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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: 959/2023

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION

Plaintiff

(Registration number: LR2/6/2/56)

and

MOKONE MOSES MIYA

Respondent

JUDGMENT BY: MHLAMBI, J

HEARD ON: 20 SEPTEMBER 2024

DELIVERED ON: 30 JANUARY 2025

- [1] The plaintiff instituted an action in this court against the defendant for the payment of R9 605 204.69. The plaintiff alleged that the defendant had perpetrated a series of thefts and/or fraud from 1 January 2012 to 31 December 2015 when he unlawfully caused sums of money to be transferred from the plaintiff's bank accounts to the accounts of the plaintiff's service providers.
- [2] In its particulars of claim, the plaintiff averred that the court had jurisdiction to hear the matter because the defendant resided within the court's area of

jurisdiction, and the cause of action upon which the plaintiff relied arose wholly within its territorial jurisdiction.

[3] The defendant filed three special pleas and a plea on the merits. The first special plea was that the court lacked jurisdiction to hear the matter because:

2.1 The defendant was, since September 2012 after his appointment as the Deputy General Secretary of the Plaintiff until the termination of his employment in March 2020, carrying on business or employed at the Plaintiff's head office within the Johannesburg area;

2.2 The Defendant has since September 2012 been permanently residing within the Johannesburg area;

2.3 The Defendant is still residing within the Johannesburg area; and

2.4 The alleged cause of action arise did not within the jurisdiction of this Court.

[4] The second special plea was that the plaintiff's claim was- expunged by prescription in terms of section 11 of the Prescription Act 68 of 1969 in that:

4.1 On or about the year 2015, the Plaintiff lodged a criminal complaint ("*criminal case*") with the South Africa Police Service (**SAPS**) in terms whereof the Defendant, as on of the co-accused in the criminal case, was alleged to have committed fraud, theft and alternatively money laundering against the Plaintiff in the period from 2012 to December 2014.

4.2 On 9th February 2015, the Defendant made a first appearance at the Johannesburg Specialised Commercials Court arising from the criminal case referred to above. Annexed hereto marked "**AA**" is the copy of the charge sheet.

4.3 The Defendant together with his co-accused appeared at the Commercial Crime Court on a number of occasions thereafter until the criminal case was ultimately struck off the roll on 30th October 2017.

[5] The third special plea was based on non-joinder in that:

5.1 The Plaintiff seek in prayer 3 an order directing Old Mutual Super Fund Pension Fund to deduct certain monies from the Defendant's Pension Benefit.

5.2 The Plaintiff has failed notwithstanding, to join Old Mutual Super Fund Pension Fund, as Defendant in the matter.

5.3 The non-joinder of the Old Mutual Super Fund Pension Fund constitutes a material non-joinder in the proceedings.

[6] The defendant testified that he resided in Johannesburg, was arrested there, and the matter was withdrawn against him there. B[...] at Phuthaditjhaba was his old address before he went to work for the plaintiff in Johannesburg. The alleged offence took place at the plaintiff's head office in Johannesburg. The summons, which was issued in 2020, was never served on him. Old Mutual informed him of the summons when he inquired about his claim based on his pension, which the assurance company withheld. This company was interested in the civil matter, but the plaintiff failed to cite it as a party.

[7] He was arrested in 2015, and for two years, the case served before the Johannesburg criminal courts before its withdrawal in 2017. The civil matter should have been dealt with in Johannesburg. The plaintiff had known about the case since 2014 before his arrest. He had not spoken to his wife for a couple of years. When he left Qwaqwa, he worked for the plaintiff in Bloemfontein. He never updated his residential address after he departed from QwaQwa.

[8] Mpho Malcolm Miya testified that he was the defendant's son resident at Sunninghill, Gauteng and that the defendant resided at Ennerdale, near Johannesburg, since his suspension from employment. The defendant last resided in QwaQwa in 2004/5. At the time of the summons service, though he was a bit uncertain, the defendant resided at Clearwater or R[...] R[...], Boksburg.

- [9] Dumisani Raymond Magagula testified that he was the plaintiff's General Secretary since September 2021. The defendant served as a national office bearer from August 2012 to 2015 and as a Deputy General-Secretary from 2016 to September 2018, when he was suspended on the strength of the auditors' (Ernst and Young) report that was not made public then. He was dismissed from the Union on 3 March 2020 for non-compliance with the conditions of his suspension. This occurred after the auditors tabled a report on 22 May 2022, and the union officials were instructed to proceed with charges against the defendant.
- [10] He did not know where the defendant resided and did not dispute that the cause of action occurred in Gauteng. He was not instrumental in issuing the summons against the defendant but the Secretary-General, Ramatlou, who had the defendant's file containing his address at QwaQwa. He does not know how the lawyers traced the defendant's address. Letters were sent to the defendant's Gauteng addresses, but there was no proof that they were received.
- [11] According to him, union officials received a car and housing allowance. He was aware that Nedbank (MFC, a division of Nedbank) had issued a summons against the defendant in the Johannesburg High Court for the recovery of the motor vehicle that he used. The plaintiff knew in 2015 that the defendant had committed theft and fraud, and he knew that the defendant was arrested for those crimes.
- [12] In oral argument, the plaintiff's counsel advised the court that the plaintiff relied on the jurisdiction of persons only and, by implication, not on the provision that the causes of action had arisen within the court's area of jurisdiction.
- [13] The defendant contended that he resided in Johannesburg, Gauteng, since 2012. He first resided at R[...] R[...] and Clearwater near Boksburg and currently resides at Ennerdale. All these residential areas are within the territorial jurisdiction of the South Gauteng High Court in Johannesburg. His version was corroborated by his witness, who testified that the defendant had resided in Gauteng since 2012. The court was requested to consider the

correspondence from the plaintiff's attorneys, who suggested that the civil case be transferred from the Bloemfontein High Court to the one in Johannesburg.

[14] The plaintiff's criticism of the defendant's special plea of jurisdiction is that he failed to upset the *prima facie* nature of the sheriff's return of service. The defendant bore the onus of proving that the return was incorrect and he failed to provide ¹clear and satisfactory evidence of his address when the summons was issued. He failed to present his wife's evidence regarding the veracity of the contents of the return of service, which hampered his own case. His wife, who accepted the service of the summons despite his absence for 20 years, was not called to dispute the assertion in the return that the defendant was temporarily absent. No justification was provided for his failure to call her.² The defendant failed to discharge the onus to establish his residence at the time the summons was served and that the special plea of jurisdiction should be dismissed with costs.³ The plaintiff contended that the return of service should be considered conclusive proof of the contents reflected therein and it may not be impugned in the absence satisfactory evidence.⁴

[15] In its criticism of the defendant's evidence, the following points were raised:

15.1 The defendant's evidence in chief is in the main that he is residing in Johannesburg and has been residing there since he assumed the position of DGS in the Union in 2012. He similarly indicated in his special plea that he has since 2012 been employed at the union's offices in the Johannesburg area and similarly been residing permanently in the Johannesburg area.

15.2 It is peculiar that the defendant who had the onus of demonstrating that this court had jurisdiction, merely stated in his special plea that he resided in the Johannesburg area without providing the address at which he resided. The same norm was followed throughout the

¹ Para 2.48 of the plaintiff's heads.

² Para 2.50.

³ Para 2.51.

⁴ Para 2.51.

litigation between the parties and was an integral part of his testimony in court as well.

- 15.3 On 2 October 2020, shortly after the defendant's special plea on jurisdiction was filed, the plaintiff requested verification of the defendant's residential address in Johannesburg in accordance with 35 (3) and (6). In its response, the defendant deposed to an affidavit dated 4 November 2020 in which he confirmed that his address is situated at 5[...] C[...], Clearwater Estate, Boksburg admittedly not an address situated in Johannesburg.
- 15.4 In addition, the defendant discovered a further document from MFC dated 14 April 2023 reflecting his address as unit 3[...] R[...] R[...]k, Witfield, as evidence of his assertion that he resided in Johannesburg. This address is likewise admittedly not an address situated in Johannesburg.
- 15.5 More peculiar was the fact that on or around April 2020, the defendant referred a dispute regarding the termination of his employment by the union to the CCMM. His postal address in the referral is reflected as a postal address in Vanderbijlpark.
- 15.6 The Union, through its former legal representatives, sought proof of either rates and taxes or rental agreements in three separate letters from March to May 2024 to ascertain the address that the defendant claimed to be his residential address in Johannesburg. No response was forthcoming.
- 15.7 The defendant's son, in turn testified in chief that the defendant moved to Ennerdale after his employment was terminated. He, however, made an about turn in cross examination that he moved to Clearwater Estate thereafter. His evidence in chief therefore contradicted the defendant's version that he was residing either at Clearwater Estate or R[...] R[...] after termination of his employment.

- 15.8 The defendant had the duty to demonstrate that he was not residing within the jurisdiction of this court at the time the summons was served. For the purpose of determining the jurisdiction of this court, any reference to a period other than the period during which the summons was served was irrelevant.
- 15.9 The Union was privy to the contents of the defendant's personal file and the address reflected therein was B[...], Phuthaditjhaba, an address that was evident in the SARS documents with a transaction date in 2020.
- 15.10 In so far as the Union and Sars were concerned, the defendant portrayed that he was residing in Phuthaditjhaba. His employment with the union had been terminated and it could not simply be inferred that he was still residing in Johannesburg more so that he had provided a postal address in Vanderbijlpark in his CCMA referral.
- 15.11 His assertion that he simply did not amend his details with SARS was improbable having the regard to the Sheriff's return which is regarded as prima facie evidence of the truth of its content.

[16] Section 21 of the Superior Courts Act 10 of 2013 regulates the persons over whom and matters to which the Provincial Divisions of the High Court have jurisdiction. A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may, according to law, take cognisance.⁵ I agree with the plaintiff's submission that if the defendant is an incola of the Division in which the proceedings are instituted, the court will exercise jurisdiction on that ground alone. It does not matter where the cause of action arose. The question is: is the defendant an incola of this court? In my view, he is not.

⁵ Section 21(1).

[17] A person can only reside in one place at any given moment as stated in *MAYNE v MAIN*⁶. The court stated the following:

“[3] The basic principles which govern a matter such as the present are enunciated in Ex parte Minister of Native Affairs 1941 AD 53. They have been repeatedly applied in our Courts. They may conveniently be summarised as follows:

- (1) In giving a court statutory jurisdiction over a person who resides in its area the Legislature has simply followed the common-law rule actor sequitur forum rei (at 58).*
- (2) The question is not one of domicile but of residence. A defendant may have his domicile at one place and his residence for the time being at another (at 58).*
- (3) A person can have more than one residence. Where that is the case he (or she) must be sued in the court having jurisdiction at the place where he is residing at the time when the summons is served (at 58 - 9).*
- (4) A person cannot be said to reside at a place where he is temporarily visiting. Nor does a person cease to reside at a place even though he may be temporarily absent on certain occasions and for short periods (at 59).*
- (5) Apart from the above, the Courts have studiously refrained from attempting 'the impossible task' of giving a precise or exhaustive definition of the word 'resides'. Whether a person resides at a particular place at any given time depends upon all the circumstances of the case seen in the light of the applicable general principles (at E 59 - 60).*

[4] Although a person may have more than one residence, for the purpose of s 19(1)(a) of the Act a person can only be residing in one place at any given moment (T W Beckett & Co Ltd v H Kroomer Ltd 1912 AD 324 at 334).”

[18] It is evident from the plaintiff's submissions that the addresses furnished to the plaintiff as of 2020 were within Gauteng. It is common cause that the plaintiff's attorneys suggested that the matter be transferred to Johannesburg. In this regard, it would appear that the problem was the defendant's attitude that the matter be withdrawn and proceeded with in Gauteng. What is clear from the plaintiff's submissions is that, since the termination of the defendant's services

⁶ 2001 (2) SA 1239 (SCA)

until 2024, the plaintiff gave the impression that he did not know his address. Mr Magagula's evidence buttresses this. The defendant's services were terminated on 3 March 2020, and the summons was issued on 18 May 2020. Strangely, the plaintiff's administration did not seem to have the defendant's address, and the General Secretary used any address he found in the defendant's file for service.

[19] The defendant testified that the postal address referred to in the details referring the dispute to the CCMA were the contact details of his legal representative, Mr Gaga.⁷ He testified further that, despite the reflection of his address as 1[...] B[...], Phuthaditjhaba, Witsieshoek, on SARS' employee's tax deduction directive dated 2 March 2021⁸, he had since moved from that address and was no longer staying there. The fact that his wife resided there and whether they were still together, was neither here nor there. Though the defendant was argumentative and, at times, confrontational, he consistently testified to his residence. So was his witness. His evidence that he was estranged or not on speaking terms with his wife for years is uncontested. There is no evidence that suggests that he could have stayed at any other place than Johannesburg.

[20] When a party raises a challenge to the jurisdiction of a court, this issue must necessarily be resolved before any other issues in the proceedings. The reason is simple. If the court has no jurisdiction, it is precluded from dealing with the merits of the matter brought to it.⁹

[21] Having considered all the circumstances, I believe that the most probable inference to be drawn is that the defendant's place of residence at the time the summons was issued was either in Boksburg or Ennerdale, all places situated in the Gauteng Province. He resided there as envisaged by section 21 of the

⁷ Pages 45-48 of the Index: Plaintiff's Bundle of documents.

⁸ Page 50 of the Index: Plaintiff's Bundle of Documents.

⁹ *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL* 2015 (1) SA 345 (SCA) at para 50.

Act. It follows that this Court has no jurisdiction to entertain the plaintiff's action.
As a result, the special plea on jurisdiction must succeed.

[22] The following order is made:

Order:

1. The special plea of jurisdiction succeeds with costs.

MHLAMBI, J

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