

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Vorster N.O and Others (M150/2018) [2018] ZANWHC 78 (13 December 2018) [2018] ZANWHC 78

COURT

North West High Court, Mafikeng

BEFORE

Kgoele

CASE / FILE NUMBER

M150/2018

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IN THE NORTH WEST HIGH COURT

MAHIKENG

CASE NO. M150/2018

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

and

GABRIEL JAKOBUS PETRUS VORSTER N.O. 1st Respondent

MARYNA ANNA MARGARETHA WALTERS N.O. 2nd Respondent

MARIZELLE PRETORIUS N.O.

3rd Respondent

GABRIEL JAKOBUS PETRUS VORSTER

4th Respondent

DATE OF HEARING

: 25 OCTOBER 2018

DATE OF JUDGMENT

: 25 OCTOBER 2018

DATE REASONS REQUESTED : 9 NOVEMBER 2018

DATE REASONS HANDED DOWN : 13 DECEMBER 2018

FOR THE APPLICANT : Adv. M A Badenhorst SC

FOR THE RESPONDENT : Adv. Maree

REASONS

FOR JUDGMENT

KGOELE J

- [1] The applicant applies for judgment against the first, second and third respondents in their capacity as the joint Trustees of the Cisko Rand Trust (“The Trust”) and against the fourth respondent in his capacity as surety and co-principal debtor.
- [2] The application is premised on two credit agreements in terms of which the applicant advanced to the Trust, funds in respect of a mortgage redemption loan and a short-term direct credit facility (working capital). The applicant alleges that the Trust is in default of the credit agreements and the applicant claims against the respondents in terms of the respective agreements for payment of the amounts of R 6,745,264.01 and R 2,666,933.60 together with interest.
- [3] In the founding affidavit the applicant traversed the terms and conditions of the mortgage redemption loan entered into between the applicant and the Trust and the short-term direct credit facility (working capital). It is further alleged that the agreements were entered into between the parties respectively on 20 June 2011 and 20 August 2015. It also appears from the founding affidavit that the fourth respondent signed a suretyship agreement as surety and co-principal debtor for the liabilities of the Trust. The particulars of the suretyship agreement and the terms and conditions thereof are also set out in the founding affidavit and the fourth respondent’s liability in terms of the suretyship agreement is unlimited.
- [4] The details of these terms of the agreements will not be summarized in this judgment for the simple reason that the first and the fourth respondents being the only parties who opposed this application, do not contest the merits of the claims of the applicant as set out in the founding affidavit, but raised defenses in a form of Points in Limine only with regard to the appointment of the Trustees, the alleged lack of jurisdiction of this Court and the alleged non-compliance with the provisions of the National Credit Act 34 of 2005 (the NCA) before instituting the claims. I pause here to state that the second and third respondents did not file any papers except a notice of intention to oppose.

- [5] The Points in Limine were argued before this Court and were all dismissed with costs. As there was no opposition to the merits of the matter and no opposition papers filed by the respondents, I granted judgment in favour of the applicants after hearing arguments on the merits from the Counsel representing the applicant and being satisfied that a case was made against the respondents and the following Order was made on the 25 October 2018.

“1. THAT: All the Points in Limine raised by the 1st and 4th Respondents be and are hereby dismissed.

2. THAT: That Judgment be and is hereby granted against the trust represented by the First Respondent and against the Fourth Respondent jointly and severally, the one paying the other to be absolved as follows:

2.1 Payment of the amount of R6, 745, 264, 01 together with interest thereon at the rate of 9.3% per annum compounded monthly and calculated as from the 8th day of MARCH 2018 until date of payment;

2.2 Payment of the amount of R2,666,933.60 together with interest calculated at the rate of 10.25% per annum compounded monthly and calculated from the 8th day of MARCH 2018 to date of payment;

2.3 Costs of suit on the scale of attorney and own client.”

- [6] The first respondent requested reasons for the said Order / judgment and the reasons follows hereunder.

Jurisdiction

- [7] The main argument raised by the respondents is that the applicant failed to make any factual averments in its founding affidavit with regard to jurisdiction of this Court over the respondents and further that, the founding affidavit did not set out specific allegations in support of their claim for jurisdiction. According to the respondents such facts were only set out in the replying affidavit.

- [8] It was submitted on behalf of the respondents by their Counsel that because no facts were set out in the founding affidavit, the manner to determine whether or not the Court is vested with jurisdiction over the respondents, is to have regard to the documentation annexed to the founding affidavit, more specifically the agreements entered into between the parties. In expanding on this proposition, the respondents' Counsel submitted that a Division of the High Court is normally vested with jurisdiction in contractual causes of action. A contractual cause of action arises:-

(a)

Where the contract was concluded and;

(b)

Where the contract was to be performed, either in whole or in part.

Advocate Maree appearing on behalf of the respondent quoted several cases relevant in support of this proposition amongst others: *Hugo v Wessels* 1987 (3) SA 837 (A); *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd* 1962 (4) SA 326 (A).

[9] Advocate Maree furthermore submitted that this Court is not vested with jurisdiction in respect of the Trust if regard is had to the relevant contents and terms of the two mentioned agreements because:-

9.1 The agreements were entered into at respectively Thabazimbi and Lephalale. Both these said areas fall outside the jurisdiction of this Court;

9.2 Performance in terms of the said agreements were to be done in Gauteng which area does not fall within the jurisdictional area of this Court.

9.3 The chosen domicilium citandi et executandi of the Trust does not fall within the area of jurisdiction of this Court.

[10] For the purpose of establishing jurisdiction in respect of the fourth respondent having regard to the relevant contents and terms of the surety agreements, Advocate Maree argued that:-

10.1 The chosen domicilium citandi et executandi of the fourth respondent (being an address in Thabazimbi) does not fall within the area of jurisdiction of this Court;

10.2 The surety agreement dated August 2015 was concluded in Thabazimbi which falls outside of the jurisdictional area of this Court;

10.3 Performance in terms of the said surety agreements were, by implication, to be done in Gauteng which area does not fall within the jurisdictional area of this Court.

[11] In as far as reliance is placed on the surety agreement entered at Potchefstroom for purposes of establishing jurisdiction, he submitted that the said surety agreement is limited only to R1 500 000-00 and furthermore that the claim amounts in the notice of motion far exceed the surety limit. In the premises he argued, this Court is not vested with jurisdiction in respect of the fourth respondent. Alternatively, and only in so far as it is found that the Court has jurisdiction over the fourth respondent in respect of the surety agreement entered into at Potchefstroom, the claim amounts against the fourth respondent exceed the surety limit and the relief sought against him, as it stands, is not competent.

[12] In reply Advocate Badenhorst SC submitted on behalf of the applicant that the crucial date for determining the existence of jurisdiction of a Court is the date of commencement of the proceedings which commensurate with the issuing of the application of the applicant. He referred this Court to the cases of *Boltman v Abrahams* 1926 NPD 113 at 116 and *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (AD) as a basis for his submission.

- [13] In amplification of his submission above, he argued that the applicant pursued the application against the Trust in this Division by virtue of the new adopted physical business address of the Trust falling within the area of jurisdiction of this Court. The resolution to change the address to the new one was held on the 22 March 2018 in a meeting of Trustees, wherein the resolution to the appointment of the second and the third respondents was taken that they were to be appointed as Trustees. He argued that this meeting was held prior to the issue of the applicant's application on 4 May 2018. The new address is 28 Pyper Street, Safari Tuine in Rustenburg.
- [14] In reply to the submission made by the respondent's Counsel that the applicant only made their case for jurisdiction in the replying affidavit, Advocate Badenhorst SC indicated that the applicant made allegations in the founding affidavit about the new chosen domicilium citandi at Rustenburg, and also attached Annexure "KJC3" which is the resolution referred to. He maintained that these

allegations are sufficient to found jurisdiction.

- [15] I fully agree with the applicants' Counsel that the argument that the Court is bound only to the address where the contract was entered into or executed is incorrect. In Pollak on Jurisdiction: 2nd Edition, p. 45 the learned author stated the position as follows:-

"the fact that the cause of action arose outside the area over which the Court exercises jurisdiction is also not relevant where the defendant is domiciled or resident within the area..."

It will follow that according to Roman-Dutch Law an action for a judgment sounding in money could, a fortiori, be brought in the forum domicilii although the cause of action arose elsewhere. In Modern South Africa Law this doctrine has never been doubted...

In *TW Beckett & Co. Ltd v Kroomer Ltd*. Bristow J said:-

"As a general rule, indeed, residence is conclusive and any action, wherever the cause of it arose, may be brought in the forum of a defendant's residence".

- [16] The learned author Pollak further states on page 43 of his work the position as follows:-

"In our law the domicile of residence of a defendant is accepted as a ground for jurisdiction of its courts in an action in which a judgment sounding in money is claimed, even though the defendant is no physically present within the state of the time of the

commencement of the action, and no prior attachment of the defendant's property within the country has been effected"

- [17] I furthermore agree with the submissions of the applicant's Counsel that the principle underlying rule actor sequitur forum rei (the plaintiff /applicant) follows the Court of the defendant's / respondent's domicile was to ensure effectiveness of a Court Order. In the modern world the rule serves as an important consumer protection purpose in that the consumer who is a defendant / respondent must be sued in the jurisdiction of the Court

where he or she resides unless there is a ground which gives the Court of another area, jurisdiction.

- [18] The learned authors of *Heb & V Winsen* in the *The Civil Practice of the High Court of South Africa*, 5th Edition, stated at page 68 that an alternative to instituting an action for payment of money in the Court where the defendant resides is to institute action where the cause of action arose. It must be understood that this is a clear alternative to institute an action for payment of money in the Court where the defendant resides or is domiciled and it will be premised on the fact that the contract was concluded within the area of jurisdiction or the fact that the breach occurred within the area, which will generally be sufficient for the Court to assume jurisdiction on the basis that the cause arose within its area.
- [19] It is clear from the papers filed by the applicant that in casu the Trustees of the Trust adopted a domicilium address for each of the Trustees and for the Trust, which is within the area of jurisdiction of this Court and therefore, this Court will have jurisdiction pursuant to the provisions of Section 21(1) of the Superior Court Act No. 10 of 2013. The Trust clearly adopted a resolution which is not disputed by the respondents concerning its domicilium and residence. At the time when the application was launched, being a crucial date for determining the existence of jurisdiction,
- the Trust had elected its domicilium address to be within the jurisdiction of this Court.
- [20] Advocate Maree on this issue of the changed domicilium address of the Trust argued that the reliance placed by the applicant in its replying affidavit on the Trust resolution changing the address of the Trust does not assist the applicant. He submitted that the chosen address for legal notices (including
- service of the application) as set out in the agreements had to be changed which was not done.
- [21] Advocate Maree furthermore argued that even if the applicants can rely on the resolution, they had not in the affidavit made a case that the domicilium citandi was properly changed by giving notice to the other party (in this case, the applicant) in terms of the provisions of the contract and/or these two agreement which stipulates that if you change address, you should notify the other party. He argued that the resolution that was issued was not at that particular time meant for the applicant's perusal, but for the Trust.
- [22] This argument does not assist the respondents at all. It is clear from the papers of the applicants that they did their homework before they instituted their claim. It is also not true that they are making their case in the replying affidavit. In the replying affidavit the applicant only expanded on what steps they did to obtain the documents they rely on in the founding affidavit for jurisdiction. In any event, in accordance with the terms and conditions applicable to the credit agreements entered into between the parties, the bank is in every instance at its option, entitled to institute proceedings in any Division of the High Court of South Africa which has jurisdiction. As an example, Clause 15.4 of the Mortgage redemption credit facility provides:-

“..... The Bank is nevertheless, at its option, entitled to institution proceedings in any division of the High Court of South Africa which

has jurisdiction”.

[23] The argument that relates to the fourth respondent signing surety agreements in Potchefstroom and Thabazimbi respectively also do not have merit. The fourth respondent was cited as surety and co-principal debtor with the Trust for the liability of the Trust and in terms of Section 21(2) of the Superior Court Act No. 10 of 2014, this Division also has jurisdiction over any person residing or being outside its area of jurisdiction, who is joined as a party to any cause in relation to which such Court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the

said person resides or is within the area of jurisdiction of any other Division.

[24] Even if the Court has no jurisdiction in relation to the fourth respondent (which fact I do not find), this Court once it has jurisdiction with regard to the Trust, will have jurisdiction with reference to a party which the plaintiff or applicant seeks to join or in respect of the proceedings which has already commenced. The object of section 21(2) is to avoid the inconvenience and expense of a multiplicity of actions.

[25] In as far as the second and third respondent are concerned, they were cited as the elected Trustees of the Trust who also accepted the election and nominations for themselves as Trustees, and their chosen domicilium citandi et executandi is in Rustenburg. It is common cause between the parties that although they have already accepted the election and nominations, the Master has not yet officially appointed them. It is understandable why the applicant also cited them as a precautionary

measure. But the fact that they have not been officially appointed does not take the issue of jurisdiction any further.

Trust not represented by three Trustees and the applicability of National Credit Act (NCA)

[26] The two Points in Limine mentioned above will be dealt with together as they are interlinked and the decision in one affects the other. On behalf of the first and fourth respondents the argument is also pursued that the NCA is applicable to the credit agreements on the premise that the Trust was not, or did not have three (3) or more individual Trustees appointed when the agreements were concluded. The other leg to this argument is that the first respondent did not have the authority to act on behalf of the Trust as he was the only Trustee at that time. Advocate Maree argued that the NCA is furthermore applicable because the Trust does not fall under the definition of a juristic person as defined in the NCA and the applicant did not comply with the provision of the NCA by issuing necessary notices before instituting the claims.

[27] It must be pointed out from the onset that the first and fourth respondents did not supply facts in their opposing affidavit in support of these two legal arguments they are raising except to regurgitate what the laws says. I find this approach of the respondents opportunistic to say the least. In their heads of argument they indicated that “further legal arguments in this regard will be presented at Court during the hearing thereof”, but Advocate Maree could not make any further submissions during the hearing of these legal arguments except to say that he abides by what is contained in the heads.

[28] This is despite the fact that the applicant demonstrated in their replying affidavit that at the time when the credit agreements were entered into, the Trust was represented by three (3) appointed Trustees. The following facts which were provided by the applicant in support of this proposition were not disputed at all by the first and second respondent:-

10.6.1 “On 16 July 2007 the trust appointed Ms Frederika Berdina Vorster, at the time the spouse of the First Respondent, together with the First Respondent and the accountant Mr Daniel Rothman, as the trustees of the trust;

10.6.2 On this occasion the trust deed was amended in its entirety and replaced with the existing trust deed referred to in the minutes as Annexure “A”. I attach hereto in confirmation of the aforementioned the minute of the trustee meeting held on 16 July 2007 where both the First Respondent and Mr Rothman were present. The minutes of the meeting is marked Annexure “KJC27” and the trust deed is marked Annexure “KJC28”,

10.6.3 On 13 October 2010 the Master of the North Gauteng High Court issued letters of authority to Ms Frederika Berdina Vorster, the First Respondent and Mr Daniel Rothman as the joint trustees of the trust under signature of the assistant Master. The letters of authority is annexed hereto marked Annexure “KJC29”;

10.6.4 In the premises and on 24 May 2011 when the FNB mortgage redemption credit agreement was entered into on 24 May 2011 {Annexure “KJC7”), the trust was duly represented in terms of letters of authority issued by the Master, by three (3) trustees, represented by the First Respondent on the occasion of signature of the FNB mortgage

redemption agreement, duly authorised thereto;

10 6.5 On or about 28 May 2014 the trust represented by its trustees, founder and beneficiaries, entered into an addendum to the trust deed, a copy of which is annexed hereto marked Annexure “KJC30”;

10.6.6 In the said addendum to the trust deed, the trustees as aforesaid, Ms FB Vorster, the First Respondent and Mr Daniel Rothman, signed the addendum to the trust deed in their capacity as the serving trustees of the trust;

10.6.7 The Applicant and the Respondent entered into a short term direct working capital credit facility on 20 August 2015. The three (3) trustees referred to above were represented by the First Respondent duly authorised thereto, when the agreement was entered into and signed by the First Respondent on 22 August 2015 (Annexure “KJC9”);

10.6.8 On 9 October 2015 the Master issued new letters of authority in favour of the First Respondent, Mr Daniel Rothman and Ms Johanna Petronella Grobler, who replaced Ms Frederika Berdina Vorster as a trustee. A copy of the letters of authority is annexed hereto marked Annexure “KJC31”;

10.6.9 On 17 March 2017 the services of Ms JP Grobler as trustee was terminated by the trust beneficiaries at the meeting held on that date. The minutes of the meeting is annexed hereto marked Annexure “KJC32”. At the same meeting Ms Nelmarie Grundlingh was appointed as the third trustee, replacing Ms JP Grobler;

10.6.10 On 11 May 2017 the accountant Mr Daniel Rothman confirmed that from 27 March 2017 the trustees then appointed in terms of the amendment were the First Respondent, Mr D Rothman personally and Ms N Grundlingh. A copy of his letter confirming this position is annexed hereto marked Annexure “KJC33”;

10.6.11 As set out in the founding affidavit since the 11th of May 2017, Ms Nelmarie Grundlingh and Mr Daniel Rothman resigned as trustees and the documents annexed to the founding affidavit were prepared for the appointment of the Second and Third Respondents as trustees, together with the First Respondent in terms of the minutes of the meeting of trustees, held at Rustenburg on 22 March 2018. For the sake of completeness and for ease of reference, a full set of the documents that served before the meeting of trustees on 22 March 2018, are annexed hereto marked Annexure “KJC34”;

[29] It is therefore clear from these facts that there were three Trustees at the time the agreements were concluded including the surety agreement. In the premises, further and pursuant to the Trust being a juristic person as defined in the National Credit Act, none of the provisions of the said Act were of application at the time when the respective credit agreements were entered into between the applicant and the Trust.

[30] The Trust deed also provided that during the period when there are less than three (3) Trustees appointed, the remaining Trustee or Trustees will exercise all powers and authority on behalf of the Trust. This has also been demonstrated by the fact that when the resolution attached to this application appointing the new Trustees and changing the domicilium citandi was taken, only one Trustee, the first respondent, was present in the meeting. We did not hear any arguments from the respondents, challenging the validity of the resolution because of one Trustee signing the resolution. The respondents cannot therefore approbate and reprobate at the same time. In the premises there is no merit in the arguments pursued on behalf of the respondents in respect of the two Points in Limine.

Merits

- [31] The respondents failed to raise any defense against the applicant's application and chose only to raise Points in Limine. I am satisfied that the applicant made out a case for all its claims as prayed for in its founding affidavit. The applicant is therefore entitled to an Order as set out in the notice of motion as amended only as far as the first and fourth respondents are concerned. These are the reasons why judgment was granted against the Trust represented by the first respondent and against the fourth respondent, jointly and severally, the one paying the other to be absolved.
- [32] The costs of suit was granted on the scale of an attorney and own client as it has been agreed to by the parties in terms of all the agreements signed.
- [33] Advocate Maree requested the Court to grant the costs in favour of the second and third respondents even if the Court rules against the Points in Limine raised because according to him, they were successful in their arguments that they have not yet been appointed. As already

indicated earlier, the applicant was within the law to cite them as a precautionary measure, and therefore cannot be penalized for this stance. At any rate, the second and third respondents only filed a notice of intention to oppose, they did not file any further papers. The opposing affidavit filed by the first respondent was clearly worded and it refers to the deponent of the said affidavit being, the first and fourth respondents only. As to how they can claim the costs baffles one's mind as they are clearly not before this Court. The affidavit was not worded to give an impression that it was on their behalf as well. They did not even file a notice in terms of Rule 6 (5) (d) (iii) of the Uniform Rules of Court that they will raise a point of Law.

- [35] The above are the reasons why the Order on the 25 October 2018 was granted.

A.M. KGOELE

JUDGE OF THE HIGH COURT

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