**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**
Case No: 823/2015

In the matter between:

| | |
|---|---|
| **TRAVELEX LIMITED** | **APPELLANT** |
| **and** | |
| **SEAN MALONEY** | **FIRST RESPONDENT** |
| **GILLIAN MALONEY** | **SECOND RESPONDENT** |

| | |
|---|---|
| **Neutral citation:** | *Travelex Limited v Maloney* (823/15) ZASCA 128 (27 September 2016) |
| **Coram:** | Mpati AP, Tshiqi and Mathopo JJA and Schoeman and Fourie AJJA |
| **Heard:** | 17 August 2016 |
| **Delivered:** | 27 September 2016 |

**Summary:** Civil procedure: rescission application: based on alleged lack of jurisdiction of court that granted order of attachment *ad fundandam et confirmandam jurisdictionem*: ratio jurisdictionis present: no submission to jurisdiction established.

## ORDER

**On appeal from:** Gauteng Division of the High Court, Pretoria (Teffo J sitting as court of first instance):

The appeal is dismissed with costs, such costs to include the costs of two counsel.

## JUDGMENT

**Schoeman JA (Mpati AP, Tshiqi and Mathopo JJA and Fourie AJA concurring)**

[1] The Gauteng Division, Pretoria refused an application by the appellant to set aside an order granted at the instance of the respondents attaching shares owned by the appellant in a company, FX Africa Foreign Exchange (Pty) Limited (FX Africa), *ad fundandam et confirmandam jurisdictionem*. This appeal is with the leave of the court a quo.

**Background**

[2] On 8 December 2010 the parties entered into an agreement related to the sale of shares in FX Africa. In terms of the agreement the appellant purchased the second respondent's shares in FX Africa as well as those shares held by Sanderling Investments Incorporated, a company incorporated in the Virgin Islands.

[3] The appellant is a peregrinus of South Africa while the respondents are peregrini of the Gauteng Division, but incolae of South Africa. They

are both permanently resident in the area of jurisdiction of the Western Cape Division of the High Court.

[4] The respondents, as applicants, brought an urgent application in the Gauteng Division, Pretoria, on 19 November 2013 for the attachment of the appellant's shares in FX Africa *ad fundandam et confirmandam jurisdictionem.* The first respondent claimed locus standi in the Gauteng Division on the basis that one of the suspensive conditions contained in the agreement was that he was obliged to deliver to the appellant and FX Africa his letter of resignation, both as an employee of FX Africa and as a director of subsidiaries of FX Africa. The application for interim relief was served on the appellant. Without opposition, but in the presence and with the acquiescence of the appellant's counsel, an interim order was granted attaching the shares. On the return date, 6 February 2014, the application was unopposed, but again in the presence and with the acquiescence of the appellant's legal representatives Prinsloo J confirmed the rule nisi attaching the shares. I will refer to this order as 'the initial order'.

[5] The attachment preceded an action for damages instituted by the respondents against the appellant following an alleged repudiation of the agreement. Two months later the appellant launched the rescission application, seeking, inter alia, the setting aside of the initial order and the action that had been instituted.

[6] The application, according to the founding affidavit of Mr Birch, a director of the appellant, was premised on the fact that the court granting the initial order did not have jurisdiction to do so. The reason advanced was that the appellant had submitted to jurisdiction in the agreement and

therefore an attachment order was incompetent and impermissible. During argument in the court a quo, counsel for the appellant raised a further issue, namely that there was no ratio jurisdictionis for the initial order and the subsequent action and that the court should therefore set aside the initial order and the action.

[7] The respondents answered to the allegation relating to the appellant's alleged submission to jurisdiction, but did not address the issue of the ratio jurisdictionis of the court. This is because that issue was not raised in the founding affidavit. The application was dismissed on the basis that the appellant did not make out a case for rescission on those grounds, as it should have.

[8] The appellant did not bring the application for rescission in terms of the common law or the provisions of Uniform rule 42(1)(*a*) or (*c*). The appellant argued that the court that granted the initial order did not have the necessary jurisdiction to do so, due to the absence of a ratio jurisdictionis, and that the appellant had in any event submitted to the jurisdiction of the court.

**Issues**

[9] The appeal is opposed on three grounds, namely that (a) the appellant procedurally should have brought the application for rescission of the initial order either in terms of the common law or the provisions of Uniform rule 42(1)(*a*) and (*c*) and that failure to do so resulted in the court a quo correctly dismissing the application); (b) a recognised ratio jurisdictionis existed and the court that granted the initial order therefore had the requisite jurisdiction; and (c) the appellant had not submitted to the court's jurisdiction.

**The procedure in the application for rescission**

[10] In dismissing the rescission application, the court a quo did not consider the appellant's arguments that the court that granted the initial order did not have jurisdiction to do so. Although the judgment mentions that the appellant based its application on the lack of jurisdiction, no reference is made in the judgment to the arguments advanced in this regard or the issue of the absence of jurisdiction. Before us counsel for the appellant submitted that the rescission application was in any event unnecessary because the court that granted the initial order lacked jurisdiction and that the initial order was, therefore, a nullity and could simply be ignored.

[11] In *Campbell v Botha*[1] Streicher JA quoted with approval the following passage by Innes CJ in *Lewis & Marks v Middel* 1904 TS 291 at 303:

'[T]he authorities are quite clear that where legal proceedings are initiated against a party, and he is not cited to appear, they are null and void; and upon proof of invalidity the decision may be disregarded, in the same way as a decision given without jurisdiction, without the necessity of a formal order setting it aside (Voet, 2. 4. 14, and 66; 49. 8. 1 and 3. . . . .

Voet 49:8:3 says:

'But by the customs of today such over stressful and pettifogging discussion on fine points of law as to whether a decision is *ipso jure* void, or holds good by strict law and must be set aside through the remedy of an appeal, has been as far as possible abolished. The ruling has rather prevailed that decisions are never annulled under cover of nullity without appealing. *There are exceptions when the nullity arises from a lack of jurisdiction, or of summons or of an attorney's mandate.*' (My emphasis.)

[1] *Campbell v Botha & others* [2008] ZASCA 126; 2009 (1) SA 238 (SCA) at 243I-244B.

[12] This was again emphasised in *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & others*,[2] when Ponnan JA said:

'As long ago as 1883 Connor CJ stated in *Willis v Cauvin* 4 NLR 97 at 98 – 99:

"The general rule seems to be that a judgment, without jurisdiction in the Judge pronouncing it, is ineffectual and null. . . "

*Willis v Cauvin* was cited with approval in *Lewis & Marks v Middel* 1904 TS 291; and *Sliom v Wallach's Printing & Publishing Co, Ltd* 1925 TPD 650. In the former, Mason J (with whom Innes CJ and Bristowe J concurred) held at 303:

"It was maintained that the only remedy was to appeal against the decision of the Land Commission; but we think that the authorities are quite clear that where legal proceedings are initiated against a party, and he is not cited to appear, they are null and void; and upon proof of invalidity the decision may be disregarded, in the same way as a decision given without jurisdiction, without the necessity of a formal order setting it aside (Voet, 2, 4, 14; and 66; 49, 8, 1, and 3; Groenewegen, *ad Cod*. 2; 41; 7, 54; *Willis v Cauvin*, 4 N.L.R. 98; *Rex v Stockwell*, [1903] T.S. 177; *Barnett & Co. v Burmester & Co*., [1903] T.H. 30)."'

[13] The Constitutional Court in *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute*[3] affirmed this approach:

'In *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* 2012 (3) SA 325 (SCA) the Supreme Court of Appeal, reaffirming a line of cases more than a century old, held that judicial decisions issued without jurisdiction or without the citation of a necessary party are nullities that a later court may refuse to enforce (without the need for a formal setting-aside by a court of equal standing). This seems paradoxical but is not. The court, as the fount of legality, has the means itself to assert the dividing line between what is lawful and not lawful. For

---

[2] *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) at 331J - 332D; See also *Vidavsky v Body Corporate of Sunhill Villas* [2005] ZASCA 53; 2005 (5) SA 200 (SCA) para 14.

[3] *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC).

the court itself to disclaim a preceding court order that is a nullity therefore does not risk disorder or self-help.'

[14] The respondents argued that even if there was a lack of jurisdiction in the present matter that did not exonerate the appellant from proceeding in terms of the rules or the common law. They relied on *Bezuidenhout v Patensie Sitrus Beherend Bpk*[4] where Froneman J said:

'I could find no support in the cases he [advocate for the applicant] referred to for the proposition that another court of equal standing could vary or discharge an order for temporary relief if the court that issued the original order lacked jurisdiction to deal with the issues it did (but, to be fair, I may have misunderstood the argument).'

[15] The facts of the instant matter differ markedly from *Bezuidenhout*. In that case it was found that the Competition Tribunal did not have the competence under the Competition Act 89 of 1998 to issue orders in conflict with pre-existing orders of the relevant division of the high court which had not been set aside, nor does the tribunal have the competence under the Act to set aside such orders. The passage from the judgment of Fronaman J quoted above was in response to counsel's contentions and is of no assistance to the respondents.

[16] I incline to the view that if a judgment or order has been granted by a court that lacks jurisdiction, such order or judgment is a nullity and it is not required to be set aside. However, I agree with the view expressed in *Erasmus Superior Court Practice,* that if the parties do not agree as to the status of the impugned judgment or order, it should be rescinded.[5] That is the position in the instant matter where the appellant applied to have the order set aside on the premise that the court did not have jurisdiction.

---

[4] *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 231H-232A.
[5] D E van Loggerenberg and P B J Farlam 2 ed (looseleaf) Vol 1 *Erasmus Superior Court Practice*. Section 21 notes.

Therefore, the usual requirements for a rescission application in terms of the common law or rule 42 do not apply.

**Did the court granting the initial order have jurisdiction?**

[17] In *Ewing McDonald & Co Ltd v M & M Products Co*[6] the different bases upon which a court will assume jurisdiction in a claim sounding in money were discussed. Of relevance to the instant matter is point (c) which is set out as follows.

'Where the plaintiff is a *peregrinus* (foreign or local) and the defendant is a foreign *peregrinus* both a recognised *ratio jurisdictionis* as well as an arrest or attachment are essential. Any arrest or attachment merely *ad fundandam jurisdictionem* would not be sufficient. To be sufficient the arrest or attachment must necessarily be one *ad confirmandam jurisdictionem*. (Cf *Pollak (op cit* at 52, 58, 62 - 3); *Herbstein and Van Winsen (op cit* at 40); *Maritime & Industrial Services Ltd v Marcierta Compania Naviera SA; NV Scheepsvictualienhandel Atlas & Economic Shipstores Ltd v Marcierta Compania Naviera SA* 1969 (3) SA 28 (D).)'

This was affirmed as a correct exposition of our law.[7]

[18] The respondents are incolae of the Western Cape Division of the High Court and thus local peregrini of the court a quo. The appellant is a foreign peregrinus. Therefore it is necessary to determine: (a) whether there was a recognised ratio jurisdictionis, for only if there was a ratio jurisdictionis would an attachment be competent; and (b) if the court had jurisdiction then it must be determined whether or not the appellant had submitted to its jurisdiction.

[19] In the founding affidavit, Mr Birch only referred to the submission to the court's jurisdiction and did not allege a lack of a ratio jurisdictionis.

---

[6] *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) at 258E-259B.
[7] *Siemens Ltd v Offshore Marine Engineering Ltd* 1993 (3) SA 913 (A) at 929G-H.

This is understandable, for if the court did not have jurisdiction, then there could be no valid submission to jurisdiction. However, in the court a quo and in this court the appellant presented these contradictory arguments viz that there was no ratio jurisdictionis and that the appellant had submitted to the jurisdiction of the court. The latter cannot happen without the former. It is therefore necessary to determine whether there was a ratio jurisdictionis and only if so, whether the appellant has submitted to the jurisdiction of the court.

**Ratio jurisdictionis for the action**

[20] The agreement, which forms the basis of the action, was signed in Cape Town and Switzerland. The purchase price had to be paid in Cape Town. The appellant argued that no other performance in terms of the contract conferred jurisdiction on the court a quo, and as the contract was not repudiated within the jurisdiction of the court a quo, the court did not have the necessary jurisdiction to entertain the action or the application for attachment. The appellant submitted that only the Western Cape Division had the necessary jurisdiction.

[21] It is the respondents' case that this argument is incorrect, as there were certain performances that had to take place within the area of jurisdiction of the court. In *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd*[8] it was determined that '[b]y prorogation a defendant subjects his person to the jurisdiction of the Court, but that is not enough. One or more of the traditional grounds of jurisdiction must also be present.'.

[8] *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd* 1987 (4) SA 883 (A) at 890E - 891B; See also:*Gallo Africa Ltd & Others v Sting Music (Pty) Ltd & Others* [2010] ZASCA 96, 2010 (6) SA329 (SCA) at para 10.

[22] A court in whose area of jurisdiction a contract must be performed has jurisdiction, as well as the court in whose area of jurisdiction part of a contract has to be performed.[9]

[23] As no evidence was presented in the founding affidavit regarding the lack of jurisdiction, it is incumbent on the court to rely solely on the agreement to determine whether or not there is a contractual connection with the court a quo's area of jurisdiction (Is it not of the court that granted the initial order). The agreement relates to the sale of shares in FX Africa, which company has both its registered office and principal place of business in Johannesburg, within the court's area of jurisdiction. The shares are located within the court's area of jurisdiction and, in terms of the agreement, delivery of the share certificates and other documentation had to take place within the court's area of jurisdiction. The grant of exchange control approval was a suspensive condition of the agreement and had to be performed within the court's area of jurisdiction. Furthermore, in the event of any of the suspensive conditions not being fulfilled, the respondents had to pay an amount of R2.2 million into the appellant's bank account in Johannesburg, within the area of jurisdiction of the court a quo. Although the agreement was not entered into or payment of the purchase price had to be effected within the court's area of jurisdiction these mentioned facts bring it into the ambit of a 'direct connection' to the court's area of jurisdiction. Therefore the necessary ratio jurisdictionis, in my view, did exist.

**Submission to the jurisdiction of the court**

[24] The correct approach to determine whether the appellant had submitted to the jurisdiction of the court is to ask if the cumulative effect

[9] *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd* 1962 (4) SA 326 (A) at 331H-332A.

of the proven facts establish a submission on the balance of probabilities.[10]

[25] The respondents argued that any submission by the appellant to the court's jurisdiction would be incompetent, for a peregrinus defendant can only submit to the jurisdiction of a court of which the plaintiff is an incola. Therefore any submission by the appellant would have had no effect because the respondents are also peregrini of the court. They based this argument on *Tsung & another v Industrial Development Corporation of SA Ltd*[11] where the following was said:

'The rationale for jurisdiction is often said to be one of effectiveness, and attachment is historically and logically closely related to this principle; but not only has the principle of effectiveness been eroded (Forsyth says "it is artificial and conceptual rather than realistic"), effectiveness is also not necessarily a criterion for the existence of jurisdiction. In one instance, effectiveness is non-existent, and that is in the case of submission to jurisdiction (also referred to as prorogation). The reason is this: If a peregrine defendant has submitted - whether unilaterally or by agreement - to the jurisdiction of the court of the *incola*, an attachment or arrest to found or confirm jurisdiction is not only unnecessary, it is not permitted. (*Consent on its own cannot confer jurisdiction unless the plaintiff is an incola.*)' (footnotes omitted, my emphasis).

[26] In the case of a peregrinus defendant, what is additionally required, with either attachment to found jurisdiction or a submission to jurisdiction, is ' . . . the link between the cause and the court, a link that is established when the plaintiff is an incola'[12]. As stated in *Veneta Mineraria SPA* at 894A-B, if the plaintiff and defendant are both

[10] *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* [2004] ZASCA 116; 2005 (2) SA 522 (SCA) para 13.
[11] *Tsung v Industrial Development Corporation of SA Ltd* [2006] ZASCA 28; 2006 (4) SA 177 (SCA) para 6.
[12] *Hay Management* para 23.

peregrini, submission to jurisdiction by the defendant alone is insufficient, one or more of the traditional grounds of jurisdiction must also be present. Therefore if there is a ratio jurisdictionis, although the plaintiff is not an incola, the appellant was able to submit to the jurisdiction of the court. This is the only logical conclusion.

[27] Mr Birch stated in the founding affidavit that:

'. . .properly construed, paragraph 17 of the agreement required any dispute to be resolved finally by way of arbitration and, in the event of a dispute arising, that written notice thereof be given should any party wish to commence arbitration proceedings to have the dispute resolved.'

[28] Clause 17 of the agreement deals with arbitration in the event of any dispute arising from the agreement. It is argued that in terms of clause 17.7 of the agreement the appellant submitted to the jurisdiction of the court and therefore attachment was not allowed.

Clause 17 reads:

'17 ARBITRATION

17.1 Any dispute arising from or in connection with this agreement shall be finally resolved in accordance with the Rules of the Arbitration Foundation of Southern Africa ("AFSA") by an arbitrator or arbitrators appointed by AFSA.

17.2 Any Party shall be entitled to require that a dispute be determined by arbitration in terms of this 17 by giving written notice thereof to the other Parties.

17.3 This 17 shall not preclude any Party from obtaining interim relief on an urgent basis from (or instituting any interdict, injunction or similar proceedings in) a court of competent jurisdiction pending the decision of the arbitrator.

17.4 The decision of the arbitrator shall be final and binding on the Parties to the dispute and may be made an order of any competent court at the instance of any of the Parties to the dispute.

17.5 The Parties hereby consent to the non-exclusive jurisdiction of the South Gauteng High Court, Johannesburg for the purpose of any interim relief proceedings referred to in 17.3 and/or making the decision of the arbitrator an order of court.

17.6 The Parties agree to keep the arbitration including the subject-matter of the arbitration and the evidence heard during the arbitration confidential and not to disclose it to any one except for purposes of interim relief in terms of 17.3 and/or an order to be made in terms of 17.4 or, where required by law, a court of competent jurisdiction or under the rules of any relevant stock exchange, listing authority or other competent regulatory body.

17.7 The provisions of this 17 -

17.7.1 constitute an irrevocable consent by each of the Parties to any proceedings in terms hereof and no Party shall be entitled to withdraw therefrom or claim at any such proceedings that it is not bound by such provisions;

17.7.2 are severable from the rest of this Agreement and shall remain in effect despite the termination of or invalidity for any reason of this Agreement.'

[29] To determine whether the appellant submitted to the jurisdiction of the court a quo, it is necessary to interpret the whole document and specifically clause 17 thereof. Such interpretation should be objective, starting with the words of the agreement, while keeping in mind that the interpretation does not occur in stages, but is 'essentially one unitary exercise'.[13]

[30] The whole tenor and context of clause 17 is confined to arbitration. Clause 17.1 determines that any dispute will be resolved by arbitration while 17.2 requires written notification of arbitration. Clauses 17.3 and 17.5 relate to submission to jurisdiction solely pending the finalisation of

[13] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para 12.

arbitration. It does not deal with an unreserved general submission to jurisdiction. Clause 17.4 determines that the decision of the arbiter is final and 17.6 with the confidential nature of the arbitration proceedings and award. The submission referred to in clause 17.7 is a submission to arbitration and there is nothing to indicate that the appellant considered any other legal action.

[31] Apart from the analysis of clause 17 the appellant chose, both in respect of its physical address and service by facsimile, a London address and telephone number as its domicilium citandi et executandi. In *Hay Management*[14] it was found that a foreign company's selection of a domicilium citandi et executandi in South Africa was a significant factor indicating submission to jurisdiction. By parity of reasoning, the choice of a foreign domicilium, tends to show that the appellant did not submit to the jurisdiction of the court.

[32] I am of the view that the cumulative effect of the proved facts does not, on a balance of probabilities, establish a submission to the jurisdiction of the court a quo.

**Conclusion**

[33] It follows that, as the court hearing the application for attachment *ad fundandam et confirmandam jurisdictionem* had the requisite jurisdiction, the application was correctly dismissed, albeit for different reasons.

[34] The following order is made:

[14] Para 14.

The appeal is dismissed with costs, such costs to include the costs of two counsel.

_____

**I Schoeman**

**Acting Judge of Appeal**

APPEARANCES

| | |
|---|---|
| For Appellant: | M J Fitzgerald SC<br>Instructed by:<br>Bowman Gilfillan, Pretoria<br>Matsepes, Bloemfontein |
| For Respondent: | W R E Duminy SC (with him I C Bremridge SC)<br>Instructed by:<br>Ward Ward & Pienaar Attorneys, Pretoria<br>Symington & De Kok, Bloemfontein |