

**IN THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION,PRETORIA)**

47553/2016

24/10/2016

Reportable: No

Of interest to other judges: No

Revised.

NEDBANK LIMITED

APPLICANT/PLAINTIFF

and

PETRUS STEYN ROSSOUW N.O

(Trustee for Doornpoort Trust -IT7663/0S)

1ST RESPONDENT

THERESA LORINDA ROSSOUW N.O

(Trustee for Doornpoort Trust-IT7663/05)

2ND RESPONDENT

PETRUS STEYN ROSSSOW

3RD RESPONDENT

THERESA LORINDA ROSSOUW

4TH RESPONDENT

JUDGMENT

KHUMALO J

[1] The Applicant, Nedbank Limited, is applying for summary judgment in an action it instituted on 15 June 2016 against P N Rossouw and T L Rossouw, the 1st and 2nd Respondents respectively, in their representative capacity as the trustees of Doornpoort

Trust ("Trust"). The action is founded on the Trust's alleged breach of the terms of loan agreements secured by mortgage bonds and a suretyship signed by 1st and 2nd Respondent in their personal capacities as a result of which they are cited as the 3rd and 4th Respondent, respectively.

[2] The order sought by the Applicant is for payment of the amount outstanding on the bonds, plus interest thereon and declaration of the mortgaged properties to be especially executable.

[3] The Respondents object to the court's jurisdiction to entertain the matter, a point they have raised *in limine*, without pleading to the merits. As a result the Respondents' opposition is only based on a technical point. However they prayed for the dismissal of the summary Judgment Application. Applicant's on the other hand moved for the point *in limine* to be dismissed and the order for Summary Judgment to be granted.

[4] The Respondents by not dealing with the merits in the alternative, in case their technical defence fails, ran a risk of a Summary Judgment being granted against it if a proper case is found to have been made for the relief sought by the Applicant. On the other hand if it is found that the court has no jurisdiction, the action cannot be sustained in this court, the matter would have to be struck off; see *Viljoen v Federated Trust Ltd* (1) SA 750 (0) at 759H.

[5] The Respondents allege that neither their residential addresses are situated, nor were any of the agreements referred to in the particulars of claim concluded within this court's area of jurisdiction. According to them they reside almost on the border of Witbank in Middleburg and all the agreements were concluded in Middleburg, which is where they were also advised of the Applicant's acceptance of their offer to take up the loan. The suretyship was however concluded at Witbank .. Furthermore, none of the mortgage bonds registered over the properties sought to be declared especially executable were registered within this court's area of jurisdiction but in the Mbombela Deeds Office (Nelspruit).

[6] The Doornpoort Trust and the Trustees are in accordance with the summons domiciled at Plaas Doornpoort, in Witbank, which place is in accordance with the

Applicant's s 129 letter in Middleburg. The said Plaas is also reflected as a domicillium address of the Trust in the latest Bond registered in 2014 whilst the earlier Bond registered in 2012 reflects 18 Olifant Street, Middleburg as the trust's domicile. The Respondents allege the principal address of the trust to be that of its trustees from where it is administered by the trustees, located within the district of Middleburg. The properties mortgaged and sought to be declared executable are described as:

[6.1] Pin 8 (a portion of portion 2) of the Farm De Goede Hoop 532, Registration Division J.T., the Province of Mpumalanga, measuring 1643, 7269 hectares, held under the Deed of Transfer No. T005838/2009.

[6.2] Remaining Extent of Portion 2 of the Farm De Goede Hoop 532, Registration Division J.T., the Province of Mpumalanga, measuring 1643, 7269 hectares, held under Deed of Transfer No. T005838/2009

And situated at Farm De Goede Hoop 532, Ngodwana, Nelspruit, now called Mbombela.

[7] In its particulars of claim the Applicant has alleged that the Trust's performance in terms of the loan agreements would take place at the Plaintiff's Menlyn Maine branch, in Waterkloof Glen, Extension 2 and all payments made in terms of the agreement would be made at that branch, consequently the Gauteng Division, Pretoria has jurisdiction to hear the matter.

[8] During argument, the Respondents' Counsel submitted that in terms of clause 2.1 of the Practice Directive issued in terms of s 7 (1) of the Superior Court Act 10 of 2013 ("the Superior Court Act") by the learned Judge President Mlambo ("JP") of the High Court Gauteng Division, Pretoria on 29 January 2016, the Middleburg Circuit Court would be the relevant court vested with the jurisdiction to entertain this action. Also referring to the decision by *Legodi J in First National Bank v Lukhele and Seven Others* cases unreported case no's: 01/16- 107/16) [2016] ZAGPPHC 616 (16 May 2016) .

[9] Applicant's Counsel's counter-argument was that the directive vested the Mbombela and Middleburg courts with the jurisdiction to hear all matters in any area in

Mpumalanga, at the same time the Gauteng High Court in Pretoria, remained the main court (alleging that the Directive did not take away the latter's jurisdiction). Therefore matters from those areas can still be issued in the Gauteng Division, in Pretoria which according to him, now has concurrent jurisdiction with the 2 circuit courts in respect of the Mpumalanga matters.

[10] Counsel further argued that in accordance with the determination by the Minister of Justice and Correctional Services ("the Minister") in Government Notice no 1226 published in the Government Gazette No. 39601 dated 15 January 2016, Emalahleni (Witbank) and Mbombela are 2 of the few areas in the magisterial district within the Mpumalanga Province, that with effect from 25 January 2016 were determined to fall under the jurisdiction of the Gauteng Division of the High Court in Pretoria. The Notice further provided that the areas under the jurisdiction of the outstanding Divisions of the High Court will be determined gradually concomitant with the rationalization process in the province. There hasn't been a further determination of the areas under Mpumalanga Province which the Minister reckoned was an ongoing process.

[11] Clause 2.1 of the Judge President's practice directive provides that:

"All action and motion proceedings including urgent applications **in any area in the Mpumalanga Province shall**, with effect from 1 February 2016, be issued through designated officials and at the offices situated at the Mbombela and Middleburg courts specified in clause 4 below which shall operate as the Registrar's office of the circuit court." (my emphasis)

[12] Notably the J P's directive was published two weeks later, exercising the power conferred upon him by s 7 (1) of the Superior Court Act in terms of which he could establish Circuit Courts for the adjudication of Civil or Criminal matters and **alter the existing boundaries** of any such district. He established the 2 Civil Circuit Courts, Mbombela and Middleburg. They are referred to as the Gauteng Division functioning as Mpumalanga Division of the High Court and are going to operate until the Minister has determined in terms of s 6 (3) of the Act, the areas under the jurisdiction of the Mpumalanga Division and its Local Division.

[13] It seems Middleburg is not so affected by this confusion which according to the

determination was not put under the Gauteng Division, Pretoria, but only Emalahleni and Mbombela. The rationale of the Minister's inclusion of Mbombela in his determination is inexplicable. The question which arises from the argument on behalf of Applicant necessary to clarify is whether the determination by the Minister and the JP's directive confer on the Gauteng Division, Pretoria concurrent jurisdiction over the 2 circuit courts.

[14] Legodi J inferred that matters in the whole of Mpumalanga Province will continue to be serviced by the Gauteng Division. He also recognized that s 6 (3) (a) is silent on the concurrent jurisdiction of the main seat over the local seats or the Circuit Courts. What does that then make of the Minister's determination, in terms of which the areas of Mbombela and Witbank fall under the Gauteng Division, Pretoria as against the JP's directive. Does that mean that for matters from the areas of Witbank and Mbombela litigants could choose to issue their processes either as per JP's directive or per Minister's determination, concurrency inferred now applies.

[15] Now if assessed in that context, the case of Lukhele and Others is different in that the issue that arose in those matters was whether or not the JP's directive presented an option to a litigant to issue proceedings in either of the two circuit courts, creating concurrent jurisdiction. In *casu*, the Respondents are arguing that the directive takes away the jurisdictional power that is vested upon the Gauteng High Court to hear the Mpumalanga matters whilst Applicant argues that it confers concurrent jurisdiction in respect of the areas which fall under the Mpumalanga Province but determined by the Minister in terms of s 6 (3) of the Superior Courts Act 10 of 2013. to fall under the Pretoria Gauteng Division.

[16] The answer lies in the phrasing or wording of the JP's directive. It is actually notable when reading clause 2.1 of the directive that he used the word "shall" and also determined the effective date. So in terms of the language used, the directive is mandatory and not discretionary or optional. The Judge President of the Court determines practicality and manages the functionary of the courts through the powers vested upon him by the Act. It is therefore reasonable that his directives would be mandatory.

[17] According to the Superior Court Act preamble it is provided that:

"Since the Constitution provides that the judicial authority is vested in all the courts, it is desirable to provide **for a uniform framework for judicial management, by the judiciary, of the judicial functions of all courts;**

And recognizing that the rationalization envisaged by item 16 (6) (a) of Schedule 6 to the Constitution is an ongoing process that is likely to result in further legislative and other measures in order to establish a judicial system suited to the requirements of the Constitution."

[18] Constitutionally the management of the judicial functions of all court lies with the Judiciary. The legislature just provide a framework within which such authority is to be exercised. To that end, s 7 (1) of the Superior Court Act confers such authority/ power which include **altering the existing boundaries** of any district or circuit court so created.

[19] The Respondent also argued on the other hand that for the sake of fair play and access to justice, personal jurisdiction requires facts to exist that makes it fair for High Court Pretoria to entertain the matter, making reference to *FNB v Lukhele supra*, wherein Legodi J held that

"In the present proceedings, such facts for this court at Mbombela, to exercise jurisdiction over the Defendants who are residing at Middleburg or closer to Middleburg circuit court, have not been established."

Have those facts been established by the Applicant in *casu*?

[20] In its particulars of claim the Applicant allege that jurisdiction is bestowed upon the Gauteng Division by a provision in the loan agreements that performance (payment of instalments) would take place at its Menlyn branch in Pretoria.

[21] Furthermore it was argued on its behalf that over and above that the Respondents are domiciled in Witbank and the signing of the surety agreement took place in Witbank, therefore the Gauteng High Court in Pretoria has jurisdiction over the Respondents as according to the Minister's determination, Witbank falls under it,

[22] Section 21 Chapter 6 of the Act makes provision for Persons over whom and

matters in relation to which Divisions have jurisdiction:

(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all other matters of which it may according to law take cognisance, ...-

(a) ...

(b) ...

[23] The position under this section does not mention domicile. Jurisdiction is therefore not determined by domicile but by residence, as it is also under common law. see *Ex parte Minister of Native Affairs* 1941 AD 53 at 59; *Mayne v Main* 2001 (2) SA 1239 (SCA) 12438. A choice of a *domicilium citandi et executandi* within the area of jurisdiction of the High Court is said not to confer jurisdiction upon that court; see *Geyser v Nedbank Ltd : In re Nedbank Ltd v Geyser* 2006 (5) SA 355 0/11 at 360 E. A person may have a domicile at one place whilst residing at another.

[24] With regard to the argument of the *causa* arising partly in the area of jurisdiction of Middleburg being a place where the Respondents signed the loan agreements and reside, even though the suretyship was signed in nearby Witbank, and the alleged provision by the loan agreements for a place where performance is to be effected to confer jurisdiction, considerations of convenience, justice and good sense justify proceedings being conducted from the court nearest to where the Respondents are resident and the property located. So as a matter of expediency as well, the exercising of jurisdiction by the Middleburg Circuit Court would be just and fair.

[25] Moreover, the Applicant's contention about the place of performance by the Trust which is the only jurisdictional fact that is stated in the particulars of claim, is unpersuasive. The Respondent has alleged that the loan agreements were granted and accepted at the Applicant's Middleburg branch. Whilst the Applicant says the loan agreement provides that performance would be effected at its Menlyn branch in Pretoria. The clause 10.2 referred to in the loan agreement dated October 2014 reads:

"All payments in terms of this agreement will be made in South African currency, ..., at the branch of the Bank that has granted the Loan or wherever else Nedbank may at any time in writing direct."

[26] The current document constituting the loan agreement granting the loan to the Respondents is from Nedbank branch, 35 Rivonia Road, Sandton and signed on 24 October 2014. The details of the Applicant in all the loan agreement is set out as 6 Press Avenue, Crown Mines Selby. The Applicant does not allege that the Pretoria branch granted the loan, whilst the Respondent make the necessary allegation that the loan was granted and accepted in Middleburg. The allegations as countered by the Respondents assertion are therefore not sufficient to found the alleged jurisdiction.

[27] The Applicant therefore fails on both its argument on the areas of jurisdiction of the Divisions of the High Court as determined by the statute or by personal facts.

[28] I therefore make the following order:

[28.1] The matter is struck off the roll with costs.

N V KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

For the Applicant:	M RILEY
Instructed by:	Baloyi, Swart & Associates Attorneys
	Tel: 0861298 008/298 007
	Ref: Mr Swartl Kobrin
For the Respondent:	H. P. van NIEUWENHUIZEN
Instructed by	Eugene Marais Attorneys
	Tel: 011 704 4831
	Ref: MR E MARAIS/MS N DO REGO/R405