REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between: Case No: 3754/2011

SAMUEL PAUL FROST N.O

SUNETTE FROST N.O

KARIN EVELINA VERMAAK N.O

SONJA BOSHOFF N.O

DANIEL JOHANNES SMIT N.O

(in their capacity as trustees of Die Vermaak Trust) Applicants

And

PERCIVAL ORSMOND HUGH VERMAAK Respondent

Coram: **Chetty, J**

Date Heard: **31 May 2012**

Date Delivered: **1 June 2012**

Summary: ***Practice*** *– Application for attachment ad confirmandam jurisdictionem – Only defence raised one of res judicata – Issue disposed of in Magistrates Court – Magistrates Court application ad fundandam jurisdictionem fatally defective – Affidavit not attested – Plea of res judicata dismissed – Application granted.*

JUDGMENT

Chetty, J

[1] This is the return day of an *ex parte* application in which the applicants seek a final order for the attachment of certain immovable properties pending the institution of an action against the respondent for payment of certain sums of money which the applicants allege are due to them. An order for attachment, whether *ad fundandam jurisdictionem* or *ad confirmandam jurisdictionem* serves to provide an *incola* with property against which he/she can execute the judgment in the event of the contemplated action succeeding. The respondent opposes the relief sought.

[2] The requirements for obtaining an order for attachment whether *ad fundandam* and/or *ad confirmandam jurisdictionem*, shorn of excess verbiage, are that –

(i) The applicant has a *prima facie* cause of action against the defendant;

(ii) The defendant is a *peregrinus*; and

(iii) The property is within that area, alternatively, within the Republic of South Africa.

In **Italtrafo SpA v Electricity Supply Commission**[1] King AJ emphasized that in such applications "the matter in issue is the attachment and not the cause of action" It is trite law that once the requirements for an order are met a court had no discretion to refuse to grant an order. In **Naylor and Another v Jansen: Jansen v Naylor and Others**[2] Nicholas AJA expounded the position 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.'"

The position is no different where the attachment sought is one *confirmandam jurisdictionem*.

[1] 1978 (2) SA 705 (W)
[2] 2006 (3) SA 546 (SCA)

[3] The relief sought is resisted by a claim of *res judicata*. It is contended that the relief is in substance and form identical to that previously brought by the applicants in proceedings before the Magistrates Court at Hankey and the issue disposed of by a judgment in the respondent's favour. It is indeed so that on 3 December 2009 the applicants sought an order of attachment *ad fundandam jurisdictionem* over the same properties. It is common cause that the document accompanying the notice of motion, though signed by the parties whose names appeared therein, was neither sworn to nor attested. Rule 57(2)(a) of the Magistrates Court Rules provides that an application for an order of attachment of property under section 30bis of the Act shall be supported by an affidavit which, in common parlance, is a statement in writing sworn to before someone who has authority to administer an oath. The documents annexed to the applicants' notice of motion under the guise of affidavits were thus clearly not affidavits as contemplated by the rules and the defect rendered the documents incomplete and inoperative as affidavits. The application before the magistrate was thereby rendered fatally defective and the application ought to have been struck from the roll. The fact that the magistrate nonetheless proceeded to hear the matter and to deliver lofty legal pronouncements on the points raised *in limine* was an exercise in futility and meaningless. The judgment is a legal nullity.

[4] In any event and assuming in favour of the respondent that there was due compliance with provisions of the rule the issue which served before the magistrate was the attachment and not the merits of the action. A defence that a

claim has become prescribed is related to the merits of the action itself and must be raised by special plea and no other way. This statement of law was emphasized by Goldstone J in **Union and SWA Insurance Co v Hoosein**[3] with the rider "this is presumably for the reason that a plaintiff may wish to replicate a defence to the claim of prescription, for example, an interruption".

[5] The respondent's plea of *res judicata* can accordingly not be sustained. In the result the following order will issue –

1. The rule nisi is confirmed and an order made for attachment ad *confirmandam jurisdictionem* of the following properties –

    1.1. An undivided ⅓ (one third) share of portion 4 of the Farm Geelhoute Boom No 21, situated in Kouga Municipality, Division of Humansdorp, Province Eastern Cape
    IN EXTENT: 45,0799 (FORTY FIVE comma ZERO SEVEN NINE NINE) hectares
    Held by Deed of Transfer No. T 40302/1986

    1.2 An undivided ⅓ (one third) share of portion 6 of Farm Geelhoute Boom No 21, situated in Kouga Municipality, Division of Humansdorp, Province Eastern Cape

[3] 1982 (2) SA 481 (W)

IN EXTENT: 142,2495 (ONE HUNDRED AND FORTY TWO comma TWO FOUR NINE FIVE) hectares

Held by Deed of Transfer No. T 40302/1986

2. The respondent is ordered to pay the applicants' costs

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D. CHETTY
JUDGE OF THE HIGH COURT

Obo the Applicants:	Adv Mullins instructed by Goldberg & Victor, 2nd Floor, First National Bank Building, 582 Govan Mbeki Ave, North End, Port Elizabeth, Tel (041) 484 3346, Ref: Mr Victor
Obo the Respondent:	Adv Pretorius instructed by Jacques Du Preez, 96 Mangold Street, Newton Park, Port Elizabeth, Ref: Mr Du Preez