IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

REPORTABLE

CASE NO: D1608/2021

In the matter between:

REVFIN (PTY) LTD — Applicant

and

IMC DISTRIBUTORS AFRICA(PTY) LTD T/A INTERNATIONAL MARKETING CONCEPTS — First Respondent

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION — Second Respondent

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ORDER

The application is dismissed with costs.

JUDGMENT

Delivered on: 29 July 2021

Ploos van Amstel J

[1] This is an application to place the first respondent company under business rescue proceedings in terms of s 131(4) of the Companies Act of 2008.

[2] The applicant is Refvin (Pty) Ltd, which has its principal place of business in Melrose Arch, Gauteng. The first respondent is IMC Distributors Africa (Pty) Ltd, t/a International Marketing Concepts. According to the founding affidavit its *domicilium citandi et executandi* is at Unit 1, Grid Rock, 1[...] K[...] Avenue, Riverhorse Valley, Durban, and its 'place of business' is within the jurisdiction of this court. The second respondent is the Companies and Intellectual Property Commission. No relief is sought against it.

[3] The applicant is a creditor and therefore an affected person as defined in s128 of the Act. It is not disputed that the first respondent is liable to pay monthly rentals to the applicant in respect of the hire of equipment. The applicant contends that the first respondent is substantially in arrears with the rentals, and that it is accordingly financially distressed as contemplated in the Act. The first respondent disputes this. It says there is a dispute about the amount owing, it is able to pay its debts, and it is not financially distressed.

[4] The first issue relates to the jurisdiction of this court. The matter was raised by Olsen J when it came before him in motion court, and he gave the applicant leave to supplement its papers. The applicant stated in a supplementary founding affidavit that the first respondent's principal place of business is at the address to which I have referred, and that this court accordingly has jurisdiction.

[5] The first respondent admitted in its answering affidavit that this court has jurisdiction to hear the application. That admission appears to have been made on the basis that it did not dispute that its principal place of business was here. Counsel for the applicant submitted that accordingly jurisdiction is not in issue on the papers. However, a consent to jurisdiction, or acquiescence, does not confer jurisdiction on a court if none of the traditional grounds of jurisdiction is also present.[1] It was undisputed before me that the first respondent's registered address is in Sasolburg.

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[1] *Veneta Mineraria SPA v Carolina Collieries (Pty) Ltd (In liquidation)* 1987 (4) SA 883 (AD)

In a supplementary answering affidavit it challenged the court's jurisdiction and said it resides at its registered address.

[6] The dispute then turned on whether the first respondent resides at its registered address in Sasolburg, or whether it resides at both its registered address and its principal place of business.

[7] The difficulty lies in the provisions of s23(3)(b) of the Act, which requires a company to register the address of its office, or its principal office if it has more than one office. That address is its registered office as defined in s1 of the Act. It was held in *Sibakhulu*[2] that s23 must be interpreted so as to allow a company to reside only at the location of its registered office, so that only a single court will have jurisdiction over business rescue matters pertaining to it. Rogers J agreed with this conclusion in *Mfwethu.*[3] Binns-Ward J said in *Sibakhulu*[4] that where a company registers its address at a place other than its principal office it will be a matter to be dealt with by the Companies and Intellectual Property Commission under the provisions of Part D of Chapter 7 of the Act.

[8] Counsel for the applicant submitted that *Sibakhulu* and *Mfwethu* were decided incorrectly and should not be followed. He referred me to *Van der Merwe*[5], *Lonsdale Commercial Corporation*[6] and *Wild and Marr*[7] in support of this submission*.* These three cases dealt with applications for liquidation in terms of the 1973 Companies Act. As Rogers J explained in *Mfwethu*, a distinction must be drawn in this context between liquidations and business rescue. Applications for the liquidation of insolvent companies are dealt with in terms of the 1973 Act, which provides in s12 for a company to reside at its principal place of business in South Africa, and also at its registered office. Applications for business rescue are dealt with in terms of the 2008 Act, which does not contain a similar provision. In terms of s23(3)(b) of that Act

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[2] *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd* 2013 (1) SA 191 (WCC)
[3] *Mfwethu Investments CC t/a Recharger Prepaid Meters v Citiq Meter Solutions (Pty) Ltd t/a Citiq Prepaid* 2020 (6) SA 578 (WCC)
[4] Para 26
[5] *Van der Merwe v Duraline* (2013) ZAWCHC 213.
[6] *Lonsdale Commercial Corporation v Kimberley West Diamond Mining* (2013) ZANCHC 11.
[7] *Wild and Marr (Pty) Ltd v Intratek Properties* 2019 (SA) 310 (GJ).

the principal place of business of the company has to be its registered office, and that is where it resides. I find the reasoning in *Sibakhulu* and *Mfwethu* persuasive with regard to business rescue applications, and I see no reason not to follow them.

[9] Counsel submitted that even though the first respondent's registered address is in Sasolburg this court nevertheless has jurisdiction over it in terms of s21 of the Superior Courts Act, which provides for jurisdiction 'over all persons residing or *being in*' its area of jurisdiction. He argued that the first respondent is present in this area of jurisdiction as, factually, its principal place of business is here, and that it is therefore a person 'being' in this jurisdiction. Section 19(1)(a) of the Supreme Court Act 59 of 1959 contained an identical provision. In *Bisonboard*[8] the court referred with approval to a statement by Trollip J[9] that the court's jurisdiction under s19(1) was simply determined by reference to the common law and/or any relevant statute. It has never been our law that a court has jurisdiction over a person on the sole ground that he is present in its area of jurisdiction. For the same reason a court does not have jurisdiction over a company with a branch office in its area, but its registered office and principal place of business elsewhere.

[10] It follows that the first respondent resides, for purposes of jurisdiction, where its registered office is, in Sasolburg, and that this court has no jurisdiction over it in this matter.

[11] In case I am wrong about this, I deal briefly with the merits of the application.

[12] The applicant says the first respondent is financially distressed, as is evidenced by the arrears on its rental account. It says it has no information with regard to the first respondent's actual financial position, and relies in the alternative on s131(4)(a)(ii), which refers to a failure by a company to pay an amount due in terms of a contract. This point is misconceived as the subsection expressly relates to employment-related matters. The question remains therefore whether the applicant has shown that the first respondent is financially distressed as defined in 128(f). This expression means that it appears to be reasonably unlikely that the company will be

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[8] *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 486H-J
[9] *In Gulf Oil Corporation v Rembrandt Fabrikante en Handelaars (Edms) Bpk* 1963 (2) SA 10 (T)

able to pay all of its debts as they become due and payable within the immediately ensuing six months; or that it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.

[13] There is no evidence that the first respondent is likely to become insolvent. The only question is whether it is reasonably unlikely to be able to pay its debts in the next six months. There is no evidence of other unpaid creditors, so we are only concerned with the debt owing to the applicant.

[14] In September 2020 the first respondent's managing director wrote to the applicant and offered to pay R850 000 in settlement of the rental agreements. He said the first respondent required working capital and could obtain a loan which would enable it to pay the settlement figure and have working capital, for an instalment similar to what it was paying to the applicant. He said failing that, the first respondent would probably have to consider business rescue. The applicant says this shows that the first respondent is financially distressed. That is however not the whole picture. Mr Govender explains that he mentioned the possibility of business rescue in September 2020 because he was concerned about the possible impact of the Covid pandemic; the first respondent has not paid the instalments for the last approximately seven months because of a dispute about what was owing; the parties agreed to a moratorium in respect of the instalments until the negotiations in this regard had been concluded; the first respondent is a profitable business and has met all its financial commitments in the past financial year; and the first respondent has terminated the agreements and tendered to pay the settlement figures.

[15] I cannot find on this evidence that the first respondent is financially distressed as contemplated in the Act.

[16] With regard to a reasonable prospect of rescuing the company, the applicant says it has no information about the first respondent's financial situation. It is therefore unable to put the necessary facts before the court, but a business rescue practitioner will be able to investigate the matter and report on the way forward. This is not how business rescue works. In order to succeed in an application for business rescue the applicant must place before the court a factual foundation for the

existence of a reasonable prospect that the desired object can be achieved.[10] And it must be a prospect based on reasonable grounds.[11]

[17] I conclude that this court does not have jurisdiction to deal with the application for business rescue, and that it would have failed on the merits in any event.

[18] The application is dismissed with costs.

Ploos van Amstel J

Appearances:

For the Applicant	:	H A De Beer SC (Together with D Dheoduth)
Instructed by	:	K Maharaj Incorporated
	:	Durban
For the Respondents	:	A Van Der Westhuizen
Instructed by	:	Kershnie Govender Attorneys
	:	Durban

Date Judgment Reserved	:	21 July 2021
Date of Judgment	:	29 July 2021

[10] *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* 2013 (1) SA 542 (FB) para 11.
[11] *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami)* 2013 (4) SA 539 (SCA)