

SOUTH AFRICA / JUDGMENT

Moosa N.O. and Others v Moosa and Others (A146/13) [2014] ZAGPPHC 796 (18 September 2014)

[2014] ZAGPPHC 796

COURT

North Gauteng High Court, Pretoria

BEFORE

P.M. Mabuse, Windell, M.W. Msimeki

CASE / FILE NUMBER

A146/13

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: A146/13

DATE: 18 September 2014

ABDOOL KADER MOOSA N.O.First Appellant

MAHOMED FEROUSE MOOSA N.O.Second
AppellantFAYYAS MOOSA N.O.Third
AppellantASIF MOOSA N.O.Fourth
Appellant

MOHAMMED FEROUZE MOOSA N.O.Fifth Appellant

FAYYAZ MOOSA N.O.Sixth
AppellantAS!F MOOSA N.O.Seventh
Appellant

V

SHAUKAT ALLI MOOSA.....First
Respondent

OSMAN ABDUL LATIF DADA.....Second
Respondent

RANAVAV (PTY) LTD.....Third
Respondent

JUDGMENT

MABUSE J:

[1] In a written judgment handed down on 13 November 2012 my brother Phatudi J upheld a special plea of jurisdiction. The first Respondent (the first defendant in the trial court), had raised a special plea of jurisdiction against the action instituted against him by, among others, the fourth to seventh Appellants (the Plaintiffs in the trial court). The learned Judge struck from the roll the Appellants' action with costs. This is therefore an appeal against the said order, leave so to appeal having been granted by the court a quo on 30 November 2012.

[2] For purposes of convenience I will refer to the Appellants as the Plaintiffs and to the Respondent as the First Defendant. According to the written judgment of the Court a quo, right at the initial stages of the trial, counsel for the all the Plaintiffs informed the court that first, second and third Plaintiffs, in their capacities as the trustees of Sikander Amod Hassam Family Trust, had resolved their disputes and for that reason they withdrew their claims against the First Defendant. Counsel informed the Court furthermore that the rest of the plaintiffs, who were trustees of Abdool Kader Moosa Family Trust No, IT5933/82/PMB ("the Abdool Kader Trust") would pursue their claims

against the defendants. Accordingly we propose to deal with this appeal to the extent that it relates to the case of the fourth,

fifth, sixth and seventh Plaintiffs against the First Defendant only.

[3] 3.1 The Fourth, Fifth, Sixth and Seventh Plaintiffs are all adult businessmen who have chosen their attorneys address, Sixth Floor, Byron Place corner Schubart and Skinner Streets, Pretoria, for purposes of the action. For purposes of convenience they will collectively be referred to as the Plaintiffs. They sued in the Court a quo in their capacities as trustees of the Abdool Kader Trust.

3.2 The First Defendant is an adult businessman and a director of companies who resides at 17 O[...] Road, M[...] R[...], Pietermaritzburg, in the Province of KwaZulu- Natal.

3.3 The Second Defendant is an adult businessman of 73 J[...] Street, P[...], in the Province of Limpopo.

3.4 The Third Defendant is a company duly registered in terms of the company statutes of this country with its registered offices situated at 29A Biccard Street, Polokwane, also in the Province of Limpopo.

3.5 The orders that the Plaintiffs sought in the Court a quo were directed against the First and Third Defendants only.

[4] At the heart of the appeal is the question whether the court a quo was correct in finding that it had no jurisdiction to entertain the matter that was before it or whether it was correct in upholding the First Defendant's plea of lack of jurisdiction against the Plaintiffs' action.

[5] In order to fully grasp the issues that the court a quo grappled with at the hearing of the matter and to explain the provenance of the First Defendants' special plea; it is only apposite at this stage to set out the facts of the matter as the Plaintiffs had done in their particulars of claim. In the combined summons issued by the Registrar of this Court on 9 June 2009, the Plaintiffs had sought the following prayers against the First Defendant and the Third Defendant:

"4. A declaratory order that the Abdoo/ Kader Moosa Family Trust No. IT5933/82/PMB is the owner of one share of the issued share capital and 10% of the loan account registered in the name of the First Defendant in the Third Defendant.

5. That the First Defendant be directed to transfer one share and 10% of the loan account which is registered in his name in the Third Defendant into the name of the Abdool Kader Moosa Family Trust.

6. The Third Defendant is directed to record the true state of affairs in terms of paragraphs 4 and 5 above.

7. No order as to costs is sought unless the First Defendant opposes this action in which event the Plaintiffs will seek costs against the First Defendant on attorney and client scale, alternatively party and party scale."

[6] The following are the reasons why the Plaintiffs sought the relief set out paragraph 5 supra. The Third Defendant is a property holding company with a commercial centre at Polokwane in the Province of Limpopo. The Third Defendant

has issued a share capital of 40 shares. Of these 40 shares the Second Defendant holds one half or 50% of the issued share capital.

The First Defendant is the registered holder of ten shares and 50% of the loan account in the Third Defendant as monies owed to the First Defendant.

[7] The Abdool Kader Trust is the lawful and true owner of one of the shares registered in the name of the First Defendant in the Third Defendant and is the true beneficiary of 10% of the loan account recorded as owing to the First Defendant in the books of account of the Third Defendant.

[8] It was alleged by the Plaintiffs that the First Defendant is the nominee of the Abdool Kader Trust in respect of one share of the issued share capital registered in the name of the First Defendant in the Third Defendant. It further alleged that the said trust is the true owner of 10% of the value of the loan account recorded in the Third Defendant as owed to the First Defendant. In the books of account of the Third Defendant the First Defendant appears as the creditor of the Third Defendant.

[9] During April 1991 and at Shop 17 Shalwa Centre, Old Man's Road, Pietermaritzburg, the Plaintiffs, who were at all material times represented by A Osman and R Osman, and the First Defendant who was at all relevant times acting personally, concluded an oral agreement in terms of which the First Defendant agreed to:

9.1 hold as nominee one share of the issued share capital in the name of Abdool Kader Trust;

9.2 hold as nominee 10% of the value of the loan account for and on behalf of Abdool Kader Trust.

[10] The Plaintiffs alleged further that the First Defendant had expressly, alternatively impliedly, further alternatively tacitly agreed to retransfer the shares and the loan account to the trustees of Abdool Kader Trust on demand and for no value. According to the Plaintiff's in terms of the provisions of s. 115 of the Companies Act 61 of 1973, the Court may, on application by the person concerned or the company or a member of the company, order the company to rectify the share register of the company if the name of any person is, without sufficient cause, entered in or omitted from the register of members of the company or default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member. The Plaintiffs alleged that time had arrived for them to assert their aforementioned rights.

[11] The Plaintiffs alleged in their particulars of claim that the Articles of Association of the Third Defendant did not prohibit the abovementioned transaction. They also did not prohibit the Plaintiffs from asserting their statutory and contractual rights. These are all the facts placed before the Court a quo for the order sought.

[12] The First Defendant raised three special pleas namely a lack of jurisdiction; prescription against the Plaintiffs' claim; and non-joinder. Counsel for the Plaintiff who informed the Court a quo that he only had been briefed on the special plea of jurisdiction, applied to the Court for a separation of the special plea of jurisdiction from the other special pleas and the merits in terms of Rule 33(4) of the Uniform Rules of Court. The application was duly granted. The Court ordered that, pending the results of the special plea, other issues in the main application, which included the other two special pleas, be postponed sine die. For the purposes of this appeal we will confine our attention to the special plea of lack of jurisdiction. In raising the special plea of jurisdiction or lack of it, the First Defendant pleaded that on the facts pleaded in the particulars of claim, the First Defendant was resident in Pietermaritzburg and the alleged oral agreement was concluded in Pietermaritzburg, both in Kwazulu Natal.

- [13] The Court a quo, finding that a party against whom substantial portion of the relief was sought did not reside within the area of jurisdiction of this Court, upheld the special plea. The Court a quo also made a finding that it could not find jurisdiction in the matter by virtue of the Third Defendant against whom no relief was sought. It was reluctant to presume that the shares and register were in the custody of the auditors in Polokwane.
- [14] In its judgment the Court a quo referred to the provisions of s. 19(1) (a) of the Supreme Court Act 59 of 1959 ("the Act"), (now section 21 of the Supreme Courts Act 10 of 2013) ("the new Act"), and stated that they did not favour the Plaintiffs. The said section provided as follows that:

"(a) A provincial or local division shall have 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 shall, subject to the provisions of subsection (2), in addition to any powers or jurisdiction which may be vested in it by law, have to power to-

(i).....

(ii).....

(iii).....

The words "provincial or local" in the old Act have in the new Act been replaced by the word "Division".

- [15] Reference was also made to *Mossgas (Pty) Ltd v Escom and Others* 1995 (3) SA 156 (WLD) ("Mossgas"). This is the authority on which counsel for the Plaintiffs relied when he submitted that s 19(1)
- (b) extended jurisdiction of the Courts in regards to persons outside its ordinary jurisdiction. He had submitted furthermore that once a provincial or local division had jurisdiction in an action or proceedings s 19(1)
- (b) could be invoked to join in that cause the Defendant who resides outside the area of jurisdiction of that provincial or local division. This was what the Court stated in the Mossgas authority. Fine AJ put it this way at page 157E-G;

"The difficulty which would arise when defendants who are liable to a plaintiff on the same cause action and are resident in different jurisdictions is thus averted by the enactment and proper application of this section. There is in my view no basis for limiting its application and the only limitations to its applicability are those to be found in the subsections.

Once the Local or Provincial Division has jurisdiction in the action or legal proceedings s 19 (1)

- (b) can be invoked to join to that cause a defendant not resident within the area of jurisdiction of that Court provided, of course, that the other requirements for joinder and the jurisdictional requisites are present."

[16] About s 19(1)

- (b) the Court stated in *Mossgas* at page 157 C-E that:

"... it was enacted to extend the territorial jurisdiction of a Local or Provincial Division over parties not ordinarily susceptible to the Court's jurisdiction where it was sought to join such party to a cause over which that Local or Provincial Division had jurisdiction. By 'cause' is meant an action or legal proceedings, not cause of action. (See *Spier Estate v Die Bergkelder Bpk and Another* 1988(1) SA 94 (C) at 100 B.) The aim and purpose of s. 19(1) (b) was to avoid a multiplicity of actions with all the inconvenience and expense that that would involve and to avoid conflicting judgments in the same cause of action. See *Majola v Santam Insurance Company Ltd and Others* 1976(1) SA 874(E) at 876 H and 877"

- [17] It was imperative for the Plaintiffs to allege in the summons, and in Court prove, all the instances which are necessary to establish that this Court had jurisdiction in the matter and over the Defendants. It was not required of the Plaintiffs to make any specific allegations that this Court has jurisdiction. It was enough for the Plaintiffs to set out underlying facts that establish jurisdiction. Any of the Defendants who pleaded that the court did not have jurisdiction would have to raise it by way of a special plea, as the First Defendant has done so in the current matter. The manner in which the Defendants have raised their special plea is, however, somewhat flawed. It is correct that the First Defendant resides in Pietermaritzburg and furthermore that the oral agreement was concluded in Pietermaritzburg. In the circumstances, in terms of s. 19(1) (a) of the Act the Provincial or Local Division in KwaZulu Natal, and not this Provincial Division, would ordinarily have jurisdiction. The flaw in the First Defendant's special plea lies in the fact that he merely looked at his position, isolated it and, relying on his residence and the place of conclusion of the agreement, concluded without further ado, that the Court had no jurisdiction. He failed to consider other crucial factors that normally or statutorily confer jurisdiction on a court such as set out in s 19 (1) (b) of the Act.

- [18] The Third Defendant is a company registered as such in terms of the company statutes of this country and has its registered office at 29A Biccard Street, Polokwane, within the area of jurisdiction of this Court. In the action in the Court a quo the Plaintiffs sought against the Third Defendant and order in terms of s 115 of Act 61 of 1973 ("the old Companies Act"). In paragraph [10] supra, I set out the contents of the said s 115, Counsel for the Plaintiffs argued that s115 is a self-standing cause of action as contemplated in s. 19(1) of the Act. Accordingly the Plaintiffs were entitled to initiate their application for the rectification of the company's share register in this Division because the company's registered office is situated within its area of jurisdiction. Mr Politis, counsel for the First Defendant, conceded that once the Court accepted that s 115 was applicable, the First Defendant had no leg to stand

on. We were thankful to Mr Politis for this concession because it went a long way towards assisting us to deal very quickly with this appeal.

[19] The principle of our law is that where more than one Court have jurisdiction in the matter or in a particular matter, the Plaintiff,

as dominus litis, has the right to choose the Court in which to institute his action. See *Marth NO v Collier and Another* 1996 (3) All SA 506 (C). Section 19(1)

(b) also conferred jurisdiction on a Court over any person residing or being outside its area of jurisdiction and who is joined as a party to any cause in relation to which such Court has jurisdiction. This is clear from s19 (1) (b) which provides as follows:

"(b) A provincial or local division shall also have 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 provisional or local division has jurisdiction or who in terms of the 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 area of the other provincial or local division."

[20] This Court therefore has, in terms of s 19(1)(b) of the Act, jurisdiction over the First Defendant notwithstanding the fact that he resides in Kwazulu Natal and furthermore notwithstanding the fact that the oral agreement in question was concluded in Kwazulu Natal. This Court's jurisdiction over the First Defendant arises from the fact that the First Defendant has been joined as a party or is a party to the action or legal proceeding that the plaintiffs initiated in this Court in a cause of action or in a particular matter over which this Court has jurisdiction. The Plaintiffs sought against the Third Defendant an order that the Third Defendant be directed, in terms of s 115 of the Old Companies Act, to rectify the share register. By virtue of this prayer the Court rightfully became seized with the case or the Plaintiffs' application. This case or the Plaintiffs' application is then the 'cause' referred to in the *Mossgas* case, which I apply in this appeal. We are unanimous in our view that considering the provisions of s 19 (1) (b) of the Act the Court a quo should have found that it had jurisdiction in the matter and should accordingly have dismissed the First Defendant's special plea.

[21] I do not find it necessary to refer to the other factors, such as the location of the shares and the share register, in order to determine whether the court a quo should have found whether it could entertain the matter. For the purposes of this judgment reference to s 19 (1) (b) is sufficient. We are unanimous in our view that the appeal should succeed.

[22] In the result we make the following order;

[1] The appeal is upheld.

[2] The order of the Court a quo is hereby set aside and in its place is substituted the following:

[2.1] The First Defendant's special plea of jurisdiction is hereby dismissed with costs.

P.M. MABUSE

JUDGE OF THE HIGH COURT

I agree

WINDELL

JUDGE OF THE HIGH COURT

I agree and it is so ordered

M.W.MSIMEKI

Appearances:

Counsel for the appellants: Adv. N A Cassim SC

Instructed by: Abbas Latib & Company

Counsel for the respondents: Adv. A Politis

Instructed by: L ockat & Associates

Date Heard: 3 September 2014

Date of Judgment: 18 September 2014

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Prepared on 11 October 2026 · Esheria