THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 27 September 2016

STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

***Travelex Limited v S Maloney & another* (823/15) ZASCA 128 [27 September 2016]**

MEDIA STATEMENT

Today the Supreme Court of Appeal (SCA) delivered a judgment whereby the appeal was dismissed with costs.

The issues before the SCA was (i) whether the appellant procedurally could have brought the application for rescission of an order ad fundandam en confirmandam jurisdictionem solely on the alleged lack of jurisdiction of the court granting the order or should the application have been brought either in terms of the common law or the provisions of Uniform rule 42(1)(a) and (c); and (ii) whether a recognised ration jurisdictionis existed and the court that granted the initial order therefore had the requisite jurisdiction and (iii) whether the appellant had not submitted to the court's jurisdiction.

On 8 December 2010 the parties entered into an agreement related to the sale of shares in FX Africa. In terms of the agreement the appellant purchased the second respondent's shares in FX Africa as well as shares held by Sanderling Investments Incorporated, a company incorporated in the Virgin Islands. The appellant was a peregrinus of South Africa while the respondents were peregrini of the Gauteng Division, but incolae of South Africa. They were both permanently resident in the area of jurisdiction of the Western Cape Division of the High Court. The respondents, as applicants, brought an urgent application in the Gauteng Division, Pretoria, on 19 November 2013 for the attachment of the appellant's shares in FX Africa *ad fundandam et confirmandam jurisdictionem.* The first respondent claimed locus standi in the Gauteng Division on the basis that one of the suspensive conditions contained in the agreement was that he was obliged to deliver to the appellant and FX Africa his letter of resignation, both as an employee of FX Africa and as a director of subsidiaries of

FX Africa. Without opposition, but in the presence and with the acquiescence of the appellant's counsel, an interim order was granted attaching the shares. On the return date, 6 February 2014, the application was unopposed, but again in the presence and with the acquiescence of the appellant's legal representatives the court a quo confirmed the rule nisi attaching the shares. The attachment preceded an action for damages instituted by the respondents against the appellant following an alleged repudiation of the agreement. Two months later the appellant launched the rescission application, seeking, inter alia, the setting aside of the initial order and the action that had been instituted.

The appellant contended that the court granting the initial order did not have jurisdiction to do so and that the appellant had submitted to the jurisdiction in the agreement and therefore an attachment order was incompetent and impermissible. In the court a quo, counsel for the appellant raised a further issue, namely that there was no ratio jurisdictionis for the initial order and the subsequent action and that the court should therefore set aside the initial order and the action.

On appeal, the SCA stated that if a judgment or order has been granted by a court that lacks jurisdiction, such order or judgment is a nullity and it is not required to be set aside. If parties do not agree as to the status of the impugned judgment or order, it should be rescinded and that was the position in the instant matter where the appellant applied to have the order set aside on the premise that the court did not have jurisdiction.

The SCA had to determine: (a) whether there was a recognised ratio jurisdictionis, (for only if there was a ratio jurisdictionis would an attachment be competent) and (b) if the court had jurisdiction then it must be determined whether or not the appellant had submitted to its jurisdiction.

The SCA held that in order to determine whether the appellant submitted to the jurisdiction of the court a quo, it is necessary to interpret the whole document and one of the factors is that the appellant chose as its domicilium citandi et executandi a foreign domicilium. The SCA found that the cumulative effect of the proved facts did not on a balance of probabilities establish a submission to the jurisdiction of the court a quo and the court hearing the application for attachment had the requisite jurisdiction and correctly dismissed the application, albeit for different reasons.

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