IN THE NORTH WEST HIGH COURT

MAFIKENG

CIV APP MG 6/2014

In the matter between:

AMPISOL (PTY) LTD **First Appellant**

I-COM SERVICES (PTY) LTD **Second Appellant**

and

MPONARE JOB MOTHIBI **First Respondent**

KOCHNEL BANTJES & PARTNERS (PTY) LTD **Second Respondent**

CIVIL APPEAL

GURA J, KGOELE J

DATE OF HEARING : 29 AUGUST 2014

DATE OF JUDGMENT : 30 OCTOBER 2014

FOR THE APPELLANT : Adv. G.V. Maree

FOR THE RESPONDENT : Adv K. Chwaro

JUDGMENT

KGOELE J:

A. INTRODUCTION

[1] This is an appeal by the first and the second appellants (who were the first and the third defendants in the court *a quo*) against the whole of the judgment and order of the Magistrate Court of Molopo held at Mmabatho, granted by the learned Magistrate B.E**.** Chulu on the 25 March 2014.

[2] The first respondent, Mr Job Mothibi who was the plaintiff in the Court *a quo* instituted action against the two appellants including the second respondent who was at that time the second defendant, for damages (premised on enrichment) suffered due to some alleged unlawful deductions from his salary in respect of a loan agreement entered into between him and Lantern Financial Services, alternatively ABSA Bank Limited.

[3] The first respondent resides at Mafikeng in the North West Province. The first appellant is a company with limited liability duly incorporated within the laws of the Republic of South Africa by the name of Ampisol, which conducts its business in Sandhurst, Gauteng Province. The second respondent also is a company with limited liability duly incorporated by the name of Kochnel Bantje and Partners, conducting its business in Erasmuskloof, Gauteng Province. The second appellant is I-Com Services, also a company with limited liability and duly incorporated with its business situated at Hatfield Pretoria, Gauteng Province.

B. FACTUAL BACKGROUND

[4] During August 2000, first respondent entered into a loan agreement with Latern Financial Services in terms whereof Lantern Financial Services lent and advanced the sum of R2000.00 to him. The said loan agreement was a written one concluded at or near Mafikeng in the North West Province.

[5] On the 30 June 2010, Musa Kubu Fund purchased the "Unifer Loan Books" from ABSA Bank Limited, Merque Financial Services and UB Microloans Limited. In terms of this agreement ABSA Bank Limited, Merque Financial Services and UB Microloans would retain for their benefit any sums received in respect of all debtor accounts prior to the effective date (30 June 2010).

[6] The first appellant is a subsidiary company to Musa Kubu Fund. It is as a result of the aforesaid sale of loan books that the first appellant became the legal owner of the loan book(s) and the debts which were due to ABSA Group Limited became due to the appellants.

[7] The first appellant furthermore entered into a contract with another company called I-Com Services Pty Ltd, the second appellant in order for it (the second appellant) to manage collection of the debts on behalf of the first appellant. According to the allegation of the first respondent, the first appellant appointed another company called Kochnel Bantjies and Partners (Pty) Ltd, the second respondent, to assist the second appellant in the collection of the debts. The first respondent further alleged that he (the second respondent) received

payments from him (first respondent) in respect of the monthly instalments which were due and payable to the first appellant, alternatively second respondent, further alternative second appellant, including payments made and received in excess of the initial loan amount together with interest thereon to the total of R14 684-98. Furthermore, according to the first respondent, the appellants acted and continue to act contrary to the aforesaid loan agreement in that they collected and still collect more than what was due to them. The first respondent alleged further that the first appellant, alternatively second respondent or second appellant received an excess amount of R6 602-00 from him contrary to the provisions of the loan agreement, and were as a result enriched at the first respondent's expense. He instead was impoverished as he suffered damages in the amount of R6 602-00.

C. CASE BEFORE THE MAGISTRATE COURT (TRIAL COURT)

[8] The claim was defended by the first and second appellants only (referred to herein jointly as the appellants). The appellants raised several special pleas which were set down for adjudication separate from the merits of the main action, by agreement between the parties.

[9] The special pleas can be summarised as follows:-

Ad Jurisdiction

[10] The appellants contended in the court *a quo* that if, for argument sake, the first respondent's version of facts are to be accepted as correct

(which they deny), the first respondent had to show (and therefore prove) that: -

10.1 With regard to the claim based on a written agreement, that the said agreement was concluded in the jurisdictional area of the Magistrate Court Molopo and that the breach of the alleged agreement also occurred in the same jurisdictional area;

10.2 With regard to the claim based on enrichment that the first respondent was impoverished and the appellants enriched at the first respondent's expense and further that both enrichment and impoverishment occurred within the area of jurisdiction of the above honourable Court.

[11] They submitted that this is clearly not the case. In respect of the agreement the breach thereof would have manifested with the appellants and seeing that the appellants are "residing" outside the jurisdictional area of the above honourable Court, the breach could not have occurred within this Court's area of jurisdiction. Similarly, the appellants' alleged enrichment would most probably occur where they are "residing" which falls outside the area of jurisdiction of the above honourable Court.

[12] They further submitted that if the Court however takes into account the defendant's version, being that deductions from the first respondents were by way of emolument attachment order obtained in Gauteng, then yet again the cause of action could not vest within the above honourable Court's area of jurisdiction in that, *inter alia*, the basis for the deductions being the emolument attachment order was obtained in Gauteng.

[13] In conclusion on this aspect they submitted that the first respondent failed to show that the above honourable Court is vested with jurisdiction in this matter and as a result the first respondent's claim should be dismissed with costs including costs of counsel.

Ad Prescription

[14] The appellants further contended that the first respondent claimed damages based on alleged wrongful deductions. From the annexures attached to the first respondent's papers deductions were made during the following periods:

September – December 2003;
January – December 2004;
January – December 2005;
January – December 2006;
January 2007;
March – December 2008;
January – December 2009
January 2010;
December 2011;
January – June 2012;
September – Nov 2012.

[15] Further that summons in this matter was served on 16 May 2013. In the premises the claim in respect of the amount claimed prior to 16 May 2010 had prescribed. For the period 17 May 2010 to November 2012 a total amount of R 2000.00 was deducted from the first respondent's salary. The appellants indicated that they formally

tendered payment of the amount of R 2000.00 to the first respondent but he refused to accept it.

[16] They submitted further that if one takes into consideration the fact that the respondent receives his salary statement monthly and that the deductions were made therefrom, it therefore means that his claim became due on the date of the occurrence of the alleged deductions. To this end they specifically stated that, based on the above the first respondent ought reasonably to have been aware of the claim on such dates on which he received his salary statement.

[17] It is the appellant's further contention that prior to the period June 2010 they did not receive any benefit in respect of monies deducted from the first respondent's salary. Such according to their version were benefits received by Lantern Financial Services (Lantern) alternatively ABSA Bank Ltd (Absa).

[18] According to them, it follows logically that if the appellants had no entitlement to any monies deducted from the first respondent's salary prior to the period June 2010, the appellants were not enriched at the expense of the first respondent and therefore no cause of action exists against them for such stated period. Therefore the first respondent's claim should be dismissed.

Ad Non – Joinder

[19] In order for the first respondent to claim damages for the period prior to June 2010 the appellants argued that, the first respondent had to

join ABSA and Lantern as parties to these proceedings. The first respondent's failure to do so resulted in a material non-joinder.

[20] A further leg upon which the appellants rely to substantiate this argument is to the effect that the second respondent was cited as an active company by the first respondent. This is done notwithstanding the fact that the second defendant is liquidated. The second respondent as liquidated should have been cited and the proceedings should have been served on the liquidator of the second respondent. This was not done. Therefore the second defendant in liquidation was not joined to the proceeding resulting in a non-joinder.

Ad Alternative Plea

[21] According to the appellants the deductions made from the first respondent's salary are based upon a Court order in the form of an emolument attachment order granted in Gauteng Province. The default judgment and emolument attachment order are still in force and have not been set aside. In the premises the appellants submitted that they acted within the course and scope of a Court order which order still stands.

[22] Finally they submitted that, the first respondent must first and foremost set aside the Court order prior to being able to claim damages for alleged wrongful deductions. In the premises the first respondent's claims should be dismissed with costs including costs of counsel.

D. THE APPEAL

[23] The trial Court upon hearing the special pleas raised by the appellants dismissed the special pleas of jurisdiction, together with the one that relates to prescription and furthermore, held that the non-joinder plea was not properly before it. In as far as costs is concerned, the trial Court ordered that costs occasioned by the adjudication of the special pleas be the costs in the cause.

[24] Aggrieved by this decision, the appellants appealed to this Court, hence this Appeal.

[25] The grounds upon which the Appeal is founded were couched as follows in the appellants' notice of Appeal:-

25.1 The learned magistrate erred in holding that it is common cause between the parties that first respondent disputes the validity of the emolument attachment order granted during 2002 in the Magistrates' Court Pretoria under case number 147817/2002;

25.2 The learned magistrate erred in finding that the dispute between the parties arose from the loan agreement concluded between the first respondent and Lantern Financial Services on or about 8 August 2000 in Mafikeng, and that the first respondent was entitled to institute action on this basis from the Magistrates' Court for the district of Molopo, held at Mmabatho;

25.3 The learned magistrate erred in finding that the *lis* between the first respondent and the appellants is not based on the

emolument attachment order granted by the Magistrate's Court Pretoria;

25.4 The learned magistrate erred in finding that the first respondent could, as of right emanating from the loan agreement, institute action against ABSA (Pty) Ltd after a judgment had *prima facie* been granted in the Magistrate's Court Pretoria and, on this basis, also against the first appellant (having "stepped into the shoes of ABSA (Pty) Ltd");

25.5 The learned magistrate erred in finding that the Magistrates' Court for the district of Molopo, held at Mmabatho has the necessary jurisdiction in respect of all the appellants including the second respondent and in further dismissing the appellants' special plea of jurisdiction;

25.6 The learned magistrate erred in not upholding the appellants' special plea of lack of jurisdiction and in not dismissing the first respondent's action against appellants with costs.

25.7 The learned magistrate erred in holding:

25.7.1 that the appellants argued that the first respondent (*sic*) only became aware of the identity of the judgment creditor in the emolument attachment order in February 2012;

25.7.2 that the appellants argued that after receipt of a certificate of balance they made investigations and certain information only surfaced in 2012;

25.7.3 that the appellants argued that their claim or part thereof has not prescribed as it only became due when they became aware of it;

25.7.4 that the Court was required to make a determination as to whether the claims after 30 June 2010 until November 2012 have prescribed;

25.7.5 that the question as to whether each deduction from the first respondent's salary constituted a separate cause of action for the purposes of prescription did not find relevance;

25.7.6 that the claim against the appellants only relates to the period from 30 June 2010 until 2012;

25.8 The learned magistrate erred in dismissing the appellants' special plea of prescription and in not upholding the appellants' special plea of prescription with costs.

25.9 The learned magistrate erred in holding that the appellants' pleas of non-joinder and misjoinder were only raised in their heads of argument.

25.10 The learned magistrate erred in finding that the appellants' pleas of non-joinder and misjoinder were not properly before Court.

24.11 The learned magistrate erred in not finding that the appellants' pleas of non-joinder and misjoinder ought to be upheld with costs.

E. ANALYSIS

[26] The first respondent did not file any opposition to the Appeal, but was represented at the hearing of the Appeal by Mr Chwaro. He submitted to the Court that his instructions were to make submissions in respect of costs only.

[27] Mr Chwaro submitted to the Court that the trial Court did not deal with the issue of costs as it ordered that the costs will be costs in the cause. He therefore urged this Court to remit the issue of costs back to the Court *a quo* or that if this Court grants an order against the first respondent it should be in accordance with the Magistrate's Court scale.

[28] Mr Maree on behalf of the appellants submitted firstly that a proper case has been made from the papers before Court and secondly, that it is trite law that costs should follow the results unless there are exceptional circumstances. He agreed that costs of the adjudication of the special plea before the trial Court can be on a Magistrate's Court scale but that the costs for the adjudication of the Appeal should be on a High Court scale.

[29] I am of the view that as correctly pointed out by Mr Maree on behalf of the appellants a proper case on Appeal has been made by the appellants. From the facts of this matter as alleged by the appellants, which facts were not disputed by the first respondent, it is clear that the cause of action (the alleged overdrawn deductions) did not take place in the jurisdiction of the Magistrate Molopo. The overdrawn deductions were made pursuant to an emolument attachment order

granted in a jurisdiction of the Magistrate Court in the Gauteng Province. This fact on its own is a clear indication that the cause of action is not the loan agreement, as the Court *a quo* found. Furthermore, whether the first respondent disputed this emolument attachment order or not during the hearing was in my view, irrelevant to the proceedings before the Court *a quo*. The Court *a quo* was not entitled to even entertain or consider that argument at all, because it had no jurisdiction. The situation is aggravated by the fact that the appellants and the second respondent ordinarily conduct business in Gauteng Province which is not within the jurisdiction of Molopo Magistrate Court nor this Court. It is therefore clear that the Court *a quo* ought to have upheld the special plea of lack of jurisdiction. The Court *a quo* clearly misdirected itself. On this basis alone, the appeal can be upheld.

[30] A thorough analysis of the record of the proceedings, reveals that the submissions made by the appellants in regard to the remaining special pleas of prescription and non-joinder are equally meritorious. There is no doubt that the trial court misdirected itself in its findings both on facts and the law in regard to these issues as well as clearly enumerated in the appellant's grounds of Appeal. The whole judgment of the Court *a quo* needs to be interfered with.

[31] In as far as costs are concerned there is no reason why costs should not follow the results. The costs order by the trial Court falls to be interfered with as well.

F. ORDER

[32] Consequently the following order is made.

32.1 The Appeal against the whole of the decision of the trial Court is upheld;

32.2 The first respondent (the plaintiff in the court *a quo*) is ordered to pay the costs of the adjudication of the special plea in the trial Court on the Magistrate's Court scale;

32.3 The first respondent (the plaintiff in the court *a quo*) is further ordered to pay the costs of the adjudication of this Appeal on the High Court scale.

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A M KGOELE
JUDGE OF THE HIGH COURT

I agree

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SAMKELO GURA
JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE APPELLANT	:	Minchin & Kelly Inc. 19 Constantia Drive Riviera Park MAHIKENG
FOR THE RESPONDENT	:	Motshabi & Modiboa Attorneys Suite No. 4 69 Carrington Street MAHIKENG