

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Superious Trading 10 CC and Others (50451/2016, 50454/2016,50453/2016) [2017] ZAGPPHC 1205 (1 December 2017) [2017] ZAGPPHC 1205

COURT

North Gauteng High Court, Pretoria

BEFORE

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CASE / FILE NUMBER

50451/2016, 50454/2016,50453/2016

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 50451/2016

1/12/2017

In

the application between: NEDBANK
 LIMITED
 Applicant/Plaintiff
 and
 SUPERIOUS
 TRADING 10 CC
 First Respondent/Defendant
 MARINA
 HOLZHAUZEN
 Second Respondent/Defendant
 PHILLIPES
 RUDOLF HOLZHAUZEN
 Third Respondent/Defendant
 QUANDO
 SIMONI
 JOSE
 Fourth Respondent/Defendant
 RUDNER
 PROPERTIES (PTY) LTD
 Fifth Respondent/Defendant
 PHALABORWA

BRAKE AND CLUTCH CC
Sixth Respondent/Defendant
CASE NO.: 50454/2016
NEDBANK
LIMITED
Applicant/Plaintiff
PHALABORWA
BRAKE AND CLUTCH CC
First Respondent/Defendant
MARINA
HOLZHAUZEN
Second Respondent/Defendant
PHILLIPES
RUDOLF HOLZHAUZEN
Third Respondent/Defendant
SUPERIOUS
TRADING 10 CC
Fourth Respondent/Defendant
RUDNER
PROPERTIES {PTY) LTD
Fifth Respondent/Defendant
CASE
NO.: 50453/2016
NEDBANK
LIMITED
Applicant/Plaintiff
RUDNER
PROPERTIES (PTY) LTD
First Respondent/Defendant
MARINA
HOLZHAUZEN
Second Respondent/Defendant
PHILLIPES
RUDOLF HOLZHAUZEN
Third Respondent/Defendant
SUPERIOUS
TRADING 10 CC
Fourth Respondent/Defendant
PHALABORWA
BRAKE AND CLUTCH CC
Fifth/Respondent/Defendant

JUDGMENT

CONSTANTINIDES AJ:

1. This is an application in terms of the Interim Rationalization of

Jurisdiction of High Courts Act, Act 41 of 2001 (hereinafter referred to as "the Act"), alternatively in terms of Section 27 of the Superior Court's Act, Act 10 of 2013, ("the Superior Court's Act") for an order directing the Applicant to facilitate the transmission of all Court files and/or documents from the Registrar of the Gauteng Division, Pretoria to the Registrar of the Limpopo Provincial Division of the High Court in the matters under case numbers 50451/2016, 50454/2016 and 50453/2016.

2. The Applicant wishes to remove the actions instituted in the Gauteng Division and have them transferred to the Court in the Limpopo Provincial Division.
3. Counsel for the Respondents contended that the Gauteng Division does not have the necessary jurisdiction to adjudicate the present action and therefore does not have the jurisdiction to transfer the matter to another division and seeks an order that the present application be dismissed with costs.
4. It is common cause that the pleadings have already closed in the actions pending in this Court.
5. The Applicants' and Respondents' Counsel provided lengthy arguments as to why this matter should or should not be transferred to the Limpopo Provincial Division of the High Court.
6. In terms of Section 27 of the Superior Courts Act, if any proceedings

have been instituted in a division or at a seat or division and it appears to the Court that such proceedings:

"(a) should have been instituted in another division or at another seat of that division; or

(a) would be more conveniently or more appropriately heard or determined -

(i) at another seat of that Division; or

(ii) by another Division that, 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.

An order for removal under sub-section (i) must be transmitted to the Registrar of the Court to which the removal is ordered, and upon the receipt of such order that Court may hear and determine the proceedings in question."

BACKGROUND

7. The Applicant instituted three actions against the various Defendants under the above case numbers, inter alia, claiming payments of the sums of R290 996.34, R331 992.17 and ancillary relief in respect of a cheque account and overdraft facility in respect of monies lent and advanced and payment of the sum of R1 923 713.73 and ancillary relief.
8. The Respondents served and filed their notice of intention to defend the actions on the 14th July 2016 and the Applicant launched summary judgment applications on the 16th September 2016.
9. In the Affidavits opposing summary judgment, the Respondents stated that:
 - 9.1. this Court has no jurisdiction to hear the matter;
 - 9.2. that the agreement was concluded at the Polokwane Branch of the Applicant;
 - 9.3. the account was to be conducted at the Polokwane Branch of the Applicant;
 - 9.4. performance in respect of the account was to be at Polokwane Branch; and
 - 9.5. the Deed of Surety signed by the Respondents therein and upon which the Applicant bases its claim were
all concluded at the Polokwane Branch of the Applicant; and
 - 9.6. having regard to the aforesaid, these actions ought to have been finalised within the Polokwane Provincial
Division.
10. The Applicant then agreed to grant the Respondents leave to defend the actions.
11. On the 16th November 2016 the Applicant addressed a letter to the Respondents' Attorney requesting that the matter be transferred to the Limpopo
Provincial Division of the High Court. The aforesaid letter is marked "MS1" to the Founding Affidavit in the present application.
12. The Respondents' Attorney responded that he had no instructions to agree to the request by the Applicant to have the matter transferred; and on the 18th November 2016 the Respondents filed a Special Plea and the Plea to the Applicant's action which averments were as follows:

The Respondents are not located or situated within the Court's jurisdiction;

The Agreements have been concluded outside the area of the Court jurisdiction;

Cause of action falls outside this Court's jurisdiction."

13. The Applicants then addressed a further letter to the Respondents' Attorney requesting that the matter be transferred for the sake of convenience to the Limpopo Provincial Division of the High Court.

14. On the 19th January 2017 the Respondents' Attorneys responded and reiterated that they "do not hold instructions" to agree to the matter being transferred to the Limpopo Provincial Division. The relevant passages in the letter (annexure "MS4" to the Founding Affidavit) reads as follows:

"2. Our client does not reside in Pretoria and has never done so. As a result of your client issuing a High Court Summons in the High Court of South Africa (Gauteng Division, Pretoria), our client has of necessity had to appoint attorneys in Pretoria to represent him. As a result, our client has spent an enormous amount of time and money to attend our offices in Pretoria to consult the writer and counsel.

3. The Courts have taken a very dim view on the misuse of jurisdiction as is clear from a recent constitutional court decision, of which no doubt you are aware.

4. It is therefore our instructions that your client should withdraw its action and tender costs before instituting its action in the

Limpopo Provincial division should it wish to do so."

15. The Applicant states that based on the aforesaid and the refusal by the Respondents to grant the Applicant this indulgence, the Applicant has no option but to approach the Court and to seek relief.

16. The Applicant avers that the reasons why it would be convenient to transfer these matters to the Limpopo Provincial Division of the High Court are as follows:

22.1 It would be far more convenient to the Respondents as it will- not be required of them to travel excessive kilometres to attend to consultation and/or Court;

22.2 The witnesses which the Applicant intends calling at the time of the matter proceeding to trial are located within Limpopo and it would be more convenient and less costly for them;

22.3 Even though this Court have concurrent jurisdiction to hear the matter it would be more convenient;

22.4 The Rules of Court are there to assist and facilitate access to Courts rather than to hinder it;

22.5 Will ensure the attaining of justice if the Court is closer to the Respondents and witnesses for both parties herein;

22.6 Will prevent the matter from having to start de nova at great cost to both Applicant and Respondents and will ensure the efficient and effective disposal of the matter is brought about;

17. The parties agree that the pleadings have closed and the matter is ready to proceed to trial.
18. The Counsel for the Applicant conceded in court that it is incorrect that the Gauteng Division has concurrent jurisdiction with the Limpopo Provincial Division.

THE PRESENT DISPUTE

19. The Respondents Counsel in paragraph 8 of the Heads of Argument has stated that:

"[8] SMITH in her Affidavit in support of summary judgment confirmed the Particulars of Claim and, consequently, on oath, made the allegation that the various agreements between the parties provided for payment to occur in Pretoria."

20. The Respondents have argued that it would in fact be "inconvenient" for the present matters to be transferred to another Court as they have already employed Attorneys and Counsel in Pretoria to represent them in the main action. They have stated that in the event of the matter being transferred to the Limpopo Division, this would result in them having to employ new Attorneys and Counsel at great cost or employing a correspondent and having the current Attorneys and Counsel travel to Limpopo at similarly great cost.

21. The Respondents took issue with the fact that the Plaintiffs, despite

having made the allegation that payment is to occur in Pretoria, have not amended their papers. The Applicant's reply to the aforesaid was that the parties can amend their papers at any stage up and until

Judgment.

22. The Respondents' Counsel has repeatedly argued that the Plaintiff is not

prepared to say why they have instituted action in the wrong Court. It was confirmed by the Respondents' Counsel and Attorney that there is no risk of prescription as the amounts that are allegedly due and payable to the Plaintiffs are due in June 2016.

CASE LAW

23. The Honourable Judge DAVIS AJ in the matter of Masemola Taxi Association and Six Others and MEC of Roads and Transport (Limpopo Province) and Another in Case No. 7708/2016 which was reported in the Gauteng Division, Pretoria on the 11h February 2016 summarises the law as follows:

"[7] The jurisdiction of the Limpopo Division of the High Court of South Africa.

7.1 In terms of section 166 of the Constitution of the Republic of South Africa, Act 108 of 1996 ('the Constitution,') the judicial system comprises of the Constitutional Court, the Supreme Court of Appeal, the High Court of South Africa, the Magistrates' Courts and "any court established or recognised in terms of any Act of Parliament" .

7.2 In terms of section 169(2) of the Constitution the High Court of South Africa consists of the Divisions determined by an Act of Parliament which must provide for the establishment of Divisions, with one or more seats in a Division and the assignment of jurisdiction to a Division or a seat within a Division.

7.3 The relevant Act contemplated in the abovementioned section of the Constitution is the Superior Courts Act, No 10 of 2013 which commenced on 23 August 2013 ('the Superior Courts Act?.

5cm; margin-right: 0.04cm; text-indent: -0.95cm; margin-top: 0.41cm; margin-bottom: 0cm; line-height: 150%"> 7.5 Section 6(3)(a) read with section 1 prescribes that the Minister responsible for the administration of justice must, after consultation with the Judicial Service Commission, by notice in the Gazette, determine the area under the jurisdiction of a Division.

7.6 The area under the jurisdiction of a Division may comprise any part of one or more provinces (section 6(3)(b)) and the Minister may similarly establish one or more local seats for a Division and determine the area under the jurisdiction of a local seat.

7.7 The publication of any of the aforementioned notices (which include amendments or withdrawals) does not affect any proceedings which are pending at the time of such publication.

7.8 Transitional provisions are catered for in Chapter 9 of the Superior Courts Act, in terms hereof, section 50(1) prescribed that the Limpopo High Court, Thohoyandou became a local seat of the Limpopo Division and that South Gauteng High Court, Johannesburg became the local seat of the Gauteng Division.

7.9 In addition, section 50(2) prescribe as follows:

'Notwithstanding section 6(1), the Gauteng Division should also function as the Limpopo and Mpumalanga Divisions respectively until a notice published in terms of section 6(3) in respect of those Divisions comes into operation.' (my emphasis)

7.10 For present purposes, it is not necessary to refer to various amendments of the areas of jurisdiction of Divisions preceding the commencement of the Superior Courts Act promulgated from time to time in terms of section 6(1) of the (now repealed) Supreme Court Act 59 of 1959 or section 4 of the Interim Rationalisation of the Jurisdiction of the High Courts Act 41 of 2001 or to the fact that since the second half of 2015, the Limpopo Division had been staffed with a Judge President and a complement of judges.

7.11 The determining fact regarding the issue of jurisdiction raised above, is the fact that on 15 January 2016 the Minister of Justice and Correctional Services and by GN30 published in Government Gazette No 39601 determined the areas of jurisdiction of the Limpopo Division and its local seats. In addition to the already aforementioned established local seat at Thoyandou, the Lephalale Magistrates' Court was also established as a local seat. The magisterial districts and sub-districts constituting the areas of jurisdiction of the Main Seat of the Limpopo Division, Polokwane and the Local Seats were determined in a Schedule to the aforesaid notice.

7.12 The abovementioned determination and establishment came into effect on 25 January 2016.

7.13 The publication of the aforementioned notice therefore terminated the Gauteng Division's functioning as the Limpopo Division as contemplated in the transitional provisions mentioned above.

7.14 For sake of completeness, I mention that on the same date, of publication of the abovementioned notice and also with effect from 25 January 2016, the Minister has created, established, appointed, detached and defined magisterial districts and portions thereof in terms of section 2(1)(a) and (f) of the Magistrates Courts Act, No 32 of 1944 read with section 16(6) of Schedule 6 of the Constitution in respect of Magisterial districts and district courts in the Limpopo Province. (GN 33 also in Government Gazette No 39601)"

24. Since the publication of the Notice under Section 6(3) and 50(2) of the Superior Courts Act the Gauteng Division no longer has concurrent jurisdiction with the Limpopo Division.
25. In the case of *Road Accident Fund v. Rampukar/Road Accident Fund v. Gumede* [2007] SCA 148 (RSA) the Supreme Court of Appeal stated that, Section 3(1)(a) of Act 41 of 2001 jurisdiction under Section 19 of Supreme Court Act, 59 of 1959 on part of transferring Court is not a requirement and the operation of the section is not limited to areas affected by change of jurisdiction under Section 2 of the Act.
26. The aforesaid two appeals were heard together because the issues they raised were substantially the same. This is similar to the present matter where the issues which are raised in all three matters are substantially

the same.

27. The aforesaid matters turn on the interpretation of Section 3(1)(a) of the Interim

Rationalisation of Jurisdiction of High Courts Act, 41 of 2001. Brand JA in the aforesaid case stated the following:

"[1] ...broadly stated for introductory purposes, however, s3(1)(a) affords a High Court the authority to order the removal of civil proceedings instituted in that Court to another High Court if it appears to the former that such proceedings should have been instituted in the latter."

28. In each the aforesaid two matters, the Road Accident Fund raised the special plea that the Court had no jurisdiction, whereupon the Respondents conceded the validity of the special defence. (See: paragraph [2] in the headnote of the aforesaid Judgment)
29. After having conceded that the Johannesburg High Court had no jurisdiction, Mr Rampukar launched an application in that Court, based on Section 3(1)(a) of the Act for an order that his action be transferred to the Pretoria

High Court where the Road Accident Fund has its principal place of business. Despite the Road Accident Fund's opposition, the application was granted by the honourable WILLIS J.

30. In the Rampukar appeal, the Road Accident Fund contended that on a proper interpretation of Section 3(1)(a) of the Act, the Court a quo was not authorised to transfer the proceedings to another High Court.

31. In the Road Accident Fund v. Rampukar; Road Accident Fund v. Gumede, the Supreme Court of Appeal held that:

"Section 3(1)(a) of the (now repealed) Interim Rationalization of High Courts Act, 41 of 2001 was intended to alleviate the predicament of the litigant who mistakenly (and regardless of the reason for the mistake) instituted civil proceedings in the incorrect High Court by granting that High Court the discretion to come to the aid of the litigant and order the removal of those proceedings to the correct High Court. The Court held that Section 3(1)(a) did not bestow the transferring Court with jurisdiction to entertain and decide the main disputes;"

Superior Court Practice, Vol 1 [Original Service, 2015] Second Edition Van Loggerenberg, Vol 1, Juta

Page A-141

32. It was stated that all this Act did was to afford the transferring Court the limited jurisdiction to transfer the matter to the Court with proper jurisdiction under Section 19(1) of the (now repealed) Supreme Court Act 59 of 1959 to determine disputes between the parties.

Page A - 142 (Original service, 2015 - Superior Courts Act, Section 27)

33. Section 27 of the Act according to VAN LOGGERENBERG now:

"Singularly provides for the removal of proceedings from one division of the High Court to another or from one seat to another in the same division of the High Court."

Page A - 142 (Original service, 2015 - Superior Court Practice, Vol 1)

34. BRAND JA in Road AccidentFund v. Rampukar; Road Accident Fund v. Gumede succinctly summarised the situation where a plaintiff had wrongly instituted proceedings in the transferring Court instead of the transferee Court and now seeks a transfer from the former to the latter. It has been submitted that the Court will not likely order the removal of a matter which it is competent to decide. The Applicant for a change of venue must satisfy the transferring Court that the proceedings would be more conveniently or more appropriately heard or determined at the transferee Court. (VAN LOGGERENBERG) .

35. I am satisfied that it will be more convenient for all the parties to have the actions appropriately heard and determined in the Limpopo Provincial Division of the High Court.

36. In the circumstances I make the following order:

1. The pending trial actions instituted out of the Gauteng Division, Pretoria under Case Numbers 50451/2016, 50453/16 and 50454/16 are to be removed from the Gauteng Division, Pretoria and transferred to the Limpopo Provincial Division of the High Court;
2. The Applicant is directed to:
 - 2.1 facilitate the transmission of all court files and/or documents from the Registrar of the Gauteng Division, Pretoria to the Registrar of the Limpopo Provincial Division;
 - 2.2 serve a copy of this order on the Registrar of the Limpopo Provincial Division, within fourteen days of the granting of this order;
3. Costs are reserved for argument before the Limpopo Provincial Division.

H CONSTANTINIDES

Acting Judge of the High Court

Gauteng Division

Pretoria

1 December 2017

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