THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 366/2024

In the matter between:

TONGAAT HULETT LIMITED	**FIRST APPELLANT**
TONGAAT HULETT SUGAR LIMITED	**SECOND APPELLANT**
TONGAAT HULETT AÇUCAREIRE DE XINAVANE SA	**THIRD APPELLANT**
and	
HOLLARD INSURANCE COMPANY LIMITED	**FIRST RESPONDENT**
GLOBAL ALLIANCE OR GLOBAL ALLIANCE INSURANCE	**SECOND RESPONDENT**
HOLLARD MOZAMBIQUE COMPHANIA DE SEGUROS SARL	**THIRD RESPONDENT**
GLOBAL ALLIANCE SEGUROS INSURANCE	**FOURTH RESPONDENT**

Neutral citation: *Tongaat Hulett Limited and Others v Hollard Insurance Company Limited and Others* (366/2024) [2026] ZASCA 158 (20 November 2026)

Coram: SCHIPPERS, KGOELE, UNTERHALTER and BAARTMAN JJA and KUBUSHI AJA

Schippers JA (first judgment): [01] to [124]

Unterhalter JA (second judgment): [125] to [204]

Heard: 15 September 2025

Delivered: 20 November 2026

Summary: Civil Procedure – jurisdiction – claims under contracts of insurance – concluded in Mozambique – risk materialising in Mozambique – insured and insurer in Mozambique – whether insured constitute a joint venture – whether Mozambican insurer the alter ego of South African insurers – submission to jurisdiction by *peregrini* – whether *ratio jurisdictionis* required – whether *causae continentia* doctrine applies – if not whether it should be developed under s 39 and s 173 of the Constitution.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Balton J, sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Schippers JA (Kgoele and Baartman JJA and Kubushi AJA concurring)

Introduction

[1] The appellants (plaintiffs) are associated companies and part of the Tongaat Hulett Group (the Tongaat Group). The first plaintiff is the holding and operations company of the Tongaat Group. The second plaintiff controls the Group's sugar production in South Africa. Where appropriate, the first and second plaintiffs are referred to as 'the South African plaintiffs'. The third plaintiff is a sugar producer of the Tongaat Group in Mozambique.

[2] The first and second respondents (defendants) are insurance companies in Johannesburg, South Africa, and where appropriate, are referred to as the South African defendants. The third and fourth respondents (defendants) are insurance companies registered and incorporated in Maputo, Mozambique (the Mozambican defendants).

[3] On 21 September 2011 the plaintiffs issued summons against the defendants in the KwaZulu-Natal Division of the High Court, Durban (the High Court) for indemnification against certain losses in an amount of R52 377 947, allegedly arising from the interruption of the third plaintiff's business, in terms

of two insurance policies (the action). They allege that these policies were issued by the first and second defendants, which include the third and fourth defendants (the Mozambican defendants) as insurers. The losses were allegedly sustained when certain chain links broke, which damaged chains, chain ladders and a diffuser at the third plaintiff's sugar mill in Mozambique (the loss-causing event).

[4] The South African plaintiffs are *incolae* of the High Court (entities domiciled within its area of jurisdiction). The third plaintiff is a foreign *peregrinus* (peregrine). The Mozambican defendants raised a special plea that the High Court lacked jurisdiction in respect of the South African plaintiffs' claim against them, because they had not submitted to its jurisdiction; and as regards the third plaintiff's claim, that there was no *ratio jurisdictionis* (ground of jurisdiction).

[5] The High Court upheld the special plea and concluded that it had no jurisdiction to try the action. The central issue on this appeal is whether that court was correct. The appeal is with its leave.

The basic facts

[6] In 2007 the first plaintiff funded the expansion of the third plaintiff's sugar mill, known as the 380 TCH Expansion Project, in the Maputo Province, Mozambique (the project). When the project commenced, the first plaintiff owned 49% of the shares in the third plaintiff, through Sociedade de Assistência à Agricultura e Indústria SA (SAAISA), a Portuguese-registered company. The Government of Mozambique held the remaining shares. The first plaintiff owns 100% of the shares in SAAISA. When the project was completed, the first plaintiff increased its shareholding in the third plaintiff from 49% to 88%, and the Mozambican Government's shareholding was reduced to 12%.

[7] The risk cover for the project was procured by way of two insurance policies: a Contract Works Policy and a Project Delay Insurance Policy (the Project Delay Policy). The former covers physical damage to the 'contract works' as defined in that policy. The latter covers loss occasioned by business interruption caused by an insured event of damage to the contract works, indemnifiable under the Contract Works Policy.

[8] Both policies record that the insurers are Hollard (80% – Lead) and Global Alliance (20%); and the nominated reinsurers, Scintilla-ERU (35%) and Construction Engineering Underwriters (CEU) (35%). The policies define the insured as the 'Employer', namely 'Tongaat-Hulett Group Limited / Tongaat-Hulett Sugar Limited / Açucareira de Xinavane SARL / Tongaat-Hulett Acucar Limitada' and 'their divisions and/or subsidiaries and/or associated companies and/or organisations'. The 'Contractor' is defined as including the 'Employer to the extent that [it] undertakes work in the performance of the insured contract'. The policies were signed by the third defendant in Mozambique on behalf of 'Hollard Insurance'.

[9] The Contract Works Policy covers contracts and works in connection with the project, undertaken by or on behalf of the Employer at the contract site. The policy contains a submission to jurisdiction clause (condition 14), which states that it shall be interpreted according to the laws of South Africa and any dispute arising out of the policy shall be determined by action to be instituted in South Africa.

[10] The Project Delay Policy covers loss caused by business interruption arising from an insured event of damage to the contract works, indemnifiable under the Contract Works Policy. The various endorsements to the two policies in July 2009, were issued by the third defendant.

[11] The plaintiffs' claims are founded on the policies. The essential allegations in the particulars of claim are these:

(a) The first and second plaintiffs provided finance and advice in relation to the project. The finance was provided by the acquisition of further shares in and making loans to the third plaintiff.

(b) At all material times the first defendant was able to control the business of the third defendant; and the second defendant, the business of the fourth defendant.

(c) In April and May 2007, the policies were negotiated at the business of the first and second plaintiffs in KwaZulu-Natal, where it was orally agreed that the Mozambican defendants would provide insurance to the plaintiffs for the project, in accordance with the risks covered by the Contract Works Policy and the Project Delay Policy.

(d) The policies were issued in accordance with the negotiations and the oral agreement.

(e) On 17 August 2007 the policies were signed at Maputo, Mozambique, by the third defendant, acting on behalf of the South African defendants; alternatively, the Mozambican defendants; further alternatively, all the defendants.

(f) In the policies the insurers were defined to include the first defendant as the lead insurer (for 80%) and the second defendant (for 20%); alternatively, the third defendant (for 80%) and the fourth defendant (for 20%); further alternatively; the first and third defendants (for 80%) and the second and fourth defendants (for 20%).

(g) The South African or the Mozambican defendants were the insurers up to 15 January 2010.

(d) The material express, implied, or tacit terms of the policies included the following. Each plaintiff was an insured as defined in the policies. The insurers insured all contracts, materials and works undertaken in respect of the project, indemnified the insured against damage to any part of the

contract works and would indemnify the insured for any loss resulting from the loss or interference with the plaintiff's business. The insured would timeously pay the premiums, which it did.

(e) The contract works included the construction, installation and operation of mechanical chains and chain ladders in the diffuser at the third plaintiff's mill, which were damaged between June and September 2009.

(f) As a result of this damage, the third plaintiff's business in Mozambique was interrupted or interfered with, causing a total loss of R52 377 947, said to be a loss of gross profit and an increase in the costs of working and repairing or replacing the diffuser or chain components. The first and second plaintiffs suffered a consequential loss in their businesses in the same amount.

[12] The third defendant repudiated the claim, and the plaintiffs instituted the action. In paragraphs 1 to 7 of their special plea of lack of jurisdiction – advanced in relation to all the claims made by the first to third plaintiffs – the Mozambican defendants assert the following:

(a) They are companies incorporated in Mozambique, where their registered offices and principal places of business are located. They have no place of business within the jurisdiction of the High Court and do not conduct business anywhere in South Africa.

(b) For these reasons, they are *peregrini* of South Africa.

(c) They did not consent to the jurisdiction of the High Court in respect of claims under either the Contract Works Policy or the Project Delay Policy.

(d) The plaintiffs' claims are based on contracts of insurance signed at, and which had to be performed in, Maputo, Mozambique. That is where the contracts allegedly were breached. The contracts insured against risks in Maputo. The risk materialised there.

(e) The plaintiffs have not attached assets belonging to the Mozambican defendants to found or confirm jurisdiction.

(f) Consequently, the claims by the third plaintiff against the Mozambican defendants are claims between *peregrini*; and the claims by the first and second plaintiffs are claims by *incolae*, where there is no submission to jurisdiction nor attachment to found or confirm jurisdiction.

[13] In their plea over, the Mozambican defendants dispute the loss-causing event. They admit that certain chain links failed but allege that such failure was caused by a casting defect in the chain links themselves.

[14] In paragraphs 2 and 3 of the replication the plaintiffs allege that the High Court has jurisdiction, in sum, on the following grounds:

(a) Their claims are based on the contracts of insurance set out in the particulars of claim.

(b) The South African defendants cannot conduct business in Mozambique, because its law requires risks in that country to be insured by insurers registered in Mozambique.

(c) The South African defendants caused the Mozambican defendants to be established as registered companies in Mozambique. The latter owned no assets of their own, save for those made available to them by the South African defendants.

(d) All the funds required by the Mozambican defendants 'ostensibly to conduct the business of registered insurers in Mozambique' were made available to them by the South African defendants.

(e) The Mozambican defendants could not issue the policies, neither accept nor pay any claim without the approval of the South African defendants.

(f) The Mozambican defendants therefore 'acted as a front respectively for, or were in all respects controlled by', the South African defendants.

(g) For these reasons, 'the apparent or ostensible independence and separate existence' of the Mozambican defendants could be ignored: at all material times they were the alter egos of the South African defendants in

circumstances which render the latter liable under the policies (the alter ego issue).

(h) The negotiations preceding the issuance of the policies were conducted in South Africa with local representatives of the South African defendants. The premiums, deductibles and limits of indemnification were stated in South African currency; and the policies provided that they should be interpreted according to the laws of, and determined by action instituted in, South Africa.

(i) By reason of the foregoing, the Mozambican defendants expressly or tacitly consented to the jurisdiction of the High Court.

(j) It is an express term of the policies that the plaintiffs and their divisions, subsidiaries and associated companies are regarded as the insured; that a joint venture as undertaken by the plaintiffs would be deemed a legal entity with the same rights as the other party insured; and that in the event of a loss indemnified in terms of the policies, payment would be made to the insured.

(k) Alternatively, and in the event of the court finding that it has no jurisdiction, then the plaintiffs assert that the common law should be developed in terms of s 39(2) or s 173 of the Constitution.

[15] The parties agreed that the issue as to whether the High Court has jurisdiction in respect of the plaintiffs' claims against the Mozambican defendants would be separated and determined in advance of the other issues in the case. There were however ancillary questions which bore on that issue and formed part of the separated case. These included whether there had been a submission to jurisdiction, the alter ego question and the alleged composite nature of the plaintiffs.

[16] In the separated case both parties adduced evidence on the issues agreed upon, more specifically, paragraphs 1 to 8 and 13 to 19 of the particulars of claim,

read with paragraphs 1 to 9 and 11 to 15 of the plea; and 1 to 7 of the special plea of jurisdiction read with paragraphs 2 and 3 of the replication. The plaintiffs presented evidence by Mr Sean Slabbert, the second plaintiff's former Financial Director, concerning the financing and management of the project; and Ms Lesley Evangelides, an insurance broker. The defendants adduced evidence by Mr James Connolly, the principal of Scintilla-ERU at the relevant time, and Mr Henrique Mittermayer on the establishment of the third defendant in Mozambique.

The High Court judgments

[17] On 29 May 2019 the High Court (Balton J) made an order that it does not have jurisdiction to determine the plaintiffs' claim against the Mozambican defendants arising out of the Project Delay Policy and ordered the plaintiffs to pay the defendants' costs (the first High Court judgment). The court did not decide the alter ego issue.

[18] The High Court granted leave to appeal to this Court. However, this Court concluded that the appeal was premature since the High Court had not decided an anterior issue, namely the alter ego question. Without deciding the merits of the appeal or delivering a written judgment, this Court upheld the appeal, set aside the order in the first High Court judgment and remitted the case to the High Court to decide all the issues in the separated case.

[19] The plaintiffs' conditional claim for the development of the common law was introduced after the first appeal. The High Court was thus required to decide the alter ego issue and the claim for the development of the common law in the second judgment. It found against the plaintiffs on both these issues.

[20] The alter ego claim was dismissed essentially on the basis that it was insupportable on the evidence. The High Court found that the Mozambican defendants were utilised because the risk had to be insured by a Mozambican

insurer, which involved no abuse, misuse or unconscionable conduct that entitled the court to ignore their separate corporate personalities. The court found that there was no submission to jurisdiction in the Project Delay Policy. It declined to develop the common law on the grounds that it was unjustifiable on the facts. The development sought was drastic, which would result in the courts of this country becoming courts of convenience.

The issues

[21] This appeal raises the following issues:

(a) The status of the plaintiffs as 'the insured' under the policies.

(b) The alter ego issue: Should the separate juristic personalities of the Mozambican defendants be ignored and they be treated as the alter egos of the South African defendants?

(c) The meaning and effect of the submission to jurisdiction contained in condition 14, specifically whether it confers jurisdiction regarding the claim by the third plaintiff against the third defendant, who are both *peregrini*.

(d) Does the High Court have jurisdiction in respect of the third plaintiff's claims by application of the *causae continentia* doctrine (cohesion of a cause of action)?

(e) If the High Court does not have jurisdiction, should the common law be developed to create a jurisdictional basis that did not exist when the action was instituted?

[22] Before addressing these issues, two preliminary points are required to be made at the outset. First, while jurisdiction is ordinarily determined on the pleadings and not the merits of a matter,[1] in this case – and in terms of the issues the parties agreed would be determined at the initial hearing – the evidence shows

[1] *Gcaba v Minister of Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 1145 (CC) para 75.

that the High Court has no jurisdiction, and that there is no plausible basis in fact for jurisdiction. This is not an exception where the allegations in the particulars of claim must be accepted as true.[2] Second, the decision to institute the action in South Africa, according to Mr Slabbert, was taken because an action in Mozambique would require a large deposit, a percentage of the claim would be forfeited if the plaintiffs lost, and it was understood that a Mozambican court would not exercise jurisdiction. I now turn to the issues on appeal.

The plaintiffs' status as the insured

[23] The plaintiffs submit that they were collectively insured under the policies; that 'an unincorporated joint venture' has the claim; and that it is 'artificial and inapposite to approach the case on the basis of separate claims by separate [plaintiffs]'. Then it is submitted that since the joint venture includes two *incolae*, one of which invested R1 billion in the project, bore the risk and is the only company whose registration number, VAT number and postal address are recorded in the policies, it may reasonably be concluded that the joint venture is an *incola*.

[24] The latter submission is simply not pleaded and has no foundation in the evidence. The remaining submissions, advanced for the first time on appeal, do not bear scrutiny. Unsurprisingly, there is no citation nor allegation of a joint venture in the particulars of claim. Instead, the claims advanced by the plaintiffs are discrete and independent – the business of the third plaintiff was affected or interrupted by the loss-causing event, and the first and second plaintiffs consequentially suffered a loss in their businesses. Indeed, Mr Slabbert confirmed this in evidence.

[2] *Pretorius and Another v Transport Pension Fund and Another* [2018] ZACC 10; 2019 (2) SA 37 (CC); (2018) 39 ILJ 1937 (CC); 2018 (7) BCLR 838; [2018] 7 BLLR 633 para 15.

[25] On Mr Slabbert's evidence, the project was nothing more than the expansion of the sugar mill of a subsidiary in Mozambique, structured, managed and financed by its holding company. The first plaintiff funded the project through loans to the third plaintiff via the former's bank accounts in Mozambique. In return, the first plaintiff received a financial benefit in the form of dividends. Indeed, this was the basis on which the action was brought in the first hearing before this Court – there was no suggestion of any joint venture. Further, Mr Slabbert confirmed that the third plaintiff had repaid the loan which the first plaintiff had advanced as finance for the project.

[26] The project does not evince the elements of a joint venture. The particulars of claim state that the first and second plaintiffs provided the finance for the project by making loans to, and acquiring further shares in, the third plaintiff. On the plaintiffs' own evidence, the first and second plaintiffs made no contribution; rather, the third plaintiff funded the project through a loan, which was paid back. The bulk of this loan was for the acquisition of shares by the first plaintiff – not to make a profit, nor to share in the losses. Those shares were in fact transferred.[3]

[27] It follows that there is no insured joint venture as a legal entity of some kind which has any claim under the policies. On the contrary, the wording and import of the definition of the 'insured' in both policies, which confines any claim by the insured to 'their respective rights and interests', are to the opposite effect. And the conclusion that the so-called joint venture is an *incola,* has no basis in the evidence. So too, the assertions in the replication that the South African defendants had established, funded and controlled the Mozambican defendants. Indeed, Ms Evangelides was driven to concede that the policies were issued with the third defendant (Hollard Mozambique) as the lead insurer and a co-insurer of

[3] See *Rhodesia Railways and Others v Commissioner of Taxes* 1925 AD 438 at 464–465, in which the essential elements for a partnership as laid down by *Pothier* were accepted as the elements for a joint venture; *Bester v Van Niekerk* 1960 (2) SA 779 (A) at 783H–784A. Dictum applied in *Gihwala and Others v Grancy Property Ltd and Others* [2016] ZASCA 35; 2017 (2) SA 337 (SCA); [2016] 2 All SA 649 (SCA) para 59-61.

the fourth defendant (Global Alliance Mozambique) who were the insurers liable under the policies, regardless of reinsurance. This, after her initial testimony that the South African defendants were liable under the policies.

[28] What is more, the interests of the first and second plaintiffs as pleaded, are that they are the insured. However, as is shown below, all these allegations were shown to be insupportable on the evidence.

The alter ego issue

[29] The plaintiffs' main contention on the alter ego issue is this. The Mozambican defendants 'were used as a façade even though they were not incorporated with any deceptive intention'. This conduct, so it is submitted, justifies piercing the corporate veil because the corporate form of the Mozambican companies was used as a device to conceal the true underlying insurance relationship – that the risk would be held by reinsurers located in South Africa, ostensibly insured through insurers registered in Mozambique. The separate legal identities were then utilised to 'evade a claim under the policies by invoking a jurisdictional objection'.

[30] These contentions, it is said, are evidenced by the following. The negotiations on the terms of the policies, covering risks and entities in both countries, took place in South Africa. The Mozambican defendants would not extend cover without the South African defendants taking on the risk. The policies had to be approved by the South African defendants, both *incolae*. The policies, which are in substance South African documents, do not identify the separate obligations of different legal entities and elide their distinctness. Decisions regarding the underwriting of and claims under the policies, were made in South Africa.

[31] The alter ego claim however fails on the facts and the law. The evidence shows that several pleaded facts are simply unsustainable on the evidence. These are that the South African defendants caused the Mozambican defendants to be registered as insurers in Mozambique and provided funds and assets for the latter, who have no assets, to conduct business there; and that the Mozambican defendants could not issue any policy of insurance in Mozambique, or accept or settle any claims against them, without approval by the South African defendants.

[32] It is common ground that Mozambican law required risks in that country to be insured by a Mozambican insurer, and that there was no such insurer who could carry the entire risk of the project on its books. Consequently, any Mozambican insurer would have had to reinsure the risk – an arrangement whereby a primary insurer transfers all or part of the risk it assumes to another insurer to provide protection against the risk of the first insurance, in exchange for a premium. The reinsurer could have been a related entity (as it was in the case of the third defendant) or an unrelated global entity such as Munich Re or Swiss Re. Indeed, the risk was ultimately reinsured in Germany. This relationship is called 'fronting', an accepted industry practice which has none of the unlawful connotations of fronting in black economic empowerment transactions.

[33] So, on the evidence and as a matter of commercial practice, the Mozambican defendants determined the extent of the reinsurance sought. Any claim under the policies had to be brought against the Mozambican insurers. The latter, in turn, would have a claim against their own reinsurers in terms of the arrangement between them. There was no contractual relationship between the insured for the loss in this case (the third plaintiff) and the reinsurers (the first defendant being a reinsurer for the third defendant). In fact, this was confirmed by the plaintiffs' witness, Ms Evangelides. And it was repeatedly made clear in correspondence and when the policies were negotiated, that the insurance relationship would exist between the plaintiffs and the Mozambican insurers.

[34] Further, the evidence shows that the principal risks and premium terms were determined in Mozambique. No evidence was presented to gainsay the evidence of Mr Connolly in this regard. Neither was his evidence challenged that the reinsurers had to be satisfied of the risk, and that the expertise for insurance of the project lay with their experts on whom they relied for the determination of the risk, premium and the like. In addition, the policies were issued in Mozambique; the risk insured was in Mozambique; the premium was payable in Mozambique; and the policy was repudiated by the third defendant.

[35] Turning to the law, the origin of the doctrine of piercing the corporate veil is English law. In *Prest*,[4] Lord Sumption explained the doctrine thus:

'"Piercing the corporate veil" is an expression rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of the company.'

The separate personality of a company refers to the doctrine that the company is treated in law as a person, capable of owning property and having assets and liabilities of its own, which are distinct from those of its shareholders.[5]

[36] Lord Sumption went on to say that two distinct principles underlie the cases concerned with piercing the corporate veil, namely the 'concealment principle' and the 'evasion principle'. The concealment principle involves the interposition of a company or several companies to conceal the true nature of an arrangement. In these cases, the court looks behind the company to discover the facts which the corporate nature is concealing and applies the ordinary legal principles to those facts. This principle, Lord Sumption said, 'is legally banal and does not involve piercing the corporate veil at all'.[6]

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[4] *Prest v Petrodel Resources Limited and Others* [2013] UKSC 34 para 16.
[5] *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530, affirming *Salomon v Salomon and Co Limited* [1897] AC 22 (HL).
[6] *Prest* fn 4 para 28.

[37] The evasion principle applies to a category of cases 'where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company'.[7] The principle applies,

'. . . when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.'[8]

[38] Our law adopts a similar approach. In *Hülse-Reutter*,[9] Scott JA said:

'There can be no doubt that the separate legal personality of a company is to be recognised and upheld except in the most unusual circumstances. A court has no general discretion simply to disregard the existence of a separate corporate identity whenever it considers it just or convenient to do so . . . The circumstances in which a court will disregard the distinction between a corporate entity and those who control it are far from settled. Much will depend on a close analysis of the facts of each case, considerations of policy and judicial judgment. Nonetheless what is, I think, clear is that as a matter of principle in a case such as the present there must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter.'[10]

[39] The plaintiffs rely on the evasion principle in these proceedings. They say that the South African defendants are seeking to evade their legal obligations under the policies. The abuse they assert is that the separate legal identities of the Mozambican companies are a device to conceal the true underlying insurance relationship – between the insured and the South African defendants – to escape liability by invoking a jurisdictional objection.

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[7] *Prest* fn 4 para 35; *Hurstwood Properties (A) Ltd and Others v Rossendale Borough Council and Another* [2021] UKSC 16 paras 64-65.
[8] Ibid.
[9] *Hülse-Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA); [2002] 2 All SA 211 (A) para 20.
[10] Ibid.

[40] This is an assertion of fraud on the insured, pure and simple. It casts a formidable onus on the plaintiffs. Nothing short of proving fraud on a balance of probabilities will suffice. It is not lightly inferred.[11] Fraud is proved when it is shown that a false representation has been made knowingly.[12]

[41] On the evidence, the plaintiffs did not, and cannot, discharge this onus. Any assertion of fraud is negated solely by the fact that the policies were issued by the Mozambican defendants, because the law of Mozambique required a risk in that country to be insured by a Mozambican insurer.

Condition 14: submission to jurisdiction

[42] The plaintiffs contend that condition 14 operates in respect of both policies; and that it confers jurisdiction on the High Court in respect of all the pleaded claims to the extent that the defendants are viewed as a joint, single insured. If this Court finds that the claims of each of the plaintiffs fall to be considered separately, then the plaintiffs submit that the High Court has jurisdiction over the first and second plaintiffs' claims in terms of both policies, and over the claim of the third plaintiff by virtue of the *causae continentia* doctrine.

[43] As stated above, the assertion that there is an insured joint venture as a legal entity entitled to claim under the policies, is unsustainable on the pleadings, the plain wording of the policies and the evidence. The submission that the High Court has jurisdiction over the South African defendants' claims is founded on condition 14. It provides:

'This policy shall be interpreted according to the laws of the Republic of South Africa and any dispute or difference of any kind whatsoever or any cause of action arising out of or by virtue of this policy shall subject to the terms of Condition 5 be determined by action to be instituted in the Republic of South Africa.'

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[11] *State Bank of India and Another v Denel Soc Limited and Others* [2014] ZASCA 212; 2014 JDR 2586 (SCA); [2015] 2 All SA 152 (SCA) para 10.
[12] Ibid.

[44] The reference to condition 5, which requires the insured to exercise reasonable care in the selection and supervision of employees, is nonsensical and can safely be disregarded.[13] In any event, the plaintiffs' case was advanced on the basis that the inclusion of condition 5 was a mistake. For this reason, the plaintiffs' submissions that condition 5 is a reference to condition 5 in the Project Delay Policy (which precludes fraudulent claims), cannot be sustained. The defendants' suggestion that condition 14 was mistakenly included in the Project Delay Policy, is unsustainable on the evidence.

[45] When the action was commenced, the Supreme Court Act 59 of 1959 (the Supreme Court Act) was operative and thus jurisdiction must be determined in accordance with s 19 of that Act. The equivalent provision in the Superior Courts Act 10 of 2013 (the Superior Courts Act) is s 21. Concerning this case, both these sections contain identical requirements for jurisdiction.

[46] The requirements, in short, are these. In an action by an *incola* against a foreign *peregrinus* there must be a submission to jurisdiction (alternatively, an attachment which has not been done in this case).[14] An action by a foreign or local *peregrinus* against another foreign *peregrinus* requires both a *ratio jurisdictionis* and additionally, an attachment or submission.[15] These requirements have been repeatedly stated by this Court both before and after the coming into force of the Constitution.[16]

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[13] Condition 5 provides:
'The Insured shall exercise all reasonable care in the selection employment and supervision of all employees and in the prevention of any injury, disease, illness or damage against which the policy indemnifies the Insured and in compliance with any statutory regulation.'

[14] *Tsung v Industrial Development Corporation of SA Ltd* [2006] ZASCA 28; 2006 (4) SA 177 (SCA); [2006] JOL 16998 (SCA) para 6. Dictum applied in *MV Alina II (NO 2) Transnet Ltd v Owner of MV Alina II* [2011] ZASCA 129; 2011 (6) SA 206 (SCA); [2011] 4 All SA 350 (SCA) para 5.

[15] *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) at 258E-259B.

[16] *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987 (4) SA 883 (A) at 890E-891B; *Siemens Ltd v Offshore Marine Engineering Ltd* 1993 (3) SA 913 (A); [1993] 2 All SA 437 (A) at 929G-H; *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* [2010] ZASCA 96; 2010 (6) SA 329 (SCA); [2011] 1 All SA 449 (SCA); 2010 BIP 256 (SCA) para 10*; Travelex Limited v Maloney* [2016] ZASCA 128; 2016 JDR 1776 (SCA) para 17.

[47] The first question is whether condition 14 is confined to the Contract Works Policy. This requires the interpretation of the policies in the normal way, considering text, context and purpose together, to render a sensible and businesslike interpretation of the documents as a whole.[17]

[48] The plaintiff's pleaded claim is based on both policies. A claim under the Project Delay Policy can only arise by virtue of the Contract Works Policy, because of the requirement that there must be an accident indemnifiable in terms of the 'specified policy' – the Contract Works Policy. The policies are inextricably linked and have an interlocking design:

(a) The Project Delay Policy defines: the 'property insured' as the contract works as described in the Contract Works Policy; the 'project', as all contracts and works undertaken by and on behalf of the insured in connection with the project; and the 'contract site', as the lands and other places on which the works are to be carried out. Similar definitions are contained in the Contract Works Policy.

(b) The wording of condition 14 itself does not confine that clause to disputes or causes of action arising out of the Contract Works Policy, but includes those which arise 'by virtue of' that Policy.

(c) Interpreting condition 14 as being confined to claims under the Contract Works Policy runs counter to the purpose for which the clause was included, but also produces an absurd and unbusinesslike result. Thus, when an insured event occurs under the Contract Works Policy giving rise to damage covered by the Project Delay Policy, the insured would be obliged to institute two separate actions: one in South Africa for the contract works portion of the claim which would be determined in accordance with South African law; and another for the project delay claim to be determined in terms of Mozambican law.

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[17] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA) para 18; *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) paras 64-66; *Travelex* fn 16 para 29.

[49] The High Court therefore erred in concluding that only the Project Delay Policy was relevant, and in failing to construe both policies in its interpretation of condition 14. The meaning and effect of condition 14, in my view, is that there is a submission to the jurisdiction of the High Court by the Mozambican defendants in respect of both policies. This means that the High Court has jurisdiction in respect of a claim by the first and second plaintiffs, who are resident within the area of the court's jurisdiction,[18] provided that the latter can establish such claim based on their rights and interests under either policy.

[50] However, consent to jurisdiction by the Mozambican defendants does not vest the High Court with jurisdiction in respect of the claim by the third plaintiff, a Mozambican entity with its place of business in Maputo, against the Mozambican defendants. This is because consent to jurisdiction (prorogation) on its own, cannot confer jurisdiction unless the plaintiff is an *incola*. In *Veneta,*[19] this Court said:

'[T]he *dictum* of Innes CJ in *Ueckermann v Feinstein (supra)*, to the effect that there can be no prorogation in regard to cases where the court has no authority at all to adjudicate upon the subject-matter of the dispute, has never been departed from in this country.'

[51] This principle was affirmed in *Tsung*.[20] The question whether the doctrine of *causae continentia* can be used to grant a court jurisdiction which it does not by law possess, is considered next.

[18] *Veneta* fn 16 at 886G-H and 893F-894C; *Tsung* fn 14 para 6.
[19] *Veneta* fn 16 at 893C.
[20] *Tsung* fn 14 para 6.

The *causae continentia* doctrine

The parties' submissions

[52] As to whether the High Court has jurisdiction over the third plaintiff's claim against the third defendant – both *peregrini* of that court – the parties were requested to file written submissions on the following questions:

(a) In a case where a South African court has jurisdiction over *incolae* plaintiffs suing *peregrini* defendants based on contracts, and, arising out of the same contracts, there is also a claim by a *peregrinus* plaintiff against the same *peregrini* defendants, can the *causae continentia* doctrine be applied for the court to exercise jurisdiction over the latter claim?

(b) If the *causae continentia* doctrine can be applied in these circumstances, what are its limits?

[53] The plaintiffs' main submissions on these questions are the following. The doctrine of *causae continentia* justifies the High Court exercising jurisdiction over the whole cause and all the parties to it. There is no reason in principle to restrict the doctrine to *incolae*. The grounds for doing so, namely that a state's power does not extend beyond its sovereign territory; that it binds only those within its territorial control; and that the doctrine originated in a system of various courts operating within the same legal framework, are jurisprudentially unsound.

[54] The statement in *Berger*,[21] that the doctrine applies parochially and not in a case involving different courts which do not function within the same legal system, it is submitted, is *obiter*; and appears to be based on *Roberts Construction*,[22] in which there is no indication that the doctrine is confined to domestic application as a matter of practice and principle. Indeed, in *Roberts Construction*, this Court stated unequivocally that the doctrine could apply to

[21] *Berger and Others v Aiken and Others* 1964 (2) SA 396 (W); [1964] 2 All SA 221 (W).
[22] *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd* 1962 (4) SA 326 (A); *Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA); 2001 (10) BCLR 1039 (A) para 22.

foreign subjects. Issues of comity do not militate against recognition of the extra-territorial scope of the doctrine.

[55] The defendants submit that the *causae continentia* doctrine cannot be applied in a South African court to exercise jurisdiction over a claim by a foreign *peregrinus* plaintiff against foreign *peregrini* defendants, unless the requirements for the exercise for jurisdiction in respect of such a claim by a South African court are independently met. This principle has been codified in s 19(1)*(b)* of the now repealed Supreme Court Act, which was applicable when the action was instituted. It provided:

'A provincial or local division shall also have jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such provincial or local division has jurisdiction or who in terms of a third party notice becomes a party to such a cause, *if the said person resides or is within the area of jurisdiction of any other provincial or local division*.'[23]

[56] The defendants therefore submit that an extension of the *causae continentia* doctrine is beyond the limitations imposed by s 19(1)*(b)*. The doctrine cannot be used to circumvent the principle that jurisdiction concerning disputes between foreign *peregrini* requires a *ratio jurisdictionis* (ground of jurisdiction).

Analysis

[57] The common law doctrine of *causae continentia*, laid down in *Roberts Construction*, states that where one court has jurisdiction over one part of a cause, considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause. Steyn CJ held that a claim for breach of a contract which had to be performed partly in the Free State and the Cape Provinces, respectively; and an alternative claim based on a fraudulent

[23] Emphasis added. Section 19(1)*(b)* is reproduced in almost identical terms in s 21(2) of the Superior Courts Act 10 of 2013.

misrepresentation in Johannesburg which induced the contract, gave the Free State court jurisdiction over the whole cause of action.

[58] Both claims concerned the dissolution of the same contract which, in the one instance related to the contract itself; and in the other, to its conclusion. It can reasonably be said, Steyn CJ concluded, that the two claims together in fact constitute one case; that the alternative claim begins where the main claim ends; and that in a real sense the former is merely a continuation of the same case, and that it cannot be separated from the main claim and be instituted in another court, without inconvenience and hindrance.[24]

[59] The plaintiffs' submissions are at odds with first principles. Our law does not permit any South African court to exercise jurisdiction over a claim brought by a *peregrinus* against another *peregrinus*, in the absence of a ground of jurisdiction originating within the area of jurisdiction of the court.[25] This is an absolute requirement.

[60] The *rationes jurisdictionis* include residence; domicile (*ratio domicilii*); the location of the subject matter of the action within the jurisdiction (*ratio rei sitae*); cause of action (*ratio rei gestae*) including the conclusion or performance of a contract (*ratio contractus*); and the commission of a delict within the jurisdiction (*ratio delicti*).[26] And where a *ratio* does exist, jurisdiction can be exercised only in the event of either (i) consent or submission to jurisdiction; or, failing which, (ii) an attachment to found jurisdiction. Where there is consent or

[24] *Roberts Construction* fn 22 at 337F-H. Steyn CJ said:
'Dit kan met rede gesê word dat die twee vorderings tesame eintlik een saak uitmaak, dat die alternatiewe eis begin waar die hoofeis ophou, dat dit in wesenlike sin slegs 'n voortsetting van dieselfde saak is, en dat dit nie sonder ongerief en belemmering van die hoofeis geskei en voor 'n ander Hof ingestel kan word nie. Dit wil my daarom voorkom dat hier voldoende grond vir 'n *conjunctio causarum* bestaan, en dat die alternatiewe vordering daarom gevoeglik deur dieselfde Hof as die hoof eis besleg kan word.'
[25] See the authorities cited in fn 15 and fn 16.
[26] D E Van Loggerenberg *Pollak: The South African Law of Jurisdiction* 3 ed (Service 2, 2020) at 24.

submission, attachment is impermissible; absent consent or submission, attachment is an essential requirement.[27]

[61] Thus, *Roberts Construction* cannot be read as establishing a free-standing jurisdictional power enabling a South African court to adjudicate a dispute between two foreign *peregrini*, merely because it is convenient that the claims be heard together. This is consistent with the principle articulated in *Veneta*. There, this Court rejected a proposition that submission to the court's jurisdiction alone could confer jurisdiction where a ground of jurisdiction was absent – one of the recognised jurisdictional grounds must exist.[28] And in *Ingosstrakh*[29] this Court described *Veneta* as the leading authority on this point, and affirmed the principle that submission does not suffice when none of the traditional grounds of jurisdiction is present. Conceptually, there is an important reason for this: jurisdiction is a power vested in a court by law; it is not a contractual attribute which litigants can confer upon the court by agreement.

[62] The second judgment places considerable weight on the policy consideration underlying the privilege accorded to an *incola* plaintiff, namely that such a plaintiff should not be compelled to pursue a foreign *peregrinus* defendant in a foreign forum, with the attendant expense and inconvenience. But that consideration cannot be elevated into a general principle of jurisdiction. The privilege accorded to an *incola* plaintiff is a historically recognised exception to the ordinary rules governing jurisdiction. As explained in *Thermo Radiant*,[30] the procedure of arrest or attachment to found jurisdiction was conceived primarily for the benefit of an *incola*. It does not follow that the same privilege is available to a foreign *peregrinus* plaintiff.

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[27] *Tsung* fn 14 para 6.
[28] *Veneta* fn 16 at 893C-E.
[29] *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others* [2021] ZASCA 69; 2021 (6) SA 352 (SCA); [2021] 3 All SA 316 (SCA) paras 28-29.
[30] *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A); [1969] 2 All SA 338 (A).

[63] The distinction is confirmed by *Veneta*, where this Court held that the submission of a defendant, who was an *incola* of the Republic but a *peregrinus* of the court, did not, without more, confer jurisdiction at the suit of a foreign *peregrinus* plaintiff. A recognised ground of jurisdiction connecting the court with the subject matter of the litigation remained necessary. That distinction was expressly affirmed in *Ingosstrakh*. The Court distinguished the position in *Hay Management Consultants*,[31] where an *incola* plaintiff sued a foreign *peregrinus* defendant, from the position where a foreign *peregrinus* plaintiff seeks to invoke the jurisdiction of a South African court against another foreign *peregrinus*.

[64] The second judgment's reliance on the convenience of avoiding litigation in two jurisdictions therefore overlooks the anterior question: whether this Court has jurisdiction to entertain the claims in question in the first place. Convenience may justify the extension of jurisdiction which already exists. It cannot substitute for the jurisdictional foundation which the law requires.

[65] Put simply, *Roberts Construction* cannot be invoked to confer jurisdiction where no recognised ground of jurisdiction exists. The *causae continentia* doctrine presupposes a jurisdictional foundation; it does not create one. In *Roberts Construction* there was already a ground of jurisdiction: the contractual connection with the Free State, where partial performance of the contract took place. The claims in that case were so closely connected that they constituted one coherent dispute. The doctrine allowed the court to determine the whole dispute.

[66] But that is not the position in the present case. Indeed, the particulars of claim and the evidence point the other way. The claim is squarely founded on the policies. There is no contractual connection arising from the policies between the South African defendants and the Mozambican defendants; there is no joint

[31] *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 (2) SA 522 (SCA); [2005] 3 All SA 119 (SCA).

venture and no composite insured. The claims do not concern an indivisible contractual obligation which was partly to be performed within the jurisdiction of the High Court and partly in Mozambique.

[67] Ms Evangelides' testimony makes it clear that the Contract Works Policy and the Project Delay Policy are not South African policies issued to the South African plaintiffs. The latter are not the principals, responsible for the premiums and claims under the policies. Neither would any claims under the policies be paid in South Africa. The insured risk related to the Project in Mozambique. The alleged breach likewise occurred in Mozambique. These were not incidental facts. They went directly to the nature and location of the contractual relationships upon which the claims against the Mozambican defendants are founded.

[68] The second judgment seeks to avoid the consequences of this evidence by describing it as 'unclear' and by asserting that the claims of the South African plaintiffs do not form part of the special plea. But this approach, in my respectful opinion, fails to engage with the substance of the evidence. The identity of the insurers, the identity of the insured, the place of conclusion and performance of the contracts, and the location of the insured risk were all directly relevant to the jurisdictional issue referred for determination.

[69] It follows, in contrast to the second judgment, that this case does not concern indivisible obligations regarding an indivisible subject matter in two different jurisdictions. In my opinion, the fact that claims may arise out of a common factual background does not make the obligations legally indivisible. There is neither an indivisible obligation nor an indivisible subject matter giving rise to a single coherent cause of action straddling South Africa and Mozambique. And the fact that there is a submission to jurisdiction by the Mozambican defendants, does not alter the position.

[70] The plaintiffs' submission that there is nothing in *Roberts Construction* which confines the doctrine to domestic application, and that this Court stated unequivocally that the doctrine could apply to foreign subjects (vreemde onderdane),[32] is incorrect. For this submission, they rely on the reference by Steyn CJ to Huber's *Praelectiones* 11.2.11. It reads:

'In 11.2.11, he mentions *conjunctio causarum*, by which he understands instances in which actions are so interconnected that they cannot be separated without great inconvenience. They must be heard before the same Judge, such as possessory and ownership actions concerning the same thing where, although they have a different origin and foundation, the evidence is so related that (*fere*) the evidence of the one can almost be applied to the other. In 11.2.11, he further says that where the proceedings (*negotia*) are inseparable, even foreign subjects must (subject to the applicable procedure) appear before the same Judge, in the same manner as where the court's competence is determined by the *locus rei sitae*.'[33] (My translation.)

[71] There is nothing in 11.2.1 to suggest that the *causae continentia* doctrine can be applied to create jurisdiction over a foreign subject where the court otherwise has no jurisdiction. As the passage makes clear, just as the location of property (*locus rei sitae*) gives the court jurisdiction over that property, the 'inseparability' of proceedings can likewise draw a foreign subject into that same court. But this involves joining the foreign subject to an existing, validly founded action, where there is a sufficient connection between the cause of action and the court's area (such as the contract being concluded or the delict committed there). The doctrine serves to expand an existing jurisdictional foothold where this is convenient, appropriate or sensible, but it does not do away with the fundamental requirement that the court must have a primary legal link to the dispute or at least one of the parties.

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[32] *Roberts Construction* fn 22 at 334G-H.

[33] *Roberts Construction* fn 22 at 334F-H. The Afrikaans text reads thus: 'In 11.2.11 noem hy *conjunctio causarum*, waaronder hy verstaan gevalle waarin aksies onderling so verbind is, dat hulle nie sonder groot ongerief geskei kan word nie. Hulle moet voor dieselfde Regter dien, soos besits-en eiendomsaksies oor dieselfde saak waarby, hoewel hulle van verskillende oorsprong en grondslag is, die bewyse so samehang dat hulle byna *(fere)* van die een op die ander toegepas kan word. In 11.2.11 sê hy verder dat waar die verrigtings *(negotia)* onskeibaar is, selfs vreemde onderdane (onderworpe aan die toepaslike prosedure) voor dieselfde Regter moet kom, op dieselfde wyse soos waar die hof se kompetensie deur die *locus rei sitae* bepaal word.'

[72] Moreover, it is beyond question that the *causae continentia* doctrine originated in a system of various courts operating within the same legal framework. In this regard, Steyn CJ in *Roberts Construction*,[34] referring to Groenewegen *O.C. Ad Cod.* 3.18, said:

'It does not follow, therefore, that competence arising from the unity of a case or the cohesion of cases, in accordance with the principles recognised by our common law, is rendered inoperative merely because we do not have a Court like the Court of Holland which, with regard to the areas of jurisdiction of the Provincial and Local Divisions of the Supreme Court, in such cases is vested with competence at first instance. *Our Courts too can, as far as their procedures and the enforcement of their judgments are concerned, count on efficiency outside their area. The summonses and orders of one Court can be served and enforced in the area of another. A case before one Court can, if it appears that it can be heard or decided with greater convenience or appropriateness in another Division, be transferred to that Division, and that Division can then hear and decide it.* (S. 9 of Act 59 of 1959). *It is true that a resident of the area of one Division is legally a peregrinus in the area of another Division, but he is an incola of the Republic in which the various Divisions function; and he is also not a peregrinus in the full sense of the word.* He cannot be arrested and no attachment can be levied on his goods to found jurisdiction.'[35] (My translation.)

[73] Steyn CJ then concluded:[36]

'It is against this background of our common law *and the framework within which our Courts function*, that the recognition and applicability of a jurisdictional ground that would correspond

[34] *Roberts Construction* fn 22 at 335H.
[35] *Roberts Construction* fn 22 at 335H-336A-C. Emphasis added. The Afrikaans text reads thus:
'Dit volg dus nie dat kompetensie uit eenheid van saak of samehang van sake, ooreenkomstig die beginsels deur ons gemenereg erken, by ons buite werking gestel word slegs omdat ons geen Hof soos die Hof van Holland het wat ten aansien van die regsgebiede van Provinsiale en Plaaslike Afdelings van die Hooggeregshof, in sulke gevalle met bevoegdheid ter eerste instansie beklee is nie. Ook ons Howe kan, wat hul prosedures en die ten-uitvoer-legging van hul vonnisse betref, reken op doeltreffendheid buite hul gebied. Die dagvaardings en bevele van die een Hof kan in die gebied van 'n ander bestel en afgedwing word. 'n Geding voor die een Hof kan, indien dit blyk dat dit met groter gerief of gepastheid in 'n ander Afdeling verhoor of beslis kan word, na daardie Afdeling oorgeplaas word, en daardie Afdeling kan dit dan verhoor en uitwys. (Art. 9 van Wet 59 van 1959). 'n Inwoner van die een Afdeling se gebied is weliswaar regtens 'n *peregrinus* in die gebied van 'n ander Afdeling, maar hy is 'n *incola* van die Republiek waarin die verskillende Afdelings funksioneer; en hy is ook nie 'n *peregrinus* in die volle sin van die woord nie. Hy kan nie in hegtenis geneem word en geen beslag kan op sy goed gelê word om jurisdiksie te vestig nie.' (Emphasis added.)
[36] *Roberts Construction* fn 22 at 336C-D.

with the *continentia*-rule, must be assessed. I can find nothing that would stand in the way of its recognition and application in the present case.'[37] (My translation.)

[74] This, in my judgment, is a complete answer to the plaintiffs' submission that in principle, there is no justification for limiting the doctrine to a domestic scope, as the court in *Berger*[38] did. They contend that Forsyth has rightly criticised its restrictive application as running counter to the principles underpinning the doctrine and its intended purposes. Forsyth says:

'[I]n *Berger v Aiken*, the court suggested that the *continentia* doctrine was not applicable if the courts before which the claims could be brought were not part of the same legal framework. It would be a pity if the rule were so parochially conceived even where considerations of convenience make it clear that a court should be prepared to extend its jurisdiction more broadly.'[39]

[75] No authority is cited for this statement, save for a reference to *Cheshire and North's Private International Law*,[40] and a statement that the English courts would extend their jurisdiction over persons abroad on similar grounds. However, that section of *Cheshire and North's Private International Law* discusses Order 11 of the 1998 The Civil Procedure Rules of the United Kingdom, which essentially regulates service outside the jurisdiction of English courts.[41]

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[37] Ibid. The Afrikaans text reads thus: 'Dit is teen hierdie agtergrond van ons gemenereg *en die raamwerk waarbinne ons Howe funksioneer*, dat die erkenning en toepaslikheid van 'n jurisdiksiegrond wat met die *continentia*-reël sou ooreenstem, beoordeel moet word. Ek kan niks vind wat die erkenning en toepassing daarvan in die huidige geval in die weg sou staan nie.' (Emphasis added.)

[38] *Berger* fn 21.

[39] C F Forsyth *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* 5 ed (2012) at 193.

[40] P M North and J J Fawcett *Cheshire and North's Private International Law* 13th edition 1999. This section, referenced by Forsyth, concludes, at 325, with a heading 'Can new bases of competence be introduced?' This question is answered with reference to Lord Diplock in the case of *Siskana (owners of cargo lately laden on board) v Distos Cia Naviera SA, The Siskina* [1979] AC 210 at 260: 'any extension of the jurisdiction of the courts over foreign defendants requires subordinate legislation by the rules committee if not primary legislation by Parliament itself.' The most recent edition of the text, P Torremans *et al Cheshire, North and Fawcett Private International Law* 15th edition 2017, discusses Rule 6.36 of the Civil Procedure Rules and Practice Direction 6B, which now govern the discretionary power of courts to summon absent defendants, whether English or foreign.

[41] Order 11 of The Civil Procedure Rules aimed to produce a list of grounds for service out of the jurisdiction which was clearer and simpler than the list under the predecessor Rules of the Supreme Court. It is headed 'Service of Process, etc., Out of the Jurisdiction'. Rule 1(1) provides that 'a claim form may be served out of the jurisdiction with the permission of the Court' if certain conditions are met, and Rule 1(2) makes provision for two instances in which '[a] claim form may be served out of the jurisdiction on a defendant without the permission of the Court'.

Fundamentally, Forsyth's criticism runs counter to basic principles of jurisdiction. This Court in *Roberts Construction* recognised the *causae continentia* doctrine as a ground for extending jurisdiction over interconnected claims, but only where the court already has jurisdiction over at least one part of the cause of action. That is clear from the Roman Dutch authorities cited by Steyn CJ. They refer to situations where jurisdiction is already competent but multiple claims are intertwined. The doctrine is ancillary: it does not independently confer extra-territorial jurisdiction.

[76] In addition, Steyn CJ emphasised the institutional framework in which South African courts operate, more particularly, the different divisions of the same national court system; that judgments are enforceable across divisions; and that cases can be transferred from one division to another. This context explains why the doctrine could function. The Court specifically noted that a litigant may be a *peregrinus* to a division but still an *incola* of the Republic; and that enforcement across divisions is administratively integrated.

[77] Thus, the doctrine presupposes a single judicial system and mutual enforceability of judgments. If courts belong to different sovereign systems, those assumptions collapse. This reasoning explains why courts should be cautious about extending the doctrine internationally.

[78] Forsyth's criticism is academically interesting, but insupportable on Roman Dutch authority. Further, English law on which he relies operates under different principles. For example, it has flexible jurisdictional gateways which allow courts to exercise jurisdiction over international disputes where a 'meaningful connection' to England exists, even if that connection is not purely territorial;[42] and which recognises the doctrine of *forum non conveniens* (a court's

[42] See in this regard *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45 at 197. The notion of a 'meaningful connection' pertains to the requirements to obtain the court's permission to serve a claim outside of the jurisdiction. A prospective claimant must demonstrate that firstly, it has a good arguable case that the claim

discretionary power to decline to exercise jurisdiction). The latter doctrine has limited application in our law. In *Agri Wire*,[43] this Court said:

'Save in admiralty matters, our law does not recognise the doctrine of *forum non conveniens*, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction.'

[79] It follows that the statement in *Berger* is correct. There, the court declined to apply the *causae continentia* doctrine because there was no inherent connection between a claim to interdict trustees from distributing amounts due to additional trustees, and a claim based on the *condictio indebiti* where money was mistakenly paid to trustees outside the Republic, in Israel and the United States. Boshoff J held that the claims concerned acts in Israel and the United States; and that the courts involved did not operate within the same legal system. Therefore, the doctrine could not extend jurisdiction. This reflects a fundamental principle of South African jurisdiction: courts cannot assume jurisdiction unless a recognised *ratio jurisdictionis* exists.

[80] For the above reasons, the *causae continentia* doctrine cannot be applied to grant the High Court jurisdiction over the claim by the third plaintiff (a foreign *peregrinus*) against the Mozambican defendants (foreign *peregrini*). That would subvert the South African jurisdictional system which is founded on established *rationes jurisdictionis*. The proposition in the second judgment that it would be odd if our common law of jurisdiction were to disregard the fact that it has taken root in a modern African society and economy, and engages the African continent in commercial trade and investment, in my view, is a recognition of economic

falls within one of the statutory jurisdictional 'gateways' in paragraph 3.1 of Practice Direction 6B; secondly, there is a serious issue to be tried for each cause of action; and thirdly, England is the proper place in which to bring the claim. See P Torremans *et al Cheshire, North and Fawcett Private International Law* 15 ed (2017) at 334-335.

[43] *Agri Wire (Pty) Ltd and Another v Commissioner, Competition Commission and Others* [2012] ZASCA 134; 2013 (5) SA 484 (SCA); [2012] 4 All SA 365 (SCA) para 19 (at 493E-F). Dictum applied in *Commissioner, South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd* 2025 (5) SA 617 (CC); 2025 (5) SA 617 (CC); 2025 (6) BCLR 639 (CC); 88 SATC 162 para 83 and *TMT Services & Supplies (Pty) Ltd v MEC, Department of Transport, Kwazulu-Natal and Others* [2022] ZASCA 27; 2022 (4) SA 583 (SCA); [2022] JOL 52532 (SCA) para 34.

reality: it does not establish that a particular foreign defendant is subject to the jurisdiction of a particular High Court in a particular dispute.

Section 21(2) of the Superior Courts Act

[81] The South African defendants submit that the *causae continentia* principle has been codified in s 19(1)*(b)* of the Supreme Court Act. That provision applied only where a division already had jurisdiction over a cause, and the party joined was within the jurisdiction of another division of the same court system. This confirms that the *causae continentia* doctrine operates between different divisions, not between different countries.

[82] Section 21(2) of the Superior Courts Act replaced s 19(1)*(b)* of the Supreme Court Act. Like its predecessor, s 21(2) of the Superior Courts Act does not create jurisdiction, nor does it allow a court to hear a matter that it otherwise could not. It is a statutory embodiment of the *causae continentia* principle in the context to which the section applies. Section 21(2) provides:

‘**Persons over whom and matters in relation to which Divisions have jurisdiction**

(2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.’

[83] The second judgment holds that the *causae continentia* doctrine is not codified in s 21(2) of the Superior Courts Act, nor limited to the jurisdiction of courts within our legal system. I respectfully disagree. Harms correctly states:[44]

‘The objects of this common-law principle of preventing the destruction of the coherence of a cause, are to avoid duplication of proceedings and conflicting decisions in the same matter, and to dispose of cases more conveniently. The principle is now enshrined in s 21(1)*(b)*.’

[44] D R Harms *Civil Procedure in the Superior Courts* (2026) SI 83 at A4-19.

[84] I would merely add that the wording of s 21(2) itself contains the following limitations: (i) the Division must already have jurisdiction over the cause; (ii) the additional person must be joined as a party to that cause or become a party through a third-party notice; and (iii) the person must reside or be within the jurisdiction of another Division. Section 21(2) therefore deals with territorial allocation within the South African High Court system.

[85] Thus, s 21(2) embodies the *causae continentia* doctrine in relation to persons falling within another Division. But, as in the case of that doctrine, s 21(2) does not create jurisdiction where the court has no jurisdiction over the underlying cause of action. Importantly, s 21(2) does not permit unlimited jurisdiction over foreign disputes merely because parties submit to the jurisdiction of the court. So construed, s 21(2) constitutes a significant barrier to the development of a broader *causae continentia* rule under the common law.

The doctrine is not engaged in the present case

[86] It is common ground that the plaintiffs' claims, pleaded in paragraphs 13 to 19 of the particulars of claim, are based on the contracts of insurance. The parties agreed that this issue, together with the issues described in paragraph 16 above, would be decided at the initial hearing of the matter.

[87] The defendants have established that the High Court has no jurisdiction in respect of the claim by the third plaintiff against the Mozambican defendants, as alleged in paragraphs 1 to 6 and 7.1 of the special plea of jurisdiction. The allegations in paragraphs 2 and 3 of the replication are simply unsustainable on the evidence. These are essentially the following. The parties had orally agreed in KwaZulu-Natal that the first and second defendants would provide insurance to all the plaintiffs for risks relating to the project, and the policies were issued in accordance with that agreement. The first defendant controlled the business of the third defendant and the second defendant, that of the fourth defendant. The

Mozambican defendants are the alter egos of the first and second defendants. A 'joint venture (such as undertaken by the plaintiffs) would be deemed to be a legal entity with rights no more or no less extensive than any other party insured'.

[88] The question then arises: what is the claim *based on the contracts*, by the first and second plaintiffs against the defendants? The particulars of claim state that the loss-causing event resulted in the third plaintiff suffering a loss of gross profit, an increase in the cost of working, and the costs of repairing or replacing a diffuser or chain components, in a total amount of R52 377 947. Consequentially, so the first and second plaintiffs allege, they suffered the same loss, in the same amount, in their businesses.

[89] But the evidence contradicts this. Mr Slabbert for the plaintiffs accepted that the first and second plaintiffs did not suffer the losses as alleged; and that any loss in the first instance was suffered by the third plaintiff – its plant was damaged and its rights and interests are affected. That is nothing more than a claim by the insured under the policies, in Mozambique.

[90] The evidence thus establishes that the loss in question was suffered by the third plaintiff; that its property was damaged in Mozambique; that the insurance contracts were concluded in Mozambique; that performance under those contracts had to be rendered there; that the insured risk materialised there; and that the alleged breach occurred there. This evidence affirmatively establishes that the substantive dispute is centred in Mozambique.

[91] Therefore, the jurisdictional foundation is absent. There is no South African *ratione contractus* (jurisdiction by reason of the contract) or *ratione rei gestae* (by reason of the thing done) or any other recognised ground of jurisdiction or jurisdictional connecting factor, in respect of the third plaintiff's claim. This matters because the *causae continentia* doctrine cannot be used to convert the existence of other proceedings in South Africa into a jurisdictional connecting

factor. And the plaintiffs cannot supply that factor simply by pleading the same loss.

[92] The defendants submit that the first plaintiff could possibly advance a claim for a reduced or delayed dividend, a part of which might have been paid by the third plaintiff to the Portuguese shareholder which might in turn, have distributed that dividend to the first plaintiff. However, that is not the claim advanced in the particulars, nor the case that the defendants were called upon to meet. The court must determine jurisdiction in relation to the cause of action actually advanced, not a possible cause of action which could have been pleaded.

[93] Concerning the second plaintiff, we were referred in argument to an annex to the particulars of claim, showing the supply of chain links valued at R115 635; and labour and travelling costs of R66 752, allegedly incurred in relation to the project. This claim too, is not founded on the insurance policies.

[94] Consequently, the doctrine of *causae continentia* is not engaged because there is no claim against the Mozambican defendants over which the High Court has jurisdiction and which constitutes the jurisdictional basis for extending the court's jurisdiction to the claims in respect of which jurisdiction is otherwise absent. In sum, the doctrine cannot itself supply the jurisdiction which it presupposes. In my view, the reasoning in the second judgment risks rendering the *causae continentia* doctrine self-justifying. If factual indivisibility and convenience were sufficient to establish jurisdiction, the doctrine would no longer require an existing jurisdictional foundation at all. That would fundamentally alter its character.

[95] As to an alleged claim *based on the policies*, the second judgment holds that each of the plaintiffs is an insured under the policies; that there is no differentiation regarding the property insured as between the insured; and that the

insured event allegedly giving rise to liability is the same in the case of each of the plaintiffs. Then it is said that the 'features of the pleadings and the Policies relied upon by the plaintiffs mean that the actions are closely interconnected and the evidence relevant to the trial of these actions will have considerable commonality'.

[96] This holding, with respect, is inconsistent with the evidence. First, the present case is not an exception, in which the allegations in the particulars of claim must be accepted as true. Second, and as already stated, Ms Evangelides, the plaintiffs' own witness, was driven to concede that the policies are not South African policies issued to the South African plaintiffs; that the latter are not the principals responsible for the premiums and claims under the policies; that the Mozambican defendants, and not the South African defendants, are the insurers under the policies; and that no claims under the policies would be paid in South Africa.

[97] Thus, the evidence does not establish that the South African plaintiffs were insured in terms of South African policies, or that the Mozambican defendants undertook an indivisible contractual obligation which had to be performed partly within the jurisdiction of the High Court and partly in Mozambique. The premise upon which cohesion between the claims was sought to be established is accordingly absent.

Development of the common law of jurisdiction

[98] The second judgment holds that in *Bid Industrial Holdings*,[45] this Court developed the common law of jurisdiction by substituting an unconstitutional regime of arrest with a flexible rule, based on the service of a summons on the defendant if attachment is not possible. It is said that this flexible rule is founded on 'party choice and a flexible consideration of connection as the basis for the

[45] *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* [2007] ZASCA 144; 2008 (3) SA 355 (SCA); [2008] 2 All SA 373 (SCA).

recognition of jurisdiction; that the rule adopts a pragmatic approach, far removed from the rigid requirements of personal and subject matter jurisdiction'.

[99] As explained above, the *causae continentia* doctrine has no application, not merely because the claims of the first and second plaintiffs are insufficiently connected to those of the third plaintiff. It is that there is no jurisdictional foundation in respect of the claim of the third plaintiff against the Mozambican defendants, for the doctrine to apply. In my view, the decision in *Bid Industrial Holdings* does not alter that conclusion.

[100] The case concerned the circumstances in which a South African plaintiff could obtain jurisdiction over foreign defendants, without attachment. The plaintiff was an *incola* South African company, and the defendants were foreign *peregrini* (Australian residents). The plaintiff wished to sue the defendants in the Johannesburg High Court for delictual damages and applied for their arrest to establish or confirm that court's jurisdiction. One of the grounds of opposition was that foreign nationals, while in South Africa, enjoyed the protection of the Constitution and their arrest to found or confirm jurisdiction was unconstitutional.

[101] This Court in *Bid Industrial Holdings* developed the common law by abolishing the requirement of arrest to found or confirm jurisdiction over a foreign *peregrinus*, where attachment was not possible. Howie P said:[46]

'In my view it would suffice to empower the court to take cognisance of the suit if the defendant were served with the summons while in South Africa and, in addition, there were an adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of the appropriateness and convenience of its being decided by that court. Appropriateness and convenience are elastic concepts which can be developed case by case. Obviously the strongest connection would be provided by the cause of action arising within that jurisdiction.'

[46] Ibid para 56. Dictum applied in *IRD Global Ltd v The Global Fund to Fight AIDS, Tuberculosis and Malaria* [2024] ZASCA 109; 2025 (1) SA 117 (SCA); 2024 JOL 65393 (SCA) para 14.

[102] There are three important qualifications in this dictum. First, this Court did not abolish the requirement for a jurisdictional connection: it emphasised that there must be an adequate connection between the suit and the area of jurisdiction, making it appropriate and convenient for the court to decide the dispute. Second, convenience is not an independent jurisdictional ground. It informs the assessment of whether the requisite connection is adequate. To read the judgment otherwise would be to detach the words 'appropriateness and convenience' from the jurisdictional connection which they qualify. And third, this Court referred generally to service on the defendant in South Africa and an adequate connection, but it did not decide the distinct question whether a foreign *peregrinus* plaintiff may, without attachment or submission, invoke that principle in a suit against another foreign *peregrinus*. In other words, it did not decide the present question.

[103] But even on the assumption that the principle in *Bid Industrial Holdings* applies to this case, the result is the same. This is because the essential requirement is an adequate connection between the suit and the South African forum. The material connecting factors in the present case point overwhelmingly to Mozambique. The contracts were concluded there; were to be performed there; the insured risk materialised there; and the alleged breach occurred there. There is accordingly no adequate connection between the third plaintiff's claim against the Mozambican defendants and the jurisdiction of the High Court, as contemplated in *Bid Industrial Holdings*. It follows that neither *causae continentia* nor the principle developed in *Bid Industrial Holdings* establishes the jurisdiction which is otherwise absent.

Conclusion on causae continentia

[104] The doctrine of *causae continentia* does not assist the first and second plaintiffs. The doctrine is one of cohesion of causes. It permits a court which has jurisdiction over part of a matter, in appropriate circumstances and having regard to considerations of convenience, justice and good sense, to exercise jurisdiction

over the whole. It is not, however, an independent source of jurisdiction. It presupposes that the court has jurisdiction over at least part of the litigation to which the doctrine is sought to be applied. That jurisdictional foundation is absent in the present case. For these reasons, it is not necessary to address the parochial application of the doctrine any further.

[105] The observation in the second judgment that the common law of jurisdiction takes into account that it has taken root in a modern African society and economy, which is increasingly outward-looking and engaged in commercial relations across the continent and beyond, is unobjectionable as a proposition concerning the development of the common law. It does not, however, answer the anterior question whether the court possesses jurisdiction in a particular case. The development of jurisdictional rules must remain anchored in recognised principles governing the assumption of jurisdiction. The doctrine of *causae continentia* is such a rule, but it operates on the premise that the court has jurisdiction over a part of an indivisible cause and, in appropriate circumstances, permits that jurisdiction to extend to the whole. It is not a free-standing source of jurisdiction over foreign *peregrini*.

[106] For the same reason, *Ngxuza* does not assist the plaintiffs. In *Ngxuza*, there was an existing jurisdictional connection between the High Court and the subject matter of the litigation: the alleged failure of the Eastern Cape Department of Social Services to pay social-security grants to persons within the province. That jurisdictional connection furnished the foundation upon which persons who were *peregrini* of the court could, in the particular constitutional and procedural context of a class action, be joined to the proceedings. *Ngxuza* therefore concerned the extension of an existing jurisdictional nexus; it did not establish that a South African court may assume jurisdiction over wholly foreign *peregrini* merely because the dispute has some connection with South Africa. Further, an

obiter observation in *Multi-Links*[47] that the *causae continentia* doctrine might potentially be extended to a foreign *peregrinus* does not establish that the doctrine can operate without a *ratio jurisdictionis*.

[107] To apply the *causae continentia* doctrine where neither the third plaintiff nor the Mozambican defendants have the requisite jurisdictional connection with the court, would invert the doctrine: rather than extending an existing jurisdiction, it would create one. The considerations of convenience, justice and good sense that underlie *causae continentia* cannot, without more, supply the missing *ratio jurisdictionis*.

Should the common law be developed under the Constitution?

[108] The plaintiffs contend that if submission alone is insufficient to found jurisdiction in respect of the claim by the third plaintiff against the Mozambican defendants, then the common law rules of jurisdiction should be developed in terms of s 39 or s 173 of the Constitution, as follows:

(a) The rule in proceedings between *incolae* plaintiffs and *peregrini* defendants that submission or attachment alone is sufficient to found or confirm jurisdiction, should be extended to proceedings between *peregrini* plaintiffs and foreign *peregrini* defendants.

(b) The existing grounds of jurisdiction should be extended to include the so-called '*ratio jurisdictionis* of adequate connection'.

(c) The rule that submission to jurisdiction or attachment is mandatory to found or confirm jurisdiction in a suit by a *peregrinus* plaintiff against a foreign *peregrinus* defendant, should be developed so that it is no longer mandatory where the *ratio jurisdictionis* of adequate connection is present.

[47] *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP).

[109] This issue can be dealt with briefly. In *Mighty Solutions*,[48] the Constitutional Court emphasised that 'legal certainty is essential for the rule of law – a constitutional value'. It observed that litigants who find themselves on the wrong side of the common law, 'often at a late stage in proceedings – seek what they would call its "development"'. This is such a case.

[110] The Court then stated the criteria for the development of the common law, as follows:

'Before a court proceeds to develop the common law, it must *(a)* determine exactly what the common-law position is; *(b)* then consider the underlying reasons for it; and *(c)* enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must *(d)* consider precisely how the common law could be amended; and *(e)* take into account the wider consequences of the proposed change on that area of law.'[49]

[111] The attempt to develop the common law fails at the first hurdle. The common law requirement of a *ratio jurisdictionis,* more specifically in relation to prorogation and failing that, attachment to found jurisdiction, has endured and withstood scrutiny. As already stated, prorogation on its own cannot confer jurisdiction, unless the plaintiff is an *incola*.[50] And in *Veneta,*[51] this Court clearly stated that there can be no prorogation where a court has no authority at all to adjudicate on the subject matter of the dispute.

[112] The rationale for attachment to found or confirm jurisdiction – established in Holland by the 17th century – is sound and has stood the test of time. As Harms JA explained in *Tsung*:[52]

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[48] *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another* [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) para 38. Dictum applied in *Van Meyeren v Cloete* [2020] ZACA 100; 2021 (1) SA 59 (SCA); [2020] 4 All SA 358 (SCA) para 32.
[49] *Mighty Solutions* fn 48 para 39. Dictum applied in *TN obo BN v MEC for Health, Eastern Cape, and Others* [2026] ZASCA 14; 2026 (3) SA 507 (SCA); [2026] 1 All SA 500 (SCA) paras 45-47 and *JM and Another v Masureik and Others* [2026] ZASCA] 1; 2026 (4) SA 367 (SCA); [2026] 1 All SA 259 (SCA) para 25.
[50] *Tsung* fn 14 para 6.
[51] *Veneta* fn 16 at 893C.
[52] *Tsung* fn 14 para 4.

'It enabled [*incolae*] to proceed in local courts against *peregrini* who . . . possessed property there. In addition to founding or confirming jurisdiction and to commence proceedings, an attachment had, since those days, an additional function, and that was the provision of security, enabling the plaintiff, eventually to execute in his own jurisdiction. Pending the finalisation of the proceedings, the defendant could not alienate or encumber the attached property. This function of attachment has since repeatedly been highlighted by our courts, including by this Court some months ago.' (Citations omitted.)

[113] The underlying reasons for attachment to found or confirm jurisdiction, and why submission alone cannot confer jurisdiction over a foreign *peregrinus*, are consistent with the right of access to courts in s 34 of the Constitution.[53] That being so, the common law rules of jurisdiction sought to be developed, do not offend the spirit, purport and object of the Bill of Rights, as envisaged in s 38 of the Constitution. Neither is it in the interests of justice to develop the common law as contemplated in s 173 of the Constitution. Consequently, no change to the relevant common law rules is necessary.

[114] The proposed development would constitute a policy change and require legislative amendment to s 21(2) of the Superior Courts Act. In *Mighty Solutions*,[54] the Constitutional Court reiterated the principle laid down in *Carmichele*:[55]

'Judges should be mindful of the fact that the major engine for law reform should be the Legislature and not the judiciary. The principle of separation of powers should thus be respected.' (Citations omitted.)

[115] Most recently, in *TN obo BN*[56] (a case in which a high court erroneously developed the common law by abolishing the rule that damages must be claimed

[53] Section 34 of the Constitution provides:
'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'
[54] *Mighty Solutions* fn 48 para 40.
[55] *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC); 2002 (1) SACR 79 (CC) para 36.
[56] *TN obo BN* fn 49 para 69.

in a single action and as a lump sum), this Court restated the principle that Parliament and not the courts, is responsible for major law reform, as follows:

'[It] is the legislature that is responsible for law reform. Courts decide disputes between parties. They are confined to the evidence before them. They are not the elected branch of government and have no mandate to redesign an entire compensation system. Courts cannot gather evidence, nor consult broadly. They are ill-equipped to predict the systemic consequences of the abolition of the rule. They cannot test the long-term sustainability of an order of the kind made in this instance. This is crucial, because future medical care commitments, such as the public healthcare and undertaking to pay remedies depend on proven reliability, something courts cannot properly evaluate in adversarial litigation. Yet this adverse effect is precisely the consequence of the High Court's order.'

[116] In principle, the position is no different in this case. The plaintiffs are asking for a radical development of the common law: long-standing rules of jurisdiction should be replaced to allow courts to decide disputes between foreign *peregrini* plaintiffs and foreign *peregrini* defendants, without any *ratio jurisdictionis*; and a broad, vague test of 'adequate connection' should be introduced. This is law reform, not mere development.

[117] The development sought by the plaintiffs will have grave consequences on the rules of jurisdiction and the functioning of the courts. Removing the requirement of a *ratio jurisdictionis* would create a massive, unpredictable and uncertain expansion of the jurisdiction of South African courts. It would allow foreign *peregrini* – by mere submission – to utilise scarce judicial time and resources to resolve their disputes having nothing to do with or any connection to South Africa. It would even permit foreign *peregrini* to select a particular division of the High Court – an option not available to *incolae*. Cases with no real link to the country could be heard. Foreign litigants could flood South African courts.

[118] A change of the magnitude sought by the plaintiffs involves the allocation of resources, determining access to courts by foreigners and balancing

international comity. These are policy-laden considerations best left to the legislature.

Conclusion

[119] Ultimately, this case must be seen for what it is. The inescapable inference from the facts established in evidence, is that the particulars of claim were designed to procure the adjudication in South Africa of the third plaintiff's claim against the Mozambican defendants. This is ironic, considering that it is the plaintiffs' own case that the defendants had devised a scheme to evade the jurisdiction of the South African courts, thereby necessitating the piercing of the corporate veil.

[120] The material facts admit of little room for doubt:

(a) The third and fourth defendants, both Mozambican companies, are the insurers under the policies. The first defendant (Hollard South Africa) is a contracted reinsurer to the third defendant (Hollard Mozambique). It has no contractual nexus to the insured.

(b) The insured and its brokers knew and understood this. Before these proceedings were instituted, they knew that any claim under the policies lay against the Mozambican defendants, not against Hollard South Africa.

(c) The loss claimed is a loss allegedly suffered by the third plaintiff. Its asset was damaged. It was exposed to and initially suffered, a loss of gross profit and an increase in the cost of working. The claim sought to be enforced is therefore, in substance, a claim by the third plaintiff, a foreign *peregrinus*, against the Mozambican defendants, both of whom are foreign *peregrini*.

(d) Against that factual background, the alternatives pleaded in the particulars of claim – both as to the identity of the plaintiff vested with the claim, and the identity of the defendants liable under the policies – cannot be viewed in isolation. Their effect was to construct a jurisdictional foothold in South Africa from which the plaintiffs could contend that the High Court had

jurisdiction over the litigation as a whole and specifically, that the doctrine of *causae continentia* could be invoked to determine the third plaintiff's claim against the Mozambican insurers.

(e) The evidence further establishes the practical reason for proceeding in South Africa. If the third plaintiff pursued its claim in Mozambique, it would have to furnish a substantial deposit, calculated as a percentage of the value of the claim, which would be liable to forfeiture if the claim were unsuccessful. The institution of proceedings in South Africa accordingly had the effect of avoiding that consequence.

[121] These circumstances are significant. They demonstrate that the jurisdictional difficulty confronting the third plaintiff was not an accidental consequence of the manner in which the dispute arose. It was known before the commencement of the proceedings. The plaintiffs then sought to overcome that difficulty by the way in which the claims were formulated, and the parties were joined.

[122] This Court must, of course, distinguish between a legitimate invocation of the jurisdiction of South African courts and the manipulation of pleadings to manufacture a jurisdictional connection which does not otherwise exist. The latter cannot be permitted merely because the resulting forum is more advantageous to a litigant.

[123] In the circumstances of this case, the evidence supports the conclusion that the proceedings were instituted in South Africa in order to secure a forum in which the third plaintiff could pursue a claim which, in substance, is a claim by a foreign *peregrinus* against foreign *peregrini*, despite the absence of a jurisdictional connection upon which the plaintiffs' reliance on *causae*

continentia depends. The attempt to achieve that result comes perilously close to an abuse of the process of the court contemplated in *Villa Crop Protection*.[57]

[124] The appeal is dismissed with costs, including the costs of two counsel.

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A SCHIPPERS

JUDGE OF APPEAL

Unterhalter JA

[125] I have had the pleasure of reading my brother, Schippers JA's thoughtful and careful judgment (the first judgment). There are two issues decided in the first judgment with which I concur. They are, following the first judgment's delineation of issues, the *alter ego* issue and the holding that there is a submission to the jurisdiction of the High Court by the Mozambican defendants in respect of claims brought under both the Contract Works Policy and the Project Delay Policy (collectively the Policies). On two issues, I hold a different view to the first judgment. First, there is the question as to who is the insured under the policies. The first judgment rejects the contention that there was a joint venture that qualified as an insured. I agree with this holding, but come to it by way of different reasoning. Second, the first judgment finds no basis upon which the High Court enjoyed jurisdiction over the claims against the Mozambican defendants, as foreign *peregrini*. I take a more expansive position.

[57] *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* [2022] ZACC 42; 2024 (1) SA 331 (CC); 2023 (4) BCLR 461 (CC).

What issues were before the high court?

[126] Before venturing upon this terrain, it is important to be clear as to the issues that were before the High Court for determination, and those that were not. The parties agreed, and the High Court ordered, in relevant part, that the following issues shall be determined at the initial hearing of the matter:

'(a) the issue of whether this court has jurisdiction in respect of the plaintiffs' claim against the third and fourth defendants and the first to fourth defendant's special plea of *lis pendens* shall be determined prior to the determination of any other issues as defined on the pleadings;

(b) in this regard, the issues set out in:

(i) paragraphs 1 to 8 and 13 to 19 of the particulars of claim, read with paragraphs 1 to 9 and 11 to 15 of the plea, and 1 to 7 of the defendants' special plea of jurisdiction, read with paragraphs 2 and 3 of the replication; and

(ii) paragraphs 1 to 6 of the defendants' special plea of *lis penden*, read with paragraphs 4 to 6 of the replication;

shall be determined at the initial hearing of the matter.'

It is thus clear that the separated issue of jurisdiction is whether the High Court enjoyed jurisdiction in respect of the plaintiffs' claims against the Mozambican defendants, that is, the third and fourth defendants. It follows that the High Court did not include in its order of separation the claims of the plaintiffs against the *incolae* defendants, that is, the first and second defendants. The parties agreed that the separated issue would not be decided simply on the pleadings, but by recourse to evidence. That evidence was adduced before the High Court. But its remit cannot extend beyond the order made by the High Court to separate a defined issue. What this means is that the High Court could not consider, much less determine, whether on jurisdictional grounds or otherwise, the pleaded claims of the plaintiffs against the *incolae* defendants, and neither may we do so.

Who is the insured?

[127] The action has been brought by three plaintiffs: Tongaat Hulett Limited (TH and first plaintiff), Tongaat Hulett Sugar Limited (THS and the second plaintiff), and Tongaat Hulett Açucareira de Xinavane SA (Xinavane and the

third plaintiff). I shall refer to all three plaintiffs, collectively, as the plaintiffs. The compensation or indemnification sought against the defendants, in different permutations, is claimed by '. . . the First, Second and/or Third plaintiffs . . .'.

[128] A pleading of this kind would ordinarily occasion little difficulty, but for the averments in the amended pleadings that the plaintiffs constituted a joint venture. It is submitted by the plaintiffs that, under the Policies, this joint venture falls within the definition of 'the Insured', and enjoys the rights under the Policies of what is styled 'a composite insured'. The amended particulars of claim contain the following averments. TH and THS, acting in cooperation with the Government of Mozambique (the Government), established a sugar mill in Mozambique, which they 'caused to be owned by the Third Plaintiff', that is Xinavane. During 2006 – 2007, TH and THS, with the consent and collaboration of the Government, expanded this sugar mill. The expansion was funded by TH and THS by way of acquiring shares in Xinavane and making loans to Xinavane. TH and THS advised on the expansion of the mill and the works necessary to implement the expansion. TH and THS relied upon their investment in the expansion of the sugar mill to recoup the loan and provide an income from the profitable operation of the sugar mill. The business of TH and THS 'included the production of sugar through the instrumentality of the mill of the Third Plaintiff and financing the expansion of the mill'. In the replication, the following is pleaded: 'It is an express terms of the policies that: . . . (ii) a joint venture (such as undertaken by the Plaintiffs) would be deemed to be a legal entity with rights no more or less extensive than any other party insured;' The replication then refers to the averments here summarised, and the terms of the Policies to assert jurisdiction.

[129] These averments sit alongside the averment that 'each plaintiff was an insured as defined in the said policies'. My understanding of the plaintiffs' pleaded case is that under the Policies the Insured is described by reference to the

Employer, which is defined to mean, *inter alia,* TH, THS and Xinavane, and, in relevant part, '. . . all other parties for which the above (companies) undertake to arrange insurance, including Consortia Joint Ventures and Partnerships,' and that such definition serves in the language of the Policies, 'All for their respective rights and interests'. In sum, the pleadings aver that the Policies allowed that the Insured meant both that each plaintiff is an insured, but so too is any joint venture that they bring into existence. In the Contract Works Policy the indemnity to the insured contains the following, 'Joint Ventures, Consortia, and Partnerships included in the definition of the insured shall be deemed to be a legal entity with rights no more or less extensive than any other party insured hereunder'. And so, it is submitted that a joint venture is included in the definition of the insured under the Policies, and that TH, THS, and Xinavane brought such a joint venture into being for the purposes of the expansion of the sugar mill.

[130] What then did the evidence establish? The first judgment correctly draws attention to the evidence of Mr Slabbert who was at the relevant time the financial director of THS. Mr Slabbert explained that the expansion of the sugar mill was approved by the board of TH. He was referred in evidence to the document that served before the board (the project document). The project document provides a detailed description of the proposed expansion and the history of the sugar mill. The initial rehabilitation of the sugar plant, in the aftermath of the civil war, was undertaken within a corporate structure that reflected the Government as the ultimate majority shareholder, with 51% of the shares, and TH with 49%. Of importance, the expansion of the sugar mill was funded by debt and by the shareholders. The shareholders for this purpose were TH and the Government. The Government's contribution was by way of a debt equity swop. This would reduce the Government's effective shareholding in Xinavane from 51% to 18%, under the proposal, which ultimately, according to Mr Slabbert, was reduced to 12%.

[131] The relevance of the project document and Mr Slabbert's testimony on this aspect of the matter is as follows. First, the funding of the expansion required agreement between TH and the Government. Both the project document and, after approval by the Board of TH, the application to the Reserve Bank (also referred to by Mr Slabbert) make it plain that the recapitalization of Xinavane to expand the sugar mill rested upon the capital injections by TH, by way of share capital, and the Government by the conversion of its loan into share capital, as well as loans extended by TH. The loans were repaid. Second, it is TH, through THS, that is to structure and manage the project. Third, the financial valuation of the project is predicated on its rate of return to TH as against the total capital costs to TH. Fourth, the proposed project is stated to be 'directly aligned with TH's key strategy of growing earnings through expansion of sugar production in low-cost regions . . .'. TH is the controlling interest behind the project. Fourth, as the project document explains, 'Xinavane will be consolidated post expansion as opposed to being equity accounted'. And it was so, as Mr Slabbert explained under cross-examination. TH's consolidated accounts include the profits attributable to its Mozambique operations. Fifth, Mr Slabbert explained that by reason of TH investing 'billions' in Xinavane, TH was obliged to take out insurance for the project. It did so and paid the premiums.

[132] Under cross-examination, Mr Slabbert conceded a number of matters. First, he conceded that 'the interest' of TH and THS in the expansion project was as shareholders of Xinavane. Second, that the loss of income in the event of a production delay or an incident would 'in the first instance, be suffered by . . . Xinavane'. Third, that a loss of profits in Xinavane might affect the payment of dividends to Xinavane's shareholders.

[133] The first judgment finds as follows. On the basis of Mr Slabbert's evidence, the project was nothing more than the expansion of the sugar mill of a subsidiary; structured, managed and financed by its holding company. The notion that an

unincorporated joint venture is the insured is artificial and at variance with the case that was first brought to this Court. The project lacks the essential attributes of a joint venture. TH and THS made no contribution; Xinavane funded the project and the loan from TH has been repaid. TH made the loan not to make a profit or share in the losses, but to acquire shares in Xinavane. The joint venture is not cited as a party and its existence as an *incola* is not pleaded. The loss, as Mr Slabbert confirmed, was suffered by Xinavane, and only in consequence could TH or THS suffer losses as shareholders.

[134] The plaintiffs submitted that they undertook a joint venture in respect of the expansion project to which the Policies related. The defendants submitted that the construct of a joint venture is an afterthought to cure the plaintiffs' jurisdictional difficulties.

[135] The plaintiffs' pleadings make averments as to how the investment in the expansion of the sugar mill came about. The reference in the replication to a joint venture 'such as undertaken by the Plaintiffs' is an emaciated pleading. The replication does cross-refer to the averments in the particulars of claim that I have summarised. Those averments do not plead the agreement under which the joint venture was constituted, the scope of the joint venture, and its terms and duration are not specified. Rather, we are asked to find that there was a joint venture that came into being by reason of the manner in which the expansion project came about, its funding structure, and implementation; as also the terms of the Policies that allowed that a joint venture may be an insured.

[136] The true question is whether there is a basis even on these pleadings and the evidence led at trial, to conclude that there was a joint venture that fell within the meaning of the insured under the Policies. The first issue that arises is this: who are the parties to the joint venture? The pleaded case is that the joint venture is said to subsist between TH, THS and Xinavane. Hence, the reference in the

replication to a joint venture undertaken by the plaintiffs. While Mr Slabbert's evidence explained how TH came to make the investment in Xinavane, so as to expand the sugar mill, his evidence does not show that this investment was undertaken by TH, THS and Xinavane, as a joint venture. Standardly a joint venture is an agreement between parties to enter into a business, with a shared commercial object, to which the parties contribute resources, and share in the profits and losses, in defined ways. On the evidence, that is not what took place as between TH, THS and Xinavane. Rather, TH made use of THS, and acquired control of Xinavane to undertake the investment in the expansion of the sugar mill. TH had no need to enter into a joint venture with companies in the group that it controlled or would come to control, in the case of Xinavane. A vertical joint venture of this kind is implausible because a holding company enjoys the power to exercise control over its subsidiaries to execute its commercial objectives. The holding company does not form a joint venture with its subsidiaries to do so.

[137] The pleading of the plaintiffs and the evidence of Mr Slabbert do refer to the relationship between TH and the Government. This was the historical basis upon which the sugar mill was rehabilitated after the civil war, and both TH and the Government contributed to the expansion of the sugar mill. The plaintiffs, however, do not rely upon a joint venture between TH and the Government. Their pleaded case falls between two stools. The expansion of the sugar mill was not simply an investment by TH in its subsidiary Xinavane. Xinavane only became its subsidiary by reason of the share swop arrangement with the Government. The Government contributed to the expansion of the sugar mill with TH. But it is not the relationship between TH and the Government that is relied upon by the plaintiffs as constitutive of the joint venture. Rather, it is the vertical relationship between TH, THS and Xinavane that is said to constitute the joint venture. And that is an illusory construct upon which to base a joint venture.

[138] Nor does the relationship between TH, THS and Xinavane make out the conventional features of a joint venture. Xinavane is said to be the mere instrumentality of TH. THS, it is pleaded, enjoyed an advisory role in the implementation of the expansion project. These averments fall well short of anything that might reasonably be understood to be a joint venture. A party to a joint venture is not a mere instrument. Nor is there a case made as to the separate contributions of TH, THS and Xinavane to the joint venture and the rewards each company would accrue from their collaboration. The agreement under which the joint venture was constituted, and its terms and conditions are neither pleaded nor proven.

[139] In addition, the terms of the Project Works policy states that joint ventures are included in the definition of the insured. What joint ventures fall within this provision? There is no evidence as to what was in the contemplation of the parties to the Project Works policy. But since the plaintiffs have not proven a joint venture of the kind they allege, that is one subsisting between TH, THS and Xinavane, we do not need to consider what joint ventures qualify for inclusion as the insured.

[140] For these reasons, I find, with the first judgment, that the plaintiffs have not proven that a joint venture, including Xinavane, qualified for inclusion as the insured under the Policies. The legal consequences of a different finding for the jurisdictional challenge before us need not be further considered.

The claims against the third and fourth defendants

[141] I turn next to the central issue upon which this appeal turns. It is this: does the High Court enjoy jurisdiction over the claims of the plaintiffs against the third and fourth defendants? This is the issue, and the only issue, raised by the defendants' special plea.

[142] The order, in the amended particulars of claim, in relevant part, seeks declaratory relief and a money judgment against the third and fourth defendants at the instance of the 'First, Second and/or Third Plaintiff . . .'. This means that the plaintiffs, jointly and severally, seek relief against the third and fourth defendants. Two separate jurisdictional issues arise. First, the claims of TH and THS against the Mozambican defendants are money claims by *incolae* against foreign *peregrini* defendants. The first judgment has held that the Mozambican defendants submitted to the jurisdiction of the High Court. Once this is so, following the holding in *Hay Management Consultants*,[58] the High Court enjoys jurisdiction over these claims. Whether or not TH and THS can prove these claims is not for us to decide, given the terms of the separation order.

[143] The second jurisdictional issue is this. Does the High Court enjoy jurisdiction over the claims of Xinavane against the Mozambican defendants? Xinavane is a foreign *peregrinus*, and the Mozambican defendants are foreign *peregrini*. The first judgment holds that the High Court lacks jurisdiction because the *causae continentia* doctrine is not of application, and there is no warrant to extend the doctrine by way of the development of the common law. It is to these matters that I now turn.

[144] I commence by distinguishing two dimensions of jurisdiction: personal jurisdiction and subject-matter jurisdiction. Personal jurisdiction engages the question as to connection between the parties to the suit and the court that would assume jurisdiction. Subject matter jurisdiction concerns the relationship between the court's jurisdiction and the subject matter of the dispute. Personal jurisdiction has often been understood to engage the principle of effectiveness: that is, the power of a court to give effect to its judgment. Subject matter jurisdiction concerns whether a court should take cognizance of the dispute.

[58] *Hay Management Consultants* fn 31.

[145] In *Hay Management Consultants*, approving the extensive reasoning marshalled in *American Flag*,[59] submission to the jurisdiction of the court by a foreign *peregrinus* in a suit brought by an *incola* plaintiff sufficed to establish the jurisdiction of the court. Once submission was established, the additional requirement of a link between the cause and the court was found to exist by reason of 'a link that is established when the plaintiff is an *incola*'.[60] *Hay Management Consultants* thus recognised the jurisdiction of the court on this basis because submission offered sufficient, if attenuated, effectiveness. And even in the absence of the cause of action arising within the territorial jurisdiction of the court, cognizance of the dispute arose from the identity of the plaintiff as an *incola*. *Hay Management Consultants* affirmed the practical advantages of recognising jurisdiction based on submission, but noted that such affirmation would not necessarily extend to the suit of a foreign peregrine plaintiff against a foreign *peregrinus* defendant,[61] the very matter before us.

[146] The position of a *peregrinus* plaintiff that brings an action against a *peregrinus* defendant, who has submitted to the jurisdiction of the court, was dealt with in *Veneta*. *Veneta*[62] affirmed the proposition that the High Court can only be said to have jurisdiction if it has the power to take cognizance of the suit and also give effect to its judgment. By submission (or to use the language of the court 'prorogation') a person submits their person to the jurisdiction of the court. But that alone does not suffice, there must, in addition, be 'something more' so that a court can take cognizance of a matter in its jurisdiction. The something more is the requirement that one or more of the traditional grounds of jurisdiction be present. In *Veneta*, the plaintiff and defendant were *peregrini* (though the defendant was an *incola* of South Africa), and the contract that was the subject of

[59] *America Flag plc v Great African T-shirt Corporation CC* 2000 (1) SA 356 (W); [1999] 1 All SA 26 (W) at 363A-G.
[60] *Hay Management Consultants* fn 31 para 23.
[61] *Hay Management Consultants* fn 31 para 17.
[62] *Veneta* fn 16 at 893-894.

the dispute was not concluded or performed within the jurisdiction of the court. The High Court accordingly lacked jurisdiction.

[147] The application of the holding in *Veneta* to the case before us would lead to the same conclusion. The cause of action relied upon by Xinavane against the Mozambican defendants rests upon contracts concluded in Maputo, that indemnified Xinavane in respect of a project in Mozambique, which the Mozambican defendants failed to honour. The cause of action did not arise in the High Court's jurisdiction, and thus the submission alone of the Mozambican defendants does not suffice to confer jurisdiction on the High Court.

[148] That would resolve this appeal, but for two questions. First, does the High Court enjoy jurisdiction over the claims of Xinavane against the Mozambican defendants in virtue of the application of the *causae continentia* doctrine, which I will refer to as the doctrine of indivisible causes. Second, if not, should the common law be developed to permit the recognition of the High Court's jurisdiction over these claims?

The revival of the doctrine

[149] The doctrine of indivisible causes was revived in *Roberts Construction*.[63] The essence of the doctrine is that a multiplicity of actions or indivisible obligations, arising from the same cause, should, on grounds of convenience and the avoidance of conflicting decisions, be heard by the same court. The first judgment understands *Roberts Construction* on the following basis. First, the application of the doctrine still requires that the cause of action relied upon by the plaintiff arises within the territorial jurisdiction of the court. This is said to be an absolute requirement. Second, the doctrine applies within the framework of a single (national) court system. The doctrine of indivisible causes, so understood,

[63] *Roberts Construction* fn 22.

cannot be of application to the claims of Xinavane against the Mozambican defendants for two reasons: (i) these claims rest upon a cause of action in contract that does not arise within the territorial jurisdiction of the High Court; and (ii) these claims could be pursued before the courts of Mozambique. The doctrine does not extend to considerations of convenience that lie outside the courts of South Africa.

[150] The first judgment has provided a scholarly interpretation of the common law sources upon which the holding in *Roberts Construction* is based. It is important to recall the issue that arose in *Roberts Construction.* The cause of action was a claim in contract for cancellation for breach and damages, alternatively for misrepresentation. The contract was concluded in Johannesburg. The subject matter of the contract was a bridge that spanned the Orange River between the Free State and the Cape Province. The plaintiff and defendant were resident in the Transvaal. The action was brought in the Orange Free State Provincial Division (as it then was, to which I will refer as the OPD). The parties were thus *peregrini* of this Court. The contractual obligation of the defendant was only in part to be performed in the Free State, and the misrepresentation did not take place in the Free State.

[151] *Roberts Construction* revived the doctrine of indivisible causes so as to recognize the jurisdiction of the OPD. This Court did so, in virtue of the doctrine's application, even though the litigants were not resident within the court's territorial jurisdiction (though local *peregrini),* the contractual obligations were only in part to be performed there, and the delict (of misrepresentation) did not take place in the Free State. On conventional jurisdictional precepts, personal jurisdiction over the parties did not exist, and as for subject matter jurisdiction, that was only partial because the contractual obligations were to be performed partly in the Free State and partly in the Cape Province, and the breach related to the entirety of the obligations. The doctrine of indivisible causes nevertheless

provided a ground of jurisdiction so that the Orange Free State Provincial Division enjoyed jurisdiction. It did so because of the need to secure the convenient disposal of cases of '. . . an indivisible obligation regarding an indivisible subject matter situated simultaneously in two different jurisdictions'.[64]

[152] There are a number of aspects of the *Roberts Construction* decision that warrant consideration. First, Steyn CJ found nothing in our common law to preclude the recognition and application of the doctrine of indivisible causes to the case before the court. Yet, it is acknowledged that there is no need to determine precisely how far the doctrine should extend in our contemporary law.[65] *Roberts Construction* does not preclude the development of the doctrine, nor does it suggest that the unusual facts in *Roberts Construction* define the doctrine. On the contrary, how a doctrine predicated upon convenience should engage our law of jurisdiction is left open in *Roberts Construction*.

[153] Second, *Roberts Construction* recognises that the examples cited by our legal writers mostly concerned multiple claims against persons or property situated in different jurisdictions, but not indivisible obligations regarding an indivisible subject matter in two different jurisdictions.[66] The reasoning in *Roberts Construction* is based on the underlying consideration that if convenience and the avoidance of conflicting decisions are availing reasons, under the doctrine, to confer jurisdiction in cases of multiple claims, *a fortiori* is this so in cases of a single claim that spans two jurisdictions.[67] *Roberts Construction* permits that the doctrine of indivisible causes is a principled recognition of jurisdictional convenience that, as a matter of common law, is not confined to

[64] *Roberts Construction* fn 22 at 336E, my translation of the relevant portion of the following sentence: 'Hulle handel nie uitdruklik met 'n ondeelbare verpligting ten opsigte van 'n ondeelbare saak wat tegelyk in twee verskillende regsgebiede gelee is nie'.
[65] *Roberts Construction* fn 22 at 336D. Dictum applied and extended in *Ngxuza* fn 22 para 22.
[66] *Roberts Construction* fn 22 at 336E.
[67] Ibid at 336F.

cases of subject matter jurisdiction based upon property situated in the jurisdiction of the court that would exercise jurisdiction.[68]

[154] Third, *Roberts Construction* is a case concerning local *peregrini* litigants. It did not have to determine whether the doctrine could apply to foreign *peregrini*. That is a matter that we must decide. And I shall consider whether the doctrine of indivisible causes may only be of parochial application. *Roberts Construction* did not reach this issue because it was not required to do so.

[155] The first judgment holds that the scope of the doctrine of indivisible causes is bounded by the absolute requirement that for a South African court to exercise jurisdiction over a claim brought by a foreign *peregrinus* plaintiff against a *peregrinus* defendant there must be a ground of jurisdiction originating within the area of jurisdiction of the court. This warrants further consideration. I will reference this postulate as the absolutist requirement. In sum, the first judgment understands *Roberts Construction* to mean that the doctrine of indivisible causes cannot be invoked, 'to confer jurisdiction where no recognised ground of jurisdiction exists'.

[156] This is not so. *Roberts Construction* invoked the doctrine of indivisible causes precisely because, absent its application, the defendant was not otherwise amenable to the jurisdiction of the OPD. In other words, for the OPD to assume jurisdiction over the claim required the application of the doctrine of indivisible causes. *Roberts Construction* invoked and applied the doctrine precisely to meet the special plea of the defendant that the OPD lacked jurisdiction because it did not suffice that only a portion of the contract was to be performed within the area of jurisdiction of the court. If such performance was a recognized ground of jurisdiction, there would have been no reason to apply the doctrine of indivisible causes.

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[68] Ibid at 336D.

[157] The first judgment reasons that the present case is not one of indivisible obligations regarding an indivisible subject matter to be performed partly within the jurisdiction of the High Court and partly in Mozambique. It finds that the Policies are not South African policies; TH and THS are not insured under the Policies; and they have no claims under the Policies.

[158] The doctrine of indivisible causes is not simply a doctrine that engages indivisible obligations and an indivisible subject matter. The unusual facts in *Roberts Construction* required the determination of whether the doctrine was of application in respect of these dimensions of indivisibility. The doctrine of indivisible causes, as *Roberts Construction* and its progeny make plain, extends to multiple claims against persons or property situated in different jurisdictions.

The principles of jurisdiction at common law

[159] The absolutist requirement is also at odds with the principles of jurisdiction that have been recognized in our common law.

[160] In *Hay Management Consultants*, an *incola* plaintiff brought an action for a money judgment against a foreign *peregrinus* defendant. The defendant submitted to the jurisdiction of the court. *Hay Management Consultants* reasoned, adopting the commentary of Professor Forsyth, that a judgment based on submission will be sufficiently effective, and will suffice to justify the exercise of jurisdiction. This is so, not least because submission is a well-recognised ground of international jurisdiction for the recognition and enforcement of a judgment of our courts.[69] Thus, in *Hay Management Consultants*, submission provides the basis for personal jurisdiction. And cognizance of the dispute, that is subject-matter jurisdiction, is established simply by reason of the fact that the plaintiff is an *incola*.[70] The link between the court and the subject matter of the

[69] See *Elscint (Pty) Ltd v Mobile Medical Scanners (Pty) Ltd* 1986 (4) SA 552 (W); [1986] 4 All SA 81 (W) at 557G-H.
[70] *Hay Management Consultants* fn 31 at paras 21-23.

dispute subsists only on this basis. This, *Hay* explains, is an incident of the policy that '[o]ur courts have long treated an *incola* plaintiff more leniently than his *peregrine* counterpart'.[71] I observe that the assumption of jurisdiction in *Hay* is not predicated upon a *ratio jurisdictionis* that connects the subject matter of the suit to the court. Rather, it is based upon the submission of the foreign *peregrinus* defendant and the identity of the plaintiff as an *incola.*

[161] In *Bid Industrial Holdings*, a South African company, and an *incola*, sought to arrest two Australians, John and Andrew Strang, domiciled and resident in Australia, to establish or confirm the High Court's jurisdiction for the purposes of a suit it wished to bring, alleging that the proposed defendants wrongfully interfered with contractual relations subsisting between the South African company and two eponymous Australian companies. This Court was required to decide whether the proposed arrest was unconstitutional. It found that it was. In so doing, this Court had to consider on what basis the High Court could assume jurisdiction, if arrest was unconstitutional and attachment was not possible. It did so by developing the common law rules of jurisdiction. It held that a South African High Court would enjoy jurisdiction, where attachment is not possible, if the summons is served on the defendant while in South Africa and 'there is [a] sufficient connection between the suit and the area of jurisdiction of the court concerned so that disposal of the case by that court is appropriate and convenient'.[72]

[162] In the course of coming to its conclusion, this Court said the following:[73]

'Obviously the jurisdictional principles we are concerned with here have originated because courts have always sought to avoid having to try cases when their judgments will, or at least could, prove hollow because of the absence of any possibility of meaningful execution in the plaintiff's jurisdiction. It seems to me that, firstly, one has to apply reasonable and practical

[71] Ibid fn 31 para 21.
[72] *Bid Industrial Holdings* fn 45 para 59.
[73] Ibid paras 55-57.

expedients in moving away, where necessary, from historical practices that cannot achieve what they were intended to. Secondly, the responsibility for achieving effectiveness, absent attachment, is essentially that of the parties, and more especially the plaintiff. Economic considerations will dictate whether a South African judgment has prospects of successful enforcement abroad and thus influence a plaintiff in deciding whether to attach and sue here or to sue there (leaving aside, of course, other costs considerations). And if the plaintiff decides in favour of suing here it is open to the defendant to contest, among other things, whether the South African court is the *forum conveniens* and whether there are sufficient links between the suit and this country to render litigation appropriate here rather than in the court of the defendant's domicile.

In my view it would suffice to empower the court to take cognisance of the suit if the defendant were served with the summons while in South Africa and, in addition, there were an adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of the appropriateness and convenience of its being decided by that court. Appropriateness and convenience are elastic concepts which can be developed case by case. Obviously the strongest connection would be provided by the cause of action arising within that jurisdiction.

As to the principle of effectiveness, despite its having been described as "the basic principle of jurisdiction in our law"[74] it is clear that the importance and significance of attachment has been so eroded that the value of attached property has sometimes been "trifling".[75] However, as I have said, effectiveness is largely for the plaintiff to assess and to act accordingly.'

[163] I have cited these passages because of the salience of their exposition of our common law jurisdictional principles. Three propositions should be emphasised. First, effectiveness is a function of party responsibility. Service of the summons upon the defendant whilst in South Africa suffices, subject to the defendant's contestation on the grounds of *forum conveniens* and the connection between the suit and the area of the court's jurisdiction. Implicit in the concept of party responsibility is the following necessary entailment: if the defendant

[74] *Thermo Radiant* fn 30 at 307A.
[75] Ibid at 309D-E.

chooses not to contest jurisdiction on these grounds or submits to the jurisdiction of the court, jurisdiction is established. This Court recognized that effectiveness is a somewhat overblown principle, in light of the trivial value of property that may be attached to found or confirm jurisdiction.

[164] Second, *Bid Industrial Holdings* was willing to develop the common law by formulating a rule of jurisdiction to replace the unconstitutional regime of arrest. In so doing, the rule permits the establishment of jurisdiction under a very modest standard to satisfy personal jurisdiction, and a flexible standard to satisfy subject matter jurisdiction. Effectiveness as a principle of jurisdiction, based on the proposition that the court will be able to enforce its own judgment, is supplanted in favour of party responsibility and the recognition of submission as the basis of international jurisdiction to permit enforcement. And the power to take cognizance of the matter is decided under a flexible standard of connection. Indeed, under the broad test formulated in *Bid Industrial Holdings*,[76] the requirements of personal and subject matter jurisdiction overlap.

[165] Third, the rule in *Bid Industrial Holdings* does not recognize jurisdiction on the basis that, together with the service of the summons, the cause of action must be linked to the area of jurisdiction of the court. On the contrary, that link is simply a factor to be weighed, if invoked by the defendant, to decide whether the court should assume jurisdiction. Although some analysis was given to the cause of action that the plaintiff intended to rely upon, the links between the delict and the area of the High Court's jurisdiction was a matter to be determined on the basis of the sufficiency of the links with the area of jurisdiction of the High Court.[77]

[76] *Bid Industrial Holdings* fn 45 paras 54-55.
[77] Ibid para 58.

[166] Fourth, there is no suggestion in the reasoning in *Bid Industrial Holdings* that the rule it fashioned is intended to offer some special protection to the *incola* plaintiff. The case, as indicated, concerned such a plaintiff. But this did not figure in the considerations that justified the adoption of the rule.

[167] In sum, *Bid Industrial Holdings* developed the common law of jurisdiction to substitute an unconstitutional regime of arrest, with a flexible rule predicated on the service of the summons upon the defendant, if attachment is not possible. The rule is not founded upon effectiveness. It is based on party choice and a flexible consideration of connection as the basis for the recognition of jurisdiction. Such a rule adopts a pragmatic approach, far removed from rigid requirements of personal and subject matter jurisdiction. The absolutist requirement is at odds with this holding.

[168] This Court again addressed the principles of jurisdiction in *Ingosstrakh*. There, a foreign *peregrinus* plaintiff brought proceedings in the High Court against a foreign *peregrinus* defendant. The question was this. If the defendant submits to the jurisdiction of the court, was attachment necessary for the High Court to enjoy jurisdiction? This Court's answer was as follows:[78]

'. . . In my view, if a foreign peregrinus defendant submits to the jurisdiction of the court, and a ground of jurisdiction is established that links the court to the subject matter of the litigation, that will suffice for the court to assume jurisdiction. This is so because once a foreign peregrinus defendant has submitted to jurisdiction, an effective basis is established to enforce a judgment that might issue against such a defendant. This follows because submission is universally recognised as the basis upon which the courts of one country recognise the judgments of another. Attachment in these circumstances is unnecessary.'

It recognised that there are forceful arguments that submission alone should suffice for the court to assume jurisdiction in a suit between a foreign *peregrinus* plaintiff and a foreign *peregrinus* defendant, but declined, as in *Hay Management*

[78] *Ingosstrakh* fn 29 para 30.

Consultants, to engage this question, and thereby reconsider the holding in *Veneta*, because it was unnecessary to do so.

[169] I have sought to offer an exposition of this Court's modern jurisprudence of jurisdiction because it reflects an engagement with the principles underlying our common law of jurisdiction that does not adhere to an absolutist position that subject matter jurisdiction requires a ground of jurisdiction originating within the area of jurisdiction of the court. In cases of a suit brought by an *incola* plaintiff against a foreign *peregrinus* defendant, that is simply not so.

[170] In *Hay Management Consultants*, the supremacy of submission as the basis for assuming jurisdiction is plain, and the identity of the plaintiff as an *incola* supplants the link between the subject matter of the suit and the area of jurisdiction of the court. This privilege accorded an *incola* plaintiff is based on the proposition in *Thermo Radiant* that an *incola* plaintiff should not be required to pursue the foreign *peregrinus* defendant to a foreign forum, and incur the costs and inconvenience of doing so. Whether this provides a consideration of sufficient weight, once there has been submission by the foreign *peregrinus* defendant, to distinguish the position of an *incola* plaintiff from that of a foreign *peregrinus* defendant is an issue of some moment, with entailments for the justification of the position adopted in *Veneta*. We were not asked to decide whether *Veneta* should be revisited, and I do not do so. What is before us is whether the doctrine of indivisible causes can enjoy application in respect of the claims of Xinavane against the Mozambican defendants. And in doing so, the scope of the doctrine must be determined in light of the principles of jurisdiction that emerge from our case law.

[171] The doctrine of indivisible causes is ultimately based on a pragmatic concern for convenience to ensure that interconnected actions or indivisible obligations may be heard by a single court so that litigants are not required to

bring suit before more than one court. The first judgment holds, as I have explained, that the doctrine is disciplined in two ways. First, there must be subject matter jurisdiction over the action brought by the foreign *peregrinus* plaintiff. Second, the doctrine is only of application within a single national court system. I shall refer to these two disciplines as the subject matter constraint and the parochial constraint.

The subject matter constraint

[172] The pleadings, read with the Policies, in this case disclose the following. Each of the plaintiffs is an insured under the Policies. All of the defendants are insurers under the Policies. The Contract Works Policy does not differentiate the property insured as between the insured. Nor is there any differentiation of the basis of loss settlement. So too in the Project Delay Policy, the property insured references the contract works and free issue of materials as 'more fully described in the concurrent Contract Works Policy'. Here too, there is no differentiation as to the property insured as between the insured. The insured event that is alleged to give rise to liability under each of the Policies is the same for each of the claims made by the plaintiffs. These features of the pleadings and the Policies relied upon by the plaintiffs mean that the actions are closely interconnected and the evidence relevant to the trial of these actions will have considerable commonality.

[173] The High Court plainly has jurisdiction over the claims that TH and THS bring against the first and second defendants. TH and THS are *incolae* plaintiffs. The first and second defendants have submitted to the jurisdiction of the court. These claims form no part of the special plea that was separated for determination. So too, on the holding in *Hay Management Consultants*, the High Court enjoys jurisdiction over the claims of TH and THS (as *incolae* plaintiffs) against the Mozambican defendants by reason of their submission. Whether TH and THS will be able to prove these claims falls outside the scope of the special plea. What then of the claims of Xinavane against the Mozambican defendants? There can

be little doubt, on the basis of the pleadings and the evidence already led before the High Court, that the claims of TH, THS and Xinavane against the defendants are closely interconnected. The defendants have all submitted to the jurisdiction of the High Court. Effectiveness is secured, even in respect of the Mozambican defendants, in an attenuated but substantial way, because submission is universally recognised as the basis upon which the courts of one country recognise the judgments of another. Any judgment that may issue against the Mozambican defendants may thus be enforced against them. Since the High Court has jurisdiction over the claims of TH and THS against all the defendants, and will, in consequence, be seized of the subject matter of these claims, considerations of convenience and good sense would indicate that the claims of Xinavane against the Mozambican defendants, having such congruent subject matter, should be determined in the same proceedings. This would avoid duplication, unnecessary cost, delay and the risk of inconsistent outcomes. The doctrine of indivisible causes would thus appear to be sensibly engaged to extend the jurisdiction of the High Court to the claims of Xinavane against the Mozambican defendants.

[174] The doctrine of indivisible causes has been applied so that a court may assume jurisdiction over the whole cause of action, when its jurisdiction extends to only part of the cause.[79] It was extended in *Ngxuza* to permit a court to exercise jurisdiction over members of an entire class, when the court would otherwise have enjoyed jurisdiction over only portion of the class.[80] The doctrine has been applied to establish jurisdiction over multiple defendants with co-extensive liabilities.[81] And *obiter*, in *Multi-Links*[82] the court was willing to apply the doctrine to assume jurisdiction over a foreign *peregrinus* defendant.

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[79] *Roberts Construction* fn 22 affirmed in *Ngxuza* fn 22 para 22.
[80] *Ngxuza* fn 22 para 22.
[81] *New York Shipping Co (Pty) Ltd v EMMI Equipment (Pty Ltd and Others* 1968 (1) SA 355 (SWA); [1968] 2 All SA 68 (W) at 364H-365B.
[82] *Multi-Links* fn 47 para 21.

[175] Why then should the doctrine of indivisible causes not be of application to the claims of Xinavane against the Mozambican defendants on the basis of convenience, so as not to require that Xinavane litigate before the courts of Mozambique an action with such commonalities to the actions and parties over which the South African do enjoy jurisdiction? Put differently, if the doctrine cannot apply, then the plaintiffs will be required to bring actions before the courts of two countries, in two jurisdictions, with considerable cost, delay and inconvenience.

[176] The answer of the first judgment is the subject matter constraint. I am unpersuaded that the doctrine of indivisible causes warrants such constraint. Submission, as we have seen, is already doing most of the work to recognize jurisdiction in the suit of the *incola* plaintiff against the foreign *peregrinus* defendant. The preferential treatment accorded to an *incola* plaintiff is not in virtue of any subject matter jurisdiction that links the cause to the territorial jurisdiction of the court. The treatment is predicated upon the value we attach to the inconvenience and cost that the *incola* plaintiff would otherwise be required to incur to litigate in a foreign court. That is the very same basis upon which the doctrine of indivisible causes is founded. Where the foreign *peregrinus* plaintiff is joined as a party to an action in which the High Court enjoys jurisdiction over the claims of *incolae* plaintiffs against all of the defendants, including foreign *peregrini* defendants, and there is commonality between the claims, I can see no principled basis to refuse to entertain jurisdiction under the doctrine of indivisible causes by way of an extension of considerations of convenience to the foreign *peregrinus* plaintiff.

[177] This is so for the following reasons. First, the High Court already enjoys jurisdiction over causes that are closely linked to the action that Xinavane would pursue against the Mozambican defendants. Second, submission is the principal basis securing jurisdiction in a variety of circumstances where there is otherwise

no link between the cause relied upon by the plaintiff and the area of jurisdiction of the court. Third, if submission and convenience may serve to allow for the assumption of jurisdiction in the suit of an *incola* plaintiff against the foreign *peregrinus* defendant, there seems no basis not to do so in the interests of a foreign *peregrinus* plaintiff whose cause of action is closely bound up with the action of other parties over which the court does enjoy jurisdiction. Fourth, once subject matter jurisdiction is at least notionally secured by the identity of a litigant as an *incola* plaintiff, why should that not also be so in respect of a litigant who is a foreign *peregrinus* plaintiff, when the actual subject matter of the dispute, with which the court will be seized, is closely connected? Fifth, the subject matter constraint lacks sufficient foundation because, as we have seen, it is predicated upon an absolute requirement that the common law of jurisdiction does not uniformly impose.

The parochial constraint

[178] I turn then to the second basis upon which the first judgment declines to apply the doctrine of indivisible causes – the parochial constraint. The first judgment observes that the old authorities referenced in *Roberts Construction* that support the recognition of the doctrine do so on the basis of the jurisdictional implications within a single legal system, and *Roberts Construction* applied the doctrine to the institutional structure of the South African courts.[83] The doctrine is understood to rest upon the mutual enforceability of judgments within a single judicial system and not between 'different sovereign systems'. And in *Berger*,[84] the High Court held that the doctrine does not apply to courts that 'do not function in the framework of the same system of legal administration'. The first judgment holds that the recognition of the doctrine in *Roberts Construction* is a function of particular arrangement of the different divisions of South Africa's national court

[83] *Roberts Construction* fn 22 at 336A-E.
[84] *Berger* fn 21 at 403F.

system in which judgments are enforceable across divisions and cases may be transferred between divisions.

[179] The first judgment goes on to reason that the doctrine of indivisible causes extends jurisdiction over interconnected claims, but only where the court already has jurisdiction over at least one part of the cause of action. This is reinforced by s 19(1)*(b)* of the Supreme Court Act[85] which applied where a division already enjoyed jurisdiction over a cause, and plainly between divisions of the Supreme Court. The recognition of the doctrine beyond its parochial application would entail the adoption of a regulating principle of *forum non conveniens*, which, outside admiralty matters, is not recognised in our law.[86] And, in any event, the doctrine is not engaged in this case because neither TH nor THS have claims that they can pursue, and hence there are no claims to which the claims of Xinavane may be said to connect.

[180] This reasoning warrants careful consideration, but here too I am unpersuaded by the parochial constraint. The origins of the doctrine of indivisible causes, to be found in our old authorities, recounted in *Roberts Construction*, refer to the Court of Holland and the system of the administration of justice under which the courts operate. Fairly read, these references situate the doctrine in a parochial setting. But I do not read these authorities to engage the question that confronts us. That is, whether the doctrine of indivisible causes can extend beyond the institutional limits of a national court system. *Roberts Construction*, on its facts, did not have to consider the issue now before us, and expressly left open the further development and application of the doctrine in our common law.[87] And such development was taken up in *Ngxuza*.

[85] Since repealed but repeated in s 21(2) of the Superior Courts Act.
[86] *Agri Wire* fn 43 at 493E-F.
[87] *Roberts Construction* fn 22 at 336D-E.

[181] It would be an oddity if our common law of jurisdiction were to be entirely unheeding of the fact that it has taken root in a modern African society and economy that is outward-looking; and engages the African continent, and beyond, in commercial trade and investment relationships of great importance. I do not understand *Roberts Construction* or the authorities that it references to mandate a narrow ossification of the common law. This would amount to an unwarranted form of originalism that would limit the scope of the doctrine, simply because it was applied to resolve one type of jurisdictional issue; that is, how jurisdiction over causes within a national system of law should be determined. It follows that the parochial conception of the doctrine formulated in *Berger* should not be followed.

[182] The first judgment places some emphasis upon the proposition that s 19(1)*(b)* of the Supreme Court Act (now repealed), but re-enacted in almost identical terms in s 21(2) of the Superior Courts Act, is a codification of the doctrine of indivisible causes. The codification permits of the extension of jurisdiction to a person joined as a party to a cause over which one division already enjoys jurisdiction, where that person resides or is within the area of jurisdiction of another division. And thus the doctrine is now, as a matter of statute, bounded in this way; it is limited to the jurisdiction of the courts within our legal system, and cannot extend jurisdiction as the plaintiffs propose. Furthermore, these statutory provisions require that the court must already enjoy jurisdiction over the cause, in order to permit of any extension of jurisdiction. And hence, s 21(2) does not permit of the assumption of jurisdiction over foreign disputes, merely on the basis of submission. I shall refer to this reasoning as the codification construction.

[183] The codification construction is incorrect. First, *Roberts Construction* is not a case that turns upon the joinder of parties not resident in the court's territorial jurisdiction. As explained, though none of the litigants in *Roberts*

Construction resided in the OPD, the central issue in the case concerned the jurisdiction of the court in respect of an indivisible obligation situated in two different jurisdictions. The central issue in *Roberts Construction,* as explained above, was to determine whether the OPD could assume jurisdiction over a claim in which the contractual obligation of the defendant was only in part to be performed in the Free State. Absent the application of the doctrine of indivisible causes, the OPD enjoyed no jurisdiction. The statutory provisions upon which the codification construction relies would not have permitted the OPD to assume jurisdiction because the OPD did not already enjoy jurisdiction over the cause. The doctrine was invoked to resolve a question of subject matter jurisdiction. The content and application of the doctrine at common law extends beyond what the statutory enactments provide for. The enactments accordingly cannot constitute a codification of the doctrine revived in *Roberts Construction*.

[184] Second, the doctrine of indivisible causes is a common law doctrine. *Ngxuza* invoked and applied the doctrine, without any suggestion that the common law has now been codified and limited in its scope by the enactments relied upon in the first judgment. The relationship between the broad statutory formulations of jurisdiction and the common law of jurisdiction are elucidated in *Bid Industrial Holdings*,[88] where the following is said: '[t]he legislation in question has all along merely been concerned to reflect or implement the common law'. The presumption that a statute should not be taken to abrogate the common law is a hardy perennial of statutory interpretation. The doctrine remains part of our common law and its proper exposition and development remains a matter for the courts to determine.

[185] The first judgment observes that *Ngxuza* is a case in which there was an extension of an existing jurisdictional nexus. The failure by the Provincial

[88] *Bid Industrial Holdings* fn 45 at para 54; referencing s 19 (1)*(a)* of the Supreme Court Act (now s 21(1) of the Superior Courts Act).

Government to pay disability pensions to recipients resident within the province provided the High Court with jurisdiction over these members of the class. The first judgment understands *Ngxuza* to rest upon the proposition that the extension of jurisdiction to *peregrini* depended upon the establishment of the High Court's jurisdiction over the members of the class over whom the court already enjoyed jurisdiction.

[186] These observations do not blunt the importance of *Ngxuza* as an authority of this Court that directly contradicts the codification construct. Cameron JA in *Ngxuza* was clear that what he described as 'the non-residents of the Eastern Cape Division's jurisdictional area' could not ordinarily have sued the provincial government in that Division. That was so because 'between such non-residents and the Eastern Cape Division there would be no jurisdictional tie'.[89] It is the development of the doctrine of indivisible causes (what Cameron JA styled 'the doctrine of cohesion of a cause of action') that forms the basis of the extension of jurisdiction recognized in *Ngxuza* as a doctrinal development of the common law of jurisdiction. There is no suggestion whatever that the extension is predicated upon the statutory provisions that the first judgment holds to be a codification of the common law.

[187] *Ngxuza* recognizes the provenance of the doctrinal development that it favours to be *Roberts Construction*, which, as we have seen, excavated the doctrine of indivisible causes as a common law doctrine. And further, the exposition of the doctrine in *Roberts Construction* is not confined to cases of an existing jurisdictional tie to the court that would extend its jurisdictional reach. In *Roberts Construction*, there was no existing jurisdictional tie. Though the application of the doctrine of indivisible causes does not require an existing jurisdictional tie, yet in the appeal before us, there is such a tie. The High Court has jurisdiction over the claims of TH and THS against the Mozambican

[89] *Ngxuza* fn 22 para 22.

defendants. And once the doctrine of indivisible causes is correctly located as a common law doctrine, its application to the claims of Xinavane against the Mozambican defendants is not bounded by the joinder rule contained in s 19(1)*(b)* of the Supreme Court Act, nor its successor, s 21(2) of the Superior Courts Act. The question is then only whether the doctrine of indivisible causes may be of application to such claims. And for the reasons that I have given, this question must be answered in the affirmative.

[188] The first judgment further observes that the exposition of the doctrine of indivisible causes in *Roberts Construction* references its application to issues of jurisdiction as between courts within the same legal system. That is so. But the point that is stressed in *Roberts Construction* is that the doctrine is of application under quite differently structured systems of courts that have existed from Roman times to those of the Court of Holland, and our own modern institutional arrangements.[90] *Roberts Construction* emphasises the flexible application of the doctrine, and makes no affirmative holding favouring parochialism. The issue with which we are confronted was simply not before the court in *Roberts Construction.*

[189] The first judgment finds that Professor Forsyth's critique of parochialism to want for authority; to run counter to the account of our common law set out in *Roberts Construction*; and to be influenced by English law which provides distinct principles for regulating the assumption of jurisdiction over international disputes, including the doctrine of *forum non conveniens*, which provides a power to the courts to decline jurisdiction; however, this doctrine is of limited application in our law. I have dealt extensively with our common law and the holding in *Roberts Construction*, which does not require repetition, but come to

[90] *Roberts Construction* fn 22 at 335F-336C.

a different view on these matters. The principle of *forum non conveniens* in our law does warrant brief treatment.

[190] The first judgment posits that the application of the doctrine of indivisible causes, at the instance of a foreign *peregrinus* plaintiff, would entail the adoption of the principle of *forum non conveniens*, which, outside admiralty cases, does not form part of our law. Reliance is placed upon *Agri Wire*.[91] *Agri Wire*'s holding is more confined. A court cannot decline to hear a case 'in the exercise of their jurisdiction' on the grounds of principle of *forum non conveniens*. The predicate of this dictum is that the court already enjoys jurisdiction. The principle of *forum non-conveniens* clearly forms part of our law for the purposes of deciding whether jurisdiction is established. It is the basis upon which a defendant may contest jurisdiction, as made clear in *Bid Industrial Holdings*.[92] The considerations of convenience and practicality that underpin the doctrine of indivisible causes are of sufficient breadth to include the principle of *forum non conveniens*, just as *Bid Industrial Holdings* does in resolving the jurisdictional issue before it. The principle of *forum non conveniens* was adopted in *Bid Industrial Holdings*; it is not a principle repugnant to our common law, and may comfortably fall within the realm of convenience and practicality upon which the doctrine of indivisible causes is based.

[191] The first judgment would limit the doctrine of indivisible causes to cases in which the court already enjoys jurisdiction over at least one part of the cause of action. For the reasons I have already traversed, the subject matter constraint, as an absolute constraint, is not congruent with our law of jurisdiction, and there is no reason to impose this constraint upon the doctrine.

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[91] *Agri Wire* fn 43 paras 19-20.
[92] *Bid Industrial Holdings* fn 45 paras 55-57.

Is the doctrine engaged?

[192] The first judgment holds that the doctrine of indivisible causes is not engaged in this case for two reasons. First, it is said that TH and THS have no claims based on the contracts relied upon in the particulars of claim. The first judgment finds on the evidence of Mr Slabbert that TH and THS suffered no loss, the loss was suffered by Xinavane. Hence, the companies cannot seek indemnification under the Policies against any of the defendants. This means that there is nothing to which the claims of Xinavane, as against the third and fourth defendants, may be said to be connected. I shall reference this as the finding of no loss. Second, the first judgment finds that the Policies are not South African policies issued to TH and THS. The only insurers identified in the Policies are the third and fourth defendants. I shall reference this as the insurer finding.

[193] As to the finding of no loss, as I have explained above, this exercise goes beyond the remit of the issues that were separated for determination. The special plea advanced by the defendants is one of jurisdiction. The listed issues to be determined 'in this regard' are for the purpose of deciding the special plea of jurisdiction. The want of jurisdiction pleaded in the special plea is framed as follows:

'In the result:

7.1 The claims by the third plaintiff against the third and fourth defendants are claims between *peregrini* of the Republic of South Africa and there is no jurisdictional fact that vests this court with jurisdiction in respect of those claims.

7.2 The claims by the first and second plaintiffs against the third and fourth defendants are claims by local *incolae* where there has been no attachment to found or confirm jurisdiction and where there has been no submission to jurisdiction.

7.3 This Honourable Court does not have jurisdiction in respect of the plaintiffs' claim against the third and fourth defendants.'

[194] The special plea thus contests jurisdiction in respect of two classes of claim. The first is a challenge to the jurisdiction of the court over the claim of

Xinavane against the third and fourth defendants (the Mozambican defendants) on the basis of an absence of jurisdictional facts to vest the court with jurisdiction. That issue turns upon the application of the doctrine of indivisible causes to the claims of Xinavane. And, in particular, its status as a foreign *peregrinus* plaintiff, its claims against foreign *peregrini* defendants, and the connection of these claims to those of TH and THS. The second challenge is to the claims of TH and THS against the Mozambican defendants, in that they are local *incolae*, and no attachment has taken place, and there has been no submission to the jurisdiction of the court.

[195] A special plea demarcates the scope of the challenge made. It is common ground that there was no attachment. And I am in agreement with the first judgment that submission has been established. Once that is so, there is no warrant, on the special plea that falls for determination, to consider whether TH and THS, on the merits, have supportable claims for the losses they allege. This is for the trial court to determine, if the court enjoys jurisdiction. The High Court enjoys jurisdiction over the claims instituted by TH and THS against the Mozambican defendants, in virtue of their submission, and the status of TH and THS as *incolae* plaintiffs. No challenge is made to the jurisdiction of the High Court over the claims of TH and THS against the first and second defendants. It follows that the only question that remains is whether the doctrine of indivisible causes is of application to the claims of Xinavane against the Mozambican defendants, given the claims brought by TH and THS against the defendants over which the High Court enjoys jurisdiction and with which it will be required to engage at trial. I find that the doctrine is of application, and that the parochial constraint is unavailing.

[196] As to the insurer finding, the first judgment would make far-reaching findings in respect of the Policies that would, in effect, non-suit the claims of the South African plaintiffs against the first and second defendants, the South African

insurance companies, being the first and second defendants, Hollard Insurance Company Limited (Hollard SA) and Global Alliance. The first judgment finds this to be the upshot of Ms Evangelides' testimony.

[197] The claims of TH and THS against Hollard SA and Global Alliance were not before the High Court and they are not before us. The High Court, rightly, was not willing to decide these claims. Nor was it willing to decide upon the merits of the claims of TH and THS against the Mozambican defendants. The evidence of Ms Evangelides was described by the High Court as 'poor'. Her evidence is certainly unclear. In chief, she identified the insurers as 'South African insurers', and explained that there was a fronting arrangement, with one reinsurer acting as an underwriting manager on behalf of Hollard SA, and the other reinsurer, on behalf of Global Alliance. Under cross-examination, Ms Evangelides identified the Mozambican defendants as the insurers liable under the Policies. In response to a direct question from the judge in the High Court as to whether the reference in the Policies to 'Hollard' is a reference to 'Hollard Mozambique', Ms Evangelides said 'I disagree'. But she then further contradicted this statement.

[198] We are then left in the following position. The claims of TH and THS against Hollard SA and Global Alliance are not before us and formed no part of the issues to be determined in respect of the defendants' jurisdictional challenge. The pleaded case of TH and THS is that Hollard SA and Global Alliance are the insurers (in one variant of the claim); that each of the plaintiffs is an insured; and that TH and THS are entitled to claim indemnification under the Policies as against Hollard SA and Global Alliance for the losses suffered by the business of Xinavane. Whether these claims can ever be proven is not before us. We can only decide the jurisdictional challenge that is before us on the basis that the High Court enjoys jurisdiction over these claims. TH and THS are identified as insured

under the Policies, and they are entitled to bring these claims before the High Court and go to trial on the issues pleaded.

[199] But even accepting that the evidence led before the High Court supports the conclusion that the insurers identified in the Policies are the Mozambican defendants, there is no question that under the Policies TH and THS are identified as the insured and enjoy the right of indemnification specified in the Policies. For the reasons given, the High Court enjoys jurisdiction over the claims of TH and THS against the *peregrini* defendants. Once that is so, the claims of TH and THS against the Mozambique defendants and the evidence to be traversed will have a very considerable overlap with the claims that Xinavane makes against these defendants. TH and THS enjoy the right to bring their case against the Mozambican defendants in the High Court. The High Court enjoys jurisdiction. The litigation gives rise to multiple overlapping claims between persons situated in different jurisdictions. That is the very basis upon which, for reasons of convenience, the doctrine of indivisible causes is of application.

The framing of the doctrine and its application

[200] I thus come to the following conclusion. First, the doctrine of indivisible causes continues to form part of our common law. Second, the doctrine is not confined to the recognition of jurisdiction as between courts within our legal system. Third, the doctrine is of application to a foreign *peregrinus* plaintiff where the foreign *peregrinus* defendant has submitted to the jurisdiction of the court. The application of the doctrine requires that the claims of such a plaintiff are closely connected to or indivisible from the causes of other plaintiffs, over which the court does enjoy jurisdiction, but subject to considerations of convenience and practicality, which may include the principle of *forum non conveniens*. These considerations may also embrace the question as to whether

there is an adequate connection of the cause to the court's jurisdiction, a matter recognised in *Bid Industrial Holdings*.[93]

[201] The appellants sought, in the alternative, that should the doctrine of indivisible causes not be of application to invest in the High Court with jurisdiction, the common law should be developed in terms of s 173 of the Constitution. The first judgment has drawn attention to the importance of securing legal certainty and the strictures upon development set out in *Mighty Solutions*.[94] The first judgment considers the development sought to be radical, and to rest on a broad and vague test that would introduce uncertainty, and permit of a flood of litigation at the instance of *incolae* with no real link to the country.

[202] I do not consider that there is any need to develop the common law under the inherent power conferred upon the courts by s 173 of the Constitution. Our common law of jurisdiction is capable of principled articulation, without such recourse. As *Ngxuza*, *Bid Industrial Holdings*, *Hay Management Consultants* and *Ingosstrakh* amply demonstrate, there is every reason to develop the common law in accordance with modern conceptions of jurisdiction. My recognition and articulation of the doctrine of indivisible causes falls within the amplitude of our modern jurisprudence of jurisdiction. To the extent that this would require recourse to this Court's inherent power to develop the common law (which I do not consider to be so), the doctrine of indivisible causes, as I have sought to conceptualize it, falls within the permissible scope of such development. I do not consider the proposed doctrine to be radical, but rather congruent with modern developments in our law of jurisdiction. That it is predicated upon connection, convenience, and practicality provides no obstacle. These are concepts already well entrenched in our common law of jurisdiction.

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[93] *Bid Industrial Holdings* fn 45 para 56.
[94] *Mighty Solutions* fn 48 para 38.

[203] I find also that the application of the doctrine of indivisible causes favours the enjoyment by the High Court of jurisdiction over TH, THS and Xinavane's claims. For the reasons given, the claims of TH, THS and Xinavane against the defendants are closely inter-connected. The issues raised on the pleadings and the evidence relevant to them are intertwined. Convenience favours the recognition of jurisdiction. Why should Xinavane be required to litigate its claims against the Mozambican defendants in a Mozambique court, while TH and THS do so in the High Court? That is both costly, wasteful and unnecessary. Once the defendants submitted to the jurisdiction of the High Court, there seems little reason not to give primacy to their election. Any judgment and orders made against the defendants will be effective, even as against the Mozambican defendants, given that submission is the universal ground for recognition and enforcement by a foreign court. Since the High Court already enjoys jurisdiction over the claims of TH and THS against all the defendants, the High Court is the convenient forum to assume jurisdiction over the claims of Xinavane against the Mozambican defendants. Those defendants are already before the High Court in respect of TH and THS's claims against them. And the subject matter of all the claims meets the standard of interconnectedness. Nor will the High Court be unduly burdened. It must determine TH's and THS's claims, and the incremental burden, given the interconnectedness, of also entertaining those of Xinavane would not appear to be great.

[204] I would thus:

1 Uphold the appeal, with costs, including the costs of two counsel;

2 Set aside the order of the High Court and in its place make the following order:

'The defendants special plea of jurisdiction seeking to dismiss:

(a) the claims of the third plaintiff against the third and fourth defendants; and

(b) the claims of the first and second plaintiffs against the third and fourth defendants;

is dismissed, with costs, including the costs of two counsel.'

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D N UNTERHALTER

JUDGE OF APPEAL

Appearances

For appellants:	A M Annandale SC with J L Miranda
Instructed by:	Goodrickes Attorneys, La Lucia Ridge
	McIntyre Van Der Post, Bloemfontein
For respondents:	S R Mullins SC with P J Wallis SC
Instructed by:	Norton Rose Fulbright South Africa Inc, La Lucia Ridge
	Webbers Attorneys, Bloemfontein.