

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, MAKHANDA)**

**CASE NO: CA145/2021**

**COURT A QUO: ECPERC 334/2016**

**Reportable: Yes/No**

**Of interest to other judges: Yes/No**

**Revised**

In the matter between:

**MAGDALENA JOSINA VORSTER**

Appellant

And

**CLOTHING CITY (PTY) LTD**

Respondent

**JUDGMENT**

**NQUMSE AJ**

**INTRODUCTION**

[1] This is an appeal against the judgment of the Regional Magistrate (per Reddy) held in Port Elizabeth. The appeal is with the leave of the court *a quo*

[2] The background facts which are common cause are briefly the following.

[3] The plaintiff issued summons in a damages action against the defendant on 19 February 2016, in which the plaintiff claims damages suffered by her in consequence of her injuries suffered as a result of her fall at the defendant's premises on 29 September 2015.

[4] At the time that summons was issued, the total quantum of damages claimed by the plaintiff amounted to R255 856.40 as reflected in the particulars of claim.

[5] On 21 June 2016 the defendant filed its plea in which it opposed the plaintiff's action. This was followed by filing of its necessary expert notices in preparation for the trial.

[6] On 9 October 2018, an order was granted by the honourable magistrate in terms of which the defendant conceded the issue of negligence on the basis of an apportionment of 75% in favour of the plaintiff, with the issue of quantum and causality postponed for hearing on 6 December 2018.

[7] For reasons which are not relevant to this appeal the matter did not proceed on the said date but was eventually set down for trial on 24 November 2020.

[8] On 20 October 2020, subsequent to the matter having been settled in respect of negligence, the plaintiff filed a notice of intention to amend her particulars of claim. The amendment sought to increase the plaintiff's quantum from R255 856.40 to R531 225.02, by increasing the amounts claimed for past medical and related expenses. The plaintiff further sought to apply the apportionment of 75% in respect of negligence something which changed the prayers of the plaintiff to reflect an amount of R394 418.77 plus interest and costs.

[9] The defendant not having raised any objection to the plaintiff's proposed amendment resulted in the amendment effected on 2 November 2020.

[10] For some reason not relevant to this appeal the matter did not proceed on the trial date of 24 November 2020, it only proceeded at the end of March 2021. However, between 2 November 2020 and the end of March 2021 the defendant filed an amendment to its plea on 21 January 2021. When it did so, it did not raise any objection to the issue of jurisdiction.

[11] However, on 4 March 2021 the defendant served its notice of intention to amend its plea with the sole purpose to introduce a special plea of jurisdiction as a result of the plaintiff's amendment to her particulars of claim. Absent any objection from the plaintiff defendant proceeded to effect its amendment by serving on 12 March 2021. The plaintiff replicated to the defendant's amended plea on 24 March 2021, where it alleged that the relief and judgment sought after all the issues are taken into consideration, including apportionment of negligence falls within the jurisdiction of the *court a quo* and therefore the defendant's special plea stands to be dismissed.

[12] On 30 March 2021 the matter proceeded in respect of the special plea only. The judgment of the *court a quo* was handed down on 16 April 2021 wherein the magistrate ordered that the defendant's special plea is upheld with costs. Aggrieved by this ruling, the plaintiff launched this appeal.

[13] The issue for determination as I see it is crisp. Is whether the matter having been settled in respect of negligence when the particulars of claim reflected a quantum of R255 856.00 which was subsequently increased by an amendment to R531 255.02, has such an increase ousted the jurisdiction of the magistrate.

[14] A point of departure is the statutory provision which governs the aspect of jurisdiction in respect of causes of action in the magistrate's courts which is Section 29 of the Magistrate Court Act<sup>1</sup> (the Act), it provides:

*"29 Jurisdiction in respect of causes of action*

*(1) Subject to the provisions of this Act and the National Credit Act 2005 (Act 34 of 2005), a court, in respect of causes of action shall have jurisdiction in -...*

*(g) actions, other than those already mentioned in this section 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 gazette. Section (1A) provides that the Minister may determine different amounts contemplated in subsections (1) (a),*

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<sup>1</sup> Act 32 of 1944

*(b), (d), (f) and in respect of costs for districts and counts for regional divisions  
....”*

[15] The amount referred to in section 29 (1) (g) of the Act has been determined by the Minister as being above R200 000.00 and up to R400 000.00 in respect of a Regional Court<sup>2</sup>. It is common cause that at the commencement of the action the claim of the plaintiff was less than R400 000.00 and was within the amount determined by the Minister for regional courts. It should therefore follow that an objection to the jurisdiction of the court could not have arisen at that stage. Nor could it have been competent for the issue of jurisdiction to have arisen at the stage of the *court a quo*'s judgment of 16 April 2016. The appellant contends that a defendant who pleads to the plaintiff's claim without objecting to jurisdiction must be considered to have bound himself irrevocably to accept the jurisdiction of the court, even where the failure to raise the question of jurisdiction might have been due to some mistake. In support of its contention the appellant relies on ***William Spilhaus & Co (MB) (Pty) Ltd Marx***<sup>3</sup> and ***Purser v Sales; Purser and Another v Sales and Another***<sup>4</sup>.

[16] In *Purser*<sup>5</sup> it was held

*“a defendant who raises no objection to a court's jurisdiction and asks it to dismiss on its merits a claim brought against him is invoking the jurisdiction of that court just as surely as the plaintiff invoked it when he instituted the claim. Such a defendant does so in order to defeat the plaintiff's claim in a way which will be decisive and will render him immune from any subsequent attempt to assert the claims should he succeed in his defence, the doctrine of res judicata will afford him that protection. Should his defence fail, he cannot repudiate the jurisdiction of the very court which he asked to uphold it”*. In further support of its contention the appellant referred to ***Zwelibanzi Utilities (Pty) Ltd t/a Adam Mission Services Centre v TP Electrical Contractors CC*** in which the court with

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<sup>2</sup> Government Gazette 37477, Notice GN 216 of 27 March 2014

<sup>3</sup> 1963 (4) SA 994 (c)

<sup>4</sup> 2001 (3) SA 453 (SCA)

<sup>5</sup> Para

reference to William Spilhaus & Co<sup>6</sup> noted that if the defendant was aware of the facts upon which a plea to the jurisdiction could have been founded, and he was so aware that at the time that he filed his plea to the merits, and he fails to plead to the jurisdiction of the court, he should not be accorded leave at a later stage to amend his plea so as to raise a defence to the jurisdiction.

[17] The court further held that “*jurisdiction is established as an objective fact by the joinder of issue and is thereupon irreversible. A substantive right is thereby conferred on the plaintiff to pursue his action in the previously incompetent court without the threat that jurisdiction may be declined at the instance of the other party*”.<sup>7</sup> In light of the failure by the respondent to raise the issue of jurisdiction in its revised plea of 21 January 2021 so the appellant argued, the respondent is precluded from raising the issue of jurisdiction as it did, by way of its special plea.

[18] Whilst conceding the legal position which is advanced in the authorities referred to by the appellant, the defendant submitted that those authorities dealt with section 28 of the Act, which relates to jurisdiction over persons and did not deal with causes of action inter alia monetary jurisdiction which is governed by section 29 of the Act.

[19] I turn to agree with the respondent that the authorities above which the appellant sought to rely on are not applicable to the case at hand.

[20] Even if the court were to apply by parity of reasoning, the principles derived from the common law and which have been restated in the authorities above, more particularly the effect of a special plea to the jurisdiction of a magistrate’s court which was first raised after *litis contestatio*. It has to be borne in mind that in *casu*, at *initio litis* the claim of the plaintiff fell within the jurisdiction of the court *a quo*, the issue of jurisdiction came to the fore only when the appellant delivered its amended particulars of claim which resulted in the claim being increased beyond the court’s jurisdiction.

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<sup>6</sup> (160/10) [2011] ZASCA 33 (25 March 2011)

<sup>7</sup> Ibid at para 20

[21] Whilst there is merit on the point made by the appellant that jurisdiction having once been established, continues to exist to the end of the action in keeping with ‘the principle of continuance’, in *casu* the circumstances are quite different in that it cannot be said that the respondent was from the outset aware of the monetary claim that changed later and the effect it brought to bear on the court’s jurisdiction. I therefore do not agree with the proposition that the respondent having submitted itself to the jurisdiction of the court *a quo* at the commencement of the matter, had by so doing, effectively bound itself to the subsequent increased claim amount.

[22] Furthermore, with the issue of jurisdiction being a legal issue, nothing would preclude the court to have raised it on its own, since it is a critical issue in establishing whether the court has the competence to deal with the issue or it is the correct forum to entertain it. In light thereof the materiality of the special plea having been filed after the raised plea of 21 January 2021 is not fatal so as to detract from the central issue whether the court is conferred with the necessary jurisdiction to adjudicate upon a claim which is beyond its monetary jurisdiction as determined by the Minister. Put differently, it would be an absurdity to expect the court to turn a blind eye on the issue of jurisdiction well aware that it has a bearing on its competence to deal with such [a] matter.

[23] The appellant further argued that section 37 (2) of the Act finds application since matters incidental to the prayer sought do not oust the jurisdiction of the magistrate albeit the finding to be made is beyond the jurisdiction of the court. Section 37 of the Act provides as follows: -

*“(2) Where the amount claimed or other relief sought is within the jurisdiction, such jurisdiction shall not be ousted merely because it is necessary for the court, in order to arrive at a decision, to give a finding upon a matter beyond the jurisdiction.”.*

The commentary on this section by Jones and Buckle<sup>8</sup> is that the sole test is the amount claimed, or the relief sought,<sup>9</sup> that is, where the decision of a particular issue falls outside the jurisdiction of the court but the amount claimed or relief sought falls within the jurisdiction of the court, this subsection confers incidental jurisdiction on the court. The learned author also referred to ***Tshisa v Premier of the Free State***<sup>10</sup> where the following was stated '*A reading of this section makes it clear that a finding on the matter that is beyond the jurisdiction of the court must be necessary in order for the court to reach a decision on the main matter before it, which is within the jurisdiction.... What s37(2) envisages is an issue that is central to a determination of the merits of the case before the court, but which is beyond the jurisdiction.*' In its attempt to make section 37 (2) applicable the appellant advanced the argument that its claim is not for R531 225.02, but only seeks an amount of R398 418.77. However, sight must not be lost as to how the latter quantum was arrived at, which was only after the application of the apportionment of 75%.

[24] The hurdle the appellant has to overcome is the application of the apportionment before its proven damages. On this point, counsel for the appellant conceded before us that the apportionment that has been applied and effected by the appellant can be seen as to usurp the court's function. The upshot hereof was for the appellant to first prove its damages and only thereafter will the apportionment be applied. That being the case, the claim of the appellant pursuant the amendment of the particulars of claim increased to R531 225.02, an amount which undoubtedly falls beyond the jurisdiction of the magistrate. What the magistrate was effectively required to do by the appellant is to adjudicate her claim which by all accounts fell beyond the magistrate's jurisdiction. The contention that the claim the magistrate was required to adjudicate upon is R398 418.77, but in so doing should consider 'incidental' factors to the extent of R531 225.02 is in my view not sustainable if regard is had to the principle that if a portion of an indivisible claim is beyond the jurisdiction, the whole of the claim is beyond it<sup>11</sup>. I therefore do not agree that section 37 (2) finds application on the facts of this matter. Instead I find that the appellant's claim as per her amended particulars of claim is R531 225.02.

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<sup>8</sup> The Civil Practice of the Magistrates' Courts in South Africa Vol. 1

<sup>9</sup> Van Der Merwe NO Van Der Merwe 1973 (1) SA 436 (c) at 440

<sup>10</sup> 2010 (2) SA 153 (FB) at 156I - 157B

<sup>11</sup> Jones v Williams 1911 TPD 536

[25] It was also submitted on behalf of the appellant further that section 39 of the Act, entitled it to take into account such apportionment in calculating her damages which according to its calculations brings the claim to fall within the jurisdiction of the court *a quo*.

[26] Section 39 of the Act provides:

*“In order to bring a claim within the jurisdiction a plaintiff may, in his summons, or at any time after the issue thereof, deduct from his claim, whether liquidated or unliquidated, any amount admitted by him to be done by himself to the defendant.”* There is an important

distinction between sections 38 and 39 of the Act. In terms of s 38 the plaintiff is required to explicitly abandon part of its claim. Whereas in s 39 the plaintiff is allowed a deduction of a liquidated or unliquidated ‘amount’ which has been admitted by him. I find myself constrained to agree with the submission of the respondent that the appropriate remedy that was available to the appellant following the special plea that was raised, is to abandon part of her claim in terms of section 38 in order to bring it within the jurisdiction of the court. This remedy remained available for the appellant to invoke at any time before final judgment.<sup>12</sup> However, the appellant chose not to avail itself that opportunity.

[27] The difficulty facing the appellant’s reliance on section 39 of the Act, is not only because the respondent did not admit to any amount but a percentage of negligence that is an apportionment on a “*proven*” not a “*specific*” amount. As already alluded the appellant’s damages were yet to be proven and its only thereafter will the apportionment be applied. I am constrained to agree with the respondent that the remedy that was available to the appellant is to abandon part of its claim in terms of section 38.

[28] For all the reasons above, I do not find that the magistrate erred in making an order which upheld the special plea to the effect that pursuant the amended

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<sup>12</sup> Hahndiek NO v Raath 1977 (3) SA 947 (C)



particulars of claim which increased the appellant's claim, her jurisdiction to adjudicate the matter was ousted. It follows therefore that the appeal cannot succeed.

[29] Accordingly, the following order will issue.

### **ORDER**

[30] The appeal is dismissed with costs.

**V.M NQUMSE**

Acting Judge of the High Court

I agree

**G. N. Z MJALI**

Judge of the High Court

### **APPEARANCES**

DATE OF HEARING : 25 February 2022

DATE OF JUDGMENT : 17 May 2022

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