

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION, MBOMBELA
(MAIN SEAT)**

CASE NO: 4262/2019

1. REPORTABLE: **YES**
2. OF INTEREST TO OTHER JUDGES: **YES**
3. REVISED.

21 JUNE 2021

LB SIGOGO

DATE

SIGNATURE

In the matter between:

ADVENT OIL (PTY) LTD

APPLICANT

AND

VULETJENI TRADING & PROJECTS (PTY) LTD

RESPONDENT

JUDGMENT

Sigogo AJ:

- [1] A period of more than 2 years has elapsed since the Minister of Justice and Constitutional Development had, on 26 April 2019, determined the areas under the jurisdiction (territorial jurisdiction) of the Mpumalanga Division of the High Court¹. By now it should have been settled how territorial jurisdiction of this Division operates. In the contrary this case is a living example that many litigants still approach territorial jurisdiction of the High Court in the manner it was under the Supreme Court Act 59 of 1959 (the Supreme Court Act).
- [2] Out of habit, without giving attention to the proclaimed jurisdictional boundaries of this Division the applicant issued court process, falling under the Middelburg area of jurisdiction, in the Main Seat on the wrong belief that the Main Seat, like is the position in other Divisions, exercises concurrent jurisdiction with the Local Seats. This is not a separate incident. Discussion with other colleagues revealed that this practice is common place within the division. This judgement is aimed at addressing this notion.
- [3] The Superior Courts Act 10 of 2013 (the Superior Courts Act) ushered in a whole new dispensation in as far as territorial jurisdiction of the High Court is concerned. The circumstances under which the High Court may exercise its jurisdiction to hear any matter is provided for under section 21 of the Superior Courts Act. The relevant part of this section reads thus:

“Persons over whom and matters in relation to which Divisions have jurisdiction

21. (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within,

¹ Government Gazette No. 42420 dated 26 April 2019.

its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power—

...

(Emphasis supplied)

- [4] When section 21 deals with circumstances which give a Division of High Court jurisdiction over any person residing or being in its area of jurisdiction determination of Division's area of jurisdiction is dealt with under section 6(3) of the Superior Courts Act. The relevant part of this section reads as follows:

6(3)(a). The Minister must, after consultation with the Judicial Service Commission, by notice in the Gazette, determine the area under the jurisdiction of a Division, and may in the same manner amend or withdraw such a notice.

...

(c) The Minister may, after consultation with the Judicial Service Commission, by notice in the Gazette established one or more local seats referred to in subsection (1) and determine the area under the jurisdiction of such a local seat, and may in the same manner amend or withdraw such notice. (My emphasis).

...

(4) If a Division has one or more local seats –

(a) The main seat of that Division has concurrent appeal jurisdiction on the area of jurisdiction of any local seat of that Division....
(Emphasis supplied).

- [5] Section 6 (3) of the Superior Courts Act is couched differently from section 6(2) of the repealed Supreme Court Act. Under the Supreme Court Act the provincial divisions of the Transvaal, Natal and Eastern Cape were given concurrent jurisdiction with their local divisions. Under

the Superior Courts Act whether the Main Seat of a Division will exercise territorial jurisdiction over the entire Province is left in the hands of the Minister who in consultation with the Judicial Service Commission will determine the necessary jurisdictional boundaries of the High Courts. The Main Seat is only guaranteed of concurrent jurisdiction with the Local Seat of the same Division on issues of appeals². Put differently, the Superior Courts Act shifted the authority to determine territorial jurisdiction of Divisions of the High Court from the legislature to the executive.³

[6] The areas of jurisdiction of the two seats of this Division are as captured in the hereunder Schedule⁴:

<i>"Schedule</i>					
<i>Item</i>	<i>Name of Division</i>	<i>Main Seat</i>	<i>Area under jurisdiction of the Division</i>	<i>Local Seat</i>	<i>Area of jurisdiction of the local seat</i>
1	Mpumalanga	Mbombela	<p><i>The following magisterial districts and sub-districts within Mpumalanga Province as described in Government Notice No. 39961 of 29 April 2016:</i></p> <p><i>Bushbuckridge (including Mhala sub-district); Chief Albert Luthuli (including Carolina sub-district) Emgwenya sub-district of eMakhazeni district incorporating the adjacent farms listed in the footnote below; Mbombela (including White River and Nsikazi sub-districts); Nkomazi (including Komatipoort sub-district); Thaba Cheu (including Graskop and Sabie sub-districts) and Umjindi.</i></p>	Middleburg	<p><i>The following magisterial districts and sub-districts within Mpumalanga Province as described in Government Notice No. 39961 of 29 April 2016:</i></p> <p><i>Dipaleseng; Dr JS Moroka (including Mbibana sub-district); eMakhazeni (excluding Emgweya sub-district and the adjacent farms listed in the footnote below; eMalahleni (including Ga-Nala and Vosman sub-districts); Dr Pixley ka Isaka Seme (including Amersfoort and Wakkerstroom sub-districts); Govan Mbeki (including Bethal and Secunda sub-districts); Lekwa; Mkhondo (including Amsterdam sub-district), Steve Tshwete (including Hendrina sub-district); Thembisile Hani (including kwaMhlanga sub-district) and Victor</i></p>

² Section 6(4)(a) of the Superior Courts Act.

³ Section 6(3)(a) of the Superior Courts Act.

⁴ Schedule to the Government Gazette No. 42420 *supra*.

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Footnote: Driekop 387 JT; Dalmanutha 401 JT; Dalmanutha 376 JT; Willem 372 JT; Driefontein 377 JT; Rietvlei 375 JT; Schoongezicht 364 JT; Button 576 JT; Rietfontein 365 JT; Geluk 348 JT; Geluk 1002 JT; Black Eagle 994 JT; De Kroon 363 JT; De Goedenhoop 515 JT; De Goedenhoop 362 JT; De Goedenhoop 352 JT; Goedwater 359 JT; Waterval 1007 JT Portion of the Farm Groenvlei 353 JT Waterval 351 JT; Winnaarsport 350 JT; Portion 2, Remainder of Portion 4 and Portion 8 of the farm Elandsfontein 322 JT; Farrefontein 349 JT; River Cottage 1012 JT; Vlakfontein 325 JT; Vlakfontein 323 JT; Tabolt 575 JT; Portion 26 of Farm Elandskloof 321 JT; Wagenbietjieshoek 991 JT; Remainder of Portion 1 and Portion 12 of the Farm Roodekrans 133 JT; Doornhoek 324 JT; Donkerhoek 138 JT; Wachteenbeetjieshoek 327 JT; Wilgekraal 141 JT; Mooiplaats 328 JT; Zwartkop 329 JT; Waterval 331 JT; Vluchtfontein 330 JT; Boschrand Height 148 JT; Boschrand Heights 146 JT; Zondagskraal 145 JT; Hartebeestfontein 333 JT; Boschrand Heights 149 JT; Goedeverwachting 334 JT; Goedeverwachting 335 JT; Loopfontein 298 JT; Mooiplaats 147 JT; Somerset 150 JT; Doornhoek 113 JT; Sterkdoorn 110 JT; Bruintjieslaagte 499 JT; and Elangeni No 979 JT.”

- [7] In the instances where the provincial division has concurrent jurisdiction with the local division it remains in the hands of the plaintiff or the applicant, guided by convenience and expense, to choose the forum to litigate from. This position is stated by Herbstein & Van Winsen⁵ as follows:-

*“Secondly, if the matter is a proper one for a superior Court, the plaintiff as dominus litis must select the division that has jurisdiction since, as has been pointed out, there are a number of superior courts, each having original jurisdiction only within a defined area and none of them exercising jurisdiction over the whole of the Republic. In choosing a forum, the plaintiff may find in a particular case that several divisions (for example a Provincial Division, a permanent local division and circuit local division) have jurisdiction, in which event the plaintiff’s selection will have to be governed by considerations of **convenience and expense**”. (Emphasis supplied).*

- [8] Consideration of convenience and expense in these circumstances inevitably will, in the main, be practised in favour of the *dominus litis* much to the inconvenience and expense of the respondent/defendant.

⁵ The civil practise of the Supreme Court of South Africa (now the High Court and Supreme Court of Appeal) by Van Winsen *et al*, 4th edition, Juta & Co LTD, Kenwyn, 1997 at page 36.

The superior Courts Act aims to correct this situation. This is the position because it resonates well with section 34 of the Constitution of the Republic of South Africa, 1996. The promise of the right of access to justice as enshrined section 34 of the Constitution is a promise that will be realized if litigants are given access to courts in their locality. Otherwise, the right of access to justice would not worth the paper it is written on if *dominus litis* will continue be allowed to choose to litigate in a court far away from the respondent's/defendant's residence in the name of concurrency of the court's jurisdiction, in the process making access to justice for the respondents or defendants unattainable dream.

- [9] The full court of the Gauteng Province Pretoria High Court (as it was then called), in 13 various matters brought by the banks⁶ on the issue of competing rights of the plaintiffs against those of the defendants in as far as the choice of court and access to justice is concern, had the following to say:

"[42 Our Courts have also long recognised that, where more than one court has jurisdiction in a matter, the plaintiff, as dominus litis, has the right to choose the Court it wants to institute its action. This principle was recently reaffirmed in Moosa NO v Moosa. In our view, however, the access to court should also take into consideration the rights of defendants or respondents. The plaintiff's rights should not dictate the choice of court at the expense of access to justice.]"

- [10] There is no doubt that the shift in terminology from "provincial division" and "local division" in the Supreme Court Act to the "main seat" and "local seat" in the Superior Courts Act is an indication that the main seat does not, as a matter of fact, exercise jurisdiction throughout the

⁶ ZAGPPHC/2018/692

Province. The new dispensation is aimed at addressing issues of access to both courts and justice.

[11] Government Gazette No. 42420 unequivocally makes it clear that the Main Seat of this Division does not have concurrent jurisdiction with the Middelburg Local Division to hear matters other than matters of appeal. The clear intention of the Minister in this regard is demonstrated by the fact that even in respect to the border magisterial district between the two seats of the Division (eMakhazeni District) the two seats do not have concurrent jurisdiction instead the district is shared between the two seats of the Division.

[12] In now turn to deal with the relevant facts of this case. The applicant seeks an order that the respondent be placed under final winding-up in the hands of the Master of this Court. The applicant's application is brought in terms of section 344 (f) and section 345(1) of the Companies Act 61 of 1973 (the 1973 Companies Act or the Old Act), read with item 9 of Schedule 5 of the same Act on the ground that the respondent is deemed to be unable to pay its debts. Winding-up of corporations is done either in terms of the provisions of the Companies Act 61 of 1973 (the Old Companies Act) or the Companies Act 71 of 2008 (the New Companies Act). The choice of the applicable Act will primarily depend on the reason for winding-up⁷.

[13] During June of 2018 the parties concluded an oral agreement for supply of diesel products on a cash on delivery basis. The agreement was later varied to allow payment within 14 days of delivery.

⁷ The New Companies Act prescribes the procedure for the winding-up of solvent companies, whereas the Old Companies Act, still largely regulates the winding-up procedure of insolvent companies.

- [14] The respondent fell in arrears. On 25 September 2019 the applicant issued a letter of demand in terms of section 345 of the Old Companies against the respondent claiming an amount of R907 777.18 (Nine Hundred and Seven Thousand Seven Hundred and Seventy-Seven Rand and Eighteen Cents). The said letter of demand was delivered by Sheriff at the respondent's previous registered address at stand no: 3315, EXT 10, Barberton (falling under the Main Seat in Mbombela) on the 30th day September 2019.
- [15] On 14 October 2019 the applicant prepared the Notice of Motion for final winding-up of the respondent. On the 15th of November 2019 the respondent's registered address was changed at the Companies and Intellectual Property Commission (CIPC) from Barberton to Emalahleni, falling under the local seat in Middelburg. Thereafter, on 18 November 2019 the applicant's Notice of Motion was issued by the Registrar of Court at the Main Seat in Mbombela.
- [16] This matter first appeared before me on the 4th day of May 2021. On that date the matter did not proceed because the respondent had not filed its answering affidavit. Counsel for the respondent, from the bar, indicated that the respondent had on the previous day served its answering affidavit including a condonation application for the late filing of the answering affidavit on the applicant's attorneys and had emailed same to the registrar of court.
- [17] The respondent applied for postponement of the matter. That necessitated that the matter be case managed for the second time as it had already been case managed for the first time after the respondent

had entered its notice of intention to oppose. The case was then postponed to 09 June 2021 and the parties were directed to further attend to the matter as follows: -

“1.1.1 The respondent shall file its answering affidavit on 05 May 2021;

1.1.2 The applicant to file its replying affidavit, if any, on 12 May 2021.

1.1.3 The respondent to file its duplicating (in reply only to the issues of application for condonation) for the late filing of the answering affidavit by not later than 17 May 2021, if necessary.”

[18] On 9 June 2021 the matter appeared before me once more. On this date the respondent had filed its answering affidavit and the applicant had filed its replying affidavit. In its answering affidavit the respondent averred that its registered offices are not in Barberton but in Emalahleni⁸. Other than making this factual averment no issue was taken in respect of the court’s jurisdiction.

[19] It is upon this basis that I called upon the parties to address the Court in respect to jurisdiction of the Mbombela Main Seat to hear this matter. In response to this invitation counsel for the applicant, Mr Masombuka, argued that this Court has jurisdiction to entertain the matter on the basis that Emalahleni is within Mpumalanga Province and that the Mbombela Main Seat of the Mpumalanga Division of the High Court has jurisdiction on the whole of the Province. After I had drawn the counsel’s attention to Government Gazette number 42420 dated 26 April 2019 he then presented an alternative argument. He argued that this Court has jurisdiction because the respondent did not object to the court’s

⁸ Page 104 of the court bundle at paras 69, 70 and 71.

jurisdiction, as such it has subjected itself to the court's area of jurisdiction, contends the applicant's counsel.

[20] Counsel for the respondent, Mr Mathiba, on the other hand argued that since jurisdiction of court is a legal matter the court either have jurisdiction or not. If courts are allowed, developed the argument, to cloth themselves with territorial jurisdiction in the circumstance where they do not have such jurisdiction that would result in courts' encroachment into the lanes of both the legislature and the executive. The respondent's counsel concluded his address by urging the Court to dismiss the applicant's application for lack of jurisdiction.

[21] In reply to the respondent's submission the applicant's counsel urged the Court, in the interest of justice and not placing form over substance, to continue to hear the matter despite the fact that the court does not have the necessary territorial jurisdiction over the respondent. Failing which, he argued, the Court should invoke the provisions of section 27(1) of the Superior Courts Act No. 10 of 2013 (the Superior Courts Act).

[22] First, I will deal with the argument that the respondent subjected itself to this Court's area jurisdiction. Having regard to the fact that both counsel did not appear to appreciate that this Court lacked jurisdiction to hear this matter I am not satisfied that the respondent could be said to have subjected itself to the jurisdiction of this court. For a litigant to subject himself to a court's jurisdiction such a litigant must take a conscious decision to so subject itself. This means that the respondent litigant must firstly know that the court does not have jurisdiction over him but

nonetheless elect to subject himself in that court's jurisdiction. He must consent to the court's jurisdiction.

[23] The respondent's argument that the applicant's application must be dismissed for court's lack of jurisdiction was opportunistic. I hold this view because the respondent's counsel like the applicant's counsel did not seem to know that the Mbombela Main Seat lacked jurisdiction to hear this matter. Both in his papers and in court counsel for the respondent did not challenge the issue of court's jurisdiction. It was only after the court's invitation to parties' counsel that the issue was argued.

[24] It is trite that litigation is not a game.⁹ The parties must plead their cases fully in their papers for their respective opponents to know and fully appreciate what they are going to meet in court. Litigants must not be encouraged to take tactical steps which do not assist the course of litigation but rather just postpone the unavoidable and in the process accumulate unnecessary legal costs. To dismiss this matter for lack of jurisdiction will not take away the dispute between the parties. I did not find the dismissal of this matter to be an answer to the issue of jurisdiction. On the other hand, to proceed with the hearing of the matter as submitted by counsel for the applicant was going to perpetuate the wrong practice where the parties issue processes without firstly determining the correct forum having jurisdiction to hear the matter. Having taken this approach, I arrived at the conclusion that the solution of this matter rested in section 27 of the Superior Courts Act.

⁹ Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd (3670/2019) [2020] ZAWCHC 28; 2020 (6) SA 624 (WCC) (30 April 2020) at para 14.

[25] Apart from the fact that the respondent did not on its own take an issue with this Court's jurisdiction I find that when the legislature enacted section 27 in its current form it had in sight situations like this. In the circumstances I am of the view that in deserving cases, like the present case, section 27 is capable of resolving issues of jurisdiction without resorting to harsh measures like dismissal of the case. In this case it make more sense to follow this route because this issue concerns two seats of the same Division. The provisions of this section read thus: -

“Removal of proceeding from one division to another or from one seat to another in the same Division

27.(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 Divisions or

(b). ...

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.”

[26] In light of the provisions of Government Gazette No 42420 read with section 27 of the Superior Courts Act it became clear to me that these proceedings were supposed to have been issued in the Middleburg Local Seat. Hence, I called upon the parties to address me in this regard. Having heard counsel for both parties in this regard I was

persuaded that it will be in the interest of justice that this matter be removed to the court having jurisdiction.

[27] As a result, I made the following order: -

- 1. The Mbombela Seat of the Mpumalanga Division of the High Court of South Africa does not have jurisdiction to entertain this matter.*
- 2. The Seat having jurisdiction to hear this matter is the Middleburg Local division of the Mpumalanga Division of the High Court of South Africa.*
- 3. In the circumstance the proceedings herein are removed to the Middleburg Local Division.*
- 4. The Registrar of the main seat, Mbombela is ordered to forthwith transfer the Court file in this matter together with this order to the Registrar at the local seat Middleburg.*
- 5. Reasons for the order shall be made available to the parties in due course.*
- 6. There is no order as to costs.*

[28] I did not make cost order because the respondent is not with clean hands. When this matter was postponed on the 04th day of May 2021 it was at the instance of the respondent which delayed filing its answering affidavit. On the other hand, the applicant could not be blamed as having been negligent by issuing court processes in the wrong court. The applicant did a “company search” with CIPC on 20 September 2019 and on that date the respondent’s registered address was within this Court’s area of jurisdiction. The registered address, as I have indicated above already, was changed on the 15th of November 2019 and at this

time the applicant's papers had already been prepared but were not yet issued.

[29] On this aspect, I could not blame the respondent for changing its registered address. It appears to me that the change of address was both a matter of coincidence and an innocent move. If this was a calculated malicious tactical move it was going to unashamedly expose itself when the respondent takes an issue with the court's lack of jurisdiction. This did not happen. In the circumstances it was justified that I make no cost order

[30] It is on this basis that I granted the order on the 9th day of June 2021 as quoted in paragraph [27] above.



Sigogo AJ
Acting Judge of the High Court
Mpumalanga Division, Mbombela

DATE OF HEARING:

09 JUNE 2021

DATE OF JUDGMENT:

21 JUNE 2021

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