

Reportable	YES / NO
Circulate to Judges	YES / NO
Circulate to Magistrates	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

JUDGMENT

CASE NUMBER: 1961/2013

PHILLIPPUS JOHANNES DE BRUYN

APPLICANT

AND

GRANDSELECT 101 (PTY) LTD

FIRST RESPONDENT

HANS KLOPPER N.O.

SECOND RESPONDENT

Date of hearing: 24 January 2014

Date of judgment: 05 March 2014

PHATSHOANE J.

- On 20 November 2013 Mr Christiaan Paul Conradie and Mr Eric Peter Turck, the directors of Grandselect 101 (Pty) Ltd, the first respondent, resolved to voluntarily commence business rescue proceedings by placing Grandselect under supervision by a business rescue practitioner in terms of s 129(1) of the Companies Act, 71 of 2008. On 06 December 2013 Mr Phillippus Johannes de Bruyn, the applicant, approached this Court on an urgent basis for an order that the resolution taken by Grandselect initiating the business rescue proceedings be set aside; that in the event that this resolution is set aside it be further

ordered that Grandselect is provisionally and thereafter finally liquidated in the hands of the Master of the High Court. By agreement between the parties the application was postponed to the urgent opposed roll of 24 January 2014.

2. Adv Oosthuizen SC, for Grandselect, broached two points *in limine* against the application. On the first preliminary point he contended that this Court does not have jurisdiction to entertain the application relating to liquidation or business rescue of Grandselect because its registered office and principal place of business fall within the geographical jurisdiction of the Western Cape High Court. It is common cause that the registered office of Grandselect is in Cape Town. What is in dispute is whether its principal place of business is situated in that same area or in Northern Cape. Mr Oosthuizen argued that in the wake of the Companies Act, 71 of 2008, only a High Court in the area where the registered office of the Company is situated would have jurisdiction to entertain the application.
3. Counsel finds support for his contention in *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)* 2013 (1) SA 191 (WCC) where the question of Jurisdiction of the High Court under the Companies Act, 71 of 2008, came under scrutiny. The following dictum appears at para 23 of the judgment by Binns-Ward J:

“[23] I consider that it would give effect to the purposes set out in s 7(k) and (l) to interpret s 23 of the Act [Companies Act 71 of 2008] to the effect that a company can reside only at the place of its registered office (which, as mentioned, must also be the place of its only or principal office). The result would be that there would in respect of every company be only a single court in South Africa with jurisdiction in respect of winding-up and business rescue matters. I think it admits of no doubt that winding-up and supervision for business rescue purposes are both matters going to the status of the subject company, and that the power to make a determination on a question of status involves a *ratio jurisdictionis* exercisable only by the court within whose jurisdiction the company 'resides' or is domiciled (I do not perceive there to be scope for any distinction within South Africa between a local company's residence and its domicile.) Furthermore, winding-up and business rescue are also matters which are interlinked in such a manner by the provisions of the 2008 Act that it is undesirable for reasons of comity between courts of equal status, efficiency, commercial convenience and certainty that they be amenable to proceedings in concurrent jurisdictions. These are considerations militating in favour of the recognition of a regime that recognises a company only to be resident in one place rather than two, thereby assuring that only one court will have jurisdiction.”

4. Against the backdrop of item 9 of schedule 5 of the Companies Act, 71 of 2008¹, which provides for the continued application of the previous Companies Act, 61 of 1973, to the liquidation and winding-up of companies, Adv Zietsman SC, for the applicant, argued with reference to s 339 of the previous Act that in the winding-up of a company unable to pay its debts the law of insolvency shall continue to apply in respect of any matter not specially provided for in the previous Act. In this regard he submitted that s 149 of the Insolvency Act, 24 of 1936, deals with the Jurisdiction of the Court². It is apposite to bear in mind that in *Spendiff NO v Kolektor (Pty) Ltd* 1992 (2) SA 537 (A) at 543G-H the Court pronounced that s 149(1) of the Insolvency Act is not to be applied in order to determine which Court has jurisdiction in the winding-up of a company because the provisions of the Insolvency Act only apply in the winding-up, and that stage is only reached when the order to wind up has been granted in terms of the Companies Act.

5. There is an apparent lacuna in the Companies Act, 71 of 2008, because it does not have a statutory provision governing jurisdiction in the same way as its precursor³ had, nor does it expressly exclude the jurisdiction of the High Court in respect of a company whose principal place of business is situated within the Court's territorial jurisdiction. Section 12 of the previous Companies Act, 1973, dealt with jurisdiction of the Court. It provided as follows:

“12. Jurisdiction of Court under this Act and review of decisions of Registrar

¹ Item 9 of schedule 5 provides in part:

(1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).

....

(4) The Minister, by notice in the Gazette, may-

(a) determine a date on which this item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies; and..

² Section 149 provides:

(1) The court shall have jurisdiction under this Act over every debtor and in regard to the estate of every debtor who-

(a) on the date on which a petition for the acceptance of the surrender or for the sequestration of his estate is lodged with the registrar of the court, is domiciled or owns or is entitled to property situate within the jurisdiction of the court; or...

³ See s 12 of Companies Act, 1973.

(1) The Court which has jurisdiction under this Act in respect of any company or other body corporate, shall be any provincial or local division of the High Court of South Africa within the area of the jurisdiction whereof the registered office of the company or other body corporate or the main place of business of the company or other body corporate is situate.

(2) Any person, including any company or other body corporate, aggrieved by any decision, ruling or order of the Registrar may bring the same under review by the provincial or local division of the High Court of South Africa within the area of the jurisdiction whereof such person is ordinarily resident or such company or other body corporate has its registered office or main place of business.”

6. The following dictum appears in *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 496B-E

“..That a company resides at its place of central control was again accepted in *Vanderbijl Park Health Committee and Others v Wilson and Others* 1950 (1) SA 447 (A) at 466 - 7. The principle is accordingly well established in our law, and I can see no warrant for departing from it. I accept, furthermore, that it applies in respect of matters of jurisdiction, with the result that the court of the area where the company's place of central control is situated will have jurisdiction to entertain a monetary claim against the company on the ground that it is resident within the court's area of jurisdiction. On this approach it follows that, if the company's registered office is located elsewhere than at its place of central control, a finding that the company is resident at the place of its registered office for the purposes of jurisdiction must necessarily involve an acceptance of the principle that a company can for such purposes (ie in regard to questions of jurisdiction) be resident at two places at the same time. In my judgment, the cases that I have mentioned do not preclude the acceptance of such a principle, as I shall endeavour to show in a moment, and I consider that this Court should now approve it. Accordingly I find that a company can and does have a dual residence for jurisdictional purposes, where its central control and its registered office are located at different places.”

See also *Dairy Board v John T Rennie & Co (Pty) Ltd* 1976 (3) SA 768 (W) at 771H.

7. Binns-Ward J in *Sibakhulu Construction* supra is of the view that with the advent of the Companies Act, 2008, the position as enunciated in *Bisonboard Ltd* and *Dairy Board* supra is no longer supported by the current statutory scheme because s 23 of the Companies Act, 2008, requires that each company or external company must continuously maintain at least one office in the Republic which should be registered. Section 23(3) of the Companies Act, 2008, provides:

“(3) Each company or external company must-

- (a) continuously maintain at least one office in the Republic; and
- (b) register the address of its office, or its principal office if it has more than one office-

- (i) initially in the case of-
 - (aa) a company, by providing the required information on its Notice of Incorporation; or
 - (bb) an external company, by providing the required information when filing its registration in terms of subsection (1); and
- (ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee.”

8. In the Handbook: Erasmus Superior Court Practice Farlam *et al* on commentary under s 19 of the repealed Supreme Court Act, 59 of 1959, at A1-26 (Service 41 of 2013) state:

“Although, generally speaking, the principal office of a company is not necessarily equivalent to its principal place of business, it is submitted that for purposes of jurisdiction based on residence under the Companies Act 71 of 2008, it is. In other words, the ‘principal office’ of a company as contemplated in s 23(3) of the Companies Act 71 of 2008 constitutes, for jurisdictional purposes, its statutory home where it is to perform its corporate functions and where it is regarded as at all times present and ready to conduct and control its administrative affairs. Viewed in this context, the requirement notional connection with a court’s area within which the principal office is located is present.”

9. In the Judgment of this Court in *Lonsdale Commercial Corporation v Kimberley West Diamonds Mining Corporation* Case No 312/2012 at page 8-9 paras 6.2-6.3 delivered on 17 May 2013 (unreported) Lacock J held:

“A finding that the legislature intended the provisions of s 23(3) of the 2008 Act to be construed “for purposes of jurisdiction” (a phrase repeatedly used by Binns-Ward J in *Sibakhulu* (Supra) is, to my mind, tantamount to a finding that the legislature intended to limit or oust a local- and provincial division’s jurisdiction derived from the common law and/or section 29 of the Supreme Court Act in respect of the liquidation and or business rescue proceedings of a company that “resides” or has its principal place of business within that Court’s area of jurisdiction, but not also its registered address. I am not persuaded that the reasons advanced by the learned judge justify such a drastic limitation of a Court’s jurisdiction.

Had the legislature intended to limit a Court’s jurisdiction as suggested by Binns-Ward, I would have expected the legislature to have made provision for such drastic limitation in clear and unambiguous terms. This was not expressly done when the 2008 Act was promulgated or since.”

10. Jurisdiction should be determined by common law and/or the relevant statute. See *Bisonboard Ltd* supra at 486H—J. This is a common thread which runs through *Sibakhulu Construction* and *Lonsdale Commercial*. Consideration of the question of jurisdiction involves a two-stage enquiry. Firstly, it should be determined if the Court is, as matter of principle, competent to take cognisance of the particular case (whether a recognised jurisdictional ground exists – *ratio*

jurisdictionis). Secondly, whether the defendant is subject to the Court's authority (whether an effective judgment can be given). See Harms Handbook: Civil Procedure in the Supreme Court, A-16 [Issue 49]. In *Estate Agents Board v Lek* 1979 (3) SA 1048 (A) at 1063 F–H Trollip JA set out the general principles of our law in determining jurisdiction as follows:

“That depends on (a) the nature of the proceedings, (b) the nature of the relief claimed therein, or (c) in some cases, both (a) and (b). . . . Approach (a) was adopted by Innes J in Steytler's case 1911 AD at 315-16. The inquiry was, he said, whether, by its nature, the action was personal, real, or mixed. De Villiers JP adopted approach (b) at 346-7; and (c) was applied in the *Gulf Oil* case [*Gulf Oil Corporation v Rembrandt Fabrikante en Handelaars*(Edms) Bpk 1963 (2) SA 10 (T)]. Approach (b) is based on the principle of effectiveness - the power of the Court, not only to grant the relief claimed, but also to effectively enforce it directly within its area of jurisdiction, ie without any resort to the procedural provisions in the Supreme Court Act 59 of 1959 canvassed above.”

11. Section 21(1) of the Superior Courts Act, 10 of 2013, provides in part that a Division of the High Court has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognisance. Harms in his Handbook Civil Procedure in the Supreme Court in the commentary under s 21 of the Superior Courts Act, 2013, restates the legal position set out in *Bisonboard Ltd* and *Dairy Board* supra that a domestic corporation or legal person is resident both at the place where its registered office is located and where its principal place of business is. Put differently, it may have dual residence.
12. It is a well-known rule of statutory interpretation that the curtailment of the powers of a court of law will not be presumed in the absence of an express provision or a necessary implication to the contrary. See *inter alia*, *Richards Bay Bulk Storage (Pty) Ltd v Minister of Public Enterprises* 1996 (4) SA 490 (A) at 494G-I.
13. There can be no doubt that the approach propounded by Binns-Ward J is commercially sound and brings about certainty. The examples of problematic situations that may arise if only one Court is intended to have jurisdiction in respect of liquidations and business rescue proceedings highlighted by Binns-

Ward J in para 24 of his judgment are compelling. Nevertheless, considerations of convenience as stated in *Dairy Board* should also be taken into account. I wish to add that in certain instances this may be decisive. I share the view expressed by Lacock J that the hurdles alluded to by Binns-Ward J are not insurmountable and sufficient to oust the Court of jurisdiction in respect of a company whose principal place of business is situated in its boundaries. I am of the view that this Court would have jurisdiction to determine the liquidation or business rescue application of a company whose principal place of business and/or registered office is situated in its area of jurisdiction.

14. Grandselect's registered address is No 3 Rose Avenue, Kirstenhof, Cape Town, Western Cape. As mentioned earlier, it is in dispute that Grandselect's principal place of business is within this Court's territorial jurisdiction. Grandselect is the registered owner of Farm Houmoed whose business is farming operations. The applicant states that it brought this application in this Court because Farm Houmoed, the only asset of Grandselect, is situated in the district of Upington, Northern Cape. It is settled that the principal place of business of a company for jurisdictional purposes is the place where the central control and management of the company abides. See *Leibowitz t/a Lee Finance v Mhlana and Others* 2006 (6) SA 180 (SCA) at 184B – C para 9.
15. Grandselect states that its principal place of business is in the Western Cape because its control, management and administration are conducted from the offices of Afrifresh Group (Pty) Ltd situated at 5 Primrose Avenue, Cape Town, while its auditor's office and home is at 3 Rose Avenue, Kirstenhof, Cape Town. Mr Christiaan Paul Conradie, Grandselect's deponent, says 5 Primrose Avenue is a place where Grandselect's directors meet and at which its annual general meetings are held. It maintains that even if it were to be held that its principal place of business is Farm Houmoed that would be insufficient to confer jurisdiction upon this Court.
16. Apparent from the papers are disputes of fact on the exact location of the principal place of business of Grandselect. In terms of the oft quoted *Plascon-*

Evans rule⁴, where disputes of fact in motion proceedings arise in the affidavits, a final order could be granted only if the facts averred in the applicant's affidavits and admitted by the respondent, together with the facts alleged by the latter, justify such order. The situation would of course be different if the respondent's version consists of bald or implausible denials, raises fabricated disputes of fact, or was palpably implausible, far-fetched or untenable that the Court would be justified in rejecting it merely on papers. This is not a case where it can be said that the respondents' version on the place where the central management and control of Grandselect resides can be regarded as far-fetched. The upshot of this is that this Court does not have jurisdiction to entertain the application.

17. Lastly, Mr Zietsman urged, belatedly in the heads of argument, that should the Court find that it does not have jurisdiction, that this matter be transferred to the Western Cape High Court in terms of s 27 of the Superior Courts Act, 10 of 2013, which provides:

"27 Removal of proceedings from one Division to another or from one seat to another in same Division:

- (1) If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings-
 - (a) should have been instituted in another Division or at another seat of that Division; or
 - (b) would be more conveniently or more appropriately heard or determined-
 - (i) at another seat of that Division; or
 - (ii) by another Division,

that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.
- (2) An order for removal under subsection (1) must be transmitted to the registrar of the court to which the removal is ordered, and upon the receipt of such order that court may hear and determine the proceedings in question."

18. Mr Oosthuizen objected to the removal of the matter because the applicant did not bring a substantive application justifying the removal. He contended that the removal will cause a wholly unacceptable delay in the holding of the necessary

⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A): See dictum at 634E – 635C

business rescue meetings. He added that there are considerable costs to which the respondents have been put in defending the proceedings which the applicant instituted in the incorrect Court without any tender of costs.

19. In terms of s 27 of the Superior Courts Act 10, of 2013, the removal of a matter can be made upon the application by a party. No basis has been established in the papers for the removal save the contingent oral argument. This is insufficient. In the result the prayer for the removal of the matter cannot be acceded to. Costs will follow the results.

Order:

1. The application by Mr. Phillippus J de Bruyn (the applicant) that the resolution taken by Grandselect 101 (Pty) Ltd (the first respondent) initiating business rescue proceedings be set aside is refused and dismissed with costs.

M.V. PHATSHOANE
JUDGE
NORTHERN CAPE HIGH COURT

Counsel for the Applicant:
 Instructed by

Adv. P. Zietsman SC
 Van De Wall & Partners, Kimberley

Counsel for the First Respondent
 Instructed by

Adv.A.C. Oosthuizen SC
 Duncan & Rothman, Kimberley