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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **16025/2021**

In the matter between:

ABSA BANK LIMITED

Plaintiff/Applicant

and

LINDA BOLTMAN

First Defendant/Respondent

FREDERIK HENDRICUS BOLTMAN

Second Defendant/Respondent

Coram: Justice J Cloete

Heard: 29 November 2024

Delivered electronically: 13 February 2025

JUDGMENT

CLOETE J:

- [1] This is an opposed application in terms of s 27(1)(b) of the Superior Courts Act¹ in which the applicant (plaintiff) seeks the removal (transfer) of the main action pending in this Division under the above case number to the North Gauteng High Court, Pretoria. For convenience I will refer to the parties as they are in the main action.
- [2] On 17 September 2021 the plaintiff issued summons against the defendants, jointly and severally, for payment of R3 706 192.44 plus interest and costs on the attorney and client scale, as well as for an order declaring a certain immovable property, which is registered in the name of the first defendant and situated at 2[...] M[...] Avenue, Farm T[...] (the “Pretoria address”) specially executable. The plaintiff’s claim arises out of the alleged breach by the first defendant of a written overdraft facility agreement and whose indebtedness thereunder was secured by three mortgage bonds registered in favour of the plaintiff over the Pretoria address, as well as a written deed of suretyship in which the second defendant bound himself as surety and co-principal debtor for all amounts owed by the first defendant to the plaintiff.
- [3] Prior to the institution of action the plaintiff obtained a tracer report which reflected that the defendants’ *‘home address’* was The Farm L[...] (Portion 26 of the Farm Doornrivier 98), Herold, George (the “George address”). In paragraph 2 of the plaintiff’s particulars of claim it was alleged that both defendants were residing at the George address. The summons was served on the defendants by the Sheriff at the George address on 23 September 2021 (personally on the second defendant, and on the second defendant on behalf of the first defendant). On 6 October 2021, they entered an appearance to defend in which their attorney (based in Limpopo) notified the plaintiff that their *‘full residential address’* is the Pretoria address.
- [4] A mediation process followed, which was unsuccessful. On 17 January 2023 the defendants delivered their plea. In regard to paragraph 2 of the plaintiff’s

¹ No 10 of 2013.

particulars of claim they made identical allegations, and I thus quote only those made by the first defendant:

‘Save to admit the name and identity number of the first defendant, the remainder of the contents of this paragraph, relating to the first defendant’s place of residence are denied. It is pleaded that the first defendant alternates her residency between her primary residence situated at [the Pretoria address] and [the George address] which she looks after on behalf of the owner.’

[5] On 3 March 2023 the plaintiff served a notice of intention to amend its particulars of claim but in respect of allegations other than those pertaining to paragraph 2 thereof. The defendants did not object to that notice, and on 15 March 2023 the plaintiff delivered the amended pages of its particulars of claim. On 4 April 2023 the defendants appointed new attorneys based in Pretoria, and on 24 April 2023 they delivered their consequentially amended plea. In regard to paragraph 2 of the plaintiff’s particulars of claim, each alleged in identical terms (and again I thus quote only that portion pertaining to the first defendant) that:

‘2.1 Save to admit the name and identity number of the first defendant, the remainder of the content of this paragraph, relating to the first defendant’s place of residence are denied.

2.2 The first defendant specifically pleads that her primary residence is situated at [the Pretoria address] and that merely for employment purposes she acts as a caretaker of an immovable property in George [the George address]. Due to the aforesaid the first defendant is duty bound to occupy the immovable property in George for a period of time.

2.3 The first defendant however further specifically pleads that this does not detract from the fact that the property situated at [the Pretoria address] remains her primary residence.’

- [6] On 16 May 2023 the plaintiff delivered applications for summary judgment and for a special execution order in terms of rule 46 and 46A (the capital sum claimed in the summary judgment application was reduced to R2 682 427.52). In the affidavit filed in support of the application for summary judgment, the deponent alleged that:

4.

From the Respondents' plea it is evident that the following are common cause between the parties alternatively not seriously disputed: ...

4.3

The identity of the Respondents, (note paragraphs 2 and 3 of the plea read with paragraph 2 of the particulars of claim). Save that the Respondents deny that the George address cited is their permanent residential address. Pleading that the said address is only resided in on a temporary basis, whilst the encumbered property is their permanent residence...'

- [7] After delivering notices of opposition to both applications, the defendants served a notice of intention to amend their plea to introduce a special plea of lack of jurisdiction. After pleading that the facility agreement was concluded at or near Pretoria; the Pretoria address is situated within Pretoria; the mortgage bonds pertaining thereto are registered in the Pretoria Deeds Office; and that both defendants chose the Pretoria address as their *domicilium* in terms of the agreements with the plaintiff, they alleged that:

'A.7 The Defendants specifically plead that in terms of Section 21 of the Superior Court's Act 10 of 2013 jurisdiction of this Court to adjudicate the matter in casu will be established by either the cause of action relied upon by the Plaintiff having arisen within this Honourable Court's area of jurisdiction (or a portion thereof) or the Defendants to be regarded as a person over whom the

Court has jurisdiction and as such being persons residing within the Court's area of jurisdiction.

A.8 It is patently clear that the cause of action or simply a portion thereof has not arisen within this Honourable Court's area of jurisdiction.

A.9 The Defendants specifically plead that they are not resident within the Honourable Court's area of jurisdiction and that they are resident in the Gauteng Province with their specific address being that of the mortgaged property. The Defendants further plead that they have always regarded the mortgaged property as their primary residence. The address utilised by the Plaintiff in order to attempt to establish jurisdiction in this Honourable Court is not a residential address of the Defendants and has at no stage whatsoever been regarded by the Defendants as their residential address or address of permanent residence.

A.10 In extrapolation of the aforesaid the Defendants specifically plead that the address utilised by the Plaintiff is simply an address of a property at which the Defendants, from time to time and on an ad hoc basis attend to as caregivers. The Defendants specifically plead that the fact that they attend to the aforesaid property on an ad hoc basis from time to time to effect and oversee maintenance and that same is indeed maintained in no way constitute residence for the purpose of establishing jurisdiction in the abovementioned Honourable court.

WHEREFORE the First and Second Defendants pray that the Plaintiff's action be dismissed with costs, alternatively that the action be transferred to the North Gauteng High Court.'

(emphasis supplied)

[8] The defendants annexed their notice of intention to amend to the affidavit filed in opposition to the summary judgment application. However no mention was made in the affidavit itself of the alternative prayer that the action be transferred to the North Gauteng High Court. Instead the defendants adopted the stance that the issue of lack of jurisdiction of this court was one that entitled them to leave to defend *'in order to ventilate'* it at trial (along with 4 other defences raised which have no bearing on the s 27 application before me – these will be dealt with by the court hearing the summary judgment application in due course). The special plea was subsequently delivered on 24 July 2023.

[9] On 25 July 2023 the plaintiff's attorney wrote to the defendants' attorney and the relevant portion thereof reads as follows:

'3. Secondly, in respect of the procedural continuation of the matter:

3.1 Our client will not at the moment be amenable to grant leave to defend.

3.2 It was noted that your client's special plea (inserted by way of amendment) alludes to the possibility that the matter be transferred from the Western Cape, Cape Town Division of the High Court to the Gauteng, Pretoria Division of the High Court. Our client is desirous to institute an application for the transfer of the matter. In light of the fact that your client also alludes to the possibility of transfer and to avoid the incurrence of costs, will your client be amenable to consent to the transfer of the matter?'

[10] In her response dated 7 August 2023, the defendants' attorney strongly condemned the plaintiff for not being amenable to grant leave to defend the action *'notwithstanding the patent lack of jurisdiction'* of this court, which the plaintiff was alleged to have conceded (clearly not the case); of having made *'false and incorrect'* allegations under oath on this score in the summary

judgment application; and of being *'highly opportunistic'* in making such a request. She even threatened the plaintiff with a punitive costs order after informing its attorney that any such application brought by the plaintiff would be opposed unless the plaintiff agreed to the defendants being given leave to defend.

- [11] The current application was launched on 19 March 2024 in terms of s 27(1)(b) of the Superior Courts Act which reads as follows:

'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 --- ...

(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...'

- [12] Given the contents of the (amended) particulars of claim read with the defendants' special plea, there can be little doubt that it would be both appropriate and convenient for the action to be transferred to the North Gauteng High Court, Pretoria. The defendants themselves allege they are primarily resident within that court's area of jurisdiction; the agreements were concluded there; the overdraft facility which is the subject matter of the main action is operated from one of the plaintiff's Pretoria branches, the relevant

witnesses for all the parties will be located in Pretoria including the defendants who can quite easily travel there on their own version; the immovable property (the Pretoria address) in respect of which the plaintiff seeks a special execution order is also situated within that court's area of jurisdiction; and both sets of instructing attorneys, as well as counsel who appeared before me, are based there.

- [13] However, ignoring their own alternative prayer in the special plea, the defendants now contend that this court has no jurisdiction to entertain the present application since it has no jurisdiction in the main action. In my view the defendants misconstrue the legal position. Section 21(1) of the Superior Courts Act provides that a Division has jurisdiction ‘*over all persons residing or being in*’ its area of jurisdiction (my emphasis). No mention is made in the subsection of “primary residence” or “permanent residence”. It is well-established that: (a) the question is not one of *domicile* but of residence; a person may have his or her *domicile* at one place and temporary residence at another; and (b) a person may have more than one residence; and where that is the case, this jurisdictional requirement is met if he (or she) is sued in the court having jurisdiction at the place where he (or she) is residing at the time when the summons is served: *Mayne v Main*² where it was also stated, referring to the previous equivalent s 19(1)(a) of the now repealed Supreme Court Act³:

[5] Amongst the more appropriate and apt definitions of residence (in the sense of “residing”) are those in Hogsett v Buys 1913 CPD 200 at 205 (quoted with approval in Ex parte Minister of Native Affairs (supra at 59)), namely there must be “some good reason for regarding it as his place of ordinary habitation at the date of service” and Beedle & Co v Bowley (1895) 12 SC 401 at 403 to the effect that

² 2001 (2) SA 1239 (SCA) at para [3].

³ No 59 of 1959.

“(w)hen it is said of an individual that he resides at a place it is obviously meant that it is his home, his place of abode, the place where he generally sleeps after the work of the day is done”.

In Tick v Broude and Another 1973 (1) SA 462 (T) at 469 F-G it was said that residence is a concept which conveys “some sense of stability or something of a settled nature”. A presence which is merely fleeting or transient would not satisfy the requirement for residence; some greater degree of permanence is necessary.

[6] Without detracting from the principles enunciated, one needs, in my view, to adopt a common-sense and realistic approach when deciding whether, having regard to all the relevant circumstances, a person can be said to be residing at a particular place for the purpose of s 19(1)(a). This is all the more so because of modern-day conditions and attitudes and the tendency towards a more itinerant lifestyle, particularly amongst business people, of whom the respondent, as will presently be apparent, is a striking example. Not to do so might allow certain persons habitually to avoid the jurisdictional nets of the courts and thereby escape legal accountability for their wrongful actions.’

- [14] Applying these principles to the facts relevant to this issue, on the defendants’ own version: (a) they alternate their residency between the Pretoria and George addresses (as set out in their initial plea); (b) in terms of s 21 of the Superior Courts Act this court has jurisdiction over persons residing within its area of jurisdiction (as contained in their special plea) and (c) they are caretakers of the George address and are thus ‘*duty bound*’ to occupy it ‘*for a period of time*’ (as set out in their first consequentially amended plea). This all supports residency by the defendants at the George address which is neither ‘*fleeting*’ nor ‘*transient*’. In any event s 27(1)(b) makes provision, not only for ‘*residing*’, but also for ‘*being*’ in this court’s area of jurisdiction at the time when the summons was served. It follows that their attempt to escape the ‘*jurisdictional net*’ of this court must fail.

[15] Of course, this finding in no way detracts from the other, separate defences raised by them in both their plea and affidavits filed in opposition to the summary judgment and rule 46A applications. They profess to have great confidence in those defences. That being the case, the court hearing them may grant leave to defend, and the trial will thereafter take place in that Division as well.

[16] The plaintiff asks for costs on the attorney and client scale. I have given this careful consideration, but notwithstanding the quite unnecessarily dramatic, *ad hominem* attacks made on the plaintiff, it seems to me more appropriate that at this stage, I should order that costs be costs in the cause. The court dealing with the summary judgment and rule 46A applications, or the trial, will be better placed to determine whether a punitive costs order is warranted. Put differently, although the costs of this application will follow the result in the main proceedings, that court will nonetheless retain the discretion as to the scale of costs and/or whether they should be awarded on a punitive basis.

[17] **The following order is made:**

- 1. The action instituted under the abovementioned case number (and including the pending applications for summary judgment and in terms of uniform rules 46 and 46A) are removed from this Division and transferred to the North Gauteng High Court, Pretoria;**
- 2. The Registrar of this Court is directed to give effect to the Order at paragraph 1 above; and**
- 3. The costs of this application shall be costs in the main action.**

J I CLOETE

For applicant: Adv C L Markram-Jooste

Instructed by: VZLR Inc. (Ms E Niemand) c/o Brink De Beer Potgieter Inc. (Ms R Lategan)

For first and second respondents: Adv C Sevenster

Instructed by: LLR Inc (Ms M Le Roux) c/o Ashersons Attorneys (Mr A Goldschmidt)