

SOUTH AFRICA / JUDGMENT

Xpharm (Pty) Ltd v Emoyamed Hospital (Pty) Ltd (36/2023) [2023] ZAFSHC 195 (24 May 2023) [2023] ZAFSHC 195

COURT

Free State High Court, Bloemfontein

BEFORE

Van Rhyn

CASE / FILE NUMBER

36/2023

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 36/2023

In the matter between:

XPHARM (PTY) LTD

Applicant

[REGISTRATION NO: 2020/560236/07]

and

EMOYAMED HOSPITAL (PTY) LTD Respondent

[REG. NO. 2017/225961/07]

CORAM:

VAN RHYN, J

HEARD ON: 20

APRIL 2023

DELIVERED ON: 24

MAY 2023

- [1] This is an application for the provisional winding-up of the respondent on the basis that it is both commercially and factually insolvent and is unable to pay its debts as envisaged in section 344(f) read with section 345(1)(c) of the Companies Act[1] (the “1973 Act”).
- [2] The applicant is XPharm (Pty) Ltd, a private company with limited liability incorporated as such with registered address at 7 F[...] Kl[...] Road, Bloemfontein, Free State Province. The respondent is Emoyamed Hospital (Pty) Ltd a private company with limited liability. The applicant averres that the respondent’s registered address is also at 7 F[...] K[...] Road, Bloemfontein, Free State Province.
- [3] The application for the provisional liquidation was issued on 6 January 2023. A notice of intention to oppose the application was filed on 1 February 2023 and on 2 February 2023 an order was granted in terms whereof the matter was postponed to the opposed roll on 9 March 2023 with specified dates for the filing of further affidavits to be exchanged by the parties. Subsequent to a further postponement to file a substantive application for condonation, the matter eventually came before this court on 20 April 2023.
- [4] At the hearing, Mr Grobler SC, counsel on behalf of the applicant informed the court that an employer of the respondent company has filed an application in terms of the provisions of section 131(1) of the Companies Act[2] (the “2008 Act”) for the respondent to be placed under supervision and for business rescue proceedings to commence. Applicant received notice that the business rescue application was filed the previous day, 19 April 2023, in the Gauteng Division of the High Court, Pretoria.
- [5] The court was therefore requested to determine whether the application for business rescue has the effect of suspending the application for the provisional liquidation of the respondent in accordance with the provisions of section 131(6) of the 2008 Act. Mr Grobler SC contended that the Pretoria High Court does not have jurisdiction to entertain the application for business rescue and that a provisional liquidation order is therefore sought by the applicant. Mr Grobler SC finds support for his argument in *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd & others intervening)*. [3] In *Sibakhulu* the question of jurisdiction under the 2008 Act and the determination of where a company’s principal place of business or principal office is situated and the requirement in section 23 that a company’s registered office be at the place of its principal office came under scrutiny.
- [6] In the *Sibakhulu* matter the salient facts were as follows: The applicant, sought the winding up of the respondent. At the hearing of the matter in the Western Cape Division of the High Court, Cape Town, the effect of an application for an order placing the respondent under supervision for business rescue, not in the Cape Town division, but in the Port Elizabeth High Court had to be decided. Initially the argument advanced by the applicant was that the Port Elizabeth High Court lacked jurisdiction because both the registered office and the principal place of business of the respondent company were situated in Cape Town. It was common cause between the parties that the respondent company’s registered office was in

Cape Town. It was however disputed that the respondent company's principal place of business was also in Cape Town.

- [7] In terms of the 1973 Act any division of the High Court where a company's registered office or its principal place of business is located, would have jurisdiction.[4] More than one court could, as a consequence, have jurisdiction in proceedings where a company was involved. The 2008 Act, which to a large extent repealed the 1973 Act, does not have similar wording to section 12(1) of the latter Act that provides for more than one address.
- [8] In Sibakhulu, Binns-Ward J therefore held that jurisdiction in respect of matters arising under the 2008 Act had to be determined on common-law grounds unless it can be argued that a proper reading of the said Act reflects a different intention. Section 23(3) of the 2008 Act provides as follows:

Each company or external company must-

- (a) continuously maintain at least one office in the Republic; and
 - (b) register the address of its office, or its principal office if it has more than one office-
 - (i) initially in the case of-
 - (aa) a company, by providing the required information on its Notice of Incorporation; or
 - (bb) an external company, by providing the required information when filing its registration in terms of subsection (1); and
 - (ii) subsequently, by filing a notice of change of registered office,
- together with the prescribed fee.

Section 23(4) provides:

A change contemplated in subsection (3)(b)(ii) takes effect as from the later of-

- a) the date, if any, stated in the notice; or
- b) five business days after the date on which the notice was filed.

- [9] In terms of the provisions of section 1 of the 2008 Act, the office registered by the company in terms of section 23 of the Act is its 'registered office' within the meaning of the Act. In Sibakhulu it was held that the determination of where a company's principal place of business or principal office is situated is a

question of fact and that "...notwithstanding the evident intention of the Legislature that a company's legally chosen place of residence should be at the same as its factual place of residence for jurisdictional purposes" it is possible that a company would be legally and factually resident at two places in the event of its registered office not being the same as its principal office.

[5]

- [10] With reference to section 5 (1) which provides that the Act must be interpreted to give effect to the purposes set forth in section 7(k) and (l), Binns-Ward J held that there would be in respect of every company only a single court in South Africa with jurisdiction in respect of winding-up and business rescue matters.[6] The court concluded that the business rescue proceedings have not been competently instituted in the Port Elizabeth High Court on the basis that the company did not have its principal place of business at the address in Port Elizabeth at the time when the business rescue application was instituted.
- [11] Mr Grobler SC, with reference to *Mfwethu Investments CC t/a Recharger Prepaid Meters v Citiq Meter Solutions (Pty) Ltd t/a Citiq Prepaid*[7] contended that, at the time when the application for the provisional liquidation of the respondent was issued, jurisdiction was established and admitted by the respondent. At the time, not only the registered address of the respondent was situated at Frans Kleynhans Road, Bloemfontein, but also the principle place of business, in other words, the hospital where medical services are rendered by the respondent.
- [12] It is common cause that even though the principal office used to be at Frans Kleynhans Road, Bloemfontein it has subsequently been changed to be at Gauteng. Jurisdiction has therefore been established at the time of the commencement of the application for liquidation of the respondent and service thereof upon the respondent[8]. In any event, jurisdiction has been admitted by the respondent in its answering affidavit. Jurisdiction having once been established, continues to exist to the end of the proceedings even though the ground upon which the jurisdiction was established ceases to exist.[9]
- [13] The question is whether the Pretoria High Court lacks jurisdiction in respect of the business rescue application made subsequent to the change of the respondent's principal office being registered in accordance with the provisions of section 23(4) of the 2008 Act.
- [14] The controversy regarding whether a specific court has jurisdiction over a respondent company for the purposes of a winding-up order was considered in *Wild & Marr (Pty) Ltd v Intratrek Properties (Pty) Ltd*[10] by Sutherland J. The controversy arose from the fact that service of the winding-up application was served upon the respondent company at its principal place of business at Johannesburg, which was within the territorial jurisdiction of the court hearing the application. The respondent company's registered address was however situated at Nelspruit.
- [15] The two statutory provision namely section 23(3) of the 2008 Act and section 12 (1) of the 1973 Act were examined and Sutherland J, with reference to the decisions in *Burmeister & Another v Spitskop Village Properties & Others*,[11] *Lonsdale Commercial Corporation v Kimberley West Diamond Mining Corporation*[12] and *Van der Merwe v Duraline (Pty) Ltd*[13] came to the conclusion that the reasoning by Gamble J in *Van der Merwe v Duraline* that "...liquidations of insolvent companies remain, for the time being, the preserve of chapter 14 of the 1973 Act" is to be followed.

[16] Section 23(3) of the 2008 Act requires each company or external company to continuously maintain at least one office and register the address of its office, or its principal office, if it has more than one office in the Republic of South

Africa. The principal office of a company is not necessarily equivalent to its principal place of business. Section 21(1) of the

Superior Courts Act[14] provides as follows:

“A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising ... within its area of jurisdiction and all other matters of which it may according to law take cognisance...”

[17] The meaning of residence must of necessity be different when dealing with juristic persons, inasmuch as such persons cannot be said to ‘reside’ in the conventional sense of the word as natural persons do. The residence of a legal persona such as a company, artificially created, must be a mere notional conception introduced for purposes of jurisdiction and law[15]. In early case law it was held that a corporation, similar to a natural person, could have only one place of residence and that place was its principal place of business.

[18] In *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd*[16] the Appellate Division held that a company can also be regarded as being resident at its registered office. Thus, where the

registered office and principal place of business of a company are at two different places, the company is regarded as having two places of residence and if they are in different jurisdictions then either High Court may assume jurisdiction. In *Sibakhulu* it was held that since commencement of the 2008 Act the only court clothed with jurisdiction to liquidate a company and to adjudicate on business rescue proceedings, is the court in whose area of jurisdiction that company has its ‘principal office’ as contemplated in section 23(3) of the 2008 Companies Act.

[19] In *Lonsdale Commercial Corporation v Kimberley West Diamond Mining Corporation* Lacock J held as follows:

“6.2 A finding that the legislature intended the provisions of section 23(3) of the 2008 Act to be construed “for purposes of jurisdiction” (a phrase repeatedly used by Binns-Ward J in Sibakhulu (supra) is, to my mind, tantamount to a finding that the legislature intended to limit or oust a local and provincial division’s jurisdiction derived from the common law and/or section 29 of the Supreme Court Act in respect of the liquidation and/or business rescue proceedings of a company that “resides” or has its principal place of business within the court’s area of jurisdiction, but not also its registered address. I am not persuaded that the reasons advanced by the learned judge justifies such a drastic limitation of a court’s jurisdiction.”

[20] In *Wild & Marr Sutherland J* disagreed with the reasoning by Lacock J in the *Lonsdale* matter and agreed with the finding by Gamble J in *Van der Merwe v Duraline*. Sutherland J concluded that the thrust of Gamble J’s conclusions is that: “...section 224(3) of the 2008 Act, read with item 9 of schedule 5 to the 2008 Act preserve chapter 14 of the 1973 Act in

operation. In that chapter the “court” referred to must be the “court” as defined in section 1 of the 1973 Act, which in turn is the court referred to in section 12 of the 1973 Act.”[17]

Liquidations of insolvent companies remain, for the time being, the preserve of chapter 14 of the 1973 Act. And further that: “ ... the procedural regime draws on other provisions of the 1973 Act, including section 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 section 23.” [18]

- [21] It is furthermore recognised that a company’s “residence will be determined by the periodic, usual or habitual location of the directing mind of the company”[19]. In the Mfwethu Investments matter, Rogers J (as he then was) reflected upon the ‘residence of a company’ both in respect of the position before the 2008 Act as well as corporate residence in terms of the 2008 Act. With reference to Sibakhulu, Rogers J held as follows:

“The learned judge’s statement, insofar as it concerns jurisdiction in liquidation matters (as distinct from business rescue

proceedings), appears to me to have been obiter, and subsequent decisions have cast doubt on the correctness in that respect. The reasoning in the latter decisions has been based on item 9 of Schedule 5 of the 2008 Act, which has preserved the provisions of 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. (see, eg, Van der Merwe v Duraline (Pty) Ltd

- [2013] ZAWCHC 213; Wild & Marr (Pty) Ltd v Intrartek [2019] ZAGPPHC 613 and decisions discussed therein.) The 2008 Act does not have an equivalent of s 12 of the 1973 Act. It appears that in Sibakhulu Construction Binns-Ward J’s attention was not directed to the possible implications of item 9 of Schedule 5.

It is unnecessary for me to decide whether the obiter dictum in Sibakhulu Construction concerning jurisdiction in liquidation proceedings is right. The ratio of the decision is that, at least in relation to matters entirely governed by the new Act (including business rescue proceedings), a company can have only one place of residence, namely its registered office. Later decisions do not impugn Binns-Ward J’s reasoning in regard to matters wholly governed by the new Act, and it was followed in Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd & others [2014] ZAWCHC 103;

- [2014] 3 All Sa 591 (WCC) para19.” [20]

- [22] In the matter at hand neither party has proffered evidence about where the respondent's company's principal place of business is situated at. In order to know which court is clothed with jurisdiction, at least in respect of the business rescue application is concerned, the parties are better served by treating the registered office as dispositive.[21] The information registered with the CIPC is easily ascertainable as a matter of public record. Similar to the facts in Mfwethu Investments, the respondent's registered office was changed to the address reflected in its current registration. "By law, this is where the company's records, and particularly its financial records, must be located or accessible." [22]
- [23] Accordingly, I am unable to find that the Pretoria High Court lacks jurisdiction in respect of the business rescue application made in terms of the provisions of section 131 of the 2008 Act.
- [24] Mr Snyman SC, counsel on behalf of the respondent submitted that the business rescue application was properly made with the result that section 131(6) of the 2008 Act suspended the liquidation proceedings. To my mind it is necessary to consider whether a business rescue application was "made" precluding this court from deciding the provisional winding-up application and resulting in the suspension of the liquidation proceedings.
- [25] A copy of the Notice of Motion and founding affidavit deposed to by Shereen Jurakan on 19 April 2023 in the business rescue application "made" in the Pretoria High Court were submitted by agreement between the parties. Mr Snyman SC furthermore submitted a copy of an "Affidavit of Service" deposed to by Bianca Potgieter, attorney employed as such at Tintingers Incorporated, Attorneys, Pretoria confirming that a copy of the business rescue application was submitted to Court Online and a case reference number, HCGS192603 was allocated. A copy of the application and proof of submission with Court Online were sent via email to all known creditors/suppliers, shareholders, parties representing employees/staff of the respondent and to the respondent, the applicant and The Companies and Intellectual Property Commission on 19 April 2023.
- [26] Section 131(1) of the 2008 Act provides that an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings. In terms of the provisions of Section 128(1)(a) of the 2008 Act an "affected person" include the following; a shareholder or creditor of the company; any registered trade union representing employees of the company; and if there are employees who do not belong to a registered trade union, each of those employees or their respective representatives.
- [27] A copy of the application to place a company under supervision and commence with business rescue proceedings must be served on the company, the Companies and Intellectual Property Commission and each affected party in accordance with the provisions of section 131(2) of the 2008 Companies Act.[23] In Lutchman N.O. and Others v African Global Holdings (Pty) Ltd and Others[24] Meyer AJA (as he was then) held as follows:

“The business rescue application must be issued, served on the company and the Commission and all reasonable steps must be taken to identify affected persons and their addresses to deliver the application to them, to meet the requirements of s 131(6) in order to trigger the suspension of the liquidation proceedings.”[25]

[28] In my view proper service and notification as set out in the relevant service affidavit in respect of the business rescue application has been effected. The business rescue application was made by an employee of the respondent who has been appointed as the financial manager of the respondent on 25 November 2022. It appears as if the application for business rescue is made, inter alia, in an effort to save the employment of 183 employees of the respondent, a hospital which in a relative short period of time has become successful and even more so since the former director of the respondent, Mr Wiid was removed by vote of the majority of

shareholders as director of the respondent on 25 November 2022.

[29] Mr Grobler SC furthermore raised the issue that the founding affidavit in respect of the business rescue application, filed the previous day, has not been properly commissioned. It was pointed out by Mr Grobler SC that the founding affidavit was commissioned by Adeline Vorster, a commissioner of oath and attorney with the same address, namely 7 Frans Kleynhans Road, Bloemfontein, as the main place of business of the respondent with the result that the commissioning of the founding affidavit in respect of the business rescue application was irregular.

[30] The proper commissioning and attestation of affidavits is prescribed by the Justice of Peace and Commissioners of Oaths Act[26] and the regulations issued in terms thereof (more specifically in terms of section 10 of the Act). Regulations 1-4 of the Regulations Governing the Administration of an Oath set out the nature of the oath or affirmation to be taken and the form in which it is administered. The courts have consistently held that regulations made pursuant to the Justice of Peace and Commissioner of Oaths Act are directory only. In *S v Munn*[27] Van den Heever J (as she was then) held as follows:

“Compliance with the regulations provides a guarantee of acceptance in evidence of affidavits attested in accordance therewith, subject only to defences such as duress and possible undue influence. Where an affidavit has not been so attested, it may still be valid provided there has been substantial compliance with the formalities in such a way as to give effect to the purpose of the legislator as outlined above.”[28]

[31] In the present matter the oath was administered and both the deponent and the Commissioner of Oaths initialled every page. I am of the view that these factors signify substantial compliance. The court seized with the application for business rescue of the respondent may, in the event of the respondent not rectifying any non-compliance with the regulations prior to the hearing of the application at the Pretoria High Court, order that the affidavit deposed to by Shereen Jurakan be re-attested with the result that the objection raised by Mr Grobler SC does not, at this stage, invalidate the affidavit deposed to by the said

deponent. I therefore find that the affidavit substantially complies with the said Regulations. Furthermore, the appropriate forum to consider arguments regarding substantial compliance and condonation will be the court adjudicating the application for business rescue of the respondent.

[32] After perusing the copy of the business rescue application it appears that reasonable prospect that the business rescue application may be successful exists and taking into account considerations such as fairness, convenience and the interests of justice, I am of the view that the business rescue application was made and as such triggered the suspension of the liquidation proceedings as contemplated in section 131(6) of the 2008 Companies Act. For all the above reasons, I find that the liquidation proceedings may not proceed until such stage as the business rescue application has been decided upon.

[33] In the result the following order is made:

1. The application for the provisional liquidation of the respondent is suspended and the application is removed from the roll.
2. The issue of costs is reserved for later adjudication.

VAN RHYN, J

On behalf of the Applicant: ADV S GROBLER SC ADV R VAN DER MERWE Instructed by: HENDRE CONRADIE ATTORNEYS BLOEMFONTEIN On behalf of the Respondent: ADV M SNYMAN SC Instructed by: SYMINGTON & DE KOK ATTORNEYS BLOEMFONTEIN

[1] Act 61 of 1973.

[2] Act 71 of 2008.

[3] 2013 (1) SA 191 (WCC).

[4] Section 12(1) provides as follows: "The Court which has jurisdiction under this Act in respect of any company or other body corporate, 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."

[5] Sibakhulu (supra) at [21].

[6] Sibakhulu (supra) at [22]- [23].

[7] 2020 (6) SA 578 (WCC).

[8] Terblanche NO v Damji 2003 (5) SA 489 (C) at 498E-F.

[9] Coin Security Group (Pty) Ltd v Smit NO [1992] ZASCA 55; 1992 (3) SA 333 (A) at 344 A-C.

[10] 2019 (5) SA 310 (GJ).

[11]

[2015] ZAPPHC 1094 (21/09/2015).

[12]

[2013] ZANHC 11 (17/5/2013).

[13]

[2013] ZAWCHC 213 (23/08/2013).

[14] Act 10 of 2013

[15] T W Beckett & Co Ltd v H Kroomer Ltd 1912 AD 324 at 334.

[16] 1991 (1) SA 482 (A).

[17] Wild & Marr (supra) at [13].

[18] Wild & Marr (supra) at [13].

[19] PMG Motors Kyalami (Pty) Ltd & another v Firststrand Bank Ltd, Wesbank Division 2015 (2) SA 634 (SCA) at [19].

[20] Mfwethu (supra) at [21] and [22].

[21] Mfwethu (supra) at [26].

[22] Mfwethu (supra) at [32].

[23] Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metals CC & Others 2013(6) SA 141 (KZP) at [11.4].

[24] 2022 (4) SA 529 (SCA).

[25] Lutchman N.O. (supra) at [28].

[26] Act No 16 of 1963.

[27] 1973 (3) SA 734 (NC).

[28] S v Munn (supra) at 737 H.

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Prepared on 11 October 2026 · Esheria