REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

In the matter between: Case No: 47/2014

THEMBANI WHOLESALERS (PROPRIETARY) LIMITED **Appellant**

And

BRIAN MZWANELE SEPTEMBER **First Respondent**

BHELEKAZI PORTIA SEPTEMBER **Second Respondent**

Coram: **Chetty, Makaula JJ and Brooks AJ**

Heard: **17 June 2014**

Delivered: **26 June 2014**

Summary: ***Practice*** *– Jurisdiction – Eastern Cape High Court, Grahamstown – Extent of – Superior Courts Act 10 of 2013 – Legislative intent – Court exercising jurisdiction over entire geographical area of Eastern Cape Province*

JUDGMENT

Chetty, J

[1] This is an opposed application for summary judgment (the application) which, ordinarily, is heard before a single judge in the unopposed motion court. Quintessentially, the defence raised is one of jurisdiction. According to the particulars of claim, the principal place of business of both parties to the lis is in Ngqamakwe, an area over which the Eastern Cape High Court, Mthatha, exercises jurisdiction. This court has however, for reasons which will become apparent in due course, been specially constituted pursuant to the provisions of s 14 (1) (a) of the **Superior Courts Act *10 of 2013*** (the Act), to primarily determine whether the Eastern Cape High Court, Grahamstown, has the requisite jurisdiction to adjudicate upon the application. The resolution of the jurisdictional challenge necessitates an analysis of the relevant legislative framework as a precursor to determining the merits of the application.

Jurisdiction

[2] The balkanization of South Africa by the apartheid regime was pertinently redressed in the founding provisions of the **Constitution of the Republic of South Africa**, **1996** (the **Constitution**), which proclaimed that ***"the Republic of South Africa is one, sovereign, democratic state . . . "***. It eradicated the homeland system and ushered in nine provinces[1]. The newly constituted **Province of the Eastern Cape** was demarcated pursuant to the provisions of s 103 (2) and Schedule 1A of the **Constitution** and encompassed, within its

[1] Act No, 108 of 1996 – S 103(1)

geographical area, the former nominally independent homelands of Transkei and Ciskei, each of which had their own Supreme and Appeal Courts.

[3] Section 166 of the **Constitution** listed the new hierarchical structure of the courts as: -

> "(a) the Constitutional Court;
>
> (b) the Supreme Court of Appeal;
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> (c) the High Courts including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
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> (d) the Magistrates' Courts; and
>
> (e) any other court established or recognized in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts." (emphasis added)

and item 16 (4) (a) of Schedule 6 of the **Constitution**, which contained a plethora of Transitional Arrangements, under the rubric, "***Courts***", provided that:-

> "(4) (a) A provincial or local division of the Supreme Court of South Africa or a supreme court of a homeland or a general division of such a court, becomes a High Court under the new Constitution without any alteration in its area of jurisdiction, subject to any rationalisation contemplated in subitem (6)."

As a consequence, the Supreme Court of the two polities created by the apartheid regime within the Province of the Eastern Cape, i.e. Transkei and Ciskei, became the High Court, Transkei and Ciskei, with their main seats in Mthatha and Bhisho respectively.

[4] Item 16 (6) (a) of Schedule 6 of the **Constitution** however enjoined the legislature: -

> "(6) (a) As soon as is practical after the new Constitution took effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution."

[5] Notwithstanding the aforegoing constitutional injunction, the envisaged rationalization of the existing court structure was procrastinated. The enabling legislation, the Act, was only assented to seventeen (17) years later and came into operation in August 2013. In the intervening years, the status *quo* remained, and the existing courts, the Eastern Cape Division, the Supreme Court of Transkei and Supreme Court of Ciskei respectively, albeit with various modifications and guises, continued operating independently of each other, exercising original territorial jurisdiction over their defined geographical areas.

[6] It is evident from its preamble that the Act was promulgated in consequence of the rationalization imperative enshrined in the **Constitution**. It, *inter alia*, provided as follows: -

> **"AND item 16 (6) (a) of Schedule 6 of the Constitution provides that as soon as practical after the Constitution took effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalized with a view to establishing a judicial system suited to the requirements of the Constitution:**
> **NOTING FURTHER that, with the advent of the democratic constitutional dispensation in 1994, the Republic inherited a fragmented court structure and infrastructure which were largely derived from our colonial history and were subsequently further structured to serve the segregation objectives of the apartheid dispensation;"**

[7] Thus, s 6 of the Act, under the rubric, ***Constitution of High Court of South Africa***, in conformity with the structure of the judicial system, and in particular, its hierarchy, as envisaged in s 166 of the **Constitution**, not only created and delineated the nine (9) Divisions of the High Court, but moreover, identified the main seat of each Division. In terms of s 6 (1) (a) of the Act,

Grahamstown was identified as the main seat of the Eastern Cape Division (the Division).

[8] Chapter 6 of the Act, (sections 21 – 28), encapsulates the provisions applicable to the High Courts. Under the rubric, ***Persons over whom and matters in relation to which Divisions have jurisdiction***, s 21 (1) provides as follows: -

> "(1) 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, and has the power-
>
> (a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;
>
> (b) to review the proceedings of all such courts;
>
> (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination." (emphasis supplied)

[9] Although the language in the underlined portion of the section is clear and precise, it has given rise to conflicting statutory interpretations. Mr *Paterson*, who

appeared together with Mr *Mphalwa* for the defendants, submitted that the words "**A Division**" in s 21, refers to a local seat within the Division and not the Division itself. The correctness of this interpretation, he contended, was amply demonstrated by s 6 (4) of the Act which specifically provides for concurrency between the main and a local seat in regard to appeals. He submitted that the omission in the Act of a provision similar to s 6 (2) of the Act's predecessor, the **Supreme Court Act**[2], (the old Act) which provided for concurrence between the Eastern Cape Division and the South Eastern Cape Local Division (Eastern Cape High Court, Port Elizabeth) was a clear indication that the legislature did not intend that there should be concurrent jurisdiction between the main and local seats of the Division in non-appeal matters. Mr *Smuts*, who appeared for the plaintiff, together with Ms *Watt*, took the opposite view and submitted that the section was clear and unambiguous. Mr *Paterson's* reliance upon the omission of a provision in the Act corresponding to s 6 (2) of the old Act, in support of the submission advanced, is entirely misplaced. The effect of s 6 (2) of the old Act was not to confer jurisdiction on the Provincial Division – it had original jurisdiction. The subsection merely conferred concurrent jurisdiction on the local Division over a specified territorial area, the whole of which fell under the area of jurisdiction of the Provincial Division.

[10] Mr *Paterson* further submitted that there were sound policy reasons, in particular the doctrines of effectiveness and convenience, which favoured the

[2] Act No, 59 of 1959

interpretation contended for. The argument ignores, firstly, the express wording of the transitional arrangements embodied in s 50 of the Act. Section 50 (1), after specifying the four courts within the Province and designating their locality and status as either a local and main seat of the Division as **"Courts of the High Court of South Africa"** proclaims that **". . . the area of jurisdiction of each of those courts becomes the area of jurisdiction or part of the area of jurisdiction, as the case may be, of the Division in question."**. Grammatically, its meaning is clear and unambiguous – the local seats of the Division, identified as the Eastern Cape High Courts, Bhisho, Mthatha and Port Elizabeth, are endowed with concurrent jurisdiction over smaller areas than that enjoyed by the main seat[3]. As adumbrated hereinbefore the Division's area of jurisdiction, conferred by s 21, comprises the entire Province of the Eastern Cape. As Smalberger J.A. emphasized in **S v Toms; S v Bruce**[4] at 807H-808A: -

> "The primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. One does so by attributing to the words of a statute their ordinary, literal, grammatical meaning. Where the language of a statute, so viewed, is clear and unambiguous effect must be given thereto, unless to do so 'would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of

[3] See also – The Judiciary in South Africa, Cora Hoexter and Mornè Olivier at pp 19-20
[4] 1990 (2) SA 802 (A)

> the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account...' (per Innes CJ in R v Venter 1907 TS 910 at 915). (See also Shenker v The Master and Another 1936 AD 136 at 142; Summit Industrial Corporation v Claimants against the Fund Comprising the Proceeds of the Sale of the MV Jade Transporter1987 (2) SA 583 (A) at 596G - H.)"

[11] Secondly, whilst it cannot be gainsaid that access to justice is a fundamental right enshrined in the **Constitution** (s 34), the principle espoused cannot be invoked to endow a local seat with original territorial jurisdiction when the Act itself merely vests it with concurrent jurisdiction. In any event, the convenience principle is adequately addressed in the Act itself, which, in s 27, provides that: -

> "(1) If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings-
>
> (a) should have been instituted in another Division or at another seat of that Division; or
>
> (b) would be more conveniently or more appropriately heard or determined-
>
> (i) at another seat of that Division; or

(ii) by another Division,

that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.

(2) An order for removal under subsection (1) must be transmitted to the registrar of the court to which the removal is ordered, and upon the receipt of such order that court may hear and determine the proceedings in question."

[12] This discretionary power to order the removal of a matter from one court to another, albeit, apropos the similarly worded corresponding section of the old Act, Plasket J, with reference to earlier authority, emphasized in **Jeremy Davis v Kenneth James Denton**[5], had to be exercised as follows: -

"[5] The proper way to exercise this discretion was set out by Bristowe J in Ogilvie v Bettini and Co, a matter involving whether an action that had been initiated in the Transvaal Supreme Court, with its seat in Pretoria, should be transferred to the Transvaal High Court, with its seat in Johannesburg. The court's power to transfer the matter was founded in s 29 of Proclamation 14 of 1902 of the Transvaal Colony, which, much like s 9(1) of the Supreme Court Act, allowed for the transfer of a matter where it appeared that it may be more

[5] Unreported Case, Case No: 630/2008 (ECD)

conveniently heard in another court. Having rejected the argument that the most convenient court was, of necessity, the court within which jurisdiction the defendant resided, Bristowe J proceeded to say:

'It seems to me that under the Proclamation the plaintiff has the choice of two courts – either the Supreme Court or the High Court – and prima facie it seems to me he may choose whichever court he likes. Now if there was something to show that an action could be tried in Johannesburg more conveniently, having regard to the expense to which the parties would be put and the places where their witnesses were living or any other circumstances, an application of this kind very probably would be granted.'

[6] As Kotze JP held, in Morgan v Erskine, 1913 EDL 94, 95 there is usually in matters of this kind 'something to be said on both sides' but because the court 'cannot decide in favour of both parties' it must 'go by the ordinary rule, which is, that after looking at the circumstances on the one side and on the other we should put to ourselves the question: On which side is the balance of convenience?'

[7] It is clear from the case law that the convenience of the parties and of witnesses are of importance in determining the balance of convenience. So, for instance, in Rothman v Woodrow and Co, Buchanan J held that the balance of convenience favoured transferring a matter to a Circuit Court

> sitting in Graaf Reinet where all of the defendant's witnesses resided there while neither of the two witnesses to be called by the plaintiff resided in Grahamstown."

[13] Although the section provides the machinery for the removal of a matter to another court on application, there is, in my view, nothing to preclude a judge, sitting as a court of first instance in the Eastern Cape High Court, Grahamstown, from *mero motu* concluding that, notwithstanding the court having original territorial jurisdiction, the balance of convenience clearly dictates that the matter properly be heard at a particular local seat and order that it be so removed. The inconvenience to a litigant hauled before a far flung court will, no doubt, not be lightly countenanced and, the court's opprobrium, marked by an appropriate costs order. Consequently, the convenience argument relied upon as an aid to the interpretation contended for, must fail.

The Remaining Defences

[14] The affidavit filed in opposition to the application for summary judgment, and which Mr *Paterson* was constrained to decry with the epithet **"the less said about it, the better"** is confined to one further defence, articulated as: -

> "3.2 *Point in limine*

The Defendants have ceased to trade under B&B Hardware and the business with its liabilities has been taken over by B and B S Trading Enterprise cc therefore this debt should first be claimed to the said cc

Therefore this action should be dismissed with costs.

4.

The cc had already made an offer to the Plaintiff towards liquidation of this debt of an amount of R10 000.00 (ten thousand rands) per month prior to the institution of these proceedings. Of which was not accepted.

5.

The said offer was made to one man known to me as Gordon of the Plaintiff and I was the one negotiating on behalf of the aforementioned Close Corporation. At all times it was during December 2013.

6.

I have made two (2) equal instalments of R15 000.00 (fifty thousand rand)(sic) to the Plaintiff which they have accepted. I enclose hereto proof of payment marked "BB1".

7.

As I depose to this affidavit the debt is being paid and there is no prejudice suffered by the Plaintiff at all.

8.

I wish to state that the 2nd Defendant is no longer part of the business nor a member of a Close Corporation.

9.

I submit that this application should be dismissed with costs."

[15] A number of further defences were however raised from the bar, *inter alia*, the authority, or rather, the lack of authority of the deponent to the founding affidavit, the alleged reckless granting of credit and the anomalies between the particulars of claim and the credit agreement upon which the plaintiff's cause of action was founded. Rule 32 (3) obligates a defendant, in resisting an application for summary judgment, to disclose, on affidavit, **". . . fully the nature and grounds of the defence and the material facts relied upon therefor"**. It suffices to say that the flagrant omission to comply with the requirements of the rule precludes the defendants from relying upon the aforementioned defences.

[16] The only defences raised which, in my view, require consideration is that pertinently raised in opposition and the issue relating to the authority. The bald allegation that the defendants have ceased to trade as B&B Hardware and that its liabilities have been taken over by a close corporation is in conflict with the first defendant's sworn statement that he is **"an adult male businessman**

trading as B&B Hardware at Erf 177, Main Road, Ngqamakwe, Eastern Cape." This admission implodes the defence. The lack of authority defence is equally spurious. The deponent to the founding affidavit's factual averments that, **"The facts herein set out fall within my personal knowledge, in that all documents and files are under my control. I have direct knowledge of all facts relating to the indebtedness, and confirm that the facts are true and correct. This is by virtue of my office and my access to all records of the Plaintiff."** stand uncontroverted. The resolution, annexed to his affidavit and signed by the plaintiff's directors, moreover authorises the deponent **". . . in his capacity as a Credit Manager . . . on behalf of the Company to do all things and sign all documentation, including but not limited to the Application and signing of affidavits necessary for the Claim."** As Swain AJA emphasized in **Stamford Sales and Distribution (Pty) Limited v Metraclark (Pty) Limited**[6]: -

> "[10] This court in Dean Gillian Rees v Investec Bank Limited (330/13) [2014] ZASCA 38 (28 March 2014), in dealing with the issue of whether personal knowledge of all of the facts forming the basis for the cause of action, had to be possessed by the deponent to the verifying affidavit, said the following in para 15:
>
> 'As stated in Maharaj, "undue formalism in procedural matters is always to be eschewed" and must give way to commercial pragmatism. At the end of the day, whether or not to grant summary judgment is a fact-based enquiry. Many summary

[6] Stamford Sales and Distribution v Metraclark (676/2013) [2014] ZASCA 79 (29 May 2014)

judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institutions and large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in Maharaj.' (My emphasis.)

In my view, as long as there is direct knowledge of the material facts underlying the cause of action, which may be gained by a person who has possession of all of the documentation, that is sufficient.

[11] The enquiry, which is fact-based, considers the contents of the verifying affidavit together with the other documents properly before the court. The object is to decide whether the positive affirmation of the facts forming the basis for the cause of action, by the deponent to the verifying affidavit, is sufficiently reliable to justify the grant of summary judgment. Those high court decisions which have required personal knowledge of all of the material facts on the part of the deponent to the verifying affidavit are accordingly not in accordance with the principles laid down by this court in Maharaj."

Caedit quaestio.

[17] The defendants have failed to disclose a *bona fide* defence to the plaintiff's claim and an order for summary judgment must follow. What about costs? Normally, these follow the result, but, should the defendants be mulcted with costs in a matter which served before this court as a test case on the issue of jurisdiction? Mr *Smuts'* submission that the legal conundrum raised in the application justified the costs of two counsel explicitly recognizes the complexity of the jurisdictional issues raised in the application. Equally the competing legal submissions advanced by Mr *Paterson* merited serious attention. Under these circumstances, an order that each party bear their respective costs seems meet.

[18] In the result the following order will issue: -

1. There will be summary judgment against the defendants for –

    (a) Payment of the sum of R256 034.35 (two hundred and fifty six thousand and thirty four rand and thirty five cents);

    (b) Interest on the sum of R256 034.35 calculated from the 16th day of April 2013 at a rate of prime plus 2% per annum.

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D. CHETTY
JUDGE OF THE HIGH COURT

Makaula, J

I agree.

_____
M. MAKAULA
JUDGE OF THE HIGH COURT

Brooks, AJ

I agree.

_____
R.W.N BROOKS
ACTING JUDGE OF THE HIGH COURT

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