

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- | | |
|-----|----------------------------------|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED: YES |

2023/05/23

DATE

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SIGNATURE

CASE NO: 2021/50947

In the matter between:

MALVERN TRADING CC

APPLICANT

and

ABSA BANK LTD

RESPONDENT

Neutral citation: *Malvern Trading CC V Absa Bank Ltd* (Case No: 2021/50947
[2023] ZAGPJHC 541 (23 May 2023))

JUDGMENT SUMMARY

FLYNOTE:

*Close Corporations - Close Corporations Act, Act 69 of 1984 – principle of dual jurisdiction generally applicable to close corporations - close corporation deemed to be resident at its registered office or principal place of business – reasoning in *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) applicable – legal position regarding jurisdiction over close corporations unaffected by debate regarding the effect of the 2008 Companies Act on the dual jurisdiction principle applicable to companies under the 1973 Companies Act - recognition of dual jurisdiction in respect of close corporations a constitutional imperative to protect the right of access to courts guaranteed by section 34 of the Constitution of the Republic of South Africa, 1996.*

Close Corporations Act, Act 69 of 1984, s 25 – Uniform Rule 4(1)(a)(v) - service of process on registered office of close corporation – no merit in contention that absence of close corporation from registered office invalidates otherwise valid service – knowledge of absence irrelevant to validity of service.

Domicilium citandi – choice of domicilium citandi does not in itself exclude other legitimate forms of service of process. Question whether parties can by agreement place limitation on form of service of process not decided.

SUMMARY:

CLOSE CORPORATIONS – DUAL JURISDICTION PRINCIPLE APPLICABLE GENERALLY

- [1] This matter concerns the question whether the principle of dual jurisdiction is applicable to close corporations, an issue on which there is no direct precedent.
- [2] In this application for rescission of judgment in terms of Rule 42(1)(a), the applicant (a close corporation) attacked an order granted against it for delivery of a motor vehicle on the basis that its registered office, which is located within this court's jurisdiction, allegedly did not confer jurisdiction on this court, and that the judgment was erroneously sought and granted.

- [3] The crisp question to be decided in this matter was whether a close corporation is deemed to be resident its registered office and whether this court, consequently, has jurisdiction in this matter by virtue of section 21 of the Superior Courts Act, Act 10 of 2013.
- [4] While the position regarding companies was prior to the promulgation of the 2008 Companies Act regulated by the dual jurisdiction principle (the principle that where the registered office of a company is situated in a different jurisdiction than the principal place of business, each of these locations confer jurisdiction) as decided in *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A), there is no direct authority on this issue in relation to close corporations.
- [5] The effect of the 2008 Companies Act on the dual jurisdiction principle in relation to companies did not arise in the present matter and no view was expressed thereon.
- [6] The court analysed various provisions of the Close Corporations Act, Act 69 of 1984 ('the CCA') to determine the degree of connectedness of a close corporation to its registered office and concluded that a close corporation must for jurisdictional purposes be deemed to be resident at its registered office.
- [7] The court concluded that, for the same reasons set out in *Bisonboard Ltd v K Braun Woodworking Machinery (Pty)*, the principle of dual residency and jurisdiction applies to close corporations.

[8] The court found that due to the similarity in the provisions of the 1973 Companies Act and the Close Corporations Act (and the dissimilarity between section 25 of the CCA and section 23(3) of the 2008 Companies Act), the principle of dual jurisdiction in relation to close corporations is unaffected by the debate regarding the effect of the 2008 Companies Act on this issue in relation to companies.

[9] The court finally held that there is a constitutional imperative in the recognition of the location of the registered office of a close corporation conferring jurisdiction on a court, as the absence of such recognition may effectively deprive a plaintiff or applicant from access to the courts, contrary to section 34 of the Constitution of the Republic of South Africa, 1996.

[10] In the premises, the court held that the location of the applicant's registered office did confer jurisdiction on this court.

ALLEGED INVALIDITY OF SERVICE ON REGISTERED ADDRESS DUE TO ABSENCE OF CLOSE CORPORATION

[11] The court rejected the applicant's contention that service of the original application on the applicant's registered address was invalidated because the applicant, to the respondent's knowledge, was no longer present at the registered office.

[12] This contention had no merit in view of the provisions of section 25 of the CCA and Rule 4(1)(a)(v) of the Uniform Rules of Court.

ALLEGED INVALIDITY OF SERVICE ON REGISTERED ADDRESS WHERE A *DOMICILIUM CITANDI* WAS CHOSEN

[13] The applicant contended, *simpliciter*, that because it chose another address as a *domicilium citandi*, service at its registered address is incompetent.

[14] This argument was rejected by the court, following *Sandton Square Finance (Pty) Ltd and Others v Biagi, Bertola and Vasco and Another* 1997 (1) SA 258 (W), on the basis that the choice of a *domicilium citandi* does not prevent any other legitimate means of service.

[15] As the agreement in question merely provided an option to the respondent to serve at the applicant's chosen *domicilium citandi*, the court left the question as to whether parties can by agreement exclude an otherwise valid method of service of process open.

CONCLUSION AND ORDER

[16] Having rejected all the applicant's contentions and having found that the application was a reprehensible delaying tactic (the applicant on its own version having no defence on the merits of the respondent's claim), the application was dismissed with costs on the attorney and client scale.