CG CASE NUMBER: 199/89

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the case of:

EWING McDONALD & CO LTD Appellant

(1st Respondent a quo)

and

M & M PRODUCTS COMPANY 1st Respondent

(Applicant a quo)

THE DEPUTY SHERIFF FOR

THE DISTRICT OF PRETORIA 2nd Respondent

(2nd Respondent a quo)

THE REGISTRAR OF TRADE MARKS 3rd Respondent

(3rd Respondent a quo)

CORAM: **VAN HEERDEN, SMALBERGER JJA, NICHOLAS, FRIEDMAN et NIENABER AJJA.**

HEARD ON: **10 SEPTEMBER 1990**

DELIVERED ON: **28 SEPTEMBER 1990**

J U D G M E N T

NIENABER AJA

The appellant company is the cessionary of a claim against the first respondent (hereinafter referred to as "the respondent") for damages for breach of contract. The appellant is anxious to pursue that claim in the Witwatersrand Local Division of which it is an **incola**. The respondent is a corporation which is registered in the United States of America. Its principal place of business is in Atlanta, Georgia. The respondent accordingly is a **peregrinus** of the Republic. The agreement was concluded elsewhere but it was common cause at the hearing of the appeal that it was to be implemented throughout the Republic of South Africa so that Johannesburg was a **locus solutionis** and the Witwatersrand Local Division a **forum solutionis**.

Nothwithstanding this **ratio jurisdictionis** the appellant correctly thought it necessary to attach property of the respondent in order to vest the Witwatersrand Local Division with jurisdiction to try the

contemplated action. The appellant accordingly brought an **ex parte** application in the Witwatersrand Local Division before Van Dyk J for an order **inter alia** authorising the attachment **ad fundandam**, alternatively, **ad confirmandam jurisdictionem**, of the respondent's right, title and interest in and to certain trade marks held by the respondent and registered in South Africa. This application was successful. Pursuant to that order the deputy sheriff for the district of Pretoria attached the trade marks specified in the order.

However, those trade marks were all registered in Pretoria and as such fell outside the area of jurisdiction of the Witwatersrand Local Division. (Cf SPORTSHOE (PTY) LTD v PEP STORES (SA) (PTY) LTD 1990 (1) SA 722 (A) at 726 F-G; REMBRANDT FABRIKANTE EN HANDELAARS (EDMS) BPK v GULF OIL CORPORATION 1963 (3) SA 341 (A) at 348H-349B.) The respondent thereupon launched an application in the Witwatersrand Local Division, on

notice to the appellant, seeking to reverse the earlier order authorising the attachment. This application, before MacArthur J, in turn also succeeded. The entire order granted by Van Dyk J as well as the actual attachment were set aside, with costs. It is against that order that the appellant, with leave of the court a **quo**, now appeals. The deputy sheriff for the district of Pretoria and the registrar of trade marks were cited as parties. Neither of them took an active part in the proceedings, either in the court below or in this one.

The central issue, which is a controversial one, is thus whether one division of the Supreme Court of South Africa has jurisdiction to order the attachment ad **fundandam** or **ad confirmandam jurisdictionem** of property which is situated outside its area of jurisdiction but within that of another division.

Jurisdiction in the present context means the power vested in a court by law to adjudicate upon,

determine and dispose of a matter (cf GRAAFF-REINET MUNICIPALITY v VAN RYNEVELD'S PASS IRRIGATION BOARD 1950 (2) SA 420 (A) at 424; VENETA MINERARIA SPA v CAROLINA COLLIERIES (PTY) LTD (IN LIQUIDATION) 1987 (4) SA 883 (A) at 886D). Such power is purely territorial; it does not extend beyond the boundaries of, or over subjects or subject-matter not associated with, the court's ordained territory. In the most recent pronouncement on the topic of jurisdiction by this court, BISONBOARD LIMITED v K BRAUN WOODWORKING MACHINERY (PROPRIETARY) LIMITED, case no 384/88, in a judgment delivered on the day the present matter was argued in this court, Hoexter JA, at page 6 of the typescript copy of the judgment, quoted, with approval, the following remarks of Bristowe J in SCHLIMMER v EXECUTRIX IN ESTATE OF RISING 1904 TH 108 at 111:

> "Now the jurisdiction of the courts of every country is territorial in its extent and character, for it is derived from the sovereign

power, which is necessarily limited by the boundaries of the State over which it holds sway. Within those boundaries the sovereign power is supreme, and all persons, whether citizens, inhabitants, or casual visitors, who are personally present within those boundaries and so long as they are so present, and all property (whether movable or immovable) for the time being within those boundaries, are subject to it and to the laws which it has enacted or recognised."

Hoexter JA then went on to say (at page 6):

"Although the same common law applies throughout South Africa, it is trite that upon the establishment of the Union of South Africa the separate judicial systems of the four colonies were largely preserved despite their formal unification in the Supreme Court of South Africa. In terms of sec 19 of the Supreme Court Act the original jurisdiction enjoyed by the provincial and local divisions is limited to the extent of their respective territorial areas. Such territorial jurisdiction is confirmed by sec 68 (2) of the Republic of South Africa Constitution Act, No 110 of 1983."

Being territorial, the original jurisdiction of each division is nowadays to be exercised within the particular geographical areas specified in the First

Schedule to the Supreme Court Act, 59 of 1959 (cf ESTATE AGENTS BOARD v LEK 1979 (3) SA 1048 (A) at 1059D; VENETA MINERARIA SPA v CAROLINA COLLIERIES (PTY) LTD (IN LIQUIDATION), **supra**, at 886G). The territoriality of each division is epitomised in sec 19 (1) of the Supreme Court Act, 59 of 1959 ("the SC Act") which, in so far as it is relevant for present purposes, reads:

> "19(1)(a) A provincial or local divison shall have jurisdiction over all persons residing or being in and in relation to all causes arising ... within its area of jurisdiction and all other matters of which it may according to law take cognizance ..."

This section, the latest in a line of legislative enactments broadly restating the common law, differentiates between "persons" and "causes arising". The expression "causes arising" has been interpreted, in the BISONBOARD judgment, **supra**, at page 11 of the typescript copy

> "... as signifying not 'causes of action arising' but 'legal proceedings duly arising',

> that is to say, proceedings in which the court has jurisdiction under the common law".

Since a court under the common law would have had jurisdiction over persons domiciled within its area of jurisdiction (who would include, although not confined to persons "residing or being in"), "persons residing or being in" and "causes arising" are not antithetical concepts; the former is merely an elaboration of the latter. (Cf STEYTLER NO v FITZGERALD 1911 AD 295 at 315.) The phrase "persons residing or being in" harks back to the rule of Roman law: **actor sequitur forum rei.** According to that rule an **incola** who wished to pursue a **peregrinus** was obliged to travel to the latter's forum to do so but, by the same token, was only liable to be sued in his own. (Cf SCIACERO & CO v CENTRAL SOUTH AFRICAN RAILWAYS 1910 TS 119 at 121.) To assist its own **incolae** the law of Holland adopted a procedural expedient, borrowed from Germanic custom, of arrest of the person of

the defendant or the attachment of his property ad **fundandam jurisdictionem.** In THERMO RADIANT OVEN SALES (PTY) LTD v NELSPRUIT BAKERIES (PTY) LTD 1969 (2) SA 295 (A) Potgieter JA at 305F explained:

> "The reason for the arrest **ad fundandam jurisdictionem** was to avoid the costs which citizens would have to incur if they had to pursue the foreigner to the court of his domicile and was conceived primarily for the benefit of the **incola.** (See PECKIUS, VERHANDELINGHE VAN HANDOPLEGSEN, part II, par. 6; VROMANS, DE FORO COMPETENTI, 1.3.15, n. 34, BRADBURY GREATOREX CO. (COLONIAL) LTD. v. STANDARD TRADING CO. (PTY.) LTD., 1953 (3) S.A. 529 (W) at p. 532. Originally the purpose of the arrest or attachment was a kind of compulsion to which the foreigner was subjected so that he could be induced to pay his creditor rather than endure the worry of arrest or the retention of his property."

After discussing certain other aspects, Potgieter JA then stated (at 306H - 307A):

> "It appears to me therefore, that in the law of Holland already one of the purposes of the attachment of property to found jurisdiction was to enable the **incola** to execute on that property after judgment. In other words, the attachment of property served to found

jurisdiction and thereby enabled the Court to pronounce a not altogether ineffective judgment."

(See also LONGMAN DISTILLERS LTD v DROP INN GROUP OF LIQUOR SUPERMARKETS (PTY) LTD 1990 (2) SA 906 (A) at 912B-E.)

It is this principle of effectiveness which, in conjuntion with sec 26 (1) of the SC Act, is the central theme of the appellant's argument.

But before elaborating on it and in order to put the argument into perspective, it may be helpful briefly to recapitulate the grounds, apart from voluntary submission, on which a division of the Supreme Court according to current law and practice will assume jurisdiction in respect of claims sounding in money.

(a) Where the plaintiff (or the applicant) is an **incola** and the defendant (or the respondent) is a foreign **peregrinus** (i.e. a **peregrinus** of the country as a whole):

the arrest of the defendant or the attachment of his property is essential. Since a recognised **ratio jurisdictionis** by itself will not do it is immaterial whether such arrest or attachment is one **ad fundandam jurisdictionem** (where there is no other recognised ground of jurisdiction) or **ad confirmandam jurisdictionem** (where there is). The corollary of this rule is that an **incola** can pursue his claim where it is most convenient for him to do so, namely, within his own locality, even if his cause of action has no connection with that area other than the arrest or attachment. (See generally, THERMO RADIANT OVEN SALES (PTY) LTD v NELSPRUIT BAKERIES (PTY) LTD, **supra**, at 300 C-D; VENETA MINERARIA SPA v CAROLINA COLLIERIES (PTY) LTD (IN LIQUIDATION), **supra**, at 889D).

(b) Where the plaintiff is an **incola** and the

defendant is a local **peregrinus** (i.e. a **peregrinus** of the division but an **incola** of the country as a whole):

the existence of a recognised **ratio jurisdictionis** is essential. Arrest or attachment is not only unnecessary, it is in fact impermissible (sec 28 (1) of the SC Act). Compared to his situation under common law such an **incola** is better placed in the sense that arrest or attachment is not required at all; but worse off in the sense that arrest or attachment to found jurisdiction is no longer allowed - in that event the general rule **actor sequitur forum rei** would apply. (Cf TABORYSKI v SCHWEIZER & APIRION NO 1917 WLD 152 at 158-9; SWIFT v NATIONAL BANK OF SOUTH AFRICA 1923 OPD 24; FRANK WRIGHT (PTY) LTD v CORTICAS "B.C.M." LTD 1948 (4) SA 456 (C); POLLAK : THE SOUTH

AFRICAN LAW OF JURISDICTION, 71-75, 83; HERBSTEIN AND VAN WINSEN : THE CIVIL PRACTICE OF THE SUPERIOR COURTS OF SOUTH AFRICA, 3rd edition, p. 39.)

(c) Where the plaintiff is a **peregrinus** (foreign or local) and the defendant is a foreign **peregrinus**:

both a recognised **ratio jurisdictionis** as well as an arrest or attachment are essential. Any arrest or attachment merely **ad fundandam jurisdictionem** would not be sufficient. To be sufficient the arrest or attachment must necessarily be one **ad confirmandam jurisdictionem.** (Cf POLLAK, **op. cit.**, 52, 58, 62-3; HERBSTEIN AND VAN WINSEN, **op. cit.**, 40; MARITIME & INDUSTRIAL SERVICES LTD v MACIERTA COMPANIA NAVIERA SA 1969 (3) SA 28 (D).)

(d) Where the plaintiff is a **peregrinus** (foreign or

local) and the defendant is a local peregrinus: a **ratio jurisdictionis** alone will suffice, in as much as sec 28 (1) of the SC Act forbids the "attachment of person or property" of someone "resident in the Republic".

(e) Where the defendant is an incola: the general rule **actor sequitur forum rei** applies.

The present case falls under category (a). The rules in (a) and (e) have been expressly approved by this court. Those in (b), (c) and (d) have not. Without necessarily implying reservations about them, the question as to their correctness does not now arise. (Cf BODENSTEIN, 34 (1917) SALJ 193, 457; KAHN, 70 (1953) SALJ 226; 1969 ANNUAL SURVEY 419-420.)

The appellant's main submission may be paraphrased as follows:

The doctrine of effectiveness lies at the root

of jurisdiction. A judgment would not be effective if it should yield an empty result. The result would be empty if judgment is obtained against a foreign **peregrinus** who is absent from the jurisdiction and who owns no assets in it. But the attachment of an asset of his within the jurisdiction would render the judgment effective since the attachment would produce an asset on which execution could eventually be levied. The attachment would therefore make the **peregrinus** amenable to the court's jurisdiction. At common law and before Union the property as a matter of practical necessity, had to be within the boundaries of the court since the authority of the court did not extend to property outside its borders. After Union, the situation, according to counsel, changed. Legislation intervened. Section 26(1) of the SC Act, following on similar enactments in the past, now provides:

"The civil process of a provincial or local

> division shall run throughout the Republic and may be served or executed within the jurisdiction of any division."

A court can now make an order which can be executed on assets found outside the boundaries of its jurisdiction, thereby rendering its judgment fully effective. Because effectiveness is the basis of a court's jurisdiction and because an attachment, after judgment, would render its judgment effective, an attachment before judgment (so it was contended) would equip the court with the required jurisdiction to try the matter.

I have three major difficulties with this approach. In the first place there is, I believe, a flaw in its logic; in the second place, it emphasises effectiveness at the expense of territoriality; and in the third place it attributes to sec 26 of the SC Act a function which, according to the authorities to which I shall presently refer, it does not have.

I deal with each of these points in turn.

Firstly. Effectiveness is an essential feature of jurisdiction. A judgment would be effective if an asset outside the jurisdiction but within the country were attached in execution. All of that is so. But the reverse is not equally valid, namely, that since such an asset would be capable, after the suit, of attachment for the sake of levying execution, it is likewise capable, before the suit, of attachment for the sake of conferring jurisdiction. That is to confuse the sequel of a competent judgment (attachment to levy execution) with a prerequisite for its competence (attachment to found jurisdiction) - in short, to transpose cause and effect.

Secondly. While effectiveness may be the rationale for jurisdiction, it is not necessarily the criterion for its existence. It is true that effectiveness is, as Potgieter JA said in THERMO RADIANT OVEN SALES (PTY) LTD v NELSPRUIT BAKERIES (PTY) LTD, **supra**, at 307A, "the basic principle of jurisdiction in

our law". (See, too, HUGO v WESSELS 1987 (3) SA 837 (A) at 849J; 855G-I.) But it is as true that "... effectiveness does not per se confer jurisdiction on a Court" (per Viljoen JA in VENETA MINERARIA SPA v CAROLINA COLLIERIES (PTY) LTD (IN LIQUIDATION), supra, at 891C). According to Viljoen JA, in the judgment referred to, at 893F:

> "The crucial question that presents itself is: what jurisdiction does a Supreme Court in South African law possess? A Court can only be said to have jurisdiction in a matter if it has the power not only of taking cognisance of the suit but also of giving effect to its judgment."

A court will have the power "of taking cognisance of the suit" if the relevant cause arises within its area of jurisdiction. The cause would thus arise, again according to Viljoen JA in the same judgment at 893G-J (following Innes ACJ in THE OWNERS, MASTER AND CREW OF THE SS HUMBER v THE OWNERS AND MASTER OF THE SS ANSWALD 1912 AD 546 at 554), if it could be said to have done so according to

the common law. At common law a **ratio jurisdictionis** alone would not have vested that court with jurisdiction to try the action. The court could have been so vested as a matter of course only if the defendant happened to be domiciled within its area; in all other cases his arrest or the attachment of his property would have been a precondition for jurisdiction. (See the discussion of the common law in BROOKS v MAQUASSI HALLS LTD 1914 CPD 371 te 376; EX PARTE GOLDSTEIN 1916 CPD 483; CAPE EXPLOSIVES WORKS LTD v SOUTH AFRICAN OIL AND FAT INDUSTRIES LTD 1921 CPD 244 at 267; HOLLAND v JOHNSTONE & CO LTD 1925 CPD 132 at 135; FERGUSON AND ANOTHER v PEDERSEN 1926 WLD 246; HALSE v WARWICK 1931 CPD 233; WESSELS : HISTORY OF THE ROMAN DUTCH LAW 689.) The modern distinction between attachments **ad fundandam** and attachments **ad confirmandam jurisdictionem** was of no consequence to the common law. And because the court's jurisdiction was essentialy territorial the property

attached had to be found within the area of jurisdiction of the court. VOET 2.4.29, for example, states:

> "The judge competent to make an order for taking in charge is the judge in whose area the persons or things to be arrested are found." (Gane's translation.)

(See, too, VOET 2.4.22; 5.1.73; GROENEWEGEN **ad Codex** 3.18.)

Counsel's argument runs counter to the common law and offends against the primary principle of the territoriality of the court's jurisdiction. It means that a court would presume to exercise jurisdiction even if there were no connection between the defendant and its area of jurisdiction, neither as to his person or his property, nor as to the cause of action.

But, argues counsel, the present situation differs from the common law precisely because of a history of statutory changes in this country, culminating in sec 26 of the SC Act. The inescapable implication of

this thesis is that these provisions constituted legislative incursions into the common law which, in the result, served to expand the jurisdictional boundaries of the separate divisions of the Supreme Court. But that, according to the authorities, was simply not so. This brings me to the third point of criticism mentioned above.

The first relevant provision was sec 112 of the South Africa Act 1909 which was introduced to eliminate certain procedural problems which were encountered when a cause arose in one jurisdiction in the Union but an affected party happened to be in another. (Cf ESTATE AGENTS BOARD v LEK, **supra**, 1061B.) This section provided:

> "The registrar of every provincial division of the Supreme Court of South Africa, if thereto requested by any party in whose favour any judgment or order has been given or made by any other division, shall, upon the deposit with him of an authenticated copy of such judgment or order and on proof that the same remains

> unsatisfied, issue a writ or other process for the execution of such judgment or order, and thereupon such writ or other process shall be executed in like manner as if it had been originally issued from the division of which he is registrar."

This section, it has been held, did not extend the jurisdiction of the court so as to enable it to order an attachment of property situated outside its own area which it was not otherwise empowered to do. (Cf KOPPE AND CO v ACCREYLON CO, INCORPORATED, 1948 (3) SA 591 (T) at 593.)

Sec 6 of the Administration of Justice Act 27 of 1912 dealt specifically with a writ of arrest in connection with civil proceedings issued out of any Superior Court where the person concerned was within the Union but outside the court's area of jurisdiction. The section permitted the registrar of the court to transmit the writ to the appropriate officer at the place where the person was present, who was authorised to execute the

writ in accordance with the practice of the court at that place. That section, which dealt only with arrest and not with attachment, was likewise held to have neither extended nor conferred a jurisdiction which the court otherwise lacked (cf FERGUSON AND ANOTHER v PEDERSEN, **supra**, at 247).

These provisions were all overtaken by the SC Act. Sec 112 of the South Africa Act, in particular, was replaced by sec 26 of the new Act. Sec 6 of the 1912 Act, incidentally, was not re-enacted. Sec 26 was in turn amended by sec 5 of Act 85 of 1963. It now reads in the form quoted earlier.

The argument now advanced is not a novel one. Aspects of it were considered, mostly in the context of sec 6 of Act 27 of 1912 dealing with arrests (as opposed to attachments), in the Cape in BROOKS v MAQUASSI HALLS LTD, **supra**; EX PARTE GOLDSTEIN, **supra**; CAPE EXPLOSIVES WORKS LTD v SOUTH AFRICAN OIL AND FAT INDUSTRIES LTD,

supra and HOLLAND v JOHNSTON AND CO LTD, **supra**, and in the Transvaal in FERGUSON AND ANOTHER v PEDERSEN, **supra**, in which Tindall J, at 247, declared:

> "That section, in my opinion, does not give the Court any greater powers than it had before in regard to the arrest of a defendant to found jurisdiction. It only provides facilities for executing a writ outside the jurisdiction. It was intended to meet the contingency that after the granting of the order of arrest the defendant might have left the jurisdiction; the section does not empower the Court to arrest a person who at the time of the granting of the order of arrest is outside the jurisdiction. In view of the union of the Provinces it may be argued that it is desirable that the Provincial Divisions of the Supreme Court should have such power; but in my opinion the power is not given by sec 6."

KOPPE AND CO v ACCREYLON CO, INCORPORATED, **supra**, dealt with attachments. According to the court (Roper J, at 593), there was nothing in sec 112 of the South Africa Act 1909 nor indeed in Act 27 of 1912 which so extended the court's jurisdiction as to enable it to authorise an attachment outside its own area, although

the judgment departed from the earlier cases in reasoning, **e contrario** but obiter, that sec 6 (dealing with arrests) did so.

In BOCK & SON (PTY) LTD v WISCONSIN LEATHER CO 1960 (4) SA 767 (C), decided after sec 26 of the SC Act was substituted for sec 112 of the South Africa Act, Rosenow J granted an application for the attachment of property situated outside the court's jurisdiction, but inside the Union, in order to found jurisdiction. He rested the decision on sections 34 and 36 of the SC Act but this line of reasoning was rightly rejected by Vivier J in HARE v BANIMAR SHIPPING CO SA 1978 (4) SA 578 (C). Vivier J declined to follow BOCK'S case or indeed two later ones which arrived at the same conclusion, namely CURBERA v S.A. PESQUERA INDUSTRIAL GALLEGA 1969 (3) SA 296 (C) and EX PARTE GERALD B COYNE (PTY) LTD: IN RE GERALD B COYNE (PTY) LTD v SINCO TRADING CO LTD 1971 (1) SA 624 (W), in both of which cases the Cape and the

Transvaal courts respectively sought to justify the attachments of goods outside their respective jurisdictions by referring to sec 26 of the SC Act.

I agree with Vivier J's analysis and criticism of this trilogy of aberrant cases in HARE v BANIMAR SHIPPING CO SA, **supra**, and I do not propose to cover the same ground. Vivier J associated himself with the views earlier expressed by Kotzé J in EX PARTE BOSHOFF 1972 (1) SA 521 (E), where the learned judge observed that the argument founded on sec 26 necessarily implied that sec 26 extended the court's jurisdiction and by doing so altered the common law. The language of sec 26, Kotzé J said (at 523A), was

> "... hardly the language one would expect the Legislature to have used to widen so fundamental a matter as the jurisdiction of the Supreme Court".

Sec 26, it was held (at 523A), was only intended

> "to give validity to process, competently decreed, and to facilitate its execution,"

and could not be construed as conferring jurisdiction otherwise lacking.

In support of this line of reasoning Vivier J, in HARES'S case, said (at 583 C-G):

> "From the aforegoing it is clear that the power to enforce a judgment of one Division in another Division has always been there since s 112 of the South Africa Act, yet this section has never been considered enough to give the Court jurisdiction to attach the person or property in the area of another Court.
> Neither was s 6 of the 1912 Act, which deals with the execution of a writ of arrest of the person in another Division, considered sufficient to confer jurisdiction which the Court did not previously have. ...
> From a comparison of s 26 of the Supreme Court Act, in its present form, with its predecessors it seems to me that s 26 has been amended in order to streamline the procedure for the enforcement of the process of one Division in the area of another, namely by doing away with the additional procedure previously required for that purpose and by making it apply automatically. It seems to me to be no more than a procedural change in order to facilitate execution, and the wording falls far short of what I would have expected had the Legislature intended to confer increased jurisdiction on one Division in respect of property or persons

in another Division. I therefore find myself in full agreement with the decision in EX PARTE BOSHOFF (supra)."

Vivier J then dealt with an argument, which anticipated the one advanced in this court, in the following terms, at 583 G-H:

"It was argued by Mr Knight, for the applicant, that, as the basic principle of jurisdiction in our law is effectiveness (SONIA (PTY) LTD v WHEELER 1958 (1) SA 555 (A) at 563 and THERMO RADIANT OVEN SALES (PTY) LTD v NELSPRUIT BAKERIES (PTY) LTD 1969 (2) SA 295 (A) at 307), the power to enforce the Court's judgment in another Division must carry with it the power to grant the order in the first place. I do not agree with this submission. As I have pointed out, the power to enforce the Court's judgment in another Division has been there since the enactment of s 112 of the South Africa Act and s 6 of the 1912 Act, yet this power was not considered sufficient to give the Court jurisdiction to attach property or persons in another Division.
The very Act which confers the power (namely the Supreme Court Act, s 26) also contains ss 19 (1) and 6 read with the First Schedule to the Act, which define and limit the areas of jurisdiction of the various Divisions of the Supreme Court. The mere conferment of the power cannot therefore, in my view, be sufficient to give this Court jurisdiction over

persons and property in another Division."

These matters received the attention, albeit peripherally, of this court in ESTATE AGENT'S BOARD v LEK, **supra**. At 1062D-1063A Trollip JA stated:

> "To revert now to the SC Act of 1959. As I have already mentioned, it retained the existing system of the Divisions of our Supreme Court, each with substantially the same territorial, original jurisdiction in civil matters as had previously existed (ss 19 and 44). Moreover, in the place of ss 3 and 5 of the 1912 Act and s 112 of the South Africa Act, which were repealed, ss 25, 26 and 28 (1) were enacted, which, in their original, unamended form, were substantially similar. True, no provision similar to s 7 of the 1912 Act was reproduced. (Section 7, it will be recalled, expressly said that no increased jurisdiction was in effect conferred by those and other sections in the 1912 Act.) But, despite that, I think that the inference is irresistible that the Legislature did not, by enacting ss 25, 26 and 28 (1), intend to endow a Division with jurisdiction in any proceedings merely because its process commencing the proceedings or its judgment or order therein could be served and executed, as hitherto, on a South African **incola** outside its area of jurisdiction. For that would have meant that each and every Division was to have original jurisdiction over all causes, wherever arising, provided only

that the defendant or respondent was a South African **incola**; that would have been quite contrary to the fundamental concept of the territorial jurisdiction of the Divisions entrenched in the SC Act of 1959. It would also have been quite contrary to the well-established pre-existing legal position expounded above. If that were intended one would have expected an explicit and positive provision in the SC Act of 1959 to that effect, rather than merely the negative step of not reproducing therein s 7 of the 1912 Act. Sections 25 and 26 of the SC Act of 1959 were subsequently amended by Act 85 of 1963. They were thereby combined in a single provision in s 26 (1) saying simply that the civil process of any Division shall run throughout the Republic and may be served or executed within the jurisdiction of any Division. This was merely to further simplify the procedure and did not augment the jurisdiction of a Division in any way. See EX PARTE BOSHOFF 1972 (1) SA 521 (E) at 522-3 and HARE v BANIMAR SHIPPING CO SA 1978 (4) SA 578 (C). According to the authorities referred to in those cases, conflicting views have been expressed in the past about the effect of s 26 (1) on the jurisdiction of a Division. It is partly for that reason that I have canvassed the problem in this judgment in so much detail. No view is expressed on the correctness or otherwise of the actual decisions in the BOSHOFF and HARE cases, for they dealt with other, different problems of jurisdiction, but I agree with the views expressed in both cases that s 26 (1)

> does not by itself confer any new jurisdiction on a Division."

(And see HUGO v WESSELS, **supra**, at 852A-853A; 854 C-D.)

In this passage Trollip JA endorsed the ratio of decisions such as EX PARTE BOSHOFF, **supra**, and HARE v BANIMAR SHIPPING CO SA, **supra**, but did not find it necessary to approve them expressly. Once, however, it is resolved that sec 26 does not bestow a jurisdiction otherwise lacking, it defeats the argument advanced by the appellant in this court, which in effect uses that proposition as its fulcrum. That, too, was the conclusion reached in two subsequent decisions in which the point arose, namely, TEDECOM ELECTRICAL ENGINEERING SERVICES (PTY) LTD v BERRIMAN 1982 (1) SA 520 (W) and UNIROYAL INCORPORATED v THOR CHEMICALS SA (PTY) LTD 1984 (1) SA 381 (D).

For these reasons the appellant's main argument must fail.

The appellant also advanced an alternative argument founded on the distintion between an attachment which is **ad confirmandam** as opposed to one that is ad **fundandam jurisdictionem.** By common consent the attachment in this case was **ad confirmandam jurisdictionem** because the agreement was to be implemented in Johannesburg. Accordingly, so it was submitted, the attachment should be sanctioned, since the existing **ratio jurisdictionis** provided the necessary nexus between situs and suit. But of course, if that were the only link required to vest a court with jurisdiction, attachment or arrest would not have been a requirement at all. And that has never been the law. The alternative argument accepts the proposition that an attachment or arrest is mandatory whenever the defendant is a foreign **peregrinus.** That being so, it became necessary, in order to round off the argument, once again to invoke sec 26. And as soon as that happens it is no

longer an alternative argument, it is simply an alternative formulation of the same argument. If the main argument fails, as it must, so does its supposed alternative.

The appeal is dismissed with costs, such costs to include the costs of two counsel.

P M NIENABER AJA

CONCUR:

VAN HEERDEN JA)
SMALBERGER JA)
NICHOLAS AJA)
FRIEDMAN AJA)