THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No. 263/98

In the matter between:

SERVA SHIP LIMITED **Appellant**

and

DISCOUNT TONNAGE LIMITED **Respondent**

In re: M.V. SNOW DELTA

Coram:	HEFER, GROSSKOPF, HARMS, OLIVIER JJA and MELUNSKY AJA.
Heard:	18 AUGUST 2000
Delivered:	31 AUGUST 2000
Subject:	Jurisdiction - situs of rights in personam - maritime claims

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JUDGMENT

HARMS JA:

[1] The general rule is that where the plaintiff and the defendant are both *peregrini*, a recognised *ratio jurisdictionis* as well as arrest of the defendant or attachment of his property are essential to found jurisdiction in a high court (*Siemens Ltd v Offshore Marine Engineering Ltd* 1993 (3) SA 913 (A) esp at 928F-G). The position is different where a high court exercises admiralty jurisdiction in terms of the Admiralty Jurisdiction Regulation Act 105 of 1983 ("the Act"). According to s 2(1), admiralty jurisdiction exists in relation to a maritime claim irrespective of the place where the claim arose, i. e., irrespective of the existence of some *ratio jurisdictionis*. One implication of s 3(2)(b) read with s 4(4)(a) is that an action *in personam* may be instituted by a peregrine plaintiff against a peregrine defendant "whose property within the court's area of

jurisdiction" has been attached by the plaintiff to found or to confirm jurisdiction (*The Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994 (1) SA 550 (A) 562C-H.) This appeal is concerned essentially with the question whether the rights of a charterer (the hirer) of a ship in terms of a time charter-party can be said to be "property" which is located wherever the ship may be from time to time. A time charter-party does not entitle the charterer to the possession and control of the ship; in other words, the charterer has no real rights in relation to the ship but only contractual rights against the owner.

[2] The facts of this case have been reported and do not require much by way of elaboration. The present respondent ("DTL"), a peregrinus from Jersey, believes that it has a maritime claim for damages, mainly because of a breach of contract, against the present appellant("SSL"), also a peregrinus but from the Isle of Man. The cause of action has no

connection with this country. Litigation began with an *ex parte* application before Lategan J in the Cape High Court in which DTL obtained an order authorising the sheriff of Cape Town to attach

"all of [SSL's] possessory right, title and interest in the MV 'SNOW DELTA' ('the vessel') currently lying alongside at the Port of Cape Town, including any possessory right which may arise from [SSL's] possession and control of the vessel in terms of a demise charter-party concluded between [SSL] and the vessel's owners"

to found jurisdiction for the alleged claim. At the same time a rule *nisi* was issued calling upon all interested parties to show cause why the attachment should not be confirmed. It will be immediately apparent to the reader that the order related to the attachment of real rights flowing from a demise charter-party (the charterer under a demise charter-party being regarded as the owner of the ship during the term of the charter) and not from contractual rights flowing from a time charter-party. The

reason for this was that at the time of the launch of the application DTL believed that SSL had possession of the vessel in terms of a demise charter-party. In this regard DTL erred.

[3] The fact of the matter was that SSL had chartered the vessel in terms of a time charter-party entered into on the Isle of Man from the disponent owner (Blue Star Line, a concern in the United Kingdom) and, further, had entered into a sub-charter by time-chartering ("leasing") the vessel to yet another Manx company, Universal Reefers Ltd. In spite of having been made aware of these facts, DTL persisted in its application, alleging that SSL still had "a right in the vessel arising from the time charter" which was susceptible to attachment. It did not, however, persevere with an application for the amendment of the interim attachment order. In the event, on the return day, Foxcroft J was not prepared to confirm the rule *nisi* and discharged it (*The MV "Snow Delta":*

Discount Tonnage Ltd v Serva Ship Ltd 1997 (2) SA 719 (C)). His reason essentially was that the contractual obligation of the disponent owner was not "property" within the area of jurisdiction of the Cape High Court.

[4] Having been granted leave to appeal to the full court, DTL contended that the ship had to remain under attachment pending the finalisation of the appeal and the sheriff refused to release the ship. This led to an urgent application by SSL for a declaratory order, declaring that the ship was no longer under attachment. This application before Selikowitz J was successful (*The MV Snow Delta: Discount Tonnage Ltd v Serva Ship Ltd* 1996 (4) SA 1234 (C)).

[5] On appeal the Full Court overruled the judgment of Foxcroft J and confirmed the rule *nisi* in other terms (*MV Snow Delta: Discount Tonnage Ltd v Serva Ship Ltd* 1998 (3) SA 636 (C), per Thring J, King

DJP and Viljoen AJ concurring). What was attached was

"all of [SSL's] right to and interest in the use and employment of the MV Snow Delta . . . which [SSL] might have by virtue of a time charter-party concluded between [SSL] and the said vessel's owner . . ."

(at 655G-H). The instant appeal is, with special leave, against this order.

[6] It is convenient at the outset to say something about the judgment of Selikowitz J. The ratio of the decision was based on *SAB Lines (Pty) Ltd v Cape Tex Engineering Works (Pty) Ltd* 1968 (2) SA 535 (C) where Corbett J had held that the granting of interim relief as an adjunct to a rule *nisi* is to provide protection to a litigant pending a full investigation of the matter by the court of first instance. Once that interim order is discharged, it cannot be revived by the noting of an appeal. This approach was and still is generally accepted as correct. Dissenting views were, however, expressed in *Du Randt v Du Randt* 1992 (3) SA 281 (E) and *Interkaap Ferreira Busdiens (Pty) Ltd v Chairman, National*

Transport Commission, and Others 1997 (4) SA 687 (T). The essence of these judgments was that Corbett J had failed to have regard to the common law rule as received by our courts that an appeal suspends the execution - or, in the words of Rule 49 (11), the operation and execution - of an order (cf *Reid and Another v Godart and Another* 1938 AD 511). Unfortunately, the criticism was based upon a misunderstanding of the concept of suspension of execution. For instance, an order of absolution from the instance or dismissal of a claim or application is not suspended pending an appeal, simply because there is nothing that can operate or upon which execution can be levied. Where an interim order is not confirmed, irrespective of the wording used, the application is effectively dismissed and there is likewise nothing that can be suspended. An interim order has no independent existence but is conditional upon confirmation by the same court (albeit not the same judge) in the same

proceedings after having heard the other side (*Chrome Circuit Audiotronics (Pty) Ltd v Recoton European Holdings Inc and Another* 2000 (2) SA 188 (W) 190B-C). Any other conclusion gives rise to an unacceptable anomaly: If an applicant applies for an interim order with notice and the application is dismissed, he has no order pending the appeal; on the other hand, the applicant who applies without notice and obtains an *ex parte* order coupled with a rule *nisi* and whose application is eventually dismissed, has an order pending the appeal.

[7] The order of Selikowitz J gave rise to an argument by SSL before the Full Court that the appeal to it had become moot and was of academic interest only: the ship had left and there was no longer anything within the court's jurisdiction to attach to give effect to the order. When this Court raised the issue of mootness under s 21A of the Supreme Court Act 59 of 1959, SSL had second thoughts about the matter. The

Full Court judgment has far-reaching implications for foreign ships that enter South African waters and that, at least for that reason, this Court should consider its correctness. There is a discretion and not an obligation to refuse to hear a moot appeal. In any event, there is much force in the argument, in the light of a passage quoted by the Full Court (at 644C-G) from *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 310D-H, that the matter is not moot. The passage contains the following statement:

> ". . . the crucial time for determining the jurisdiction of a court to entertain an action is the time of the commencement of the action. Jurisdiction having once been established at such time, it continues to exist to the end of the action even though the ground upon which the jurisdiction was established ceases to exist. . . .. If, therefore, at the time of the institution of the action there is an asset which will in all probability still exist at the time of judgment, such an asset is capable of attachment to found jurisdiction. If such an asset is, for some reason or other, destroyed before institution of the action, such attachment ought on application to be set aside. If the asset is, however, destroyed after the institution of the action, jurisdiction will, in accordance with the principle enunciated above, not cease to exist."

Unfortunately, the generally sound analysis by Thring J on this aspect of

the case (at 643G - 644C), suffers from a malady to which I shall return in that it fails to distinguish between the attachment of the vessel and the attachment of the contractual rights flowing from the time charter-party.

[8] Since the rule *nisi* was premised upon the existence of a demise charter, DTT argued in the courts below that it was not possible to make a final order based upon a time-charter; it would amount to the confirmation of a rule on completely different facts giving rise to different rights. The Full Court may have been correct in dismissing this objection (at 646D-649H) but if correct in the result, the reasoning is not at all appealing. I will confine myself to one or two observations relating to the interpretation of the rule *nisi* (at 648C-G). The Full Court in my view strained the ordinary and commonsense meaning of the rule *nisi*. The phrase "right, title and interest" can only refer to "rights" because the law does not protect titles and interests that do not translate into "legal"

rights. To hold that an order may encompass more than the evidence justifies (at 648F) is untenable. Assuming the rule *nisi* to have been open to another interpretation, the Full Court was not justified in closing its eyes to the contents of the application in order to establish its meaning. It was in the position of the judge who had to consider the matter on the return day. The whole case is before such a judge and the record is not extrinsic evidence at that stage of the proceedings. Having said this, I refrain from pursuing the matter any further because the appeal has to succeed on another ground.

[9] The central question is whether the rights of the charterer (SSL) flowing from the time-charter between SSL as charterer and Blue Star Line as disponent owner can be said to be "property" which was in Cape Town because the ship, the subject-matter of the charter-party, itself was there for the time being. Some trite observations may be necessary to

introduce a discussion of the subject. Rights in relation to the (contractual) performance (*obligatio*) of another have since time immemorial been classified as incorporeal. The obligation of the debtor is not property; it is the right (often referred to as the "action") of the creditor. Obligations can therefore not be attached because they do not form part of the patrimony of the creditor whereas rights can be attached and do form an asset in the estate of the creditor. Intangibles by their very nature cannot have a physical locality. They do not attach to the objects to which they relate. For purposes of, for instance, jurisdiction the law had to make an election based upon practical considerations by deeming incorporeals to have a location. They are not located where the obligation has to be performed (Voet 1.8.30). Voet preferred the view that they are located at the domicile of the creditor (in this case SSL, not DTL), but proceeded to deal with the merits (which he recognised) of the

opinion of Grotius (*Consultatien* part 3 no 151) which was that the situs of an incorporeal right is where the debtor (in this case Blue Star Line) resides.

[10] Our courts have adopted the view of Grotius. The first reported judgment is *Union Government v Fisher's Executrix* 1921 TPD 328 (Wessels JP, De Waal J concurring). This judgment was approved and followed by this Court in *Randfontein Estates Gold Mining Co Ltd v Custodian of Enemy Property* 1923 AD 576. Innes CJ (at 581) pertinently held that the only attribute of locality that personal actions possess must relate to the locality where the debtor resides; it is only there that incorporeal rights can be regarded as localised. He also noted that he knew of no principle of our law which justifies the merger of the personal rights evidenced by a negotiable document in the instrument itself (at 582 in fine). Solomon JA, in a concurring judgment, pointed out

that the rule adopted was in accordance with English law (585-586). The question in that case was whether the rights reflected in bearer shares and bearer debentures of a company registered in Transvaal were "property" within this country where the company was resident or whether they should be regarded as localised at the situs of the documents. Since the documents, although bearer documents, are not the right but merely evidence the right (at 579 in fine - 580), and applying the Grotius approach, the judgment held that they were property in this country, irrespective of where the documents were.

[11] Two further judgments of this Court confirmed the approach (*Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) SA 906 (A) and *Nahrungsmittel GmbH v Otto* 1993 (1) SA 639 (A) 647F-649C). Both related to taxed bills of costs and especially the latter judgment made it clear that the certificate of the taxing

master did not constitute the right but merely evidenced it and that the right is located where the debtor is. (It may be mentioned that there may be an inconsistency in *Nahrungsmittel*. On the one hand it held that the court of first instance had correctly held that incorporeal movables did not have an existence separate from that of the creditor (at 647G-J) and on the other that the incorporeal had its situs where the debtor resided (at 649B-C). For purposes of that or this case it does not matter because all the parties involved were *peregrini.*)

[12] The Full Court, apparently relying on the doctrine of effectiveness, held that incorporeal property can be at more than one place at the same time (at 653B-E). In reaching this conclusion it relied on an inappropriate analogy, namely that a company may be sued at either its registered office or its principal place of business. We are concerned with the situs of property. The situs of incorporeals exists by virtue of the analogy

between corporeals and incorporeals. Corporeals have only one situs and by analogy the same ought to apply to incorporeals. The error in relying on the doctrine of effectiveness is similar to the one exposed by Nienaber AJA in *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) 259I-260C. The flaw in the Full Court's approach can be easily demonstrated with reference to its consequences. If a personal right has the ability to exist at more than one place at a time, it would mean that it could be attached by more than one creditor and sold to more than one execution purchaser. And if the charter-party related to more than one vessel, is the charter-party divisible? The law would be at sea if, for instance, the situs of a loan would be wherever the debtor had money or the situs of the sale of a movable wherever the article sold was.

[13] The ultimate ratio of the Full Court (at 654D) was that -

"during the period that the vessel spent here they [the rights in personam] were indeed

located here, inasmuch as they constituted intangibles (rights *in personam*) which were exigible here as long as the tangible property to which they related (the vessel) was here."

The argument is circuitous: it assumed that the right was enforceable in Cape Town in order to find that it was "property" which was within its area of jurisdiction whereas the ability to enforce the time-charter depended on its location. The Court never considered the question why the rights were exigible in Cape Town during the period of the vessel's stay. The reasoning fails to distinguish between the personal right (or claim) against the debtor and the vessel which is the subject-matter of the agreement. Although the Full Court purported to attach personal rights, it does not appear to have been clear in its own mind whether the ship or rights in the ship were being attached (e g at 643F-H, 648F, 653I and 654A). Counsel for DTL was unable to state whether the ship could have left the harbour after the attachment of the rights in personam and, if not,

why not, since the Full Court had made it clear that personal rights can exist at more than one place at the same time. Once again the court elevated an interest in an object to a right therein. A simple example will illustrate the point I am trying to make. If the rights of a hire-purchase seller in the agreement are attached, the article sold on hire-purchase is not attached, even though the seller may still have an interest therein. Neither are the obligations of the purchaser attached (cf Pistorius *Pollak on Jurisdiction* 2nd ed 106 n10).

[14] Without wishing to belabour the point, it appears to me that the Full Court did not succeed in distinguishing clear authority binding on it. That raises the question whether this Court should, on policy considerations, reconsider Grotius's rule. I think not. Apart from the fact that it was not suggested that our law in this regard is out of step with the international position, it has often been said that our courts should not

easily assume jurisdiction in favour of *peregrini* against *peregrini* in relation to litigation which has no connection to this country. Such an assumption of jurisdiction may prevent potential peregrine defendants from trading here and put them to unnecessary inconvenience and expense in requiring them to litigate here. There is also no reason why our limited public and judicial resources should be expended in respect of disputes which are unconnected to and between persons who have no relationship with our country. (Cf the quotations in *Siemens* especially at 922A-B and 926A-C.) These considerations raise the further question namely whether an applicant for attachment, and not the respondent as the Full Court held (at 654D-655D), is not invoking the exercise of the court's discretion to attach. In other words, should such an applicant not place facts before the court which show that the court is the convenient forum for the litigation? Since this aspect was not argued, it is preferable

to say no more about it.

[15] In the result the appeal must succeed and the order of Foxcroft J discharging the rule *nisi* be reinstated. The following order is made:

(a) The appeal is upheld with costs, including the costs of two counsel.

(b) The order of the Full Court is set aside and for it is substituted an order that "the appeal is dismissed with costs, including the costs of two counsel."

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L T C HARMS
JUDGE OF APPEAL

AGREE:

HEFER JA
GROSSKOPF JA
OLIVIER JA
MELUNSKY AJA