

SOUTH AFRICA / JUDGMENT

KTS General Trading CC v Madibeng Local Municipality and Others (UM 212/2023)

[2023] ZANWHC 225 (1 December 2023)

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COURT

North West High Court, Mafikeng

BEFORE

A Reddy

CASE / FILE NUMBER

UM 212/2023

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Policy

IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION –

MAHIKENG

CASE NO: UM 212/2023

Reportable:

YES/NO

Circulate to Judges:

YES/NO

Circulate to

Magistrates:	YES/NO Circulate to Regional Magistrates: YES/NO KTS GENERAL TRADING CC APPLICANT AND MADIBENG LOCAL MUNICIPALITY FIRST RESPONDENT TRIOTIC PROTECTION SERVICES (PTY) LTD SECOND RESPONDENT HWIBIDU GROUP (PTY) LTD THIRD RESPONDENT MOKGANYA SUPPLY AND PROJECTS CC FOURTH RESPONDENT MTUNGWA TLASEGO PROJECTS MAGAYENE JV FIFTH RESPONDENT
Summary:	Territorial jurisdiction of the North West Division of the High Court- the application of section 21 of the Superior Courts Act 10 of 2013- the common law principle of effectiveness-the reiteration of Brits falling within the territorial jurisdiction of the Gauteng North Division of the High Court- costs de bonis propriis- only ordered in exceptional circumstances- attorney and client costs-when appropriate- point in limine- lack of jurisdiction upheld- the application is dismissed with costs on an attorney client scale. ORDER The point in limine is upheld. The application is dismissed with costs on an attorney client scale.

JUDGMENT

REDDY AJ

Introduction

- [1] On or about 23 June 2023 the first respondent advertised four (4) public tenders in the Business World (a local publication) and local notice boards for the provision of physical guarding services at its buildings and premises for four clusters for a period of 36 months. The applicant amongst others submitted bids for these tenders.
- [2] Pursuant to discovering that its bid was unresponsive the applicant approached this Court on extreme urgency, contending that its unresponsive bid suffered from a procurement process which was marred by various procedural and substantive irregularities. Resultantly, the applicant seeks interim relief, interdicting the implementation of responsive bids pending an application to review the appointment of same and the setting aside thereof.
- [3] Afore the adjudication of the merits of the application, a point in limine of jurisdiction was raised by Mr Louw for the second respondent, which Mr Chwaro for the first respondent dovetailed.
- [4] As the question of jurisdiction may be dispositive of this application, it was agreed that this crisp legal point be disposed of in an insulated enquiry. What follows is a proper description of the parties which will facilitate the ease of reading.

The Parties

- [5] The applicant is KTS General Trader CC, a business entity and closed corporation duly registered and incorporated in terms of the laws of South Africa with its principal place of business at Van Heerden, Office No.1, Mokopane Limpopo Province. The applicant's branch office is in Brits and is situated at No.1[...] S[...] Avenue, Brits, North West Province.
- [6] The first respondent is the Madibeng Local Municipality, a municipality as contemplated in section 2 of the Local Government Municipal Systems Act 32 of 2000, as amended, with its principal place of business at the Civic Centre, 5[...] V[...] Street Brits, North West Province.
- [7] The second respondent is Triotic Protection Services (Pty) Ltd, a private company duly registered in terms of the company laws of the Republic of South Africa, with its principal place of business at 1[...] D[...] Road, Arcadia, Pretoria, Gauteng.
- [8] The third respondent is Hwibidu Group (Pty) Ltd, a private company duly registered in terms of the company laws, with its principal place of business at 7[...] V[...] Street, Kempton Park, Gauteng.

- [9] The fourth respondent Mokganya Supply Chain Projects CC, a Closed Corporation duly registered and incorporated as such, with its principal place of business at Plot 3[...] D[...] - K[...], Brits, North West Province.
- [10] The fifth respondent is Mtungwa Tlasego Projects Magayene JV, a joint venture between Mtungwa Tlasego Projects and Security (Pty) Ltd, a private company duly incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business at Shop No.[...] JR Trust Building, 3[...] V[...] D[...] Street, Brits, North West Province.
- [11] The first and second respondents are opposed to the main relief, but as alluded to, have raised a legal point of jurisdiction. The third, fourth and fifth respondents have not entered the fray.

The point in limine

- [12] On the vexed issue of jurisdiction, Mr Spingveldt contends that this Court is seized with jurisdiction by virtue of the first respondent's principal place of business being located within the territorial jurisdiction of this Court. Further thereto, the services to be rendered in terms of the public tender, which is the fulcrum of this urgent application is to be performed and rendered within the territorial jurisdiction of this Court.
- [13] Mr Springveldt avowed that if the second respondent asserts that the Gauteng Division of the High Court has concurrent jurisdiction to hear the matter, it therefore inadvertently admits that the Mahikeng High Court has jurisdiction to hear the present matter. Mr Springveldt further expressed that it could not be the intention of the legislature that a provincial High Court would not have jurisdiction over the entire province, in light of Section 21 of the Superior Courts Act 10 of 2013(" the SCA").
- [14] Mr Louw expressed the view that on 15 January 2016, in Government Notice 39601, the Minister of Justice and Correctional Services ("the Minister") determined that the district of Madibeng shall fall under the area of jurisdiction of the Gauteng Division High Court.
- [15] The Minister on 31 March 2017, in Government Notice 40753, published an intention to excise the district of Madibeng into the geographical jurisdiction of the North West Division of the High Court. To this end public comments were invited. On 29 March 2018, in Government Notice 41552, the Minister omitted to excise the district of Madibeng as part of the geographical jurisdiction of the North West Division of the High Court. To bolster this contention that this Court is not seized with jurisdiction, Mr Louw relied on *Go Touch Down Resort-Season CC and Another v Farm Rural Informal Dwellers Association and Another* 2022 JDR 0203(GP) and *South African Legal Practice Council v Mabuse* 2023 JDR 0667(GP).
- [16] Mr Chwaro echoed the contentions of Mr Louw and referred to relevant authority to underpin his submissions.

- [17] In addressing the issue of costs, Mr Louw and Mr Chwaro accentuated that the applicant should be saddled with costs de bonis propriis, alternatively costs on an attorney client scale due the applicant being forewarned of the clear lack of jurisdiction of this Court to entertain this application. Notwithstanding same, the applicant forged ahead. At the hand of the applicant, this Court should show its displeasure by the applicant's persistence to proceed in this territorial jurisdiction well knowing that the North West Division of the High Court does not have territorial jurisdiction is simply disingenuous.

The law

- [18] In its simplest form, jurisdiction is the power vested in a court to adjudicate upon, determine and dispose of a matter. (See: *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA) at paragraph [6]). This power is territorial. It axiomatically follows that this territorial power does not extend beyond the boundaries of, or over subjects or subject-matter not associated with the Court's ordained territory. (See: *Ewing MacDonald & Co Ltd v M & M Products Co* 1991(1) SA 252 (A) at 256G-H).
- [19] The territorial jurisdiction of the High Courts are predicated on inter alia, the Constitution of the Republic of South Africa Act, 108 of 1996, the High Court's inherent jurisdiction, the common law, with the pivotal legislation being in the form of the Superior Courts Act 10 of 2013(" the Superior Courts Act”). These primary sources are by no means a closed category. Section 21 of the Superior Courts Act, materially mirrors its predecessor, s 19(1) of the Supreme Court Act 59 of 1959. Section 21 of the Superior Courts Act, the primary legislation reads as follows:

"21. Persons over whom and matters in relation to which Divisions have jurisdiction.

- (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable

within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power—

- (2) A 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."
- [20] Extracting the core of section 21(1) of the Superior Courts Act, it provides that a division of the High Court has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance. (See: *Gulf Oil Corporation v Rembrant Fabrikante en Handelaars (Edms) Bpk v Braun Woodworking Machinery (Pty) Ltd* 1991(1) SA 482(A) at 486 H-J).

- [21] At the heart of the common law, the doctrine of effectives is the principle of jurisdiction. A judgment would be ineffective if it would yield an empty result. Effectiveness is the basis of a court's jurisdiction.

Analysis

- [22] Self-evidently, the litigation life of the urgent application is centred on whether there is a cause of action for the relief sought. This by no means should be interpreted to mean that a bad case cannot be aerated in a court. The merits of such an application is a discussion for another day.
- [23] In *Makhanya v University of Zululand*, [2009] ZASCA 69; 2010
- (1) SA 62 (SCA); the Supreme Court of Appeal reaffirmed the position that litigants have a choice of fora in which to bring their claims, Nugent JA said:
- "Some surprise was expressed in Chirwa at the notion that a plaintiff might formulate his or her claim in different ways and thereby bring it before a forum of his or her choice but that surprise seems to me to be misplaced. A plaintiff might indeed formulate a claim in whatever way he or she chooses – though it might end up that the claim is bad. But if a claim, as formulated by the claimant, is enforceable in a particular court, then the plaintiff is entitled to bring it before that court. And if there are two courts before which it might be brought then that should not evoke surprise, because that is the nature of concurrent jurisdiction. It might be that the claim, as formulated, is a bad claim, and it will be dismissed for that reason, but that is another matter."*
- [24] It axiomatically follows that an application would then engage the judicial discretion of a competent court, if it adhered to the strict requirements as defined in section 21 of the Superior Courts Act. The territorial jurisdiction of each division of the High Court is to be exercised within its territory. A court can only be said to have jurisdiction in a matter if it has the power not only of taking cognisance of the suit but also of giving effect to its judgment.
- [25] The issue of jurisdiction is important on two scores firstly, to the applicant to determine which court should its application be addressed to; and secondly, equally important for the court itself since it forms the basis for the court's power to grant or to refuse the relief sought.
- [26] It is beyond question that the applicant's principal place of business is not within the territorial jurisdiction of this Court. This is restated by the applicant's factual concession that applicant's principal place of business falls within the Limpopo Province.
- [27] As a second string to its jurisdictional bow, the applicant asserts that the applicant has a branch office situated at No. 1[...] S[...] Avenue Brits, North West Province. To support this postulation, reference is made to annex "CK2." Annex CK2, cites the registered address of the applicant as 1[...]th Street, K[...], P[...], 0612. Mokopane, previously known as Potgietersrus, is a town in the Limpopo Province. It is probably for these reasons that the

applicant does not rely on the applicant's branch office address to find territorial jurisdiction within this Court. At any rate, the applicant being a close corporation would have to adhere to the principle of dual jurisdiction, as a close corporation is deemed to be resident at its registered office or principal place of business. See: *Bisonboard Ltd v K Braun Wood working Machinery (Pty) Ltd* 1991(1) SA 482(A).

[28] Curiously the applicant implies that the jurisdiction of this Court is engaged as the first respondent's

principal place of business is located within the jurisdiction of this Court. The address provided by the first applicant that ought to adhere to the dual principle of jurisdiction does not fall within the territorial jurisdiction of this Court. This then is the end of this enquiry. The contention that the Gauteng Division of the High Court and this division have concurrent jurisdiction is misplaced.

[29] The fact that services are been rendered within this territorial area is of no moment. Jurisdiction is not founded on where services are to be rendered. This much is clear from the wording of the primary legislation evinced in section 21 of the Superior Courts Act.

[31] In *Go Touch Down Resort-Season CC and Another v Rural Informal Dwellers Association and Another* 2022 JDR 0203(GP), with reference to *Madibeng* held at paragraph 12.1 that:

"On that basis, the Gauteng Division, Pretoria has jurisdiction over this matter." Further, in South African Legal Practice Council v Mabuse 2023 JDR 0667(GP), the following was stated as regards *Madibeng*:

"Respondent took issue with the Court's jurisdiction, alleging that Mabopane, where his office is situated falls within the jurisdiction of the North West Division of the High Court. That is factually incorrect. Ga-Rankuwa, within which Mapopane is situated, falls under the Magisterial District of Madibeng, and save for the Ga-Rankuwa sub-district of Tlokwe, the remaining part of Madibeng falls under the jurisdiction of this Court."

[32] The Report of the Rationalisation of Areas under the Jurisdiction of the Divisions of the High Court of South Africa and Judicial Establishments [2023] states as follows:

"418. The areas under the jurisdiction of the North West Division were in 2018 determined by the Minister through a notice in the government gazette. The notice indicated that the North West Division has its main seat in Mahikeng and exercises jurisdiction over the province of the North West except for the Madibeng magisterial district."

[33] The magisterial districts are Ditsobotla, Kagisano -Molopo, Mahikeng, Mamusa, Moretele, Tuang, Matlosana, Ventersdorp, Naledi, Tswaing, Koster, Lekwa-Teemane, Maquassi Hills, Moses Kotane, Ramotshere Moila, Rustenburg, Tlokwe. In government notice 30 published in Government Gazette 39601 dated 16 January 2016, provides that the Madibeng magisterial district falls under the Gauteng Division, excluding Ga-Rankuwa. Brits falling under Madibeng clearly is within the territory of the Gauteng Division.

[34] The Constitution, evinces that the Republic of South Africa is one sovereign, democratic state predicated on constitutional values and principles including the supremacy of the Constitution and the rule of law. See section 1(c). A synergy between the rule of law and the provision that everyone has the right to have any dispute resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum is peremptory. See section 34 of the Constitution. Access to justice and the application of the rule of law requires the proper application of section 21 of the Superior Courts Act, to promote legal order in the court process and effective orders. It is unarguable that access to justice is not deprecated by strict compliance with the principle of jurisdiction. For all that, access to justice by its very nature imports effective

orders.

[35] The applicant has undoubtedly engaged the incorrect court. In the premises, the point in limine must be upheld.

Costs

[36] In *Ferreira v Levin NO and Others* 1996 [2] SA 621 CC at 624 B-C par [3] it was held that the award of costs, unless expressly otherwise enacted, is in the discretion of the court. The general principles of awarding costs *de bonis propriis* are trite. In *SA Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board and Others*, 2009

(1) SA 565 (CC) at paragraph [54], the Constitutional Court said the following:

“an order of costs de bonis propriis is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy.”

[37] In *Multi-Links Telecommunications Limited v Africa Prepaid Services Nigeria Limited* 2013

(4) ALL SA 346 GNP at paragraph [34], the following was said:

“Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket. The obvious policy consideration underlying the court's reluctance to order costs against the legal representative personally, is that attorneys and counsel are expected to pursue their client's rights and interest fearlessly and vigorously without due regard for their personal convenience. In that context, they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal Practitioners must present their case fearlessly and vigorously, but always within the context of a set ethical rules, that pertain to them, and which are aimed at preventing practitioners from becoming party to deception of the court. It is in this context that society and the courts and professions demand absolute personal integrity and scrupulous honesty of each practitioner.”

[38] In elucidating appropriate circumstances for the consideration of costs on an attorney and client scale, the following was stated in *Re Alluvial Creek Ltd* 1929 CPD 532 at 535 stated that:

“an order is asked for that he pay the cost as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the court considers should be punished, malice/ misleading the court and things like that but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious/ and by vexatious I mean where they have the effect of being vexatious/ although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright and a most firm belief in the justice of the cause/ and yet his proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear.”

[39] A court is enjoined with a discretion in appropriate circumstances to award costs on a punitive scale including costs *de bonis propriis*. The latter orders will not be easily granted. It goes without saying that punitive costs *de bonis propriis* will only be granted in exceptional circumstances. The criterion to be used is *inter alia* misconduct of any sort or recklessness. The applicant had been forewarned that the respondents were being dragged to the incorrect forum. This convivial notification was blatantly ignored. I am of the view that a punitive costs order is warranted.

[40] Resultantly, I make the following order:

Order

- (i) The point in limine is upheld.
- (ii) The application is dismissed with costs on an attorney and client scale.

A REDDY

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES:

Counsel For Applicant Adv PW Springveldt Attorneys For Applicant Moshidi Attorneys 2280 Molebatsi Street Unit 1, Mmabatho Counsel For 1st Respondent Adv Adv O Chwaro Counsel For 2nd Respondent Adv Louw Attorneys for Respondent Labuschagne Attorneys 19 Constantia Riviera Park, Mafikeng Date Of Hearing: 17 November 2023 Date Of Judgment: 1 December 2023

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