

REPUBLIC OF SOUTH AFRICA



HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

NOT REPORTABLE

CASE NO: 12520/2014

In the matter between:

MMI GROUP LTD

24/6/2014

Plaintiff

and

**H.O.V.G POTGIETER
B. POTGIETER**

Fourth Defendant
Fifth Defendant

J U D G M E N T

MAKGOKA, J

[1] This is an opposed summary judgment application against the defendants. The plaintiff instituted action against De Wet-De Villiers Finansiele Dienste BK (the principal debtor) and eight defendants, including the defendants, jointly and severally, for payment of R198 946.45. The action is based on a contract concluded between the plaintiff and the principal debtor on 21 September 2009. The fourth and fifth defendants (the defendants) and other defendants have signed deeds of suretyship in favour of the plaintiff for the performance of the obligations of the principal debtor to the plaintiff.

[2] The defendants oppose the granting of summary judgment on a single ground that this court lacks jurisdiction to hear this matter. It is alleged that the court which has jurisdiction is the North West High Court, Mahikeng. The following common cause facts are necessary to consider the issue in dispute. In its particulars of claim, the plaintiff avers that the agreement between it and the principal debtor was concluded in Rustenburg, 'alternatively Centurion'. The suretyships by the defendants were, respectively, signed in Rustenburg. The registered office of the principal debtor is situated in Ventersdorp.

[3] It is further common cause that Rustenburg falls within the area of jurisdiction of the Mahikeng High Court, thus outside the area of jurisdiction of this court, while Ventersdorp, like Centurion, fall within the area of jurisdiction of this court. It flows from the above that this court has jurisdiction over the principal debtor, but lacks, ordinarily, it in respect of the defendants. Furthermore, this court lacks jurisdiction, ordinarily, over the suretyships, which were concluded in Rustenburg.

[4] To overcome these hurdles, Mr. *Goslett*, counsel for the plaintiff, contended for 'incidental' jurisdiction over both the defendants, on the authority of s 21(2) of the Superior Courts Act 10 of 2013, which confers jurisdiction of a division over a person outside its ordinary jurisdiction, if such person is 'joined as a party to any cause' in relation which such court has jurisdiction. I proceed from the premise that the defendants have been joined in these proceedings within the contemplation of the section.

[5] From the above, the crisp issue for determination is the place where the agreement between the plaintiff and the principal debtor was concluded. The answer to this question is determinative, and dispositive, of the issue raised by the defendants in opposing summary judgment. In the present case, the agreement was signed on behalf of the principal debtor on 21 September 2009

in Centurion. Mr. *Goslett* argued that Centurion is the place at which the agreement was concluded. For this contention, reliance was placed on the dictum in *Driftwood Properties (Pty) Ltd v McLean* 1971 (3) SA 591(A) at 597.

[6] Earlier, I pointed out to the plaintiff's averment in its particulars of claim that the agreement was concluded in Rustenburg. The bold assertion to the contrary in these proceedings, by no means make the position clear. As correctly pointed out by Mr. Esterhuyse, the defendant's attorney, jurisdiction is determined on the basis of the pleadings. See *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 para 12. It is also instructive that nowhere in its particulars of claim, are any allegations made as to the basis on which this court has jurisdiction.

[7] The jurisprudential framework within which an application for summary judgment should be considered, is trite and established. The defendant must satisfy the court that he has a *bona fide* defence to the plaintiff's claim and the full nature and grounds thereof. In *Oos-Raandse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk* 1978 (1) SA 164 (W) at 171 it was stated that not a great deal is required of a defendant but that he must lay enough before the court to persuade it that he has a genuine desire and intention of adducing at the trial, evidence of facts which, if true, would constitute a valid defence.

[8] All that the court enquires into is whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded and whether, on the facts disclosed so disclosed the defendant appears to have a defence which is *bona fide* and good in law. See *Maharaj v Barclays National Bank* 1976 (1) 418 (A) at 426.

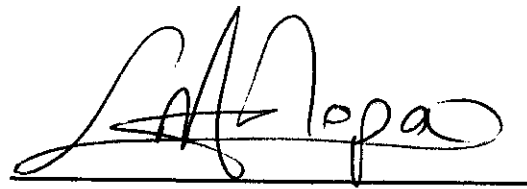
[9] In order to stave off summary judgment, the defendant has to disclose a *bona fide* defence. This means a defence set up *bona fide* or honestly, which if proved at the trial, would constitute a defence to the plaintiff's claim (*Bentley Maudesley & Co. Ltd v "Carburol" (Pty) Ltd and Another* 1949 (4) SA 873 (C); *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C) at 88). In *Dowson and Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 (C) at 419 it was noted that an ever increasing reluctance to grant summary judgment in the face of opposition, was evident from the South African courts. See also *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C) at 550, and *Standard Krediet Korporasie v Botes* 1986 (4) SA 946 (SWA). Therefore the court must always be reluctant to deprive the defendant of his normal right to defend, except in a clear case. See *Standard Bank of SA Ltd v Naude* 2009 (4) SA 669 (E) at 672C-676D.

[10] In the present matter, I am satisfied that the defendants have disclosed a defence which is neither inherently untenable nor devoid of merit. If established at the trial, it will be a complete answer to the plaintiff's claim. Considering the conspectus of all the relevant factors – the facts of the case and the proper approach to applications for summary judgments, I am satisfied that the defendants' defence is *bona fide* and not raised solely for the purpose of delay.

[11] In the result the following order is made:

1. The application for summary judgment is refused;
2. The fourth and fifth defendants are granted leave to defend.
3. Costs are in the main action.

PP



TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING : 18 JUNE 2014

JUDGMENT DELIVERED : 24 JUNE 2014

FOR THE PLAINTIFF : ADV. S. GOSLETT

**INSTRUCTED BY : GERINGS ATTORNEYS,
JOHANNESBURG**

FOR THE DEFENDANTS : MR. N. J. ESTERHUYSE

**FIRM : SAVAGE JOOSTE & ADAMS INC.,
PRETORIA**