

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(FREE STATE PROVINCIAL DIVISION)**

Case No. : 7382/08

In the matter between:-

**RUWACON (EDMS) BPK**

Applicant

*versus*

**DEPARTEMENT VAN OPENBARE WERKE**

Respondent

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**CORAM:**

H.M. MUSI, JP

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**HEARD ON:**

26 FEBRUARY 2009

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**DELIVERED ON:**

5 MARCH 2009

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**JUDGMENT**

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**H.M. MUSI, JP**

[1] In this matter and that of Ruwacon (Edms) Bpk *versus* Department of Public Works, Case No. 7382/2008 I granted the orders prayed for in the applications but indicated that I would give a short written judgment dealing with the issue of jurisdiction that arose in these matters. This then is the judgment.

- [2] The applicant in this matter is a company with limited liability registered in accordance with the company laws of the Republic of South Africa with its principal place of business situated in Bloemfontein. The respondent is the Department of Public Works of the Republic of South Africa, a national State department with its head office in Pretoria, Gauteng Province. The applicant claims from the respondent by way of motion proceedings payment of an amount of R270 460,51 together with ancillary relief.
- [3] The claim arises from a tender contract entered into by and between the parties during 2004 in terms of which the applicant provided certain services on behalf of the respondent, which included repairs and maintenance of the premises of the Waterval Prison in KwaZulu Natal under a project dubbed "Contract 2 Ref. WCS 037 435". Payment to the applicant was to be made upon production of a certificate issued by the engineer appointed for the project. The applicant avers that the engineer has issued the requisite certificate for the amount of R270 460,51, which amount has become due and payable but that demand notwithstanding, the respondent has failed to effect payment. The applicant

also alleges that interest on the above amount fixed in terms of the contract is due and payable.

[4] The notice of motion was served on the State Attorney in Bloemfontein and the latter served and filed a notice of intention to oppose but did not file any answering affidavit or any further pleading. Accordingly the applicant, acting in terms of Rule 6(5)(f) of the Uniform Court Rules, set the matter down for hearing on 26 February 2009. Despite service of the notice of set-down, no-one appeared on behalf of the respondent on the date of hearing.

[5] Mr. Zietsman appeared for the applicant and I raised with him the question of whether this court has jurisdiction in the matter. My concerns arose out of the following facts:

- (a) It appeared that the contract was not concluded within the jurisdiction of this court, nor was it, *ex facie* the papers, to be performed within the area of this court.
- (b) The respondent was a *peregrinus* of this court. Surely the fact that the notice of motion was served on the State Attorney in Bloemfontein and the State Attorney

had authority to accept such service on behalf of the respondent could not in itself found jurisdiction.

- [6] In responding to my query, Mr. Zietsman referred to a letter dated 9 June 2004 addressed by the respondent's Director-General to the applicant, annexure "F" to the founding affidavit, wherein the respondent's acceptance of the applicant's tender was communicated to it by registered post. Counsel suggested that the tender contract would have been concluded in Bloemfontein when the letter of acceptance reached the applicant. Counsel indicated, however, that that was not the ground upon which he relied for the submission that this court has jurisdiction. I may add that it is as well that counsel did not rely on such proposition because it is clearly wrong. The contract was concluded at the moment that the acceptance was posted in Pretoria. See **COLOURED DEVELOPMENT CORPORATION LTD v SAHABODIEN** 1981 (1) SA 868 (CPD) at 873A – B.

- [7] I was referred to a passage in the founding affidavit which appears under the heading "Die Algemene Kontrakvoorwaardes 1990". It reads:

“9.3 Aangesien die Applikant se geregistreerde hoofkantoor asook vernaamste plek van besigheid in Bloemfontein is, en die Applikant se bankrekening ook in Bloemfontein bedryf word, sou betaling van enige verskuldigde bedrae aan die Applikant te Bloemfontein plaasvind.”

Based on this counsel submitted that payments to the applicant were to be made in Bloemfontein and that this suffices to confer jurisdiction.

[8] The difficulty I had with the above passage is that it does not say that it was part of the agreement that payment would be so made. Mr. Zietsman then proposed to file a supplementary affidavit to clarify this issue and I stood the matter down to enable him to do so.

[9] The supplementary affidavit was subsequently filed and it reads in part:

“3.1 Ek bevestig dat die ooreenkoms tussen Applikant en Respondent tot inhoud gehad het dat betaling van bedrae aan Applikant verskuldig, te Bloemfontien gemaak sal word.

3.2 Ek bevestig verdermeer dat alle betalings wat vantevore deur Respondent aan Applikant gemaak is, ten aansien van hierdie kontrak, gedoen is in Applikant se rekening te Bloemfontein.”

[10] In COLOURED DEVELOPMENT CORPORATION LTD v SAHABODIEN, *supra*, it was held that the *forum contractus* in the wide sense includes the place where the contract must be performed and if such *locus solutionis* falls within the area of the court, that would be sufficient to found jurisdiction. The position was put as follows in **Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa**, Fourth Edition, by Van Winsen, Cilliers and Loots at p. 60:

“... the court will exercise jurisdiction by reason of a claim arising out of a contract (*ratione contractus*) which was entered into, or was to be performed, either wholly or in part, within the court’s area of jurisdiction, or out of a delict (*ratione delicti commissi*) committed within that area. Such jurisdiction is known as *jurisdictio ratione rei gestae*.”

[11] The evidence of the applicant is uncontested that it was agreed that payments for its services would be made into its

account with Absa bank in Bloemfontein. That means that part of the contract was to be performed within the area of jurisdiction of this court. It is precisely the breach of this part of the contract which constitutes the cause of action in this matter.

It is for these reasons that I concluded that this court has jurisdiction in the matter.

**H.M. MUSI, JP**

On behalf of applicant:	Adv. Paul Zietsman Instructed by: Rossouws Attorneys BLOEMFONTEIN
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On behalf of respondent:	No appearance
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