REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 329/2000
Reportable/Not reportable

In the matter between:

JAMIESON, NEIL Appellant

and

SABINGO, AMINDO CESAR Respondent

CORAM: NIENABER, FARLAM, NAVSA, MTHIYANE JJA, et LEWIS AJA

HEARD: 21 FEBRUARY 2002

DELIVERED: 27 MARCH 2002

SUMMARY: Jurisdiction – attachment to confirm jurisdiction – whether possible where voluntary submission to jurisdiction by defendant occurs after attachment order made but before execution thereof.

JUDGMENT

FARLAM JA

FARLAM JA:

[1] This is an appeal from a judgment of Willis J, sitting in the Witwatersrand Local Division of the High Court, who discharged a rule *nisi* granted on an *ex parte* basis in favour of the appellant by Malan J on 13 July 1999. The judgment of the Court *a quo* has been reported: see *Ex parte Jamieson: In re Jamieson v Sabingo* 2001(2) SA 775(W).

[2] The appellant is an *incola* of the area of jurisdiction of the Court *a quo.* The respondent is a *peregrinus* of South Africa as a whole, described by this Court (in *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987(4) SA 883(A) at 886C) as 'an out-and-out *peregrinus'*. He had obtained judgment in the Witwatersrand Local Division on 30 April 1999 against a company known as Madiba Air (Pty) Ltd for the rand equivalent of $142 000, plus interest and costs on the scale as between attorney and client.

[3] The rule *nisi* granted on 13 July 1999 was part of an order which read as follows:

> '1. That leave be granted to Applicant to institute action against Dr Amindo Cesar Sabingo in terms of the Particulars of Claim being annexure "A" hereto ("the action"), within two weeks of date of this Order.
>
> 2. That the right, title and interest in the judgment of Dr Amindo Cesar Sabingo against Madiba Air (Pty) Limited under case number 97/29219 of this Court, a certified true copy whereof is annexed hereto marked "B", be placed under attachment to found jurisdiction in the action pending the final determination of the action.
>
> 3. That leave be granted to the Applicant to institute the action by way of edictal citation.
>
> 4. That this order and the citation be served on Dr Amindo Cesar Sabingo as provided for in the Uniform Rule of Court 4 at Maboque, Rua Gastao de Sousa Dias VI-990, Luanda, Angola.

5. That Dr Amindo Cesar Sabingo be allowed two (2) months from date of this Order within which to enter an appearance to defend the action.

6. That paragraph 2 above will operate as a rule nisi returnable two months from the date of this order.

7. That the costs of this application be costs in the main action.'

[4] The order for the attachment of the respondent's 'right, title and interest' in the judgment against Madiba Air (Pty) Ltd granted on 13 July 1999 was executed only on 7 September 1999. On 19 August 1999, some two and a half weeks before this took place, attorneys acting on behalf of the respondent wrote a letter to the appellant's attorneys, which contained the following:

> '... in light of the fact that we represent our client in South Africa, we confirm that our client hereby consents to the jurisdiction of the Witwatersrand Local Division of the High Court in respect of your client's action and our client also appoints our offices as his chosen *domicilium citandi et executandi* for all purposes. There is accordingly no need for you to confirm the order already obtained, or indeed to serve the Order for the attachment of the Judgment, and there is also no need for the Writ of Attachment which must have been issued by yourselves in respect

> thereof to be executed by the Sheriff. An attachment is now not necessary or competent under the circumstances.'

[5] The claim which forms the subject matter of the action instituted by the appellant against the respondent was based on a contract allegedly concluded by the appellant and the respondent for the sale and installation by the appellant at a hotel in Luanda, Angola, of a water purification system, a power generator and a vibrating compact roller. Although the appellant alleged in his founding affidavit that the contract between the respondent and himself was an oral one entered into at Luanda, he annexed a copy of a quotation he allegedly sent by facsimile transmission to the respondent in Angola together with a copy of a letter which the respondent had sent, also by facsimile transmission, to him in Johannesburg in which his quotation was accepted. Although Willis J found (at 777G) that the contract was concluded in Luanda, when the matter was argued before us, Mr *Horwitz,*

who appeared with *Mr Kaplan* for the appellant, conceded that the case had to be approached on the basis that the contract was concluded in Johannesburg when the appellant received the respondent's letter accepting his quotation. In my opinion this concession was correctly made. Parties who communicate by telephone, telex or telefacsimile transmission are 'to all intents and purposes in each other's presence' (to use an expression used by Parker LJ in *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327 (CA) at 337) and the ordinary rules applicable to the conclusion of contracts made by parties in each other's physical presence apply, *viz.,* the contract comes into existence when and where the offeree's acceptance is communicated and received to the offeror. This has been held to be the legal position in the case of contracts concluded over the telephone (*Tel Peda Investigation Bureau (Pty) Ltd v Van Zyl* 1965(4) SA 475(E), approved by this Court in *S v Henckert* 1981(3) SA 445 (A) at 451B) and contracts

concluded by telex (*Entores Ltd v Miles Far East Corporation, supra,* approved by the House of Lords in *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34). By parity of reasoning the same principle must apply where the parties are in communication with each other by telefacsimile transmission (see *Gunac Hawkes Bay (1986) Ltd v Palmer* [1991] 3 NZLR 297 (HC)).

[6] It follows from this concession that when the rule *nisi* was granted it was competent for the appellant to have sought the attachment of the respondent's property only in order to *confirm* jurisdiction and not to *found* it.

[7] As appears from his reported judgment (at 777H–J) Willis J discharged the rule *nisi* because of the respondent's voluntary submission to the jurisdiction of the Witwatersrand Local Division on 19 August 1999 and because of the decision of a Full Bench of that division in *American Flag plc*

v Great African T-Shirt Corporation CC; American Flag plc v Great African T-Shirt Corporation CC: In re Ex parte Great African T-Shirt Corporation CC 2000(1) SA 356(W), by which he was bound. In the *American Flag* case it was held that even where there was no other *causa jurisdictionis* (such as that the contract sued on was concluded in the court's area of jurisdiction), 'where the plaintiff was an *incola* in an action for money submission to the jurisdiction by the peregrine defendant was effective' (at 365E–I).

[8] In the *American Flag* case it was further held that the legal position as to the effectiveness of a submission to the jurisdiction of a court of the area of which the plaintiff is an *incola* by a defendant who is *peregrinus* of that area was not changed by this Court in its decision in *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in Liquidation), supra.* In that case Viljoen JA, with whom the other members of the Court concurred, said (at 894A-B):

> 'By prorogation a defendant submits 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.'

In the *American Flag* decision (at 366C-D) it was pointed out that both parties in the *Veneta* case were *peregrini* of the Natal Court from which the case came, the plaintiff a *peregrinus* of the Republic and the defendant an *incola* of the Transvaal and a *peregrinus* of Natal. It followed, so it was held, that what was called the '*Veneta* dictum', while wide enough to cover cases where the plaintiff was an *incola* of the court's area of jurisdiction, was not intended to extend to cases where a peregrine defendant consents to the jurisdiction of the court of the area of which the plaintiff is an *incola* (at 368 B – 373 H).

[9] In the *American Flag* decision it was further held (at 377B–F) that if the '*Veneta* dictum' intended to extend the inadequacy of consent on its own as a ground for jurisdiction, even to a case where the plaintiff is an *incola,* to

the extent it was not necessary for the Court's decision, was *obiter* and that there were weighty reasons for not following it. It was also held that the decision in *Briscoe v Marais* 1992 (2) SA 413 (W) was wrongly decided. In that case Streicher J, relying on 'the *Veneta* dictum' (at 416F-G), held that an attachment to found jurisdiction could not be replaced by a consent to jurisdiction, as such consent in itself cannot confer jurisdiction on the court. Only where a *causa jurisdictionis* apart from attachment exists, ie only in the case of an attachment *ad confirmandam jurisdictionem,* can the attachment become unnecessary as a result of consent to jurisdiction.

[10] Willis J said (at 778A-B) that he was not convinced that the Court in the *American Flag* case 'correctly divined' the intentions of the Appellate Division. For that reason, although he discharged the rule *nisi* granted by Malan J, and thereby the interim attachment of the respondent's right, title

and interest in the judgment referred to, he granted leave to appeal to this Court and suspended his order pending the decision of this Court.

[11] In the light of the concession that the alleged contract between the parties was concluded in the area of jurisdiction of the Witwatersrand Local Division and that a *causa jurisdictionis* apart from attachment exists, it is unnecessary for me to consider whether the interpretation and criticism of 'the *Veneta dictum'* in the *American Flag* decision and the fairly voluminous academic literature which preceded it (notably the illuminating note by Professor Ellison Kahn in 1992 *Annual Survey of SA Law* 687-691) is correct. I shall resist the temptation to do, so first because anything I say on the matter will be *obiter;* and secondly, because Mr *Horwitz*, in view of the concession to which I have referred, did not address argument to us on the point. Indeed he conceded that the *American Flag* decision was correct and sought to uphold the conclusion to which Streicher J came in *Briscoe v*

Marais, supra, on reasons other than those set out in the judgment in that case.

[12] This brings me to Mr *Horwitz's* submissions as to why the appeal should succeed, despite the fact that the alleged contract was concluded in the area of jurisdiction of the Witwatersrand Local Division, so that a *causa jurisdictionis* apart from attachment was present.

[13] Mr *Horwitz's* main contention was that a distinction has to be drawn between a bilateral submission embodied in a contract between the parties and a unilateral submission where a defendant, without the consent of the plaintiff, submits to the jurisdiction of a court. A bilateral submission, where another *causa jurisdictionis* is present, so he contended, can vest the court with jurisdiction and renders an attachment of the defendant's property both unnecessary and impermissible. A unilateral submission on the other hand, even where another *causa jurisdictionis* is present, cannot, so he

contended, vest the Court with jurisdiction and attachment of the defendant's property is not only permissible but also necessary to confirm jurisdiction.

[14] Mr *Horwitz* also contended during his argument in reply, that, even if the distinction between bilateral and unilateral submissions was not a sound one, the attempted submission by the respondent in this case would be of no avail because it was effected *after* the proceedings for the attachment of the respondent's property had been set afoot and indeed after the attachment order had been granted. In support of this submission he relied on the case of *Kasimov and Another v Kurland* 1987 (4) SA 76 (C).

[15] In developing what I have called his main contention, Mr *Horwitz* submitted that the courts, more particularly the Witwatersrand Local Division, had since the 1980's begun to accept, wrongly he submitted, that a *unilateral* submission by a defendant is sufficient to avert attachment of his or her property to confirm jurisdiction. He submitted further that the courts

took their cue from the judgment of Goldstone J in *Elscint (Pty) Ltd and Another v Mobile Medical Scanners (Pty) Ltd* 1986 (4) SA 552 (W). This case, however, was one where the consent to the court's jurisdiction was embodied in the contract which formed the basis of the plaintiff's cause of action. It was accordingly not a case of unilateral submission and was therefore not authority for the proposition for which it was relied on. The cases to which Mr *Horwitz* referred and which he contended were wrongly decided on this point were *Utah International Inc v Honeth and Others* 1987(4) SA 145(W), *Small Business Development Corporation Ltd v Amey* 1989 (4) SA 890 (W), *Ghomeshi-Bozorg v Yousefi* 1998(1) SA 692 (W) and the *American Flag* case.

[16] Mr *Horwitz* said that in all those cases (except the *American Flag* decision) the court simply assumed, without considering the matter at all, that unilateral submissions were to be treated in the same way as cases

where there was a contract between the parties in which they bound themselves to accept the jurisdiction of a particular court or where the plaintiff had sued the defendant in a particular court and the defendant had fought the case without taking the point that the court did not have jurisdiction, in which event he could not thereafter raise the point (a case of submission by conduct *post litem motam* where what Mr *Horwitz* called a quasi-contractual relationship between the parties comes into existence).

[17] What should have been considered, said Mr *Horwitz,* was whether a defendant *peregrinus* whose property was liable to attachment to confirm the court's jurisdiction should be entitled to foist a submission to the jurisdiction on to an unwilling plaintiff so as to deprive him of the right to attach his property to confirm jurisdiction and to secure the debt, to some extent at least. This question had not been considered in any of the cases.

[18] As has been said, in no case except the *American Flag* decision was the question considered at all, while in the *American Flag* case it was merely stated (at 376C) that there should be no difference in principle. The judgment was not motivated on the point and what had happened, said Mr *Horwitz,* was that a quantum leap had been made. He pointed out that Voet 24.2.1 and 2 (to which reference was made in *Du Preez v Philip-King* 1963(1) SA 801(W) at 803A) discusses two categories of submission: contractual submission and submission consequent upon unilateral conduct following upon citation before a tribunal not ordinarily competent to give judgment against a particular defendant (where there was what Mr *Horwitz* called a quasi-contractual relationship between the parties). There was no basis, he contended, for holding in favour of the existence of a third category of cases, namely cases of unilateral submission by a defendant without any

concomitant action on the part of the plaintiff to indicate that the parties are *ad idem* in regard to jurisdiction.

[19] Mr *Horwitz* conceded that one case which might appear to present a problem to him was *Kopelowitz v Auerbach* (1907) 24SC 567. He contended, however, that an attachment order was refused in that case less because of a unilateral submission by the defendant and more because the defendant had appointed an agent to represent him and to attend to his business affairs in the Court's area of jurisdiction.

[20] He submitted further that it has been accepted for over a century that a plaintiff who establishes a *prima facie* case and other jurisdictional requisites for an attachment, such as the arising of the cause of action within the jurisdiction of the court and the fact that the defendant is an out-and-out *peregrinus,* has a *right* to an attachment, not only for purposes of vesting the Court with jurisdiction but also so that he can obtain an effective judgment.

It is accordingly what he called a startling proposition that a defendant can by his or her unilateral act deprive the plaintiff of that right. He contended that the only route by which this Court could reach the conclusion that a unilateral submission to jurisdiction can deprive a plaintiff of a right to obtain an attachment order in a case such as this would be for the Court to revisit the century-old principle that the Court does not have a discretion to refuse an attachment. There was no basis, he submitted, for this Court to do that.

[21] In my view the answer to Mr *Horwitz's* submission is to be found in the reason that an attachment is normally necessary, when it is sought to sue a *peregrinus* in a case sounding in money, to attach property belonging to the *peregrinus.* It is clear from the authorities (see, eg, *Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries (Pty) Ltd),* 1969(2) SA 295(A) at 310 H) that the purpose of an attachment to found or confirm jurisdiction is to

enable the court to pronounce a judgment 'which will not be void of result'.

[22] The normal rule, to which the rules relating to attachments to found and confirm jurisdiction and submissions to jurisdiction are exceptions, is *actor sequitur forum rei.* As it was put in the *Thermo Radiant* case at 305C-D 'an *incola* was compelled to institute action against a *peregrinus* in the latter's country of domicile'. This rule is based on the principle of effectiveness: 'the Court can give an effective judgment ... because it is considered that usually a person's possessions are where his home is, and that execution can be levied against those possessions' (*Thermo Radiant* case at 309G-H).

[23] Where action is sought to be instituted in a court other than the *forum rei* the court in order to be able to give 'a judgment which will not be void of result' has to have some of the defendant's property preserved in its area of

jurisdiction until after judgment so that execution can be levied thereon (*Thermo Radiant* case at 306 F).

[24] Those considerations do not apply where the defendant has submitted to the Court's jurisdiction. This is because a judgment given by a court against a *peregrinus* who has submitted to its jurisdiction will be internationally enforceable and will, *eg.,* be recognised by the court of the judgment debtor's domicile. It is sometimes said (see, eg, the *Thermo Radiant* case at 307A) that the principle of voluntary submission to jurisdiction is an exception to the principle of effectiveness but that is only true, as was pointed out by John Peter in his article 'Consent Confusion but no Effect' ((1993) 110 *SALJ* 15 at 20), insofar as it is an exception to the rule that a court must be able to give effect to its *own* judgment.

[25] Indeed a judgment founded on a voluntary submission to jurisdiction by the defendant is in many ways better than a judgment founded on an

attachment where the defendant has not appeared and contested the suit. Such a judgment binds only the property attached and has no extra-territorial force and obligation (see the passage from Story, *Conflict of Laws,* 8th ed para 549, approved by De Villiers C J in *Acutt Blaine & Co v Colonial Marine Assurance Co* (1882) 1 SC 402 at 406, which I quoted in *Blue Continent Products (Pty) Ltd v Foroya Banki PF* 1993(4) SA 563(C) at 570 C-E). On the other hand a judgment based on a voluntary submission to jurisdiction is not only internationally enforceable but binds the whole property of the judgment debtor: it is accordingly clearly not 'a judgment void of result'.

[26] It follows that the reason that it is necessary for a *peregrinus'* property to be attached before action can be instituted against him does not apply where there has been a voluntary submission and in such a case there is no 'right' to attachment as was argued by Mr *Horwitz*.. This is so whether the

submission was unilateral or fell into either of the two categories referred to by Voet in the passage cited above. In other words, the reason that Wunsh J was correct in the *American Flag* case in saying that there is no difference in principle between bilateral and unilateral submissions, is the fact that both types of submission render a judgment given on the strength thereof internationally enforceable.

[27] It follows that Mr *Horwitz's* main contention must be rejected.

[28] I turn now to his alternative argument, *viz* that the submission in this matter was of no avail because it was given after the proceedings for attachment had commenced and indeed after the attachment order had been granted.

[29] In *Elscint (Pty) Ltd and Another v Mobile Medical Scanners (Pty) Ltd, supra,* at 557 E Goldstone J said:

> '(W)here such an attachment has taken place, there is no basis for denying the *incola* any benefit conferred thereby merely because the *peregrinus, ex post facto* and unilaterally submits to the jurisdiction of the Court: *Bedeaux v McChesney* [1939 WLD 128].'

This dictum and the decision on which it was based, *Bedeaux's* case, were approved in the *Blue Continent* case. There are other decisions, such as the *Small Business Development Corporation* case, *supra,* and *Ghomezi-Bozorg v Yousefi, supra,* where it has been suggested that even a submission given after the defendant's property has been attached may be sufficient to lead to the release of the property. We are not called upon in this case to decide whether a submission given after the attachment has taken place will be too late and no arguments on the point were addressed to us.

[30] We are concerned, it will be recalled, with a submission given after the order for attachment was given but before it was put into effect. In my view it is not too late for a submission to jurisdiction to be given before the attachment is put into effect. The purpose of the attachment, as has been

seen, is to enable the court to give an effective judgment. If the respondent in ignorance of the order had transferred his ownership of the property sought to be attached to another person before the attachment was carried out, the order for attachment would clearly have to be set aside (because no effective judgment could have been given thereafter against the respondent because the goods attached would no longer have been his). Conversely, where the respondent had submitted to the jurisdiction before the attachment took place, an effective judgment could thereafter have been given in the main case and the attachment would not have been necessary in order to achieve this.

[31] It has not been suggested before us that the submission was not a voluntary one and that any judgment given on the strength thereof would not be recognised internationally, in which event other considerations might well apply (cf the *Blue Continent* case, supra, at 574 F-G).

[32] In the circumstances I am satisfied that the appeal must fail. The following order is made:

'The appeal is dismissed with costs, including those occasioned by the employment of two counsel.'

.....
IG FARLAM
JUDGE OF APPEAL

CONCURRING:
NIENABER JA
NAVSA JA
MTHIYANE JA
LEWIS AJA