IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 22710/2019

In the matter between:

CAPE FLEXIBLE CONVERTERS (PTY) LTD Applicant

and

NSP UNSGAARD (PTY) LTD Respondent

Date of hearing: 05 October 2020

Date of Judgment: 21 October 2020 (delivered by email to the parties' legal representatives).

JUDGMENT

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[1] This is an application for the provisional winding up of the respondent company by the applicant in terms of section 343(1)(a) and with reliance on section 344(f) and (h) of the Companies Act 61 of 1973 (the 1973 Act). The applicant's case is based on a debt owed to it by the respondent resulting from goods sold and delivered. The respondent

admits liability to the applicant, but disputes the amount, and that the debt has become due and payable.

[2] One of the various issues raised by the respondent in opposition to the application, is that this courts lacks the jurisdiction to hear this matter. In this regard, the respondent avers that neither its registered office, nor its principle place of business are within the jurisdictional area of this court. In respect of its registered address, it is common cause that such address is situate at 20 Mahatma Ghandi Road, Point, Durban. According to the respondent, its principle place of business is the same as its registered address.

[3] It is apposite to mention that the applicant filed a conditional application in terms of section 27(1) of the Superior Courts Act, 2013 for the removal of the application for the provisional winding-up of the respondent from the Western Cape Division of the High Court to the Kwazulu Natal Local Division, Durban in the event that it fails on the jurisdictional point in this division.

[4] At the commencement of the proceedings, the parties, in discussion with me, agreed that it would be apposite to argue the jurisdictional point first, together with an application for the late filing of two further affidavits by the respondent. After brief arguments on these issues, the court adjourned for a short while, I considering the issue, I returned to court and advised the parties that I will hear argument on the matter and deal with the jurisdictional point in the judgment. I did so as I was of the view that the jurisdictional issue required proper consideration that should not be rushed.

[5] The issue of competing jurisdiction over a company incorporated in terms of the company laws of South Africa has received notable attention in the courts since the advent of the Companies Act, 71 of 2008 ("the 2008 Act") which replaced the 1973 Act save for Chapter XIV thereof which survived the introduction of the new Act in terms of transitional provisions contained in Schedule 5, Item 9 of the new Act.

[6] Section 12 of the old Act is the source of jurisdictional power over a company. In terms of this section, jurisdiction *"...shall be any provincial or local division of the High Court of South Africa within the area of the 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.*"

[7] In **Sibakhulu Construction (Pty) Ltd v Welgemoed Village Golf Estate (Pty) Ltd (Nedbank Ltd Intervening)** 2013 (1) SA 191 (WCC), in a judgment in this division of the high court by Binns-Ward J, the court was concerned about the jurisdiction of the high court sitting in Port Elizabeth in a matter concerning a business rescue application and stated in paragraph 23:

> *"I consider that it would give effect to the purpose set out in s 7(k) and (l) to interpret s 23 of the [new] 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 principle 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 in whose area of 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.)"*

[8] It has been opined by Rogers J, also in this division, in **Mfwethu Investments CC v Citiq Meter Solutions (Pty) Ltd** 2020 JDR 0851 (WCC) that the statement of Binns-Ward J insofar as it concerns jurisdiction in liquidation matters, appear to be obiter. Rogers went on to say that *"subsequent decisions have cast doubt on its correctness in that respect. The reasoning in the later decisions has been based on item 9 of Schedule 5 of the 2008 Act, which has preserved the provisions of the 1973 Act in liquidation proceedings, including the old Act's conception of a 'court' and the provisions of s 12 of the old Act relating to a 'court's' jurisdiction. Section 12(1) of the old Act provided that a 'court' had jurisdiction under that Act if the company had its registered office or main place of business within its area of jurisdiction."*

[9] In **Van der Merwe v Duraline (Pty) Ltd** [2013] ZAWCHC 213 (23/08/2013) Gamble J held in paragraph 17:

"The winding-up of solvent companies is dealt with in Part G of the New Act. The interplay between Sections 79 (2) and (3) and Items 9 (2) and (3) of Schedule 5 to the New Act make it clear that an application for winding-up of a solvent company must take place in accordance with the provisions of the

> *New Act. However, if in the course of such proceedings it is found that the company is in fact insolvent the matter must then be determined in accordance with the provisions of Chapter 14 of the Old Act."*

[10] The reasoning of Gamble J in the **Duraline** case was approved in Wild & Marr (Pty) Ltd v Intratek Properties (Pty) Ltd [2013] ZAWCHC 213 (23/08/2013) where Sunderland J held:

> *"However,* ***Sibakhulu*** *was expressly disapproved of in the Cape Division in* ***Van Der Merwe v Duraline*** *…Gamble J squarely addressed the reasoning in* ***Sibakhulu****. The thrust of his conclusions is that liquidations of insolvent companies remain, for the time being, the preserve of ch 14 of the 1973 Act. That procedural regime draws on the provisions of the 1973 Act, including s 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 s 23 [which, provides for the registration of a registered office by a company]. I agree with this reasoning"*

[11] Rogers J in **Mfwethu** went on to point out that the new Act does not have an equivalent of s 12 of the 1973 Act, and that it appears that in **Sibakhulu Construction**, Binns-Ward J's attention was not directed to the implications of Item 9 of Schedule 5, which provides for the continued application of the 1973 Act to the winding-up and liquidation of companies. However, Rogers J found it unnecessary to decide whether the obiter in **Sibakhulu Construction** is plainly wrong. On the contrary, he stated that he found its reasoning persuasive and opined that *"[it] is highly desirable that there should be certainty as to where a company is resident in South Africa, and the lawmaker appears to have been*

intent that there should be only one such place, easily ascertainable as a matter of public record."

[12] If on is to accept that the approach in **Van der Merwe v Duraline** is correct, then the applicant must show that the Cape Town office of the respondent is its principle place of business. In **Leibowitz t/a Lee Finance v Mhlana and others** [2006] 4 All SA 428 (SCA), it was held (at para 9) by Jafta JA that *"there is a vast difference between a 'a company's principle place of business' and 'a company's principle place of business within the court's jurisdiction.' The principle place of business of a company for jurisdictional purposes is the place where the central control and management of a company is situated."*

[13] In its founding affidavit deposed to by its director, Mr Gary Seale, the applicant acknowledged that the respondent has its registered address in Durban, and states that the *"business address"* is in Epping, Cape Town, which is within the jurisdiction of this court. It is not alleged that the Cape Town address is the main business address of the respondent.

[14] In its endeavor to show that the respondent's principle place of business is its Cape Town address, the applicant relies on the following:

14.1 An extract from the respondent's website attached to the papers describes its address as the Cape Town address.

14.2 Emails from the representatives of the respondent (i.e. a general works manager, finance manager and a creditor's administrator) contain the

Cape Town address for the respondent.

14.3 The goods sold and delivered to the respondent was delivered at the Cape Town address.

14.4 The respondent admits that its Cape Town address is its factory address.

14.5 When the sheriff served the founding documents on the respondent's registered office in Durban, a Ms Naidoo, who is described as a legal assistant on the sheriff's return, informed the sheriff that that the Durban address is *"only the respondent's registered address, respondent trades from Cape Town."*

[15] The respondent, however, denies that its principle place of business is its Cape Town address and avers that its Durban address is such address. It further states that it is part of The Lion Match Company based in Durban. In fact, the extract from its website on which the applicant relies, clearly shows that it has an address in Cape Town where it is to be contacted, but lists its head office as the office of The Lion Match Company (Pty) Ltd in Durban.

[16] I am not satisfied that the applicant has shown that the main business address is the respondent's address in Cape Town. It may be so that that the respondent had certain managers that are stationed at its business in Cape Town, but this does not mean that the control and management of the business of the respondent takes place from Cape Town. There is no indication that the finance manager who seem to be based in Cape Town, is in

control of the respondent's finance, and that, as an example, is no financial officer or director to whom the finance manager reports to. The position and status in the hierarchy of the respondent of the general works manager is also not clear. In my view, the applicant should have done more to show that the respondent is managed and controlled from its Cape Town premises, which it failed to do.

[17] I now turn to the applicant's conditional application in terms of Section 27 of the Superior Courts Act, 2013 to have the matter removed to the KwaZulu Natal Local Division of the High Court.

[18] The respondent opposes the relief and Mr Hansen, who appeared on its behalf argued that since this court does not have the necessary jurisdiction and since the respondent has ability to pay its debts, it would serve no purpose to transfer this matter to the KwaZulu Natal Local Division as this will only result in the incurring of more costs.

[19] The relevant part of section 27 of the Superior Courts Act provides:

> *"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 the 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."*

[20] Under the now repealed Supreme Court Act 59 of 1959, there was significant debate as to whether a court which has no jurisdiction to decide a case, has jurisdiction to deal with that case in order to decide and order to transfer that case to another Division. Be that as it may, Section 27 of the Superior Courts Act now specifically provides for the removal of one a case wrongly instituted in a Division, from that Division to another Division which has jurisdiction.

[21] I do not agree with the argument that the removal of the matter to the KwaZulu Natal Local Division will necessarily result in more costs. On the contrary, if the matter is dismissed as requested by Mr Hansen, and if it is to be instituted afresh in Durban, it will result in more, not less costs.

[22] The respondent has conceded that the KwaZulu Natal Local Division of the High Court has jurisdiction over it. I am of the view that it is in the interest of justice that the matter be removed to that division. Indeed, in **Nedbank Ltd v Thobane and Similar Matters** 2019(1) SA 594 GP, it was held (at p 621 E that *"...a High Court is entitled to transfer a matter to another court, ie magistrates' court and/or local and provincial division, if it is in the interest of justice to do so."*

[23] I have not dealt with any of the other issues raised before me as these will have to be dealt with by the court in the KwaZulu Natal Local Division.

[24] Lastly, on the issue of costs, both parties have achieved some success, the applicant in having the matter removed in terms of section 27, and the respondent in its resistance to a finding that this court has jurisdiction to hear this matter. Under these circumstances, I am of the view that each party should pay its own costs in respect of the proceedings in this court.

[25] In the result, I make the following order:

1. This matter, instituted in this court under case number 22710/19 is removed from this court to the KwaZulu Natal Local Division, Durban.
2. There is no order as to costs.

HOCKEY AJ

Appearances:

For Applicant: Adv. A Montzinger

Instructed by:	Laas & Scholtz Inc.
For Respondent:	Adv. B Hansen
Instructed by:	England Slabbert Attorneys Inc.