**IN THE HIGH COURT OF SOUTH AFRICA**
**(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case No : 39230/19

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| REPORTABLE : **NO** |
| OF INTEREST TO OTHER JUDGES : **NO** |

In the matter between:

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| **THE INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED** | Applicant |
| and | |
| **INGWENYAMA CONFERENCE AND SPORT RESORT (PTY) LIMITED** | First Respondent |
| **P C JUNIOR BELEGGINGS (PTY) LIMITED** | Second Respondent |
| **PIERRE CHRISTIAAN DE JAGER N O** | Third Respondent |
| **CATHERINA GERTRUIDA DE JAGER N O** | Fourth Respondent |
| **GERT HENDRIK MULLER N O** | Fifth Respondent |
| **PIETER CHRISTIAAN DE JAGER** | Sixth Respondent |
| **COUNTRY BOUTIQUE HOTEL (PTY) LIMITED** | Seventh Respondent |
| **NEDBANK LIMITED** | Eighth Respondent |

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**JUDGMENT**

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**MUNDELL A J**

1. The Industrial Development Corporation ("*IDC*") has applied for a money judgment of R28 644 354.06 against the first to seventh respondents, jointly and severally, the one paying the others to be

absolved, together with an order declaring certain immovable property specially executable in satisfaction of its judgment.

2. The foundation of the application is a common cause agreement of loan concluded between the IDC, the first respondent and the Piet and Ria de Jager Trust ("*the trust*").[1] The agreement of loan consists of two parts. The first is headed "*CONSTRUCTION LOAN AGREEMENT*" and the second contains a range of "*MASTER TERMS AND CONDITIONS*".

3. The loan document was signed on behalf of the first respondent and the trust at White River on 23 March 2015. A representative of the IDC signed the document at Sandown on 30 March 2015.

4. Clause 22 of the Master Terms and Conditions is in the following terms:

> "*JURISDICTION*
>
> *The parties hereby irrevocably and unconditionally consent to the non-exclusive jurisdiction of the Gauteng Local Division of the High Court of South Africa, Johannesburg (or any successor to that division) in regard to all matters arising from this agreement*".

[1] The third, fourth and fifth respondents are cited as the trustees for the time being of the Trust. The sixth and seventh respondents stood surety for the loan liabilities of the first respondent to the IDC.

5. The parties exchanged answering and replying affidavits and the IDC delivered a supplementary replying affidavit. Of greater relevance to this hearing, however, is the fact that the first to seventh respondents elected to also deliver a notice in terms of Rule 6(5)(d)(iii) which is dated 17 January 2020 ("*the Rule 6(5) notice*").[2] That document consists of some seven pages of complaints, but the tenor thereof is the respondents' assertion that the IDC's founding affidavit lacks averments or evidence necessary to afford this Court jurisdiction to entertain the application.[3]

6. The rule 6(5) notice concludes with the following prayers:

> "*The application be dismissed with costs on the scale as between attorney and client; alternatively,*
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> *that the above Honourable Court exercises its discretion in transferring the application to the appropriate Court having jurisdiction for the commencement of the proceedings afresh, and that the applicant pays the costs of the applications (**sic**) on the scale as between attorney and client up to and including the costs associated with the transfer thereof*".

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[2] The respondents' procedural approach in delivering their answering affidavits together with their notice in terms of Rule 6(5)(d)(iii) complied with mandated judicial practice : **Standard Bank of South Africa Ltd v RTS Techniques and Planning (Pty) Ltd and Others** 1992 (1) SA 432 (T) at 440H-442A

[3] The Court's jurisdiction to entertain the main application is determined by section 21 of the Superior Courts Act, 10 of 2013. In terms of sub-section 21(1) of the Act this Court has jurisdiction over "*all causes arising ... within its area of jurisdiction ...*"

7. At the commencement of the hearing counsel confirmed that the only issue I am now called on to decide is the question of this Court's jurisdiction which is the "*question of law*" raised in the respondents' rule 6(5) notice.

8. It is not in dispute that the only direct allegation in the founding affidavit in support of this Court's jurisdiction is that contained in paragraph 22 thereof which reads:

> "*The Honourable Court has jurisdiction to hear and adjudicate upon this matter as each of the first to seventh respondents has irrevocably and unconditionally consented, in terms of the written financing agreements to which they are party alongside the applicant, to the non-exclusive jurisdiction of the Court in respect of all matters arising from the agreements*".

9. In argument Ms Magano (counsel representing the IDC) conceded that the consent to jurisdiction in clause 22 of the Master Terms and Conditions is insufficient to found jurisdiction in this Court without the addition of an accepted, common-law jurisdictional fact. Ms Magano's concession was appropriate in the face of the reference by Advocates van den Bergh SC and Nel (representing the respondents) to the oft-cited confirmation of that principle in **Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)**.[4]

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[4] 1987 (4) SA 883 (A) at 894

10. The additional jurisdictional facts relied on by Ms Magano in argument were that:

10.1 the loan agreement had been signed on behalf of the IDC in Sandown; and

10.2 payment by the first respondent in terms of the loan agreement was to be into the IDC's bank account in Sandton – a reference to paragraph 8.2 of the Master Terms and Conditions.

11. The respondents correctly emphasise that in motion proceedings the applicant is required to make out its case in the founding affidavit and that affidavits in motion proceedings serve not only to define the issues between the parties but also to place the essential and necessary evidence before the Court.[5]

12. In the context of the procedure to be adopted in relation to notices in terms of Rule 6(5)(d)(iii) Harms JA said in **Valentino Globe BV v Phillips and Another**[6] 1998 (3) SA 775 (SCA)[7]:

> "*Initially the appellant wished to argue the first point with reference to the allegations contained in the founding affidavit only as was done in the Court below. There are a number of*

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[5] **Hart v Pinetown Drive-In Cinema (Pty) Ltd** 1972 (1) SA (D) at 469C-E
[6] 1998 (3) SA 775 (SCA)
[7] At pages 779G-780A

*cases which recognise the right of a respondent, in spite of having filed an answering affidavit, to argue at the outset that the founding affidavit does not make out a prima facie case for the relief claimed. They for two reasons suggest that the procedure is akin to an exception based on the ground that a summons or similar initiating process does not disclose a cause of action. The founding affidavit alone calls to be considered, and the averments contained therein must be accepted as true. An important difference with an exception is, however, that the application contains evidence and not only allegations of fact, and what might be sufficient in a summons may be insufficient in a founding affidavit. See, for example, Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972 (1) SA 464 (D), Pearson v Magrep Investments (Pty) Ltd and Others 1975 (1) SA 186 (D), and latterly, Hubby's Investments (Pty) Ltd v Lifetime Properties (Pty) Ltd 1998 (12) SA 295 (W) at 297 A-E. The usual object of the procedure is to enable a respondent to meet an application for referral to evidence or the like and relieve the court of considering the conflicting allegations of fact. Compare Bader and Another v Weston and Another 1967 (1) SA 134 (C) at 136F-G.*

*It seems to me to be wrong to permit the use of this procedure in a court of first instance where there is no real conflict of fact on the papers, as is the case here. But having used the procedure unsuccessfully at that level does not mean that an appellant is entitled to use it again on appeal. In any event it seems to me that analogy with the exception procedure may be inappropriate and that the comparison should rather be with an application for absolution from the instance in a trial action. Having lost an application for absolution, a defendant cannot thereafter lead evidence and on appeal argue that absolution should have been*

*granted at the end of the plaintiff's case".*[8]

13. The principles applicable to assessment of an application for absolution from the instance were re-stated by Harms J A in **Gordon Lloyd Page & Associates v Rivera and Another**[9] in the following terms:

> *"[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:*
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> > *'...(W)hen absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the 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.' (authorities omitted)*
>
> *This implies that the plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no Court could find for the plaintiff ... Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be*

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[8] See also: **Contract Employment Contractors (Pty) Ltd v Motor Industry Bargaining Council and Others** 2013 (3) SA 308 (CC) at paras [2] to [5]

[9] 2001 (1) SA 88 (SCA) at 92E-93A

*granted sparingly but when the occasion arises, a court should order it in the interests of justice*".

14. The IDC's founding affidavit does not comply with Uniform Rule 18(6) in the sense that, when pleading the loan agreement, it is not said when, where and by whom that agreement was concluded. Mr van den Bergh SC fairly conceded that, had the founding affidavit taken that form, there would, at the very least, exist a *prima facie* case for this Court's jurisdiction.

15. In argument both Ms Magano and Mr van den Bergh SC accepted that, at face value, the loan agreement had been concluded in Sandown. That issue is, of itself, not free from difficulty as, in general terms, a contract comes into existence when and where the offeree's acceptance is communicated to and received by the offeror. Given the sequence of signatures evident from the loan agreement, that would appear to be the place at which the IDC's acceptance of the offer by the first respondent and the trust was received by those entities.[10]

16. That issue was not debated before me, however, and I will, for the purposes of applying the test for absolution, determine the matter on the assumption that the loan agreement was concluded in Sandown.

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[10] **Jamieson v Sabingo** 2002 (4) SA 49 (SCA) at para [5] on pp 53-54

17. Mr van den Bergh SC argued with some conviction that the IDC is not permitted to attach extensive documents to its founding affidavit (including the loan agreement made up of the two parts I have described) and expect of the respondents to divine therefrom on which contents of those documents the applicant relies.[11] Relying on, amongst others, **Lipschitz and Schwartz NNO v Markowitz**[12] he argued that the same principle must be applied to the disputed question of this Court's jurisdiction.

18. The authorities on which Mr van den Bergh SC relied are unassailable but, of course, must be reasonably applied to the facts of the particular matter under consideration.

19. In my view the facts which guide a determination of this matter are:

19.1 one of the *rationes jurisdictionis* recognised by the common law is the *ratio contractus*[13] which, in the current instance, falls within this Court's jurisdiction;

19.2 although not pleaded in the terms required by Rule 18(6), the contents of the founding affidavit make it clear that the IDC relies for this Court's jurisdiction on the contents of the

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[11] **Minister of Land Affairs and Agriculture v D & F Wevell Trust** 2008 (2) SA 184 (SCA) at 200D-E

[12] 1976 (3) SA 722 (W) at 775H-776A

[13] **Pollak** : "**The South African Law of Jurisdiction**" (Juta) 3rd edition by van Loggerenberg at para 7.5.5 at pp 238-239

loan agreement concluded between it, the first respondent and the trust;

19.3 in paragraph 2.3 of their Rule 6(5) notice the respondents say:

> "*It appears ex facie the written agreements concluded allegedly between the applicant and the first to seventh respondents that the said agreements were signed for and on behalf of the first to seventh respondents at White River, Mpumalanga*";

19.4 the same analysis make it clear that the loan agreement was signed on behalf of the IDC at Sandown;

19.5 the pleadings in the main application have closed and the respondents have delivered an answering affidavit which appears to comprehensively deal with the facts alleged in the IDC's founding affidavit. There is no prejudice contended for by the respondent in that process;

19.6 although it may be more convenient for the respondents to conduct their opposition to the application in the Mpumalanga Division of the High Court (as is asserted in paragraph 3.2 of the Rule 6(5) notice) that convenience, in my view, is outweighed by the totality of the remaining facts including the fact that the IDC will, should the objection to

jurisdiction be upheld, institute precisely the same proceedings in the Mpumalanga High Court with a duplication of the existing affidavits and costs. That is, after all, what the respondents propose as an alternative in their Rule 6(5) notice;

19.7 there is no suggestion by the respondents that either the first respondent or the trust falls within the category of a vulnerable or indigent litigant who has been brought to the seat of a remote court which renders meaningful opposition to the suit impractical and unnecessarily difficult.[14]

20. For these reasons I am of the view that, applying the lenient test for absolution, the respondents' objection to this Court's jurisdiction must fail.

21. In argument, as an alternative to the IDC's support of this Court's jurisdiction, Ms Magano proposed that I should consider removing these proceedings to the Mpumalanga High Court. I am, of course, afforded that authority by section 27 of the Superior Courts Act, but, given my view on the outcome of the Rule 6(5) application, it is unnecessary for me to consider that issue in any detail.

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[14] **University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others** 2016 (6) DS 596 (CC) at paras [122] to [125]

22. The short answer to Ms Magano's submissions, however, is that the IDC has made no case for that relief in the terms contemplated in section 27(1) of the Superior Courts Act.

23. In the context of the appropriate costs order I am mindful of the short-comings in the IDC's founding affidavit, but in the end am guided by the admonition by Schutz JA in **De Klerk v Absa Bank Ltd and Others**[15] and the anecdote he relates in that context.[16]

24. In the circumstances I am not persuaded that the usual rule should not apply. The costs will follow the event.

25. The following order is made:

25.1 the respondents' objection to this Court's jurisdiction as formulated in their notice in terms of Rule 6(5)(d)(iii) dated 17 January 2020 is dismissed with costs;

25.2 the first to seventh respondents are to pay the applicant's costs jointly and severally, the one paying the others to be absolved.

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[15] 2003 (4) SA 315 (SCA) at para [1]
[16] At para [44]

**MUNDELL A J**

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| Date of hearing : | 30 November 2020 |
| Date of delivered : | 20 January 2021 |

APPEARANCES:

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| For the applicant : | Advocate Magano |
| Instructed by : | Ramathe MJ Inc |
| For the respondent : | Advocates van den Bergh SC and Nel |
| Instructed by : | Doman Weitsz Attorneys |