



IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED. ✓

DATE 26/11

SIGNATURE 

CASE NO: A676/2008

DATE: 15/6/2011

IN THE MATTER BETWEEN

DUROFIN (PTY) LIMITED

APPELLANT

AND

HENQUE 4257 CC

1ST RESPONDENT

DE VILLIERS VAN DER MERWE

2ND RESPONDENT

JUDGMENT

PRINSLOO, J

[1] When this appeal came before us, the appellant applied for condonation, in terms of two substantive applications, for the late filing of the record and also for the late filing of the appellant's heads of argument. The applications were unopposed

and an order was made granting condonation on both counts and ordering the appellant to pay the costs of the condonation applications.

- [2] Before us, Mr Higgins appeared for the appellant and Mr Strydom appeared for the respondents.

Introduction and background

- [3] On 20 November 2001, and at Pretoria, the appellant and the first respondent entered into a written instalment sale agreement in terms of which the appellant sold certain equipment to the first respondent. The equipment was to be used to equip and run a bakery in Marble Hall in terms of a franchise agreement also entered into between the first respondent and Butterfield Holdings (Pty) Ltd which is the franchisor of a series of well-known "Butterfield" bakeries. It appears that the appellant is associated, from a corporate point of view, with Butterfield Holdings (Pty) Ltd.
- [4] It is common cause that the first respondent, through its member, the second respondent, started conducting the bakery at the Cotton Fields Centre, cnr Railway and First Streets, Marble Hall.
- [5] When the instalment sale agreement was entered into in November 2001, the second respondent also bound himself, in terms of a written deed of suretyship, as

surety and co-principal debtor with the first respondent as security for compliance with the latter of its obligations in terms of the agreement.

[6] It appears that, at all relevant times, the second respondent was the sole member of the first respondent and actively involved in the running of the bakery.

[7] In terms of both the instalment sale agreement, and the deed of suretyship, the first and second respondents, respectively, chose as their *domicilium citandi et executandi* ("domicilium address") the business address of the bakery, namely Cotton Fields Centre, cnr Railway and First Streets, Marble Hall.

[8] It is common cause that payment of the instalments in terms of the instalment sale agreement, fell in arrears. It is not clear from the papers when the breach occurred, but it seems that a demand was sent to the respondents by the attorney of the appellant in June 2005.

[9] When payments were not forthcoming, the appellant instituted action against the respondents in the Pretoria magistrate's court. Summons was served on the second respondent at his residential address in Meyerspark, Pretoria. I assume that summons was served on the first respondent at the *domicilium* address. The returns of service do not form part of the record.

- [10] It is common cause that the plaintiff then withdrew the Pretoria action. This was not before the respondents filed a plea and instituted a counter-claim in the Pretoria action. It appears that the counter-claim was never withdrawn and is, at least in theory, still pending.
- [11] On a general reading of the papers, it seems that the appellant's decision to withdraw the Pretoria action was inspired by a conclusion that the Pretoria court did not have jurisdiction to entertain the claim. It is not necessary to comment any further on this subject, except for remarking that the Pretoria court would, at least, have had jurisdiction to entertain the claim against the second respondent, because of his residence in Pretoria and in terms of the provisions of section 28(1)(a) of the Magistrates' Courts Act 32 of 1944.
- [12] Thereafter, and, it appears, in January 2006, the appellant instituted the action, forming the subject of this appeal, out of the Groblersdal magistrate's court. Although it was not stated in so many words, it appears that Marble Hall falls inside the area of jurisdiction of the Groblersdal magistrate's court ("the Groblersdal court").
- [13] When the respondents entered an appearance to defend, the appellant applied for summary judgment. This application was successfully resisted when the respondents filed an opposing affidavit.

[14] In August 2007, the trial came before the learned magistrate of Groblersdal, Mr Van der Walt.

[15] At the conclusion of the plaintiff's case, the respondents, as defendants, applied for absolution from the instance on the ground that the plaintiff (appellant) had failed to prove that the Groblersdal court had jurisdiction to entertain the claim.

[16] By agreement between all the parties, written heads of argument were filed. This took place in December 2007, and January 2008.

[17] On 23 July 2008, the learned magistrate, concluding that "dit is duidelik dat eiser nie daarin geslaag het om te bewys dat hierdie hof jurisdiksie oor die persone van die verweerders het nie en dus nie oor die aangeleentheid kan beslis nie", granted absolution from the instance with costs.

[18] It is this judgment that came before us on appeal.

The provisions of section 28 of the Magistrates' Courts Act

[19] It is convenient to quote the wording of the above section:

"28. Jurisdiction in respect of persons

(1) Saving any other jurisdiction assigned to a court by this Act or by any other law, the persons in respect of whom the court shall have jurisdiction shall be the following and no other-

- (a) any person who resides, carries on business or is employed within the district;
- (b) any partnership which has business premises situated or any member whereof resides within the district;
- (c) any person whatever, in respect of any proceedings incidental to any action or proceeding instituted in the court by such person himself;
- (d) any person, whether or not he resides, carries on business or is employed within the district, if the cause of action arose wholly within the district;
- (e) (it deals with interpleadings proceedings) ...
- (f) any defendant (whether in convention or reconvention) who appears and takes no objection to the jurisdiction of the court;
- (g) any person who owns immovable property ..."

[20] Where section 28 deals with jurisdiction in respect of persons, it is appropriate to note that, in terms of the Interpretation Act, No 33 of 1957 (section 2) "person" includes "any company incorporated or registered as such under any law" and "any body of persons corporate or unincorporate".

It follows, from the foregoing, that the first respondent is also "a person" as intended by the provisions of section 28 of the Magistrates' Courts Act.

[21] In the summons, the appellant, as it was obliged to do, alleged that the Groblersdal court had jurisdiction to entertain its claim. This allegation was denied in the plea. On these pleadings, the *onus* was on the appellant to prove that the Groblersdal court had jurisdiction – see *Buys v Roodt (nou Otto)* 2000 1 SA 535 (O) at 539E-G.

[22] It appears that even if a special plea denying jurisdiction ("*exceptio fori declinatoria*") had been raised, the *onus* to prove that the court had jurisdiction would remain on the plaintiff – see *Lieberman v Van der Stel Furniture Manufacturers (Pty) Ltd* 1963 1 SA 769 (T) at 771A-772D.

[23] I mention this, because, although he did not argue that the appellant did not have the *onus*, Mr Higgins submitted that the respondents, in their plea, ought to have raised their objection to jurisdiction in the form of a special plea. In this regard he referred us to the case of *Purser & Another v Sales & Another* 2001 3 SA 445 (SCA) at 452A-D. I do not consider this judgment to provide authority for an argument that it is incumbent on a defendant, denying that the court has jurisdiction, to raise that point in the form of a special plea. In any event, nothing turns on this, as the appellant, either way, bore the *onus* as I have illustrated. No argument to the contrary was presented to us.

[24] In the end, barring an argument presented to us by Mr Higgins with reference to section 45 of the Magistrates' Courts Act, which I will briefly refer to later, the main issue for decision before us was whether or not the Groblersdal court had jurisdiction as intended by the provisions of section 28(1)(a), namely whether or not the appellant had succeeded in proving that the court had jurisdiction over the respondents because they resided, carried on business or were employed within the Groblersdal district where the action was instituted. This was also the crux of the finding of the learned magistrate, *supra*, namely that this *onus* had not been discharged.

[25] It is convenient to add, at this point, that it was not disputed that the court did not have jurisdiction in terms of the provisions of section 28(1)(d) because the contracts were signed in Pretoria, and it was common cause before us that the whole cause of action did not arise within the Groblersdal district.

The section 45 argument

[26] Before us, Mr Higgins raised an argument based on the provisions of section 45 of the Magistrates' Courts Act.

[27] Section 45(1) reads as follows:

"45. Jurisdiction by consent of parties

(1) Subject to the provisions of section 46, the court shall have jurisdiction to determine any action or proceeding otherwise

beyond the jurisdiction, if the parties consent in writing thereto: Provided that no court other than a court having jurisdiction under section twenty-eight shall, except where such consent is given specifically with reference to particular proceedings already instituted or about to be instituted in such court, have jurisdiction in any such matter."

- [28] The argument of Mr Higgins, which he described as his best argument, goes like this: shortly after instituting the action, the appellant, on an *ex parte* basis, obtained an order for the attachment of the equipment in the bakery, pending the outcome of the case. The attachment was aimed at protecting the appellant's rights in so far as guarding against further loss or damage to the equipment was concerned. On the return date of this *ex parte* interim order, which was 22 February 2006, and well after the action was instituted, a final order was obtained by agreement between the parties. This final order does not form part of the record. Nevertheless, Mr Higgins argued that, by consenting to the final order, the respondents consented to the jurisdiction of the court, in the spirit of section 45, so that later arguments that the court did not have jurisdiction, as upheld by the magistrate, were futile and without merit. It was argued that the final order (which we did not see) constitutes the necessary "consent in writing" to the court's jurisdiction, as required by the provisions of section 45(1).

In this regard, we were referred to an extract from a text book containing commentary on the Magistrates' Courts Act, and, in this instance, commentary on the provisions of section 45. I presume that the authority emanates from work by the learned authors *Jones and Buckle*, although it was not identified as such by Mr Higgins.

It is useful to consider and quote an extract from what the learned author had to say:

"'Consent in writing'. The section does not require the consent to be in the form of 'an express agreement in writing executed by the parties'. The section merely requires that the parties must consent in writing; each party may separately consent and there need be nothing in the form of an agreement between them; it is not even required that any such consent need be signed by either party – there must be a writing or writings which constitute proof that each of the parties has consented to the jurisdiction.

Thus the requirement of the section that the parties' consent in writing is satisfied if the consent is embodied in correspondence between the attorneys of the parties, or by the written consent of the defendant and the issue of summons by the plaintiff alleging the consent of the parties ..."

[29] From the foregoing, it is clear that some form of writing is required to satisfy the requirements of section 45. Before us, there was no sign whatsoever of such a

consent on the part of the respondents. There was no attempt by Mr Higgins to point out such consent. Indeed, such "writing" as there was, displays strong and unequivocal submissions by the respondents that the Groblersdal court did not have jurisdiction to hear the matter: in an opposing affidavit to the *ex parte* application, dated 21 February 2006, the day before the return date, the second respondent, on behalf of both respondents, makes the following allegations when dealing with the supporting affidavit to this *ex parte* application (I quote extracts without dealing with the full context of the denials by reference to the particular paragraphs in the supporting affidavit):

"Ek ontken dat die besigheid doen (*sic*) onder die naam Butterfield Bread Marble Hall te Cotton Field Centre, h/v Railway- en Eerste Strate, Marble Hall. Die respondent doen sedert 1 Mei 2004 nie meer besigheid nie, en word die besigheid bekend as Butterfield Bread Marble Hall vanaf 1 Mei 2004 deur mnr Pieter van Vuuren bedryf.";

And

"Ek ontken dat die agbare hof jurisdiksie het om hierdie aksie te bereg, aangesien die respondent nie meer besigheid doen binne die jurisdiksie van bogenoemde agbare hof nie.";

And

"Ooreenkomstig die bepalings van artikel 21 van die Wet op Kredietooreenkomste, Wet no 75 van 1980, het die agbare hof nie jurisdiksie om hierdie saak te bereg nie.";

And

"Ek is tans woonagtig te Simmetriestraat 258, Meyerspark Pretoria en is dit ook die geregistreerde adres van die respondent ... Die respondent is nie in besit van die bates waarna verwys word nie, aangesien mnr Pieter van Vuuren sedert 1 Mei 2004 in besit is van hierdie bates.";

And

"Ek verklaar dat die respondent nie in besit is van die bates nie, maar dat mnr Pieter van Vuuren sedert 1 Mei 2004 in besit is van die bates en die bakkery vir sy eie rekening bedryf met die volle medewete en kennis van die applikant."

[30] There are other extracts from this opposing affidavit which clearly suggests quite the opposite from a consent to jurisdiction. It is also clear from the provisional order that it would only operate as an interim attachment pending the decision of the action. Where the respondents clearly indicated their argument that the Groblersdal court did not have jurisdiction, I fail to see how an agreement to a final order which would only be effective pending the outcome of the action,

where the question of jurisdiction would be vigorously attacked, could constitute a "consent in writing" to jurisdiction as intended by the provisions of section 45.

[21] I add that this argument, based on the provisions of section 45, was not raised in the written heads of argument presented to the learned magistrate before he gave judgment, so that he did not deal with the matter at all. Moreover, this argument was not raised in the notice of appeal either, so that the learned magistrate, when furnishing additional reasons for his judgment upon receipt of the notice of appeal, did not deal with the section 45 argument either.

Finally, I add that the argument was not raised in the heads of argument presented to us either. The first we heard about it, was when it was raised by Mr Higgins.

Under these circumstances, it is doubtful whether the argument should be entertained at all. The learned author, Erasmus *Superior Court Practice*, says the following at B1-358:

"When a *bona fide* effort has been made, in noting an appeal, to state clearly and specifically the grounds of appeal, and other or further grounds of appeal are subsequently found to exist, the court will allow amplification of the grounds in a proper case, subject to any orders as to adjournment and costs rendered necessary by the inadequacy of the original notice. Such amplification will be considered more favourably if the appellant has given timeous notice to the court and to the respondent.

There should in the normal course be a formal application for amendment, on notice of motion with supporting affidavits showing cause for relief, but the appeal court may in its discretion allow an amendment of the grounds at the hearing, without requiring an affidavit to be filed, if there has been adequate notice."

Before us, none of these formalities were complied with. Nevertheless, we allowed Mr Higgins to make his submissions. For the reasons mentioned earlier, I am of the view that there is no merit in the argument, firstly because there is no "consent in writing" as required by the provisions of section 45(1), and secondly because, whatever "writing" there was, contains a clear objection by the respondents to the Groblersdal court exercising jurisdiction over the case.

Selection of the *domicilium* address within the Groblersdal district

[32] One of the points raised in the notice of appeal, although not argued with any force before us, is a submission that the learned magistrate erred in not attaching sufficient significance to the fact that the respondents chose the Marble Hall address as their *domicilium* address, *supra*, in the contracts.

[33] It is clear from the authorities that the choice of a *domicilium* address in a contract, within the jurisdiction of the court in question, is not enough to establish the jurisdiction of that court – see *Geyser v Nedbank Ltd and Others: In re*

Nedbank Ltd v Geyser 2006 4 SA 544 (WLD) at 546D-E and the other cases there quoted.

[34] In *Mayne v Main* 2001 2 SA 1239 (SCA) at 1243B-E it was held that a person must be sued in the court having jurisdiction at the place where he is residing at the time when the summons is served. In the same judgment, at 1242H, it was reaffirmed that the *onus* of establishing jurisdiction based on the defendant's residence rests on the plaintiff.

[35] On the same subject of the *domicilium* address the learned magistrate, in his additional reasons, quoted from Jones and Buckle *The Civil Practice of the Magistrate's Court in South Africa* 9th ed vol 1 p45 as follows:

"It is submitted that the election of an address *domicilium citandi et executandi* is not to be equated with residence (may I add or 'principal place of business') and that the election of such an address does not confer jurisdiction upon a magistrate's court over the person of a defendant."

Some evidence on the question of jurisdiction

[36] It is convenient to refer to relevant portions of the evidence presented by the appellant as plaintiff.

[37] The first witness was Mr Floris van Zyl, financial director of the appellant. He could not deny that the summons in the Pretoria case was already served on

the second respondent at his Pretoria address, *supra*, in 2005. He did not know of any residential address which the second respondent may have had in Groblersdal at the time. He knew that a meeting had been held with a view to transferring the business to Mr Van Vuuren and he knew that the second respondent was, at all relevant times, no longer involved with the day to day activities of the bakery. This is corroboration of the evidence presented by the second respondent on oath, *supra* in his opposing affidavit to the attachment application and also in his opposing affidavit to the summary judgment application to which I will refer hereunder. The witness knew that Van Vuuren was running the business. The meeting already took place in 2005, according to the witness. He knew that Van der Merwe, the second respondent, was not involved in the running of the business from the time when the Pretoria action was launched in 2005.

28 The following passage of the evidence under cross-examination is perhaps noteworthy:

"Nou meneer u sal ook nie kan ontken dat op daardie dag en datum toe hierdie dagvaarding in 2006 uitgereik is toe het hierdie besigheid Henque het nie meer besigheid daar gedoen nie. Mnr Van Vuuren het daar besigheid gedoen. --- Ek kan dit nie beaam of ontken nie want ek weet nie wat hulle ooreenkoms was en of hulle uiteindelik by hulle ooreenkoms gehou het nie. Dit is hoekom ons tot die dag wat ons met al ons prosesse begin het mnr De Villiers mnr Van der Merwe aanspreeklik gehou het vir alles."

[39] The witness could also not deny that the respondents approached one Mr Gerrit Prinsloo, of the appellant's business, with a view to selling the bakery. This is dealt with in the opposing affidavit to the summary judgment application.

[40] The following was also said in cross-examination:

"En dan ten slotte meneer dat Durofin, ekskuus tog dat Henque die eerste verweerder het geen besigheid meer gedoen hier by Marble Hall vandat mnr Van Vuuren die besigheid hier oorgeneem het nie. Dit wil sê Van Vuuren het hierdie besigheid met sy eie rekening bedryf, hy het geensins enige oorbetaal (onhoorbaar) die eerste verweerder Henque gemaak nie. --

- Ja ek weet nie wat hulle ooreenkoms was nie.

U kan dit nie betwis nie? --- Nee."

[41] The second witness, Jack Brumler, was a valuator and could not make any contribution with regard to the question of jurisdiction.

[42] The third and last witness was the appellant's attorney of record, Mr Stewart. He confirmed that the second respondent paid him a visit in Pretoria in 2005 when the Pretoria action was also launched. He confirmed that the second respondent's street address was situated in Meyerspark at the time. He did not know where the second respondent was resident in 2006.

[13] The following was said in cross-examination:

"U kan ook nie betwis meneer dat hy op daardie stadium nie meer betrokke was of werk verrig het vir die tweede verweerder hier by Marble Hall bakkerie nie? --- Ek kan dit nie betwis nie maar dit was nog steeds sy beslote koöperasie waarvan hy die lid was.

En meneer kan u betwis dat in 2006 toe hierdie aksie ingestel het, het die beslote koöperasie nie meer besigheid gedoen hier in Marble Hall nie? --- Ek dra nie kennis daarvan nie."

[44] So much for the evidence tendered during the trial.

[45] Included in the record, on p80, is a written offer by Pieter van Vuuren, dated 27 September 2005, addressed to the Butterfield head office, containing an offer to buy the Marble Hall bakery. Details of the purchase price and the tender to pay over proceeds of sales to Shoprite are contained in this offer. As I indicated, Van Vuuren did not give evidence.

[46] In his affidavit opposing the summary judgment application, dated April 2006, the second respondent revisited some of the aspects already covered in his opposing affidavit to the attachment application, *supra*. He stated that the arrangement with Van Vuuren, going back to May 2004, was concluded with the full knowledge of the appellant. The evidence, in its totality, suggests that this was indeed the case.

He also reaffirmed that at the relevant time he did not stay in the Groblersdal area neither did the first respondent carry on business there.

The test to be applied when absolution is sought

[47] The following is said in *Claude Neon Lights (SA) Ltd v Daniel* 1976 4 SA 403 (AD) at 409F-H:

"... when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff

..."

Did the appellant succeed in discharging the *onus* of proving that the Groblersdal court had jurisdiction in terms of the provisions of section 28?

[48] I have referred to the evidence. The appellant could offer no evidence to the effect that the first respondent was still carrying on business in Marble Hall at the time when the action was instituted at the beginning of 2006.

[49] The weight of the evidence indicates, on the overwhelming probabilities, that the first respondent was not carrying on business in Marble Hall at the relevant time. The probabilities indicate that Van Vuuren was in charge and there is no evidence whatsoever to suggest that he ran the business for the first respondent bakery or

while in its employ. The evidence suggests, on the probabilities, and this is undisputed, that Van Vuuren had taken over the business with the blessing of the appellant. This probably happened in 2004 already. There is also an indication in the evidence that Van Vuuren, in turn, also abandoned the bakery.

[39] On the evidence it is clear, and undisputed, that the second respondent did not reside or do business in Groblersdal at the relevant time. It is undisputed that he already stayed in Pretoria in 2005.

[51] The findings of fact made by the learned magistrate, as expressed in his judgment and additional reasons for judgment, were that when summons was issued in January 2006, the respondents were no longer in Marble Hall and that Van Vuuren was running the bakery at the time.

In his additional reasons, the learned magistrate puts it as follows:

"Die getuienis voor hierdie hof was dat die hoofplek van besigheid aanvanklik te Marble Hall was maar dat ten tye van uitreiking van dagvaarding nie eerste of tweede verweerder nog enige besigheid te Marble Hall bedryf het nie. Die indruk wat gelaat was, was dat besigheid deur 'n sekere mnr Van Vuuren op daardie tydstip bedryf was.

Die borgstellingsakte was in Pretoria geteken en nie eerste of tweede verweerder het meer 'n hoofplek van besigheid gehad in Marble Hall – geen besigheid was meer bedryf nie."

[52] A court of appeal will be slow to interfere with findings of fact made by the court *a quo*. The well-known principles are set out in *R v Dhlumayo and Another* 1948 2 SA 677 (AD) at 705-706. On 706, the learned judge of appeal also pointed out that the same general principles will guide a court of appeal both in civil and criminal cases.

[53] On the available evidence, and bearing in mind the test to be applied when absolution is sought at the end of the plaintiff's case, I can find no misdirection on the part of the learned magistrate which would justify this court to interfere with his findings. Moreover, I find no indication, on the evidence and the cross-examination, that the learned magistrate may have come to a different conclusion if the trial had run its course.

Yet another bite at the proverbial cherry

[54] On the day after this matter came before us, and when the preparation of this judgment had reached this advanced stage of dictation, we received a visit from counsel in chambers. We were informed by Mr Higgins that he wanted to file further heads of argument, and raise further arguments not canvassed in the court *a quo* or in the notice of appeal or, for that matter, in earlier heads of argument.

During our discussion with Mr Higgins and Mr Strydom, we asked the former whether he intended applying to re-open the case, because the impression was created that he may have been seeking to introduce new evidence. We were informed that the appellant was not asking to re-open the case but only to raise new arguments, as explained. We gave Mr Higgins leave to file further heads of argument by the same afternoon and we gave Mr Strydom the opportunity to file heads of argument in rebuttal.

[55] I now to proceed to deal with the further arguments.

(i) The authority of the appeal court to hear further legal points on appeal not raised in the lower court

[56] I already touched on this subject earlier when pointing out that we allowed Mr Higgins, during the hearing before us, to deal with the argument based on the submission that the respondent had consented to the jurisdiction of the Groblersdal court.

[57] In his further heads of argument, Mr Higgins developed the submission further, by referring us to the case of *Argus Printing & Publishing Co Ltd v Die Pers Korporasie van Suid-Afrika Bpk; Argus Printing & Publishing Co Ltd v Rapport Uitgewers (Edms) Bpk* 1975 4 SA 814 (A) where the following was said at 822B-C:

"... dit hoef nouliks gesê te word dat dit uiters onbevredigend sou wees as hierdie hof se bevoegdheid daartoe beperk sou wees om te beslis of die uitspraak van COLEMAN R. korrek is op die basis waarop die saak voor hom beredeneer is, terwyl ons van oordeel is dat albei partye in die hof *a quo* die regsposisie nie juis ingesien het nie en dat ook die uitspraak van daardie hof van 'n verkeerde siening van die regsposisie uitgaan. Dit sou die vreemde gevolg meebring dat 'n regsdwaling aan die kant van die party hierdie hof in sy beslissing oor die aangeleentheid sou kon bind ..."

[58] I add that in *Argus Printing*, it appears that counsel for the appellant raised a new ground of exception relating to the proper interpretation of the Copyright Act, 63 of 1965. It appears that the exceptions were raised against pleas filed by the respondents and that no evidence had as yet been led in the court below.

[59] It is also noteworthy, in my view, that the court of appeal, after upholding the appeal on the strength of the new exception ground raised, did not allow the appellant costs of the appeal.

[60] In developing his argument further, counsel for the appellant also referred us to *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 460 (CC) at 476F-477D. The issue was whether a litigant who had expressly abandoned a legal contention in the court below, was entitled to revive the contention on appeal. The case

originated as an application in the Land Claims Court and ended up in the Constitutional Court. It appears that it was a legal point that was revived.

In allowing the litigant to revive the point originally abandoned, the following was said by the Constitutional Court:

"The *rationale* for this rule is that the duty of an appeal court is to ascertain whether the lower court reached a correct conclusion on the case before it. To prevent the appeal court from considering a legal contention abandoned in a court below might prevent it from performing this duty. This could lead to an intolerable situation, if the appeal court were bound by a mistake of law on the part of a litigant. The result would be a confirmation of a decision that is clearly wrong. As the court put it:

'If the contention the appellant now seeks to revive is good, and the other two bad, it means that this court, by refusing to investigate it, would be **upholding a wrong order.**' (Note: this is a reference to what was said in *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A) at 24F.) It is therefore open to Alexcor and the government to raise in this court the legal contention which they abandoned in the SCA. However, they may only do so if the contention is covered by the pleadings and the evidence and if its consideration involves no unfairness to the Richtersveld community. (Note: this is a reference to *Cole v Government of the Union of South Africa* 1910 AD 263 at 272-273.) The legal contention must, in other words, raise no new factual issues. The rule is the same as that

which governs the raising of a new point of law on appeal. In terms of that rule 'it is open to a party to raise a new point of law on appeal for the first time if it involves no unfairness ... and raises no new factual issues'."
(Emphasis added.)

[61] The constitutional court held, at 477D-F, that the legal argument sought to be revived, did not raise new factual issues and its consideration would not involve any unfairness to the Richtersveld community which had been able to deal fully with this new point.

Although counsel for the appellant, correctly, quoted the whole passage in his new heads of argument, he did not deal with the portion which I have emphasised. I will revert to this issue hereunder. I will refer to it as "the *Alexkor* proviso".

[62] Jurisdiction in regard to section 45 of the Magistrates' Courts Act

[52] I already dealt with this issue earlier in this judgment, and before we were approached by Mr Higgins to raise further arguments in new heads of argument.

[63] In the new heads of argument, it does not appear as though the submissions already dealt with were developed any further. The main thrust of the argument is that in consenting to the draft order on the return date of the *ex parte* application, the respondent had "consented in writing" to the jurisdiction of the Groblersdal court in the spirit of the provisions of section 45, quoted above. For the reasons

already mentioned, I repeat my conclusion that the appellant had failed to prove such a "consent in writing" as required by the section and the authorities already dealt with.

[64] I add that, given the wording of the *Alexkor* proviso, *supra*, it may not, after all, be open to this court of appeal to entertain this argument based on section 45 at all: in the spirit of the *dictum* of the Constitutional Court, it should be observed that the new contention is not covered by the pleadings or the evidence and it is fair to say that to raise it at this late stage may well lead to prejudice or "unfairness" to the respondent.

[iii] Jurisdiction pertaining to section 28(1)(a) of the Magistrates' Courts Act – the registered address of the respondent

[65] It is convenient to again quote section 28(1)(a):

"Jurisdiction in respect of persons – (1) Saving any other jurisdiction assigned to a court by this Act or by any other law, the persons in respect of whom the court shall, subject to subsection (1A), have jurisdiction shall be the following and no other –

(a) any person who resides, carries on business or is employed within the district or regional division; ..."

[66] I already pointed out, and this was repeated by Mr Higgins in his new heads of argument, that "person" is defined in section 2 of the Interpretation Act, 33 of

1957, to include "any company incorporated or registered as such under any law".

See also *Nel v Road Accident Fund* 2000 1 SA 931 (T) at 935B-C.

67 Subsection (1A), referred to in the text of section 28(1), does not apply to the present case.

[58] Attached to the replying affidavit of the appellant in the *ex parte* application, was a search print-out issued by the Companies and Intellectual Property Registration Office ("CIPRO") dated 27 February 2006 (shortly after the summons was issued) reflecting the registered address of the first respondent as "Marble Wesstraat 24, Marble Hall". The "status date" reflected on the print-out is 6 July 2001, which is probably the time when the first respondent was incorporated under incorporation no 2001/045626/23.

[59] This replying affidavit is dated 6 March 2006. I referred, earlier in this judgment, when dealing with certain allegations made by the second respondent with regard to the question of jurisdiction, that he stated in his opposing affidavit to the *ex parte* application, where jurisdiction was attacked, that "Ek is tans woonagtig te Simmetriestraat 258, Meyerspark, Pretoria en is dit ook die geregistreerde adres van die respondent."

[70] I also, *supra*, quoted extensively from allegations made by the second respondent in both the affidavit under discussion, and the affidavit resisting summary judgment, with regard to the question of jurisdiction.

[71] The allegation that the registered office of the first respondent was in Marble Hall at the relevant time, was not pleaded. The pleadings are silent on the question of the registered office.

In the evidence presented by the appellant before the learned magistrate, no mention was made of the first respondent's registered office. I have already pointed out that it was put to the witnesses in cross-examination, on behalf of the respondents, that the bakery business of the respondents was closed down long before the summons was issued, and the business was sold to Mr Van Vuuren in 2004 or 2005. This was not disputed, as I pointed out, by the appellant's witnesses during the trial. Indeed, the weight of the evidence suggests that the appellant was well aware of the fact that Van Vuuren had taken over.

[72] In his opposing heads of argument, Mr Strydom, on behalf of the respondents, relied heavily on the *Alexkor* proviso. He pointed out, correctly, that the *onus* is on the appellant to prove that the court has jurisdiction. He emphasised that the CIPRO print-out, on which the appellant now seeks to rely, was never placed before the trial court. No effort was made to prove the correctness or authenticity of the document. The document did not feature at all. Counsel also, correctly,

pointed out that the pleadings are silent on the whole issue relating to the registered address of the first respondent.

[73] In dealing with the question of prejudice, in the spirit of the *Alexkor* proviso, Mr Strydom makes the following submission in his heads of argument:

"Die probleem wat die appellant hier in die gesig staar is dat die punt wat hulle nou vir die eerste keer voor enige hof, rakende die aksie tussen die partye, wil bring nie gepleit of bewys is in die hof *a quo* nie. Dit is onregverdig teenoor die respondente in die sin dat die appellant hier poog om 'n tweede kans te bekom om getuienis voor die hof te kry wat nooit vir die hof *a quo* se oorweging beskikbaar was nie."

[74] In my view, this submission is correct, and in line with the *Alexkor* proviso. It follows, that the appellant ought not to be allowed to present this argument at this stage of the appeal proceedings.

[75] In support of the appellant's argument that the Groblersdal court has jurisdiction to entertain the action, counsel for the appellant referred to the case of *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 1 SA 482 (AD). At 499C-F, the appeal court endorsed an earlier decision by ELOFF, J, as he then was, in *Dairy Board v John T Rennie & Co (Pty) Ltd* 1976 3 SA 768 (W) that a South African domestic company resides at the place of its registered address.

[76] *Bisonboard* dealt with the question of jurisdiction in terms of section 19(1)(a) of the Supreme Court Act 59 of 1959. On a general reading of the judgment, it appears that it was not in dispute that the registered address of the particular company was within the area of jurisdiction of the court concerned. The decision with regard to the registered office vesting jurisdiction in the court, was taken by a majority of the appellate division.

In coming to this conclusion, the learned judge of appeal said the following at 499E-F:

"That finding, by itself, does not conclude the appeal in favour of the appellant. The enquiry is a dual one: (1) is there a recognised ground of jurisdiction; and, if there is, (2) is the doctrine of effectiveness satisfied – has the Court power to give effect to the judgment sought? See *Hugo v Wessels* 1987 (3) SA 837 (A) at 849H-850A."

In *Hugo v Wessels*, at the passage quoted, the following is said:

"Die tweede deel van die ondersoek het betrekking op die onderworpenheid al dan nie van die verweerder aan die hof se regspraak; die antwoord daarop moet gesoek word aan die hand van die sogenaamde leerstuk van doeltreffendheid of effektiwiteit: die hof se bevoegdheid om, indien hy die regshulp wat die eiser aanvra sou toestaan, uitvoering aan sy bevel te kan gee."

In the present case, given the facts which are largely undisputed, it is doubtful whether the Groblersdal court would have been able to give effect to any judgment it may have granted against the first respondent. The *ex parte* attachment order, *supra*, evidently had to do with what was left of the bakery after Van Vuuren had also abandoned it.

[77] In the present case, as I have pointed out, the issue of where the first respondent's registered office was at the relevant time, was not pleaded or canvassed in evidence. Given the weight of the evidence that the business had already closed down in Marble Hall a year or two before the action was instituted, it is likely, and indeed probable, that an allegation that the registered office was still in Marble Hall at the relevant time would have been hotly contested in cross-examination. Indeed, in his earlier affidavit, *supra*, the second respondent said that the registered office was in Meyerspark.

In *Dairy Board*, it was also not in dispute that the registered office of that particular company was within the jurisdiction of the then Witwatersrand local division.

[78] In this respect, therefore, the two authorities relied upon by the appellant are, in my view, distinguishable from the present case, where all indications are, on the weight of the evidence, that the first respondent and the second respondent had left Marble Hall years before the trial commenced. In the spirit of the *Alexkor*

proviso, it would be unfair and prejudicial to the respondents, to entertain the appellant's late argument at this stage, without the issues having been raised in the pleadings or in evidence. The prejudice for the respondents lies in the fact that they, under these circumstances, neither had the opportunity to deal with the allegation relating to the registered office either in their pleadings or when cross-examining the appellant's witnesses.

[79] For all these reasons, I have come to the conclusion that the new arguments raised by the appellant, fail to be rejected.

[80] In the result, I am of the view that the appellant failed to discharge the *onus* of proving that the Groblersdal court had jurisdiction to entertain the claim. There is consequently no basis for interfering with the order made by the learned magistrate, and the appeal must fail.

The order

[81] I make the following order:

1. The appeal is dismissed.
2. The appellant is ordered to pay the costs.



W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree



B L MOLAMU
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

A676-2008

HEARD ON: 12 MAY 2011
FOR THE APPELLANT: H P HIGGINS
INSTRUCTED BY: E Y STUART INC
FOR THE RESPONDENTS: C P J STRYDOM
INSTRUCTED BY: DU RANDT & LOUW INC