

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**CASE NO: 2287/2015
DATE HEARD: 03/09/2015
DATE DELIVERED: 04/09/2015
NOT REPORTABLE**

In the matter between:

DERK JAN HAMER

PLAINTIFF/APPLICANT

and

CLIVE BRUYNS

DEFENDANT/RESPONDENT

JUDGMENT

PLASKET J

[1] This is an application for summary judgment in which the plaintiff, Mr Derk Hamer, (Hamer) claims from the defendant, Mr Clive Bruyns, (Bruyns) the amount of R500 000 plus interest, alternatively R426 082.49 plus interest. The first amount is claimed on the basis of an oral loan agreement and subsequent written acknowledgment of debt, while the alternative claim is based on unjust enrichment.

[2] Bruyns has opposed the application for summary judgment on various grounds, the first of which is that this court does not have jurisdiction. The basis for this point is that neither the oral agreement of loan or the acknowledgement of debt were concluded within this court's jurisdiction, the entire cause of action did not arise

within its jurisdiction and Bruyns does not ordinarily reside or carry on business within this court's jurisdiction.

[3] In her heads of argument, Ms Beard, who appeared for Hamer, argued that this court had jurisdiction on the basis of performance having to be made within its jurisdiction. She relies, *inter alia*, on *Bush & others v BJ Kruger Inc & another* [2013] 2 All SA 148 (GSJ), para 18 in which it was held that payment of a debt (by electronic transfer) 'can only occur when the party entitled to receive such payment receives it in his bank account' and that if a debtor is required 'to pay over so the recipient can have access to the funds in his own account', a failure to do so is a failure that occurs at the place where the bank account is held.

[4] I do not understand Ms Watt, who appeared for Bruyns, to take issue with the law as set out by Ms Beard. Her argument is that the facts necessary to establish jurisdiction are absent.

[5] In the particulars of claim, it is alleged that the oral agreement of loan was entered into by Hamer and Bruyns at Kenton-on-Sea, within this court's jurisdiction. Bruyns stated in his affidavit that this was not so. It was made telephonically and he was in Johannesburg. It is alleged in the particulars of claim that the acknowledgement of debt was concluded in Kenton-on-Sea and Johannesburg, which is confirmed by Bruyns. In paragraphs 5 and 7 of the particulars of claim, Hamer alleged that certain payments were made by Bruyns but no mention is made of how and where payment was effected. In paragraph 8, he dealt with the alleged breach by Bruyns, as follows:

'The capital sum, together with interest thereon, calculated in accordance with the schedule annexed hereto and marked "POC2", became due, owing and payable on 31 October 2014 but Defendant has, despite demand dated 4 December 2014, failed and neglected to pay either the said capital sum or interest thereon or any part thereof to the Plaintiff.'

[6] Clause 5 of the acknowledgement of debt states that payments 'are to be made at the offices of the creditor, or at any place or account specified by him, in cash'. Neither this document nor the particulars of claim provide an address for Hamer's offices and nor do they specify any other place for payment. In any event,

this is not relied on for jurisdiction purposes. The only allegation that is relied upon is that Hamer resides in Bushman's River Mouth.

[7] In his affidavit, Bruyns stated that some of the payments that he made were deposited, on Hamer's instructions, into Hamer's daughter's bank account but where she operates that account is not stated.

[8] Ms Watt summed up the argument on jurisdiction as follows in her heads or argument.

'5.1 There is no evidence that payment was to be made to the Plaintiff at Bushman's River Mouth.

5.2 If payment was to be made via electronic transfer to the Plaintiff's bank account (of which there is no suggestion) there is no evidence that the Plaintiff's bank account is in fact held within the jurisdiction of this Honourable Court; and

5.3 The Plaintiff instructed the Defendant to make payment of the instalments into his daughter's bank account.'

[9] What all of this amount to is that Bruyns has raised a bona fide defence of lack of jurisdiction which if sustained in the trial will result in the dismissal of the claim. He must, in other word, be granted leave to defend and it is not necessary for me to consider the other defences that he has raised.

[10] Bruyns seeks an attorney and client costs order on the basis that the application for summary judgment should never have been brought in the face of the defences of which he gave notice before hand. I do not intend to make such a costs order. Those defences, which relate in the main to fairly complex issues concerning the interpretation and application of provisions of the National Credit Act 34 of 2005, were dealt with in correspondence between the attorneys for the parties and are arguable both ways. It cannot be said that by bringing the application for summary judgment, Hamer's attorney was guilty of an abuse of the process.

[11] I shall accordingly make the usual order in cases such as this, namely:

- (a) The application for summary judgement is dismissed and the costs shall be costs in the cause.

(b) The defendant is granted leave to defend.

C. PLASKET
JUDGE OF THE HIGH COURT

APPEARANCES:

For the plaintiff: M Beard, instructed by Cloete & Company, Grahamstown

For the defendant: K Watt, instructed by Wheeldon, Rushmere & Cole,
Grahamstown