THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 13124/19

In the matter between

MFWETHU INVESTMENTS CC t/a RECHARGER PREPAID METERS	**APPLICANT**

and

CITIQ METER SOLUTIONS (PTY) LTD t/a CITIQ PREPAID	**RESPONDENT**

Coram: Rogers J

Heard: 11 May 2020

Delivered: 19 May 2020

This judgment was handed down electronically at approximately 12:30 on Tuesday 19 May 2020 by circulation to the parties' legal representatives by email. On the same day it was released to SAFLII.

JUDGMENT

Rogers J

[1] This opposed motion was argued by audio-visual link. I was in Cape Town, counsel for the applicant in Durban and counsel for the respondent in Johannesburg.

[2] The applicant, Mfwethu Investments CC t/a Recharger Prepaid Meters ('Recharger'), seeks a final interdict against the respondent, Citiq Meters Solutions (Pty) Ltd t/a Citiq Prepaid ('Citiq'). Recharger and Citiq are among various firms which compete in the wholesale and retail supply of prepaid electricity sub-meters ('meters'). Each meter has a unique 11-digit number. Each supplier has its own supplier group code ('SGC'). The meters it supplies, each with its own 11-digit number, are linked to that supplier's SGC.

[3] After a customer has bought a meter, the meter needs to be activated on the supplier's platform. This a customer does by telephoning the supplier's call centre. The supplier provides vendors (retail outlets which sell electricity tokens) with details of the meters activated on its platform. When the customer purchases a token in such circumstances, the meter number will match the SGC, and the resultant token number can be successfully punched into the meter. The supplier earns a service fee whenever a token is purchased.

[4] Recharger alleges that Citiq has activated Recharger meters on Citiq's platform (ie has linked such meters to Citiq's SGC) and has supplied particulars of such meters to vendors. Although a consumer can buy a token in respect of such a meter, the token number cannot be successfully punched into the meter, because there is a mismatch between the meter's number and the SGC. This,

Recharger alleges, causes harm to the consumers, and is damaging to Recharger's business, because the consumers complain that Recharger's meters are defective when that is not the case. In some instances Recharger, in order to appease customers, has to buy fresh tokens for them or even arrange for the customers to be transferred to the Citiq platform by providing a key-change code.

[5] It is unclear how many of Recharger's meters have been incorrectly activated in this way. In the papers there is a schedule listing 51 meters. Both counsel acknowledged in argument that the number of affected meters is small ('a drop in the ocean') in relation to the total number of meters supplied by their respective clients.

[6] Citiq has raised a preliminary objection to this court's jurisdiction. I have come to the conclusion that the objection is sound, and as a result I will not be addressing the merits of the case.

[7] Recharger is a South African close corporation with its principal place of business in Durban. Citiq is a South African company. It has a places of business in Cape Town and another in Midrand, Gauteng. The Midrand office is its registered office in terms of s 23(3)(*b*) of the Companies Act 71 of 2008 ('the 2008 Act').

[8] Recharger does not assert that Citiq's allegedly wrongful conduct was perpetrated, wholly or partly, in the area of this court's jurisdiction. This court will thus only have jurisdiction if Citiq's presence within the court's territory confers such jurisdiction.

[9] For purposes of s 21(1) of the Superior Courts Act 10 of 2013 (formerly s 19(1)(*a*) of the Supreme Court Act 59 of 1959), the question whether a cause 'arises' within a court's area of jurisdiction is determined by common law. The

provision that the court has jurisdiction 'over all persons residing or being in' such area does not enlarge the jurisdiction endowed by the words 'causes arising'. At common law, however, the residence (but not the mere physical presence) of a defendant or respondent within the court's area of jurisdiction is, in most types of claims, a circumstance which enables one to say that the cause 'arises' within the court's area of jurisdiction (*Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 490 H-492I; *Bid Industrial Holdings (Pty) Ltd v Strang & others* [2007] ZASCA 144; 2008 (3) SA 355 (SCA) para 53).

[10] It follows that, to the extent that Recharger's argument is that the court has jurisdiction merely because Recharger's office in Cape Town causes it to be physically present within the court's territory, the argument is unsound and must be rejected. The court will only have jurisdiction – or to put it differently, the cause at issue in the present case could only be said to be one arising within this court's territory – if Citiq resides in this court's territory.

[11] Recharger's counsel made extensive reference to the recent judgment in *Apleni v African Process Solutions (Pty) Ltd & another* [2018] ZAWCHC 160. He emphasised passages in the judgment which referred to effectiveness. However, and as the cases cited by the learned judge in that matter show, effectiveness, while it may lie at the root of, or be the rationale for, the common law grounds of jurisdiction, is not itself an independent ground of jurisdiction (*Gallo Africa Ltd & others v Sting Music (Pty) Ltd & others* [2010] ZASCA 96; 2010 (6) SA 329 (SCA) para 10). The writ of a division of the High Court runs throughout South Africa (s 42(2) of the Superior Courts Act), so that in principle any division could give an effective judgment against an *incola* of South Africa who is a *peregrinus* in that division's territory, yet it is clearly not the law that every division in South Africa has jurisdiction over any person who is resident somewhere in South Africa.

[12] For the rest, *Apleni* is authority for the trite proposition that in a delictual claim the court will have authority over a defendant who is resident in its area, even though the delict was committed elsewhere. Since the delict in our case was not committed within this court's area of jurisdiction, the question is whether Citiq is resident within this court's territory.

The residence of a company – the legal position before the 2008 Act

[13] The majority judgment in *Bisonboard* answers the question as to when a company can be said to 'reside' within the territory of a court. A company resides (a) at its principal place of business in South Africa; (b) and also at its registered office. This means that if the principal place of business and the registered office of a company are in different places, the company resides in two places (and so, potentially, in the areas of two different provincial divisions). Residence in either form suffices for jurisdiction (493B-495H).

[14] Where a company has more than one place of business in South Africa, the 'principal place of business', in the jurisdictional sense, means the place where the company's 'general administration is centred', the 'seat of its central management and control, from where the general superintendence of its affairs takes place'. This may or may not be where its manufacturing or other business operations are carried on (*T W Beckett & Co Ltd v H Kroomer Ltd* 1912 AD 324 at 334); *PMG Motors Kyalami (Pty) Ltd & another v Firstrand Bank Ltd, Wesbank Division* [2014] ZASCA 180; 2015 (2) SA 634 (SCA) para 9).

[15] The question whether a particular place is a company's principal place of business in this sense is a factual matter which, if disputed, would involve evidence as to where the company's general administration takes place.

[16] If a company is to be regarded as resident within a particular court's territory on the basis of the location of its principal place of its business, it does

not suffice that the company has a place of business within that court's territory, even a significant one. The question is whether that place of business is the company's principal place of business in South Africa. If the company's general administration is centred elsewhere, the company does not reside in the court's territory.

[17] For purposes of service of process, rule 4(1)(*a*)(v) of the Uniform Rules states that service on a company may be effected by delivering a copy of the process to a responsible employee at the company's registered office 'or its principal place of business within the court's jurisdiction'. A company which has several places of business within a court's territory may have a place of business which can be regarded as its 'principal' place of business within that area. Service at that place is permissible. However, this is irrelevant when it comes to jurisdiction, because for this latter purpose it does not suffice that the place of business is merely the company's principal place of business within the court's area; it must be the company's principal place of business in South Africa. (See *Leibowitz t/a Lee Finance v Mhlana & others* [2005] ZASCA 126; [2006] 4 All SA 428 (SCA) para 9.)

Corporate residence in terms of the 2008 Act

[18] In terms of the Companies Act 61 of 1973 ('the 1973 Act'), there was no requirement that a company select, as its registered office, its principal place of business in South Africa, hence the possibility of dual corporate residence. Section 23(3)(*b*) of the 2008 Act has effected a change, because now, if a company has more than one office in South Africa, it must register the address of its 'principal office'. Although the new Act speaks of a 'principal office" rather than a 'principal place of business', I do not think that there is a distinction between the two expressions. Both refer to the place where the company's general administration is centred.

[19] The implications of the new regime were considered by Binns-Ward J in *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd intervening)* [2011] ZAWCHC 439; 2013 (1) SA 191 (WCC). The learned judge concluded that in the new regime a company can only be resident in one place in South Africa, namely at its registered office. For purposes of jurisdiction, a court cannot enquire into the question whether a company has erroneously registered, as its address, a place which is not its 'principal office'. That is a matter to be taken up with the Companies and Intellectual Property Commission ('CIPC').

[20] *Sibakhulu Construction*, although a decision of this court, was concerned with the question whether the division of the High Court sitting in Port Elizabeth had jurisdiction to determine a business rescue application which had been instituted in that court. This was relevant to the question whether liquidation proceedings pending before the High Court in Cape Town had been suspended in terms of s 131(6) of the 2008 Act. In the course of his reasoning, Binns-Ward J said that his conclusion entailed that in respect of every company there would be only a single court in South Africa with jurisdiction in respect of winding-up and business rescue matters (para 23).

[21] The learned judge's statement, insofar as it concerns jurisdiction in liquidation matters (as distinct from business rescue proceedings), appears to me to have been *obiter*, and subsequent decisions have cast doubt on its correctness in that respect. The reasoning in the later decisions has been based on item 9 of Schedule 5 of the 2008 Act, which has preserved the provisions of the 1973 Act in liquidation proceedings, including the old Act's conception of a 'court' and the provisions of s 12 of the old Act relating to a 'court's' jurisdiction. Section 12(1) of the old Act provided that a 'court' had jurisdiction under that Act if the company had its registered office or main place of business within its area of

jurisdiction. (See, eg, *Van der Merwe v Duraline (Pty) Ltd* [2013] ZAWCHC 213; *Wild & Marr (Pty) Ltd v Intratek* [2019] ZAGPPHC 613 and decisions discussed therein.) The 2008 Act does not have an equivalent of s 12 of the 1973 Act. It appears that in *Sibakhulu Construction* Binns-Ward J's attention was not directed to the possible implications of item 9 of Schedule 5.

[22] It is unnecessary for me to decide whether the *obiter dictum* in *Sibakhulu Construction* concerning jurisdiction in liquidation proceedings is right. The *ratio* of the decision is that, at least in relation to matters entirely governed by the new Act (including business rescue proceedings), a company can have only one place of residence, namely its registered office. Later decisions do not impugn Binns-Ward J's reasoning in regard to matters wholly governed by the new Act, and it was followed in *Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd & others* [2014] ZAWCHC 103; [2014] 3 All SA 591 (WCC) para 19).

[23] I do not think that Binns-Ward J's decision is plainly wrong. On the contrary, I find his reasoning persuasive. In particular, I regard as significant that the lawmaker saw fit to introduce s 23(3)(*b*) as a novel provision in our corporate law, to omit the former s 12 of the 1973 Act, and to include among the stated purposes of the Act the provision of a 'predictable and effective environment for the efficient regulation of companies' (s 7(*l*)). It is highly desirable that there should be certainty as to where a company is resident in South Africa, and the lawmaker appears to have been intent that there should be only one such place, easily ascertainable as a matter of public record.

[24] The office registered in terms of s 23(3)(*b*) is in law the company's registered office' as that expression is defined in s 1 of the Act. When the Act lays down certain requirements with reference to the 'registered office', most

importantly the location or accessibility of its company records (s 25) and accounting records (s 28(2)), it is referring to the address as actually registered. The company could not ward off a complaint of non-compliance with these sections by proving that its registered office is not in fact its principal office and that the records are available at its principal office.

[25] If, as I consider to be the case, the lawmaker intended to do away with dual corporate residence, it seems to me that there are only two possibilities: either (a) the registered address is dispositive of the company's place of residence or (b) the registered address can always be called into question, in which case the office which is in fact the company's principal office is dispositive, even though it is not the registered office. If the latter were the true position, a company could not be said to be resident at its registered office as well as at its actual principal office, because the registration is *ex hypothesi* wrong and not reflective of the true position.

[26] In my view, third parties are better served by treating the registered office as dispositive. In order to know in which court to sue, third parties need only consult the information registered with the CIPC. If they could not place complete reliance on the registration, the company might notionally object to jurisdiction on the basis that its principal office is in fact in the territory of some other court. Third parties cannot be expected to know, and may have no means of finding out, where the general administration of a company is centred.

[27] However, and even if I were to assume that *Sibakhulu Construction* is wrong, and that a company may for purposes of jurisdiction be regarded as resident at its principal place of business in South Africa, even though that is not its registered office, it was for Recharger to establish facts to show that Citiq's Cape Town office, rather than its Midrand office, is its principal place of business

in South Africa, and that this court thus has jurisdiction (*Mayne v Main* 2001 (2) SA 1239 (SCA) para 1).

[28] The applicant in its founding papers alleged that the Cape Town office was Citiq's principal place of business, and this allegation Citiq denied in its answering papers. Neither side proffered evidence about where the general administration of the company was centred. To say that a particular office is a company's principal place of business is a mere conclusion. The deponents for the parties may not even have had the correct legal test in mind, since they may have been judging the question of principality with reference to number of employees based at the office or the physically size of the office or the scale of operations (as distinct from administration) conducted at the office.

[29] In response to the denial in the answering papers, Recharger provided evidence, from its inhouse legal adviser, Ms Feroza Aziz, of two telephone calls she made to a Citiq telephone number, the first about two weeks before the application was instituted, the second about two months after institution. Citiq filed a supplementary answering affidavit in which it dealt with these two telephone calls. The telephone number in question was for Citiq's call-centre, which is staffed by about 40 call-centre telephonists. Citiq says that these telephonists are not trained in matters relating to corporate organisation.

[30] The first call was answered by an unidentified telephonist. This person allegedly said that Citiq's 'head office' was in Cape Town. The second call was answered by a Ms Refilwe Ndlala. With this information, Citiq was able to track down the call, which had been recorded for quality and training purposes. After opening pleasantries, Ms Aziz said that she knew that Citiq had an office at a particular address in Cape Town and asked if that was 'your principal place of

business'. Ms Ndlala said yes. After Ms Aziz had taken down the spelling of Ms Ndlala's name, the conversation continued:

Aziz: So, um, and, um, it is your principal place of business this, um, Citiq Prepaid, Pinnacle, Burg Street, Cape Town?

Ndlala: Yes, um, we have, actually have two offices, one is in Joburg, the other one is in Cape Town, so that is the only one in Cape Town.

Aziz: Okay. Thanks you so much, Refilwe.

[31] In my view, this evidence is insufficient to establish that the Cape Town office was in fact Citiq's principal place of business. In the second call, the only one of which there is an exact record, the portion of the conversation I have quoted suggests that Ms Ndlala may have meant no more than that the address Ms Aziz had mentioned was the company's only, and thus its principal, office in Cape Town. (This is how Ms Ndlala explained herself in her confirmatory affidavit.) Even if one or both of the telephonists thought that the Cape Town office was the company's 'head office' or 'principal place of business' in South Africa, neither of them was qualified to speak on that question. Bald statements of this kind, by persons who cannot by virtue of their positions be assumed to be possessed of the requisite knowledge, do not count for much.

[32] Accordingly, in the absence of evidence about the activities carried on at the two offices, the *prima facie* position established by the registration has not been displaced. I observe, in this regard, that the company's registered office, which has always been in Gauteng, was changed to the address reflected in the current registration – Howick Gardens, 1 Mac Road, Vorna Valley Extension 21, Midrand – in June 2016.[1] This was nearly two years after Citiq's deponent, and its only active director, Michael Franze, became a director of the company (the

[1] Record 96.

second director is described as non-executive).[2] This address in Midrand was nominated some years after the 2008 Act came into force, and must represent an endeavour to nominate, as the registered office, the company's 'principal office' in South Africa. By law, this is where the company's records, and particularly its financial records, must be located or accessible.

[33] Recharger's counsel submitted, somewhat faintly, that I should refer the application to oral evidence if I were not satisfied that the Cape Town office was Citiq's principal place of business. For two reasons I decline to follow this course. First, the question as to Citiq's *de facto* principal place of business only arises if my primary finding on the effect of s 23(3)(*b*) is wrong. Second, this is not a case where the evidence relevant to a particular issue is in dispute. Rather, there are two competing bald conclusions. For all I know, the evidence (as distinct from the conclusion), had it been placed before the court, would be uncontested.

[34] Given my finding that this court lacks jurisdiction, it is undesirable that I express any opinion on the merits of the case, as they may need to be decided by another division of the High Court.

[35] I make the following order:

The application is dismissed with costs.

Owen Rogers

O L Rogers
Judge of the High Court
Western Cape Division

[2] Record 91.

APPEARANCES

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