REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 27814/2018

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

16/5/2019
DATE

RT SUTHERLAND

In the matter between

WILD & MARR (PTY) LIMITED **APPLICANT**

and

INTRATREK PROPERTIES (PTY) LIMITED **RESPONDENT**
(Registration Number: 2000/017603/07)

J U D G M E N T

SUTHERLAND J:

Introduction

[1] This application is for the winding-up of the respondent company. The applicant is owed R14 638 660.00 plus interest as from 22 June 2017. It is common cause that the respondent cannot pay the debt. Only two controversies are ventilated; first, whether this court has jurisdiction over the respondent for the purposes of a winding-up order and second, whether it is an appropriate exercise of the court's discretion to postpone the application until 30 June 2019 by which date, so it is alleged from the bar, the respondent shall have been able to procure overseas funders to provide it with the money necessary to pay the debt owed to the applicant.

The Jurisdiction argument

[2] The controversy arises from the fact that service of the winding up application was served on the respondent's principal place of business at 136 10th Street, Parkmore, Johannesburg. This address is within this court's territorial jurisdiction. The respondent's registered address is said to be at 21 Van Rensburg Street, Nelspruit. That address is not within this court's territorial jurisdiction, but in the province of Mpumalanga. The contention advanced on behalf of the respondent is that the only address at which effective service of a winding up application can take place is at the registered office. If that contention is correct, it would follow that only the Mpumalanga court can entertain the application.

[3] The argument is not novel. Several decisions in the Cape Division, the Northern Cape Division and in the Gauteng Division which address this argument have been drawn to my attention. The two Gauteng Divisions' decisions are said to

be against the proposition that service may be effective only at the registered address. Plainly, if that is so, these decisions bind me unless I conclude they are distinguishable or clearly wrong. The sole decision which supports the proposition is in the Cape Division, but has been both followed and disapproved in that division. There is one SCA decision on appeal from a Gauteng Division decision which, it is argued, is against the proposition. These decisions are, accordingly, examined.

[4] The font of the debate lies in two statutory provisions, one in the 1973 Companies Act and another in the 2008 Companies Act.

Section 23(3) of the 2008 Act provides:

> "Each company or external company must—
> *(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—
> 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 12(1) of the 1973 Act provides:

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

(Emphasis supplied)

[5] The thesis is that because the 2008 Act requires the main place of business to be identical with the registered address, applications for liquidation must therefore be launched exclusively in that court which exercises territorial jurisdiction over the registered address. In other words, the opportunity to serve on one of two addresses under the 1973 Act is extinguished.

[6] This notion was given its fullest expression in the decision by Binns –Ward J in *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd intervening)* 2013 (1) SA 191 (WCC). In that decision, it was concluded the aim of the 2008 Act was that a company can reside at only one place. The reasoning ran that there had been no replication of provisions like those in section 12 of the 1973 Act, and having regard to section 23 of the 2008 Act, a company's principal office and its registered address were to be one and the same. Thus, the dual jurisdiction regime had been abolished. At [22] – [23] it was held:

> "[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 —
> >
> > . . .
> >
> > (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
> >
> > (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, and that the power to make a determination on a question of status involves a *ratio jurisdictionis* exercisable only by the court within whose jurisdiction the company 'resides' or is domiciled (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."

[7] Other than this decision, there is no support for the proposition that the court exercising jurisdiction over the registered address has sole jurisdiction.

[8] In the Gauteng Division, in the decision in *Burmeister & Another v Spitskop Village Properties & Others* [2015]ZAPPHC 1094 (21/09/2015), Makgoka J disapproved the decision in *Sibakhulu*. At [8] – [10] of the judgment, the issue is addressed, not by countering the reasoning in *Sibakhulu*, but by referring to, and relying on, several other decisions said to disapprove the decision in *Sibakhulu*. First, there was reference made to a decision by Lacock J in *Lonsdale Commercial Corporation v Kimberley West Diamond Mining Corporation* [2013] ZANHC 11 (17/5/2013), in which the abolition of duality was rejected on the premise that to

interpret section 23 to have such an effect amounted to an ouster of the court's jurisdiction, which was an unsustainable proposition where not articulated in the clearest terms. Second, there was reference to the decision in the Gauteng Division of *Firstrand Bank Ltd v PMG Motors Alberton (Pty) Ltd (In liquidation)* [2013] 4 All SA 117 (GSJ). Mayat J was dealing with litigation in the hands of the liquidators, the company having been wound up by an order of the Kwazulu –Natal Division. Mayat J held that the Gauteng Division had jurisdiction to deal with the conduct of the liquidators who were situated within the territorial jurisdiction of the Gauteng Division. A third reference was made to the subsequent appeal, reported as *PMG Motors Kyalami (Pty) Ltd & Another v Firstrand Bank Ltd, Wesbank Division 2015* (2) SA 634 (SCA). The passage in [9] is said to impliedly overrule the *Sibakhulu* decision:

> "It has long been recognised as trite that artificial persons such as companies have no bodies and therefore cannot reside in a particular area. They do, however, have directing minds and 'the residence of a corporation will be determined by the periodic, usual or habitual location of the directing mind'. This has been held to be the company's 'seat of its central management and control, from where the general superintendence of its affairs takes place, and where, consequently, it is said that it carries on its real or principal business'. To say that a company resides at its principal place of business is simply a convenient way of ensuring that the nerve centre of the operations of a company founds jurisdiction in proceedings taken against it. Although s 12 of the Companies Act refers to 'the main place of business', this amounts to the same thing for jurisdictional purposes. The dealerships accepted that, on the above basis, the court below had jurisdiction over PMG Kyalami and PMG Alberton prior to their liquidation."

[9] In my view these decisions relied on in *Burmeister,* save for that of Lacock J, are not dispositive of the proposition that duality has been preserved. The post-liquidation phase in the PMG Motors cases is a clear basis for distinguishing them.

To argue thus that these decisions disapprove or overrule the *Sibakhulu* decision is, with respect, doubtful.

[10] The SCA's dictum in *PMG Motors* does not address the duality issue expressly, and I am hesitant to read into those remarks that the court contemplated disposing of that thesis.

[11] The notion of the court's jurisdiction being ousted in *Lonsdale,* is in my view, an exaggerated proposition with which I cannot agree. The jurisdiction of the court is conferred by statute in respect of a juristic entity which, by a fiction, is said to be at a place; if the reforming statute creates a different arrangement that is merely more restrictive about the place where the fiction resides, it does seem obvious to me that the re-arrangement infringes on the court's jurisdiction or inhibits reasonable access to a court by any litigant. No threat is created by this procedural provision to the courts' basic functioning nor to litigants' constitutional rights of access to justice.

[12] Accordingly, what remains is one decision in the Gauteng Division, which does not interrogate the reasoning in *Sebakhulu*, against the proposition, and one distinguishable decision, supposedly against the proposition.

[13] However, *Sibakhulu* was expressly disapproved in the Cape Division in *Van der Merwe v Duraline (Pty) Ltd* [2013] ZAWCHC 213 (23/08/2013). Gamble J squarely addressed the reasoning in *Sibakhulu.* The thrust of his conclusions are that liquidations of insolvent companies remain, for the time being, the preserve of chapter 14 of the 1973 Act. That procedural regime draws on other provisions of the

1973 Act, including section 12. To conclude otherwise would be to produce an intolerable incoherence if sections of the 1973 Act were to be ignored and reliance placed on provisions of the 2008 Act, including section 23. I agree with this reasoning. Section 224(3) of the 2008 Act, read with item 9 of schedule 5 to the 2008 Act preserves chapter 14 of the 1973 Act in operation. In that chapter, the "court" referred to must be the "court" as defined in section 1 of the 1973 Act, which in turn is the court referred to in section 12 of the 1973 Act.

[14] Gamble J at [20] – [23] of *Duraline* states thus:

> "[20] Under the Old Act, therefore, Section 12 was the source of the dual jurisdictional power to liquidate, a situation which has, for a number of decades, been recognised under Section 344. At the risk of stating the obvious, the entire winding up process of an insolvent company on the basis of inability of a company to pay its debts must, until the transitional provisions of the New Act are varied, take place in terms of Chapter 14 of the Old Act. Once reliance is placed on those sections for such winding up, I consider that the definitions, internal references and interpretations which have applied to that Chapter of the Old Act will continue to apply, and it is not permissible to cross-reference to provisions of the New Act whilst so applying Chapter 14 of the Old Act.
> [21] Chapter 14 of the Old Act does not only deal with the application for winding-up itself, it governs, *inter alia* the functions and duties of liquidators, meetings of creditors, the interrogation of directors and other persons in relation to the affairs of the bankrupt company, liability of directors for the mismanagement of the company and importantly, the incorporation of various provisions of the Insolvency Act of 1936. The many sections under this Chapter have over the years been interpreted by our Courts and there is therefore a substantial body of authority and established jurisprudence which continues to be of general application, notwithstanding the passing of the New Act.
> [22] That the application of Chapter 14 requires resort to, and reliance upon, the definitions and other internal references to the Old Act, is further borne out by the following. There are several instances where definitions under the Old Act have a different meaning under the New Act, or where a term is not defined under the Old Act but is defined under the New Act. See for example *"Accounting Records", "Company",*

"Director", "External Company", "Member" "Memorandum", "Share" and "Special Resolution".

[23] As I have said many of these terms have been interpreted by the Courts over the years, and in the continued interpretation of Chapter 14 of the Old Act (that is until the introduction of the promised winding up legislation referred to below), the Courts must continue to have regard to such definitions and internal references. It would be chaotic to have to apply [the] New Act definitions and provisions to Old Act provisions in Chapter 14 without an express direction in the New Act to do so." (Footnotes omitted)

[15] Subsequently, in the Cape Division, *Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd* [2014] 3 AL SA 591 (WCC) was decided. The application was to wind up the company in terms of Section 81(1)(d)(i) of the 2008 Act as a result of an impasse amongst the directors, not the insolvency of the company; thus chapter 14 of the 1973 Act was not implicated. This decision followed *Sibakhulu.* The issue is dealt with at [18] – [19] of the judgment by Ndita J. The *Duraline* decision was apparently not brought to the attention of the court. Drawing on the authority of *Sebakhulu*, the court dismissed a contention that the Western Cape Court had no jurisdiction because the registered office was in another jurisdiction and held that as the principal place of business was within the court's jurisdiction, the company had improperly not registered the "correct" address, ie the principal place of business. It followed, that the jurisdiction of the court was determined by the principal place of business and not the incorrectly registered address elsewhere. This case is plainly distinguishable from a winding-up on grounds of insolvency. Paradoxically, in relation to the argument advanced by the respondent in the present case that only the actual registered office can found jurisdiction, were section 23 indeed to apply in this case, on the authority of *Navigator Property*, the reliance by the applicants on the principal place of business

would suffice to found jurisdiction. In my view, however, it has no application to the present case.

[16] Accordingly the challenge to the jurisdiction of the Gauteng Division is without merit.

A Postponement of the liquidation order

[17] It is argued on behalf of the respondent that a discretion should be exercised to postpone the application. A court has such a discretion in terms of section 347(1) of the 1973 Act, to be exercised in deserving circumstances. The core rationale would be that there is a convincing prospect of the liquidation being avoided. That prospect must be seriously evaluated.

[18] Regrettably, such circumstances are not in evidence. The respondent is the alter ego of its controlling mind, Ibrahim Sildsky Yusuf. The respondent seems to be no more than a corporate face of Mr Yusuf, and it is not alleged that there are assets in the respondent other than the supposed goodwill of Mr Yusuf's efforts to drum up business. The business is said to be a consultancy and the substance is the facilitating of deal-making by introducing persons to one another, deriving an income from commissions for so doing. There are bland allusions to the prospects of making millions in the near future but without a smidgeon of substantiation offered. The request is to postpone to 30 June 2019, some six weeks away. Altogether, the proposal is unconvincing.

[19] A postponement of the application must be refused.

The Order

(1) The respondent is placed under final winding-up in the hands of the Master.

(2) The costs of this application are costs in the winding-up.

(3) The costs of opposition are excluded from the winding-up costs.

ROLAND SUTHERLAND
Judge of the High Court
Gauteng Local Division, Johannesburg

Date of Hearing: 13 May 2019

Date of Judgment: 20 May 2019

For the Applicant: Adv L Hollander

Instructed by Snaid & Edworthy

For the Respondent: Adv D Block

Instructed by Howard Woolf Attorney