

Summary of court case dealing with the registered office of a company – Sibakhulu Construction (Pty) Ltd v Wedgwood Village Golf and Country Estate (Pty) Ltd (16 November 2011)

The Western Cape High Court recently considered the issue of the 'residence' of a company under the new Companies Act (the 'Companies Act, 2008'). The case deals with the winding up request by an applicant and a subsequent application for business rescue by another respondent. The application for business rescue was made in the Port Elizabeth High Court, whilst the application for winding up was made in the Western Cape High Court. The case was then decided by determining the jurisdiction of where the company resides.

The issue then arose whether the winding up needs to be put on hold whilst the business rescue process is continuing. The jurisdiction of the court impacted the decision and the business rescue application.

Under the Companies Act, 1973 an express provisions was made in respect of which court had jurisdiction. Section 12(1) stated:

“The Court which has jurisdiction under this Act in respect of any company or other body corporate, shall be any provisional 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 corporation or the main place of business of the company or other body corporate is situate.”

Section 128(1)(e) of the Companies Act, 2008 defines: **‘court’**, *depending on the context, means either:*

- (l) the High Court that has jurisdiction over the matter; or*
- (ii) either—*
 - (aa) a designated judge of the High Court that has jurisdiction over the matter, if the Judge President has designated any judges in terms of subsection (3); or*
 - (bb) a judge of the High Court that has jurisdiction over the matter, as assigned by the Judge President to hear the particular matter, if the Judge President has not designated any judges in terms of subsection (3);”*

In *Dairy Board v John T Rennie & Co (Pty)Ltd* 1976 (3) SA (W) it was held that a company’s registered

office was at the place at which it in law resided. It was considered that a company could reside for jurisdictional purposes at both the registered office and principal place of business. Based on that decision, courts could have concurrent jurisdiction over a company.

Section 23 of the Companies Act, 2008 states:

“(3) 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.”

The court found that if the company had more than one office, its 'principal office' must be its registered office in accordance with section 23(3). The term 'principal office' is not defined in the Companies Act, 2008. Looking at the Companies Act, 2008 requirements as to what must be kept at its registered office (sections 24 and 28), the court concluded that the principal office should be the place where “the company’s general administration is centred”. The judgement acknowledged the fact that under the Companies Act, 1973 there was a possibility of a distinction between a company’s registered office and its “main place of business”. The judgment also referred to the fact that in practice a company’s registered address under the Companies Act, 1973 was “*often an address chosen for convenience rather than an office of the company in itself in the ordinary sense, frequently the registered office of a company was for example that of the company auditors*”.

The Companies Act, 2008 requires the registered office and the principal place of business for jurisdictional purposes to be the same. As the transitional provisions do not make reference to the issue of a pre-existing company’s registered office the result must therefore be that a pre-existing company is obliged to change its registered office in terms of section 23(3)(b) of the Act if the registered office does not agree with the principal place of business.

The judge considered that a company could only reside at the place of its registered office and therefore

in respect of every company there would only be a single court in South Africa dealing with winding-up and business rescue matters. The judgment concluded that the business rescue proceedings instituted in the Port Elizabeth High Court has not been competently instituted and is not accepted. Based on the above, companies should revisit the decision of having their auditors / company secretaries listed as the registered office. Companies should ensure that the CIPC records reflect the address of the principal office if there is more than one office.

The Companies Act, 2008 does allow for companies to have a different location for their company records than their registered office. Should companies change their registered office in line with this judgment then companies can file a notice of location of company records (CoR22) to state where the company's records are kept. There is no filing fee applicable for this.

The records referred to that should be kept at the registered office or other location included the following:

- copy of its MOI and any amendments or alterations;
- record of directors;
- copies of all reports presented at AGMs;
- annual financial statements;
- accounting records;
- notice and minutes of shareholders meetings, including resolution and supporting documents;
- copies of written communication;
- minutes of meetings and resolutions of directors or directors committees or audit committee;
- securities register;
- records of company secretary and auditor.