



# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable  
Case no: 243/04

In the matter between:

MICHAEL NAYLOR	First Appellant
ATOMAER (RSA) (PTY) LTD	Second Appellant
and	
PIETER JOHANN JANSEN	Respondent

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Reportable  
Case no: 251/04

In the matter between:

PIETER JOHANN JANSEN	Appellant
and	
MICHAEL NAYLOR	First Respondent
ATOMAER (RSA) (PTY) LTD	Second Respondent
ATOMAER HOLDINGS (PTY) LTD	Third Respondent

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Coram : SCOTT, CAMERON, CLOETE, HEHER *et*  
MLAMBO JJA  
Date of Hearing : 6 MAY 2005  
Date of delivery : 31 MAY 2005

Summary: Defamation – *animus injuriandi* – qualified privilege of occasion –  
admissibility of evidence to mitigate damages – arrest – costs of unopposed  
application when respondent not first invited to submit to jurisdiction – orders at paras  
19 and 32.

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**JUDGMENT**

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SCOTT JA/...

**SCOTT JA:**

[1] It is convenient to dispose of both of these appeals in one judgment. The circumstances in which they arise are briefly as follows. On 24 October 2002 Mr Pieter Jansen, an *incola* of Gauteng, applied for and was granted *ex parte* an order for the arrest of Mr Michael Naylor to confirm the jurisdiction of the High Court, Johannesburg, in an action for defamation which Jansen proposed to institute against Naylor and one other. It is common cause that Naylor is an Australian citizen and a peregrine of South Africa. The order, which was granted by Coetzee J, provided that the arrest would fall away upon Naylor furnishing security or showing cause why the arrest should be set aside. The question of the costs was ordered to stand over for later determination by the trial court. The order was served on Naylor by the sheriff who was accompanied by Jansen's attorney. Arrangements were immediately made for Naylor to put up security, which he did, and he was not taken into custody. On 4 November 2002 Jansen instituted action for damages against Naylor as first defendant and Atomaer (RSA) (Pty) Ltd as second defendant. The latter, as its name suggests, is an *incola* of South Africa. The cause of action was an alleged defamatory statement of and concerning Jansen

made by Naylor, acting in the course and scope of his employment with the second defendant, at a meeting held at Vanderbijlpark, Gauteng, on 2 October 2002. In due course the trial was held before Willis J who on 31 October 2003 gave judgment in favour of Jansen with costs. The judgment, however, made no reference to the costs of the *ex parte* application granted by Coetzee J which had been ordered to stand over. Subsequently, on 20 February 2004, Naylor filed an answering affidavit to the application for the arrest in which he alleged that there had been no need to incur the costs of the application since, to the knowledge of Jansen, he was a frequent visitor to South Africa and would have consented to the jurisdiction of the court had he been asked to do so. On 3 May 2004 Willis J granted Naylor and the second defendant leave to appeal to this court against his judgment in the defamation case. I shall refer to this appeal as the 'defamation appeal'. On the same day he ordered Jansen to pay the costs of the *ex parte* application. Because the judge considered the costs order to involve a question on which there was no authority he granted Jansen leave to appeal to this court against the order. He recorded in his judgment that both parties were in agreement that leave should be granted. I shall refer to this appeal as the 'costs appeal'. A somewhat unusual feature of the proceedings in this court was that

while Jansen was represented by counsel in the costs appeal (in which he was the appellant) he was not represented in the defamation appeal (in which he was the respondent) and instead elected to abide the judgment of the court.

[2] It is convenient to deal first with the defamation appeal. Much of the evidence adduced at the trial was common cause. A brief summary will serve to assist in understanding the issues that require determination. Some time prior to October 2002 Naylor became the chief executive of an Australian company, Atomaer Holdings (Pty) Ltd, which operates from Perth. He also became the chief executive of its various subsidiaries, one of which was the second defendant. The business of the group is process technology and involves the development and commercial application of *inter alia* processing units which are used in the processing of substances such as minerals, metals and chemicals. Until his suspension on 30 September 2002 and subsequent dismissal, Jansen was a manager employed by the second defendant and the local person in charge of the group's operations in South Africa. Earlier in September 2002 another of the group's managers expressed concern about certain of Jansen's activities. The group's secretary was sent to South Africa to conduct an investigation and Naylor followed shortly thereafter. The

investigation revealed that Jansen had breached his service contract in various respects. It appeared that he had failed to protect the group's intellectual property rights properly and had failed to conclude confidentiality agreements with various manufacturing companies that had been engaged by the second defendant to manufacture components which were regarded by the group as a critical part of its intellectual property rights. More importantly for present purposes, it was ascertained that Jansen had a 45% interest in JFP Chemical Corporation CC ('JFP') which was one of the entities engaged to do manufacturing work for the second defendant. This interest had not been disclosed to the group as required by Jansen's conditions of service. (In passing I mention that Jansen was not a director of the second defendant.) It appeared that regular payments had been made to JFP but these had all been made against invoices submitted by JFP. There was no suggestion that JFP had been paid for work it had not done or services it had not rendered.

[3] A meeting was held on 30 September 2002 at which Jansen was confronted with what the investigation had revealed. He was less than frank regarding his interest in JFP. He denied it at first but thereafter said he had relinquished it in July of the previous year, which was not the case. He later conceded that he had

acquired the interest in JFP to supplement his income after the group had declined to give him an increase in salary. As I have indicated, he was suspended.

[4] There existed at that stage an on-going business relationship between the second defendant and Iscor Ltd which had as its object the joint development of a 'gas scrubbing process'. This involved not only research but also test work and trials which were being conducted at Iscor's facilities at Benmore Park. The parties had previously entered into a confidentiality agreement but each appeared to be somewhat wary of the other regarding their respective intellectual property rights arising out of the development. Jansen had been involved in negotiations with Iscor in connection with the gas scrubbing process since late 2000 and had developed a good relationship with its management. Naylor had met with representatives of Iscor in June 2002. Sometime in September a meeting was arranged for 2 October 2002 to be held at Iscor's premises at Vanderbijlpark. Because of his suspension, Jansen did not attend.

[5] The meeting was chaired by Mr Bezuidenhout who was employed by Iscor as its engineering manager at Vanderbijlpark. Some eight representatives of Iscor were present, including Mr Du Toit who was responsible for taking minutes. Both Bezuidenhout

and Du Toit gave evidence at the trial. This evidence was by agreement omitted from the record, presumably because it was no longer disputed. The minutes of the meeting recorded the following:

'Mr Naylor informed the meeting that Mr Jansen of the South African local office had been suspended from his position because he had misappropriated Atomaer funds to a company of which he holds a directorship.'

Du Toit confirmed the correctness of the minutes. Bezuidenhout, too, was adamant that the words attributed to Naylor in the minutes had been uttered by him. Bezuidenhout said that Naylor's statement came as a 'bombshell' and had a profound effect on the meeting.

[6] In their plea the defendants denied that the words complained of (ie that Jansen had misappropriated Atomaer funds to another company of which he was a director), had been uttered by Naylor and in the alternative denied that they were defamatory of him. Neither denial was maintained in this court and, in my view, rightly so. The word 'misappropriate' is defined in the OED as meaning: 'to appropriate to wrong use; chiefly, to apply dishonestly to one's own use (money belonging to another)'. The Encarta World English Dictionary gives the following definition: 'to take, especially money, dishonestly, or in order to use it for an improper

or illegal purpose'. In my view the use of the word 'misappropriate' in conjunction with the words 'to a company of which he held a directorship' would be understood by the ordinary person hearing the words to mean that Jansen had been stealing money from the second defendant by diverting it to a company in which he had an interest. This was clearly defamatory of Jansen.

[7] Proof that the words were uttered gives rise to two presumptions: first, that the publication was unlawful and, second, that the statement was made with the intention to defame. (See eg *Joubert v Venter* 1985 (1) SA 654 (A) at 696A.) It is now settled that the onus on the defendant to rebut one or other presumption is a full onus; it must be discharged on a balance of probabilities (*Mohamed v Jassiem* 1996 (1) SA 673 (A) at 709H-I). I might just add, at this stage, that the second defendant's alleged liability was based upon the principles of vicarious responsibility and that it was common cause that, if Naylor was liable to Jansen, so was the second defendant.

[8] The defendants denied in their plea both that the statement complained of was unlawful and that it was made *animo injuriandi*. Before considering the grounds upon which these denials were based it is necessary to refer to a feature of the plea which has a bearing on a ruling which the court *a quo* made regarding the



cross-examination of Jansen, to which I shall revert later, and also on the question of Naylor's state of mind. In para 6.1 of the plea it was denied that Naylor had uttered the words alleged. In para 6.2 his version of what he said at the meeting is set out. It reads:

'6.2 The first defendant stated at the meeting, referred to in paragraph 6 of the particulars of claim, that:

6.2.1 the plaintiff had been suspended pending an investigation;

6.2.2 the Atomaer Group (hereinafter referred to as "Atomaer") was concerned about the arrangements taken (or lack of such arrangements) by the plaintiff to protect confidential information of Atomaer;

6.2.3 JFP Chemicals, Composite House, Model Haus and other parties were in unauthorised possession of confidential information belonging to Atomaer relating to the units for gas scrubbing;

6.2.4 the plaintiff appeared to have interests in one of the entities mentioned above.'

Thereafter in para 9.2 a number of defences were raised to rebut the presumptions of unlawfulness and *animus injuriandi* in the event of the court finding that what Naylor had said, on his own version, was defamatory. The object was in effect to answer a version which was not the one advanced by Jansen and on which he relied to found his action.

[9] In para 9.3 of the plea various defences were advanced in the alternative and in the event of it being found that the statement, alleged (as recorded in the minutes) had been made by Naylor at the meeting. These defences were absence of *animus injuriandi*, truth and public benefit, qualified privilege, fair comment and the so-called *Bogoshi* defence. (See *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA.) In this court only two of these were pursued, namely lack of *animus injuriandi* and qualified privilege. The others were not, and rightly so. For reasons that will become apparent later it is necessary to quote para 9.3 of the plea in full.

‘9.3 In the further alternative, and should this Honourable Court find that the first defendant did make the statement complained of (which is denied), then the defendants plead that:

9.3.1 The plaintiff, whilst managing the operations of the second defendant, appointed JFP Chemicals CC (“JFP”) as a contractor to the second defendant and caused payments to be made by the second defendant to JFP and/or to a third party, Fred Mindszenty, on behalf of JFP.

9.3.2 At the time that the said appointment and payments were made, the plaintiff was a member of JFP, Atomaer was unaware of the payments made to or on behalf of JFP or of the fact that the plaintiff was a member of JFP or of any other entity who received payment from the second defendant.

9.3.3 The appointment of JFP and the said payments were made without the necessary approval from Atomaer, without following established

company procedures and in circumstances that constituted a conflict between the interests of the plaintiff and those of his employer.

9.3.4 Accordingly, and in acting as aforesaid, the plaintiff had acted inappropriately and the statement complained of in any event represents the truth. The plaintiff had placed himself in a position where he could benefit and is likely to have benefited at the expense of his employer and the statement complained of would have been understood as such.

9.3.5 In all their dealings with Iscor, the defendants were motivated by an intent to convince Iscor of the necessity of Atomaer's actions concerning the plaintiff; to protect and maintain the relationship with Iscor and the defendants acted accordingly, without any intention to defame the plaintiff and without any *animus iniuriandi* towards the plaintiff.

9.3.6 All statements to Iscor concerning the suspension of the plaintiff's employment and the reasons therefor were made during the course of negotiations between Atomaer Holdings and Iscor about a joint gas scrubbing project, were made in the furtherance of Atomaer's legitimate business interests and, in particular, in an attempt to protect Atomaer's relationship with Iscor. The defendants refer to paragraphs 9.2.2 and 9.2.3 and pray that same be read as incorporated herein. Accordingly, all such statements were relevant to the issues at hand and were made in circumstances of qualified privilege.

9.3.7 In any event, the statement represents the truth in the interest of those persons attending the meeting and accordingly is truth in the public

interest. In the alternative, the statement represents a comment concerning the suspension of the plaintiff's employment; the statement is fair in the circumstances and the facts on which the statement complained of are based, are true.

9.3.8 The first defendant did not make the statement complained of recklessly, without regard to the truth thereof. The first defendant based the statements made by him about the suspension of the plaintiff from his employment, on facts uncovered about the plaintiff's involvement with JFP and the activities of the latter and the plaintiff. The first defendant had reason to believe that the plaintiff had or may have caused JFP to be unduly advantaged, as a result of the plaintiff's involvement with that entity. Accordingly, and in light of the content of paragraphs 9.3.1 to 9.3.6, the publication of the statement was objectively reasonable.'

[10] In his evidence Naylor dealt in detail with Jansen's conduct and the business relationship that existed between the Atomaer group and Iscor. On the issue of what he had said at the meeting concerning Jansen, his evidence, however, was equivocal and less than satisfactory. He repeated the version set out in para 6.2 of the plea quoted above and insisted that he had no recollection of uttering the words recorded in the minutes. He said it had never entered his head that Jansen had stolen funds but nonetheless he could not after a lapse of 12 months categorically deny that he had uttered the words in question. I might mention that in a letter

written soon after the event on 20 October 2002 by the defendants' attorney in response to Jansen's letter of demand, it was alleged that Naylor had merely informed the meeting that Jansen had been suspended pending an investigation but 'did not verbalise the reasons for the suspension or pending investigation'. This was inconsistent with both Naylor's evidence and the version pleaded. His explanation that he did not have his notes with him and that he had other things on his mind when he gave instructions to his attorney is hardly persuasive and does not reflect well upon his credibility. Naylor did not simply rely on his inability to recall having uttered the defamatory words. He went further: he insisted that even if he had said what he was alleged to have said, the meaning attributed to the words was not what he had intended and that it had never been his intention to suggest that Jansen had been a party to the theft of money. In the absence of some clear indication to the contrary, it will be inferred that a person making a verbal statement intends it to have the meaning that persons hearing it will ordinarily attribute to it. In the present case, of course, Naylor was faced with a full onus of negating *animus injuriandi*. But even if he had inadvertently expressed himself incorrectly, the reaction from the representatives of Iscor would immediately have brought this to his attention. He readily conceded that his announcement

had had a profound effect on the meeting. Indeed, Bezuidenhout of Iscor understood Naylor's announcement to mean that Jansen had in effect stolen money and he immediately responded accordingly. (He subsequently phoned Jansen to ask him 'hoekom het jy gesteel' and to inform him that he was *persona non grata* at Iscor.) In these circumstances, Naylor's bald denial that he intended to say what he in fact said cannot rebut the inference of *animus injuriandi*, far less the presumption. In the course of cross-examination he proffered the explanation that it was only after the proceedings commenced that he learned that the word 'misappropriate' ordinarily implied theft. The court *a quo* observed Naylor to have presented himself as a highly intelligent and experienced businessman fluent in English, and disbelieved this explanation. I can see no reason to differ. It follows that the contention that Naylor lacked the necessary *animus injuriandi* must be rejected.

[11] I turn to the defence of qualified privilege. Given the relationship between Naylor, acting on behalf of the second defendant, and Iscor at the time, there can be little doubt that the occasion of the meeting on 2 October 2002 was a privileged one. Viewed objectively, each party to the negotiations enjoyed a right or legitimate interest to make statements to, and receive

statements from, the other. Furthermore, an explanation for Jansen's absence from the meeting and the circumstances relating thereto would clearly have been 'germane to the occasion'. (See *De Waal v Ziervogel* 1938 AD 112 at 122-123.) Indeed, the evidence established that Jansen had been involved in negotiations on behalf of the second defendant with Iscor for some while and enjoyed the confidence of Iscor's management. His absence from the meeting called for explanation. Whether the statements were true or not would have no bearing on whether they were germane to the occasion. But that does not mean that the truth or otherwise of the statement in question would be irrelevant. The privilege is a qualified one. In the event of it being shown that the statement was made with knowledge of its untruthfulness, the inference that would arise, in the absence of any indication to the contrary, would be that the statement was actuated by malice. As observed by Corbett JA in *Borgin v De Villiers and another* 1980 (3) SA 556 (A) at 578H:

'The defence of qualified privilege is, however, not concerned with the truthfulness or otherwise of the publication, though proof that the defendant did not believe that the facts stated by him were true may give rise to the inference that he was actuated by express malice.'

[12] Jansen filed a replication alleging malice. The question in issue is whether on all the evidence malice on the part of Naylor was established on a balance of probabilities. I may mention that the court *a quo* did not consider the defence of qualified privilege but in passing and in a different context indicated that it was prepared to 'accept' that Naylor did not act with malice. However, no reasons were advanced for this acceptance.

[13] It is not in dispute that Jansen breached the conditions of his employment and that this included utilising the services of an entity in which he had an undisclosed interest. The latter conduct clearly involved a breach of the good faith he owed to his employer and to this extent was dishonest. But this conduct fell far short of actually stealing money from his employer, whether by diverting it to another company in which he had an interest or otherwise. This much was acknowledged by Naylor. He testified that he had no justification for accusing Jansen of stealing. The necessary implication is that a statement of fact to that effect would have been to his knowledge untrue. But once it is accepted, as I have, that Naylor uttered the words in question knowingly, ie with appreciation of what he was saying, the inference is inescapable that he knew that what he was saying was untrue. In the absence of any indication to the contrary – and, save for Naylor's bald



denial, there is none – one is driven to the conclusion that he made the statement in question knowing it to be untrue and with the object of injuring Jansen in his reputation or possibly to ensure that the latter's good relationship with Iscor was terminated. This amounts to malice. See *Basner v Trigger* 1946 AD 83 at 105. It follows that this defence too must fail.

[14] There is however a further aspect that requires consideration. In the course of Jansen's evidence, the court *a quo* made a ruling disallowing cross-examination on the matter of Jansen's breach of his terms of employment. The reasoning of the learned judge, in short, was that this was irrelevant both to the case made out by Jansen and to the defendants' response to that case, which was a denial that the words complained of had been uttered. It was argued in this court that the ruling was incorrect because the cross-examination was relevant on two grounds, the one being in respect of the alternative defences raised in para 9.3 of the plea (quoted in para 9 above) and the other being in respect of the quantum of Jansen's damages. I mention at this stage that Naylor was permitted to testify at some length on the issue of Jansen's breach of his employment conditions and in doing so he covered all the factual allegations contained in para 9.3 of the plea. If these allegations are accepted (as I have for the purpose of the

appeal), the refusal to permit cross-examination can result in no prejudice as far as the defences raised in para 9.3 are concerned. But different considerations apply to the question of quantum. It is clear from both the judge's ruling and subsequent judgment that he did not take Jansen's wrongful conduct in relation to his employer into account when awarding damages. It follows that if the evidence as to the breach of his conditions of employment was admissible for this purpose the court *a quo* misdirected itself and for this reason alone the damages determined by it would have to be reconsidered.

[15] It has long been established that while evidence of a plaintiff's general bad character is admissible to reduce the damages that may be awarded, evidence of particular acts of misconduct is not. But the rule does not operate to exclude evidence in a plea of justification that falls short of completely justifying the defamatory statement but which is sufficiently related to it to mitigate its impact. In *Sutter v Brown* 1926 AD 155 at 172 evidence was held admissible in mitigation of damages to establish 'some severable and substantial portion, though not the whole of the defamatory matter'. But the exception to the general rule is not limited to evidence that justifies a portion of the defamatory matter; it is sufficient if the circumstances sought to be

proved are directly related to, 'or linked up' with, the words complained of. See *Walton v Cohn* 1947 (2) SA 225 (N) at 231; *Geyser v Pont* 1968 (4) SA 67 (WLD) 78A-B.

[16] In the present case the factual allegations contained in para 9.3 of the plea and confirmed by Naylor in evidence would no doubt justify what he contended he had said at the meeting. But they fall short of justifying what he in fact said. Nonetheless, the allegations (and the evidence) deal with the very conduct on the part of Jansen that gave rise to the defamatory words being spoken by Naylor and although Jansen's conduct amounted to something less than theft, namely a breach of the duty of good faith that he owed to the second defendant, that conduct, like theft, nonetheless involved dishonesty. For these reasons there is in my view a direct link in this case between the making of the defamatory statement and Jansen's conduct. I, therefore conclude that the court *a quo* erred in not taking into account Naylor's evidence in support of the allegations in para 9.3 of the plea when determining the quantum of damages.

[17] The order ultimately granted by the learned judge was somewhat unusual. He ordered the defendants to pay the plaintiff damages in the sum of R30 000 together with interest and costs, but directed that the order was only to take effect in the event of

the defendants failing to send a formal apology (which the judge formulated) to the plaintiff and the senior executive officer of Iscor within 30 days of the order. In the event of the defendants making the apology they were ordered to pay costs on the attorney-and-client scale. There is no cross-appeal by Jansen and accordingly no basis upon which this court could properly interfere with that part of the order which afforded the defendants an option of tendering an apology; nor was argument presented to us on the appropriateness or otherwise of such an order. I shall therefore refrain from commenting upon it. However, in view of what has been said above, it follows that the award of R30 000 must be reduced. In all the circumstances, an amount of R15 000 strikes me as fair and reasonable and I propose to reduce the award accordingly.

[18] To sum up, none of the defences raised by the defendants can be sustained and to this extent the appeal must fail. The limited success achieved on appeal, namely by the reduction of the amount of R30 000 to R15 000, does not in my view justify an order of costs in favour of the defendants. Jansen, it will be recalled, abided the judgment of this court.

[19] In the result the following order is made in the defamation appeal:

The appeal succeeds to the limited extent that the amount of R30 000 referred to in paragraph 1 of the order of the court *a quo* is reduced to R15 000. Save as aforesaid, the appeal is dismissed.

[20] I turn to the costs appeal which, it will be recalled, is Jansen's appeal against the order made by Willis J that he pay the costs of the application for the arrest of Naylor to confirm the jurisdiction of the court *a quo*. (For convenience I shall continue to refer to the parties as before.) It is necessary at the outset to observe that the validity of an arrest (as opposed to an attachment of property) to found or confirm jurisdiction is not in issue. In modern times the arrest of a person for this purpose has in general become no more than a technique to obtain security. As happened in the present case, the procedure adopted is to negotiate the issue of security immediately the defendant is arrested so that he or she is not taken into custody. Whether this will survive constitutional scrutiny is not an issue we are called upon to decide. It is also not in issue that, in the absence of a submission to the jurisdiction of the court, an arrest or attachment was necessary to confirm the court *a quo*'s jurisdiction to entertain the defamation action against Naylor. Indeed, it is well-established that even if a plaintiff is an *incola* and there exists a recognised ground of jurisdiction a court will not exercise jurisdiction over a peregrine

defendant in an action sounding in money unless the defendant has first been arrested or his or her property attached to confirm the court's jurisdiction or the defendant has submitted to the jurisdiction of the court. (See eg *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) at 258D-G. As to the circumstances in which a submission to jurisdiction will suffice, see *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 (2) SA 522 (SCA).)

[21] In the present case Naylor in his answering affidavit (filed after judgment had been delivered in the defamation case) insisted that had he been requested to submit to the jurisdiction of the court he would have done so. He added that it was known to Jansen that by reason of his business interests in South Africa he was a regular visitor to this country and that Jansen would have known that there was no question of him 'absconding from or fleeing South Africa'. The question in issue in this appeal is therefore whether in such circumstances a plaintiff who is ultimately successful in the main action will forfeit his (or her) right to the costs of the application for the arrest or attachment if he fails first to afford the peregrine the opportunity of consenting to the jurisdiction of the court before proceeding for such an order.

[22] Ms Robinson who argued the costs appeal on behalf of Naylor contended *in limine* that this court, in the exercise of its discretion in terms of s 21 A of the Supreme Court Act 59 of 1959, should decline to entertain the appeal as the result would have no practical effect save in respect of costs which, in terms of the section, are to be left out of account save under 'exceptional circumstances'. I cannot agree. As will appear from what follows, the circumstances in the present case are exceptional as the order granted by the court *a quo* involves not only a departure from a practice that is well-established but also an inroad in what has hitherto always been regarded as a substantive right enjoyed by an *incola*. I should add that the point taken is somewhat surprising as it appears from the judgment of the court *a quo* granting leave to appeal that both counsel were in agreement not only that leave should be granted but that it should be granted to this court.

[23] It is a generally accepted practice in applications for an attachment or arrest to found or confirm jurisdiction for the order to be sought *ex parte*. See *Pollak on Jurisdiction* 2 ed at 85 and 88. The order so granted either takes the form of a rule *nisi* or provision is made in the order entitling the respondent on notice to the applicant to apply to have the order set aside as a matter of urgency. In either event, the onus of justifying the arrest or

attachment remains on the applicant. See *Anderson and Coltman Ltd v Universal Trading Co* 1948 (1) SA 1277 (W) at 1283-4.

[24] The primary reason for the order being granted *ex parte* is undoubtedly the real risk that if the peregrine receives notice of the application he may leave the country before the matter has been resolved. In that event the *incola* would either have to follow him to his country of domicile, or wait for him to return to South Africa, if he ever did. It would generally speaking not be an easy matter for an *incola* applicant to predict with any degree of certainty what a peregrine respondent would do if given notice of the impending application. On the other hand, it is easy enough for a peregrine respondent, *ex post facto* and once the arrest or attachment has been put into effect, to profess that he would have submitted to the jurisdiction of the court had he been asked. Indeed, in the present case a letter of demand threatening proceedings was sent to Naylor. He consulted an attorney who wrote back advising that any proceedings would be 'strenuously' opposed. There was no mention of a submission to the jurisdiction of a South African court until after the order had been served.

[25] There is also another important but less obvious reason for proceeding *ex parte*. If a peregrine submits to the jurisdiction of the court in response to a threat, whether express or implied, that if he



fails to do so he may be arrested or have his goods attached, there is always the danger that a judgment thereafter given against him may not be recognised internationally. The reason is that the peregrine may be able to contend in some other forum that the submission was not voluntary as it was induced by the threat of an arrest or attachment which in that forum is regarded as unlawful. See *Blue Continent Products (Pty) Ltd v Foroya Banki* PF 1993 (4) SA 563 (C) at 574F-G.

[26] It is important to bear in mind that although an attachment (or arrest) and a submission to the jurisdiction both have the effect of founding or confirming jurisdiction, there are significant differences between the two. An attachment or arrest serves also to provide an *incola* with property or security in South Africa against which he can execute the judgment in the event of his action being successful. (See *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 697E-698D; *MT Argun* 2001 (3) 1230 (SCA) at 1244E-F.) A submission, on the other hand, does no more than found or confirm jurisdiction so that once an *incola* obtains judgment he is obliged to pursue the peregrine to the latter's country of domicile and there seek to have the judgment enforced. Unless, therefore, the security obtainable or the value of the property available for attachment is substantially

less than the value of the claim, an *incola* would normally prefer to attach the property or the person of the peregrine to provide security for his claim. (Cf *Jamieson v Sabingo* 2002 (4) SA 49 SCA para 25 at 58G.)

[27] The procedures relating to attachments and arrests were developed by the tribunals of Holland to enable *incolae* to proceed against peregrines in the jurisdiction instead of being compelled to follow their debtors to domiciles abroad. (See *The Owners, Master and Crew of the SS Humber v Owners and Master of the SS Answald* 1912 AD 546 at 555.) If a peregrine submits to the jurisdiction prior to an order being granted for the attachment of his person or property an *incola* will lose his right to pursue the latter procedure; he may even lose it if the submission is made after the order is granted but before it is put into effect. (See *Jamieson v Sabingo, supra*, para 29 at 59B-E.) But until there has been a submission an *incola* is entitled as of right to seek an order of attachment or arrest with the concomitant benefit of obtaining security for his claim. A court to which the application is made has no discretion to refuse it once the requirements for an order are met. In *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) SA 906 (A) at 914E-G Nicholas AJA explained the situation as follows:

'In our law, once an *incola* applicant (plaintiff) establishes that *prima facie* he has a good cause of action against the peregrine respondent (defendant), the Court must, if other requirements are satisfied, grant an order for the attachment *ad fundandam* of the property of the peregrine respondent (defendant). It has no discretion (Pollak *The South African Law of Jurisdiction* at 64, citing *Lecomte v W and B Syndicate of Madagascar* 1905 TS 696 at 702). The Court will not inquire into the merits or whether the Court is a convenient forum in which to bring the action (Pollak (*ibid*)). Nor, it is conceived, will the Court inquire whether it is "fair" in the circumstances for an attachment order to be granted.'

(See also *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at 937C-F.) It follows that an applicant for an order of attachment or arrest to found or confirm jurisdiction is under no obligation first to invite the respondent peregrine to submit to the jurisdiction, nor does the latter enjoy a right to be afforded an opportunity to submit to the jurisdiction before the applicant seeks an arrest or attachment order. (See *Associated Marine Engineers (Pty) Ltd v Foroya Banki PF* 1994 (4) SA 676 (C) at 688G-J.)

[28] In view of the foregoing and because the *ex parte* application for the attachment of the property of a peregrine (or his arrest) is a preliminary step in the proceedings against him, the costs of the application, if unopposed, are normally made costs in the cause of the main action. (If opposed the costs order would

normally follow the result of the application.) The reasoning of Willis J for not making a similar order was shortly this. It was not permissible, he said, to 'peer behind the allegation' of Naylor that if requested he would have submitted to the jurisdiction of the court; therefore it had to be accepted that had Jansen invited Naylor to submit there would have been no need to bring the application. Accordingly, so the reasoning went, Jansen was not entitled to his costs of the application in the same way as a plaintiff who receives payment against service of a summons would not be entitled to his costs if he omits to send a letter of demand. After referring to *Havenga v Lotter* 1912 TPD 395 and other cases to the same effect regarding the question of costs where a plaintiff omits to send a letter of demand, the judge said:

'Ms Robinson argued convincingly, in my view, that the same principle must apply in matters such as this. In other words, although the applicant was entitled as of right to seek an order for the attachment of the person of Michael Naylor in order to confirm jurisdiction, if it subsequently emerges that this course of action was unnecessary, the applicant, although entitled to the relief which he sought, would not be entitled to the costs of the application. There is no authority directly in point, so I have been advised by counsel for both sides, and accordingly I believe it appropriate to extend this general principle to a matter such as this.'

[29] I cannot agree. The general principle to which the judge refers is in my view inapplicable to an application to attach the property of a peregrine (or to arrest him to obtain security). First, there is always the risk of the peregrine respondent leaving the country without submitting to the jurisdiction. As I have indicated, the object of the arrest and attachment procedure is to assist an *incola*. Requiring the *incola* to guess what the peregrine will do if invited to submit could serve to undermine the very purpose for which that procedure was developed. Second, the application is not for an order directing the peregrine to submit to the jurisdiction (which is what it is suggested an applicant must first invite the respondent to do). It is an application for something different, namely for an order for the attachment of the property or person of the peregrine. As I have indicated, that is an order to which an *incola* is entitled as of right and which he loses only when the peregrine submits to the jurisdiction. An attachment or arrest will ordinarily better protect the rights of an *incola*. I can see no reason why he should be required first to tender a relief that affords less protection than the one he seeks.

[30] To return to the present case, Jansen was entitled as of right to an order for the arrest of Naylor to confirm jurisdiction. In seeking the order *ex parte* he was following a well-established

practice. That order carried with it the advantage that the security put up by Naylor would be available to satisfy a judgment granted in favour of Jansen in the defamation action. Merely because Naylor may have submitted to the jurisdiction had he been invited to do so placed no obligation on Jansen to apprise him of his right to do so. Jansen understandably wished to have the benefit of security; he did not want to have to pursue Naylor to Australia and seek, possibly with opposition, to have the order implemented there. I can see no reason why Jansen should have been deprived of the costs of the application for failing to invite Naylor to tender a relief which, as I have said, was different and less advantageous to Jansen than the relief he was seeking and to which he was entitled.

[31] In my view, therefore, the judge in the court *a quo* misdirected himself in his approach to the question of costs. Having found for Jansen in the main action there was no justification for not ordering Naylor to pay the costs of the arrest application.

[32] The costs appeal is therefore upheld with costs. The order of the court *a quo* as to costs in relation to the arrest application is set aside and the following order is substituted:

'The respondent (Naylor) is ordered to pay the costs of the applicant (Jansen).'

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**D G SCOTT**  
**JUDGE OF APPEAL**

**CONCUR:**

<b>CAMERON</b>	<b>JA</b>
<b>CLOETE</b>	<b>JA</b>
<b>HEHER</b>	<b>JA</b>
<b>MLAMBO</b>	<b>JA</b>

