

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

- " --

REPORTABLE

Appeal A1446/2005
DATE: 2/10/2007

In the matter between:

E TADEUSZ MALKIEWICZ

Appellant

Defendant *a quo*

and

E F VAN NIEKERK

Respondent

Plaintiff *a quo*

and in the matter between:

E TADEUSZ MALKIEWICZ

Appellant

Defendant *a quo*

and

FOUROUCLAS INVESTMENTS CC

Respondent

Plaintiff *a quo*

JUDGMENT

BOTHA J :

This is an appeal from the Magistrate's Court for the district of Witbank.

It concerns two Magistrate's Court cases. In both cases the defendant was Mr E Tadeusz Malkiewicz. In case 828/2005 the plaintiff was Mrs E F van Niekerk. In case 829/2005 the plaintiff was Fourouclas Investments CC.

I shall first deal with case 828/2005. I shall refer to the parties as they were cited in the court *a quo*.

The plaintiff issued a summons in which she claimed an order that the defendant be compelled to remove a boundary wall. She alleged that she was the owner of portion 1 of stand 1700 in Highveld Park Extension 1, Witbank and that the defendant built a boundary wall on the adjoining stand, stand 1701, which encroached on portion 1 of stand 1700. She alleged that the value of the land on which the encroachment extends is less than R100 000,00.

In case 829/2005 the plaintiff alleged that it was the owner of the remainder of stand 1700 in Highveld Park Extension 1. It alleged that the defendant built a house and boundary wall on stand 1701 which encroached on its property. It also alleged that the value of the land on which the encroachment extends is less than R100 000,00.

In both cases the defendant raised identical special pleas relating to jurisdiction. In the first special pleas the defendant contended that the court had no jurisdiction because there were no alternative claims for damages.

The first special pleas in both cases were disposed of together *in limine* in terms of Rule 19(12). The magistrate found:

- (a) that the value of the claims did not exceed R100 000,00,
- (b) that the claims were not claims for the specific performance of a contractual obligation,

(c) that section 46 of the Magistrates' Court Act, 1944 (Act 32 of 1944) was not applicable and

(d) that section 30(1) of Act 32 of 1944 empowered the court to entertain the matter.

The defendant appeals on the ground that the plaintiffs' claims were claims for specific performance without alternative claims for damages and that they did not arise out of contractual obligations.

I do not understand the persistent allegation by the defendant that the plaintiffs' claims do not arise out of contractual obligations. Of course they do not arise out of contractual obligations, but as I see it the defendant's case is based on the reasoning in the judgment in **Sydney Clow Co Ltd v Herzberg 1938 TPD 201** where it was held that a claim for specific performance which excluded the jurisdiction of a Magistrate's Court (if without an alternative claim for damages) could arise from any obligation, and not only from a contractual obligation.

The judgment in **Sydney Clow's case supra** was a judgment of two judges. It may be argued that the judgment in **Sydney Clow's case** was approved by a court of three judges in **Zinman v Miller 1956(3) SA 8 (T)** and that it is binding on this court. In **Carpet Contracts (Pty) Ltd v Grobler 1975(2) SA 436 (T) at 439 G-H** the court remarked that in **Zinman's case supra** it was held that "specific performance" in section 46 of Act 32 of 1944 referred to claims arising from any obligation, which could include obligations arising from delict.

It is necessary to make the point that in **Zinman's case supra** the court refrained from deciding the issue of whether "specific performance" in section 46 referred to obligations in general or only to contractual obligations. See p12 D-E.

Sydney Clow's case supra was based on the Magistrates' Court Act 1917 (Act 32 of 1917). Section 28 of that Act dealt with jurisdiction in respect of persons. Section 29 dealt with jurisdiction in respect of causes of action. In section 29(1)(c) the monetary limit of jurisdiction was fixed at £ 200. Section 30 granted jurisdiction in respect of arrests, attachments, interdicts and *mandamenten van spolie* "subject to the limits of jurisdiction prescribed in this Act". Section 44 enumerated instances "where Magistrate's Courts would not have jurisdiction, one of which was matters" in which is sought specific performance of an act without an alternative payment of damages". (My underlining). In the Dutch version is : " .. waarin daadwerkelijke vervulling van een verbintenis zonder een alternatieve eis voor schadevergoeding gevorderd word ". (My underlining). The English version of Act 32 of 1917 was the signed version.

In Sydney Clow's case the court dealt with the differences between the English and Dutch versions and nevertheless came to the conclusion that the reference to specific performance was not confined to specific performance arising out of contract.

The Magistrates' Court Act, 1944 (Act 32 of 1944) retained the jurisdictional scheme of the 1917 Act. Sections 28, 29 and 30 were retained with the same section numbers. Section 44 of the 1917 Act became section 46 in the 1944 Act. In section 46(2)(c), also dealing with an exclusion of jurisdiction in the case of claims for specific

performance, the wording is as follows: " A court shall have no jurisdiction in matters ...

(c) in which specific performance is sought without an alternative of payment of damages..." In the Afrikaans text, which is the signed one, the term for "specific performance" is "daadwerklike vervulling". The significant changes in the 1944 Act are that the words "of an act" in the English text and "van een verbintenis" in the Dutch text of the 1917 Act were deleted from the 1944 Act.

The changes in section 46(2)(c) of Act 32 of 1944 led Dowling J in **Wiles v Praeg 1952(1) SA 87 (T) at 90** question whether the judgment in **Sydney Clow's case supra** was still applicable. He found that a party could claim a right of way in the Magistrate's Court without an alternative claim for damages. As he pointed out, section 29(1)(c) specifically granted jurisdiction in respect of rights of way notwithstanding the provisions of section 46.

In **Maisel v Camberleigh Court (Pty) Ltd 1953(4) SA 371 (C) at 379 C-H** the court expressed doubt as to whether the judgment in the case of **Sydney Clow supra** still held good under the 1944 Act. It expressed the view that the words "specific performance" standing alone should be given their well- known meaning of specific performance of a contract.

In **Francis v Roberts 1973(1) SA 501 (RAD)** the court had to apply the Rhodesian Magistrates' Court Act, which was based on the South African Act of 1917. It held that a magistrate had the jurisdiction to grant a mandatory interdict (the cutting of overhanging branches) in spite of the absence of an alternative prayer for damages.

The court found that the equivalent of the present section 46(2)(c) in the Rhodesian Act (section 12) had no application to the equivalent of the present section 30 (section 11).

In Olivier v Stoop 1978(1) SA 196 (T) at 202C the court found that "daadwerklike vervulling" in section 46(2)(c) of Act 32 of 1944 referred to the specific performance of a contractual obligation. The court arrived at that finding after a consideration of the Act and the decisions in the cases of **Sydney Clow supra, Wiles v Praeg supra and Maisel supra**. The court found that the magistrate had the power to order the appointment of a liquidator- a mandatory interdict.

In my view the conclusion of the court in **Olivier v Stoop supra** was correct. It is supported by the authors of **Jones and Buckle, The Civil Practice of the Magistrates' Courts in South Africa 9th edition at 191-192** and **Pretorius, Burgerlike Prosesreg in die Landdroshowe volume 1 pp 53-54**.

It is undeniably so that the normal context of the concept "specific performance" is the field of contract. Where section 30 confers jurisdiction in respect of interdicts on magistrates' courts, it would largely nullify that jurisdiction if it would be subject to the restriction that an interdict can only be sought if there is an alternative prayer for damages. Interdicts in the High Court are rarely, if ever, sought on that basis.

Section 30 of the Act empowers a Magistrate's Court to grant interdicts. It is accepted nowadays that jurisdiction in respect of interdicts extends to prohibitory and mandatory interdicts. See **Pretorius op cit volume 2 at 728, Jones and Buckle op cit**

at 80, **Francis v Roberts supra** and **Weepner v K** **JUDGE OF THE HIGH COURT**

however, the interdict is aimed at the enforcement of a contractual obligation, th I agree

court will have no jurisdiction unless there is an alternative prayer for damages. See

Badenhorst v Theophanes 1988(1) SA 793 (C) at 801G. It must be pointed out that

in this appeal the issue of whether the magistrate could grant a mandatory interdict

as opposed to :

**JMN POSWA
JUDGE OF THE HIGH COURT**

Ms Bosch, who

HEARD ON: 1/10/2007

disclose a cause **FOR THE APPELLANT: C L H Harms**

INSTRUCTED BY: Henderson, Kuiper-Isaacson and Rooseboom Attorneys, Pta

from the alleged **Instr by: Ferreira's Attorneys, Witbank**

FOR THE RESPONDENT: Adv J S Stone

encroachments **INSTRUCTED BY: Couzyn Hertzog & Horak Attorneys, Pta**

Instr by: Van Heerden & Brummer Inc, Witbank

notice of appeal. If the defendant wanted to raise this argument, he had to raise it by

way of exception.

In the result I come to the conclusion that the defendant's first special pleas were

correctly dismissed in both actions.

The following order is made:

1. The appeal is dismissed with costs.
2. The matters (being cases 828/2005 and 829/2005) are remitted to the
magistrate.