IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 439/03

In the matter between

HAY MANAGEMENT CONSULTANTS LTD **APPELLANT**

and

P3 MANAGEMENT CONSULTANTS (PTY) LTD **RESPONDENT**

Coram: **SCOTT, CAMERON, CONRADIE, HEHER JJA and PATEL AJA**

Heard: **23 NOVEMBER 2004**

Delivered: **30 NOVEMBER 2004**

Summary: Practice: jurisdiction – implied contractual submission – whether can be relied on in action not arising from the contract – weight to be attached to domicilium and choice of law clauses – submission by *peregrinus* in action by *incola* – whether sufficient of itself to found jurisdiction.

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JUDGMENT

HEHER JA:

[1] This is an appeal with leave of the court *a quo* from a judgment of Rabie J, sitting in a trial in the Witwatersrand Local Division, in which he dismissed a special plea to the jurisdiction of the court with costs. The issue of jurisdiction had by agreement between the parties been tried separately prior to embarking on the trial of the merits of the case. Neither party chose to adduce evidence and the issue was consequently argued on the pleadings.

[2] The plaintiff in the action (the respondent on appeal) is an *incola* of the Witwatersrand court. The defendant (the appellant) is a company incorporated in England and Wales and a *peregrinus* of the Republic of South Africa.

[3] In September 2000 the plaintiff instituted the action against the defendant claiming repayment of an amount of R515 815 paid under protest and alleged to be subject to the condition that it would be repaid if found not to be due. (The claim was subsequently reduced by an amount of R117 604,85 which, the plaintiff conceded, had indeed been due and payable.) An alternative claim was based on the *condictio indebiti*. The parties had during November 1989 in London concluded a written agreement the essence of which was that the defendant granted the plaintiff a licence to operate a management consultancy in a number of Southern African countries including the Republic. In consideration for the rights the plaintiff undertook to pay royalties to the defendant in London.

[4] The plaintiff averred in its particulars of claim that the trial court possessed jurisdiction to try its cause because the plaintiff was an *incola* and the defendant had consented to the jurisdiction of the court. The plaintiff alleged that its cause of action arose 'in connection with the agreement' and relied specifically upon the terms of clauses 15 and 16.1 thereof.

[5] Clause 15 stipulated that the proper law of the agreement was to be the law of the Republic of South Africa. Clause 16.1 provided as follows:

'16.1 addresses and notices

16.1.1 For the purposes of this agreement, including the giving of notices and the serving of legal process, the parties choose domicilium citandi et executandi ("domicilium") as follows:

Group	:	c/o Deneys Reitz Crusader House 10 Anderson Street Johannesburg (Att. K. Cron)
Fax No.	:	838-7444
with an information copy to:		
		52 Grosvenor Gardens Victoria London SW1W OAU
Telex No.	:	
Fax No.	:	730-7004
HSA and Ravnsborg	:	1st Floor, Norwich Park, Cor 5th Street & Grayston Drive, Sandown, Sandton 2146, SOUTH AFRICA
Telex	:	
Fax No. 884-4339	:	

16.1.2 A party may at any time change that party's domicilium by notice in writing, provided that the new domicilium is in the Republic of South Africa and consists of, or includes, a physical address at which process can be served.'

[6] The defendant raised a special plea to the jurisdiction. It pleaded that it was a *peregrinus* of the Republic and the plaintiff had not attached its property to found or confirm jurisdiction and denied that it had expressly or tacitly consented to the jurisdiction by concluding the agreement containing the clauses relied on by the plaintiff.

[7] In its plea to the merits the defendant averred that the agreement had been varied by an exchange of letters, denied that the plaintiff had calculated the fees which it owed on a proper basis and denied that the plaintiff was entitled to recover any part of the amount that it had paid.

[8] The judgment of the court *a quo* addressed two questions:

(i) whether a submission by the defendant to the jurisdiction of the court was sufficient of itself (there being no other *ratio jurisdictionis* available to the plaintiff) to found jurisdiction in an action for money by an *incola* of the court against a *peregrinus* or whether the plaintiff required an attachment of the defendant's property in addition;

(ii) whether the grounds relied on by the plaintiff established a submission to the jurisdiction by the defendant.

[9] In regard to the first question the learned judge followed, as authority binding on him, the judgment of the Full Bench of the Witwatersrand Local 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) in which it was held that, in an action for

money by a plaintiff *incola* of the court, absent a *causa jurisdictionis*, submission by a peregrine defendant is sufficient of itself to confer jurisdiction.

[10] As to the second question, the learned judge considered the totality of the evidence, consisting not only of the contractual terms but also the admitted facts relating to the parties and their business relationship. He found that the plaintiff had proved on a balance of probabilities that the parties 'intended disputes arising from the agreement to be adjudicated by the South African courts' and, consequently, that he had jurisdiction to decide the main dispute.

[11] Before us counsel for the defendant submitted that the plaintiff's causes of action on the main and alternative claims were not founded on the contract and in fact disavowed that the payment which it made was required by any contractual obligation. In these circumstances, he submitted, the plaintiff could not rely on the provisions of the contract to found jurisdiction. Even if, properly interpreted, the contract embodied a consent to jurisdiction, that consent was confined to disputes arising in relation to it.

[12] Although, at first blush, this submission possesses the attraction of logic, I think it ignores the reality. The parties concluded the agreement to regulate an ongoing business relationship. They fixed on a choice of law and, as will be seen, a forum to decide their disputes. Both would necessarily have regarded the situation as anomalous and unsatisfactory if only disputes arising strictly within the terms of the agreement could be decided in that forum according to the selected legal regime, while all other disputes, no matter how cardinal to their business, had to determined

by another court according to a different system of law. The present dispute demonstrates the absurdity: the plaintiff paid because the defendant insisted that their contract required it to do so; in the action the defendant maintains that stance and whether the plaintiff wins or loses will depend largely on the true content of the agreement and its interpretation; if the objection is good these questions will have to be decided by an English court according to English law whereas if the plaintiff had withheld the payment and been sued by the defendant the dispute would have been resolved in this country according to South African law. To give proper effect to the parties' intentions we must allow the submission a scope which serves all disputes that have the terms and performance of the contract as their substance. The first point is therefore answered in favour of the respondent.

[13] I think that the trial judge correctly approached the question whether the defendant had submitted to the jurisdiction by asking whether the cumulative effect of the proved facts established submission on a balance of probability, *cf Beverley Building Society v De Courcy and Another* 1964 (4) SA 264 (SR) at 268 C-E. That being so it does not signify that, on its own, the domicilium clause (*Standard Bank Ltd v Butlin* 1981 (4) SA 158 (D)) or the choice of law clause (*Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* 1983 (1) SA 1033 (W)) may not have discharged the onus.

[14] The proved facts which are relevant in the present case are the following:

1. The defendant, an English company, with no apparent past or present connection with South Africa, apart from its business relationship with the plaintiff, was content to select a domicilium for service of process

and writs of execution in this country. This was recognised as a significant factor leaning towards submission in *Beverley Building Society* (at 270C-E) and *Standard Bank* (at 164D-F) and, with respect, rightly so. The defendant moreover undertook that, in the event of changing its chosen domicile, it would provide a physical address within the Republic for such purposes.

2. The ongoing relationship encompassed business in countries with varying legal systems (*inter alia* Angola, Malawi and South Africa). English law was an obvious option as the governing law of the contract given that the defendant was an *incola* of England. The fact that South African law was chosen is an indication, although slight in itself, of an intention to establish a connection with the courts of this country.

[15] In *Ex parte Hay Management Consultants (Pty) Ltd* 2000 (3) SA 501(W) Wunsh J sought to ascertain the intention of the parties to the very contract presently under consideration. He said (at 508G-I):

'At the time of the [defendant] so agreeing it was a *peregrinus* and there is no reason to believe that it then contemplated becoming resident in South Africa. It is still a *peregrinus*. It could hardly have intended that an action against it would be brought or have to be brought in the English Courts. It is bizarre to suggest that what was contemplated, as a possibility, was that the applicant would have to institute proceedings against the defendant in England, have the process served here (that being the only reason for the choice of a *domicilium citandi et executandi* here) and have the English Courts try the action according to South African law. It is far more probable that it consented to the jurisdiction of a South African Court within the area of which its *domicilium citandi* would be

situated.'

This was also the line of reasoning pursued by Rabie J in the court below. I find it persuasive and sufficient (even without the considerations to which I have already referred) to raise a probability that the defendant intended to submit to the jurisdiction of a South African court. At the time of the conclusion of the contract (and at all subsequent times) the Johannesburg court was the appropriate court in the context of the agreement. I cannot divine the existence of any countervailing considerations and counsel could not take the matter further. In the circumstances I find it unnecessary to address certain other reasons relied on by the learned judge as support for his conclusion, such as the place at which the plaintiff's obligations under the contract were to be performed and the relevance of the conditions attached to the payment under protest. Suffice to say that I agree with the trial judge that the defendant consented to the jurisdiction of the Witwatersrand Local Division.

[16] The final leg of the appeal resolves itself into a question of whether *American Flag plc supra* was correctly decided.

[17] Counsel for the appellant frankly conceded that recognising consent by a peregrinus as sufficient of itself to found jurisdiction in an action for money brought by an *incola* of the court reflected sound commercial reality. The wisdom of that concession is borne out by reference to Forsyth, *Private International Law*, 4th ed 215-6 where the learned author discusses 'a fundamental issue of policy':

'However, as we have seen, today the doctrine of effectiveness is artificial and conceptual rather than realistic. And indeed even those cases that would most severely restrict submission do not

reject it altogether. Moreover, submission is widely recognised in legal systems across the world as a ground on international competence justifying the enforcement of the judgment of a foreign court to which the defendant has submitted. Thus, on the whole, a judgment based on submission will be effective. It is submitted that effectiveness in this slightly attenutated sense should suffice to justify the exercise of jurisdiction on the grounds of submission. The fact is that most other legal systems-and in particular the legal systems of South Africa's trading partners-give wide recognition to and encourage submission as a ground of jurisdiction. And this is widely welcomed by the parties to international contracts who frequently submit their disputes to resolution by courts with which they have but little connection. This is for good and obvious reasons-convenience, speed, judicial reputation, expense, neutrality (ie no link with any of the parties). It is to the benefit of international commerce that this should be so. The South African courts should as a matter of policy encourage submission. As economic development in Southern and Central Africa proceeds, there is no reason, other than archaic restrictions on the exercise of jurisdiction, why the local courts should not develop an international role akin to that of the Commercial Court in London. The judicial policy should not be 'Peregrines go home' but 'Peregrines welcome'. Thus peregrines should not find that, if they have submitted to the jurisdiction of the South African courts, their property is still at risk of being seized to found or confirm jurisdiction. That is a brake on inward investment. Moreover, there should be no bar on the submission to the South African courts of disputes where neither party is an *incola* and there may be no obvious link with South Africa. Such use of the South African courts is a tribute to them and it encourages international trade and commerce to the general benefit.'

Similar sentiments have been expressed in our courts and by academic writers over many years. See the authorities cited in *American Flag plc* at 363A-365B and *Jamieson v Sabingo* 2002 (4) SA 49 (SCA) at 58D-H. We are not in this case concerned with a peregrine plaintiff and my approval of the practical advantages of

recognising jurisdiction on the grounds discussed by Forsyth should not be understood as necessarily extending to such a person.

[18] Counsel's attack on *American Flag plc* was two-pronged. First, he submitted that it flies in the face of what was laid down by this Court in *Veneta Mineraria SPA v Carolina Collieries (Pty) Ltd* (in liquidation) 1987 (4) SA 883 (A) at 894A-B:

'This *dictum* [in *The Owners, Master and Crew of the SS Humber v The Owners and Master of the SS Answald* 1912 AD 546 at 554] again emphasises the principle that in addition to the machinery of arrest (which, in the case of a local *peregrinus*, is dispensed with by law) something more is required before a Court can take cognizance of a matter in its area of jurisdiction. By 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.'

Counsel conceded, rightly, that in so far as the quoted passage was intended to apply to proceedings against peregrine defendants generally it might be *obiter* since the issue before that court was jurisdiction over such a defendant at the instance of a peregrine plaintiff. He submitted however that it was not the intention of the court to recognise any such distinction.

[19] That submission tied in with the thrust of counsel's second criticism of *American Flag plc*, *viz* that the *Veneta* dictum (on the basis that it extended to all peregrine defendants) was consistent with long-established principles of South African law. Judgments such as those relied on by the Court in *American Flag plc* (at 363E-G) for a contrary principle were either wrong or were themselves *obiter* since, so counsel submitted, in all (or almost all) instances an accepted *ratio jurisdictionis*

was present.

[20] The first submission reflects a controversy that raged before *American Flag plc*. See the authorities referred to by Wunsh J at 376J-377A. In my view the learned Judge disposed thoroughly and comprehensively of the argument that Viljoen JA in *Veneta Mineraria* intended to enunciate a principle applicable to all peregrine defendants irrespective of whether the plaintiff was an *incola* or a *peregrinus*. No purpose will be served by traversing the ground again. Nothing said by counsel for the defendant persuades me that the learned judge was wrong.

[21] The second ground of attack is founded upon a passage from the judgment of Innes CJ in *Ueckermann v Feinstein* 1909 TS 913 at 919-20 which was cited by Viljoen JA in *Veneta Mineraria SPA* at 891G:

'There remains the much more difficult question, whether acquiescence in a judgment in *personam*, pronounced by a Court competent as to the cause, against a defendant over whose person the Court had at the time no jurisdiction, operates to prevent such defendant from thereafter challenging the validity of the judgment. The inquiry may be put in a different shape- could such a defendant, under such circumstances, have conferred jurisdiction originally upon the Court by consent? Because, if he could consent originally, it follows that he could acquiesce subsequently. Apart from statute, the common law of Holland undoubtedly recognised the doctrine of the prorogation of jurisdiction- that is, that jurisdiction might be conferred or extended by consent of parties so as to enable the Court to deal with a dispute which, apart from such consent, it would have had no jurisdiction to entertain. And that prorogation of jurisdiction might take place in regard to inferior as well as Superior Courts is clear from what *Voet* says at 2.1.15. Some of the authorities favoured a very wide application being given to this doctrine of prorogation. But I think it must be recognised as settled law in South

Africa 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; because in such cases, the matter at issue being by law outside the cognizance of the Court, the consent of parties cannot confer a coercive jurisdiction upon the Court, which the law expressly denies to it.'

As I understand counsel's reliance on this extract (and the weight which, according to him, it carried with Viljoen JA) the point is this: although any peregrine defendant may effectively submit his person to the jurisdiction whether the plaintiff is an *incola* or peregrinus, there must, in the absence of a *ratio jurisdictionis,* exist some connection between the subject-matter of the suit and the court which hears it; only then may a court take cognizance of and adjudicate upon the subject matter. As a general proposition that is no doubt correct. Mr Eloff submitted, however, that the rule is that such connection can only be established by an attachment of the person or property of the peregrine defendant. But *Ueckermann v Feinstein supra* did not hold that. On the contrary, the court upheld, as an effective basis for jurisdiction, a submission without any attachment, without reference to the presence of or need for any other *ratio jurisdictionis*. (Although one cannot be certain, the probable inference from the summary of the facts is that the plaintiff was an *incola* of the court: Innes CJ at 919 suspected that he was a nominee for the real creditor, one Wessels, who was a local attorney at the seat of the court.) Our courts have long treated an *incola* plaintiff more leniently than his peregrine counterpart. (The historical reasons for doing so were explained by Wessels J in *Springle v Mercantile Association of Swaziland Ltd* 1904TS 163 at 165 *in fine* – 167). The former may found jurisdiction by attachment

or arrest; no other ground of jurisdiction is required. The latter may also attach or arrest to found jurisdiction but only if another ground is present: the connection between court and subject matter is established by the existence of that ground. When the plaintiff is an *incola* whether the connection is made *ipso facto* or because the connection is regarded as subservient to the policy of relieving the *incola* from the disadvantages of the rule *actor sequitur forum rei* does not matter: jurisdiction is assumed; the suit is a matter of which a court may take cognizance according to law: s 19(1) of the Supreme Court Act 59 of 1959.

[22] I can see no difference in principle in the case of a consent to jurisdiction. There are the same reasons for coming to the assistance of an *incola* plaintiff. The practical advantages of recognising jurisdiction which are referred in para 17 are manifest.

[23] Nor can counsel be right in contending that attachment is required when a submission already exists. As pointed out in *Jamieson v Sabingo supra* at 57I-58I the reasons for requiring an attachment to found jurisdiction against a *pereginus* are as well if not better satisfied by a submission. What is additionally required in both cases is the link between the cause and the court, a link that is established when the plaintiff is an *incola*.

[24] The cases relied on by Wunsh J in *American Flag plc* at 363A-G were therefore correct to the extent that they held or recognised that submission by a *peregrinus* is sufficient to confer jurisdiction without an attachment *ad fundandam jurisdictionem*.

[25] Counsel for the defendant submitted that some importance resides in the question whether the submission is relied on to found or to confirm jurisdiction. In the context of the present case I think the distinction is without significance.

[26] In the result I am satisfied that *American Flag plc* correctly reflects the law in actions for money between a plaintiff *incola* of a court and a *peregrinus* when the defendant has submitted to the jurisdiction.

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

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J A HEHER
JUDGE OF APPEAL

Concur:
SCOTT JA
CAMERON JA
CONRADIE JA
PATEL AJA