

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **2024-006165**

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|-------|-------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED: YES/NO |
| _____ | _____ |
| DATE | SIGNATURE |

In the matter between:

AIR LIQUIDE LARGE INDUSTRIES (PTY) LTD

Applicant

and

LEMNOTHO CATERING CC

Respondent

JUDGMENT

HA VAN DER MERWE, AJ:

- [1] This is an application for the liquidation of the respondent close corporation.
- [2] In the founding affidavit, the applicant relies on two grounds on which it bases its case on jurisdiction: that the respondent chose a *domicilium citandi et executandi* within the territorial jurisdiction of this court and that the respondent consented to the jurisdiction of this court in terms of a written agreement concluded with the respondent.

[3] In terms section 7 of the Close Corporations Act 69 of 1984 (the Act):

“For the purposes of this Act any High Court and any magistrate's court, within whose area of jurisdiction the registered office or the main place of business of the corporation is situated, shall have jurisdiction.”

[4] An application for the liquidation of a close corporation is a proceeding in terms of the Act.

[5] As an application for liquidation is a status matter, section 7 is the exclusive source of this court's jurisdiction. In *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)* 2013 (1) SA 191 (WCC), (Sibakhulu) Binns-Ward J found in respect of a company:

“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.”¹

[6] The judgement in *Sibakhulu* was not followed in *Wild & Marr (Pty) Ltd v Intratek Properties (Pty) Ltd* 2019 (5) SA 310 (GJ), but not on this point.

[7] In *Ex Parte Oxton* 1948 (1) SA 1011 (C), Searle AJ found:

“It is now firmly established that in our law in all matters affecting status, in the absence of express statutory power, the exercise of jurisdiction is confined to the Court of the domicile of the parties at the time when the action commenced; and the fact that a party submits to or fails to object to the jurisdiction of the Court does not confer jurisdiction in respect of such matters or absolve the Court from satisfying itself as to the true domicile of the parties.”²

[8] It therefore does not matter for purposes of establishing this court's jurisdiction that the respondent chose a *domicilium citandi et executandi* within the area of jurisdiction of this court, or that the respondent failed to raise jurisdiction as a

¹ Para [23]

² At 1014. See also *Malvern Trading CC v Absa Bank Ltd* 2024 (1) SA 478 (GJ) para 47

point in limine in the answering affidavit. (The respondent's failure to raise jurisdiction as a point in limine has an effect on costs, that I deal with below).

[9] Mr Petersen, who appeared for the applicant, argued that the respondent's registered office is apparent from a summons (annexed to the answering affidavit) issued by a different company, Air Liquide (Pty) Ltd against the respondent, wherein it is alleged that the respondent has its registered office at an address in Dawn Park, Boksburg. There are several problems with this submission. An allegation made in a pleading by a third party can hardly count as evidence against the respondent. The summons was issued 2021, so even if it could be taken as evidence of the address of the respondent's registered office at that time, it does not assist the applicant in this application that was served on the respondent on 31 January 2024.³ The applicant is bound to make out its case in the founding affidavit on jurisdiction pertinently. It is not entitled to found its case on a document annexed to an affidavit (especially an answering affidavit) without having canvassed the point in issue in, if not the founding affidavit, then if permitted to do so, in the replying affidavit.⁴

[10] Mr Lindeque, who appeared for the respondent, fairly drew my attention to a return of service annexed to the founding affidavit, that pertains to the service of a letter of demand on the respondent, in which it is recorded that the respondent's registered office is in Dawn Park, Boksburg. The return of service deals with the sheriff's attempt to serve the letter of demand on 7 June 2023, so it still does not establish this court's jurisdiction when the application was served on 31 January 2024. Moreover, although, in terms of section 43(2) of the Superior Courts Act 10 of 2013, "[t]he return of the sheriff or a deputy sheriff of what has been done upon any process of a court, shall be prima facie evidence of the matters therein stated", the return is prima facie evidence of how the sheriff served the letter of demand, it is not prima facie evidence of the address of the respondent's registered office. Invariably, the party instructing the sheriff to serve a document instructs the sheriff where the document is to be served and whether

³ Jurisdiction falls to be determined when the proceedings are instituted: *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para [57]

⁴ *Botha v Smuts* 2025 (1) SA 581 (CC) para [329]; *Genesis Medical Aid Scheme v Registrar, Medical Schemes* 2017 (6) SA 1 (CC) para [172]

it is a registered office – so that the sheriff will be alive to the rules that apply when service takes place on a registered office. The sheriff does not independently establish whether a particular address is where a company's registered office is situated.

[11] Mr Petersen also referred to me an agreement in which it is recorded that the respondent has its registered office at the address in Dawn Park referred to above. However, this agreement was concluded in 2018, so it also is not evidence of the address of the respondent's registered office on 31 January 2024. It also does not assist the applicant for the same reasons set out above in respect of the summons issued by Air Liquide (Pty) Ltd.

[12] Mr Petersen submitted that this court's inherent jurisdiction in terms of section 173 of the Constitution solves the applicant's problem. In my view it does not. This court's inherent jurisdiction to regulate its own process is not a ground on which it may exercise jurisdiction over a respondent.

[13] The applicant delivered a supplementary affidavit in which it is stated:

“In this regard, I submit that this Court has jurisdiction to entertain this application as the Respondent's principal place of business and registered address are situated within its jurisdiction.”

[14] As Mr Lindeque correctly submitted, those are conclusions of law, it is not evidence of the location of the respondent's registered office or its principal place of business. Certainly not without the applicant at least providing the address or addresses. It therefore is of no assistance to the applicant.⁵ Typically, the address of a company's registered office is proven with the records kept by the Companies and Intellectual Property Commission. Why that could not have been done has not been explained.

[15] For these reasons the applicant has not made out a case that this court has jurisdiction in terms of section 7 of Act.

⁵ *Mfwethu Investments CC v Citiq Meter Solutions (Pty) Ltd* 2020 (6) SA 578 (WCC) para [27]

[16] As I referred to above, the respondent did not raise jurisdiction in the answering affidavit – all it disputed is the allegation that the respondent's *domicilium* address is a ground of jurisdiction. The respondent also did not raise jurisdiction in its heads of argument, or its practice note, or in the parties' joint practice note. In my assessment therefore, the respondent should not be entitled to any costs other than those occasioned by a perusal of the notice of motion and founding affidavit and the delivery of its notice of intention to oppose.⁶

[17] I make the following order:

- (a) The applicant is dismissed on the ground that the applicant failed to show that this court has jurisdiction;
- (b) The respondent is entitled to costs pertaining to only perusing the notice of motion and founding affidavit and delivery of its notice of intention to oppose. Otherwise I make no order as to costs.

H A VAN DER MERWE
ACTING JUDGE OF THE HIGH COURT

⁶ *Malan & Co v Sahib* 1918 WLD 51; *Perumal v Govender* 1997 (3) SA 644 (N) 654C

Heard on: 6 March 2025

Delivered on: 7 March 2025

For the applicant: Adv R Petersen instructed by Motsoeneng Bill Attorneys

For the respondent: Adv IM Lindeque instructed by D & P Smit Attorneys

