REPORTABLE
Case number: 182/99

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

J E M MAYNE **APPELLANT**

and

C P M MAIN **RESPONDENT**

CORAM: **SMALBERGER ADCJ, NIENABER, FARLAM, MPATI JJA and MTHIYANE AJA**

DATE OF HEARING: **1 MARCH 2001**

DELIVERY DATE: **23 MARCH 2001**

"Residing in" - meaning of in terms of s 19(1)(a) of the Supreme Court Act - facts establishing jurisdiction.

JUDGMENT

SMALBERGER ADCJ

SMALBERGER ADCJ:

[1] The issue in this appeal is whether the Witwatersrand Local Division has jurisdiction to entertain an action instituted by the appellant against the respondent for the payment of certain sums of money and ancillary relief. More particularly, the issue is confined to the question whether the respondent, on 18 April 1995, the date on which summons was served upon him, was a person "residing . . . in" the area of jurisdiction of that Court within the meaning of that phrase in s 19(1)(a) of the Supreme Court Act 59 of 1959 ("the Act"). No other ground of jurisdiction is relied upon. The *onus* of establishing jurisdiction based on the respondent's residence rests on the appellant.

[2] The matter initially came before Eloff JP by way of a special plea of non-jurisdiction. After hearing evidence he held that the respondent had not been proved

to have been resident within the jurisdiction of the Witwatersrand Local Division at the relevant time and dismissed the appellant's action. The appellant was granted leave to appeal to a Full Court. The appeal was dismissed by a majority decision (Blieden and Malan JJ, Stegmann J dissenting). The appellant was subsequently granted special leave to appeal to this Court.

[3] The basic principles which govern a matter such as the present are enunciated in *Ex parte Minister of Native Affairs* 1941 AD 53. They have been repeatedly applied in our courts. They may conveniently be summarised as follows:

(a) In giving a court statutory jurisdiction over a person who resides in its area the Legislature has simply followed the common law rule *actor sequitur forum rei* (at 58).

(b) The question is not one of *domicile* but of residence. A defendant may have his *domicile* at one place and his residence for the time being at

another (at 58).

(c) A person can have more than one residence. Where that is the case he (or she) must be sued in the court having jurisdiction at the place where he is residing at the time when the summons is served (at 58/9).

(d) A person cannot be said to reside at a place where he is temporarily visiting. Nor does a person cease to reside at a place even though he may be temporarily absent on certain occasions and for short periods (at 59).

(e) Apart from the above, the courts have studiously refrained from attempting "the impossible task" of giving a precise or exhaustive definition of the word "resides". Whether a person resides at a particular place at any given time depends upon all the circumstances of the case seen in the light of the applicable general principles (at 59/60).

[4] Although a person may have more than one residence, for the purpose of s 19(1)(a) of the Act a person can only be residing in one place at any given moment (*T W Beckett & Co Ltd v H Kroomer Ltd* 1912 AD 324 at 334). Counsel were *ad idem* in this regard.

[5] Amongst the more appropriate and apt definitions of residence (in the sense of "residing") are those in *Hogsett v Buys* 1913 CPD 200 at 205 (quoted with approval in *Ex parte Minister of Native Affairs*, at 59), namely, there must be "some good reason for regarding it as his place of ordinary habitation at the date of service" and *Beedle & Co v Bowley* (1895) 12 SC 401 at 403 to the effect that

> "[w]hen it is said of an individual that he resides at a place it is obviously meant that it is his home, his place of abode, the place where he generally sleeps after the work of the day is done."

In *Tick v Broude and Another* 1973(1) SA 462 (T) at 469 F-G it was said that residence is a concept which conveys "some sense of stability or something of a

settled nature". A presence which is merely fleeting or transient would not satisfy the requirement for residence; some greater degree of permanence is necessary.

[6] Without detracting from the principles enunciated, one needs, in my view, to adopt a common sense and realistic approach when deciding whether, having regard to all the relevant circumstances, a person can be said to be residing at a particular place for the purpose of s 19(1)(a). This is all the more so because of modern day conditions and attitudes and the tendency towards a more itinerant lifestyle, particularly amongst business people, of whom the respondent, as will presently be apparent, is a striking example. Not to do so might allow certain persons habitually to avoid the jurisdictional nets of the courts and thereby escape legal accountability for their wrongful actions.

[7] It was argued on behalf of the respondent, with reference to the decision in *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991(1) SA 482 (A),

that the doctrine of effectiveness had relevance to the issue of residence. It was contended that the respondent could only be considered to have been resident in the trial court's area of jurisdiction if his presence there at the relevant time was of a nature which would enable the court to grant a judgment which would "normally be effective against a person in the position of the respondent". *Bisonboard* did not deal with a situation such as the present and there is nothing in the judgment which detracts from the generally accepted principles that apply in a matter such as this. Counsel's argument, as I understood him to acknowledge, in fact went no further than to emphasize that residence connotes some acceptable degree of permanence and stability. With this there can be no quibble.

[8] With the above in mind I turn to consider the facts of the present matter. These are set out in considerable detail in the dissenting judgment of Stegmann J. I do not intend to repeat them at length. It will suffice to set out succinctly the relevant facts,

many of which are common cause.

[9] The respondent was born in England in 1961. He came to South Africa with his parents at a very young age. He received his school and university education in Natal. He became a South African citizen and appears to have remained one, at least up to the time of the trial. In 1981 he emigrated with his parents to the United States of America where he spent the next six or seven years. Over this period he worked mainly for a Mr Paul Temple who had large business and investment interests in a number of countries. He also became involved, through a South African lawyer, Mr Monty Koppel, in advising and assisting a Swiss company named Kestrel with regard to the acquisition and management of investments in various parts of the world. As a consequence he developed the lifestyle of a peripatetic businessman.

[10] In 1987 the respondent married an American woman. In the same year he was made a director of a British company in which Mr Temple had a substantial interest.

The company in question, after changing its name, was Claremont UK Plc. He became involved in its interests and continued to advise Mr Temple with regard to various matters. In 1988 the respondent and his wife moved to London. In the meantime the respondent had set up a structure, consisting of a trust and various companies, within which to conduct his business activities. The nature of his business he described as "corporate finance consulting". By his own admission he was at pains to structure his affairs in such a manner as would least expose him to tax liability anywhere.

[11] In 1990 the respondent met a certain Mrs Edmiston with whom he formed a romantic liaison. He divorced his wife in that year and Mrs Edmiston and her husband were divorced early in 1991. He and Mrs Edison thereafter lived together when he was not elsewhere engaged on business, initially in a flat in London and later in a property, Brailes House, in Oxfordshire, which had been purchased by a company effectively

owned by the respondent. The respondent continued to travel extensively to destinations in many countries in pursuit of his far-flung business activities and interests. He was constantly on the move, and conducted his business in a highly mobile manner without being tied down by conventional office and secretarial needs.

[12] In 1991, on the advice of his accountants and solicitors, the respondent restructured his business organisation. A company, Dayspring Holdings Ltd ("Dayspring"), was incorporated. He became its chief executive officer and it was under the auspices and on behalf of Dayspring that the respondent from then on conducted most of his corporate finance consulting. To all intents and purposes Dayspring became the respondent's *alter ego.* One of the companies in the new structure, More 2000 Investments (Pty) Ltd ("More 2000"), was a company incorporated in South Africa. It owned (at all relevant times) a residential property in South Africa in which an aunt of the respondent lived.

[13] In 1991 the respondent's business activities, most of which were conducted on behalf of Mr Temple, were concentrated on the United States and Europe. He also did some work in the United Kingdom for prospective foreign investors. In 1992 increased business opportunities opened up in South Africa. The British Airports Authorities Plc ("BAA") retained Dayspring to advise and assist it in becoming involved in the anticipated privatisation of airports by the South African government. This was in the nature of a long-term assignment on which the respondent was still engaged on 18 April 1995, and indeed at the time of the trial. In late 1992 Dayspring was engaged by an organisation known as Centre Spur Corporate Services, which was involved in film financing, to try to secure investments by South African companies in the film industry.

[14] In 1993 the respondent spent considerably more time in South Africa on business. He also continued to work in various other parts of the world. Apart from

its involvement in other matters, Dayspring was engaged by Mr Koppel, on behalf of Kestrel, to assist with the restructuring of Kestrel's mining interests, which included gold and diamond mining interests in South Africa and Namibia. The respondent continued to be heavily committed in South Africa in 1994 although at times work done for Kestrel, Mr Temple and others took him to different parts of the world. It would appear that very little time was spent by him in the United Kingdom. This trend continued into 1995.

[15] During all this time the respondent, with two exceptions, spent an annual holiday at Plettenberg Bay over the Christmas period. He therefore throughout maintained a regular link with South Africa. The extent to which the work done by the respondent in South Africa, and the time he spent here, increased over the years, particularly from 1994 onwards, is well illustrated by the following admitted or common cause facts. In 1990 the respondent spent a total of 55 days in South Africa, of which 25 days were

on holiday. The corresponding figures for 1991 were 45 and 22 days respectively. In 1992 the respondent spent 27 days in South Africa, all of them on holiday. In 1993 there was a significant jump to 132 days spent here, 32 of them on holiday. These figures increased in 1994 to 263 and 61 days respectively. In that year the respondent entered and left the country on eight occasions. During the period 1 January 1995 to 31 July 1995 the respondent spent 174 days in South Africa, and over the whole of 1995, 270 days. Leaving aside the holiday periods, the vast majority of the time spent by the respondent in South Africa in 1994 and 1995 was on the Witwatersrand or, to be more specific, Johannesburg.

[16] In keeping with his burgeoning interest in South Africa from 1994, the respondent (in the form of Dayspring) set up an office in Johannesburg. It was equipped with all the basic technology (such as computers and the like) needed to enable him to communicate with the persons and corporations he represented. He also

arranged for the acquisition (on lease agreement) of a motor vehicle to serve his needs. Dayspring's expenses were initially paid *via* a non-resident account. Later, in December 1995, More 2000 became the local management company for Dayspring. The respondent was its representative and a signatory on its banking account. Local business was transacted through it and it became the vehicle through which all expenses incurred in South Africa, by both Dayspring and the respondent personally, were paid.

[17] Two witnesses, Mr Rowand and Mrs Edmiston, testified on behalf of the appellant. Their evidence was not seriously challenged. Some significant facts emerge from their testimony. Mr Rowand and his wife first met the respondent in March 1994 at a dinner party in Johannesburg. Mrs Rowand and the respondent appear to have been immediately attracted to each other. They became romantically involved. This eventually led to the break-up of the Rowands' marriage and Mrs Rowand's departure

from the common home in April 1994. They were divorced in February 1995. Immediately after their divorce the respondent moved in with Mrs Rowand at the house she was occupying in Inanda. (According to certain reconstructed diary entries made by the respondent he moved in with her even before the divorce was finalised, but in evidence he claimed that he had been "mistaken" in that regard.) Prior to that the respondent, when in Johannesburg, had stayed mostly at the Inanda Club. Mr Rowand further testified that after his wife left him he frequently encountered the respondent at the house to which she had moved with their two daughters, with whom he maintained a close relationship. On 26 April 1995 Mr Rowand, in the interests of the children, attended a dinner party at Mrs Rowand's house at which the respondent openly performed all the functions of a host. This was eight days after summons had been served upon him.

[18] Mrs Edmiston, with whom the respondent had been living at Brailes House on

the occasions when he was in England, testified that he telephoned her from South Africa in April or May 1994 to tell her that he had fallen in love with someone else and would not be returning to her. The "someone else" could only have been Mrs Rowand. True to his word the respondent never returned to Brailes House after that. He also removed all his belongings from a flat in Stanley Gardens, London, which they had previously shared.

[19] The court-approved divorce settlement entered into between the Rowands provided, *inter alia*, that Mrs Rowand was not to remove their children (whose custody she had been awarded) from South Africa without the consent of Mr Rowand. This effectively precluded her from leaving the country at will and bound her, at least for the time being, to South Africa.

[20] According to the respondent he had no intention of making South Africa his home and staying here permanently. Marriage to Mrs Rowand was out of the question

because of her commitment to her children and her corresponding inability to leave the country. His priority was his business which required him to go where his services were needed from time to time by his principals.

[21] The learned trial judge in his judgment posed the question

> "Whether the evidence *in casu* establishes that the [respondent's] sojourns in Johannesburg are any[thing] more than 'temporary visitations'? Or can it be said that he had good reason for regarding it as his place of ordinary habitation?"

[22] In evaluating the evidence, he held that the evidence of Mr Rowand and Mrs Edmiston "had little value other than to require the [respondent] to go in the witness-box". With regard to the respondent he found "no sufficient reason to disbelieve him or anything of importance that he said". He went on to add that "[h]e answered all questions as best he could. I think he gave satisfactory evidence, and by and large I accept his statements". He further held that the frequency of the respondent's visits

to South Africa in 1994 and 1995 and the overall duration of his stay had to be seen in their proper context. This led him to conclude:

> "I do not find any basis for the conclusion that those were any other than temporary visitations. He is to be believed when he said that he regarded the United Kingdom as his base and his place of residence. He is to be believed when he said that his principals required him to be in the United Kingdom or elsewhere for discussions and to state their requirements."

[23] The evidence reveals that the respondent is essentially a peripatetic businessman. His vocation - financial consulting - takes him where his services are needed by his principals. It does not follow that the respondent has no say with regard to where he works, that he is at all times at the beck and call of his principals and must obey their every whim. That may be true in relation to specific assignments. But the respondent remains free to choose what work he does and to accept work where he would rather be. If during a particular period of his life he chooses to be mainly in South Africa there is presumably nothing to prevent him from structuring his business activities

accordingly. In this respect the present case is distinguishable from *Tick v Broude and Another*, *supra*.

[24] The dramatic increase in the time spent by the respondent in South Africa in 1994 and 1995 coupled with the provision of a working base for Dayspring in Johannesburg and the acquisition of a car on lease point to a heightened degree of stability and permanence in relation to both Dayspring's activities in South Africa and the respondent's physical presence here, more particularly in Johannesburg where he spent by far the greater portion of his time. The overall duration of his stays over that period in relation to the number of times he came to and left the country indicates in my view something more than "temporary visitations" as held by the trial judge. To have labelled his visits before 1994 as temporary may have been appropriate, but not his later sojourn. Apart from that, some of the projects in South Africa on which the respondent was engaged in April 1995 were long-term or ongoing and would have

required his continued attention and presence here. His efforts would have largely been concentrated on South Africa for the foreseeable future. There was no evidence to suggest that the respondent was conducting substantial business elsewhere at the time.

[25] A further important factor is the respondent's strong romantic attachment to Mrs Rowand evidenced by the break-up of his relationship with Mrs Edmiston, his frequent presence at Mrs Rowand's house and the fact that he moved in with her immediately after her divorce (if not before). He was clearly more than a "guest of Mrs Rowand" as his diary entries somewhat ingeniously suggest. He obviously spent more time with her than he was readily prepared to admit. In answer to a question under cross-examination he stated: "I believe I did spend a few nights with her prior to April 1995." According to his diary entries he spent 53 days with her over the period 14 February to 12 April 1995. Can it be purely coincidental that his increased

business interests in South Africa and time spent here largely coincided with the commencement and continuation of his liaison with Mrs Rowand? The maxim *ubi uxor ibi domus* does not strictly apply to the respondent's circumstances, but there are undoubtedly considerations which underlie it which are common to his situation. Colloquially put, home is where the heart is. And it appears from Mr Rowand's evidence that the respondent was very much at home in Mrs Rowand's house. These circumstances suggest that the respondent was not in Johannesburg simply for the purpose and duration of his work. Eloff JP held that "the only significance of the [respondent's] affair with Mrs Rowand is that it explains why, whenever he was in South Africa, he was at her house". In my view it went deeper than that.

[26] In determining whether the appellant has discharged the *onus* he bears of proving that the respondent was resident in Johannesburg on 18 April 1995, regard must be had not only to the essentially undisputed, objective facts but also to the

respondent's claim that his sojourn in South Africa was temporary and that he was not residing in Johannesburg. In other words, consideration must be given to the respondent's professed intention and his subjective view of the situation. His intention is, however, not necessarily conclusive. It may not even ultimately carry great weight. Any mental reservation he may have had about residing in Johannesburg cannot detract from a justifiable inference, having regard to all relevant facts and circumstances, that he was so residing for the purpose of s 19(1)(a) of the Act.

[27] For purposes of jurisdiction our courts do not recognise the concept of a *vagabundus*. The respondent must have been residing somewhere (in the legally accepted sense) on 18 April 1995. If he was residing in South Africa it could only have been in Johannesburg - that much would not seem to be in dispute. But if he was not residing in Johannesburg (as he claims to be the case) where was he residing? The converse to not residing in Johannesburg must inevitably be residence elsewhere. In

his affidavit opposing summary judgment the respondent alleged that he was residing at Brailes House when summons was served. His mind was specifically focused on where he was residing at that time, jurisdiction being the very issue he was called upon to address in his affidavit. Mrs Edmiston's virtually unchallenged evidence effectively gave the lie to his claim in that regard. It was put to her under cross-examination that "the [respondent] *presently* resides at a flat above the office [at] 84 Brooke Street" (my emphasis). No mention was made of where he claimed to have been residing in April 1995.

[28] When giving evidence the respondent alleged that he had been residing at 84 Brooke Street in April 1995. No reference to Brooke Street had been made in the affidavit to which I have referred. There were certain unsatisfactory features in his evidence relating to the renting of the Brooke Street office and flat. But even assuming in his favour that he maintained a flat in Brooke Street the evidence reveals that it was

virtually unoccupied during 1994 and the relevant period of 1995 even though he claimed that "[w]henever I am in London I stay here". (His own diary entries show that when he was in London in 1995 during the period in question he actually stayed somewhere else.) The mere fact that the respondent may have maintained a residence (flat) in London does not mean that he was residing there. The respondent sought to fortify his claim that he was residing in London on the basis that his business was driven from there, that was where his principals (or most of them) were and where he took instructions from them. In the nature of things his principals could just as easily have contacted him in Johannesburg and given him his instructions there, or he could have contacted them. His presence in London was not indispensable to the way in which he operated.

[29] I am conscious of the fact that the trial judge's credibility findings should not lightly be disturbed. Having said that, the respondent in my view was a glib and less

satisfactory witness than the trial judge found him to be. His change in stance with regard to where he was residing in Britain when the summons was served (not alluded to by the trial judge) is significant in the light of what was in issue at the time and must reflect upon his credibility. Nor do I agree that in an overall context the evidence of Mr Rowand and Mrs Edmiston should be regarded as "of little value". **[30]**

In my view the appellant succeeded in establishing, on the facts, a strong *prima facie* case that the respondent was residing in Johannesburg when summons was served upon him on 18 April 1995. His prolonged presence there, the ongoing nature of his work and his romantic attachment to Mrs Rowand all contributed to the required degree of stability and permanence being present at that time. While there was no *onus* upon him, the respondent sought to dispel such *prima facie* inference by adducing evidence that he was residing elsewhere. In this respect he failed lamentably. No acceptable alternative place suggests itself where he might have been residing at the

time. Whatever his subjective belief may have been, the objective facts inexorably lead to a different conclusion. This is not the type of case where, as stated in *Tick v Broude and Another*, *supra*, at 471 D - E, one "is left with a definite feeling or view that there is no element of stability in the residence or that there is no reason to keep the individual in the Republic of South Africa or that he is liable to be moved or to move from the Republic without notice".

[31] In all the circumstances the most probable inference to be drawn is that Johannesburg was the respondent's "place of ordinary habitation" on 18 April 1995 and, accordingly, that he was residing there as envisaged by s 19(1)(a) of the Act. It follows that the trial court has jurisdiction to entertain the appellant's action. In the result the appeal must succeed.

[32] The following order is made:

1. The appeal succeeds, with costs.

2. The order of the Full Court is set aside and the following order is substituted in its stead:

"(a) The appeal is allowed, with costs.

(b) The order of the trial court is set aside and the following order is substituted in its stead:

'The special plea is dismissed, with costs'."

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J W SMALBERGER
ACTING DEPUTY CHIEF JUSTICE

NIENABER JA)Concur
FARLAM JA)
MPATI JA)
MTHIYANE AJA)