieson v Sabingo* 2002 (4) SA 49 (SCA)

⁸ 1965 (4) SA 475 €

the court was of the view that the plaintiff accepted the offer in East London and therefore the cause of action arose in East London. The defendant appealed against the Magistrate's finding and the Appeal Court subsequently overruled the Magistrate's decision, finding that where a contract is concluded by means of a telephone call, the acceptance of the offer instantly becomes known to the offeror (over the telephone), hence the contract is concluded in the area where the offeror is based at that point in time. The Appeal court found that the contract has indeed been concluded in Johannesburg and the special plea should have been upheld.

[23] The *locus contractus* is the place where the last step which is required for the completion of the contract takes place.⁹ In cases of doubt, it is presumed that the contract is formed only when and where the acceptance is communicated to the offeror.¹⁰

c. *The admissibility of evidence to establish the special pleas*

[24] The Constitutional Court has made it plain that a special plea of jurisdiction must be decided on the pleadings and not the merits.¹¹ But that does not mean that evidence cannot be led to support the averments made in the special plea where there are disputes of fact.¹² If jurisdiction depends on disputed facts, the court may hear evidence before merits.¹³ The evidence is then confined to the special plea concerning jurisdiction.¹⁴

[25] In this respect, a special plea of jurisdiction is distinct from an exception. Where the jurisdiction objection is that even accepting the plaintiff's pleaded facts as true, jurisdiction is absent, the matter may be determined purely on the pleadings. This is because no factual inquiry is required.

[26] As explained in *Absa Bank Ltd v Boksburg Transitional Local Council*,¹⁵ if a special plea introduces facts not appearing *ex facie* the particulars of claim, evidence may be admissible.

⁹ *Volume 9 Third Edition LAWSA at para 306; Kergeulen Sealing & Whaling Co Ltd v CIR* 1939 AD 487.

¹⁰ *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd* 2009 (2) SA 504 (SCA)

¹¹ *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC)

¹² *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010 (4) SA 109 (SCA)

¹³ *Foize Africa (Pty) Ltd v Foize Beheer BV* 2013 (3) SA 91 (SCA), where jurisdictional facts were examined substantively rather than merely formalistically.

¹⁴ *supra*

¹⁵ 1997 (2) SA 415 (W)

[27] In the present matter, the appellant relied upon facts that did not all appear from the particulars of claim. Although the respondent did not file a replication, these facts not consistent with the particulars of claim must be regarded as having been denied. In these circumstances evidence was admissible to establish the facts set out in the special plea.

[28] I thus accept that evidence was admissible to establish where the contract was concluded and in turn to support the special pleas as pleaded.

[29] As a corollary, I must accept that evidence was admissible by the respondent to refute the special pleas; but that does not mean that evidence was admissible to support a new cause of action outside of the special pleas that was not pleaded.

[30] A plaintiff may not at trial depart from the case pleaded in the particulars of claim in order to alter the jurisdictional basis of the claim; parties are held strictly to their pleadings¹⁶-subject of course to a litigant's right to seek an amendment.

[31] As the Makhanda High Court recently confirmed in *Eastern Cape Motors (Pty) Ltd v Wolmerans (Appeal)*¹⁷ that:

"The importance of pleadings is trite. They define the issues for the other party and for the court... Holding parties to their pleadings is not pedantry - it is integral to the achievement of legal certainty which is central to the constitutional prescript of the rule of law. It is impermissible for a court, when deciding a case, to have recourse to issues not specifically pleaded by a party and which are extraneous to the pleadings... The adjudication of the matter on material that had not been foreshadowed in the defendant's plea and without proper consideration of the issues underlying the appellant's cause of action was a misdirection which entitles interference on appeal."

The application of the law to the facts

a. *The first and second appellants' special plea to claim 1*

[32] In his particulars of claim, the respondent expressly pleaded the following:

¹⁶ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1925 AD 173 at 198; *Nick's Fishmonger Holdings (Pty) Ltd v Fish Diner in Bryanston CC* 2009 (5) SA 629 (W) at 642.

¹⁷ (CA49/2024) ZAECMKHC 34 (15 April 2025)

“2. *The whole cause of action arose within the jurisdiction of the above Honourable Court. ...*

5. *On the 15th April 2021 at Armadale pursuant to [a] Writ of Execution ... the 1st Defendant instructed the Plaintiff to execute the aforesaid Writ.*

6. *The Plaintiff accepted the aforementioned instructions as mandated by the laws of the Republic of South Africa and as a result of the aforementioned acceptance of the instructions a contract or agreement was entered into between the Plaintiff and 1st and 2nd Defendants, and amongst others the following was the express or tacit terms of the agreement...”*

[33] The Respondent thus expressly pleaded both an instruction (offer) and an acceptance of that instruction, resulting in a concluded contract. This is the case which the first and second appellants were required to meet.

[34] The first and second appellants’ special plea challenged the jurisdictional basis by pleading that the instruction was given in Cape Town, the acceptance occurred in Armadale and that the agreement was accordingly concluded in Cape Town. In addition, the first and second appellants relied upon the fact that the breach (failure to pay fees) also occurred in Cape Town.

[35] Faced with these difficulties, the respondent’s counsel argued and the learned magistrate accepted that it mattered not that the claim had been formulated in contract as in truth and in fact, where a sheriff sues for fees, his cause of action is sui generis and arises from the Rules applicable to the Magistrates Court as well as the Sheriff’s Act 90 of 1986 (*“the Sheriff’s Act*) and not in contract.

[36] In this respect reliance was placed on Rule 45(3), Rule 68, and *BG Bojosinyane & Associates v The Sheriff, Vryburg and Another*.¹⁸ These provisions, when read with the Sheriff’s Act support the fact that the cause of action is statutory and the Sheriff, as an officer of the court, is duty bound to accept an instruction to execute a writ by operation of law; and the fees it may charge are prescribed in the tariff set out in the Sheriff’s Act. That being the case, it was argued and found that regardless where the contract was concluded, the court in the district where the respondent operated had jurisdiction.

[37] While it is correct that the sheriff performs statutory duties under the Sheriffs Act and Uniform Rule 45(3), this does not assist the respondent in the present context; the

¹⁸ [2023] ZASCA 174.

respondent himself pleaded a concluded contract. Even if the sheriff's primary obligation is statutory, the respondent nevertheless sued on a contract and did not apply to amend his particulars claim.

[38] The fact of the matter is that the respondent had expressly pleaded the existence of a contract arising from the acceptance of an instruction. He was bound to that pleading. The attempt to abandon the contractual foundation of the claim at trial, in order to avoid the jurisdictional consequences of the place of conclusion of the contract as pleaded, amounted to an impermissible ambush. As already noted, courts hold parties strictly to their pleadings and do not countenance such tactical shifts of the basis upon which their claim was predicated.¹⁹

[39] In response to this difficulty, the respondent's counsel argued in supplementary heads of argument and before us that although the particulars of claim had been somewhat inelegantly pleaded, the essential facts necessary to sustain a cause of action based upon the respondent's statutory entitlement to the fees and disbursements incurred by him were pleaded. The respondent's counsel argued that in essence the case pleaded was a mixture of a claim in contract and one based upon the provisions of the Sheriff's Act. He even went so far as to suggest that the contract was pleaded only by way of background and should not be determinative.

[40] In support of this argument, reference was made to several paragraphs of the particulars of claim where it was stated:

"3. *The Plaintiff is duly appointed in accordance with the Sheriff's Act 90 of 1986 and is duty bound to execute all writ and court documents within his jurisdiction.*

4. ...

5. *On the 15th April 2021 at Armadale the 1st Defendant instructed the Plaintiff to execute the aforesaid Writ.*

6. *The Plaintiff accepted the aforementioned instructions as mandated by the law of the Republic of South Africa and as a result of the aforementioned acceptance of the instructions a contract or agreement was entered into between the Plaintiff and*

¹⁹ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1925 AD 173 at 198; *Eastern Cape Motors (Pty) Ltd v Wolmerans (Appeal)* (supra).

1st and 2nd Defendants, and amongst others the following was the express or tacit terms of the agreement....

7. ...

8. *The aforesaid fees are due and payable in accordance with the Sheriff's Prescribed Tariff."*

[41] The argument advanced may have had some merit but for the fact that the respondent pleaded that as a result of the instructions provided a contract or agreement was entered into between the parties and proceeded to plead the terms of the agreement. One of these terms was that the Defendant would pay all the necessary and reasonable fees/costs of execution including any disbursement incurred by the Plaintiff in executing the 1st and 2nd Defendant's mandate (paragraph 6.1); he did not plead that the fees payable were prescribed by tariff in the context of the terms of the contract but rather this was merely pleaded as a statement of fact in paragraph 8 of the particulars of claim.

[42] The way I see the case as pleaded is that it was a claim firmly based upon contract, but with some acknowledgement of the respondent's statutory responsibilities to accept any instruction given and to charge fees in terms of a prescribed tariff.

[43] I thus dismiss the notion that somewhere within the pleadings lurked a statutory claim based upon Rule 45 (3) and the Sheriff's Act.

[44] The learned magistrate correctly held at paragraph 82 of her judgment that jurisdiction must be determined with reference to the pleadings. However, she immediately undermined this correct statement of principle by declining to apply it; instead having regard to what she regarded as the substantive nature of the claim. She concluded at paragraph 84 that "*the proceedings are for a breach of a right to payment*" and relied on authorities pertaining to High Court jurisdiction - specifically *Estate Agents Board v Lek*²⁰ and *Zokufa v Compuscan (Credit Bureau)*²¹ to justify her conclusion.

[45] This was a fundamental misdirection. The learned magistrate was bound by the case as pleaded. She was not entitled to substitute a different legal characterisation of the claim for that which the Respondent had himself pleaded. The authorities she relied upon (pertaining to High Court inherent jurisdiction) have no application to the limited statutory jurisdiction of the magistrates' court. By doing so, the learned magistrate applied the

²⁰1979 (3) SA 1048 (A)

²¹ *Zokufa v Compuscan (Credit Bureau)* 2011 (1) SA 272 (ECM)

wrong legal standard, thereby committing an error of law which requires correction on appeal.

[46] Furthermore, the respondent having expressly pleaded the conclusion of a contract, the learned magistrate was obliged to determine jurisdiction on that basis. The question of where offer and acceptance took place was directly relevant to this determination and the learned magistrate's failure to engage with it was a material misdirection.

[47] I thus now turn to consider whether the first and second appellants have established the necessary facts to sustain their special plea to claim 2.

[48] In their special plea, the first and second appellant's pleaded that:

- a. The 1st and 2nd Defendants reside and/or carry on business in Cape Town and the instruction to the Plaintiff was given in Cape Town;
- b. The Plaintiff's acceptance of the instruction occurred in Gauteng;
- c. It follows that the Plaintiff has failed to plead that both the offer and acceptance occurred in the area of jurisdiction of the Court;
- d. The alleged agreement was concluded in Cape Town;
- e. The alleged breach (in the form of the alleged failure to pay fees or charges) occurred in Cape Town;
- f. The writs upon which the instructions were given were issued in Cape Town.

[49] The evidence led and adduced during the cross-examination of the respondent supported these facts.

[50] The uncontradicted evidence of Mr Kay of Ashersons Attorneys was that on 13 April 2021 he telephoned the respondent from his office in Cape Town to instruct him to execute a writ of execution in favour of the second appellant. During that conversation Mr Kay was seated at his desk in Cape Town. This was conceded by the Respondent during cross-examination.

[51] The respondent was in Armadale in Gauteng during this conversation. The respondent requested payment of a deposit as a condition of executing the writ. Mr Kay agreed to pay the deposit. Mr Kay testified that when the acceptance of the instruction was

communicated to him, he was in Cape Town. There was, however, no mention of the payment of a deposit in the special plea.

[52] Despite this, the respondent's counsel sought to rely on the evidence of Mr Kay regarding his insistence that a deposit be paid to his advantage. In supplementary heads of argument, it was contended that on the first and second appellant's own version, the respondent had insisted on the payment of a deposit before he executed the writ (that the respondent's counsel acknowledged the respondent was not entitled to do).²² Be that as it may, it was contended that this constituted a counter-offer made by the respondent that was accepted by the first appellant in Cape Town but communicated to him by way of telephone in Armadale. On the basis of the information theory, the contract was thus concluded in Armadale within the jurisdiction of the Kliptown Regional Court. This would have been an ingenious case, had it been pleaded.

[53] The fact that this had not been pleaded in a replication to the special plea was emphasised by the first and second appellants' counsel who pointed out that this was an issue that arose not from the pleadings but from the evidence. On the basis of the authority of the Constitutional Court in *Gcaba* cited above, it was argued that a special plea of prescription must be argued on the basis of the pleadings alone and because the issue of the payment of the deposit arose in the course of the evidence, it should be disregarded. This was notwithstanding that this evidence had been adduced by the first and second appellants and had been a focus of their counsel's cross-examination of the respondent; albeit to establish the respondent's claim was not statutory as this was not permitted in a statutory claim.

[54] As I have said, evidence is admissible to establish the facts set out in a special plea; the evidence of the payment of the deposit and whether this constituted a counter-offer would thus clearly also had been admissible had this been an issue raised in the special plea or by the respondent in a replication. However, the fact that it was not raised in the replication was probably because this was not an issue relied on to establish the special plea, although it was clearly a fact within the respondent's personal knowledge as he was the one that asked for a deposit as a precondition to accepting the instruction given to him by Mr Kay and thus the counter-argument that the respondent's request for the payment of a deposit constituted a counter-offer could have been included by the

²² *BG Bojosinyane & Associates v Sheriff: Smith and Another* (1072/22) ZASCA 174 where the SCA held that the legislative framework does not provide that a sheriff may demand payment of a deposit upfront in anticipation of fees and charges to be incurred for services still to be rendered

respondent in a replication to the special plea. It is obvious why this was not *mero motu* raised by the respondent - he knew it to be unlawful.

[55] Because the stipulation that a deposit be paid was not an issue relied upon in the special plea, the evidence regarding the payment of a deposit should properly not have been led in substantiation of the special plea. But now that the evidence was led, the respondent's counsel has sought to capitalise on it. However, at the end of the day, I am afraid, no matter how attractive the counter-offer argument may be, the fact remains that this was not pleaded in a replication. As such, this was not a case that the first and second appellant were called upon to meet and their argument that they have been ambushed again carries weight.

[56] Accordingly, as the respondent failed to replicate that he demanded a deposit that constituted a counter-offer that was accepted in Cape Town but communicated to him in Armadale, I am compelled to reject this further argument raised on appeal as well.

[57] In any event, it is arguable that the question of the payment of the deposit was a separate contract for which the respondent has not sought relief (as it was paid).

[58] I need now to deal with the first and second appellants' argument that irrespective whether the claim was based in contract or as a *sui generis* statutory claim, the same jurisdictional rules apply that require that every element of that claim occur within the geographical area of the Kliptown Regional Court.

[59] The respondent's alternative case - that his claim is statutory in nature and premised on a "*breach of a right to payment*" rather than breach of contract - does not withstand scrutiny in the context of the Magistrates Court Act, that also governs the Regional Magistrates Court. The statutory duty argument is inapplicable to the jurisdictional analysis because the court *a quo* does not have inherent jurisdiction, as do the superior courts. A Magistrates Court is a creature of statute and may exercise only such jurisdiction as is expressly or by necessary implication conferred upon it.²³

[60] Thus, even accepting, for purposes of argument, the respondent's contention that the claim is statutory and not contractual, the material facts (*facta probanda*) underpinning the claim must still have arisen wholly within the jurisdiction of the court *a quo*. On the respondent's own version:

²³ *Ndamase v Functions 4 All 2004 (5) SA 602 (SCA)* at para; *BG Bojosinyane & Associates v Sheriff: Smith and Another* (supra)

- a. The writ was issued by the Western Cape High Court in Cape Town;
- b. The instruction to execute was given from Cape Town;
- c. The breach (non-payment) occurred in Cape Town.

[61] Accordingly, the cause of action, whether it was statutory or contractual, did not arise wholly within the Kiptown Regional Court's jurisdiction. Thus, even if the respondent's claim is better understood as one for statutory fees and expenses recoverable under the tariff, the facts necessary to found the claim were not confined to the Kiptown Regional Court's jurisdiction.

[62] Nor does *BG Bojosinyane* assist the respondent. That case confirms the statutory character of the sheriff's office and that a sheriff may not insist upon upfront payment before serving process. The respondent relied on that principle to say that the requested deposit was legally irrelevant. But the fact that a sheriff may not lawfully refuse to act without a deposit does not relocate the cause of action to the Sheriff's office. The question remains where the material facts arose. The respondent cannot, by invoking the public character of the Sheriff's office, convert a geographically divided cause of action into one arising wholly within Kiptown.

[63] The court *a quo* appears to have been diverted by the fact that the respondent received the writ and performed certain acts in Gauteng. That was not enough. The statutory test is not whether an important part of the cause of action arose within the jurisdiction, but whether the cause of action arose wholly there. The authorities relied upon by the first and second appellants in their counsel's heads of argument²⁴ support the proposition that, for jurisdictional purposes, the court must identify the material facts necessary to sustain the plaintiff's claim. Where conclusion, performance or breach occurs elsewhere, the cause of action cannot be said to arise wholly within the court's area.

[64] A further argument submitted by the respondent's counsel was that by law, payment is to be made at the creditor's place of business (being Armadale), and that the whole cause of action therefore arose within the Kiptown jurisdiction. In this respect, reliance was placed on *Harrismith Board of Executors v Odendaal*.²⁵ However, this principle regarding place of payment applies only in the absence of agreement to the contrary. In

²⁴ *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16, *Eisenburg v OFS Textile Distributors (Pty) Ltd* 1949 (3) SA 1047 (O), *Koenig v Motala* 1921 42 NLR 242 and *Myerson v Hack* 1969 (4) SA 521 (SWA)

²⁵ 1923 AD 530 at 539

this case, the agreement was that payment would be made from Cape Town. Furthermore, the place of payment is only one element of the cause of action; the respondent still fails on the place of conclusion of the agreement and the place of breach.

[65] Finally, the respondent argued that an appeal is directed against the order of the court *a quo* and not its reasoning, relying on *Mo Heno Bros v SA Railways*²⁶ and *Baliso v First Rand Bank t/a Westbank*.²⁷ This is correct as a general principle; however, it does not assist the respondent where, as here, the order itself is wrong. The question on appeal is whether the order - dismissing the special plea - was correctly made. For all the reasons set out above, with regard to the special plea to claim 2, it was not.

The third appellant's special plea to claim 2

[66] The same difficulty is decisive in relation to the third appellant. The respondent's claim against her was pleaded and argued as contractual; that she requested storage, that the respondent agreed to store the goods, that storage charges were agreed or became payable, and that she failed to pay. The third appellant's special plea squarely raised that the conclusion of the alleged agreement, performance under it, and breach did not occur wholly within the court's jurisdiction.

[67] The respondent's claim against the third Appellant is conceded by the respondent to be contractual in nature -specifically, an alleged oral agreement for the storage of goods attached during the execution of the writ. The third appellant denies that any agreement for payment was reached, but for purposes of determining jurisdiction, the respondent's version was accepted.

[68] On the respondent's own version (as set out in the supplementary heads of argument), the third appellant telephoned the respondent whilst she was at the Protea Glen Mall. The respondent was in Armadale when he received the call. The third appellant requested that the respondent store the goods, on her version for no costs. The respondent insists that he required payment of R5000 per day to store the goods. By operation of the reception theory, the agreement was concluded at the place where the acceptance of the offer was received by the third appellant at the Protea Glen Mall.

[69] The respondent himself conceded in cross-examination that the third appellant was at the Protea Glen Mall when the telephone call was made. The Protea Glen Mall falls outside the jurisdiction of the Kiptown Regional Court under the applicable Government

²⁶ 1936 AD 408

²⁷ 2017 (1) SA 292 (CC)

Gazette. The place of conclusion of the contract was therefore outside the territorial jurisdiction of the court *a quo*.

[70] Performance by the third Appellant, being payment, was to be made into the respondent's banking account held at a branch in Fourways, as evidenced by the respondent's own invoice. Fourways is likewise outside the jurisdiction of the Kliptown Regional Court.²⁸

[71] On the third appellant's version, any payment would have been effected by EFT from her office at Protea North. The place of payment is not a peripheral matter where the pleaded breach is non-payment. If payment was to be made outside the jurisdiction, or if the pleadings were silent on that necessary fact, the respondent failed to establish the jurisdictional requirement that the whole cause of action arose within the court's geographical area of jurisdiction.

[72] Internet banking practices have substantially changed the place where payment is required to be made; payment at a branch is now completely outdated and unless one has no access to the internet (which is not the case in the present matter) one must take judicial notice of the fact that what was contemplated was that payment be made via internet banking. In this context, payment must be taken to have occurred where the creditor's account was effectively credited (or where the creditor was entitled to receive the funds), not where the payment instruction originated. This is in accordance with the principle that payment occurs where the creditor receives effective payment. A debt is not discharged merely because the debtor instructs its bank to pay; payment is completed when the creditor receives the money in a legally effective sense.

[73] South African law has long treated breach by non-payment as occurring where payment ought to have been made. That principle appears clearly in *Ewing McDonald & Co Ltd v M & M Products Co*,²⁹ where the Appellate Division recognised that performance of a contractual obligation is linked to the place where the obligation must be discharged.

[74] In the context of the Magistrates Courts Act, where jurisdiction depends on the cause of action arising wholly within the district, the court examines where the essential facts constituting the cause of action occurred. Where a contract required payment into a specified bank account, the place where that account is maintained, that is where payment should legally be received becomes highly material. But that is not the end of

²⁸ *Jones & Buckle at Act 107; Eisenberg v OFS Textile Distributors* 1949 (3) SA 1047 (O).

²⁹ 1991 (1) SA 252 (A)

the inquiry; modern banking complicates this because accounts are not strictly tied to a physical branch in the old sense.

[75] Thus, if the contract stipulates where payment is to be made and does not only stipulate an account number, but also the branch, this would be a strong indicator that performance occurs there. Absent such stipulation, the creditor's place of business or residence may become relevant.

[76] In conclusion, the mere electronic initiation of a funds transfer within a district does not mean that the cause of action for payment arose there. In law, a monetary obligation is discharged only upon effective receipt by the creditor, and a failure to pay occurs where payment ought to have been received. For purposes of section 28(1)(d) of the Magistrates' Courts Act, the situs of an EFT is therefore ordinarily the place of contractual performance, not the place where the debtor transmitted the payment instruction. Where a particular branch is specified as opposed to a bank account, this will be at the place where that bank account is held. However, where only the bank account number is given, the place of performance must be regarded where the creditor conducts his business.

[77] It thus becomes crucial to determine whether the respondent specified the place of his bank account in his invoice rendered to the third respondent. It appears from the invoice attached to the particulars of claim that indeed, the respondent specified that payment be effective into his bank account held at First National Bank in Fourways. Thus, an essential *facta probanda* to establish the respondent's claim against the third respondent did not occur within the geographical area of jurisdiction of the Kliptown Regional Court. Thus the whole cause of action against the third respondent could not have occurred within the jurisdiction of the Kliptown Regional Court.

[78] This is sufficient to have upheld the special plea.

[79] Nevertheless, the facts demonstrate that the conclusion of the contract, the performance of the contract, and any breach thereof did not occur wholly within the jurisdiction of the court *a quo*.

[80] A further and independent ground exists to justify uphold the third respondent's special plea. That is that the respondent failed to plead the essential facts (*facta probanda*) required to establish that the cause of action arose wholly within the Kliptown Regional Court's jurisdiction. In particular, the respondent failed to plead that both offer and acceptance of the agreement with the third Appellant occurred within the court's

jurisdiction. In the absence of such pleading, the *facta probanda* to sustain the jurisdictional allegation are simply not present. The Learned Magistrate ought to have appreciated this deficiency.³⁰

[81] The learned magistrate applied the doctrine of *causae continentia* to retain jurisdiction over the third appellant on the basis that the respondent's claims against all three defendants were connected. This was a material misdirection in two respects.

- a. First, the *causae continentia* doctrine is a principle applicable to High Courts, which have inherent jurisdiction. It is not applicable to Magistrates Courts, which are creatures of statute. A Magistrates Court may exercise only such jurisdiction as is expressly or by necessary implication conferred by the Act. The learned Magistrate erred in applying High Court jurisdictional principles, derived from cases that do not concern the Magistrates' Courts Act, to determine the jurisdiction of a regional court.
- b. Second, even if the doctrine were applicable, the claim against the third appellant is based on a separate and distinct oral agreement to which the first and second appellants were not party. The *causae continentia* doctrine could not therefore provide a basis for the third appellant to be joined in proceedings over which the court has no independent jurisdiction in respect of her. The claims do not arise from the same agreement or the same cause.

[82] All in all, this is sufficient to find that the third appellant's special plea ought to have been upheld.

[83] It now finally remains for me to consider the further argument advanced by the third appellant's counsel at the hearing of this appeal. This occurs the monetary jurisdiction of the Regional Court.

[84] Section 29(1)(g) of the Act provides that a court shall have jurisdiction in actions "*where the claim or the value of the matter in dispute does not exceed the amount determined by the Minister from time to time by Notice in the Government Gazette.*" In terms of Government Gazette 37477 of 27 March 2014, published under the hand of the then

³⁰ *Nature's Choice Farms (Pty) Ltd v Ekurhuleni Metropolitan Municipality* (Case 463/19) ZASCA 20

Minister of Justice, the Regional Court has jurisdiction in respect of amounts between R200,000.00 and R400,000.00.

- [85] The claim against the third Appellant under Claim 2 of the particulars of claim is in the amount of R65,000.00. This amount falls below the jurisdictional floor of R200,000.00 for the Regional Court. The Kliptown Regional Court therefore had no monetary jurisdiction to entertain this claim against the third appellant.
- [86] This jurisdictional defect may be raised at any stage, including after judgment, because the court was simply not empowered to entertain the claim. The third respondent's counsel argued that the court ought to have rejected the claim *mero motu*.³¹
- [87] However, the respondent's counsel referred the court to the judgment of *Minister of Police v Regional Magistrate, Outshoorn and Others*.³² This case found that it was the upper limit of the Regional Court's jurisdiction that was determinative, not the lower limit. This is in line with the High Court's dealing with matters that are placed before it that ought properly have been brought in a lower court. The remedy is to only grant costs on the scale that ought to have been applicable in that court.
- [88] However, as has already been said in this judgment, the Regional Court is a creature of statute and has no independent jurisdiction. Thus unless a claim falls within the lower threshold of its jurisdiction and does not fall beyond its threshold, it should not be entertained by that court. For this reason, I agree with the third respondent's counsel that the decision relied upon by the third respondent's counsel is wrong.
- [89] However, it still remains for me to consider whether the third appellant could raise this argument after *litis contestatio*.
- [90] The third respondent's counsel argued that he could do so as the monetary jurisdiction of the Regional Court is mandated by statute. However, the same argument applies to the respondent's statutory claim for the payment of his fees; this has to be pleaded. Similarly, the third respondent's special plea regarding the monetary jurisdiction of the Regional Court needed to be pleaded-failing which it was a trial by ambush.
- [91] I am thus not inclined to have regard to this belated argument raised by the third respondent.

³¹ *Fairvest Property Holdings v Valdimax CC t/a Fish and Chips Co and Others* (A3019/2019) ZAGPJHC 435; 2020 (3) SA 202 (GJ)

³² *supra*

Conclusion

[92] The judgment of the learned magistrate is replete with errors, which individually and collectively justify interference on appeal:

- a. The learned Magistrate paid lip service to the principle that jurisdiction is determined on the pleadings, but then disregarded the pleaded case and adopted a different characterisation of the claim, contrary to the principle in *Gcaba*.
- b. The learned magistrate permitted the respondent to advance a case at trial which materially departed from his pleadings, thereby prejudicing the appellants who were entitled to proceed on the basis of the pleaded case.
- c. The learned magistrate applied legal authorities and principles applicable to the inherent jurisdiction of the High Court, rather than applying the specific provisions of section 28(1)(d) of the Act. The learned magistrate thereby applied the wrong legal test.
- d. In respect of the third appellant, the learned magistrate failed to consider the revised Government Gazette delimiting the Kliptown Regional Court's geographical jurisdiction.
- e. Moreover, the learned magistrate failed to consider the monetary jurisdictional constraint under section 29 of the Act, read with Government Gazette 37477 of 2014.
- f. In addition, the learned magistrate erred in applying the *causae continentia* doctrine, which has no application in the Magistrates Court.
- g. She also failed to have regard to the fact that the claim 2 against the third appellant fell within the jurisdiction of the Magistrate's court and she had no independent jurisdiction to entertain a claim in the amount of R65 000.

[93] In the result, the judgment is clearly wrong and falls to be set aside.

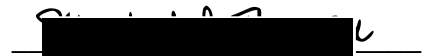
[94] In my view, the learned magistrate erred in dismissing both special pleas. The reasoning of the court *a quo* gave undue weight to the respondent's status as sheriff and to the fact that execution-related conduct occurred within Gauteng, but insufficient weight to the statutory requirement that the cause of action arise wholly within the court's jurisdiction. It also failed to appreciate that the fact that fees are statutorily charged by

a sheriff, does not relieve a sheriff of establishing the jurisdictional facts required by the Magistrates' Courts Act. The appeal by the first and second appellants must therefore succeed. The appeal by the third appellant must also succeed on territorial jurisdiction but not on monetary jurisdiction.

Order

[95] In the result, the following order is made:

1. The appeal of the first and second appellants is upheld with costs, such costs to be on Scale B as contemplated in Uniform Rule 69(7) of this Honourable Court, including the costs of counsel.
2. The appeal of the third appellant is upheld with costs, such costs to be on Scale B as contemplated in Uniform Rule 69(7) of this Honourable Court, including the costs of counsel.
3. The order of the court a quo dismissing the appellants' special pleas of jurisdiction is set aside and substituted with the following:
 - 3.1 The first and second defendants' special plea of jurisdiction is upheld, with costs.
 - 3.2 The third defendant's special plea of jurisdiction is upheld, with costs.



**WENTZEL-THOMPSON J
JUDGE OF THE HIGH COURT
JOHANNESBURG**

For the first and second appellants: Adv. C Cutler instructed by Asherson's Attorneys

For the third appellant: Adv. LCM Morland instructed by Warrener de Agrela and Associates Inc.

For the respondent: M Khumalo instructed by Mac Donald Khumalo

