REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 27956/2010

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

SIBAKHULU CONSTRUCTION (PTY) LTD	Applicant
and	
WEDGEWOOD VILLAGE GOLF COUNTRY ESTATE (PTY) LTD	First Respondent
NEDBANK LTD	First Intervening Party
WG AND Y KOEN	Second and Third Intervening Parties

JUDGMENT DELIVERED: 16 NOVEMBER 2011

BINNS-WARD, J:

[1] In this matter application was made as long ago as 28 December 2010 for an order winding up the respondent company. By agreement between the applicant, which is an admitted creditor of the respondent, and the respondent, the application was provisionally withdrawn against an undertaking by the respondent to settle the applicant's claim in monthly instalments. The agreement allowed for the re-

institution of the winding up proceedings on the same papers in the event of the respondent defaulting on its payment undertaking. In the event the respondent did default and the proceedings were re-instituted. The respondent delivered papers opposing the applicant's winding up application. The opposition to the winding up application was advanced on the basis that there was a reasonable prospect of the company being able to obtain alternative finance to complete the golf course residential development in which it had been engaged in the Port Elizabeth area. (The residential development appears to have been the respondent company's only business enterprise.) It was contended on behalf of the respondent that the court should exercise its discretion against placing the company in liquidation even if a case for its winding up had been made out.

[2] Some time before the winding up application was due to be heard, the respondent's attorney of record withdrew as such. Thereafter, another of the respondent's creditors, Nedbank Ltd, applied for and was granted leave to intervene in the proceedings as an applicant. The bank's application for the winding up of the respondent was brought contingently on the failure for any reason of the applicant's application.

[3] When the hearing of the matters was called on 24 October 2011 there was no appearance for the respondent. The hearing could not proceed, however, until the effect on the current proceedings of an application instituted on 16 August 2011 by Mr and Mrs William Koen, who are the owners of a residential erf purchased from the respondent on the golf course estate, for an order placing the respondent under supervision for business rescue purposes had been determined. This because of the provisions of s 131(6) of the Companies Act 71 of 2008.

[4] Section 131(6) of the 2008 Companies Act provides as follows:

> If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until-
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> (a) the court has adjudicated upon the application; or
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> (b) the business rescue proceedings end, if the court makes the order applied for.

Business rescue proceedings end in the manner provided in terms of s 132(2) of the Act. One of the ways in which business rescue proceedings can end is the conversion by the court of the business rescue proceedings to liquidation proceedings.

[5] The application for an order in terms of s 131(1) of the 2008 Companies Act by Mr and Mrs Koen was brought in the Port Elizabeth High Court. It has been set down for hearing in that court on 9 February 2012; apparently the earliest date for a hearing that could be secured. The Koens' application is opposed by the applicant for the respondent's winding up in this court and also by Nedbank. A preliminary issue in that opposition is the contention by the applicant and Nedbank that the Port Elizabeth High Court does not have jurisdiction to determine the Koens' application.

[6] Section 131(1) of Act 71 of 2008 provides insofar as currently relevant that '*an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings*' (my underlining for emphasis). It may be assumed for present purposes, without so deciding, that Mr and Mrs Koen, together, are 'an affected person' within the meaning of the sub-section.

[7] Section 131(6) of Act 71 of 2008 on its face would appear to have precluded this court from deciding the winding up application until the application by the Koens

for the respondent to be placed under supervision for business rescue purposes had been adjudicated upon. The applicants for winding up, however, resisted this conclusion and argued that as the Port Elizabeth High Court lacked jurisdiction to adjudicate the application, the provisions of s 131(6) found no basis for operation. Mr and Mrs Koen, having been apprised of the argument to be advanced by the applicants in this respect, applied and were granted leave to intervene in the current proceedings. The object of their intervention was to obtain orders postponing the winding up application *sine die* and staying the hearing of the application pending the outcome of proceedings in the Port Elizabeth High Court.

[8] The applicants' argument that s 131(6) found no basis for operation on the facts initially turned on the meaning of the word '*court*' in s 131(1) of the 2008 Companies Act. The court referred to in s 131(1), obviously, is the only court which can adjudicate upon the matter in the sense provided in s 131(6). The argument initially advanced by the applicant and the bank was that the Port Elizabeth High Court lacked jurisdiction because both the registered office and the principal place of business of the company were in Cape Town. (It is common ground that the company's registered office is in Cape Town. Whether its principal place of business was in Cape Town or in Port Elizabeth is a matter in dispute between the winding up applicants and the Koens.[1]) However, after the court, subsequent to the conclusion of oral argument on 24 October 2011, had requested argument on the effect of the provisions of s 23 of the Act concerning the place of a company's registered office,

[1] After oral argument had been heard on 24 October 2011, the applicant filed a notice indicating its intention to abide the court's decision in respect of the jurisdiction of the Port Elizabeth court. The issue was thereafter actively pursued only by Nedbank. Argument on the jurisdictional issue was in any event dealt with virtually exclusively by the bank's counsel in the heads of argument filed for the hearing on 24 October and in oral argument on that day. I mention this for the assistance of the taxing master.

the bank also argued that only the High Court with jurisdiction at the place of the company's registered office could have jurisdiction in a business rescue application.

[9] Business rescue procedures are regulated in terms of chap 6 of the 2008 Companies Act. Section 131 resorts in chap 6. The word '*court*' is specially defined for the purposes of chap 6 of the Act. In terms of s 128(1)(e) of the Act –

> 'court', depending on the context, means either-
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> (i) the High Court that has jurisdiction over the matter; or
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> (ii) either-
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> (aa) a designated judge of the High Court that has jurisdiction over the matter, if the Judge President has designated any judges in terms of subsection (3); or
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> (bb) a judge of the High Court that has jurisdiction over the matter, as assigned by the Judge President to hear the particular matter, if the Judge President has not designated any judges in terms of subsection (3).

The special definition begs the question, however, exactly which High Court it is that falls to be regarded as '*the High Court that has jurisdiction*'. It is perhaps significant that the court contemplated in the definition is referred to by the definite rather than the indefinite article, which suggests on the face of it that only a single High Court is held in view.

[10] Under the 1973 Companies Act express provision was made in respect of which court had jurisdiction. As at the date of the repeal of the Act, s 12(1) of Act 61 of 1973 provided:

> The Court which has jurisdiction under this Act in respect of any company or other body corporate, shall be any provincial or local division of the High Court of South Africa within the area of the jurisdiction whereof the registered office of the company or other body corporate or the main place of business[2] of the company or other body corporate is situate.[3]

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[2] The expression '*main place of business*' has been applied synonymously with '*principal place of business*' in the sense explained in *TW Beckett & Co Ltd v H Kroomer Ltd* 1912 AD 324 at 334 (see

Insofar as a juristic person, and in particular a domestic company, can be conceived as having a place of residence, that provision, for the reasons discussed below, with reference to *TW Beckett & Co Ltd v H Kroomer Ltd* 1912 AD 324; *Dairy Board v John T Rennie & Co (Pty) Ltd* 1976 (3) SA 768 (W) and *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A), echoed the provisions of s 19(1)(a) of the Supreme Court Act 59 of 1959, which are to the effect that a '*provincial or local division shall have jurisdiction over all persons residing or being in ... its area of jurisdiction*'.[4]

[11] The 2008 Companies Act, which in large measure repealed the 1973 Act, contains no equivalent provision to s 12(1) of the earlier Act. Jurisdiction in respect of matters arising under the 2008 Act therefore falls to be determined on common law grounds unless it can be said that a proper reading of the Act reflects a different intention. The provision in the previous Companies Acts which expressly provided that the place of a company's principal place of business has jurisdiction was consistent with the *actor sequitur forum rei* principle of common law. According to that principle it is residence within the territory of the court's remit that determines whether a court has jurisdiction over a person. But, as pointed out by Harms DP in *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA), at para 10, '*For purposes of effectiveness the defendant must be or reside within the area of jurisdiction of the court (or else some form of arrest to found or*

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para [12], below). As far as I could determine the expression 'principal place of business' does not appear anywhere in the 1973 Companies Act.

[3] The forerunner of s 12 of Act 61 of 1973 was s 215(1) of the 1926 Companies Act (Act 46 of 1926), which gave jurisdiction under the Act in respect of any company to '*any provincial or local division of the Supreme Court of South Africa within the area of jurisdiction whereof the registered office of the company. or any place of business of the company ...is situate.*'

[4] The expression '*being in*' has, in the relevant context, been held to add nothing to the expression residing in'; see *Bisonboard* supra, at 490 *in fine* – 492 I.

confirm jurisdiction must take place). Although effectiveness 'lies at the root of jurisdiction' and is the rationale for jurisdiction, 'it is not necessarily the criterion for its existence'. What is further required is a ratio jurisdictionis. The ratio, in turn, may, for instance, be domicile, contract, delict and, relevant for present purposes, ratione rei sitae. It depends on the nature of the right or claim whether the one ground or the other provides a ground for jurisdiction. Domicile on its own, for instance, may not be enough. As Forsyth (at 164) rightly said:

> *'First there is the search for the appropriate ratio jurisdictionis; and then the court asks whether it can give an effective judgment . . . . [and] neither of these is sufficient for jurisdiction, but both are necessary for jurisdiction.'.*

[12] It was held in *TW Beckett & Co Ltd v H Kroomer Ltd* 1912 AD 324 at 334 that '*The residence of a legal persona, like a company, artificially created, must be a mere notional conception introduced for purposes of jurisdiction and law .... The only home which a corporation can be said to have is the place where the operations for which it was called into existence are carried on. So far as it can be said to reside anywhere, that is where it resides. And if the analogy of a natural person is to be followed, one would say that it could only reside in one place at one time. This is a point on which from the nature of things it is not possible to obtain Roman Dutch authority; but there is ample support in English law - both text books and cases - for that view in regard to the domestic aspect of the residence of companies. With what may be called the international aspect I shall deal later. The doctrine is firmly established that where a company carries on business at more places than one its true residence is located where its general administration is centred. To quote the words of Lindley (**Companies**, 6th Ed., p. 1223), "The residence and domicile of an*

incorporated company are determined by the situation of its principal place of business. This is not only the opinion of the most recent writers on private international law, but is supported by the decisions of our own Courts. By the principal place of business is meant the place where the administrative business of the company is conducted; this may not be where its manufacturing or other business operations are carried on.'"

[13] In *Dairy Board v John T Rennie & Co (Pty) Ltd* 1976 (3) SA 768 (W) it was held, in the context of the statutory framework provided in terms of the 1973 Act, that a company's registered office was the place at which it in law resided. It was considered that if the company's principal place of business was at a different place the company could be said to reside for jurisdictional purposes at both places. Eloff J disapproved the proposition stated in Pollak, ***The Law of Jurisdiction***, at pp 94 – 95 that '*In the normal case the registered office and the principal place of a company are one and the same place. They may however be different, and in such case the situation of the principal place of business and not that of the registered office, is the relevant factor for the purposes of jurisdiction in an action or a judgment sounding in money against the company.*'

[14] *Dairy Board* concerned a claim for enforcement of an undertaking made by the defendant in terms of s 309(1)(a) of the Merchant Shipping Act 57 of 1951. Inasmuch as the cause of action had not arisen in the Witwatersrand Local Division the trial Court was competent to decide the action only if, in law, the defendant 'resided' within its jurisdiction. It was evident that the company's business was conducted at Durban, where all its directors also resided and where the meetings of the company's board were held. However, the defendant had its registered office in

Johannesburg. Eloff J held that the Witwatersrand Local Division had concurrent jurisdiction with the courts having jurisdiction over the company in Durban because the company resided in both Johannesburg (where its registered office was) and at the place at which its business was conducted. It is evident that Eloff J regarded the most compelling basis to arrive at the conclusion at which he did was the practical reason that to view the registered office as the residence of a company for jurisdictional purposes was to create certainty and to bring about commercial convenience.[5]

[15] In a subsequent decision of the Witwatersrand Local Division Myburgh AJ declined to follow the decision in *Dairy Board*, holding, with reference to s 19(1)(a) of the Supreme Court Act, that the only place at which a company could be said to reside was at its principal place of business. Myburgh AJ held that the Witwatersrand Local Division did not have jurisdiction in respect of a claim sounding in money against a company which had its registered office within the territorial jurisdiction of that court, but which carried on business only at a place in the Transkei. On appeal against that decision, the Appellate Division held by a majority that the conclusion of Eloff J in *Dairy Board* had been correct; see *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A).

[16] It falls to be considered whether the provisions of s 23(3) of the 2008 Companies Act, which had no equivalent in the legislation in force when *Dairy Board and Bisonboard* were decided alter the position determined in those cases. Section 23(3) provides:

> Each company or external company must-

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[5] See *Dairy Board* at 771E-H.

(a) continuously maintain at least one office in the Republic; and

(b) register the address of its office, or its principal office if it has more than one office-

(i) initially in the case of-

(aa) a company, by providing the required information on its Notice of Incorporation; or

(bb) an external company, by providing the required information when filing its registration in terms of subsection (1); and

(ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee.

Section 23(4) provides:

A change contemplated in subsection (3)(b)(ii) takes effect as from the later of-

(a) the date, if any, stated in the notice; or

(b) five business days after the date on which the notice was filed.

[17] In terms of s 1 of the 2008 Companies Act, the office registered by the company in terms of s 23 of the Act is its '*registered office*' within the meaning of the Act. A pre-existing company was required to register a registered office in terms of s 170 of the 1973 Companies Act. In practice a company's registered office under the 1973 Act was often an address chosen for convenience rather than an office of the company itself in the ordinary sense; frequently the registered office of a company was for example that of the company's auditors. The 1973 Act provided that service of any process could be effected on the company at its registered office and also required the company to keep certain specified documentation and records at its registered office.[6]

[6] A minute book of the general meetings of the company (s 204); the register of allotment of shares (s 93); the register of members (s 105); a register of pledges and bonds (s 127); a register of debenture holders (s 128); a register of directors and officers (s 216); a register of material interest of directors and other insiders in the shares and debentures of the company (ss 230 and 231); a register of declaration of interest in contracts by directors and officers (s 240); a register of attendance of

[18] Sections 24 and 28 of the 2008 Act contain quite comprehensive provisions in respect of the documentary records that a company is required to keep. Section 25 requires such records to be kept at, or to be accessible from at the registered office of the company. In the event that any of the records are not so kept or accessible the company is required to file a notice with the Companies and Intellectual Property Commission[7] setting out at which other place(s) the records are kept or accessible. Section 23(3) of the 2008 makes it clear that the registered office must be an office maintained by the company and not the office of a third party used for convenience as a registered office.

[19] It is evident from the aforegoing that the 2008 Companies Act retains the institution of a registered office, being an address at which the outside world can transact with the company effectively. A material distinction between a 'registered office' under the 2008 Act and its predecessors, however, is that under the current Act the registered office must be the company's only office, alternatively, if it has more than one office, its '*principal office*'. The term '*principal office*' is not specially defined in the statute. It seems from the context – more particularly, the requirements of what must be kept or accessible there - that it is intended to denote the place where the administrative business of the company is principally conducted, in the sense of being the place where the company's general administration is centred - in other words, the company's 'principal place of business' in the sense described in *TW Beckett & Co Ltd v H Kroomer Ltd* supra, loc cit. Thus whereas the 1973 Companies Act expressly acknowledged the possibility of a distinction between a company's registered office and its '*main place of business*', the 2008 Act requires

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directors' and managers' meetings (s 245); and a register of fixed assets (s 284); see *Dairy Board v John T Rennie & Co (Pty) Ltd* 1976 (3) SA 768 (W), at 771B-D.

[7] A statutory body established in terms of s 185 of the Act.

the registered office and the principal place of business for jurisdictional purposes to be at one and the same address.

[20] The transitional provisions in terms of s 224 and schedule 5 of the 2008 Companies Act make no reference to the issue of a pre-existing company's registered office. The result of this must be that a pre-existing company is obliged to change its registered office in terms of s 23(3)(b) of the Act if the address of the office does not coincide with that of its principal place of business. The requirement that a company register the address of its principal office is plainly intended for the benefit of third parties who might wish to obtain information about it, communicate with it, or in any manner formally transact with or in connection with it.[8]

[21] The determination of where a company's principal place of business or principal office is situated is a question of fact (cf. e.g. *Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 (4) SA 781 (C) at 782A-H). It is thus possible to approach the interpretation of s 23 of the 2008 Companies Act holding that its requirement that a company's registered office be at the place of its principal office does not exclude the possibility as a matter of fact that a company may, in breach of the requirement, register as its registered office an address which is not the address of its principal office; and that it would follow in such a case that the conclusions in *Dairy Board* and *Bisonboard* would still hold true: The company would be legally and factually resident at two places, notwithstanding the evident intention of the legislature that a company's legally chosen place of residence should be the same as its factual place of residence for jurisdictional purposes. It is, however, also possible to reason that to so hold would defeat the apparent object of the provision, which appears to be to end the potential for a company to have more than one place of residence for

[8] See *Dairy Board v John T Rennie & Co (Pty) Ltd* supra, at 771E.

jurisdictional purposes and that the statute should not be interpreted in a manner that would defeat its evident objects. Construed in the latter manner s 23 of the 2008 Companies Act provides a materially different statutory backdrop to that which applied when *Dairy Board* and *Bisonboard* were decided.

[22] Questions of interpretation of the 2008 Companies Act must be undertaken with the provisions of ss 5 and 7 in mind. In particular, s 5(1) provides that the Act must be interpreted to give effect to the purposes set forth in s 7. In determining the effect of s 23 of the Act on the question of a court's jurisdiction it seems to me that the provisions of s 7(k) and (l) have a bearing. They provide:

> The purposes of this Act are to-
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> .....
>
> (k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and
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> (l) provide a predictable and effective environment for the efficient regulation of companies.

[23] I consider that it would give effect to the purposes set out in s 7(k) and (l) to interpret s 23 of the Act to the effect that a company can reside only at the place of its registered office (which, as mentioned, must also be the place of its only or principal office). The result would be that there would in respect of every company be only a single court in South Africa with jurisdiction in respect of winding-up and business rescue matters. I think it admits of no doubt that winding-up and supervision for business rescue purposes are both matters going to the status of the subject company;[9] and that the power to make a determination on a question of

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[9] I consider the argument by counsel for Mr and Mrs Koen that placing a company under supervision for business rescue purposes does not affect the company's status does not bear scrutiny. It results in the company's ability to independently determine its affairs being removed and replaced by a regime whereby a person external to the company is in ultimate control of its affairs; such person being primarily beholden for his or her actions to the company's creditors rather to than its members.

status involves a *ratio jurisdictionis* exercisable only by the court within whose jurisdiction the company 'resides' or is domiciled[10] (I do not perceive there to be scope for any distinction within South Africa between a local company's residence and its domicile.) Furthermore, winding up and business rescue are also matters which are interlinked in such a manner by the provisions of the 2008 Act that it is undesirable for reasons of comity between courts of equal status, efficiency, commercial convenience and certainty that they be amenable to proceedings in concurrent jurisdictions. These are considerations militating in favour of the recognition of a regime that recognises a company only to be resident in one place rather than two thereby assuring that only one court will have jurisdiction.

[24] This may be illustrated by the following examples: If court A is engaged in determining a winding up application, how is it to be informed *in medias res* that the matter under its consideration has become suspended by an application in court B for supervision for business rescue purposes? What is to be the position if court A, having been alerted to a business rescue application has been instituted in court B, is faced with the contention, as I have been in the current matter, that court B is not the court with jurisdiction in respect of a business rescue of the respondent company? And if court A upholds the contention, what is the consequence if court B subsequently, disagreeing with court A's finding, grants an order placing the company, by then already put into liquidation by court A, under supervision for business rescue purposes? What is to be the position of the liquidator appointed consequent upon court A's order; a liquidator, who, on the approach of court B, should never have been appointed? What effect does the prior institution of winding up proceedings in court A have on the ability of court B in subsequently instituted

[10] Cf. *Ex parte Oxton* 1948 (1) SA 1011 (C) at 1014-5, citing *Wolter v Wolter* XI EDC 89 and *Olwage v Buntman* 1910 TH 44; and *Sauber v Sauber* 1949 (2) SA 769 (SWA) at 772.

business rescue proceedings to convert the proceedings in terms of s 132(2)(a)(ii) to liquidation proceedings? And if court B does convert the business rescue proceedings into liquidation proceedings, when is the liquidation deemed in terms of s 348 of the 1973 Companies Act (which remains in operation by virtue of s 224 read with item 9 of schedule 5 of the 2008 Act) to commence? What becomes of the winding up proceedings already instituted in court A, but suspended by reason of the subsequent application for business rescue in court B, if court B decides, in terms of s 132(2)(a)(ii) at the instance of some party other than the applicant for winding up in court A, to convert the business rescue proceedings into winding up proceedings? How are court B's powers under s 132(2)(a)(ii) of the 2008 Act constrained by the co-existent provisions of s 347(5) of the 1973 Act in the context of proceedings for a winding up commenced earlier in court A? The potential difficulties which the rhetorical questions just posed identify are avoided if the contextual import of s 23 of the 2008 Companies Act is accepted as being to make the High Court with territorial jurisdiction at the place of the company's registered office the only High Court having jurisdiction in respect of placing a company into winding up or under supervision for business rescue purposes.

[25] As already noted, the definition of the word '*court*' in s 128 of the Act also supports the notion that only one court is intended to have jurisdiction. To so construe the pertinent provisions of the Act to bring about a material change from the jurisdictional regime provided in terms of s 12 of the 1973 Act is furthermore supported by the omission of an equivalent to section 12 of the earlier statute in its 2008 replacement; cf. e.g. *Manyasha v Minister of Law and Order* 1999 (2) SA 179 (SCA) at 186C and the other cases there mentioned. The evident intention by the legislature to ring in the changes in this regard is underscored when the omission of

an equivalent to s 12 of the 1973 or s 215(1) of the 1926 Companies Act is seen to have been accompanied by the unprecedented prescription, in terms of s 23(3) of the current Act, that the location of a company's registered office must be at the company's office, or, if it has more than one office, at the place of its principal office. To construe the 2008 Act in the manner I consider to be indicated results in the conclusions that for purposes of jurisdiction a local company resides only at the place of its registered office and that the reasoning which led to a different conclusion in *Dairy Board* and *Bisonboard* is no longer supported by the current statutory framework.

[26] I also consider that the effect of the statutory provisions, construed in the manner in which I hold that the legislature intended, is directed at minimising the prospect of courts having to determine factual disputes on points of jurisdiction concerning companies. The place of a company's registered office is objectively ascertainable. Any dispute as to whether the registered office should be at a different address by reason of an argument that the actual location of the company's principal office is elsewhere is a matter that is not - primarily at least – intended to be one to concern the courts; being a matter, if it arises, falling instead to be determined and corrected administratively by the Companies and Intellectual Property Commission under the provisions of Part D of Chapter 7 of the 2008 Act. It is to be hoped that the prospect of administrative fines and criminal sanctions in respect of failures by companies or their directors to comply with the provisions of the Act and any compliance notices issued thereunder by the Commission will encourage companies to comply faithfully with the provisions of s 23(3) of the Act.

[27] I have thus concluded that the bank's contention that business rescue proceedings have not been competently instituted in the court having jurisdiction is sound and that the winding up application before this court consequently has not been suspended by virtue of s 131(6) of the 2008 Companies Act. I should add that, to the extent that it might otherwise have been relevant, it is clear in any event that the company cannot have had its principal place of business at the address in Port Elizabeth contended for by Mr and Mrs Koen at the time they instituted proceedings there. And that on any approach that had been the case since at least February 2011.

[28] The evidence adduced by Mr and Mrs Koen goes to the use of the office at the Port Elizabeth address only until February 2011. The property at the Port Elizabeth address was registered in the name of a different company, Grindstone Investments 127 (Pty) Ltd, which like the respondent company, is or was a member of the so-called 'Pinnacle Group', both companies being wholly, albeit indirectly, owned subsidiaries of Pinnacle Point Group Limited. The property was sold to a third party in April 2011 and transferred to that party in July 2011. The witness who deposed to an affidavit on behalf of the Koens to the effect that the Port Elizabeth address was the principal place of business of the company, one David Miller, stated that he was the respondent's general manager and national sales manager at all material times. The witness testified that his work had required him to relocate from Cape Town to Port Elizabeth. He, however, also averred that in February 2011 he returned to live in Cape Town. He signally failed to explain how he was able to do that if, as he had stated, his duties required him to be at the company's principal place of business. Nor did he deal with the sale of the property by the respondent's associate company shortly after his return to Cape Town. Moreover, the trial

balance for the respondent company for the period 1 March 2011 to 31 July 2011 contains no indication of the payment of rental by the respondent to the third party purchaser of the property in July 2011. Significantly, the trial balance also contains no indication that any salaries or wages were paid by the respondent company during the relevant period; something which strongly suggests that Mr Miller's return to Cape Town in February coincided with a cessation of operations by the company. Would the company's directors, all of whom are based in Cape Town, have travelled to Port Elizabeth to hold their board meetings when the company no longer had a physical address there? The Koens have put up no evidence which might support the occurrence of such unlikely conduct. The suggestion that the directors ever used to meet in Port Elizabeth to conduct the business of the company is in dispute.

[29] Mr Stefan Braun, who was a director of the respondent company and of its immediate holding company, Pinnacle Point Investments (Pty) Ltd (now in liquidation), from September 2009 to December 2010, has confirmed that all the directors' decisions were taken in Cape Town and the that central administration of the respondent company occurred here, where the central administration of the rest of the Pinnacle Group was also undertaken. Mr Braun confirmed that the respondent company's accounting books and records and its minute books were kept at Cape Town. The company's current banking account was conducted at Nedbank in Cape Town and all the signatories on that account resided in Cape Town. Braun stated that during his period as a director there was no occasion on which all the directors were in Port Elizabeth together, and that there had been only one occasion on which he had been there with even one of the other directors. The purpose of his single joint visit with a co-director to Port Elizabeth had been 'a fact

finding mission' at the commencement of their respective period of involvement in the respondent company's business, and not for the purpose of a board meeting

[30] I have therefore concluded on the papers that even if I were to accept Mr Miller's evidence that the Port Elizabeth address at which he worked was the principal place of the respondent's business in the sense explained in the passage in *Beckett* quoted above,[11] all the indications are that it ceased to be so when Mr Miller returned to Cape Town in February 2011. I do not consider that there is a real dispute of fact that the respondent company had no place of business in Port Elizabeth when Mr and Mrs Koen instituted proceedings in the Port Elizabeth High Court.

[31] Having determined on the facts of this case that s 131(6) of the 2008 Companies Act does not result in the suspension of the winding up proceedings, as contended by Mr and Mrs Koen, it remains to consider whether an order of winding up should be made as prayed by the applicant. I indicated during argument at the hearing on 24 October 2011 that I was of the *prima facie* view that a proper case for a winding up order had been made out by the applicant. I afforded the Koens, as second and third intervening parties in the application, the opportunity, if they wished, to file papers opposing the winding up application. They have not availed of that opportunity and restricted themselves to filing papers on the jurisdictional question of which I have just disposed.

[32] I nevertheless consider that it would be inappropriate to grant a winding up order at this stage without affording the Mr and Mrs Koen the opportunity to have the application for business rescue which they have brought in an incorrect forum

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[11] At para [12].

considered and determined if they so wish. I am mindful in this regard that they were under the *bona fide* but mistaken understanding that the Port Elizabeth court had jurisdiction on the basis of their allegations that that was the place of the respondent's principal place of business, and that the finding by this court that only the court with jurisdiction at the place of a company's registered office is the court '*that has jurisdiction over the matter*' in terms of the definition of '*court*' in s 128 of the 2008 Companies Act breaks new ground.

[33] It seems to me that it would be just in the peculiar circumstances to postpone the application for a short period to allow the second and third intervening parties the opportunity to transfer the proceedings instituted by them in Port Elizabeth to this court. This would be a more efficient and cost-effective means of getting their business rescue application heard and determined than by instituting proceedings afresh in this court. They would be able to do this by obtaining an order from the Port Elizabeth High Court in terms of s 3(1) of the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001. With the co-operation of the applicant and the bank, who have an interest in the expeditious determination of all the undetermined applications, the Koens should be able to obtain such an order within a week. If such an order is received by the registrar of this court by the time the matter comes before me again on the date to which I propose to postpone this application, I shall give directions on that date so that the hearing of the business rescue application can occur before the end of the current court term on 9 December. If such an order is not received, and subject to any further information or submissions I might receive, I shall make an order placing the company into provisional liquidation with an appropriate rule *nisi* on the question of costs.

Order

(a) The application by William George Koen and Yvonne Koen for an order staying the application for a winding up of the respondent company pending the determination by the Port Elizabeth High Court of an application to that court under case no. 2448/2011 to place the company under supervision and commencing business rescue proceedings is dismissed with costs, including the costs of two counsel where such were incurred.[12]

(b) The winding up application is postponed until Monday, 28 November 2011 at 9.30 am or as soon thereafter as the matter may be heard by me, then to be disposed of as set out in paragraph [33] of this judgment.

A.G. BINNS-WARD
Judge of the High Court

[12] Attention is directed to footnote 1.